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KOSOVO NATIONAL STRATEGY ON PROPERTY RIGHTS

December 2016

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ACRONYMS AND ABBREVIATIONS

AFLA	Agency for Free Legal Aid
AI	Administrative Instruction
CTG	Core Technical Group
DP	Displaced Person
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
FYROM	Former Yugoslav Republic of Macedonia
GoK	Government of Kosovo
HPCC	Housing and Property Claims Commission
HPD	Housing and Property Directorate
IPRR	Immovable Property Rights Register
KCA	Kosovo Cadastral Agency
KPA	Kosovo Property Agency
KPCC	Kosovo Property Claims Commission
KPCVA	Kosovo Property Comparison and Verification Agency
LVC	Land Value Capture
MCO	Municipal Cadastral Office
MESP	Ministry for Environment and Spatial Planning
MoJ	Ministry of Justice
NSPR	National Strategy on Property Rights
OPM	Office of the Prime Minister
OSCE	Organization for Security and Cooperation in Europe
OSR	Own-Source Revenue
PAK	Privatization Agency of Kosovo
PCC	Property Claims Commission
PRP	Property Rights Program
PVAC	Property Verification and Adjudication Commission
RAE	Roma, Ashkali, and Egyptian
RECAP	Real Estate Cadastre and Registration Project
SAA	Stabilization and Association Agreement
SAPD	Stabilization Association Process Dialogue

SFRY	Socialist Federal Republic of Yugoslavia
SIDA	Swedish International Development Cooperation Agency
SMS	Short Message Service
SOE	Socially Owned Enterprise
SWG	Sectorial Working Group
TWG	Thematic Working Group
UNHCR	United Nations High Commissioner for Refugees
UNMIK	United Nations Interim Administration Mission in Kosovo
USAID	United States Agency for International Development

I.0 EXECUTIVE SUMMARY

Lack of clarity in immovable property rights legislation, widespread informality in the property sector and inconsistent enforcement of rights has weakened the security of property rights in Kosovo. Insecure rights in property impacts human rights, disempowers marginalized communities and impedes economic growth. The Ministry of Justice (MoJ) is leading development of Kosovo's National Strategy on Property Rights (NSPR) to address these constraints to strengthen and secure property rights for all of Kosovo's citizens.

The NSPR's purpose is to provide a strategic vision for securing rights. It prioritizes and sequences interventions to clearly define property rights in law and to provide accessible, efficient and affordable mechanisms through which Kosovars can obtain legal recognition of their rights and then formalize their rights through registration in Kosovo's cadastre. Rights formalized and registered in Kosovo's cadastre can then be more efficiently and consistently enforced by the courts and government agencies providing greater security. To provide secure rights for all Kosovars, the NSPR recognizes the challenges faced by women, displaced persons (DPs) and members of non-majority communities to fully exercise in practice their rights to property and proposes specific measures to address these challenges. Finally, the NSPR will guide development of policies and legislation to promote more productive use of Kosovo's arable land to help fuel economic growth. Unpermitted construction that has fragmented valuable agricultural land must be contained and prevented from continuing while more efficient privatization processes and incentives are required to ensure the remaining stock of arable land is fully utilized to increase agricultural production. Implementation of reform initiatives to secure property rights across all NSPR objectives will produce cumulative results that will strengthen the rule of law, support Kosovo's integration into the European Union, and promote economic growth.

The MoJ, with the support of USAID's Property Rights Program, initiated development of the NSPR by facilitating a two-day workshop in June 2015 which was attended by over 100 representatives from line ministries and government agencies, civil society, and donors and international partners working in the property rights sector. The workshop concluded with consensus on five "thematic pillars" clustering a wide range of the most relevant property rights challenges in Kosovo. Five concept notes were then developed to provide in-depth research and analysis of the property rights challenges under each pillar. Through a participatory and fully inclusive process through which government stakeholders contributed to development of the Strategy narrative and vetted its content, the five thematic pillars were transformed into five aspirational objectives the NSPR was designed to achieve.

Objective 1: Securing rights to property by strengthening the legal framework.

Kosovo's property rights legal framework still retain concepts of socially owned property left over from the Socialist Federal Republic of Yugoslavia (SFRY) property rights legal framework. These concepts are no longer applicable in Kosovo and do not support development of a vibrant land market that will support economic growth. A significant portion of Kosovo's housing stock was constructed on a type of socially owned land that was designated as "urban land for construction." Under the former regime's laws, private rights could only be conveyed in the building while "social rights" vested in the land. Until Kosovo's laws are updated to allow private rights over the land, the building and the land underneath cannot be joined as a single property unit that could then be registered in the cadastre and transacted in the land market. Fragmented rights in the building and land limit its marketability and reduces its value. Moreover, reform initiatives to formalize rights in unpermitted constructions will be constrained until rights in the land upon which the building was constructed are clarified.

Additionally, socially owned arable agricultural land possessed by socially owned enterprises under the former regime were transformed through a 99-year lease rather than as a right of ownership in fee simple. Such leases are not commonly perceived as providing security of tenure, reducing investment to increase agricultural productivity.

The MoJ is currently developing a comprehensive civil code that will incorporate a stand-alone piece of legislation to regulate all private property rights.¹ Rights over other types of property, including state, public and municipal, as well as the rights of foreign citizens to own property in Kosovo, are not clearly defined in law. Legislation defining property rights must be sufficiently accessible, precise and foreseeable in its application to meet basic standards of legal certainty and prevent arbitrary implementation.²

Key recommendations under this Objective include:

- a. Develop legislation to convert socially owned rights over urban land for construction and 99-year leases into a right of ownership in fee simple. The legislation should clearly state that the land and building constructed above it are joined into a single property unit.
- b. Develop legislation to clearly define and regulate rights in non-private property including state, public and municipal, as well as the rights of foreign citizens to acquire and own property in Kosovo.
- c. Conduct a systemic and comprehensive review of all legislation defining and regulating property rights to identify outdated and inconsistent provisions and amend accordingly to clarify and harmonize rights defined in law.

Objective 2: Securing rights to property by addressing informality in the immovable property sector.

Informality occurs when formal rights in property (rights registered in the cadastre) are not transferred from the formal rights holder through operation of law. Rights informally transferred are exercised *de facto* by the informal rights holder and generally respected by the community at large but cannot be registered in the cadastre. As a result, rights remain registered in the cadastre in the name of the formal rights holder who already transferred the rights, rather than the person currently exercising rights over the property.

Stakeholder consultations conducted during the development of this Strategy identified the following scenarios giving rise to informality in Kosovo today:

Cadastral records that were not updated after the death of the rights holder because families failed to initiate inheritance proceedings.

Kosovo Cadastral Agency (KCA) systematic registration and cadastral reconstruction data indicates that approximately 30% of all applicants attempting to formalize and register rights in immovable property are prevented from doing so because they have not initiated inheritance procedures and rights in the property they possess are currently registered in the name of a deceased ancestor.³ Additionally, anecdotal information indicates that up to 50% or more of applicants seeking to formalize rights over the more than 350,000 unpermitted buildings through the government of Kosovo's (GoK's) legalization program cannot demonstrate rights in the land upon which the buildings are constructed because the land is currently registered in the name of deceased rights holder.⁴

Finally, it is of crucial importance that the records of the Cadastre and Immoveable Property Rights Registry be fully open and easily accessible to the public. Democratic societies and market economies require openness and information in order to operate effectively and efficiently and to develop and grow. This is particularly true as concerns land and rights in land. Providing the public with full and easy access to cadastral records will increase transparency in governance; make important legal and economic information

¹ Private property rights are defined in the Law on Property and other Real Rights, as well as addressed in a number of related laws, such as the Law on Obligational Relationships, the Law on Inheritance, the Law on Non-Contentious Procedure, the Law on Contentious Procedure and the Law on Establishing the Immoveable Property Rights Register. The Law on Property and other Real Rights defines ownership as the most comprehensive property right on an asset authorizing the owner to freely use the asset, dispose of it and exclude others from any interference with it (Article 18).

² Case law of the European Court of Human Rights; Novik v. Ukraine, No. 48068/06.

³ The report analyzed this issue and produced recommendations for streamlined administrative procedures to resolve delayed inheritance claims. USAID Kosovo, Property Rights Program. Informality in the Land Sector: The Issue of Delayed Inheritance in Kosovo, April 2016.

⁴ USAID Kosovo, Property Rights Program. Informality in the Land Sector: The Issue of Delayed Inheritance in Kosovo, April 2016.

available to society; encourage foreign and local investment; and support the development of dynamic land markets.

Cultural norms and practices that regarded verbal contracts for the sale of land as sufficient legal security; and, discriminatory legislation that prohibited the sale of immovable property between Kosovo's Albanian and Serbian ethnic communities, which encouraged informal sales contracts for immovable property that could not be registered in the cadastre.

In the past, the execution of verbal contracts for the sale of land and other immovable property was an accepted means for transacting property rights due to cultural and traditional norms practiced in rural areas of Kosovo. A significant percentage of these verbal contracts were executed between ethnic Serb sellers and ethnic Albanian buyers. Subsequent to 1991, even if a contract document for inter-ethnic sales of property existed, the transaction could not be recorded in the cadastre due to discriminatory legislation in effect at the time prohibiting such transactions.

