

Acquisition Of the Right of Real Servitude Over Immovable Property According To The Legislation in Kosovo with A Comparative View with Some Legislations of European Countries

PhD.Cand. Kastriote VLAHNA¹, Prof. Dr. Hajredin KUÇI², Mr.Sc. Argona KUÇI³

¹**Doctoral Student**, department of Civile Law, Faculty of Law, the University of Pristina "Hasan Prishtina"
Pristina, Kosovo. E-mail: kastriote.vlahna@uni-prizren.com.

²**Regular Profesor**, department of Private Law, Faculty of Law, the University of Pristina 'Hasan Prishtina',
Pristina, Kosovo. E-mail: hajredin.kuci@uni-pr.edu.

³**Graduated in Master Studies**, Faculty of Law, the Chicago Kent Law School, Chicago, Usa.

ABSTRACT

In order to acquire a real right over immovable property, they must meet two essential conditions, such as legal title and registration of legal title. It would be easier if it comes to gaining property rights as one of the essential rights of real property, but when it comes to property rights over foreign objects it is more controversial and also more difficult to gain of those rights over immovable property. A concrete case of property rights over foreign property is the right of real servitude, which is a current topic in which we find legal gaps when it comes to gaining this right to immovable property. Kosovo Law on Property and Other Real Rights provides in general terms how the right of real servitude over an immovable property can be acquired, emphasizing that a valid legal title and registration in the cadastral status is required. We can say that in the right of servitude the profit is the same as in having the right of ownership. But how the legal title is created, and how that title should be registered, the property law of Kosovo does not provide clarifications, but leaves it to be understood that it is the same procedure as when the right of ownership is acquired. And according to the laws of European countries, property rights are acquired in almost the same way as defined by the law of ownership of Kosovo, but we can see clear differences in the French legislation according to which it is not necessary to register property rights, especially servitude. real when acquired over immovable property. Therefore, through this paper will be clearly defined how the right of real servitude is acquired according to the legislation in Kosovo and that based on the legal title and the registration of the legal title in the book of cadastral status. Also, comparing which legislation has similarities and which legislation, the legislation of Kosovo has differences when it comes to gaining the right of real servitude.

Keywords: Property rights, property servitude right, acquisition of the right, legal title, registration of the right.

I. Introduction

Both in the past and today in the current laws it is emphasized that in order to acquire a property right you definitely need a legal title (Justus titulus) and registration in the books of real estate (modus acquired). As in the law of property and other property rights in Kosovo, property rights as the right of ownership, as well as the right of servitude as a property right, there must first be a legal title, whether a legal work, a decision of a state body or by law, and

then this legal title to be registered in the immovable registers, otherwise it cannot be considered that a right of real servitude has been acquired, if that right does not appear in the immovable registers. Immovable property and facts related to their legal status are registered in the real estate register. The registration is done on the basis of a public act, a decision of a state body, legal work or defined by law. According to the legal doctrine in general, it is emphasized that the registration of law is an

² Corresponding authors: Prof. Dr. Hajredin Kuçi, E-mail: hajredin.kuci@uni-pr.edu.

institute and the most important in civil law, and in particular of property rights. Registration or otherwise called as transcription, in this case has a special importance because the right of servitude to be acquired must be registered in the public books of real estate. Such a thing is not required for movables, but only for the acquisition of an item, or a right over immovable property such as the right of ownership, the right of servitude, the right of pledge, property encumbrance and also and the right to build. Based on the topic in question, in order to be considered the holder of a real right, it must definitely be registered-transcribed in public books. Registration in this case is understood as registration of immovable property. So generally real estate is recorded in real estate books. And for every acquired right must be registered in the public books of real estate. For this reason, we say that immovable property is registered, the real rights over these items are registered as well as the registration of legal actions through which the transfer of these rights takes place. This means that in the public books of real estate, the item on which the right is created must first be registered, e.g. type of item, be it item: land, house, or multi-storey building. Then, in addition to the registered item, it is determined which right is created over that item, the right of ownership, the right of servitude or any other real right is created. This is important to determine, as there is a difference between being a property right holder and being an easement right holder. It is understood that it is the same in nature because both are property rights over an item, but being the owner of an item has a stronger legal basis, which means you have more authority than when you are the holder of the right of servitude, but still does not mean that if you are the owner of an item you are unlimited, as the law itself can be limiting. Thus e.g. if you are the holder of the right of servitude, you have the right only to use the certain thing and that to the extent permitted by the legal title, but not to alienate the thing to someone else. Whereas if you are the owner of the thing then you can alienate (circulate) your thing either by sale or by giving it to someone else.

