

THE CONSOLIDATION OF CADASTRE RECORDS IN KOSOVO* AND PROPERTY RIGHTS OF INTERNALLY DISPLACED PERSONS²

Abstract

The implementation of the Cadastral Records Agreement, signed on 2 September 2011 by Serbia and Kosovo, requires a legal framework that would regulate the process of comparison of cadastral records. The step in this direction was the adoption by the Government of Kosovo of a Draft Law on Kosovo Property Comparison and Verification Agency, the last version of which is pending before the Assembly of Kosovo. By analysing this draft law, the author investigated in which way the process of consolidation of the cadastral records as laid down in its provisions might affect the enjoyment of the right to property. The paper looked in particular at the extent to which the rules on resolving the mismatch between the cadastre records and on adjudication of conflicting property claims are reflecting the special needs of internally displaced persons (IDPs) when it comes to the protection of their property rights. The results of the analysis show that its provisions could lead to the violations of Article 6 para. 1 and Article 1 of the Protocol 1 of the European Convention on Human Rights, in particular in cases involving the property rights of IDPs. The analysis also indicates that many of the identified shortcomings of the Draft Law might spring from the fact that the rules on comparison of cadastral plans and adjudication of conflicting claims have been modelled after those regulating the work of the Kosovo Property Agency.

Key words: *Cadastral Records Agreement, Draft Law on Kosovo Property Comparison and Verification Agency, right to property, internally displaced persons*

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* This designation is without prejudice to positions on status and it is in line with the UN Security Council Resolution 1244/99 and the International Court of Justice Advisory Opinion on the declaration of independence of Kosovo.

² The paper is based on the insights about the obstacles the internally displaced persons from Kosovo face in the enjoyment of their property rights in the place of displacement, which have been gained by the author during the research conducted within the Project "Support to the Implementation of the Strategies for IDPs, Refugees and Returnees – Legal Aid" (EuropeAid/131328/C/SER/RS).

1. Introduction

After the 2008 unilateral declaration of independence a complete stalemate in communication took over the relationship between the Serbian Government and the authorities in Kosovo. The turning point occurred two years later when, following the International Court of Justice Advisory Opinion on Kosovo's declaration of independence, the Government of Serbia together with 27 EU member states tabled a resolution before the UN General Assembly, which called for an EU-facilitated dialogue between Belgrade and Pristina.³

Following this, the so-called "technical dialog" started in 2011 as a series of meetings aimed at resolving technical matters of mutual interest.⁴ One of the important issues settled through the "technical dialog" was the question of cadastral records dislocated to Serbia proper during the conflict and their merging with the newly created cadastre in Kosovo. The Cadastral Records Agreement was concluded on 2 September 2011⁵ with the aim "to protect the rights of people with the legitimate claims to property"⁶ through the creation of reliable property records in Kosovo. To achieve this goal the parties agreed that the copies of cadastral books kept in Serbia proper would be handed over to Kosovo authorities and compared with the "reconstructed Kosovo cadastre".⁷ Another important element of the Agreement was the provision stipulating that all discrepancies between the old and post-1999 cadastral records are to be resolved by a two-tier adjudication mechanism.

The implementation of the Cadastral Records Agreement implied, as a first step, the digitalization of around 12.000.000 pages of analogue cadastral records managed by the Republic Geodetic Authority of Serbia⁸

³ UN Resolution A/RES/64/298 of 9 Sep 2010. A detailed analysis of the re-opening of the negotiations between Serbia and Kosovo after the pronouncement of the ICJ Advisory Opinion on Kosovo declaration of independence can be found in T. Papic, "The Political Aftermath of the ICJ's Kosovo Opinion", in: M. Milanovic, M. Wood (eds.), *The Law and Politics of the Kosovo Advisory Opinion*, Oxford University Press, 2015, 240 – 268.

⁴ Texts of the agreements are available at: <http://www.helsinki.org.rs/doc/all%20agreed%20conclusions%20%282011-2012%29.pdf>, October 24, 2015).

⁵ European Union Press Statement, "EU facilitated dialogue: Agreement on Customs Stamps and Cadastre" (2 September 2011), accessible at: http://europa.eu/rapid/press-release_PRES-11-294_en.htm, October 24, 2015.

⁶ Point 1 of the Cadastral Records Agreement of 2 September 2011.

⁷ Point 4 of the Cadastral Records Agreement of 2 September 2011.