Resolving such informality typically requires the Albanian buyer to initiate a contested claim in the courts to obtain a decision determining that a contract did exist and the rights in the property were freely transacted. Typically the seller has either left or was displaced by the conflict and cannot be located. Inability to secure testimony from the seller creates an evidentiary gap that both the informal seller and the courts have attempted to fill by relying on the legal doctrines of **substantial performance** and **positive prescription** to demonstrate the transaction occurred. Because both doctrines require the presence of the seller in the proceedings, courts frequently appoint a **temporary representative** to act in the interest of the seller. Appointment of a temporary representative, however, is a measure of last resort to be used after all means of notifying a party have been exhausted.⁵ The use of temporary representatives also raise human rights concerns because, in a post-conflict environment, there is the possibility that property was not voluntarily sold. Rather, it was usurped as a result of displacement. This may not be true for the majority of such cases but its possibility serves to cast a “cloud” over the rights to properties transacted informally, contributing to uncertainty in the land market.

The removal of cadastral documents to Serbia resulted in lack of updated cadastral data in Kosovo, creating a layer of confusion over evidence of property rights in Kosovo

The practice of conducting transactions outside Kosovo's cadastre was perpetuated by the removal of cadastral documents to Serbia during the conflict. The Kosovo Property Comparison and Verification Agency (KPCVA) is mandated to review and compare all cadastral documents returned from Serbia against Kosovo's cadastral documents to adjudicate (subject to right to appeal in the courts) the rights that will be finally registered in the Kosovo cadastre.

Key recommendations under this Objective include:

- a. Develop procedures to make uncontested inheritance proceedings simpler, faster and more affordable to encourage potential heirs to initiate inheritance proceedings to formalize rights that can be registered in the cadastre. As a matter of priority, the MoJ should determine whether notaries or courts should exercise exclusive jurisdiction over uncontested inheritance claims.
- b. Develop “enhanced” notification procedures to increase outreach required to inform all Kosovars, including those living in the diaspora, DPs and vulnerable communities who do not enjoy easy access to state institutions about proceedings that may impact their rights to property. Such proceedings include expropriation, demolition of unpermitted constructions, privatization of socially owned assets, duty to pay taxes, and any other claims seeking formalization of rights in property. The legal doctrine of constructive notice can be utilized to improve efficiency while ensuring the rights to due process are safeguarded. Constructive notice in delayed inheritance proceedings removes the burden on those seeking rights formalization to secure the participation of all interested parties. The doctrine also helps to provide finality for rights registered in the cadastre.

⁵ OSCE. *Litigating Ownership of Immovable Property in Kosovo*. March 2009. p. 20. Retrieved from <http://www.osce.org/kosovo/36815?>

- c. Utilize efficient and low cost administrative procedures to provide citizens with the opportunity to obtain legal recognition of informal rights created under the scenarios above and enable them to be registered in the cadastre, subject to any appeals to the courts.
- d. Revisions must be made to the Law on Data Protection and other relevant laws to provide a clear legal basis for the right of the public to have full access to the Cadastre and Immovable Property Rights Register.
- e. Create incentives and identify and remove administrative barriers to encourage registration of rights in the cadastre. Excessive fees and inconsistent practices identified and eliminated and procedures and guidelines developed to ensure consistent registration practices in all Municipal Cadastral Offices.

Objective 3: Guaranteeing and enforcing the property rights of displaced persons and non-majority communities.

Universally recognized by the European Convention on Human Rights and its Protocols, international law and Kosovo’s Constitution, people displaced by conflict have a right to return to their homes and immovable properties. Following the adoption of the “Principles on Housing and Property Restitution for Refugees and Displaced Persons,” also known as the “Pinheiro Principles,”⁶ the concept of return, as understood by the international community, has become “not simply the return to one’s country for refugees or one’s city or region for DPs, but the return to and re-assertion of control over one’s *original home, land or property*”; the process of housing and property restitution.”⁷

In the wake of the conflict, a total of 42,749 property restitution claims were filed with the Kosovo Property Agency (KPA) seeking restitution of their immovable property. Most of the claims are filed by DPs and members of Kosovo’s non-majority communities.

The KPA claims resolution process comprises two phases. First, the claim must be adjudicated and the rights of the successful claimant recognized and provided legal effect through the KPA decision. Second, the KPA decision must be fully implemented by providing the successful claimant the opportunity to avail him or herself of the available remedies. The KPA has now adjudicated all claims filed. It should also now document that all its decisions have been registered in the cadastre. A KPA decision provides the legal basis for the successful claimant to request an eviction to regain possession of his or her immovable property. Registration of the KPA decision will enable Kosovo Police or private bailiffs to confirm the decision’s legitimacy making it easier for successful claimants to request an eviction.

Approximately 29,000 KPA decisions are pending implementation including decisions to place property under KPA administration and claims closed for non-cooperation based on the right of claimant to request re-possession or re-open the claim. The recently passed Law on the KPCVA essentially transforms the KPA into the KPCVA and mandates its Executive Secretariat to fully implement KPA decisions. In the aftermath of Kosovo’s conflict, final resolution and implementation of successful claims adjudicated by the KPA is the priority intervention to strengthen and guarantee rights of the country’s non-majority communities.

Remedies to be provided by the Executive Secretariat include evicting the current occupant to reconstitute and return the property to the possession of the successful claimant, placing the property under KPCVA administration and including the property in a rental scheme. The KPCVA is required, within 18 months of the law taking effect, to contact all successful claimants and inform them that it shall conclude its mandate to administer and rent successful claimants’ properties. The legislative intent for this deadline is to finally conclude the temporary mandate of the KPA and not to unilaterally impose on DPs an 18-month deadline within which they must exercise their rights to a remedy.

⁶ See Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons: Final Report of the Special Rapporteur, Paulo Sergio Pinheiro: E/CN.4/Sub.2/2005/17 (28 June 2005) and see also Gomez, M., New Draft Principles on Housing and Property Restitution before the UN Sub-Commission for the Promotion and Protection of Human Rights, Housing and ESC Rights Law Quarterly, Vol. 1, No. 3, December 2004, Centre for Housing Rights and Evictions, Achieving Housing For All, available on www.cohre.org.

⁷ UNHCR, et al. 2007. Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the ‘Pinheiro Principles’: Inter-Agency, p. 10.

The GoK is committed to fulfilling its duties and human rights obligations after conclusion of the KPCVA mandate to provide DPs with final, fair and effective remedies that will enable them to re-assert control over their immovable properties. Administration of a successful claimant's property was only intended as an interim measure until the claimant chose a final remedy. Final remedies include providing successful claimants with an eviction so they may take possession of their property at any time in the future and placing their property in a rental or leasing scheme. The GoK will explore options to transition implementation of these remedies from the KPCVA to the Kosovo Police, private bailiffs and private real estate rental and leasing firms. The strategic priority for the GoK now is to begin to develop a plan of action to guide this transition.

Key recommendations under this Objective include:

- a. Ensure that the full range of remedies currently provided in law will be made available to successful claimants and implemented during the temporary mandate of the KPCVA. The KPCVA should lead the handover process of its functions, if not complete during its mandate, to relevant institutions. Such functions include property administration and rental scheme after the 18 month period, or other KPA functions after the conclusion of the KPCVA mandate.
- b. Improved means for communicating with DPs should be established. Utilization of "enhanced notification" would make it possible to place the responsibility to request remedy with the successful claimant, rather than requiring the KPCVA to directly contact each successful claimant. It would also facilitate two-way dialog between the KPCVA and successful claimants to provide information successful claimants will need to access remedies from the private sector after the KPCVA mandate concludes.
- c. To prevent illegal re-occupation after a KPA eviction, develop procedures that would require the KPCVA (or enable a successful claimant after conclusion of the KPCVA mandate) to request the Kosovo Police or private bailiff to immediately enforce the original KPA eviction order prior to referring the matter to the Prosecutor's Office. Internal guidelines should be developed for prosecutors to seek criminal penalties for illegal re-occupation and be trained to effectively prosecute criminal charges to deter illegal re-occupation in the future.
- d. Implement "enhanced notification" procedures in all proceedings impacting rights to property, including expropriation, demolition of unpermitted constructions, privatization, delayed inheritance proceedings and any other claims seeking formalization of rights in property to ensure DPs have access to information required to protect their rights to property.
- e. Revise eligibility criteria for free legal aid to include DPs and persons residing in informal settlements; and, substantially increase government funding for the free legal aid program.
- f. Introduce unified court fee regulations, whereby DPs in precarious socio-economic conditions are exempted from paying court expenses (DPs' occupied properties should not be counted as personal wealth).
- g. Fully implement in practice the provisions contained in Law No. 02/L-37 "On the Use of Languages" to ensure members of non-majority communities can access information and fully participate in proceedings impacting their rights to property.
- h. Harmonize and implement the Strategy for Regularization of Informal Settlements 2011-2015 with provisions of the Law on Spatial Planning and procedures to regularize unpermitted constructions to provide comprehensive and sustainable solutions for the 100 informal settlements primarily inhabited by members of the Roma, Ashkali, and Egyptian (RAE) communities.

Objective 4: Guaranteeing and enforcing the property rights of women.

Article 46 of Kosovo's Constitution guarantees the rights of all citizens to own property; but, women struggle to overcome cultural barriers to inherit immovable property from their birth families and spouses and widespread informality that prevents them from registering their ownership rights in the cadastre. According to the 2011 census, women make up 49.6% of the Kosovo population, yet only 15.24% of women have property registered in their name. When women do not control property, they cannot be full

economic actors. Moreover, women's asset ownership has been demonstrated to have a positive benefit for the well-being of families.

Women's concealment from the death act or renunciation of their rights to inherit family property rights is a major obstacle that prevents women from becoming property owners in Kosovo. Due to tradition, cultural norms that favor patrilineal inheritance, and family expectations for women not to inherit the real estate from their birth families, women often decide to renounce their rights to inherit in favor of their brothers.

