

**Department of Human Rights and Communities**

**Litigating Ownership  
of Immovable Property in Kosovo**

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## EXECUTIVE SUMMARY

This report assesses the manner in which the judicial system in Kosovo addresses disputes over property rights — in particular disputes over ownership of immovable property.<sup>1</sup> The normative framework covering immovable property rights is complex, often unclearly drafted, and scattered throughout a variety of instruments. It is also supplemented by international human rights standards relating to the peaceful enjoyment of possessions and the right to a fair trial.<sup>2</sup> The circumstances of Kosovo as a post-conflict and transitional society contribute to the legal complexity. Likewise, the historical practice of informal property transfers adds to the prevalence of court cases to confirm immovable property ownership. It is also complicated by the discriminatory legislation and practices implemented before 1999, which prohibited interethnic property transfers.<sup>3</sup>

Kosovo requires a legal framework that protects property rights for economic development and transformation into a market economy. An effective property rights protection regime fosters the return of displaced individuals, and proper adjudication of property rights promotes the rule of law and human rights.

In assessing the legal system's review of property rights cases, the Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE) notes four major problems. First, in lawsuits to establish ownership over immovable property, courts often recognize a transfer of ownership though no written contract is produced. This runs contrary to the applicable law which requires written contracts in order to transfer ownership of immovable property. Courts often justify their decision based on the doctrine of substantial performance, i.e. the fact that the claimant paid the sales price and took possession of the property. However, this appears to be a misapplication of the law. It also increases the risk of fraudulent property transactions.

Second, in order to circumvent the requirement of a written contract, courts often apply the doctrine of positive prescription whereby an individual can gain ownership by establishing possession for a specified period of time under certain conditions. Given that Kosovo is a post-conflict legal environment where many landowners are absent or missing and that positive prescription amounts to an exception to the standard method of acquiring property rights, the doctrine should be used rarely.

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<sup>1</sup> Pursuant to UN Security Council Resolution 1244, the OSCE Mission in Kosovo has the mandate to monitor the Kosovo justice system for compliance with domestic law and international human rights standards. The OSCE began monitoring criminal cases in 1999 and extended its monitoring to civil cases in 2004. The OSCE has been monitoring property cases as a matter of priority since 2004. Its court monitoring methodology involves collecting data about individual court proceedings and analyzing it for patterns of problematic court practices or violations of the law applied in Kosovo.

<sup>2</sup> Article 1, Protocol 1, European Convention on Human Rights and Fundamental Freedoms (the Convention), 18 May 1954, establishing the right to the peaceful enjoyment of possessions and prohibiting the deprivation of possession with some exceptions; *id.* at Article 13, guaranteeing the right to “an effective remedy before a national authority”; *id.* at Article 6(1), guaranteeing the right to a fair trial.

<sup>3</sup> Law on Amendments and Supplements on the Limitation of Real Estate Transactions, Official Gazette of the Republic of Serbia 22/1991, 20 July 1991. This law was repealed together with the Law on Conditions, Ways, and Procedures for Granting Farming Land to Citizens Who Wish to Work and Live in the Territory of the Autonomous Province of Kosovo and Metohija, Official Gazette of the Republic of Serbia 43/1991, 20 July 1991, by UNMIK Regulation 1999/10 on the Repeal of the Discriminatory Legislation Affecting Housing and Rights in Property, 13 October 1999. Discriminatory provisions of this nature existed in domestic law also before the discriminatory period. *See* Article 32(a), Law on Transfer of Immovable Property, Official Gazette of the Socialist Autonomous Province of Kosovo 29/1986.

Third, the OSCE notes many violations of procedural law common to property cases. Decisions in property cases in particular demonstrate a pattern of faulty reasoning and improperly weighted evidence. Courts often give to the testimony of interested parties greater weight than that given to the documentary evidence the law defines as presumptively correct.<sup>4</sup> In addition, in many cases monitored by the OSCE, courts failed to cite any legal provision supporting their decisions.

Fourth, courts continue to appoint temporary representatives for absent respondents without following proper procedures. This occurs most often in property cases. In many suits for confirmation of ownership, the respondent cannot be located. In such cases, courts in Kosovo all too readily resort to the appointment of a temporary representative. This can violate human rights related to fair trial standards and property ownership.

The report concludes with recommendations on how to overcome the identified problems.

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<sup>4</sup> *E.g.* Article 230 of the Law on Contested Procedure, Official Gazette of the Socialist Federal Republic of Yugoslavia 4/1977, 36/1980, and 66/1982, 12 February 1982, states that a document “issued in its proper form by a state agency acting within its jurisdiction [...] proves the veracity of what is stated in it.” The 1982 law applies to all cases treated in this report. Although a new law on contested procedure was adopted in September 2008, it does not entail major changes in relation to the topics discussed here..

## I. INTRODUCTION

This report focuses on civil proceedings in which one party requests that a court declare that party the owner of a particular piece of immovable property. It analyses these cases under the law applied in Kosovo and international human rights instruments.

A jumble of laws, regulations, administrative instructions, court practices, and directives combine to create a complicated and seemingly impenetrable system for determining contests over immovable property ownership in Kosovo. At the highest level, international human rights standards affect property rights. Article 1, Protocol 1 of the European Convention on Human Rights and Fundamental Freedoms (the Convention) establishes the right to the peaceful enjoyment of possessions and prohibits the deprivation of possession “except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”<sup>5</sup> In addition, “the essence of deprivation of property is the extinction of the legal rights of the owner.”<sup>6</sup> In the event an individual suffers a deprivation of property rights guaranteed by the Convention, Article 13 guarantees the right to “an effective remedy before a national authority.” And when that remedy involves the courts, any trial must be fair according to Article 6(1).<sup>7</sup>

In the domestic context, laws addressing property issues derive from different periods in Kosovo’s history, from communist-era confiscations, 1980s economic liberalism, and 1990s ethnic discrimination,<sup>8</sup> to the regulations promulgated by the United Nations Interim Administration Mission in Kosovo (UNMIK), and the legislation adopted after 17 February 2008.<sup>9</sup> Property laws are scattered through several legal texts, regulate different aspects of property rights, and often refer to institutions which no longer exist.<sup>10</sup> In previous reports, the OSCE stressed the complicated legal framework and noted that legal harmonization would be beneficial to the property rights system.<sup>11</sup> The OSCE maintains that position.

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<sup>5</sup> Paragraph 2 of the same article says, “The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.” Protocol 1 to the Convention.

<sup>6</sup> Clare Ovey & Robin C.A. White, *Jacobs & White: European Convention on Human Rights* 309, 3d ed. 2002.

<sup>7</sup> The Convention also prohibits discrimination in Article 14 and the abuse, destruction, or limitation of rights set forth therein in Article 17.

<sup>8</sup> *E.g.*, Articles 32a-32c, Law on Transfer of Immovable Property, Official Gazettes of the Socialist Autonomous Province of Kosovo 45/1981 and 29/1986 (hereinafter Kosovo Law on Transfer of Immovable Property), “The transfer of real estate by citizens and civil legal persons who have the right to the property is prohibited if the transfer of real estate is between citizens of different nations from the territory of the Socialist Autonomous Province of Kosovo.”

<sup>9</sup> Section 2, UNMIK Regulation 2000/59 amending UNMIK Regulation 1999/24 on the Law Applicable in Kosovo, 27 October 2000. The law applicable in Kosovo includes “[t]he regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder and the law in force in Kosovo on 22 March 1989. In case of a conflict, the regulations and subsidiary instruments issued thereunder shall take precedence.” If “a subject matter or situation is not covered” by those laws but is covered by another law “in force in Kosovo after 22 March 1989 which is not discriminatory and which complies with” international human rights standards, such law shall apply.

<sup>10</sup> *E.g.*, the Kosovo Law on Transfer of Immovable Property mentions the “Organization of Associated Labour”, Article 5(2), and the “Executive Government Council of the Socialist Autonomous Province of Kosovo”, Article 16.

<sup>11</sup> OSCE Mission in Kosovo, “Property Rights in Kosovo, 2002-2003”, pages 36-37.

Under the legal framework in Kosovo, courts are responsible for verifying signatures on property transaction contracts<sup>12</sup> (an essential step in the transfer of property ownership) and resolving property disputes (as long as claims do not fall under the competency of other bodies).<sup>13</sup> The Law on Regular Courts, the Law on Contested Procedure, and the Law on Executive Procedure regulate civil courts' substantive and territorial jurisdiction in addition to setting procedural rules.<sup>14</sup>

In determining substantive issues in contests over immovable property ownership, civil courts should apply the Law on Basic Property Relations, the Kosovo and Serbian Laws on Transfer of Immovable Property, and the Law on Obligations, among others.<sup>15</sup> These laws determine if a remedy is required, a specific principle has been violated, or a procedure under the competence of another governmental authority has unlawfully interfered or deprived the claimant of property rights.