II. Method

The paper as a whole has been worked on the appropriate scientific methods, so starting from the main method on which the topic will be

treated is the comparative method. Through the method of comparison, I will try to make a comparison of the legal doctrine that has been made to the law of servitudes since Roman times or from the first written sources to the present day. Along with the comparison method, the statistical method will be used to highlight the comparisons that will be made. In addition to the comparison method, other methods that will be used during the formulation of the paper are: Historical method, logical method, analytical method, normative method, practical case method and other methods that can be accessed during the formulation of the paper.

III. Results

III. I. Acquisition of real rights over immovable property

The term property right in Roman law was created from the meaning of *ius quod re* pertinent (the right that was dedicated to things), while today property law according to the legislation in Kosovo is called property law but if we take in comparison with Roman law then we can say that has another meaning. This is because in Roman times it was thought that objects are the object only of property law, but not of other civil rights such as the law of obligations, inheritance law as well as family law. Thus, property law as a whole of legal norms regulates legal relations, which as an object of relationship is the thing. [3] So, the real right can be created both in movables and also in immovable. The property right can be created both in movables and in immovable. Since Roman law, things have been divided into movable and immovable things precisely because there were differences in the acquisition of rights over things. [4] In addition to profit, items are divided based on the legal nature of the item and into items in circulation and out of circulation, then into consumable and non-consumable items, etc. [5] Just like today in modern legislations, both in the domestic legislation and in other states, the acquisition of property rights differs based on the type of thing, i.e. by looking at whether it is a movable thing or an immovable thing. At the moment when it is claimed to create a property right over an item then it should be considered that:

1. Which property right is in question, i.e. which property right is claimed to be acquired in a certain thing.

2. It must be seen whether it is movable or immovable.

First of all, it should be noted that in all types of items, before the right is thought to circulate from one subject to another, it must be seen which property right is claimed to be acquired over that item. This is because there are some property rights. That there are some property rights is confirmed by the principle of tax counting of property rights (Numerus Clausus).[6] According to this principle, property rights are: Property Right; Right of Easement; Mortgage Law; Real Burden and the Right to Build.[7] One may wonder why one should look at which right is claimed to be acquired over a certain thing. The reason lies precisely in the acquisition of property rights as it is not the same acquisition in all property rights. Thus, for example: the property right of ownership in the movable item is acquired in case the item is handed over in possession to the buyer. While the right of real servitude to movables cannot be acquired, since it is thought that at the moment when the owner hands over his property to another person, then we say that he acquires only possession of the movable and not the right of servitude. Unlike personal servitudes, respectively the right of fruitfulness (usufructus), the right of servitude is also acquired in movables. While in the right of pledge, the right can be acquired over the movable items, by giving possession to the person who has acquired this right. In addition to looking at which property right is claimed to be acquired over the movable item, it is important to know whether the item in question is a movable item or an immovable item. In cases where the item is movable it is easier to gain the right over that item. [8] Based on the local legislations as well as of other states, it is stated that: the property right over a movable item is acquired in cases when we have the item in possession, but not in all cases, but when we are at the movable item we must it is emphasized that the right of ownership can be acquired over an immovable property, but not the right of servitude, or the right of construction. However, in the general aspect, it is understood that the real right, whatever it is, that of property, servitude, pledge, real burden

or the right of construction, in order to be acquired, must first be created by a legal title (iustus titulu), and with then the right created to be recorded in public books (Modus acquirendi). So the right can initially be created by a legal title. This legal title can be a legal work, whether a contract or a will, a decision of state bodies or a decision of the Court or administrative bodies, as well as according to legal provisions.