Widespread informality with regards to marriage contracts places women in a vulnerable position concerning their property claims. They are excluded from inheriting from their partner unless they can demonstrate cohabitation for 10 years or for 5 years with children. Women are also excluded from inheriting from their birth families because they are not included in the Act of Death. This is a declarative document intended to list all the family members eligible to inherit immovable property. Currently, Municipal Civil Registry Offices, Courts, and notaries do not have the means to independently verify the accuracy of the Act of Death document, creating ample opportunities for families to exclude women heirs.

According to the Law on Inheritance, women who renounce their property rights also renounce the rights on behalf of their children, who are minors. This practice is in discordance with European standards regarding the rights of children. In Kosovo, where minors are a large percentage of the population, this significantly impacts a national welfare interest.

Key recommendations under this Objective include:

- a. Consistent recognition of rights on inheritance of factual marriages after five years of cohabitation, or three years if there are children involved.
- b. Require heirs who bring an inheritance action to a notary or a judge should swear, upon penalty of law, that they are not concealing any known heirs. In parallel, data management capacity of the Civil Registry System should be improved to enable municipal offices to produce an accurate and reliable list of the deceased's family members.
- c. Any heirs declaring their intent to renounce their right to inherit should be required to make this declaration at a special session before a judge or notary. It is essential that during this session female heirs are fully informed about their rights and the value of their portion of the estate that they intend to renounce before taking a final decision.
- d. To foreclose the possibility that a surviving spouse will lose the right to inhabit his or her home, the Law on Inheritance should be amended to delay the mandatory estate distribution until after the death of the surviving spouse to allow the living spouse access to the marital home and property until death. An alternative approach would be to allow the surviving spouse use rights to the marital home and property until their death or remarriage.
- e. Through a normative act, guided by EU best practice, objective criteria for calculating the contribution of spouses in creating immovable property during their marriage, in case they decide to separate, must be determined.
- f. Article 130.3 of the Law on Inheritance should be amended to require oversight of a custodial body whenever courts decide on cases regarding the renunciation of the rights of minors. The custodial body described in Kosovo's draft Law on Child Protection is the most appropriate type of oversight for the protection of the best interests of the child.

Objective 5: Promoting productive use of immovable property to fuel economic growth.

Promoting growth in the agriculture sector is a key component in the Government of Kosovo's program for fueling Kosovo's economic development.⁸ Excessive fragmentation of land parcels and unpermitted construction over the past 15 years has significantly reduced the amount of arable land available for investment in Kosovo's agricultural sector, reducing agricultural productivity and potential for economic growth.

The Law for Treatment of Constructions without Permit⁹ was passed to regulate the process of legalizing unpermitted constructions. It was intended to formalize rights in the building so they may be registered in the cadastre and transacted in the land market or used as collateral to secure finance for investment. It was also intended to ensure unpermitted constructions are no longer the norm in Kosovo. The law in its current form provides only the opportunity to formalize rights to occupy the unpermitted construction. It does not provide a mechanism to formalize rights in both the building and the land as a single property unit that can then be registered in Kosovo's cadastre and transacted in the land market.

The law also contains rigid criteria for excluding from the amnesty scheme, without exception, unpermitted constructions based on the type of land. All unpermitted constructions built on Public Property are excluded. The bulk of unpermitted construction exists in city and town centers designated as "urban land for construction" under the former regime. This category of land has been transformed into Public Property. Unless the law is amended to address this issue, most unpermitted constructions in city and town centers will have to be demolished, contradicting the policy objective the law was intended to achieve.

The law did not provide for sufficient notification to all Kosovars, particularly those in the diaspora and DPs, to enable them to comply with the laws deadlines. Strict enforcement of the deadlines would result in demolition of their properties and violation of their human rights. The law also requires payment of fees that exceed the economic means of many Kosovars, creating an administrative barrier to formalization of their rights.

In 2013, the GoK passed a new Law on Spatial Planning¹⁰ to address past deficiencies in the planning process that led to proliferation of unpermitted constructions and land fragmentation. As the law is implemented, mechanisms to monitor implementation of the plans, coupled with stronger penalties for unpermitted construction will help prevent unregulated urban sprawl and encroachment onto arable land best suited for agricultural production. The GoK can also begin to move from a process focused solely on regulating spatial planning to a process that includes the development and management of land. This will provide incentives to encourage land consolidation projects in both rural and urban areas. In the course of developing and implementing spatial plans, the GoK must comply with Kosovo's Constitution and legislation, and the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) standards.

The Privatization Agency of Kosovo (PAK) is mandated to privatize "socially owned" land mainly consolidated¹¹ to increase investment in arable land to increase agricultural productivity. Thus far, 22,000 hectares of socially-owned arable land have been sold and 17,000 hectares of arable land have yet to be privatized. Privatization has not produced the expected level of investment and agricultural productivity because spatial plans in place have not been effectively enforced, encouraging investors to either build unpermitted constructions on arable land or to simply hold on to the land for speculative purposes. A litigious environment surrounding the privatization process further inhibits productive use of arable land as investors have been forced to devote time and money to defend against groundless lawsuits.

⁸ Government of Kosovo. Program of the Government of the Republic of Kosovo 2015 – 2018. Retrieved from: http://kryeministri-ks.net/repository/docs/Government_Programme_2015-2018_eng_10_mars.pdf.

⁹ Law for Treatment of Constructions without Permit. Official Gazette of the Republic of Kosovo. Law No. 04/L-188, 26 December 2013.

¹⁰ Law on Spatial Planning. Official Gazette of the Republic of Kosovo. Law No. 04/L-174, 07 September 2013.

¹¹ See 'Ligji për Arondacionin, Komasonin dhe Riparcelimin e Tokës', Official Gazette of the Socialist Autonomous Province of Kosovo, 32/76; 'Ligji për Komasonin', Official Gazette of the Socialist Autonomous Province of Kosovo, 31/87.

Arable land is privatized/transfer through a 99-year lease. This unfamiliar form of private land tenure concerns investors that do not accept the tenure as secure enough to justify making investments in the land in order to increase agricultural productivity. This perception of insecurity creates further incentives for speculative investments in the land.

Although fifty-three percent (53%) of the total land area in Kosovo is classified as agricultural land,¹² much of it is left fallow. No cost is incurred when land is left fallow because it is not taxed. A transparent, fair and effectively implemented land and immovable property tax regime will create an incentive for the owners of arable land to either produce crops to recoup the cost of taxes or sell or lease the land to others who will put the land to more productive use.¹³

The primary constraint to implementing a market value tax scheme is the development of a methodology to determine market value in the absence of accurate and reliable data about actual prices paid for immovable property. There is also limited capacity in the private sector, and almost none in the public, to conduct market-based valuations.

A tax on property constitutes a restriction on an individual's property rights. In levying taxes, a proper balance must be struck between the legitimate aim of generating revenue to achieve public policy objectives and mitigating risks of creating excessive demands on low income and poor families.

Key recommendations under this Objective include:

a. Treating unpermitted constructions

- i. The Law on Treatment of Unpermitted Construction should be amended to create incentives to encourage formalization and provide the legal mechanism through which applicants can formalize rights in the both the building and land as a single property unit and then register their rights over this property unit in Kosovo's cadastre so the rights formalized can be transacted in the land market.
- ii. To ensure the overarching objective of the amnesty scheme is not frustrated, exemption clauses should be developed to provide a more flexible approach to determine eligibility. This is preferable to rigid categorical exclusions that would preclude large numbers of otherwise suitable unpermitted constructions from being formalized.
- iii. The formalization process must be accessible to all Kosovars. Legalization Taxes and Fees should be reduced for Kosovars with low incomes and cumbersome administrative barriers, such as the requirement to provide architectural drawings with applications, should be eliminated. Incentives should be developed to encourage women-headed households to formalize their property rights. It is essential that due process safeguards are in place to ensure land owners have information and knowledge to protect their rights. Enhanced notification procedures should be utilized to ensure all land owners, especially those in diaspora, DPs and members of non-majority communities are provided notice to enable them to participate in the proceedings.

b. Land consolidation through effective spatial planning

- i. Procedures to obtain building permissions should be made simpler, more affordable and transparent to encourage citizens to follow planning procedures and prevent further land fragmentation.
- ii. Municipalities should increase emphasis on monitoring and enforcing spatial plans and construction permitting procedures and strengthen powers, responsibilities and capacities of inspectors to prevent unpermitted construction at the time actual construction begins. Penalties in Kosovo's Criminal Code and administrative instructions should be rigorously enforced to serve as an effective deterrent.

¹² USAID. USAID Country Profile: Property Rights and Resource Governance, 2010, p. 4. Retrieved from: http://www.usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Kosovo_Profile.pdf.

¹³ SIDA, STA, MoF, ProTax 2 Project Plan, 2014, p. 6.

- iii. After strengthening mechanisms to enforce spatial plans, municipalities should begin to implement Land Value Capture (LVC) tools to encourage land consolidation and promote development objectives.
 - iv. Any public development projects that require expropriation of private land must comply with the provisions of Kosovo law and applicable human rights standards. This requires clear criteria for determining whether the expropriation serves a public interest and, if so, that adequate compensation based on the market value of the land expropriated is paid to its private owner.
- c. Privatization of SOE arable land*
- i. Conversion of the 99-year lease issued by PAK into rights of ownership in fee simple will provide investors greater security of tenure and encourage investments in the land to increase agricultural productivity.
 - ii. Mechanisms must be strengthened to ensure that purchasers put arable agricultural land to productive use rather than as a speculative investment. If PAK lacks the mandate or resources to monitor and enforce the terms of the privatization sale, the GoK should either expand its mandate and resources or create another body to carry out this function.
- d. Create incentives to encourage market transactions and productive use of agricultural land*
- i. Imposition of a tax on land will create an incentive for owners of arable agricultural land to either use the land for agricultural production or lease the land to someone that will.
 - ii. Procedures must be developed to guide market-based appraisals and require reporting of actual prices paid for immovable property and recording this information in the cadastre. The use of private appraisers should be considered.
 - iii. The tax rates imposed by the GoK should be calculated not to exceed the ability of Kosovars to pay. Policies will need to be developed to provide tax relief for poor and vulnerable members of Kosovo society.