Kosovo's history greatly impacts property claims filed in its courts. For example, the prohibition on interethnic property transfers implemented in the 1990's led to many informal property transactions. Those transfers typically involved a property contract signed in secret — perhaps with witnesses present — and kept in the buyer's possession. The contracts were never verified by a court. Nor was the transfer ever recorded in the cadastre.

Other difficulties result from the destruction of documents in the 1999 conflict, the relocation of cadastral record books to towns outside of Kosovo, the displacement of parties to unknown destinations, and the prevalence of informal transfers both before and after the conflict.

After the establishment of the international civilian administration in Kosovo and the subsequent revocation of discriminatory property laws in 1999, buyers (typically Kosovo Albanians who purchased from Kosovo Serbs) brought suits in courts in Kosovo to formally establish their ownership and request permission to register that ownership in the cadastre. Many of these contracts are undoubtedly genuine. However, many individuals seem to have recognized the potential to abuse the situation and claim ownership over immovable property belonging to an absent landowner.

In addition to the failure to require written contracts in property transactions and follow the procedures for the doctrine of positive prescription, the report also notes procedural problems that occur in property cases based on court monitoring. These shortcomings include

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<sup>12</sup> Article 26(14), Law on Regular Courts, Official Gazette of the Socialist Autonomous Province of Kosovo 21/1978, 17 March 1978 (hereinafter Law on Regular Courts).

<sup>13</sup> Articles 26(6) and 29(2), Law on Regular Courts. Considering the large number of persons whose property rights had been affected by the conflict and the "discriminatory period," in 1999 UNMIK established a mechanism to resolve disputes regarding the loss of residential property resulting from the conflict: the Housing and Property Directorate, later renamed the Kosovo Property Agency. UNMIK Regulation 2006/10, 4 March 2006; UNMIK Regulation 2006/50 On the Resolution of Claims Related to Private Immovable Property, Including Agricultural and Commercial Property, 16 October 2006. *See also* <http://www.kpaonline.org>.

<sup>14</sup> Law on Regular Courts; Law on Contested Procedure; Law on Executive Procedure, Official Gazettes of the Socialist Federal Republic of Yugoslavia 20/1978, 6/1982, and 74/1987, 12 November 1987.

<sup>15</sup> Kosovo Law on Transfer of Immovable Property; Law on Transfer of Immovable Property, Official Gazettes of the Socialist Federal Republic of Serbia 43/1981, 24/1985, 28/1987, 6/1989, 30/1989, and 40/1989 (hereinafter Serbian Law on Transfer of Immovable Property); Law on Obligations, Official Gazette of the Socialist Federal Republic of Yugoslavia Official Gazette 28/1978, 30 March 1978 (hereinafter Law on Obligations). Most of the main property laws applicable in Kosovo can be found on the Kosovo Property Agency web page: <http://www.kpaonline.org/framework.asp>.

unreasoned decisions and the failure to both properly weigh submitted evidence and to follow the correct methods before appointing temporary representatives to represent absent parties.

## II. LEGAL FRAMEWORK – AN INTRODUCTION

Before beginning a complex discussion on domestic property law and the way courts apply it, some significant problems with the laws themselves must be addressed. In hierarchical order, the laws applicable in Kosovo are regulations promulgated by UNMIK and subsidiary instruments issued thereunder, “primary laws” in effect on 22 March 1989, and any post-22 March 1989 law that fills in a gap and is not discriminatory.<sup>16</sup> Most property laws that are relevant to this report are those that were in effect on 22 March 1989.

In 2000, the Kosovo Law Centre<sup>17</sup> in co-operation with the OSCE and the Housing and Property Directorate<sup>18</sup> undertook the task of compiling the primary laws applicable in Kosovo on 22 March 1989. These six compilations published from 2000 to 2004 typically include photocopies of the original Albanian language and Serbian language gazettes in which each law was published and an English translation of each law. However, practitioners must be careful when using these compilations, as the English translations are often inaccurate. In addition, there are cases in which the original Albanian language and Serbian language gazettes were apparently not available, and the source of the law included in the compilation cannot be verified.<sup>19</sup>

In drafting this report, the OSCE encountered two significant problems: one related to the English translations of the laws in the compilations and the other related specifically to the Kosovo Law on Transfer of Immovable Property.

As mentioned above, the English translations of many laws in the compilations suffer serious flaws. This has a minimal impact, if any, on civil proceedings in district and municipal courts, as those judges read the laws in their original languages. However, international judges presiding in civil proceedings rely on the English translations, though the translation can at times invent new legal doctrine:

In a 2007 case before the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Matters, the three-member panel of the court, composed of two international judges and one local judge, said among other things that, “[i]n the absence of a written contract, clearly a verbal agreement to exchange

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<sup>16</sup> Section 1, UNMIK Regulation 2000/59 amending UNMIK Regulation 1999/24 on the Law Applicable in Kosovo, 27 October 2000.

<sup>17</sup> The OSCE founded the Kosovo Law Centre in June 2000 to “cultivate the professional skills of local legal talent in order to establish a locally run, independent, and sustainable NGO that embodies, develops, and promotes democratic principles, multiculturalism, high ethical standards, the rule of law and respect for human rights.” Kosovo Law Centre website, *available at* <http://www.kosovolawcenter.org/english/index.html>.

<sup>18</sup> *See* UNMIK Regulation 1999/23 on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission, 15 November 1999.

<sup>19</sup> The forewords to each compilation include a disclaimer noting, for example, that the translations are “unofficial and not authorized, therefore unclearness and mistakes are possible” or that the “English translation was obtained from unofficial source.” Foreword, Compilation III, Laws on Real Estate Applicable in Kosovo on 22 March 1989, Kosovo Law Centre, Prishtinë/Priština, December 2000; Note for Users, Compilation VI, Applicable Civil Law in Kosovo, Kosovo Law Centre, Prishtinë/Priština, April 2004. *See also* Note for Users, Compilation II, Eight Laws Applicable in Kosovo on 22 March 1989, Kosovo Law Centre, Prishtinë/Priština, June 2000, “Users are therefore advised to consult the official version of the included laws whenever possible.”

immovable property is not valid at law [...]. The Law on Obligations provides in Article 455 that, a contract on the sale of real estate has to be concluded in writing under threat of nullity.”

The text quoted by the court indeed mirrors the English translation of the law in the compilation.<sup>20</sup> However, in both the Serbian and Albanian versions of the same law, Article 455 reads as follows: “Contracts for the sale of immovable objects that are put into legal circulation by social legal persons within their regular conduct of work should be concluded in writing.”<sup>21</sup> As a result of the mistranslation (which is a less restrictive description of the written contract requirement), the court based its judgment on a provision that does not exist in the legal framework in Kosovo.

Normally, the Albanian and Serbian versions of laws in the compilations are included as direct photocopies from the original gazettes. This is helpful to confirm whether the English translation of a law is correct. Regarding the Kosovo Law on Transfer of Immovable Property, the compilation includes an English translation and re-typed versions in both Albanian and Serbian.<sup>22</sup> The lack of a photocopied gazette including the Kosovo Law on Transfer of Immovable Property means its translation cannot be double-checked against the original.

Additionally, the compilations contain some typographical inconsistencies that further call into question the accuracy of the versions of the law it contains. In the English version of the Kosovo Law on Transfer of Immovable Property, the law’s heading refers to the 45/1981 and 29/1986 gazettes of the Socialist Autonomous Province of Kosovo. Both the Albanian and Serbian versions of the law in the compilation refer to gazettes 45/1981, 29/1986, and 28/1988.<sup>23</sup> Because the original gazette cannot be located, the accuracy of the provisions contained in the compilation must be called into question. This report attempts to use other applicable laws to fill in this gap.

Further, there may be a version of the law that was either not included in the compilation or that is in use though it may not be in effect. In a report on fraudulent property transactions, the UNMIK Department of Justice cites Article 10 of the Law on Transfer of Immovable Property as requiring that contracts for the sale of immovable property be in writing.<sup>24</sup> However, Article 10 in the Albanian, English, and Serbian versions of the Kosovo-promulgated law included in the compilation refers to alternative methods for proving ownership rights in agricultural land; it does not refer, in any version, to the requirement of a written contract. Article 10 of the Serbian Law on Transfer of Immovable Property also does not relate to the requirement of a written contract.<sup>25</sup>

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<sup>20</sup> Law on Obligations. The English translation reads as follows: “A contract on sale of real property must be in written form, otherwise it shall be null and void.”

