



Acquisition of Ownership by Prescription under Kosovo Property Law and the Influence from Other Legal Systems

Berisha QERKIN¹

Abstract: Kosovo legal framework related to property and other real rights has been developed in the recent years. The post 1999 period is characterized with major changes in legislation. The influence of German Civil Code and other European legal systems is evident. This influence is justified due to major external support in the process of drafting Kosovo legislation. The focus of this paper is given to the acquisition of ownership by prescription as original form of acquisition of ownership, including a comparative perspective and applicability in practice. Acquisition of ownership by prescription in immovable is quite common in the practice of Kosovo legal system, due to large number of non-formal property transactions in the past. The existence and applicability of this title is argued in the light of ensuring legal certainty. The approach used in this study is based on observations as well as review of legal theory and practice. Ownership and property rights are very complex and challenging issues that affect the welfare of the country. This paper contributes to legal theory and its findings address some key issues with regard to acquisition of ownership by prescription. The comparative aspect will contribute to a better understanding and proper interpretation of legal framework.

Keywords: Prescription; property; ownership

1. Introduction

Acquisitive prescription as one of the original titles of acquisition of ownership takes a significant place under Kosovo Law on Property and Other Real Rights adopted in 2009. (LPORR) This title existed also under the Ex-Yugoslav legislation that was applicable in Kosovo. By adoption of the LPORR of 2009, some modifications comparing to previous legal framework were introduced. Among these modifications are the longer period of possession required and also

¹ Teaching Assistant, PhD Candidate, Department of Civil Law, Faculty of Law, University of Prishtina, Kosovo, Address: Agim Ramadani Str.p.n., 10000, Pristina, Kosovo, Corresponding author: qerkin.berisha@uni-pr.edu.

introducing some specific forms of acquisitive prescription taking into consideration specific problems and challenges that Kosovo Legal system is facing. Prescription is regulated also under Kosovo Law on Obligations of 2012; however, prescription regulated under the obligation relationships is not treated under this article. The focus of this article is on acquisitive prescription of ownership; therefore, acquisition of other real rights by prescription is not treated.

This article focuses exclusively on the acquisition of ownership in Kosovo through acquisitive prescription comparing it with some of European legal systems. Some of these systems have direct impact on Kosovo legal framework of this field, including German and Slovenian legal system. Some of the questions addressed through this article are as follows: is acquisitive prescription an original form of acquisition of ownership under Kosovo Law? Why does acquisitive prescription exist and do we need it? What are the main similarities and differences of Kosovo legal framework regulating the acquisition of ownership by prescription with other European legal systems? What are the main conditions to be fulfilled in order to acquire ownership by prescription? Does any difference between acquisition of ownership on movables and immovable exist? How much is acquisitive prescription of ownership used in Kosovo Court practice, and the main challenges on its application? The answer to these specific questions will address the acquisitive prescription of ownership in a comparative aspect, to observe the impact of other legal systems in the legal system of the Republic of Kosovo as well as to identify challenges on its implementation.

2. Why Acquisitive Prescription at All

There are many discussions among scholars with regard to justification for existence of acquisitive prescription. While modern legal systems are focused on providing accuracy and legal certainty with regard to legal transactions in the field of property rights, existence of such title is seen as one of elements that may support this objective. By recognizing factual conditions such as those required for acquisition of ownership by prescription, the legal system aims to create some legal grounds aiming to increase the legal certainty as precondition for smooth business transactions. In this regard, existence of original titles on acquisition of ownership is protecting those who are *good faith* possessors. Kosovo authors justify the existence of acquisitive prescription under Kosovo law also to fulfill some of basic requirements of legal certainty. (Aliu, 2013, p. 424) In fact, this reason is justifiable

also for the present time due to different practical problems that Kosovo Legal system is facing with regard to property rights and defining of property rights. (Gashi & Berisha, 2017, pp. 89-93) Among those practical issues, the existence of large informal property transactions is evident. From Kosovo court jurisprudence we can see that in these non-formal transactions, the possession has been transferred, there is good faith of the possessor/transferee as well as the condition of lapse of time is fulfilled. Therefore, we see many court decisions recognizing the ownership based on acquisitive prescription on immovable property. This is a clear argument that for the moment acquisitive prescription is a useful title for acquisition of ownership in immovable property. Legal certainty and general interest of society is justification behind existence of acquisitive prescription in other legal systems too, e.g. Slovenia (Rudolf, Rijavec & Kerestes, 2008, p. 607), Germany. (McGuire, 2011, p. 153) Therefore acquisitive prescription secures the possessor for his long lasting position as well as secures the interest of society by hindering the inconsistencies between possession and ownership. (McGuire, 2011, pp. 153-54)