⁸ Government of Kosovo, "State of Play in Implementation of the Brussels Agreement" (Report submitted to the European Union/European External Action Service by the Government of Kosovo), (16 January 2014), 29, at:

http://www.kryeministriks.net/repository/docs/Kosovo_Report_on_implementation_state_of_play_of_the_Brussels_Agreements_160114-signed.pdf, March 11, 2015. See also Minutes of the Human Rights International Contact Group Meeting on Property Issues held on 12 February 2015 in Pristina (statement of Xhevat Azemi, representative of USAID).

and their transfer to Kosovo.⁹

Another segment of the implementation strategy is the creation of legal and institutional setup for the process of comparison of cadastral records and adjudication of any conflicting claims that could arise in this way. To this end already in 2011 the Government of Kosovo adopted the first draft of the Law on Kosovo Property Comparison and Verification Agency.¹⁰

It is this aspect of the implementation of the Cadastral Records Agreement that the paper investigates. By analysing the substantive provisions of the Draft Law on Kosovo Property Comparison and Verification Agency (further “Draft Law”),¹¹ the author tries to examine the effects that the process of consolidation of the cadastre records might have on the enjoyment of property rights in Kosovo. The analysis is in particular focused at investigating to what extent the process of adjudication of conflicting property claims took into account the special needs of the internally displaced persons (IDPs) when it comes to the protection of their property rights in the place of displacement.

The structure of the paper evolves around those provisions of the Draft law that could have the most far-reaching consequences on the enjoyment of the property rights in Kosovo *vis-à-vis* the requirements laid down in Article 6 para. 1 and Article 1 of the Protocol 1 of the European Convention on Human Rights.

⁹ At the beginning of 2014 the first batch of digitalized copies was handed over to the authorities in Pristina through the EU Special Representative in Kosovo (See: Minutes from the UN Security Council session held on 10 February 2014 (S/PV.7108), 4). According to BIRN, by February 2015 the Serbian side completed digitalization of cadastral records for one third of cadastre zones existing in Kosovo (See: BIRN Kosovo, “Big Deal Lost in Stagnation: Report No. 2, April 2015, 41). However, the further transfer of the digitalized copies of the cadastral records has been under question mark since 30 January 2014, when the Constitutional Court of Serbia ruled that the “Decree on Special Modalities of Processing of Data Contained in the Land Cadastral Records for the Autonomous Province of Kosovo and Metohija” is not in accordance with the Serbian Constitution and its laws (Conclusion of the Constitutional Court of Serbia No. IIUo–247/2013 of 10 December 2014, *Official Gazette of the Republic of Serbia* No. 13/15 of 2 February 2015).

¹⁰ The first version of the Draft Law was approved by a Government Decision no. 01/100 of 11 December 2012. See: Government of Kosovo, “State of Play in Implementation of the Brussels Agreement”, 29. The first text of the Draft Law passed the first reading in the Assembly of Kosovo on 14 March 2013 but was withdrawn from the parliamentary procedure after the second reading that took place several months after. The second version of the Draft Law was completed at the end of 2013 and the first reading in the Kosovo Assembly took place on 26 February 2014 (see Kosovo Assembly meetings calendar at <http://www.kuvendikosoves.org/?cid=2,159,5426>, April 5, 2015). However, this version was also withdrawn and on 5th February 2015 the Government of Kosovo has adopted the third version of the Draft Law, which is still pending before the Assembly of Kosovo.

¹¹ The analysed version of the Draft Law was approved at 12th meeting of the Government of Kosovo by Decision no. 01/12 dt. of 5 February 2015. Its text is accessible at <http://www.kuvendikosoves.org/?cid=2,194,900>, October 24, 2015.

2. The process of adjudication of conflicting property related claims

On the basis of point 4 of the Cadastral Records Agreement, which envisions creation of an adjudication mechanism,¹² the Draft Law lays down rules for adjudication of disputes identified in the process of comparison of cadastral records. According to its section IV, the first instance of the adjudication mechanism, the Property Verification and Adjudication Commission (further “PVAC”), is in many respects modelled after the Kosovo Property Claims Commission.¹³ The PVAC should examine the old and new cadastre records when the Executive Secretariat of the Agency determines there is a mismatch or a gap, decide which one of them is accurate and adjudicate property disputes that have arisen during the process of comparison.

An analysis of Article 14, para. 3 shows that the PVAC has three possible ways to resolve the cases of discrepancy between the old and new cadastral records:

- a) to confirm the accuracy of data contained in the pre-1999 cadastral records;
- b) to confirm the accuracy of data contained in the post-1999 cadastral records;
- c) to “determine the legal entry that should be registered in the Cadastral records in Kosovo” if it found that none of the two cadastral records are accurate.

In other words, the PVAC is supposed to resolve all the discrepancies between the cadastral records or between the cadastral records and the claims of third parties that would be identified in the process of comparison.