<sup>21</sup> *Id.*

<sup>22</sup> Law on Transfer of Immovable Property contained in Compilation III, Laws on Real Estate Applicable in Kosovo on 22 March 1989, Kosovo Law Centre, Prishtinë/Priština, December 2000.

<sup>23</sup> *Id.*

<sup>24</sup> UNMIK Department of Justice Judicial Integration Section, “Report on Fraudulent Transactions of the Real Property of IDPs and Abuse of the Office of Temporary Representative,” page 1. The report does not contain a publication date; UNMIK Department of Justice Judicial Integration Section, “Updates to the Report on Fraudulent Transaction to the Real Property of IDPs and Abuse of the Office of Temporary Representative”, 14 June 2005.

<sup>25</sup> The provision relates to agricultural, construction, and forest land that cannot be transferred from social ownership unless otherwise foreseen by law. Article 10, Serbian Law on Transfer of Immovable Property.

The OSCE located an English-language document entitled “Law on Transfer of Immovable Property” on which it is written “SAP Kosovo”, implying that it is a law promulgated in Kosovo,<sup>26</sup> but cannot locate the original versions of the law or any reference to a gazette number. Therefore, it is unclear whether there is a Kosovo specific law requiring a written contract in immovable property transactions or whether the Serbian law predating 22 March 1989 is in fact the applicable law regulating contracts on immovable property.

Throughout this report, such difficulties encountered with applicable laws will be noted.

### III. ACQUISITION AND TRANSFER OF PROPERTY RIGHTS BY LAW AND BY LEGAL AFFAIRS

“Citizens, associations of citizens, and other civil legal entities”<sup>27</sup> can hold property rights over both movable and immovable property.<sup>28</sup> At least four types of property rights exist: (1) ownership, (2) mortgage, (3) servitude, and (4) rights of use over socially owned property and state owned property.<sup>29</sup> Owners can possess, use, and transfer property within limits defined by law and in accordance with the nature and purpose of the object and public interest.<sup>30</sup>

There are four ways to acquire a property right: by law, inheritance, state action, and legal affairs:<sup>31</sup>

(1) **By law:** Property is acquired by law “through creating a new object, combining, mixing, building on somebody else’s land, separation (collecting) of fruits, positive prescription, acquisition of property from non-owners, occupation, and other cases defined by law.”<sup>32</sup>

(2) **By inheritance:** Property is acquired through inheritance “in the moment of opening of inheritance paper for the property of the deceased person, unless otherwise defined by law.”<sup>33</sup>

(3) **By decision of a state body:** Although the Law on Basic Property Relations foresees this manner of property acquisition, it fails to explain it.<sup>34</sup> Other laws

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<sup>26</sup> “SAP Kosovo” or “SAPK” typically refer to “Socialist Autonomous Province of Kosovo”.

<sup>27</sup> Articles 1 and 9-12, Law on Basic Property Relations, Official Gazette of the Socialist Federal Republic of Yugoslavia 6/1980, 30 January 1980. Note that the term “civil legal entities”, although not defined in the legislation, implies organizations, societies, and entities whose ability to become holders of immovable property right are recognized by constitution or law. See Legal Encyclopedia 1, (Pravna Enciklopedija 1, Savremena Administracija): Beograd, 1985, page 430; see also Article 79, Constitution of the Socialist Federal Republic of Yugoslavia (1974).

<sup>28</sup> Article 2, Law on Basic Property Relations. To the extent it applies, property rights cannot be held over “objects that can only be under social ownership”.

<sup>29</sup> Section 2(2), UNMIK Regulation 2002/22 on the Promulgation of the Law Adopted by the Assembly of Kosovo on the Establishment of an Immovable Property Rights Register, 20 December 2002. The regulation says immovable property rights “include” the four listed. Lease rights are not mentioned. As this report focuses on transfers of ownership, leaseholds will not be addressed.

<sup>30</sup> Articles 1, 3, 4, and 70-80, Law on Basic Property Relations.

<sup>31</sup> *Id.* Article 20.

<sup>32</sup> *Id.* Article 21.

<sup>33</sup> *Id.* Article 36.

<sup>34</sup> *Id.* Article 20.

seem to address the issue. For example, the Law on Expropriation allows acquisition of property by decision of a state body.<sup>35</sup>

(4) **By legal affairs:** Acquiring property by legal affairs primarily involves the formation of a written contract verified in the court and submitted to the immovable property rights register to record the transfer of ownership.<sup>36</sup>

This report focuses on ownership rights over immovable property. In particular, it analyzes acquisition by law via the doctrine of positive prescription, acquisition by legal affairs, and the courts' role in resolving contests over ownership of immovable property.

### **A. Transferring property rights by legal affairs**

Based on information gathered through its court monitoring activities, the OSCE concludes that courts in Kosovo too readily infer a valid transfer of immovable property ownership without assessing whether the three elements required for the transfer of immovable property are met: (1) a written contract (2) formally verified and (3) subsequent cadastral registration.<sup>37</sup>

Article 10 of the Kosovo Law on Transfer of Immovable Property appears to set forth the requirement of a written contract in immovable property transactions, though the source and validity of this provision are uncertain, as mentioned previously:

“The contract based on which the right to use or ownership right over the immovable property is being transferred has to be made in writing, and the signatures of the contracting parties have to be certified by court. The contract which has not been concluded in terms of the paragraph 1 of this Article shall not be legally binding, unless otherwise provided by law” [sic].<sup>38</sup>

Similarly under Articles 4(2) and 4(3) of the Serbian Law on Transfer of Immovable Property, property transfers by legal affairs must involve a written contract:

“Contracts on the transfer of real property between holders of property rights, [...] are concluded in written form, and signatures of the parties are verified by the court [...]. Contracts not completed pursuant to [...] this Article, have no legal effect.”<sup>39</sup>

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<sup>35</sup> See Article 41, Law on Expropriation, Official Gazettes of the Socialist Autonomous Province of Kosovo 21/1978 and 46/1986, 22 November 1986.

<sup>36</sup> Article 33, Law on Basic Property Relations. To acquire property through legal affairs, the following conditions must be met: (1) the transferor's right to property must already exist, (2) that right is transferred from the transferor to the transferee, (3) the transfer is done through free will of the transferee and of the transferor and its legal inheritor, and (4) that it is done in a legal way. Only upon completion of the fourth condition — legal way — e.g. registry in public books — is the property right acquired. Dragoljub D. Stojanovic and Dimitar Pop-Georgiev, *Commentary on the Law on Basic Property Relations* 108, 3d Broaden Ed., Belgrade, 1986. The term “legal affairs” primarily involves transfers via a contract, but other methods of transferring property not directly applicable to this report also meet the definition.

<sup>37</sup> *Id.*

<sup>38</sup> Article 10, Kosovo Law on Transfer of Immovable Property. As mentioned previously, the OSCE has been unable to locate the version of the law which contains the provision.

<sup>39</sup> Articles 4(2) and 4(3), Serbian Law on Transfer of Real Property.

A written contract does not suffice to complete the transfer of immovable property ownership. The transfer of ownership is not finalized until recorded in the immovable property rights register. After the parties draft the contract, they bring it to the municipal court for signature and verification.<sup>40</sup> The court shall then “deliver [...] a copy of a contract on transfer of the immovable property to the municipal administrative body responsible for geodetic affairs.”<sup>41</sup> The cadastral office “shall only register an immovable property right in the [immovable property rights] register if the competent court has issued the appropriate documents in writing [to the municipal cadastral office] for the registration of the immovable property right in the register.”<sup>42</sup> And, “[o]n the basis of legal affairs, the right over immovable property shall be acquired by registration into the cadastral books or in some other way that is prescribed by law.”<sup>43</sup> Thus, the process of transferring property rights is not completed until the written and verified contract is recorded in the municipal cadastral office.

### **1. Substantial performance – no exception to the requirement of a written contract**

In spite of the requirement of a written contract, Article 73 of the Law on Obligations *appears* to set out an exception:

“A contract whose conclusion is made dependent on the *written form* shall be considered valid although not entered in such form, after the contracting parties have performed, entirely or substantially, the obligations arising from such contract, unless something else obviously results from the purpose of prescribing the form” [*sic*]. (emphasis added)

Given the process by which property rights are formally transferred, Article 73’s “substantial performance” exception cannot apply to contracts on immovable property. As explained above, three formal requirements apply for a transfer of immovable property rights by legal affairs to be legally binding: (1) a written contract, (2) signed and verified,<sup>44</sup> (3) and recorded in the immovable property rights register.<sup>45</sup> On the contrary, Article 73 applies solely to contracts whose only formal requirement is a *written form*. This provision can only substitute for the necessity of a written contract when the only thing required for a complete transaction is a written contract. This is not the case for immovable property transactions, where written contracts verified in courts are required because that is the vehicle for cadastral registration.