III.I.1. Acquisition of the right of real servitude over immovable property

Subjective civil rights, mainly property rights such as property rights, servitude rights, mortgages, property encumbrances and construction rights, as noted in the above chapters, are created by a legal title. Legal title can be legal work such as a contract or a will. So at the moment when we have a contract and a will based on which the right of real servitude is created, then we say that this right of real servitude was created by an ancestor. This means that the right which is being created now, previously had as right another person from the present one. As it is said in the creation of the property right, that the property right is created by an ancestor. [9] Thus, the right of real servitude can be created on an immovable thing, whose holder was a previous holder, so the right passes from one subject to another. [10] However, unlike the right of ownership, in the right of servitude, the holder acquires the right of servitude over the owner of that thing, but only to use that thing to meet his needs, and not to alienate it. right which he gains. So we can say that the right of servitude can be created by a previous holder, but that holder was the owner of that thing, and that the owner of that thing continues to be the owner of the thing even after the creation of the right of servitude. But only with the creation of the right of servitude the right of the owner of the thing as owner is limited, respectively I have to endure another person to use his thing to meet his needs towards the dominant thing. [11]

III.I.1.1. Legal Title (Justus Titulus) for the acquisition of real right (servitude)

Like other real rights, as well as the right of servitude, to be considered a subject of law (natural or legal person) entitled to the right, this right must first be created with a legal basis (Justus titulus) and then creation must be

obtained (Modus Acquired) by registering in the public real estate registers. The real servitude is always created taking into account the requirements of the ruling property, with which the requirement must be foreseen, the favourable and appropriate use of which can be made possible, [12] through the use of the service land. The creation and acquisition of real servitudes, throughout history has evolved and has not always been the same. Thus looking from Roman law, the law of real servitudes is created by a valid legal work, by decision of state bodies (court or administration), as well as by law. [13] Thus, based on Justinian's Civil Code, [14] it was emphasized that the right of real servitude could be created with a legal title (Justus titulus), and also that right was acquired without the need for delivery of the thing or possession of the thing (quasi - traditio) as well as without having to register (modus-acquired) in the public books of real estate that created right. [15] And now from the positive law in the state of Kosovo, the right of real servitude is created on the basis of a legal work, a decision of a state body or a law. [16] In order to create a right of real servitude, first a legal work must be created either a contract or a will, [17] which legal work must be legally valid, so that it can be considered as a legal title (Justus titulus), and then through the legal title to gain the right of real servitude by registration in the public books of real estate. Easements created on the basis of legal affairs, whether contract or will, are known as voluntary servitudes, because the basis of their creation is the will of the parties. [18]

III. I.1.2. Registration (Modus Acquired) of the created Legal title

As noted above, property rights, as well as the right of real servitude over immovable property as a real right, cannot be considered as created (acquired) or alienated if the registration is not made in the register for the registration of rights in immovable property. In order to create (acquire) a right over the immovable property, that right must be registered together with the property.

The registration of a real right, in this case a right of real servitude, which only now has a legal basis, i.e. a legal title, must be registered on the basis of several principles and the following:

1. Registration of immovable property is mandatory

Immovable property rights must be registered. Registration of immovable property is mandatory as only through registration can any property right be created (acquired). [19] These property rights are the right of ownership, the right of servitude, the right of mortgage, the right of real estate as well as the right of construction, for which they must be registered to be constituted. This means that the property rights we want to acquire over an immovable property then that right must be recorded in the real estate book. Just like now in the right of real servitude, if we want to create (gain) that right, first we must have a legal title on the basis of which the right of servitude over the immovable thing is created, and then that legal title must be registered in the real estate book. [20] Thus, both legally from the Kosovo LPORR [21] and from the law on the establishment of the immovable property register, a right which will be acquired over an immovable property must be registered. Otherwise, no one can be considered the owner of an immovable property, nor the holder of any other real right, if that right is not registered in the real estate book. [22]

2. Registration of facts related to immovable property is mandatory

The right of real estate servitude over immovable property to be registered as a right, the party must state the facts on which he bases that established right. As noted above, the right of real servitude over an immovable property must be created by a legal title such as legal affairs, the decision of a state body, as well as by law. This legal title, which of these titles, must be declared by the party in hard copy, since on the basis of that title is registered the right of real servitude over the immovable property. For example, in case the right of real servitude is created by a contract then that contract must be presented as a fact on the basis of which the right of real servitude is created and it is expected that that right will be registered in the books of real estate. Legal fact in this case will be understood all those events or legal actions which have legal consequences on the status of immovable property. [23] Specifically as mentioned above, such facts will include: legal matters such as contracts and wills; decisions of state bodies such as

decisions taken by the court as well as administrative decisions; as well as the cases which are determined by the law itself. [24]

3. The registration of the right of servitude on an immovable thing to be done on the basis of a legal fact, certified either by a state body such as the court or by a notary body.