Once an accurate, fair and equitable tax rate is established, capacity at the municipal level must be built to efficiently deliver tax bills and collect taxes. Effective collection of tax revenue will significantly increase the amount of own-source revenue (OSR) generated by the municipality.

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2.0 INTRODUCTION

Lack of clarity in immovable property rights legislation, widespread informality in the property sector and inconsistent enforcement of rights weakens the security of property rights in Kosovo. Insecure rights in property impacts human rights, disempowers marginalized communities and impedes economic growth.

The National Strategy on Property Rights (NSPR) provides a strategic vision for securing rights. It prioritizes and sequences interventions to clearly define property rights in law and to provide accessible, efficient and affordable mechanisms through which Kosovars can obtain legal recognition of their rights and then formalize their rights through registration in Kosovo's cadastre. Rights formalized and registered in Kosovo's cadastre can then be more efficiently and consistently enforced by the courts and government agencies and afforded greater security. To provide secure rights for all Kosovars, the NSPR recognizes the challenges faced by women, displaced persons (DPs) and members of non-majority communities to fully exercise their property rights in practice and proposes specific measures to address these challenges. Finally, the NSPR will guide development of policies and legislation to promote more productive use of Kosovo's arable land to help fuel economic growth. Unpermitted construction that has fragmented valuable agricultural land must be contained and prevented from continuing while more efficient privatization processes and incentives are required to ensure the remaining stock of arable land is fully utilized to increase agricultural production.

The NSPR is viewed by the Government of Kosovo (GoK) as necessary to help achieve the nation's development objectives, including compliance with its obligations under the Stabilization and Association Agreement (SAA) it executed with the European Union (EU). The NSPR will also serve as an integral part of Kosovo's five-year economic reform program, encompassing a comprehensive portfolio of policy measures on human capital, rule of law, competitiveness, and infrastructure. Furthermore, the National Program for Implementation of the SAA, adopted by the Kosovo Assembly on 10 March 2016, called for a sectorial strategy on property rights, to guide development of a property rights legal framework that is aligned with market-oriented policies and will help to stimulate foreign investments. The NSPR has also been included in the conclusions of two recent Stabilization Association Process Dialogue (SAPD) Sectorial Meetings on Justice, Freedom and Security (26-27 January 2016) and on Internal Market, Competition, and Health Protection (02 February 2016).

The Ministry of Justice (MoJ), with the support of USAID's Property Rights Program, initiated development of the NSPR by facilitating a two-day workshop in June 2015, which was attended by over 100 representatives from line ministries and government agencies, civil society, and donors and international partners working in the property rights sector. The workshop concluded with consensus on five "thematic pillars" clustering a wide range of the most relevant property rights challenges in Kosovo. Five concept notes were then developed to provide in-depth research and analysis of the property rights challenges under each pillar. Through a participatory and fully inclusive process during which government stakeholders contributed to development of the Strategy narrative and vetted its content, the five thematic pillars were transformed into the five aspirational objectives the NSPR was designed to achieve.

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3.0 OBJECTIVES

The overarching objective of the NSPR is to assist the Government to secure the property rights of all its citizens. The MoJ, based on in-depth analysis of the most pressing land tenure and property rights challenges, and in consultation with stakeholders, has determined that the NSPR must achieve the five aspirational objectives presented below to secure rights to property in Kosovo.

Secure property rights requires that the legal framework is strengthened to clearly define the rights and responsibilities of citizens and government; the property rights of women and members of minority communities are guaranteed by law and enforced by government agencies and courts so they can be fully exercised in practice; and rights to use land are regulated to protect valuable land assets such as arable land and to encourage its productive use.

Objective 1: Securing Rights to Property by Strengthening the Legal Framework

Kosovo's legal framework must be updated and harmonized to support economic development in a market economy. Legal concepts from Kosovo's socialist past must be removed and rights and responsibilities of citizens and government entities must be clearly defined in law to provide the basis for a vibrant land market to support economic growth.

Objective 2: Securing Rights to Property by Addressing Informality

Citizens must be provided access to efficient and affordable administrative processes to obtain legal recognition of rights they are currently exercising *de facto*. Legal recognition of these rights will enable citizens to register their rights in the cadastre so they may be more efficiently enforced by courts and government agencies and transacted in the land market.

Objective 3: Enforcing and Guaranteeing the Property Rights of Displaced Persons and Non-Majority Communities

Strengthening, protecting and enforcing the property rights of displaced persons (DPs) and members of non-majority communities is a mandatory requirement for Kosovo to comply with applicable human rights standards and its obligations under the SAA with the EU. DPs must be provided with fair, effective and final remedies to regain control over immovable property and land lost during the conflict and the rights of all members of non-majority communities to exercise their rights in practice must be guaranteed to strengthen the rule of law in Kosovo.

Objective 4: Enforcing and Guaranteeing the Property Rights of Women

Women comprise more than half of Kosovo's population. Impediments preventing them from property ownership hampers the country's economic growth and social welfare. Guaranteeing the rights of women to exercise their rights to property in practice will also strengthen the rule of law, promote economic growth and support EU integration.

Objective 5: Using Secure Rights to Property to Fuel Economic Growth

Secure rights to property does not provide for unlimited use of these rights. Rights must be limited and regulated, to the extent allowed by Kosovo's Constitution and applicable human rights standards, to protect valuable land assets such as arable land and to encourage its productive use.

Implementation of reform initiatives to secure property rights across all five NSPR objectives will produce cumulative results that will strengthen the rule of law, support Kosovo's integration into the European Union, and promote economic growth.

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4.0 METHODOLOGY

The Ministry of Justice (MoJ) established three layers of technical and oversight bodies to ensure Kosovo's first ever land tenure and property rights sectoral strategy identified and proposed implementable solutions to address the core challenges and constraints to securing property rights for all the country's citizens:

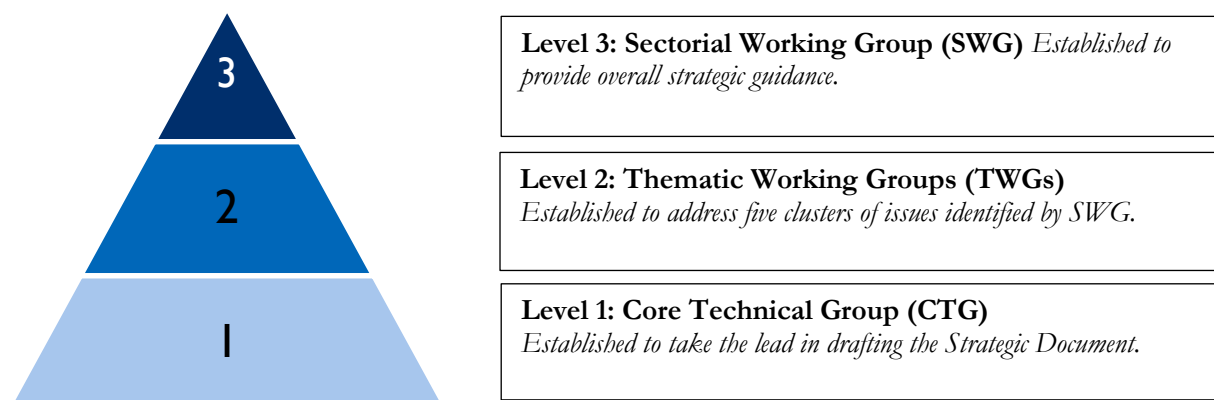


Figure 1: Government structures established to develop the NSPR.

Subsequent to Government Decision 30/01, dated 20 May 2015, to incorporate the NSPR into its Annual Plan of strategic documents, the MoJ, with assistance from USAID's Property Rights Program (PRP), developed an initial *Issues Document* that presented clusters of land tenure and property rights issues under five focus areas. The document was presented at the initial Sectorial Working Group (SWG) meeting in June 2015. Over 100 representatives from line ministries and government agencies, civil society, and donors and international partners working in the property rights sector met over a two day period and arrived at consensus on the five focus areas and technical rights issues to be analyzed and addressed under the NSPR. Five Concept Notes were then developed, providing in-depth analysis of issues identified in the *Issues Document*. The five Concept Notes provide a situation assessment, problem definition, international best practice, and recommendations on long-term and sustainable solutions to challenges in the immovable property sector. The foundations of this strategic document are guided by the five Concept Notes (see Annexes 4).

The CTG, responsible for drafting this document, included the main governmental representatives of the property rights sector. In addition to the Ministry of Justice, the group was composed of representatives of the Ministry of Environment and Spatial Planning, the Ministry of Local Government Administration, the Ministry of Agriculture, Forestry and Rural Development, the Ministry of Finance, the Property Tax Department, the Ministry of European Integration, the Kosovo Cadastral Agency, the Kosovo Property Agency, the Privatization Agency of Kosovo, the OPM Office for Strategic Planning, the OPM Agency for Gender Equality, and the Kosovo Judicial Council.

In order to conduct further in-depth analysis of the challenges identified, additional Thematic Working Groups established the problems identified and proposed solutions encompassed in this document. TWGs, which mirror the five objectives that the NSPR seeks to achieve, provided input that proposes to: (1) Develop a Clear Legal Framework on Immovable Property Rights; (2) Strengthen the Role of Courts and Other Service Providers to Recognize, Determine and Enforce Property Rights; (3) Guarantee and Enforce the Property Rights of Non-Majority Communities; (4) Guarantee and Enforce the Property Rights of Women; and (5) Promote a Vibrant Land Market to Fuel Economic Growth. (See Annex 2 of all TWG members who participated in the process).