Further, other laws support the conclusion that substantial performance cannot substitute for a verified and recorded property contract. The Law on Measurement and Land Cadastre says: “The land cadastre is the main evidence for the land and the objects in it. It is used [...] for the keeping of evidence of real estate in social and citizens ownership [*sic*].”<sup>46</sup> According to UNMIK Regulation 2002/22, “Immovable property rights [...] pertaining to land, buildings,

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<sup>40</sup> Municipal courts are competent for the “registration of rights upon immovable property.” Article 26(14), Law on Regular Courts.

<sup>41</sup> Article 27, Kosovo Law on Transfer of Immovable Property. As mentioned earlier, the OSCE has been unable to confirm the exact provisions of the Kosovo Law on Transfer of Immovable Property.

<sup>42</sup> Section 3(1), Law no. 2002/05 on the Establishment of an Immovable Property Rights Register, promulgated by UNMIK Regulation 2002/22, 20 December 2002 (hereinafter Law on the Establishment of an Immovable Property Rights Register).

<sup>43</sup> Article 33, Kosovo Law on Basic Property Relations.

<sup>44</sup> Article 4(2), Kosovo Law on Transfer of Immovable Property.

<sup>45</sup> Article 33, Law on Basic Property Relations.

<sup>46</sup> Article 3(2), Law on Measurement and Land Cadastre, Official Gazette of the Socialist Autonomous Province of Kosovo 12/1980, 28 March 1980.

and apartments shall be recorded in the Register.”<sup>47</sup> The regulation further says that, “[O]nce the register is established, no subsequent transfer of rights in immovable property shall be effective unless registered in accordance with the present law.”<sup>48</sup>

In disputes over immovable property, the Kosovo Supreme Court issued decisions only after it satisfied itself with a written contract endorsed in the relevant court. For example, in a case on certification of ownership, the court found that the “plaintiff gained the property based on the transaction contract [...] endorsed in the Municipal Court [...]” Moreover, in a similar case considering nullification of a contract, the Supreme Court held, “There is a contract for transaction of the real estate, signed between the [first] respondent [...] and the [second] respondent [...] which was endorsed in the court and represents a valid legal basis [...]. The respondent has won the right to the immovable property based on Article 20 of Law on Basic Property Relations.”<sup>49</sup>

Article 4(4) of the Serbian Law on Transfer of Immovable property offers some leeway when it comes to property transfers lacking all formal requirements, but it still requires a written contract:

“Courts can recognize the legal effect of a contract on the transfer of real property between holders of property rights if the transfer is not forbidden and if it is concluded in writing, though the signatures of the parties have not been verified in court, under the condition that the contract was entirely fulfilled or in most parts of it, that the real property was acquired within the limits of law, that the taxes have been paid, that preferential rights for the acquisition of the real property were not violated and that the other social interest was not violated.”<sup>50</sup>

Additionally, the nature of immovable property transactions makes written contracts essential. Immovable property is often expensive, and contracting parties need the security that only a written contract can provide. Thus, the need to ensure finality and security in land transactions could be considered to “obviously result from the purpose of prescribing the form.”<sup>51</sup>

## **2. Failure of the courts to apply the requirement of a written contract**

The OSCE has observed many cases in which courts approve property claims based on informal or oral contracts. For example:

A Kosovo Albanian plaintiff claimed to have bought property from a Kosovo Serb respondent pursuant to an unverified contract signed by plaintiff and respondent in the presence of three witnesses on 2 February 2000. The plaintiff filed a confirmation of ownership claim at a Gjilan/Gnjilane region court in 2004. The court appointed a temporary representative for the respondent on the

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<sup>47</sup> Article 2(1), UNMIK Regulation 2002/22, on the Promulgation of the Law Adopted by the Assembly of Kosovo on the Establishment of an Immovable Property Rights Register.

<sup>48</sup> *Id.* Section 7.

<sup>49</sup> *Z.H. v. S.S.*, Rev. no. 123/2005, Supreme Court of Kosovo, 22 February 2006. This is an example of acquisition by legal affairs. As mentioned previously, acquiring property by legal affairs involves a (1) contract, (2) verified, and (3) registered in the cadastre. Here, the court neglects to address the issue of cadastral registration. Articles 33 and 34(4), Law on Basic Property Relations; Dragoljub D. Stojanović and Dimitar Pop-Georgiev, *Commentary on the Law on Basic Property Relations* 108, 3d Broaden Ed., Belgrade, 1986.

<sup>50</sup> Article 4(4), Serbian Law on Transfer of Real Property.

<sup>51</sup> Article 73, Law on Obligations.

plaintiff's statement that he could not locate the respondent. Three witnesses, including the respondent's (alleged) brother-in-law testified on behalf of the plaintiff at a 13 April 2005 hearing. In the verdict issued on that same date, the court held that the oral contract was valid pursuant to Article 73 of the Law on Obligations. However, the court should have cited the relevant provisions of the applicable law.

In a 2004 Mitrovicë/Mitrovica region case, the Kosovo Albanian plaintiff filed a claim requesting the court to confirm his ownership of a piece of real property. The plaintiff claimed to have bought the land in 1980 pursuant to a verbal contract with two respondents, a Kosovo Albanian and a Kosovo Roma. Citing Article 73 of the Law on Contracts and Torts, the court held the oral contract to be valid because the parties fulfilled their obligations — the plaintiff made full payment on the property and the respondents handed it over to the plaintiff. However, as there was no written contract, the court should have rejected the plaintiff's claim.

In another case in the Gjilan/Gnjilane region, three Kosovo Albanian plaintiffs sued two Kosovo Serb respondents on 12 October 2004 to confirm ownership of immovable property. The plaintiffs claimed that their father bought the property pursuant to a verbal contract in 1973 from the one respondent and in 1977 from the other. The court appointed one temporary representative for both respondents. Two witnesses testified they had been the plaintiffs' neighbors since 1972 and that the plaintiffs used the property for more than 30 years without dispute, though they were not present when the contract was formed nor when the transaction money was paid. In support of their claim, the plaintiffs submitted electricity bills and proof of property tax payments made from 1974 to 1992 by their father. The court approved the claim citing the Law on Obligations: "The obligations of the provisions of the Law on Obligations were fulfilled and the contract on purchase was fully realized although it lacks the form. The same will be considered as valid since it came to co-validation of this contract, therefore the court sees that the lawsuit of the plaintiffs as grounded and it was approved as such."

In none of the above cases did the courts mention the failure of the parties to meet legal requirements for the transfer of immovable property, i.e. a written contract, verified in court, and registered in the immovable property rights register. In each case, the court deemed the informal or oral contracts a valid basis on which the plaintiffs acquired property ownership and considered that they became effective as soon as the parties fulfilled their obligations (to pay the sale price and deliver possession).

The OSCE does not ignore the reality that, in some cases, parties belonging to different communities could not enter into a written contract due to the discriminatory legislation in force at the time. However, the preferred solution is for the legislative authorities to address the problem directly and offer a solution, rather than for judges or lawyers to employ legal doctrines that do not exist. This judicial creativity can be especially counterproductive, for it not only damages the rule of law but also allows for abuse. If the requirement of a written

contract is not fully enforced, parties can more readily engage in fraud in real property transactions.<sup>52</sup>

## **B. Acquisition and transfer by law—positive prescription**

Though the law requires verified written contracts recorded in the immovable property rights register to transfer property ownership by legal affairs, alternate methods of acquiring property do exist. In particular, the Law on Basic Property Relations allows the acquisition of property rights after possessing property for a certain period of time under certain conditions, i.e. through positive prescription.<sup>53</sup>

Article 28(2) of the Law on Basic Property Relations regulates the acquisition of title over immovable property through positive prescription:

“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.”<sup>54</sup>

There are four elements of positive prescription: (1) legal holdership, (2) conscientiousness, (3) the passing of the statutory period of time, and (4) possession of the property right by another.<sup>55</sup> The required possession period, also known as the prescriptive or statutory period, rises to 20 years in the event the possessor is not a legal holder of the property, i.e. if all requirements but legal holdership are met.<sup>56</sup>

Article 72(2) of the Law on Basic Property Relations says that possession is conscientious “if the holder hasn’t known or couldn’t have known that the property he/she is holding is not his/hers.” The following paragraph says, “Conscientiousness of the possession shall be assumed.”<sup>57</sup> A holder’s possession is “legal” if “it is based on valid legal ground that is necessary for acquisition of the property right and if it is not acquired by force, deceit, or misuse of trust.”<sup>58</sup>

Holdership can be legal and un-conscientious; conversely, it can be illegal but conscientious. For example, the individual who buys property pursuant to a written contract from another whom he or she knows has no legal right to hold it has legal ground for holdership (the

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<sup>52</sup> See UNMIK Department of Justice Judicial Integration Section, “Report on Fraudulent Transactions of the Real Property of IDPs and Abuse of the Office of Temporary Representative”, page 1 (The report does not contain a publication date); UNMIK Department of Justice Judicial Integration Section, “Updates to the Report on Fraudulent Transaction to the Real Property of IDPs and Abuse of the Office of Temporary Representative”, 14 June 2005.