3. Acquisitive Prescription as an Original Title of Acquisition of Ownership

Acquisitive prescription as a specific legal title on acquisition of ownership is regulated in most of modern legal systems, including in Kosovo. Kosovo Law on Property and Other Real Rights (LPORR, 2009) provides the grounds based on which one may acquire ownership on movables and immovable based on this title. In this regard, acquisitive prescription as a title regulated under Kosovo Law provides that the acquisition of ownership is not based on the transfer of title from the previous holder of the title, but, upon existence and fulfillment of certain factual circumstances provided by law. (Aliu, 2014, pp. 167-172) In fact, this makes the acquisition of ownership by prescription as an original title of acquisition of ownership. Consequently, existence of these factual circumstances foreseen by law determines the acquisition of ownership. As a result, once the factual circumstances are existent and fulfilled, the position and the will of previous holder of title and acquirer are not relevant in the context of acquisition of ownership, since the acquisition fulfils the criteria of *ex lege* acquisition. (Aliu, 2014, p. 167) Accordingly, based on LPORR a person who claims the ownership based on acquisitive prescription shall fulfill the following requirements: a) he has had the proprietary possession over the thing (*possessio*); b) he was in good faith at the

moment of acquiring possession and during the entire period of possession (*fides*), and, c) the time foreseen by law has lapsed (*tempus*). (LPORR, Article 28, 40)

In cases of acquisitive prescription, the existence of a valid title such as contract or other form of transfer of title is not existent. If a derivative title exists the acquisition of ownership by prescription is excluded. Some agreement between the transferor and the transferee may exist, but such agreement or title does not fulfill the requirements of a valid legal title to transfer the ownership. In practice it may happen that the movable thing has been stolen. (McGuire & Mary-Rose, 2011, p. 154) Or, the other reason may be the lack of legal capacity of one of the parties. (McGuire & Mary-Rose, 2011, p. 154) In this regard, we can argue that in case of original titles, the existence of legal capacity of transferor and/or transferee is not necessary to exist. (McGuire & Mary-Rose, 2011, p. 154) With regard to the cases of acquisition of ownership in immovable property in most cases of court practice in Kosovo it happens that there is no valid title of transfer of ownership. However, parties have transferred the possession e.g. based on a verbal contract and also have fulfilled all “contractual” obligations. However, the contract is not valid due to the lack of proper form as required by law (*in written*). Still, we can argue, existence of possession, good faith and lapse of time, as it happens in most of court jurisprudence analyzed.

3.1. Influence of Other Legal Systems in Europe

With Regard to property law and particularly ownership, Kosovo has developed a legal tradition as a part of Ex-Yugoslavian system. This system was mainly based on Austrian Civil Code but influenced also by other systems. However, the post 1999 period is characterized with major changes in Kosovo legislation, reflecting also impact of different legal systems. A direct influence came from modern civil codes and legal systems including German Civil Code (BGB), Slovenian Property law, Austrian Civil Code etc. Kosovo Legal system has been influenced by other legal systems in Europe with regard to acquisition of ownership by prescription too. In the field of Property and Other Real rights there was a large impact of German Civil Code (BGB) due to major external support in the process of drafting Kosovo legislation. (Gashi, 2013, p. 58) This impact is reflected also on provisions of LPORR regulating acquisitive prescription of ownership.

Acquisition of ownership by prescription is regulated in all European Countries. Differences exist with regard to the timeframe and conditions to be fulfilled, but,

the meaning and the principle is the same. Most modern European systems require a) existence of proprietary possession, b) existence of good faith, and c) lapse of time. (BGB, Article 937; French Civil Code, Article 2261; Slovenian Property Law, Articles 27, 28, 43) If we go back to the Roman law, we will see that the acquisition of ownership by prescription has been well recognized with the term *usucapio*. Under the Roman law if a person exercised uninterrupted possession of a part of the land for two years or has exercised uninterrupted possession of any other thing for at least a year it was possible to acquire the ownership. (Mousourakis, 2012, p. 134) Looking at the modern Civil Codes and legal systems in Europe we can clearly see the influence by Roman law. (Mousourakis, 2015, p. 287) Indirectly, the influence of Roman Private Law is evident in Kosovo Legal system too. The above requirements are the same under Kosovo Law on Property and Other Real Rights.