This signifies that the PVAC would have to decide on the discrepancy even if the data contained in the cadastral records and/or in a third party claim(s) were not corroborated by the documents that could normally serve as legal ground for the registration of a property right in the immovable property registry. Theoretically, the PVAC would have a duty to decide who has the ownership right over disputed property, even if none of the parties to the proceedings possessed a valid title, such

¹² Point 4 of the Cadastral Records Agreement stipulated that when there is discrepancy between the old and new cadastral records, “[an] adjudication mechanism will make a final determination as to which cadastral record is correct”.

¹³ The Kosovo Property Claims Commission (KPCC) is a quasi-judicial decision-making body within the Kosovo Property Agency (KPA) established pursuant to UNMIK Regulations No. 2006/10 On the Resolution of Claims Relating to Private Immoveable Property, including Agricultural and Commercial Property of 4 March 2006 (as amended). Its mandate was to resolve conflict-related property claims with respect to private immovable property involving circumstances directly related to or resulting from the armed conflict that occurred between 27 February 1998 and 20 June 1999.

as contract of sale, an inheritance decision or a court judgment – the documents on the basis of which, according to the applicable law, the cadastral authorities in Kosovo can register the right of ownership of a natural person.¹⁴ This leads to the conclusion that the PVAC decisions would in some instances be constitutive in nature and that the PVAC is supposed to take on the tasks normally carried by the courts.¹⁵

Another problem arises from the fact that, according to Article 14, para. 1, the PVAC should reach these decisions by applying the Law on Administrative Procedures.¹⁶ The question is how could the individual administrative act, as defined in Article 2 of the Law on Administrative Procedure, serve as legal ground for registration in the cadastral books/immovable property registry of the right to property of a natural person? Needless to say, the adjudication of claims over immovable property of private parties goes beyond the scope of the administrative law, the role of which is to govern the interaction between the public agencies and the citizens on administrative matters.

As shown above, in cases of a mismatch between the cadastral records the PVAC decides on the property rights of parties to the proceedings whose rights are registered in one of the cadastres by either confirming their property title or revoking it. This conclusion flows from the fact that the registration in the immovable property rights register is *conditio sine qua non* of the right of ownership of immovable property in Kosovo.¹⁷ Although Article 1 of the Protocol 1 to the European Convention on Human Rights (further “ECHR”), does not lay down in an explicit manner the procedural requirements of the right to property, the European Court of Human Rights has held in its case law that the fair trial requirements apply whenever the civil rights and obligations of private persons are at stake.¹⁸ According to the text of Article 6 of the ECHR, the determination of individual civil rights and obligations shall be conducted in a fair and “public hearing”. The right to a public hearing generally includes a right to an oral hearing and as such is an essential feature of the right to fair trial.¹⁹ As the Court stated in *Axen v. the Federal Republic of Germany*:

¹⁴ See Chapter III of the Law on Property and Other Real Rights No. 03/L-154, of 25 June 2009.

¹⁵ Declarative decisions establish existence of a fact to which the law attaches specific consequences, while constitutive decisions create rights or obligations. In: R. Seerden, F. A. M. Stroink (eds.), *Administrative Law of the European Union, Its Member States and the United States: A Comparative Analysis*, 2002, 157.

¹⁶ Law on Administrative Procedure No. 02/L-28 of 22 July 2005.

¹⁷ Articles 36, para. 1 and 287, para. 1 of the Law on Property and Other Real Rights.

¹⁸ *Ringeisen v. Austria*, 16 July 1971, para. 94.

¹⁹ *Axen v. the Federal Republic of Germany*, 8 December 1983, para. 28.

“The public character of proceedings before the judicial bodies referred to in Article 6 (1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 (1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention.”²⁰

As it flows from the provisions of the Draft Law, the proceedings before the PVAC are not supposed to be public. According to Article 14, para. 3, the PVAC should reach its decisions on the basis of the “evidence submitted in the case file, the reply or replies from the parties or other interested persons and a recommendation provided by the Secretariat”. The further analysis indicates that this provision might be seen as contrary to the ECHR and the Constitution of Kosovo.²¹ Namely, while it is true that the European Court of Human Rights has held that public hearing before the appellate body, under certain circumstances, might remedy this shortcoming of the first instance proceedings, this can be of no avail in the cases decided by the PVAC. Article 15, para. 10 of the Draft Law clearly stipulates that the oral hearings before the Supreme Court of Kosovo are to be an exception to the general rule that the appellate procedure is to be conducted on the basis of the written submissions of the parties.