<sup>53</sup> Article 21, Law on Basic Property Relations. Black’s Law Dictionary defines positive prescription as “The acquisition of title to a thing (esp. an intangible thing such as the use of real property) by open and continuous possession over a statutory period.” Black’s Law Dictionary 1220, 8th ed. 2004. Positive prescription should not be confused with the similar common law doctrine of adverse possession. The essential difference being that adverse possession requires the holder to know the land belongs to another; in positive prescription, the holder must have good faith that the land is his own. See *id.* at 59 for a definition of “adverse possession.”

<sup>54</sup> Note that Articles 28(1) and 28(3) of the Law on Basic Property Relations address positive prescription over moveable property. They contain the same elements as paragraphs 2 and 4, respectively, but the period of possession is shorter in cases of moveable property.

<sup>55</sup> *Id.* Article 28(2).

<sup>56</sup> *Id.* Article 28(4).

<sup>57</sup> *Id.* Article 72(3).

<sup>58</sup> *Id.* Article 72.

purchase contract) that makes him/her a legal holder. At the same time, the purchaser cannot be a conscientious holder. The purchaser thus cannot gain title by positive prescription.<sup>59</sup> Additionally, the person who unknowingly inherits property from a holder who did not have legal title can be considered a legal and conscientious holder as the inheritor did not know all the circumstances.<sup>60</sup> In this case, the holder could acquire ownership through positive prescription after the expiration of ten years.<sup>61</sup> Further, the individual who buys property pursuant to an oral contract has no legal right to hold it (because contracts for immovable property must be in writing), but the purchaser can be a conscientious holder. Thus, the purchaser can acquire title by positive prescription after 20 years.<sup>62</sup>

When determining the prescriptive period, courts should begin counting on the day the “holder has entered into the right of possession of the object.”<sup>63</sup> The party claiming title by positive prescription can include the time when that party’s predecessor held the object “as conscientious and legal holders, respectively as conscientious holders.”<sup>64</sup> In the event the current holder acquired the property by inheritance, the fact that the testator lacked conscientious holdership does not negatively impact the heir’s right to claim title by positive prescription.<sup>65</sup> The heir becomes a conscientious holder at the moment the inheritance is opened, even if the testator was a non-conscientious holder, provided that the heir “neither knew nor could have known about the testator’s non-conscientiousness.”<sup>66</sup>

Further, the law prohibits acquiring title “over objects that are under social property” by positive prescription.<sup>67</sup>

Broadly speaking, the doctrine applies when one person uses land he or she in good faith believes is his or hers and belongs to no other.<sup>68</sup> Often, the individual will have purchased the land. In some cases, the seller may not have been the rightful owner. In other cases often seen in Kosovo, a land transaction was made and never recorded in the immovable property rights register. When an ownership transfer by legal affairs does not happen, positive prescription steps in to fill the void.

Though the legal framework in Kosovo sets forth a fairly straightforward list of requirements necessary to acquire title by positive prescription, courts and lawyers apply the doctrine in cases where the elements have not been met. First, parties rarely attempt to demonstrate legal holdership. And though conscientiousness is a presumption to be rebutted by the opponent of positive prescription, courts and lawyers seem to believe that the proponent must establish it.<sup>69</sup> Then, they proceed to establish conscientiousness by showing that no one contested the property right. However, this fails to establish whether the holder knew or could have known

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<sup>59</sup> *Id.* Article 28(4).

<sup>60</sup> Dragoljub D. Stojanović and Dimitar Pop-Georgiev, *Commentary on the Law on Basic Property Relations* 108, 3d Broaden Ed., Belgrade, 1986.

<sup>61</sup> Article 28(2), *Law on Basic Property Relations*.

<sup>62</sup> *Id.* Article 28(4).

<sup>63</sup> *Id.* Article 30(1).

<sup>64</sup> *Id.* Article 30(2).

<sup>65</sup> *Id.* Article 28(5).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* Article 29.

<sup>68</sup> Stojanović, *supra* note 66.

<sup>69</sup> Article 72(3), *Law on Basic Property Relations*.

that the property belongs to another.<sup>70</sup> Additionally, it is not necessary to establish conscientiousness as it is a presumption, i.e. a fact to be assumed by the court.<sup>71</sup>

In a Gjilan/Gnjilane region case, the court heard two witnesses who testified in a 20 December 2006 hearing in support of the Kosovo Albanian plaintiff's period of ownership. Both witnesses noted that the plaintiff had used the property without any "problems". That same day, the court rendered a judgment in favor of the plaintiff. As a basis for its decision, the court noted that the witnesses testified the plaintiff had used the property "without obstruction". The court also noted that the possession list indicated the Kosovo Serb respondent owned the property. The court had previously appointed a temporary representative for the respondent.

In a 2002 case in the Mitrovicë/Mitrovica region, the court's 22 July 2002 judgment equated conscientiousness with the alleged fact that no one contested the property right. The plaintiff eventually prevailed. His attempts to execute the judgment are stalled due to the limited functioning of the Mitrovicë/Mitrovica municipal court.<sup>72</sup>

In many cases, the period of possession is established by unreliable and unchallenged witness testimony. In particular, the OSCE has monitored many cases in which temporary representatives failed to challenge suspect testimony. For example:

In a 2005 case in the Mitrovicë/Mitrovica region, the Kosovo Albanian plaintiffs asked the court to confirm their ownership of a piece of immovable property. The plaintiffs' husband and father allegedly bought the property from the Kosovo Serb respondent in 1972 but never registered their ownership. The respondent since moved away and a temporary representative was appointed for him. During the court session, one witness (the brother of one of the plaintiffs) testified to the formation of a written contract and the payment of the transaction money. The other witness (the son-in-law of another plaintiff) testified that he had only heard about the existence of a contract. The court based its 18 March 2005 judgment on the statement of these two witnesses that the plaintiffs lived on the property since 1981 without interference.

In a 2004 case in the Mitrovicë/Mitrovica region, the Kosovo Albanian plaintiff claimed ownership by positive prescription of a property he purchased in 1980 pursuant to an oral contract from a Kosovo Albanian and a Kosovo Roma. At the first session on 13 August 2004, the court appointed a single temporary representative for both respondents without making any attempt to locate them. At a hearing on 8 October 2004, the court heard two witnesses, including the plaintiff himself. The same day at the hearing, the court confirmed the plaintiff as the owner of the property based on the oral contract and the plaintiff's factual possession of the property, citing Article 73 of the Law on Obligations and Article 28(4) of the Law on Basic Property Relations.

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<sup>70</sup> See *id.* Article 72(2).

<sup>71</sup> *Id.* Article 72(3).

<sup>72</sup> The Mitrovicë/Mitrovica District and Municipal Courts as well as the Leposavić/Leposaviq and Zubin Potok Municipal Courts ceased functioning on 21 February 2008. A group of international judges and prosecutors began addressing a small number of criminal cases on 3 October 2008.

Courts have approved claims under Article 28 of the Law on Basic Property Relations when the statutory period has not been met:

In a 2002 case in the Mitrovicë/Mitrovica region, two witnesses testified to the period of possession. At the 22 July hearing, one witness said the respondent lived on the property continuously for 20 years. The second witness testified that the respondent moved onto the property 15 to 20 years ago and lived there continuously. Neither witness said precisely the time when the respondent moved onto the property and when or whether he moved off. The vague indication of “15 to 20 years” by the second witness should not suffice to prove that the respondent lived the minimum 20 years on the property, as required by law.

Often, claims seem to assert a title right based on Article 28 though the specific law is never mentioned. These judgments tend to grant title based on possession for a certain period of time, appearing to refer to Article 28 but never mentioning so specifically. The OSCE observed this problem in all regions of Kosovo.

The OSCE also monitored a case where a court considered a holder’s assertion of rights over what may be considered social property without fully addressing the issue.<sup>73</sup>

In a Mitrovicë/Mitrovica region case filed on 4 April 2005, the court granted the plaintiff’s claim of ownership based on Article 28(4) of the Law on Basic Property Relations. The court neglected to consider Article 29 of the same law, which prohibits gaining ownership of social property through positive prescription. An appellate court confirmed the lower court’s judgment, claiming Article 29 was abrogated in 1996 by Article 16 of the Law on Amendments and Fulfillment of the Law.<sup>74</sup>

However, under UNMIK Regulation 2000/59, the law applicable in Kosovo is that which was in effect on 22 March 1989. Only if a court determines that a subject matter or situation is not covered by the laws in force before 1989 may it apply post-22 March 1989 law.<sup>75</sup> The court never addressed this issue.