3.2. Acquisition of Ownership by Prescription in Movable

The Acquisition of Ownership by prescription on movable property is regulated under Article 28 of Law on Property and Other Real Rights. LPORR states: A person who has a movable property in his proprietary possession for a period of ten (10) uninterrupted years acquires ownership of the property at the end of the ten (10) year period (acquisition by prescription) if, at the beginning and during the entire ten (10) year period, he was not aware that he was not entitled to ownership. (LPORR, Article 28, Par. 1) In this context, LPORR requires existence and fulfillment of the following conditions: a) existence of proprietary possession, b) existence of good faith, and, c) lapse of ten (10) year period of time. (LPORR, Article 28, Par. 1) All these conditions shall exist and shall be fulfilled in the cumulative way, since they are related to each other.

These provisions of LPORR are similar to what Article 937 of BGB requires for acquisitive prescription on movables: a) proprietary possession, b) existence of good faith, c) lapse of time. (BGB, Article 937) Both, BGB and LPORR are similar also with regard to the period of time ten (10) years of prescription on movables (LPORR, Article 28, BGB, Article 937). Acquisition of Ownership in movables regulated under Kosovo Law on Property and Other Real Rights has many similarities also with Slovenian Law on Property (SPZ) of 2002. Most of requirements related to acquisition of ownership by prescription on movables are identical. However, the period of three years of acquisitive prescription on

movables is much shorter under Slovenian Law comparing to ten (10) years under Kosovo Law on Property and other Real Rights and BGB.

Since, there is no requirement to register the ownership on the movable thing under Kosovo legal system, the title is established at the moment these conditions are fulfilled (*acquisition by prescription*). This is different comparing to the acquisition of ownership on immovable things by prescription due to the fact that registration of immovable is obligatory in order to acquire the ownership. At this point both LPORR is similar with BGB and SPZ.

3.2.1. Existence of Proprietary Possession

Existence of proprietary possession is one of the conditions to be fulfilled in case of acquisitive prescription. Under Article 110 of LPORR proprietary possessor is considered "*a person possessing a property that is owned by that person*". This formulation provided by article 110 of LPORR shall be understood in line with the requirements of article 28 that the possessor shall "*not be aware that he is not entitled with the right of ownership over that movable property*". (LPORR, Article 28) Therefore, in case of prescription, provisions of Article 110 that define proprietary possession as "*property that is owned by that person*" shall be interpreted in connection with provisions of Article 28 of LPORR as the possessor considers the thing as belonging to him, and himself as the owner. In case of movables, this "*property possession*" shall exist as uninterrupted possession over a period of 10 years and throughout this possession, the possessor considered himself and acts as an owner of that movable property. Some inconsistency exists under provisions of LPORR, including some inconsistencies between different language versions. E.g. in the Albanian version which is the official version, Article 110 does not mention if proprietary possession defined under that article is related to the movables, while the English version clearly relates its applicability to movable property.

Provisions of LPORR regulating proprietary possession are largely influenced by German Civil Code and Slovenian Property Law. Although some differences in the formulation exist between BGB and LPORR, these provisions have a similar requirement, which requires proprietary possession of the transferee. The proprietary possession under BGB is considered the case when "*A person who possesses a thing as belonging to him*". (BGB, Article 872) Similar provisions we find under Slovenian Property Law (SPZ). Proprietary possession under Slovenian Property Law is defined as a situation under which the proprietary possessor intends to own a thing. (SPZ, Article 27, Par. 1)

LPORR under Article 26 presumes the ownership of possessor of a movable. Therefore, it presumes also the proprietary possession. Article 26 of LPORR, states that: the possessor of a movable is the owner of the thing. However this is not applicable against a former possessor if the thing was stolen from him (LPORR, Art. 26, Par. 1) in that case the former possessor is considered the owner. These provisions are identical with provisions of German Civil Code. (BGB, Article 1006) However, provisions of German Civil Code are more specific when it comes to presumption of proprietary possession. If proprietary possession exists at the beginning and at the end of a period of time, it is presumed that his proprietary possession also existed in the intermediate period. (BGB, Article 938) Such specific provisions related to presumption of proprietary possession do not specifically exist under LPORR, even though they may be interpreted as such when analyzing provisions of the law related to possession.