During a one year-long process of preparing this Strategy, over twenty working group consultation sessions have been held. 148 registered participants provided input, representing the central government, local government, assembly, the judiciary, independent state agencies, civil society organizations, and the donor community.

The USAID Property Rights Program provided continued support in the process of developing the Strategy. Other donors who were involved in this process also include the “Support to the Civil Code and Property Rights Project,” financed by the EU Office. (See Annex 3 of all donors that participated in the process).

The Strategy has been developed based on the findings, recommendations and analyses conducted through extensive consultations. In addition to the NSPR, the Action Plan sets priorities, timelines and budgetary needs for the implementation of the recommendations. Estimated costs and implementation timelines, which may vary, have also been defined for all actions.

The portfolio of actions expected to be implemented is diverse, falling within the authority of various line ministries and agencies. Ensuring that actions are implemented requires the attention of the highest level of government.

5.0 BACKGROUND

The National Strategy on Property Rights (NSPR) is guided by Kosovo’s longer term aspirational objectives: strengthening the rule of law, promoting economic development, and supporting Kosovo’s integration in the European Union. Following a wide consultation process in June 2015 through the Sectorial Working Group, five clusters of property related issues were identified to be addressed. Following consensus reached, below is an analysis of the issues identified.

Section 1 focuses on the gaps behind the legal framework defining rights to property. The purpose of this section is to identify different types of property and ownership that require clarity. Section 2 focuses on the challenges that prevent formalizing and registering rights to property. The purpose of this section is to identify problems that prevent timely and efficient transfer of rights to property, thereby ensuring that transfer of property are formally conducted and secured. Sections 3 and 4 identify and analyze property related issues specific to marginalized members of the Kosovo society, focusing on challenges that non-majority community members and women face to determine and utilize their rights to property. Section 5 discusses the limits spatial planning can place on secured rights to ensure they are used to protect land assets and promote productive use of land to support economic growth.

5.1 SECURING RIGHTS TO PROPERTY BY STRENGTHENING THE LEGAL FRAMEWORK

Legislation defining property rights must be sufficiently accessible, precise and foreseeable in its application in order to avoid any risk of arbitrariness.¹⁴ Private property rights in Kosovo are reasonably well defined.¹⁵ However, types of non-private property rights—state property, socially owned property, including urban construction land and status of 99-year leases, public property, and municipal property—are inconsistently used in legislation. Lack of clarity leaves room for legal uncertainty and ambiguity, contributing to confusion who has what entitlements and obligations under each type of property. Under the current legal framework, there is also uncertainty if and to what extent foreigners may own immovable property in Kosovo. The relevant provisions in the Constitution are ambiguous and allow for different interpretations, leading to an inconsistent application of the law in practice. The purpose of this section is to analyze different types of property that require clarity with the purpose to achieve a comprehensive and consistent legal framework that guarantees legal certainty and clarity.

5.1.1. SOCIALLY OWNED PROPERTY

The concept of socially owned property in the former Yugoslavia, including Kosovo, was based on the basic principle that property belongs to society as a whole and not to private persons or the state. It is a form of collective, though not state owned property, where society is the supreme titleholder. It was introduced at the conclusion of World War II, when the Yugoslav state embarked on a campaign to nationalize land and other real assets. The property nationalized became state property. This state property was then transformed into socially owned property, primarily in the form of agricultural cooperatives and other forms of socially owned enterprises for economic production. The custodian of socially owned property was typically the municipality. Citizens and other legal entities were granted use rights, including the permanent right of use over socially owned property but could not transfer or encumber it.

United Nations Interim Administration Mission in Kosovo (UNMIK) legislation enacted after the conflict recognized the existence of socially owned property, but did not provide further clarity on citizens’ rights

¹⁴ Case law of the European Court of Human Rights; *Novik v. Ukraine*, No. 48068/06.

¹⁵ Private property rights are defined in the Law on Property and other Real Rights, as well as addressed in a number of related laws, such as the Law on Obligational Relationships, the Law on Inheritance, the Law on Non-Contentious Procedure, the Law on Contentious Procedure and the Law on Establishing the Immovable Property Rights Register. The Law on Property and other Real Rights defines ownership as the most comprehensive property right on an asset authorizing the owner to freely use the asset, dispose of it and exclude others from any interference with it (Law. No. 03/L-154, Article 18).

to the property after the Yugoslav institutions ceased to exist in Kosovo. Following Kosovo's declaration of independence in 2008, the new Constitution of the Republic of Kosovo changed the legal nature of socially owned property. It transformed socially owned property into state owned property (owned by the Republic of Kosovo), confirmed by the Constitutional Court of Kosovo.¹⁶ Thus, with the ratification of the Constitution, socially owned property formally ceased to exist as a type of property right in Kosovo.

The Constitution was subsequently amended in 2012. The provision transforming socially owned property into state property was deleted. This created ambiguity and controversy over whether socially owned property was reinstated as a property rights type or if the previous transformation of socially owned property into state property was still in effect. The issue has not been conclusively resolved and is still debated by Kosovo's legal community.

The legal status of property formally designated as socially owned affects efforts to legalize unpermitted constructions built on "urban land for construction," formalize property rights and transformation of rights over arable land through 99-year leases.

5.1.2. URBAN LAND FOR CONSTRUCTION

Under the practice of socially owned property, land within urban zones designated for the construction of socially owned flats and buildings was categorized as "urban land for construction." Citizens could obtain ownership rights in the residential building but were only granted rights to permanently use the "socially owned" urban land upon which the building was constructed. It is on "urban land for construction" that a significant portion of Kosovo's housing stock is located and where a significant portion of unpermitted construction is found today.

Although it is presumed this category of socially owned land has been transformed into state property, legislation from the former regime governing access to and use of this land is still in effect. As such, the *de jure* rights conveyed to citizens is a permanent right to use the land granted by the municipality. The permanent right to use the land exists only as long as the residential property exists. If the building is destroyed, the owner of the building has the right to request permission to reconstruct the building. If this right is not exercised, the land reverts to the municipality.

The implications of this right are that the building and the land underneath it are not legally joined into a single property unit and cannot be registered in the cadastre and transacted in the land market as such, limiting the property's marketability and reducing its value. This arrangement increases transaction costs because in order to comply with the law, the municipality must be involved as a third party. Moreover, citizens are frequently unaware that they are transacting only property rights in the building and not property right of the land. The overall reduction in the value of the property is also reflected in its value as collateral for seeking financing.

A more immediate concern is the impact that the designation "urban land for construction" has on the legalization of unpermitted constructions. Current legislation prohibits legalization of unpermitted constructions on state or public land. While the original intent may have been to deter construction on land over which the builder has no rights, most "unpermitted construction" projects are valid. Given the *de facto* situation on the ground today, definition of ownership of urban land for construction is necessary.

5.1.3. STATUS OF 99-YEAR LEASES

The land possessed by the former Socially Owned Enterprises (SOE) is typically the most valuable asset of the SOE. Often during privatization of SOEs created for agricultural production, the Privatization Agency of Kosovo (PAK) separated the land from the enterprises and privatized it through a 99-year lease as provided by the UNMIK regulation still in effect. UNMIK chose this form of private tenure as the instrument for transformation because it lacked the legal authority to permanently alienate land fee simple due to Kosovo's unresolved political status.

¹⁶ Constitutional Court of the Republic of Kosovo, Judgment in Case No. KI 08/09. 17 December 2010. p. 65.

Although a 99-year lease is perceived as providing sufficient security of tenure to stimulate agricultural investments in Western Europe and the U.S., it is not a familiar concept in the Balkan region. There are concerns that it is perceived as a type of interim lease by investors from the region and serves as a disincentive to investment.

As discussed further below, it is recommended that legislation be enacted that would, through the operation of law, transform *de facto* rights in urban land for construction and rights conveyed through 99-year leases into private property rights in fee simple.

5.1.4. STATE AND PUBLIC PROPERTY

Kosovo's legal framework does not clearly define the rights and obligations that exist in the categories of "state" and "public" property. Additionally, issues such as the mechanisms responsible to administer these types of property, whether such properties can be transferred to third parties and, if so, the procedures for the transfer are not specified. Moreover, the terminology used to describe these types of property is inconsistent throughout the framework. In some laws the terms are used interchangeably and in others they may be interpreted as separate and distinct.

Although the inconsistency is pervasive, an example from the Constitution will serve to illustrate this point. Article 121 of the Constitution refers to public property as incorporating natural resources of the Republic of Kosovo which include water, air space, mineral resources and other natural resources including land, flora and fauna, other parts of nature, immovable property and other goods of special cultural, historic, economic and ecologic importance. This confuses concepts of "state" and "public." The distinction can be thought of as "state," which includes assets operated by a specific state institution or branch of government, used exclusively by that branch, such as a research laboratory. While "public" is defined as assets and resources that are available to the entire public for use, such as a public park, definitions vary by country, as there is no standard definition and the Constitution provides little guidance to distinguish the two. Additionally, natural resources can also be privately owned. Evidence shows that the legislator had never intended for the Republic of Kosovo to own all of the country's natural resources.

Another issue related to state property is the status of property owned by the Socialist Federal Republic of Yugoslavia (SFRY) and Serbia. Precedent in international law supports the argument that Kosovo is the successor state to SFRY and Serbia and is entitled to rights in immovable property located in Kosovo that was vested in these states. Kosovo has not passed a law that declares itself the successor state entitled to take ownership over the immovable property register in the name of these states which is in Kosovo, creating legal uncertainty over the status of these properties. The definition of status of property registered in the name of former Social-Political Organizations of the former Autonomous Province of Kosovo has also not been defined.