Given that positive prescription amounts to an exception to the standard method of acquiring property rights mentioned previously, the doctrine should be used rarely. Its regular and loose application in Kosovo raises concerns. Additionally, in a post-conflict legal environment where many landowners are absent or missing, positive prescription should be applied very carefully.

## **C. Conclusion**

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<sup>73</sup> The OSCE noted this problem in one case and thus it cannot be considered a trend. However, it is a potential problem and the issue should continue to be monitored.

<sup>74</sup> This is how the court cites the law. It appears to refer to the Law on Amendments and Supplements to the Law on Basic Property Relations, Official Gazette of the Socialist Federal Republic of Yugoslavia 29/1996, 26 June 1996.

<sup>75</sup> UNMIK Regulation 2000/59 amending UNMIK Regulation 1999/24 on the Law Applicable in Kosovo, 27 October 2000.

Kosovo applicable law requires a written contract, verified, and subsequently recorded in the property rights register in order to transfer ownership of immovable property. Courts should refrain from applying the doctrine of substantial performance in suits to establish ownership of immovable property when no written contract exists. Additionally, the doctrine of positive prescription should only be applied in special cases and only when the proponent of its application can fully establish all of the elements.

#### IV. PROCEDURAL ISSUES

##### A. Evidentiary practice and the right to a reasoned decision

The OSCE has previously reported that decisions in civil disputes often fail to contain sufficient reasoning.<sup>76</sup> Property cases in particular demonstrate a pattern of faulty reasoning and improperly weighted evidence. For example, courts often give the testimony of interested parties greater weight than the documentary evidence the law defines as presumptively correct.<sup>77</sup> Additionally, in many cases monitored by the OSCE, courts failed to cite any legal provision supporting their decisions.

Parties in civil and criminal trials have the right to a reasoned decision.<sup>78</sup> Among other things, a reasoned decision “demonstrate(s) to the parties that they have been heard [...]. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice.”<sup>79</sup> Reasoned decisions are particularly important because they enable parties to appeal; without reasons justifying a court decision, the appealing party cannot properly challenge the basis of a court’s decision.<sup>80</sup>

In line with the requirement of a reasoned decision, the Law on Contested Procedure requires a final decision to contain an explanation including the facts and evidence upon which it is grounded.<sup>81</sup> The court shall also specify the legal provisions on which the decision relies.<sup>82</sup> The lack of reasoning of a decision constitutes a substantial breach of procedural law and serves as a ground for appeal.<sup>83</sup>

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<sup>76</sup> OSCE Mission in Kosovo, Department of Human Rights, Decentralization, and Communities: Legal System Monitoring Section, May 2007 Monthly Report, “Insufficient reasoning of decisions in civil disputes violates domestic law and affects the right to a fair trial”.

<sup>77</sup> *E.g.*, Article 230, Law on Contested Procedure. A document “issued in its proper form by a state agency acting within its jurisdiction [...] proves the veracity of what is stated in it.”

<sup>78</sup> Although not expressly required under Article 6 of the Convention, the European Court of Human Rights (ECtHR) recognized the right to a reasoned decision in both civil and criminal cases as implied by the right to a fair trial. *See Van de Hurk v. Netherlands*, Judgment of 19 April 1994, Series A, No. 288; 1994, 18 ECtHR 481, paragraph 61 of the judgment. *See also Suominen v. Finland*, 37801/97, 24 July 2003, paragraphs 34-38; *Ruiz-Torija v. Spain*, Judgment of 9 December 1994, Series A, No. 303-A; (1994) 18 ECtHR 553; and *Hiro Balani v. Spain*, Judgment of 9 December 1994, Series A, No. 303-B; 1994, 19 ECtHR 566.

<sup>79</sup> *Suominen v. Finland*, 37801/97, 24 July 2003, paragraph 37.

<sup>80</sup> *See id.* at paragraphs 34-38.

<sup>81</sup> Article 338(1), Law on Contested Procedure.

<sup>82</sup> *Id.* Article 338(4).

<sup>83</sup> *Id.* Article 354(2)(13). Under the Law on Contested Procedure, a “substantial breach on the point of practice and procedure exists if the court, while conducting the proceedings, has not applied, or has wrongly applied some provision of this Code, and that has or might have, affected the passing of a lawful and fair judgment.” Article 354(1).

In addition to the requirement of a reasoned decision, the Law on Contested Procedure sets out minimal evidentiary rules applicable in disputes. Parties must “present all facts upon which their claims are based and offer evidence in support of these facts.”<sup>84</sup> If neither party presents evidence important for reaching a decision, the court itself may adduce it.<sup>85</sup> Courts may on their own initiative seek out evidence “if the results of the hearing and adduction of evidence show that the parties tend to claim what they are not entitled to [...]”<sup>86</sup> These evidentiary rules do not cover the admissibility or weight of a particular piece of evidence. Rather, they address obligations of courts, parties, and witnesses when it comes to the adduction of evidence. For example, courts must “fully and truthfully establish the disputed facts upon which the claim is based.”<sup>87</sup> Courts also have discretion to decide which evidence tends to prove the plaintiff’s case.<sup>88</sup>

When no other evidence is available or when “it finds that it is necessary for the purpose of determination of important facts in addition to the evidence adduced”, courts may call the parties themselves.<sup>89</sup> Any person called as a witness must respond and testify (some exceptions apply),<sup>90</sup> but only persons with knowledge of the facts can serve as witnesses.<sup>91</sup> Witnesses must always be asked how they obtained the information about which they are testifying.<sup>92</sup> If the court believes the witness not to have knowledge of the facts, it can decide not to take testimony.<sup>93</sup>

The following cases demonstrate pattern of faulty reasoning and deviation from procedural rules typical in property cases:

In a Prishtinë/Priština region case, the plaintiff sued on 11 March 2004 to confirm her ownership of a commercial property.<sup>94</sup> She claimed to have bought the property from the respondent in March 1999. The respondent demurred, saying it had actually transferred the property to another entity in 1973. During the evidentiary proceedings, the court reviewed various pieces of documentary evidence. The court held for the plaintiff, citing only a procedural rule that gives courts discretion regarding which facts to take as evidentiary.<sup>95</sup> In its decision, the court recited the arguments of the plaintiff and the respondent, listed the documentary evidence it considered, and noted that the 1999 sales contract recorded in the respondent’s books supported its conclusion. The court noted that the respondent owned and rented the property up to the point in 1999 when the plaintiff purchased it, though no evidence, testimonial or otherwise, was presented to this effect. The court acknowledged that the respondent sold the property in 1973 but says it is unknown how that property again came to be owned by the respondent, though the court never delved into this issue. The court failed to refer

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<sup>84</sup> *Id.* Article 7(2). *See also id.* Article 219.

<sup>85</sup> *Id.* Article 7(3). *See also id.* Article 225.

<sup>86</sup> *Id.* Article 7(4).

<sup>87</sup> *Id.* Article 7(1).

<sup>88</sup> *Id.* Article 8.

<sup>89</sup> *Id.* Article 264(2).

<sup>90</sup> *Id.* Article 235(1).

<sup>91</sup> *Id.* Article 235(2).

<sup>92</sup> *Id.* Article 244(2).

<sup>93</sup> *Id.* Article 9.

<sup>94</sup> The case was filed in March 2004 but the first hearing did not occur until March 2006.

<sup>95</sup> Article 8, Law on Contested Procedure, “It is within the discretion of the court to decide [...] which facts shall be taken as evidentiary.”

to any substantive law supporting its decision. It failed to assess how the evidence supported its conclusion. It also failed to address the possibility that neither plaintiff nor respondent owned the property; it could belong to the third party who apparently purchased it in 1973. In doing so, the court favoured the plaintiff's testimony over documentary evidence by supporting the proposition that yet another entity owned the property. Had the court included reasoning in its decision, it would have been compelled to provide a more rational assessment of the facts and the law.

In a 2005 Gjilan/Gnjilane region confirmation of ownership case, the court granted the Kosovo Albanian plaintiff's request to confirm his ownership of immovable property. At a 14 March session, the court appointed a temporary representative for the Kosovo Serb respondent without making any attempt to summon him. The court heard the testimony of two witnesses, both for the plaintiff. It also read into evidence the possession list naming the respondent as property owner. Nevertheless, the court held that the plaintiff owns the property.