3. Notification procedures

By deciding which of the parties with the conflicting claims should be registered in the cadastral records, the PVAC in effect decides about property rights and hence its decisions need to satisfy the requirements contained in the right to fair trial, as guaranteed in Article 6(1) of the ECHR.²² The analysis, however, shows that the Draft Law does not seem to provide the necessary guarantees that the proceedings before the PVAC would fulfil another two basic requirements of the right to fair trial – to be adversarial and to comply with the principle of equality of arms.

Namely, the drafter failed to lay down the safeguards for the participation in the proceedings of the persons who are registered in

²⁰ *Ibidem*, para. 25.

²¹ Article 31, para. 2 of the Constitution of Kosovo.

²² The European Court of Human Rights has held in its case law that Article 6 is applicable under its civil head also with respect to the registration by the authorities of ownership of property, as this is decisive for the effective exercise of ownership rights (see *Buj v. Croatia*, 1 June 2006).

the cadastral records or of other persons with the legal interest. In that sense much can be learned from an analysis of its provisions regulating the process of notification of the parties. The Draft Law contains only a general rule that when there is a discrepancy between the pre-1999 and the new cadastral records, the Secretariat should “make every effort to contact the person named or their heirs and family household members of the person named on the documentation”.²³ An idea about the means to be used for the purpose of the notification of the persons with legal interest can be gained from Article 13, para. 5, which says that “[the] methodology to notify such interested parties may include physical notification of the property or an announcement in an official publication of the Secretariat”. This is very much alike to the methods of notification used by the Kosovo Property Agency, yet the important difference is that the later proceedings were initiated by the interested parties, while the proceedings before the KPVCA are to be initiated *ex officio*.

While analysing the issue of notification, one should also look at the Law on Administrative Procedure, which is to govern the proceedings before the Executive Secretariat and the PVAC. In its Article 37, para. 1 this law sets a general rule that when the administrative proceedings are initiated by a public administration body, a notice of initiation of action should be sent to interested parties “if they are identifiable”. In para. 3 of the same article, the law lays down an exception to that rule by stipulating that “[t]he public administration body shall not communicate with interested parties [...] if in the conditions of extraordinary situation, the communication may undermine the effectiveness of the administrative proceeding.”

The analysed provisions show that the drafter did not thoroughly reflect on the difficulties that stand in the way of an effective identification and communication with the persons named in the cadastral records and their heirs.²⁴ These difficulties are particularly numerous and complex when it comes to IDPs. Great many of them still live in privately rented accommodation and due to the lack of subsistence means often change place of residence. There is no functional postal service between Kosovo and the Serbia proper. Not less importantly, many of the potential claimants will certainly not have financial means or the knowledge to follow the daily newspapers, regularly visit the web page of the Agency or in other way follow the official publications of the Agency.²⁵ Another question

²³ Article 13, para. 4 of the Draft Law.

²⁴ A more detailed account of the problems related to the land register in Kosovo can be found in: M. Salamun at al., “Private Properties Issues following the Regional Conflict in Bosnia and Herzegovina”, Croatia and Kosovo (Study requested by the European Parliament’s Committee on Petitions), 2010, 115 - 116.

²⁵ As set in Article 13, para. 5 of the Draft Law.

to be asked is in which way would the Agency use the mass means of communication for the purpose of notification given the limitations laid down in the Law on the Protection of Personal Data.²⁶ When it comes to the physical notification on the property, this method goes against the interests of many displaced property owners whose immovable property is still illegally occupied or who are not using it due to their displacement, no matter to which community they belong.

All in all, one need not be very knowledgeable of the life in displacement, as well of the shortcomings of the Kosovo cadastral records both before and in particular after the 1999 conflict, to understand that the process of communication with the interested parties will be logistically, financially and time-wise a very demanding endeavour. In the light of it, the Agency might easily opt for the less strict interpretation of the “make every effort” standard for the notification of parties, or at best to use only indirect means of notification such as web site, physical notification on the property, or daily newspapers. This would, however, be detrimental to the fairness of the proceedings before the Agency and IDPs would most likely bear the greatest burden of such unfairness.

4. Collection and use of evidence in the process of comparison, verification and adjudication

Another danger for individual property rights ensuing from the Draft Law comes from its provisions regulating the use of evidence to be acquired *ex officio* by the Executive Secretariat in the process of comparison and verification of cadastre records and, subsequently, in the process of adjudication. According to Article 13, para. 4 the Secretariat should collect evidence from a wide panoply of sources:

“In cases where a gap or discrepancy is found between the pre 1999 cadastral records and the cadastral records obtained from the Kosovo Cadastral Agency and the Municipal Cadastral Office the Secretariat shall undertake a full comparison of the documentation against all available public archives and shall in addition make every effort to contact the person named or their heirs and family household members of the person named on the documentation and any institution in Kosovo which may hold information on the property in question in order to request evidence so as to be able to determine how the discrepancy came to be.”