5.1.5. MUNICIPAL PROPERTY RIGHTS

The Law on Local Self Government confirms and strengthens previous UNMIK legislation that municipalities have the rights to own and manage immovable property. In practice, these properties would need to be registered in the name of the municipality in the cadastre. Due to outdated cadastral documents, a complete inventory and registration of municipal immovable property has not been completed—creating confusion.

The Law on Allocation for Use and Exchange of Immovable Property of the Municipality also provides a municipality with the right to request PAK to revert to its rights in socially owned property. As such, PAK would not have the authority to transfer socially owned property to the municipality. If the presumption that socially owned properties have been transformed into state property is not correct, it would appear that transfer of the SOE assets to the municipality without compensating those with rights to the assets of the SOE could amount to an expropriation without payment of compensation.

5.1.6. RIGHT OF FOREIGNERS TO OWN PROPERTY

Article 121.2 of the Constitution states that foreign natural persons and foreign organizations may acquire ownership rights over immovable property in accordance with conditions established by law or international agreement. One line of interpretation argues that, according to this provision, foreign persons may only acquire immovable property in Kosovo if either a law or international agreement permits it. In the absence of a law or international agreement, foreigners would not be permitted to acquire ownership of immovable property.

However, it can be argued that this provision is instead affirming foreigners' rights to property as long as the conditions of ownership align with the Constitution and constitutional authority. Article 119.2 supports this argument by stating that foreign investors and enterprises must have the same legal rights as domestic investors and enterprises to own immovable property.

This argument is further supported by provisions in the Law on Foreign Investment. The law requires that foreign nationals and companies be treated equally. It would appear that this requirement would extend to the right to acquire property.

In practice, however, foreign citizens and legal persons have encountered resistance from Municipal Cadastral Offices (MCOs) when attempting to register property rights in the cadastre. Obstructing foreigners' property rights exemplifies the obstacles created when cadastral legislation has not defined registration rights, who can register these rights, and the documents and other requirements for registration. In the absence of clear instructions, MCO clerks interpret legislation differently and inconsistently. Legal interpretation may not be the focus of the training they receive to perform their duties. This makes registration an unpredictable process, frustrating citizens and providing disincentives to formalize their property rights.

It is also noted that such practices violate the terms of the signed Stabilization and Association Agreement between Kosovo and the European Union. Article 65.3 of this Agreement requires Kosovo to grant national treatment to EU nationals acquiring real estate on its territory within five years from the entry into force of this Agreement. Article 51.4 of the Agreement similarly states that subsidiaries and branches of EU companies will have, from the entry into force of this Agreement, the right to use and rent real property in Kosovo. It also states that subsidiaries and branches of EU companies will, within five years from the entry into force of this Agreement, have the same right to acquire ownership rights over real property as Kosovar companies and, with regard to public goods/goods of common interest, the same rights enjoyed by Kosovo companies. These rights are crucial to economic development and activity.

5.2 SECURING RIGHTS TO PROPERTY BY ADDRESSING INFORMALITY IN THE IMMOVABLE PROPERTY SECTOR

Informality occurs when formal rights in property (rights registered in the cadastre) are not transferred from the formal rights holder through operation of law. Rights informally transferred are exercised *de facto* by the informal rights holder and generally respected by the community at large but cannot be registered in the cadastre. As a result, rights remain registered in the cadastre in the name of the formal rights holder who already transferred the rights, rather than the person currently exercising rights over the property.

Stakeholder consultations conducted during the development of the NSPR identified four scenarios giving rise to informality in Kosovo today:

1. Cadastral records that were not updated after the death of the rights holder because families failed to initiate inheritance proceedings;
2. Cultural norms and practices that regarded verbal contracts for the sale of land as sufficient legal security;
3. Discriminatory legislation that prohibited the sale of immovable property between Kosovo's Albanian and Serbian ethnic communities resulted in informal sales contracts that could not be registered in the cadastre; and

4. The removal of cadastral documents to Serbia resulted in lack of updated cadastral data, creating a layer of confusion over which set of documents currently provide evidence of property rights in Kosovo.

To obtain legal recognition of his or her rights, an informal rights holder will need to establish a “chain of title” to demonstrate that he or she acquired rights from a formal rights holder. In cases where inheritance proceedings have not been initiated, this will require the informal rights holder to demonstrate that he or she is the lawful heir of the deceased formal rights holder and that his or her claim to the deceased’s immovable property is not contested by other heirs. In cases of verbal and informal contracts, the informal rights holder is required to initiate contested court proceedings to produce evidence that he or she in fact purchased the property from the formal rights holder. Informality persists because inheritance and court proceedings are expensive, time consuming, and burdensome. Cadastral procedures that are not affordable, efficient, transparent and predictable also discourage registration of rights that are legally recognized.

5.2.1. DELAYED INHERITANCE: CADASTRAL RECORDS WERE NOT UPDATED AFTER THE DEATH OF THE RIGHTS HOLDER BECAUSE FAMILIES DID NOT INITIATE INHERITANCE PROCEEDINGS

Delayed inheritance claims are those initiated by family members (potential heirs) of a deceased property rights holder many years after the rights holder’s death (frequently 20 years or more). Kosovo Cadastral Agency (KCA) systematic registration and cadastral reconstruction data indicates that approximately 30% of all applicants attempting to formalize and register rights in immovable property are prevented from doing so because they have not initiated inheritance procedures and rights in the property they possess are currently registered in the name of a deceased ancestor. Additionally, anecdotal information indicates that up to 50% or more of applicants seeking to formalize rights over the more than 350,000 unpermitted buildings through the Government of Kosovo’s legalization program cannot demonstrate rights in the land upon which the buildings are constructed because the land is currently registered in the name of deceased rights holder.¹⁷

Potential heirs often have constructed homes and buildings on the deceased rights holder’s land parcel and exercise *de facto* rights over the property. To formalize these rights, the potential heirs are required to initiate inheritance proceedings. Under current procedures, the potential heirs are required to contact and secure participation of all potential heirs in the proceedings. Because the proceedings are initiated long after the death of the formal rights holder, it is common for the number of potential heirs to have grown to 30 or more. It is also common for many of these potential heirs to have moved from Kosovo to begin new lives. The burden on the potential heirs seeking to formalize their rights to contact and secure the participation of all potential heirs is considerable and is compounded by the unwillingness of some of the potential heirs living abroad to participate in the proceeding. Nevertheless, all parties with an interest in the property must be notified and provided an opportunity to participate. In all inheritance proceedings, it is essential that female family members in particular are provided with information and knowledge required to participate in the proceedings and assert their rights to property as a means to counter cultural norms and societal pressures on female heirs to renounce their rights in favor of male members of their family. Until more streamlined, efficient and affordable administrative procedures are adopted to process delayed inheritance claims and provide sufficient due process safeguards to protect the property rights of all potential heirs, the legal status of these properties will likely remain undetermined indefinitely. Without clear legal status, full rights in the property cannot be exercised and the properties will be excluded from the land market.

5.2.2. VERBAL OR INFORMAL CONTRACTS: INFORMALITY IS PREVELANT IN CASES WHEN TRANSACTIONS HAVE BEEN CONDUCTED IN THE ABSENCE OF A CONTRACT OR WHEN CONTRACTS WERE NOT RECORDED IN THE CADASTRE

In the past, the execution of verbal contracts for the sale of land and immovable property was an accepted means for transacting property rights due to cultural and traditional norms practiced in rural areas of Kosovo. A significant percentage of these verbal contracts were executed between ethnic Serb sellers and ethnic Albanian buyers. Subsequent to 1991, even if a contract document for inter-ethnic sales of property

¹⁷ USAID Kosovo, Property Rights Program. Informality in the Land Sector: The Issue of Delayed Inheritance in Kosovo, April 2016.

existed, the transaction could not be recorded in the cadastre due to discriminatory legislation in effect at the time prohibiting such transactions.

As a result, cadastral records do not provide evidence of many inter-ethnic transactions and continue to reflect the seller as the owner of the property. The lack of sufficient documentation of the sale compels the current informal owner to exercise *de facto* rights over the property. Resolving such informality typically requires the Albanian buyer to initiate a contested claim in the courts to obtain a decision determining that a contract did exist and the rights in the property were freely transacted. Typically the seller has either left or was displaced by the conflict and cannot be located. Inability to secure testimony from the seller creates an evidentiary gap that both the informal seller and the courts have attempted to fill by relying on the legal doctrines of **substantial performance** and **positive prescription** to demonstrate the transaction occurred. Both doctrines are problematic.

- It is questionable whether **substantial performance**, as stated in Article 73 of the Law on Obligations,¹⁸ applies to transactions of immovable property and can be used as grounds for determining existence of a contract.¹⁹ While some courts have held that parties have satisfied the elements of substantial performance through sales price payment and possession of the immovable property, there are conflicting opinions that rights acquired through “legal affairs,”²⁰ also require registration of the contract in the cadastre before the contract can be given legal effect.
- Rights in immovable property can be acquired through **positive prescription**²¹ by demonstrating: “(1) legal holdership, (2) conscientiousness, (3) the passing of the statutory period of time, and (4) possession of the property right by another.” The proprietary possessor must demonstrate twenty (20) years of uninterrupted possession or ten (10) years of uninterrupted possession if the possessor’s rights are registered in the cadastre and no objection to the registration has been raised during this period to meet the requirements of the statutory period and acquire formal rights in the property.²² The application of this doctrine by courts and lawyers has been inconsistent, resulting in judgments favoring claimants even when some criteria were unmet, depriving the true property owners of their rights.