Based on this principle, it is emphasized that the right of servitude over an immovable property to be acquired as a right, that right must first be confirmed. The certification is based on the fact that the legal title contains a certificate either from the court or from a notary body. For example, in case it is proved that the right of real servitude has been created by a contract or by a will, then the cadastral registrar must ask the party for proof of the confirmation of that contract. The notarization of the contract could have been done by the notary body, [25] specifically to certify the contract and to declare that both parties have expressed their will to create the right of real servitude and that before the notary body. Also, if the right of real servitude is created by a court decision, prove the court decision as a legal fact. So the interested party who wants to gain the right of servitude, to send the request for registration to the cadastral situation, and together with the request for registration to send the legal fact, [26] specifically to send him the legal title certified either by the court or and by the notary body. [27] According to the legislation in Kosovo as well as in other EU countries, the registration serves for the creation and recognition of the right of servitude, in general property rights. The first effect applies to objects, while the second to actions for the transfer of rights to them. Transfer in this case means the circulation of the servitude right from the owner of the service item to the owner of the dominant item.

III.I. 1. 2. 1. Registration of the right of real servitude in immovable property

As noted above, registration of the right of real servitude is as necessary as the legal basis (Justus titulus). In Kosovo, the registration system has changed from the past until today. Comparing the past with the present years, the registration system had changes in the acquisition and change of real estate rights. The initial system derives from the Ottoman regime where as a document in which the registration

of real property rights was done was Tapia which system continued in the time of Yugoslavia and that with the issuance of the law on Tapias in 1931. [28] Then the Yugoslav legal system had approximations from Austrian law.

In Kosovo at that time as the province of the former Yugoslavia only a cadastral register was created containing cadastral records such as property name, location, encumbrances on property, etc., which in fact contains the same records as the land register, from which no cap but only the possession list which was considered as a document declaring the right of immovable property of the holder. [29] After this period, in 2002 in the state of Kosovo was created the Law on the Establishment of the Register for Registration of Immovable Rights (Land Register), [30] which law was amended in 2003 and in 2011, [31] attached to this law was established and the law on cadastre of 2003 amended in 2011. [32]

Today in the state of Kosovo, property rights, such as the right of ownership, the right of servitude, the right of pledge, the right of encumbrance, the right of construction, are acquired with the registration in the public registers of immovable properties and to declare that they are registered by the cadastral state body, a certificate for the property right is issued.

It should be noted that the certificate issued on the occasion of registration of the right of real servitude, proves that the holder of the right has a real right over a certain thing.

III.I.1.2.1.1. Procedure for registration of the right of real servitude in immovable property

In order to obtain a certificate of property right for which there is a legal basis (Justus titulus), [33] as noted above, this right must be recorded in the books of real estate. [34] And in the registration of the right of servitude in the cadastral status, some conditions must be met, specifically a procedure must be passed as defined by the law on the establishment of the register of immovable property rights. [35] So to be considered as the acquired right of real estate servitude in real estate, that right must be registered in the public books of real estate, which are in the cadastral status of the Municipality at the local level. [36]

Thus, the subject of law (natural or legal person) [37] who has a legal title created by legal work, decision of state bodies or by law, must first formulate a written request, with the object of the request: registration of rights of immovable properties, [38] and in this case, the registration of the right of real servitude in the immovable property. [39] The request is submitted to the Cadastral Status Office (MCO) in the territory where the immovable property is located. [40]

Upon receipt of the request from the interested party, the MCO will confirm the date and time of receipt of the registration request. [41] The registration takes effect when the decision to register the MCO is entered in the Register. [42] The request submitted by the party who wants to obtain the real servitude, must together with the request submit the legal title for the creation of the servitude. [43] If the servitude is created by contract, then the request is attached to the contract as a legal title to prove that the real servitude has a legal basis (*Justus titulus*). If the servitude has as a legal basis the decision of the court, whether with a judgment or ruling, the request must be accompanied by the decision of the court or any other administrative body, as the official who accepts the request, if he notices that the legal title is not attached to the request, then the MCO rejects the registration stating that the submitted documentation is not sufficient and that the documentation is not complete and does not represent a basis for registration. [44] If the documentation is complete, i.e. it is a request and legal title, then the MCO registers the right to immovable property, within fifteen (15) days from the day of receipt of the request for registration and will notify it. the applicant. [45] From the moment the right is registered in the immovable register, it is considered that the right of real servitude over the certain immovable property has been acquired, [46] otherwise if it is not registered but is only created with a legal title then it is not considered that the right of servitude is acquired, [47] and no subject of the right can be considered the holder of the right of real servitude if that right is not registered in the immovable registers. [48]