In a 2008 confirmation of ownership case in the Pejë/Peć region, the Kosovo Albanian plaintiff claimed to have purchased property from the Kosovo Serb respondent pursuant to an unverified 1981 purchase contract. The plaintiff testified that he paid the full purchase price and has been using the property since 1981 without interference. As the respondent was presumed to live outside of Kosovo, the court appointed a temporary representative without conducting any search.<sup>96</sup> The court found for the plaintiff on 11 April 2008. It cited no legal provision in its decision nor did it refer to any evidence presented.

In a 2006 case in the Gjilan/Gnjilane region, two witnesses testified at an 18 April 2007 hearing to the formation of an immovable property contract between the Kosovo Albanian plaintiffs and the Kosovo Serb respondents in 1977. One witness admitted that he had no firsthand knowledge of the contract formation but that he heard about it elsewhere. The other witness did not clarify whether he was present. Both said that the plaintiff had used the land continuously since the contract was formed in 1977. This testimony should have been given very little weight as neither witness could establish firsthand knowledge of the facts. Citing the witnesses' testimony, the court held for the plaintiff on 4 May 2007.

In a 2005 Mitrovicë/Mitrovica region case, the only witness who testified to twenty years of conscientious holdership was the plaintiff himself. A second witness testified that the plaintiff lived on the property without obstruction for the entire ten years that the witness was the plaintiff's neighbour. The court held for the plaintiff. In its 10 March judgment, the court noted that, in spite of Article 73 of the Law on Obligations' requirement of a written contract, the oral contract was valid because both parties fulfilled their duties (the plaintiff paid and the respondent handed over the property). The court then said the plaintiff gained ownership by positive prescription, citing Article 28(4) of the Law on Basic Property Relations. The court explained that the plaintiff possessed the property without obstruction from the time he purchased it, though the only person who testified to this fact was the plaintiff himself. A temporary representative had been

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<sup>96</sup> The court published the announcement of the temporary representative's appointment in an Albanian language newspaper.

appointed for the respondent in this case, but he offered no evidence in support of his client.

Though required by the applicable law, Kosovo courts often neglect to issue fully reasoned judgments. The problem is particularly evident in property cases, where final judgments often do not include an explanation of how the evidence presented at trial meets the requirements of the law.

## **B. Temporary representatives — continuing problems**

Courts continue to appoint temporary representatives for absent respondents without following proper procedures. This disproportionately affects Kosovo Serbs, as many are displaced from their original places of residence. It also seems to occur most often in property cases.<sup>97</sup> In many suits for confirmation of ownership, the respondent cannot be located. Often, the property transfer occurred in the discriminatory period, thus could not be recorded in the cadastral records, and the seller subsequently moved.<sup>98</sup> Many other cases involve property transfers where the seller fled, disappeared, or became displaced as a result of the conflict. In cases like these where the respondent cannot be located, courts in Kosovo all too readily resort to the appointment of a temporary representative for respondent.<sup>99</sup> This carries great human rights implications as it relates to the right to a fair trial and the right to property.

By conducting trials without the participation and knowledge of the respondent, the parties cannot present their case, thus violating the principle of equality of arms. Equality of arms is an important aspect of the right to a fair trial.<sup>100</sup> According to this principle, a party “shall be given a reasonable opportunity of presenting his/her case to the court under conditions which do not place him/her under a substantial disadvantage *vis-à-vis* his/her opponent.”<sup>101</sup>

The Law on Contested Procedure requires courts to “give to each of the parties the opportunity to express itself regarding the claims and statements of the opposing party.”<sup>102</sup> Temporary representatives may be appointed for the respondent under three conditions: (1) the respondent’s location is unknown, (2) the respondent does not have a representative, and (3) “if the regular procedure for the appointment of a legal representative would take a long time, thus causing detrimental consequences to one or both parties.”<sup>103</sup>

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<sup>97</sup> The OSCE published a monthly report on this issue in April 2008 and a spot report in April 2005. OSCE Mission in Kosovo, Monitoring Department, Legal System Monitoring Section, April 2008 Monthly Report, “[F]ailure of courts to contact the competent administrative body or use reasonable alternative means to locate the defendants violates domestic law and possibly the right to a fair trial”; OSCE Mission in Kosovo, Department of Human Rights and Rule of Law, Legal System Monitoring Section, *The Appointment of Temporary Representatives in Property Disputes Involving Minorities as Respondent Parties*, April 2005.

<sup>98</sup> The law applicable in Kosovo prohibited the transfer of immovable property between members of different communities until the 13 October 1999 promulgation of UNMIK Regulation 1999/10 on the Repeal of the Discriminatory Legislation Affecting Housing and Rights in Property.

<sup>99</sup> The Law on Contested Procedure does not specify how courts should select individual attorneys to serve as temporary representatives.

<sup>100</sup> European Court of Human Rights, *Neumeister v. Austria*, 1936/63, Judgment, 27 June 1968, paragraph 22.

<sup>101</sup> European Court of Human Rights, *Dombo Beheer BV v. Netherlands*, 14448/88, Judgment, 27 October 1993, paragraphs 33-34.

<sup>102</sup> Article 5, Law on Contested Procedure.

<sup>103</sup> *Id.* Article 84.

As previously noted by the OSCE, the appointment of a temporary representative amounts to a measure of last resort.<sup>104</sup> Courts must first proactively search for the respondent: “If the party cannot find out the address of the person to whom the writ is to be served [...] the court shall try to obtain the required information from the competent administrative body, or to obtain the necessary information in some other way.”<sup>105</sup>

Thus, the law authorizes and arguably requires courts to use reasonable available means to locate an absent respondent in civil cases. The Central Civil Registry essentially constitutes the “competent administrative body” envisaged in the Law on Contested Procedure.<sup>106</sup> Furthermore, the appropriate body to summon parties outside Kosovo is the UNMIK Department of Justice.<sup>107</sup> In addition, there are additional possible means for locating absent respondents who may have been displaced, such as the United Nations High Commissioner for Refugees, the Kosovo Property Agency, or the court liaison offices.

Nonetheless, courts regularly appoint temporary representatives in property cases without following required procedures.

In a case filed on 6 December 2007 in a Gjilan/Gnjilane region court, the Kosovo Albanian plaintiff claimed that he bought the contested property 30 years prior from Kosovo Serb respondents who allegedly left Kosovo to an unknown address. To find the address of the respondents, the court contacted the court liaison office but not the UNMIK Department of Justice, though plaintiff alleged that the respondents lived outside Kosovo.<sup>108</sup> The court appointed a temporary representative on 27 March 2008.

In another case in the Gjilan/Gnjilane region, a Kosovo Albanian plaintiff requested confirmation of ownership of his property which his father allegedly bought 40 years ago from a Kosovo Serb (second respondent) who allegedly bought it from another Kosovo Serb (first respondent). Without any effort to locate the first respondent, on 27 December 2007 the court appointed on plaintiff’s proposal a temporary representative for him.<sup>109</sup> Two additional sessions were held on 23 January and 7 February 2008 without the presence, and most likely the knowledge, of the first respondent.<sup>110</sup>

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<sup>104</sup> OSCE Mission in Kosovo, Department of Human Rights and Rule of Law, Legal System Monitoring Section, *The Appointment of Temporary Representatives in Property Disputes Involving Minorities as Respondent Parties*, April 2005.

<sup>105</sup> Article 148, Law on Contested Procedure.

<sup>106</sup> Under UNMIK Administrative Direction 2002/16 Implementing UNMIK Regulation 2000/13 on the Central Civil Registry, 19 July 2002, UNMIK judicial authorities may request the disclosure of personal data from the Central Civil Registry to locate absent people.

<sup>107</sup> UNMIK Department of Justice, Justice Circular 2003/03, *International Legal Assistance in Civil and Criminal Matters*, 5 September 2003. The reconfiguration and downsizing of the United Nations Mission in Kosovo raises question as to who will fill this role if and when the UNMIK Department of Justice ceases to function.

<sup>108</sup> Employees of the court told the OSCE that the employees no longer contact the UNMIK Department of Justice as they usually do not receive an answer. The employees expressed doubt that Serbian authorities cooperate with the UNMIK Department of Justice.

<sup>109</sup> Of note, the plaintiff also declared that he would pay the costs of the respondent’s temporary representative, which raises a potential conflict of interest.

<sup>110</sup> On 7 February 2008, the court approved the plaintiff’s claim.

In a third property case before a Gjilan/Gnjilane region court, the Kosovo Albanian plaintiff extended a lawsuit to include a Kosovo Serb respondent in the trial session on 21 September 2007. In that same session, the court appointed a temporary representative for the respondent without any effort to locate him. An additional session was held on 4 December 2007.<sup>111</sup>

In a number of property disputes pending before a court in the Prizren region, the court appointed three lawyers to represent all 24 Kosovo Serbs respondents in June 2004. The court made no attempt to locate the respondents before appointing the temporary representatives. In addition, it posted the respective announcements on the court's public announcements board as well as in an Albanian language newspaper.<sup>112</sup> The court did not demonstrate that taking further time to follow the regular procedure for the appointment of legal representatives for the respondents would cause detrimental consequences to the parties.