²⁶ Article 5 of the Law on Protection of Personal Data No. 03/L – 172, of 29 April 2010.

The evidence collected in this way is also to be used by the PVAC in the phase of adjudication of conflicting property claims arising for the mismatch between the cadastral records:

“The Commission shall determine, **based on the evidence submitted in the case file, the reply or replies from the parties or other interested persons and a recommendation provided by the Secretariat** which cadastral record is legal, [...] and in cases where neither of the cadastral records are determined to be correct, the Commission shall determine the legal entry that should be registered in the Cadastre records in Kosovo. In making its decision the Commission should **note the final and binding nature of the decisions of the authorized court and administrative institutions** (emphasis added).”²⁷

There are several problems arising in relation to these provisions. The first one lays in the fact that the Draft Law does not set exact rules on the sources and classification of different types of evidence to be used in the proceedings. Under normal circumstances, this would not be an issue *per se* since the administrative and judicial bodies usually have a discretionary power in deciding which evidence is reliable and conclusive for the matter before them. Yet, in the light of the fact that the PVAC is modelled after the Kosovo Property Claims Commission *i.e.* set to be a mass claims resolution body, it could be expected that its decisions will be summary in nature and written through the use of a template. In other words, the danger is that the decisions of the PVAC would not contain rationale that would provide the parties with enough detailed account of the way in which the PVAC was weighing evidence in their case.²⁸ This is in particular worrisome given that the PVAC proceedings are initiated by the Agency and not by the interested parties, who could otherwise have a proactive role in providing the evidence, and that the proceedings are not public. Another danger arises from the lack of rules that would regulate types of public archives from which the evidence is to be collected. Since the Draft Law does not determine which public archives should be obligatorily consulted, the question is whether the Agency would in each case act in the same way and collect the evidence with the same vigilance. Such a wide discretionary power of the Secretariat combined with the lack of guarantees that the persons with a legal interest would be timely informed about the proceedings, could lead to the violation of the right to property and the right to fair trial as guaranteed in the jurisprudence of the European Court of Human Rights.

²⁷ Article 14, para. 3 of the Draft Law.

²⁸ Although this would be contrary to Articles 85 and 86 of the Law on Administrative Proceedings.

4.1. Fiscal cadastre

Another equally worrying aspect of these provisions springs to mind when they are interpreted in the light of other property-related laws. Due to a great number of illegally occupied immovable properties, there is a whole set of laws that give special consideration to this particular feature of Kosovo. For instance, the Kosovo Law on Property Tax is unique for its Article 5 that establishes liability of the illegal occupants for the payment of immovable property tax.²⁹ On the basis of its provisions the tax authorities have been registering in the tax database illegal occupants as persons liable for the payment of the tax without making a clear distinction between them and the rightful owners. Furthermore, the tax authorities' decisions on the annual tax (tax bills) by default refer only to the illegal occupant's name without specifying that he/she is not the property owner.³⁰ Yet, the tax database could be subsumed under the generic notion of "public archives" referred to in Article 13, para. 4 and used by the Secretariat in the process of comparison and verification although it does not contain evidence reliable enough for this purpose.

4.2. Access to the Kosovo cadastre

One more obstacle ensuing from the tax laws are provisions on the termination of municipal services such as cadastre for the properties for which the immovable property tax was not paid. According to the relevant bylaw, the extracts from the immovable property rights register or cadastre plans are not to be issued for the immovable property over which there is an outstanding tax debt.³¹ Needless to say this has been a great obstacle to the effective judicial protection against illegal occupations. When it comes to the Draft Law this could also be another hurdle to a participation of the property owners whose property is illegally occupied, since they would have no possibility to learn in time whether there is a discrepancy between the cadastral records.

These provisions read in conjunction with the Draft Law raise concern that lawful owners could be prevented to prove their ownership because of the accrued tax debt, while illegal occupants could try to "legalise" their position by presenting the data from the fiscal cadastre and tax bills with their name on it.

²⁹ Law on Taxes on Immovable Property No. 03/L-204 of 07 October 2010.

³⁰ More on this in: Legal Aid Project, "Taxation of Immovable Property of Internally Displaced Persons in Kosovo" (Report), August 2012, at: http://www.pravnapomoc.org/web/analysis_of_gaps_5.pdf, April 6, 2015.

³¹ Article 3 of the Administrative Instruction No. 07/2011 on Orders to Ban Offering Municipal Services Aiming Enforced Payment of Property Taxes.