3.2.2. Existence of Good Faith

Kosovo Law on Property and Other Real Rights does not provide a positive definition of good faith, but instead provides some elements, expressed in the negative form, existence of which will cause the lack of good faith. These elements provided by Kosovo are as follows “... *he was not aware that he was not entitled to ownership*” (LPORR, Article 28, Par. 1) or, “... *was not in good faith or if he discovers ... that he is not entitled to the ownership ...*” (LPORR, Article 28, Par. 2) Good faith must be present at the time the acquirer obtains possession of movable and exist throughout the prescription period. In case of acquisitive prescription, the existence of good faith is required from the moment of acquiring proprietary possession and during the entire period of ten (10) years of proprietary possession. (LPORR, Article 28, Par. 1) Therefore, good faith exists when the possessor does not know and is not supposed to know that he is not entitled to have such possession on movable. Non-existence of knowledge to the acquirer on the lack of the ownership on such movable property may also be related to the lack of claims by other persons over that movable property. Acquisitive prescription can only take place to the acquirer when he believes in good faith that he has already become owner of the thing.

Kosovo law provides that if the acquisition of ownership depends on the good faith of the transferee, good faith shall be presumed unless proven otherwise. (LPORR, Article 4) Therefore, based on these provisions a person who may claim vindication has to prove that the possessor is not in good faith. Similarly to LPORR, good faith is also presumed under BGB. As stated above BGB in article

1006 presumes the ownership of possessor and in Article 938 presumes proprietary possession. Once the ownership is presumed the good faith may be considered as presumed too. Similar provisions are found under Slovenian Property Law. (SPZ, Article 9) Under SPZ, rules of good faith apply from the moment of acquiring possession and shall exist during the entire period of possession. (SPZ, Article 45, Par. 1)

LPORR does not recognize the acquisition of ownership by prescription if the possessor (transferee) is in bad faith. (Gashi, 2013, p. 51) By doing so, the intention of Kosovo Law is to make a balance between the protection of the rights of the current owner and the possibility of acquiring ownership by prescription. (Gashi, 2013, p. 51) LPORR does not require existence of good faith to the transferor. Similarly, there is no requirement under BGB for the previous transferor to be in good faith also. (McGuire, 2011, p. 154) This means that under both, LPORR and BGB acquisition of ownership by acquisitive prescription is possible in stolen and lost things too. If we analyze this to the Roman law, we can identify some differences. (Mousourakis, 2012, p. 134)

As we can see from different legal systems as well as from the position of different scholars on this issue, Good faith has its own objective and subjective elements that have to be taken into consideration. While the objective elements are related to the fact that the proprietary possessor is wrong on his perception since he is not the owner, the subjective element is related to his believe and behave as an owner. The subjective element is clearly seen in provisions of article 28, Par. 3 of LPORR *“Prescription is excluded if the person ...was not in good faith or if he discovers during the ten-year period that he is not entitled to the ownership...”*As already mentioned in previous parts proprietary possession is necessary in case of prescription. The acquirer has to possess the movable “as owner”, and considering the property as belonging to him. This fact takes into consideration the intention of the possessor regarding his property. Furthermore, the possession shall not be based in violence, since that will exclude good faith.

3.2.3. Lapse of Time – Period of Prescription

With regard to period of prescription, on movable things, LPORR has foreseen the period of 10 years of proprietary possession. The acquisitive prescription for movables is ten years, and shall normally start counting from the moment the acquirer obtained the possession ownership. (LPORR, Article 28, Par. 1) This means that the possession from that time shall be uninterrupted. Possession is not considered as interrupted when movable is transferred to another person based on

legal title (succession), and therefore good faith applies also to all this period and to both possessors. Provisions of LPORR do not regulate issues related to suspension and interruption of prescription. However, the practice of Kosovo Judicial system is build based on provisions of Law on Obligation Relationships with regard to suspension of prescription of claims which are applied accordingly. (Zogaj, 2016) In this regard, acquisitive prescription is suspended if a claim for the protection of ownership of the actual owner has been initiated. Other circumstances also may exist and may have impact on suspension of acquisitive prescription. Upon the cessation of the circumstances that caused the suspension of prescription, the period of prescription continues. The period of prescription is interrupted if the possessor loses his possession. Other cases of interruption may happen when the actual owner takes action to recover his position by filing a claim against the possessor or by commencing the exercise his right of ownership.