Both doctrines require the presence of the seller in the proceedings to ensure both parties are provided due process. In the event the seller cannot be located, the court is obligated to appoint a **temporary representative** to act in the interest of the seller. Appointment of a temporary representative, however, is a measure of last resort to be used after all means of notifying a party have been exhausted.²³ The use of temporary representatives also raise human rights concerns because in a post-conflict environment, there is the possibility that property was not voluntarily sold, rather it was usurped as a result of displacement. This may not be true for the majority of such cases but its possibility serves to cast a “cloud” over the rights to properties transacted informally, contributing to uncertainty in the land market.

5.2.3. REMOVAL OF CADASTRAL DOCUMENTS TO SERBIA CREATED A LAYER OF CONFUSION OVER WHICH SET OF DOCUMENTS PROVIDES EVIDENCE OF PROPERTY RIGHTS IN KOSOVO

The recently passed Law on the KPCVA mandates the KPCVA to carry out two separate but interrelated functions: to finally resolve conflict related claims previously lodged with the Kosovo Property Agency (KPA) mainly by displaced persons (DPs) currently unable to exercise rights over their properties; and to compare the cadastral records returned from Serbia against the cadastral records in Kosovo to identify and

¹⁸ Law on Obligations, Official Gazette of the Socialist Federal Republic of Yugoslavia Official Gazette 29 /1978, 30 March 1978.

¹⁹ OSCE. *Litigating Ownership of Immovable Property in Kosovo*. March 2009. Retrieved from <http://www.osce.org/kosovo/36815?download=true>.

²⁰ Law on Basic Property Relations, Official Gazette of the Socialist Federal Republic of Yugoslavia 6/1980, 30 January 1980. Article 33.

²¹ *Ibid.*, Article 28.

²² Law on Property and Other Real Rights. Official Gazette of the Republic of Kosovo, Law. No. 03/L-154, 25 June 2009, Article 40.

²³ OSCE. *Litigating Ownership of Immovable Property in Kosovo*. March 2009. p. 20. Retrieved from <http://www.osce.org/kosovo/36815?download=true>.

resolve any discrepancies between the two sets of cadastral documents. The “Explanatory Memorandum” produced for the draft version of the law discussed the need to resolve both the claims filed by DPs and discrepancies in the cadastral records in order to produce a complete and accurate cadastre to help strengthen the country’s legal system and promote the rule of law. Decisions resolving discrepancies in the records have the legal effect of determining rights to property. The KPCVA’s decision making powers create opportunities for implementing administrative procedures to systemically resolve a significant portion of informality in Kosovo that weakens security of tenure for members of both majority and non-majority communities and creates a climate of uncertainty that discourages investment.

Preliminary Identification of Administrative Barriers and Practice that Create Disincentives for Citizens to Register Their Rights

If cadastral procedures are not affordable, efficient, transparent and predictable, they will discourage registration of rights that are legally recognized and help perpetuate informality in Kosovo. Below are the most common administrative barriers, identified by stakeholders during development of the NSPR, to simple, efficient and affordable registration of property rights.

The Law on Obligatory Relationships²⁴ does not stipulate the contract’s form. The absence of standard contract forms requires registration clerks to interpret contract language to identify information required for registration, slowing and complicating the registration process.

Legislation governing registration of property rights does not list all legal documents creating rights in immovable property. The legislation²⁵ does not include decisions of the Housing and Property Claims Commission (HPCC), the Kosovo Property Claims Commission (KPCC)²⁶ recognizing the property rights of displaced persons (DPs); and notary acts documenting property transactions as providing the legal basis for registering rights in the Immovable Property Rights Register (IPRR). Because these decisions are not specifically listed in the legislation as legal documents that create rights leaves room for competing interpretations among registration clerks in some MCOs, thereby refusing to register rights based on these documents.

Outdated Cadastral Data Does Not Correspond to the Current Reality on the Ground. Court decisions and notary acts creating rights in immovable property must contain information describing the property that is “identical with the data registered into the Cadastre (unit number, area, etc.)”²⁷ Widespread informality, removal of cadastral documents to Serbia, and creation of a new cadastral system that introduced a new parcel numbering system make it difficult to include property descriptions in these acts that perfectly match outdated cadastral documents and create significant challenges to establishing a clear “clear chain of title” to demonstrate rights in a parcel of land.

Although MCOs have the authority to correct technical errors such as misspelled topographical names on maps or incorrect personal identification numbers,²⁸ the legislation does not provide clear guidance to MCOs to differentiate between “technical” and “material” errors.²⁹

²⁴ Law on Obligatory Relationships. Official Gazette of the Republic of Kosovo, Law. No. 04/L-077, 30 May 2012.

²⁵ Law on Amending and Supplementing the Law No. 2002/5 on the Establishment of the Immovable Property Rights Registry. Official Gazette of the Republic of Kosovo, Law. 04/L-009, 21 July 2011, Article 3.

²⁶ The HPCC adjudicated claims filed by DPs under the Housing and Property Directorate (HPD). The Kosovo Property Agency (KPA) succeeded the HPD. The KPCC was the adjudicatory body for the KPA.

²⁷ Administrative Instruction on Implementing the Law on Cadastre. Ministry of Environment and Spatial Planning, AI 02/2013, 11 February 2013, Article 8 (2).

²⁸ Law on Cadastre. Official Gazette of the Republic of Kosovo, Law. No. 04/L-013, 29 July 2011, Article 17 referring to the definition of technical errors in Article 1 (19).

²⁹ AI 02/2013 on implementing the Law on Cadastre governs data correction but also does not distinguish between technical and material errors. Administrative Instruction on Implementing the Law on Cadastre. Ministry of Environment and Spatial Planning, AI 02/2013, 11 February 2013, Article 19.

Inconsistent MCO Practices. Ambiguity in the cadastral legislation has led to inconsistent MCO practices regarding the requirement to complete a cadastral survey to update the cadastral records when rights have been transacted. The Law “On Cadastre”³⁰ states that a cadastral survey is required “to enter a new cadastral unit in the cadastre or to change the data about an existing cadastral unit” but this requirement is not mentioned in the implementing Administrative Instruction.³¹ Anecdotal information informs that some MCOs waive the survey requirement in inheritance cases where the applicant is seeking only recognition of his or her rights to the property, while requiring that a survey be conducted if the property right is to be transacted. This practice, however, is followed on an *ad hoc* basis and is not codified in the legislation.

Costs and fees levied for registering rights are irregular among municipalities. The applicable AI sets the fees for registering rights. Fees are based on the legal rights to be registered. These include transaction, gift, administrative or judicial decision, division of joint property, and inheritance, or “change.” In practice, however, municipalities have instituted the additional requirement that any back taxes owed on the property must be paid before the MCO will issue the certificates of ownership. Municipalities should consider whether this is an effective mechanism for increasing the collection of property taxes for own-source revenue. For example, one reason back taxes have accrued in delayed inheritance cases is because the rights holder in whom the property is registered is deceased and there is little incentive for living heirs to have paid taxes over the years on property not registered in their names. The requirement to pay back taxes before initiating formalization proceedings could discourage potential heirs from formalizing their rights. It would also constitute an administrative barrier if the amount owed exceeds their financial means. This would then perpetuate the informality that contributed to the accrual of back taxes in the first place. The additional mandatory municipal transaction tax per cadastral unit, introduced by some municipalities to register immovable property transactions, is an additional disincentive for citizens to formalize their rights.

Some MCOs have refused to register sales transactions without a certificate issued by the municipality (for which a fee is charged) confirming that the municipality will not exercise its rights of pre-emption over the property. This was a requirement under the former regime that has not been explicitly repealed by more recent legislation.³²

An additional barrier to formalize rights created through informal sales transactions is the legal requirement that payments for property sales in excess of €10,000 were made through banks. This is factually impossible for transactions that occurred prior to this requirement coming into effect in 2005.

Transparency of Cadastral Data. Democratic societies and market economies require openness and information in order to operate effectively and efficiently and to develop and grow. This is particularly true as concerns land and rights in land. For this reason it is very important that the records of the Cadastre and Immoveable Property Rights Registry be fully open and easily accessible to the public. This will increase transparency in governance; make important legal and economic information available to society; encourage foreign and local investment; and support the development of dynamic land markets.

Concerns about possible conflicts with the Law on Personal Data Protection have been cited as justification for withholding certain information from the public. Revisions must be made to the Law on Data Protection and other relevant laws to remove all ambiguity surrounding this issue and provide a clear legal basis for the right of the public to have full access to the Cadastre and Immoveable Property Rights Register.

³⁰ Law on Cadastre. Official Gazette of the Republic of Kosovo, Law. No. 04/L-013, 29 July 2011, Article 12.

³¹ Administrative Instruction on Implementing the Law on Cadastre. Ministry of Environment and Spatial Planning, AI 02/2013, 11 February 2013.

³² This was a condition imposed by the Law on Transfer of Immoveable Property, No. 45/81, 29/86 and 28/88, S.L. SAPK, which was not repealed by Kosovo’s new Law on Property and Other Real Rights (Law no. 03/L-154).

5.3 GUARANTEEING AND ENFORCING THE PROPERTY RIGHTS OF DISPLACED PERSONS AND NON-MAJORITY COMMUNITIES

Universally recognized by the European Convention on Human Rights and its Protocols, international law and Kosovo's Constitution, citizens displaced by conflict have a right to return to their homes and immovable properties. Following the adoption of the "Principles on Housing and Property Restitution for Refugees and Displaced Persons," also known as the "Pinheiro Principles,"³³ the concept of return, as understood by the international community, has become "not simply the return to one's country for refugees or one's city or region for DPs, but the return to and re-assertion of control over one's *original home, land or property*; the process of housing and property restitution."³⁴

Completing the property restitution process (which began in 2000) has been a long and difficult process due to the scale of displacement resulting from the conflict and number of claims filed by DPs. As of July 2015, the UNHCR calculated the number of DPs in Kosovo at 17,086, which includes 9,265 Kosovo Serbs and 7,078 Kosovo Albanians. The remainder are Roma and smaller numbers of Ashkali and Egyptians (Albanian-speaking minorities).³⁵ A 2011 assessment estimates that there are still approximately 97,000 people displaced as a result of the 1998-99 war living in Serbia who 'still have needs related to their displacement', the majority of which are ethnic Serbs.³⁶ A total of 42,749 claims were filed with the KPA, mostly by DPs and members of Kosovo's non-majority communities. Of these, 29,450 are pending implementation, including decisions to place property under KPA administration and claims closed for non-cooperation based on the right of claimant to request re-possession or re-open the claim.