Conclusion

Property rights to be acquired over an immovable property must meet two of the essential conditions, as stated in the content of

the work. Conditions which from the point of view of court practice we encounter many cases initiated in contentious procedure with the only object of the lawsuit the lack of fulfilment of the second condition which is the registration of property rights respectively the right of servitude in the public book of real estate. So based on the LPORR of Kosovo and some European countries, the property rights to be acquired over an immovable property must first create a legal title and then that legal title to be registered in the book of real estate, specifically in the Cadastral status. A condition which is almost not fulfilled by most persons thus thinking that the right be it the ownership of the servitude or any other real right, are acquired only with the legal title. Thus, based on the content of the paper, it is specified that both conditions must be met, such as the legal title that may come from a legal work (contract, will), from a decision of the state body (court, administration) or from the law. This created legal title must then be registered. So we should all have created *Justus titulus* (legal title) and then *Modus Acquired* (registration in the public real estate book). Not all legislations require the same conditions, as the French legislation does not require the registration of property rights as a condition, but it is said that only an agreement between the parties, or a decision of the state body is enough. Unlike the LPORR of Kosovo and the legislation of Germany, Austria which require legal title and registration of legal title to come to the acquisition of a property right whether property, servitude, mortgage, encumbrance or construction right.

Literature:

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- [2] See: Jolowicz, H.F. *Historical Introduction to the Study of Roman Law* (Cambridge, 1952), 108. Many other authors also write about the law of XII tables. The right of ownership and other real rights that had the object as an object, were defined in Table VI and Table VII.
- [3] Aliu, Abdulla, *property law*, Prishtina, 2014, p, 43-47.
- [4] Garsies, K, *The science of Law*, New York, 1968, p, 19.
- [5] Muirhead, James, *Law of Rome* (Revised and Edited by Henry Goudy, *Lawbook*

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[6] See: Law no. 03 / L-154 on Property and other property rights, Prishtina, 2009, art. 218.

[7] Aliu. Abdulla, property law, Prishtina, 2014, p. 249.

[8] Summary of the Practice of the Supreme Court of the Republic of Kosovo, Prishtina, 2019, p. 220.

[9] Kozilo, Helmut, und Welser, Grundriß des bürgerlichen Rechts Band II, Sachenrecht, Familienrecht, Erbrecht, Wiene, 1996, p. 62.

[10] Shih: Koziol, Helmut Koziol und Eelser, Rudolf, Grundriß des bürgerlichen Rechts, Band II. Wien, 1996, p. 162.

[11] See: Vlahna, Kastriote, Kuçi Hajredin, scientific paper published in the journal: Review of International Geographical Education Online, publication date: 2021/6/23, volume 11, p. 1761-1769.

[12] Arta Mandro, Roman law, Tirana, p. 306.

[13] See: Statovci, Ejup, The right of servitudes (comparative aspect), Prishtina, 1985, p. 154.

[14] See: Law no. 03 / L-154: On Property and Other Real Rights, Prishtina, 2008. Article 253, par. 2, 3.

[15] Clarification: Legal work is a legal tool for the transfer of subjective-civil rights from one subject to another. So legal work in fact represents the declaration of free will of the natural or legal person, who has full or partial legal capacity (ability) to act that enables the creation, change, termination or transfer of subjective civil law. For more details see: Ali. Abdulla. Civil Law (general part), Prishtina, 2013, p. 355.

[16] See: Nuni, Ardian. Hasaneziri, Luan, Civil Law (Ownership). Tirana, 2010, p. 305.

[17] The principle in question has been accepted by the decisions of high courts such as the court of Albania and that unifying decision no. 22/2002, in which they have determined that the immovable property that is not

registered in the IPRO does not represent a legal interest and does not enjoy protection by law.