Similar provisions with those of LPORR exist under German Civil Code with regard to the period of acquisitive prescription on movables which is ten (10) years. (BGB, Article 937) Lapse of time is calculated from the moment of obtaining proprietary possession. Furthermore, BGB presumes the proprietary possession in the intermediate period if a person had a thing in his proprietary possession at the beginning and at the end of his proprietary possession. (BGB, Article 938) Similar conditions apply with regard to calculation of uninterrupted possession. However, BGB provides specific rules on suspension of prescription (BGB, Article 939), interruption by loss of possession (BGB, Article 940) and interruption by act of execution. (BGB, Article 941) Under Albanian Civil Code suspension and interruption of prescription of ownership is not regulated by specific provisions. Instead, it provides that provisions of Albanian Civil Code related to prescription of claims are applicable accordingly with regard to suspension and interruption of prescription of acquisitive prescription of ownership. (Albanian Civil Code, Article 171) Under the Slovenian Property Law the period of prescription for movables is three (3) years. Similarly to LPORR and BGB, the lapse of time starts from the first day of proprietary possession and is commenced in the last day of prescription. (Rudolf, Rijavec & Kerestes, 2008, p. 607)

3.2.4. Third Party Rights in Case of Acquisition of Ownership by Prescription

LPORR provides that upon the acquisition of ownership by prescription, all third-party rights in the movable property which arose prior to the acquisition by proprietary possession are extinguished, unless the proprietary possessor is not in good faith with regard to these rights while acquiring proprietary possession.

Therefore, the acquirer has to be in good faith also with regard to the rights of third parties. With regard to applicability of this provisions all what is stated above with regard to existence of good faith for acquisition of ownership by prescription, is applicable also related to the rights of third parties. Therefore, we can argue that he is in good faith if he is not aware on the existence of third party rights.

3.3. Acquisition of Ownership by Prescription in Immovable Property

Differently from the case of acquisition of ownership in movables, the acquisition of ownership in immovable property requires an additional obligation, the registration (*modus*) of the title in the cadastral books. (Gashi, 2013, p. 54) The practice of Kosovo Legal system with regard to transfer of title in immovable property is based on a single contract, which in principle is an obligation contract, but some of provisions provide also the grounds for the transfer and registration of title in cadastral books. The contract shall be in written. This has direct impact also on the acquisition of ownership in immovable property by prescription.

Acquisition of ownership on immovable property by prescription is regulated under Article 40 of LPORR which requires fulfillment of these conditions: a) existence of proprietary possession, b) existence of good faith, and, c) lapse of twenty (20) year period of time. (LPORR, Article 40, Par. 1) Comparing to the conditions set forth with regard to acquisition of ownership on movables we can see that the required period of proprietary possession here is twenty (20) years, while the rest of conditions are the same. There are several issues to discuss here including the registration of ownership (*modus*) as acquired by acquisitive prescription and the procedure. LPORR does not provide any procedure with regard to registration of ownership acquired by acquisitive prescription. However, even if all the conditions of prescription are fulfilled still the existence and fulfillment of these conditions has to be verified. Therefore, the acquirer needs to prove the existence of factual conditions foreseen by law with regard to acquisition of ownership by prescription in a court procedure. In fact this is the current practice applicable by Kosovo Judicial System with regard to acquisition of ownership by prescription over the immovable property. Since Kosovo is in the process of drafting a Civil Code, a more clear provision with regard to the acquisition of ownership by prescription on immovable needs to be introduced. Such provision shall specify that acquisition of ownership by prescription in immovable property shall be verified by the court in contested procedure. Other legal systems in the region are more specific with regard to acquisition of ownership by prescription on immovable. Such provisions

for example are introduced in the Albanian Civil Code and regulate the registration of immovable property acquired by prescription. It states that the person who has acquired an immovable property by prescription “has the right to present a legal action against the previous person or his heirs for recognition of his ownership and, on the basis of the respective court decision, to request the registration of the object by the competent state agency”. (Albanian Civil Code, Article 170) Article 927 of BGB provides the possibility of acquisition of ownership by prescription in immovable property. However, these provisions of BGB are much more limited in terms of applicability comparing to those of LPORR. The period of possession is calculated similarly to acquisition by prescription on movables. The period of prescription in this case is thirty (30) years. (BGB, Article 927) Albanian Civil Code, Regulates acquisition of ownership by prescription in Article 168. The period of prescription is ten (10) years if the possessor is in good faith, and twenty years (20) if the possessor is not in good faith. Provisions of article 168 of Albanian Civil Code have some differences with those of LPORR since they use the term legal transaction “*on the basis of a legal transaction for the passing of ownership not prohibited by law*”. Article 169 of Albanian Civil Code also provides that “the person who was in possession quietly and continuously, behaving like being the owner for 20 years over an immovable property, will become the owner”. (Albanian Civil Code, Article 169) This provision does not mention the good faith of possessor.