After appointing a temporary representative, “[t]he court shall make an announcement which shall have been published in the official gazette [...] and placed on the notice board of the court, and, if appropriate, made public in some other proper way.”<sup>113</sup> Once appointed, “[t]he temporary representative shall have, in the proceedings for which he has been appointed, all rights and obligations of a legal representative [and] shall continue exercising these rights and obligations until the respondent or his agent appear before the court [...]”<sup>114</sup>

However, the means used by the courts in the cases monitored by the OSCE raise concerns in terms of effectiveness and may be discriminatory.<sup>115</sup> In the absence of an official gazette in Kosovo which would publish court announcements, most of the courts are publishing such announcements in daily newspapers in the Albanian language, which are unlikely to be read by Kosovo Serbs.<sup>116</sup> Additionally, court files often do not contain any information regarding the public announcement, which may lead to the conclusion that courts are not complying with the applicable law in this respect.

The failure of some courts to make reasonable efforts may leave respondents unaware of court proceedings against them. As the temporary representatives do not meet with their clients, they have difficulty in presenting evidence or adequately defending the respondents' interests in court. Absent respondents do not have a reasonable opportunity to present their cases to the court, and consequently are under a disadvantage *vis-à-vis* their opponent. Thus, in many of these cases courts violate the principle of equality of arms. In addition, by failing to apply reasonable means to locate the respondents, the courts violated procedural rules for the appointment of a temporary representative.

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<sup>111</sup> On the same date, the court approved the plaintiff's claim. Of concern, the temporary representative of the respondent was not only passive during the proceedings but also proposed that the court approve the claim as grounded – contrary to the interest of his client.

<sup>112</sup> While discussing with the OSCE monitor the appointment of temporary representatives in these cases, a judge explained that, as it is a well known fact that all Kosovo Serbs previously living in the Suharekë/Suva Reka municipality fled and their addresses are unknown, the practice of the court when a case is filed against a Kosovo Serb with an unknown address is to automatically assign a temporary representative.

<sup>113</sup> Article 86, Law on Contested Procedure.

<sup>114</sup> *Id.* Article 85.

<sup>115</sup> See Article 1, Protocol 12, European Convention on Human Rights, generally prohibiting discrimination.

<sup>116</sup> Apart from newspapers published outside Kosovo and read in Kosovo, courts could also publish announcements in *Jedinstvo*, a weekly newspaper in the Serbian language distributed and read in Kosovo.

Respondents for whom the court improperly appointed a temporary representative may request a retrial in their cases for a number of reasons, including when one party “has been deprived of his right to be heard before the court by some unlawful act, especially by omission of service.”<sup>117</sup> However, the respondent is often denied a retrial, since the decision whether or not to hold one is taken by the judge who originally appointed the temporary representative.<sup>118</sup>

Furthermore, even where a retrial is granted, the case is not always repeated in its entirety. The following case serves as an example:

In a case in the Mitrovicë/Mitrovica region, a retrial was granted on 14 March 2005 presumably due to the fact that the Kosovo Serb respondent was “deprived of her right to be heard before the court” because the court failed to attempt to locate her. At the retrial, the court denied the respondent’s request to question the witnesses who testified against her at the first instance, though it implied the evidence obtained from those witnesses would be used in formulating a decision on retrial.<sup>119</sup>

Repeating a trial implies that it will be conducted again in its entirety. It does not mean that only part of the trial will be redone. Denying the respondent the ability to question the witnesses against him or her on retrial may violate the right to be heard before the court.<sup>120</sup>

## V. CONCLUSION

An effective property rights protection regime fosters the return of displaced individuals, and proper adjudication of property rights enforces the rule of law and promotes human rights. Additionally, the adequate protection of property rights is essential for economic development in Kosovo.

Property laws are scattered through a variety of legal texts promulgated by the various authorities administering Kosovo over the past few decades. This presents a challenge for courts attempting consistently to apply laws and for parties and lawyers trying to understand which laws apply. According to the European Court of Human Rights, for laws to be valid they must be accessible, clear, and predictable.<sup>121</sup> The complex normative framework and the poor quality of drafting brings into question the validity of immovable property laws applicable in Kosovo. It could also affect the rights to property and a fair trial under international law.<sup>122</sup>

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<sup>117</sup> Article 421, Law on Contested Procedure.

<sup>118</sup> *See id.* Articles 424 and 426.

<sup>119</sup> The OSCE only identified one case where a full hearing was denied during a retrial, but the issue should continue to be monitored to determine if this is a trend in Kosovo.

<sup>120</sup> *See* Article 421, Law on Contested Procedure.

<sup>121</sup> *Silver and others v. United Kingdom*, A61 1983, “The qualitative requirements the law must satisfy are to be: accessible, clear, and predictable.” paragraphs 85-88; *Sunday Times v. United Kingdom*, A 30, 1975, paragraph 49.

<sup>122</sup> Article 1, Protocol 1 of the European Convention on Human Rights and Fundamental Freedoms establishes the right to the peaceful enjoyment of possessions and generally prohibits the deprivation of possession. In the event an individual suffers an improper deprivation of property rights guaranteed by the Convention, Article 13 guarantees the right to “an effective remedy before a national authority.” When that remedy involves the courts, any trial must be fair according to Article 6(1).

Though the court practice of confirming property ownership in the absence of a written contract amounts to a violation of the applicable law, the OSCE recognizes the unique circumstances in Kosovo due to the discriminatory limitations on interethnic property transfers and the 1999 conflict. The OSCE understands that, without some flexibility in assessing property claims based on oral contracts, ownership of many parcels may never be properly recorded. Nevertheless, the OSCE strongly urges that courts refrain from recognizing the transfer of property ownership unless a written contract supporting the transfer can be produced. The opportunity for depriving the true property owner of his or her possession is simply too great in an environment of absent landowners to allow recognition of transfers without a written contract.

In the event an individual seeks court confirmation of property ownership and cannot produce a written contract, courts may apply the doctrine of positive prescription found in Article 28 of the Law on Basic Property Relations. However, courts must be careful to gather sufficient evidence in support of all the elements. Given that positive prescription amounts to an exception to the standard method of acquiring property rights, the doctrine should be used sparingly. Its regular and loose application in Kosovo raises concerns.

Regarding procedural problems in property cases, the OSCE notes the lack of well-reasoned decisions and a failure to properly weigh evidence. Also, the practice of appointing temporary representatives for absent respondents without following proper procedures seems to occur most often in property cases. This carries great human rights implications as it relates to fair trial standards and the right to property and could result in improper deprivation of property. The risk of such deprivation can only negatively affect Kosovo's economic development. Before considering the appointment of a temporary representative, courts should make concerted efforts to locate respondents. Additionally, courts should refrain from making any appointment unless the plaintiff can establish that any delay would cause undue harm.

## **VI. RECOMMENDATIONS**

- The normative framework relating to immovable property should be streamlined and harmonized with internal laws and international human rights standards. Property laws should be located in a minimum number of legal texts, and the language should be clear.
- Any new laws addressing immovable property should specify in one provision that immovable property cannot be transferred without (1) a written contract (2) formally verified and (3) subsequently recorded in the cadastre.
- Legislation should directly address how courts should handle situations where parties did not enter into written contracts for real property transactions because discriminatory legislation in force at the time of the transaction prohibited them from doing so. The Kosovo supreme court should offer guidance to lower courts on how to address such cases.
- Evidentiary rules that address the admissibility and weight of evidence should be developed. Specific guidelines about which pieces of evidence carry greater weight than others, e.g. documents issued by a government agency are presumptively valid

and carry greater weight than witness testimony, could help address the lack of reasoning in many court decisions.

- Courts should sparingly apply the doctrine of positive prescription and carefully determine whether the evidence presented in support of such a claim can rationally support the conclusion.
- When rendering decisions, courts should follow the procedural law. Courts should include an explanation of the facts and evidence upon which a decision is grounded. They should also specify the legal provisions on which they are based, including the law name, official gazette number, and article number.
- Courts must carefully consider and follow the applicable law when a party proposes the appointment of a temporary representative.
- Courts should ensure that notice of the appointment of a temporary representative is published in newspapers and media outlets to which the respondent has access.
- The Kosovo judicial institute should provide training to judges on the importance and method of drafting reasoned judgments.
- Attorneys appointed as temporary representatives must zealously represent the interests of their clients.
- Judges, lawyers, and other legal professionals using English versions of laws should confirm the accuracy of English translations before applying them.