[18] See: Law no. 2002/5, on the Establishment of the Registry of Immovable Property Rights, Prishtina, 2008, article 2, par. 2.2.

[19] See: Law no. 03 / L-154, On ownership and other real rights, Prishtina, 2009. Article 225, par. 1, 2.

[20] See: Vlahna, Kastriote, Kuçi, Hajredin, ISSN 2661-2666 (Online) International Scientific Journal Monte (ISJM) DOI: 10.33807 / monte.20211895 Volume 4, (No) .2 (2021): April, 2021.

[21] A legal fact is a circumstance that has the power recognized by law to create, change or extinguish any subjective civil right. More specifically, a legal fact is any natural event or human action, the verification of which the legal order provides for the arrival of any legal consequence, the creation, change or termination of a legal relationship.

[22] See: Vlahna, Kastriote, Kuçi Hajredin, scientific paper published in the journal: Review of International Geographical Education Online, publication date: 2021/6/23, volume 11, p. 1761-1769.

[23] Etienne de la Boetie, Discours De La Servitude Vplontaire, Paris, France, 201, p. 214;

[24] He fourth most important principle of civil law is the circulation of subjective civil rights. In this case, the right of real servitude over immovable property is considered as a subjective civil right, which can be concretely transferred from one subject to another, the right over an immovable property. More specifically see the book: Ali. Abdulla, Civil Law (general part), Prishtina, 2013, p. 33;

[25] See: Vlahna, Kastriote, Kuçi, Hajredin, ISSN 2661-2666 (Online) International Scientific Journal Monte (ISJM) DOI: 10.33807 / monte. 20211895, Volume 4, (No) .2 (2021): April, 2021;

[26] See Statovci Ejup, Legal Property Relations in Immovable Property in Kosovo, Prishtina 1976, Re-published in 2009, p. 273;

[27] See: Aliu, Abdulla, Property right (ownership), Prishtina 2014, p. 449;

[28] See Law No. 2002/5 on the Establishment of the Registry of Immovable Property Rights, promulgated by UNMIK Regulation, 2003/27, 18.08.2003.

[29] See Law 2003/13 on amending law no. 2002/5

[30] Law no.04 / L-009 on amending law 2002/5, on the establishment of the register of immovable property rights, Official Gazette of the Republic of Kosovo, no.7 / 10 August. 2011.

[31] The legal basis is considered, the legal title on the basis of which it is claimed to acquire the right of real servitude in real estate, and whether that legal title is based on civil laws, the basis in civil laws is considered the legal basis in the specific case. For example, The legal basis for the contract for the creation of an easement is the legal provisions of the Law on Obligations in Kosovo, ie looking at whether that contract is concluded in accordance with the law, if at that time it is considered that the contract (legal title) is based legal.

[32] See: Law no. 03 / L-154: of Property and Other Real Rights, Prishtina, 2008. Article 253, par. 2, 3.

[33] See: Law no. 2002/5 on the establishment of the register of immovable property rights. Prishtina, 2008;

[34] See: Kondili, Valentina, Civil Law II, (ownership, temporary real rights and inheritance) Tirana, 2008, p, 30

[35] See: Aliu, Abdulla, Civil Law (general part), Prishtina, 2013, p. 235 and 251.

[36] See: Law no. 2002/5 on the establishment of the register of immovable property rights, Prishtina, 2008, article 3. 1.

[37] See: Law no. 03 / L-154: On Property and Other Real Rights, Prishtina, 2008. Article 253, par. 2. 3.

[38] Clarification: in the specific case where the real estate easement is located (eg: if the real easement is located in the municipality of Prizren, then the request must be sent to the Cadastral Registry based in the Municipality of Prizren.

[39] See: Law no. 2002/5 on the establishment of the register of immovable property rights. Prishtina, 2008, article 3. par. 1.

[40] See: Ibid. Article 3. 6.

[41] See: Ibid. Article 3. 1.

[42] See: Ibid. Article 3. 4.

[43] See: Ibid. Article 3. 6.

[44] See: Galgano, Francesco, Private Law, Tirana, 1999, p. 158.

[45] See: Law no. 03 / L-154: On Property and Other Real Rights, Prishtina, 2008. Article 253, par. 2. 3.

[46] See: Gashi, Haxhi, Right Magazine, no. B5, Prishtina, 2019, p, 75.