3.4. Acquisition of Ownership in Immovable Property by Registration of Proprietary Possession

Another form of acquisition of ownership on immovable property by prescription is regulated under Article 40, Par. 2 of LPORR. This provision regulates acquisition of ownership by prescription through registration of proprietary possession. Therefore, a proprietary possessor acquires ownership of an immovable property, or a part thereof, after ten (10) years of uninterrupted possession and if he is registered as the proprietary possessor in the cadastre and no objection against this registration is filed during this period. (Albanian Civil Code, Article 169) We have to emphasize at the beginning that this is a special form of acquisition of ownership by prescription which differs from other forms of acquisition of ownership by prescription found in other legal systems. This form of acquisition of ownership by prescription has not existed in previous legislation in force in Kosovo, prior to 2009.

Kosovo scholars argue the existence of this form of acquisitive prescription in immovable property to tackle the practical challenges that Kosovo legal system in Kosovo was facing. (Gashi, 2013, p. 57) It is also related to the transformation of property rights system of ex-Yugoslavia that was applicable also in Kosovo. Prior to introduction of LPORR, the document issued to prove ownership in Kosovo was “Possessory Document (*in Albanian, Ftetë Poseduese*) issued by cadastral office (ibid). During ex-Yugoslavia the intention was to establish land books, and based on land books to issue Tapia, but such system was not completed in most of territory of Kosovo. (Gashi, 2018) Therefore, the intention of provisions of Article 40, Par. 2, of LPORR is to make transformation from such proprietary possession to the new system of ownership certificate, which is issued based on immovable property rights register that was established in Kosovo. This argument has a strong basis considering the fact that Kosovo as part of the former Yugoslavia had failed to establish land books, however, during this period up to the entry into force of law no. 2002/5 on the Establishment of the Immovable Property Rights Register, cadastral records were the only public documents for the registration of all types of immovable property, including other records and property characteristics. (Gashi, 2013, p. 57) Furthermore, at the end of 1999 War in Kosovo, Serbian Authorities confiscated almost all original cadastral registers from cadastral offices in Kosovo. This created enormous problems and challenges for Kosovo institutions to build cadastral registers.

As mentioned above, this form of acquisition by prescription requires fulfillment of the three conditions for acquiring ownership based on this title. Based on Article 40, Par. 2 of LPORR these conditions are: a) uninterrupted possession of immovable property for 10 years; b) registration of proprietary possession in Cadastre; c) no objection against this registration filed during the period of ten years. Albanian and English versions of this provision have some inconsistencies. The Albanian version “*registration of proprietary possession in cadastre*” and English version “*registration of proprietary Possession in the immovable property rights register*”. However, when we analyze the third condition, “*no objection against this registration filed*” we can conclude that the English version is the correct one. This is due to the fact that based on the Law No. 2002/5 on the Establishment of the Immovable Property Rights Register; the Registration of objection is done in the Immovable property rights register.

Even though, there are justifiable reasons behind existence of this form of acquisition of ownership by prescription, there are several challenges that may

exist with regard to implementation of this title in practice. Furthermore, there exist several questions that are difficult to answer, or at least not yet answered. These questions among others include: what is the difference between ownership and proprietary possession as registered in the immovable property rights register? If there is a difference, is the change made *ex officio* after ten years period of prescription? For which period this title shall exist? Is it for a limited period, or it may continue forever? Does this form of acquisition of ownership by prescription violate or doubts property rights of owners? Does it mean that every immovable property registered in the immovable property rights register is considered proprietary possession for the initial 10 years period? Or, it is applicable in specific situations? How is it implemented in practice? And, a very the theoretical question: is this form an original form of acquisition of ownership?

Provisions of Article 40 Par. 2 of LPORR do not limit their implementation in terms of time. Therefore, when we analyze these provisions we can create the opinion that any registration is considered proprietary possession for the initial period of ten (10) years. These provisions do not say at which cases registration is considered proprietary possession and at which cases there is ownership. Consequently, as provisions of Article 2 of the Law No. 2002/5 on the Establishment of the Immovable Property Rights Register have foreseen, there is no proprietary possession registered on the immovable property rights register, instead, it is the ownership which is registered. If each registration of ownership in the immovable property rights register is considered as proprietary possession for the initial period of ten (10) years, instead of considering it as ownership, this may indirectly affect property rights, in this case the right to ownership. Furthermore, these provisions are not specific, hence, if that is the case they should be interpreted in that way that after the period of ten (10) years of registration of ownership there is acquisition of ownership *ex lege*, and any claim from third parties is prescribed.