4.3. Public utility bills

Similar effects could also ensue from the provisions regulating payment of unsettled public utility services in the period of UNMIK administration of Kosovo. Due to widespread illegal occupation of immovable properties of IDPs, UNMIK had rightly laid down the rule that such property owners shall be granted relief from the debts for public utility services and had authorized the public utility providers to charge the debts from the illegal occupant.³² No doubt such rules affected the validity of data contained in the archives of public companies and therefore their usefulness, as a source of evidence, is questionable.³³

The question is whether the Executive Secretariat and the PVAC will be enough aware of these complex interactions between different property related laws and the way in which they have affected the records of the public institutions in Kosovo that are supposed to serve as a source of documentary evidence in the process of comparison, verification and adjudication. Needless to say, the internally displaced persons who are, due to their specific position, predominantly victims of the widespread illegal occupation, might be the most affected by an indiscriminate and incautious use of these public archives.

5. Legal remedies against the PVAC decisions

In accordance with the Agreement on Cadastral Records, the Draft Law stipulates that the appellate proceedings before the Supreme Court of Kosovo are to be a legal remedy against the PVAC decisions.³⁴ As different from the proceedings before the PVAC, the appellate proceedings are to be regulated by the Law on Contested Procedure.³⁵ The Supreme Court of Kosovo is supposed to render its decisions primarily on the basis of the facts presented in the proceedings before the PVAC.³⁶ The unsatisfied party may initiate the appellate proceedings on the following grounds:

“[...] 3.1. The decision involves a fundamental error or serious misapplication of the applicable material or procedural law; or

³² UNMIK Administrative Directive No. 2008/5 of 5 May 2008.

³³ In the proceedings before the Kosovo Property Claims Commission (KPCC) and its predecessor, the Housing and Property Claims Commission (HPCC), public utility bills were often used as a subsidiary proof of the right to use property, but this was limited to the public utility services provided before the conflict.

³⁴ Article 15, para. 1 of the Draft Law.

³⁵ Law on Contested Procedure No. 03/L-006 of 30 June 2008.

³⁶ Article 15 para. 11 of the Draft Law.

3.2. The decision rests upon an erroneous or incomplete determination of the facts. [...].”³⁷

The first question that arises from the analysis of the cited provisions is in which way would the Supreme Court conduct the review of the decisions of the PVAC given that the later brings its decisions in administrative proceedings while the Supreme Court applies the rules of civil proceedings. According to the Draft Law, the task of the highest court is, among else, to examine the way in which the PVAC has applied material or procedural law. Given that the PVAC is applying the administrative law, the question is how could the Supreme Court review the proceedings before the PVAC by applying the Law on Contested Proceedings.

The second question is whether the proceedings before the Supreme Court can be seen at all as the appellate proceedings? As it was elaborated above, the PVAC proceedings in several respects do not fulfil the standards of fair hearings in the sense of Article 6 of the ECHR. The PVAC is to decide about the civil rights in administrative proceedings initiated *ex officio*, without holding public hearings and without the necessary guarantees that the persons with legal interest would have the opportunity to participate in the proceedings. On the other hand, the proceedings before the Supreme Court of Kosovo are envisioned to be *sensu stricto* appellate judicial proceedings. Hence, they are limited in scope and the review is confined to facts and evidence used in the proceedings before the PVAC.³⁸

6. Execution of the PVAC decisions

The Draft Law repeats the provisions on remedies provided in the legal framework regulating the execution of decisions of the Kosovo Property Claims Commission despite the fact many of them have proven to be completely or partly ineffective in practice. For instance, one of the remedies among those enlisted in Article 18 is “seizure and demolition of unlawful structures”, although the Kosovo Property Claims Commission has never used this type of remedy due to variety of obstacles, including lack of budgetary resources.

This is well illustrated in the decision of the Constitutional Court of Kosovo of 16 April 2014.³⁹ The applicant, a Kosovo Serb IDP, owner of a parcel of land in Pristina municipality that was illegally occupied since 1999, in 2005 had submitted a claim to the KPA. In June 2011, the Kosovo Property Claims Commission (KPCC) found that the applicant

³⁷ Article 15, para. 3 of the Draft Law.