With regard to the theoretical question, if this title is an original form of acquisition of ownership, this is questionable. Firstly, it is clear that registration of ownership in cadastral registers that happened prior to establishment of immovable property rights register was impossible without the existence of a valid legal title. Such a legal title on the basis of which the ownership is registered in most of cases may be a valid sale contract, and as such it constitutes a derivative legal title for the acquisition of ownership. On the other hand, as stated above, the law has foreseen a ten-year term of uninterrupted possession to acquire the ownership based on this

title. This title is introduced as a unique form of acquisition by prescription more as a protection for third parties who may have claims due to the practical problems regarding property rights, rather than an original title with factual elements as discussed above. This form may be considered as original acquisition if registration happened based on an original title and was registered prior to establishment of the immovable property rights register. It may be considered also an original title if registration happened after 1999 in situation of missing cadastral registers since taken by the Serbian authorities and when cadastre was reconstructed based on copies or possessory documents (*fletë poseduese*). If in such cases any valid contract for transfer of title does not exist or is missing. In other cases, this title as such it is difficult to be argued as original title for acquisition of ownership.

Provisions of the LPORR and those of law on the Establishment of the Immovable Property Rights Register on acquisition of ownership by prescription through registration of proprietary possession in the register of immovable property shall be further improved. There is no provision which states what happens after the 10-year period and if the ownership will be acquired *ex officio*. Furthermore, there should be made clear when there is proprietary possession registered and when it is ownership, if it is necessary at all. Therefore, if this provision is still necessary to exist as a mean of ensuring legal certainty, some modifications and clarifications are necessary. Although these provisions are of a substantive nature, some additional clarification of the way of implementation may be introduced on the law on establishment of Immovable Property Rights Register.

3.5. Acquisition by Prescription through Registration of Ownership in Property Rights Register

Another form of acquisitive prescription on immovable is regulated under article 41 of LPORR. This form of prescription regulates the cases in which someone without acquiring ownership has been registered as the owner in the immovable property rights register. These provisions require: a) registration of ownership in the immovable rights register; b) uninterrupted possession of twenty (20) years c) lapse of time; d) no objection registered in the immovable rights register during the period of prescription. This form of acquisition of ownership by prescription does not require existence of good faith, and is based solely on possession. (Gashi, 2013, p. 57) As explained above the registration of ownership in this case already exists. Thus, at the moment the period of prescription is fulfilled, and there is no objection registered, I consider that the acquisition of ownership shall happen *ex officio*.

Although, provisions of LPORR provide that the right of ownership is not terminated by limitation (LPORR, Article 7), the right to vindicate is limited since someone else has already become the owner. This form of acquisition of ownership by prescription is quite similar with acquisition by prescription regulated under Article 900 of BGB. The only difference in fact is the period of prescription which is 30 years. (BGB, Article 900)

4. Practical Challenges on Implementation of Acquisitive Prescription on Immovable Property

As noted above, acquisition of ownership on immovable property requires a valid title on transfer of property as well as registration of ownership in the register of immovable property. (LPORR, Article, 36, Par. 1; 115, Par. 1) Therefore, we can conclude that apart from a legal title in the form of a written contract (LOR, Article 52) the change in the registry of immovable property shall be reflected. This is the regular form of transfer of ownership in immovable (derivative title). There are discussions among Kosovo scholars, whether the registration is of declarative or constitutive character. Since, these provisions of LPORR are clear and consider registration in the registry as obligatory in order for acquisition to happen, I consider that registration has a constitutive character.