³⁸ The new facts and material evidence can be invoked only in the exceptional circumstances. *Ibid.*

³⁹ Judgment of the Constitutional Court of Kosovo in case no. K1187/13 of 16 April 2014.

is the lawful property right holder and ordered to the illegal occupant to vacate the property within 30 days under the threat of forced eviction. The KPCC decision was confirmed by the Special Chamber of the Supreme Court on KPA related matters in 2012. After several attempts of the applicant to initiate enforcement of the final decisions, in 2013 the KPA informed her that since the illegal occupant has erected buildings on the property, there could be no *restitutio in integrum* because the KPA could not conduct demolition of property and that she can be only offered a mediation “between [her] and the *user of the property*, with a view of finding an amicable solution on the use of [her] property (emphasis added)”.⁴⁰ The applicant then pleaded to the Constitutional Court for the non-execution of the KPCC decision. In the proceedings before the Constitutional Court the KPA, as the opposing party, stated the following:

“[...] the KPA failed to execute the KPCC decision, due to construction of the new structures in that property [...]. The obstacles appeared because, to deliver the possession of the immovable property to the legitimate owner, the KPA needed additional funds to demolish the constructed houses. Apart from the demolition of the structures, the KPA, under the law, has in disposal other legal remedies, such as the remedy of mediation. The KPA, due to the lack of funds, could not execute the decision, since the budget has already been approved and for this reason, the KPA on 21 October 2013, requested from the Ministry of Finance the approval of the additional budget for 2014, which would ensure the KPA progress with its mandate, but although our requests were reasoned, the Ministry of Finance did not approve the request for additional budget. On 5 June 2013, in order to execute the KPCC decision, the KPA contacted [the applicant] and notified her of the circumstances of the case and requested from her to accept the remedy of mediation, in order that the issue of the immovable property is solved by agreement and in a friendly manner.”⁴¹

Here is worth repeating that the “seizure and demolition of unlawful structured” has been prescribed as remedy for the execution of KPCC decisions since 2006.⁴² Yet, in executing the decisions of the KPCC, the KPA has never used seizure, demolition and auction nor the Kosovo Government ever approved financial resources necessary for the application of these remedies. No surprise, this case has not been finalized until the present day although the Constitutional Court of Kosovo unanimously ruled that:

⁴⁰ *Ibid.*, para. 26.

⁴¹ *Ibid.*, para. 37.

⁴² Article 16 of UNMIK Regulation No. 2006/50 of 16 October 2006.

“[...] the non-execution of the KPCC Decision by the KPA and the failure of competent authorities of the Republic of Kosovo to ensure efficient mechanisms for execution of final decisions are in contradiction with the principle of the Rule of Law and constitute violation of the fundamental human rights guaranteed by the Constitution.”⁴³

When it comes to the eviction, which has been the principal remedy in the cases of illegal occupations and is also enlisted among the means of execution of decisions of the Kosovo Property Comparison and Verification Agency, the available statistics show that its efficiency is doubtful due to shortcomings in its application.⁴⁴ Numerous reports have tackled this issue yet the drafter only repeats the provisions of the KPA related laws without any noticeable attempt to ensure its greater efficiency.⁴⁵

7. Financial and regulatory impact assessment

A cursory glance at the competencies of the Kosovo Property Comparison and Verification Agency leads to the conclusion that the completion of its tasks would be an extremely costly undertaking. In that sense a parallel could be made with the work of its predecessor, the Kosovo Property Agency, the work of which was in many respects ineffective due to budgetary limitations, in spite of the fact that numerous international donors supported its work.⁴⁶

Due to the lack of transparency in the process of its drafting, it is not clear whether the Draft Law was complemented by the financial and regulatory impact assessment documents *i.e.* whether the Kosovo Government has a clear overview of the costs it implies and its potential effects on the regulatory system in Kosovo. Not only it is very important to see how much budgetary means have to be secured for an effective realization of the mandate of the Kosovo Property Comparison and Verification

⁴³ Judgment of the Constitutional Court of Kosovo in case no. K1187/13 of 16 April 2014, para. 79.

⁴⁴ The widespread instances of re-occupation, looting and destruction of the real property given back to the rightful owners too often nullify the effects of the provided remedies. See, for instance, Kosovo Property Agency Annual Report for 2011, according to which “in many cases the number of re-occupations and evictions has exceeded ten on the same person and property”. In: Kosovo Property Agency, “Annual Report for 2011”, 25, available at: <http://www.kpaonline.org/PDFs/AR2011.pdf>, October, 25 2015.

⁴⁵ See, for instance, OSCE Mission in Kosovo, “Challenges in the Resolution of Conflict-Related Property Claims in Kosovo” (Report), 2011. See also: OSCE Mission in Kosovo, “Review of illegal re-occupation cases in Kosovo” (Report), 2015.

⁴⁶ Apart from the problems with the repossession of land on which buildings were illegally constructed, the Kosovo Property Agency has also been continuously failing to fulfill its mandate *vis-à-vis* the restitution of occupancy rights to socially owned apartments lost as a result of discrimination because of the budgetary limitations.

Agency but also it is important to understand in which way the Draft Law would affect the related laws and *vice versa*. Important consideration in the later sense should be given, for instance, to its relationship with the Law for Treatment of Constructions Without Permit, which contains no single safeguard that the legalization would not be allowed where the building was constructed on an illegally occupied land.⁴⁷

8. Conclusion

The signing of the Cadastral Records Agreement on 2 September 2011 created an obligation on the Government of Kosovo to prepare the legal and institutional framework necessary for its implementation. Three years after the initial text has seen the light of the day the last version of the Draft Law on Kosovo Property Comparison and Verification Agency is now pending before the Assembly of Kosovo. The analysis undertaken in the paper shows that the application of the Draft Law could lead to the violations of Article 6 para. 1 and Article 1 of the Protocol 1 of the European Convention on Human Rights. This might be in particular true when it comes to the property rights of IDPs whose vulnerability to a various types of unlawful activities, that usually characterise the post-conflict settings such as Kosovo, warrants special attention. The analysis also shows that many of the identified shortcomings of the Draft Law spring from the fact that the institutional solution for the consolidation of the cadastre records has been sought in extending the mandate of the Kosovo Property Agency. If that had made some sense in 2011 when the first text of the Draft Law was written, it made little sense now, four years later, when the Kosovo Property Agency has practically completed its mandate.⁴⁸ Moreover, given its mixed record in securing the effective protection of the property rights of IDPs it becomes hard to understand why the approach of the drafter was the one of copying the provisions of the KPA-related laws without considering how to avoid the well-documented obstacles the KPA faced in its work.

⁴⁷ Law for Treatment of Constructions Without Permit No. 04/L-188 of 26 December 2013.

⁴⁸ According to the information available at the web site of the Kosovo Property Agency, on 16 December 2014, the Kosovo Property Claims Commission (KPCC) held its last session and decided about the last 194 claims. See at <http://www.kpaonline.org/detailRelPrint.asp?ID=81>, October 24 2015.

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ПРОЦЕС КОНСОЛИДАЦИЈЕ КАТАСТАРСКИХ КЊИГА НА КОСОВУ И МЕТОХИЈИ И ПИТАЊЕ ЗАШТИТЕ ВЛАСНИЧКИХ ПРАВА РАСЕЉЕНИХ ЛИЦА

Резиме

Процес „Дијалога између Београда и Приштине” покренут је на основу Резолуције Генералне скупштине Уједињених нација А/RES/64/298 од 9. септембра 2010. године. Током дијалога о техничким питањима, који је вођен уз посредовање Европске Уније, утаначен је 2011. године и садржај Споразума о катастру. Његовим закључивањем Влада у Приштини преузела је на себе обавезу да обезбеди законодавни и правни оквир неопходан за спровођење поступка упоређивања катастарских књига које води Геодетски завод Србије и оних које су успостављене на Косову и Метохији након доласка Мисије Уједињених нација (УНМИК-а). Косовска Влада* је с тим циљем већ крајем 2011. године усвојила Нацрт Закона о Косовској агенцији за упоређивање и верификацију имовине, чија се последња верзија од фебруара 2015. налази пред Скупштином Косова. Циљ чланка је да се кроз анализу овог Нацрта Закона утврди какав би утицај поступак упоређивања катастарских књига и одлучивања о супротстављеним имовинским захтевима могао да има на остваривање имовинских права на Косову и Метохији. Ауторка се у том погледу посебно бавила питањем у којој мери анализирани одредбе одражавају посебан положај расељених лица када је у питању заштита њихових имовинских права у месту расељења. Резултати анализе указују на то да би спровођење поступка консолидације катастарских књига на начин на који је то предвиђено Нацртом Закона о Косовској агенцији за упоређивање и верификацију имовине могло довести до кршења члана 6, става 1 и члана 1 Протокола 1 уз Европску конвенцију о људским правима и основним слободама, посебно у случајевима који се тичу имовинска права расељених лица. У чланку је наговештено и то да многе од

* Овај назив не прејудира ставове о статусу и у складу је са Резолуцијом СБ УН 1244/99 и мишљењем Међународног суда правде о проглашењу независности Косова и Метохије.

уочених слабости Нацрта Закона произилазе из тога што су поступци упоређивања катастарских података и решавања о супротстављеним имовинским захтевима уређени по узору на поступке спровођене пред Косовском агенцијом за имовину.

Кључне речи: Споразум о катастру, Нацрт Закона о Косовској агенцији за упоређивање и верификацију имовине, право на неометано уживање имовине, интерно расељена лица