When there is no valid contract between the transferor and transferee, other original titles on acquisition of ownership may be applicable such as different forms of acquisitive prescription elaborated above. Acquisitive prescription of ownership as a legal title for the acquisition of ownership has found significant application in the judicial practice of the Republic of Kosovo especially after 1999. Consequently, there are a considerable number of court decisions, mainly of the basic courts, which have recognized the right of ownership based on acquisitive prescription. (OSCE, 2009, p. 13) Based on analysis of various court decisions, as well as interviews with judges; there are several situations at which acquisition by prescription may be applicable. Another issue that has to be taken into consideration is application of different law provisions for the situations of acquisitive prescription that happened prior to adoption of LPORR. Even though the content of provisions of LPORR does not change in substance from the provisions of Law on Basic Property Relationships of Ex-Yugoslavia, the period of prescription has changes. Apart from issues related to applicability of legislation there are other practical issues which are considered challenging. An OSCE report

of 2009 gives also some criticism on the way of application of acquisitive prescription in practice, especially with regard to the way courts deal with good faith possession. (OSCE, 2009, pp. 14-16)

With regard to acquisition of ownership by prescription through adverse possession over 20 years on immovable property, in the court practice of Republic of Kosovo exist different types of cases. Firstly, there are cases in which there was a transaction between parties (informal transaction), by which the possession was transferred to the acquirer, but transaction is not based in formal contract (written contract) between parties as required by law. However, all obligations between parties were fulfilled, since parties have performed their obligations to each other, including the payment of the price in the case of the sales contracts and the transfer of possession over the immovable to the acquirer. Other forms of contracts also may exist such as gift or exchange of immovable property contact. (Zogaj, 2016) Secondly, there are cases of acquisitive prescription relating to uninterrupted possession when immovable property has been in the neighborhood. As a result, one of the neighbors, thinking that the property is his own, has been in uninterrupted possession of a part of the neighbor's immovable property during entire period of prescription. It may happen also that the neighbor who is the real owner not have known that this part of property belongs to him. In practice it happens very often that in such parts of immovable property constructions are done by the possessor. (Zogaj, 2016) Both, provisions of LPORR (LPORR, Article 40, Par. 1) as well as those of Ex-Yugoslav law on basic property relationships allow for the acquisition of ownership by prescription if during the period of prescription of 20 years there is no objection by the current owner.

Thirdly, there are practical cases of informal transaction between parties; however the plot of the land is not of the same dimensions that parties have agreed. It may happen that a part of the land transferred to the possession of the acquirer was not property of the transferor, but it was under his possession and that possession is transferred to the acquirer. It may also happen that, such situation happens in cases of formal transaction, where there is a valid contract and based on which the immovable is transferred to the acquirer, but the dimensions of immovable property transferred in the possession of acquirer are larger than those foreseen in the contract and those in the cadastral records. In such cases may happen that part of plot of the land of someone else's is transferred into the possession of acquirer. In these cases, is also possible to acquire the ownership based on acquisitive prescription, since the proprietary possessor is in good faith. Taking into

consideration this challenges and practical situations, existence of a title such as acquisitive prescription is still necessary in the Kosovo context. This may ensure legal certainty as elaborated above.

5. Conclusions

Kosovo Legal Framework on Property Rights has been updated in recent years and the main development was adoption of Law on Property and Other Real Right. Law on Property and Other Real Rights adopted in 2009 has introduced some new solutions, among others are also those related to acquisition of ownership. Some of these provisions are completely new in Kosovo legal system and quite unique, such as prescription by registration of proprietary possession in the register of immovable property rights. Some of the provisions existed in Kosovo legal system as part ex-Yugoslav legislation that was applicable in Kosovo too. It is evident that provisions of LPORR were largely influenced by provisions of German Civil Code regarding acquisition of ownership by prescription. Some of provisions are identical, including those regarding acquisition of ownership by prescription on movables. Provisions of LPORR are influenced also by other legal systems, including Slovenian Property Law. This influence is justified by Kosovo scholars do to large external support from European Union Experts, but also it is related to legal tradition.

Applicability of Acquisitive prescription of ownership in immovable property is quite common in the court practice in Republic of Kosovo. This is due to the large number of informal transactions that happened in the past. Therefore, existence of acquisitive prescription as a form of acquisition of ownership is still necessary in Kosovo Legal system to ensure legal certainty. Still there are problems on definition and protection of property rights in Kosovo. Challenges exist also with regard to the implementation of property rights; therefore some clarity may be needed in the ongoing process of codifying civil law in Kosovo. There is a need for clarifying some of provisions of LPORR also related to acquisitive prescription, including some clarification on the registration of the ownership acquired by prescription, as well as introducing new rules relating to the suspension and interruption of prescription. Some clarifications are needed also on provisions of LPORR related to acquisition of ownership by prescription through registration of proprietary possession in the register of immovable property rights. It is important also for the judicial system to issue unifying decisions that will enhance

implementation of provisions of LPORR. Publication of court decisions is crucial to understand and harmonize the jurisprudence in this field.

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