In the aftermath of Kosovo's ethnic conflict, final resolution of successful claims adjudicated by the KPA is the priority intervention to strengthen and guarantee rights of the country's non-majority communities. The GoK's commitment to providing all DPs with a final, fair and effective remedy that will enable them to re-assert control over their immovable properties is highlighted in the preamble and Article 4 of the Stabilization and Association Agreement Kosovo executed with the EU.

5.3.1. FINAL RESOLUTION OF CLAIMS LODGED AT THE KPA

It is important to note that the majority of claims have been filed by DPs. The KPA claims resolution process comprises two phases. First, the claim must be adjudicated and if the claim is successful, the rights of the successful claimant will be recognized and be provided legal effect through the KPA decision. Second, the KPA decision must be fully implemented by providing the successful claimant the opportunity to avail him or herself of the remedies provided by law.

The **first phase** has been completed. Of the 42,749 claims filed with the KPA, 41,852 have been adjudicated by the Kosovo Property Claims Commission (KPCC) as of December 2015. Of the additional 897 claims, the KPCC's Executive Secretariat rejected 264 claims as ungrounded and 633 claims were withdrawn by claimants. Adjudication of all filed claims is a significant achievement demonstrating the GoK's commitment to recognize and respect the property rights of DPs.

Once the claim is adjudicated, the KPA decision must be registered in Kosovo's cadastre, if property is not registered in the name of the successful claimant, to provide notice to all of Kosovo's institutions and

³³ See Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons: Final Report of the Special Rapporteur, Paulo Sergio Pinheiro: E/CN.4/Sub.2/2005/17, 28 June 2005. and see also Gomez, M., New Draft Principles on Housing and Property Restitution before the UN Sub-Commission for the Promotion and Protection of Human Rights, Housing and ESC Rights Law Quarterly, Vol. 1, No. 3, December 2004, Centre for Housing Rights and Evictions, Achieving Housing For All, available on www.cohre.org.

³⁴ UNHCR, et al. 2007. Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the 'Pinheiro Principles': Inter-Agency, p. 10.

³⁵ Information retrieved from <http://www.internal-displacement.org/europe-the-caucasus-and-central-asia/kosovo/figures-analysis> Accessed 26 November 2015.

³⁶ Information retrieved from <http://www.internal-displacement.org/europe-the-caucasus-and-central-asia/serbia/figures-analysis>. Accessed 26 November 2015.

citizens of the DP's rights in the immovable property. Additionally, the KPA decision provides the legal basis for the successful claimant to request an eviction to regain possession of his or her immovable property. Registration of the KPA decision will enable Kosovo Police or private bailiffs to confirm the decision's legitimacy prior to executing evictions. Registration of the KPA decision also serves to strengthen due process protections for DPs and mitigates the human rights concerns related to the use of temporary representatives. For example, in proceedings to formalize rights created through informal, inter-ethnic sales contracts, as well as administrative proceedings to expropriate, privatize or formalize unpermitted constructions on immovable property of DPs, adjudicators could research cadastral documents to learn that a DP possesses rights in the property, even if his or her whereabouts are unknown.

Current legislation does not specifically mandate registration of KPA decisions in Kosovo's cadastre. Article 20 of the recent KPCVA law requires registration only of decisions issued by the Property Verification and Adjudication Commission (PVAC) established to resolve discrepancies between the cadastral documents returned from Serbia and those in Kosovo. It does not address registration of decisions issued by the KPCC (or its predecessor the HPCC) or the Property Claims Commission (PCC) created by the KPCVA law. Moreover, KPCC and HPCC decisions are not specifically mentioned in the cadastral legislation as final legal acts that shall be registered.

The **second phase** will be implemented by the KPCVA's Executive Secretariat. According to the KPA, there are currently 29,450 decisions pending implementation. This includes 7,660 decisions that have not yet been delivered to the successful claimant and 9,041 decisions for which the successful claimant was contacted but did not request a remedy. There are 13,009 successful claimants' properties under the KPA's administration and included in its rental scheme.

Remedies to be provided by the Executive Secretariat are listed in Article 18 of the KPCVA law and include evicting the current occupant to reconstitute and return the claimed property to the possession of the successful claimant, placing the claimant's property under KPCVA administration, including the property in a rental scheme, and requesting administrative closure of the claim. Additional remedies available to successful claimant include requests to seize the claimed property, to demolish unlawful constructions, and sell the property at auction.

Article 21.7 of the new KPCVA law states, however, that within 18 months of the law entering into force, the KPCVA shall conclude its mandate to administer and rent properties. The legislative intent for this deadline is to finally conclude the KPA's mandate to serve as a temporary agency for resolving claims and restitution of occupied properties, but not to unilaterally impose on DPs an 18-month deadline within which they must exercise their rights to a remedy.

The GoK is cognizant of its human rights obligations under international law and its SAA with the EU. Pinheiro Principle 2 provides that "all refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land/or property that is factually impossible to restore as determined by an independent, impartial tribunal." The European Court of Human Rights (ECtHR) has found that states have a duty to provide displaced persons secure access to their property:

The Court considers that as long as access to the property is not possible, the State has a duty to take alternative measures in order to secure property rights. The Court refers in that respect to the case of *Doğan and Others*³⁷ concerning internal displacement of villagers, in which it examined in detail the measures taken by the Turkish Government with a view to either facilitating return to villages or to providing DPs with alternative housing or other forms of assistance (cited above, §§ 153-156). The Court would underline that the obligation to take alternative measures does not depend on whether or not the State can be held responsible for the displacement itself. In *Doğan and Others* the Court noted that it was unable to determine the exact cause of the displacement of the applicants and therefore had to confine its consideration to the examination of their complaints

³⁷ ECtHR, Applications nos. 8803/02, 8804/02, 8805/02, Judgment of 29 June 2004.

concerning the denial of access to their possessions. Which measures need to be taken depends on the circumstances of the case.³⁸

Thus, the ECtHR gives great importance to the right to property and the State's duty to provide access and security with respect to the property of DPs, irrespective of whether the State was responsible for creating the circumstances that led to displacement. The GoK is committed to fulfilling its duties and human rights obligations after conclusion of the KPCVA mandate to provide DPs with final, fair and effective remedies that will enable them to re-assert control over their immovable properties. Administration of property was only intended as an interim measure until the claimant chose a final remedy. Final remedies include providing successful claimants with an eviction so they may take possession of their property at any time in the future, placing their property in a rental or leasing scheme, and offering the property for sale through an auction. The GoK will explore options to transition implementation of these remedies from the KPCVA to the Kosovo Police, private bailiffs and private real estate rental and leasing firms. The strategic priority for the GoK now is to begin to develop a plan of action to guide this transition.

Several implementation challenges will need to be addressed during the course of developing the transition plan. The first is to address the on-going issue of illegal re-occupation of properties after a KPA eviction. According to the OSCE report, between 2008 and 2013 KPA referred a total of 326 cases of illegal re-occupation of properties to the prosecution for initiation of criminal procedure. The report assessed that cases take on average two years and three months to process from the time the cases were submitted by the KPA to the prosecutors' offices to a final judgement being rendered by a Court.³⁹ Additionally, some prosecution offices did not process the claims with sufficient urgency, which delayed action and did not pursue penalties that would serve as a sufficient deterrent for preventing future illegal re-occupations.

Second is establishing efficient communication protocols between the KPCVA and successful claimants to provide information they require to select an appropriate remedy. If the KPCVA is required to directly contact each successful claimant, it may take more than the 18 months during which it is to conclude its mandate to administer properties and operate the rental scheme. The KPCVA does not have the mandate to work in Serbia, Montenegro and the Former Yugoslav Republic of Macedonia (FYROM) where the overwhelming majority of its claimants are residing. Additionally, outreach has been implemented in the past through the United Nations High Commissioner for Refugees (UNHCR), and EU funded programs, but such approaches are *ad hoc* and dependent upon donor funding.

Third, the KPCVA law does not address the legal status of properties currently under KPA administration and included in its rental scheme after the KPCVA mandate ends. It also does not address the legal status of the persons to whom the KPA allocated rights of occupation. Families have occupied these properties for years and may have made significant investment in the maintenance and upkeep of the property. Legislation is needed to clarify whether these persons have acquired any rights in the claimed property.

Additionally, clarification is needed regarding the legal status of the 9,041 decisions which are in a form of implementation "limbo" because the claimant never requested a remedy after receiving KPA notice. The new law does not address whether the claim should be administratively closed or remain open indefinitely.

Lastly, it is essential that final HPCC, KPCC and PCC decisions are not re-litigated in the courts. Although these final decisions are legally binding and not subject to challenges or reviews, there have been instances where the courts have allowed cases challenging these final decisions to proceed. It is imperative that such cases are identified and dismissed.

³⁸ ECtHR, Application no. 40167/06, para. 234.

³⁹ OSCE. *Review of Illegal Re-occupation Cases in Kosovo*. February 2015. Retrieved from <http://www.osce.org/kosovo/141131>.

5.3.2. ADDITIONAL ISSUES RELATED TO DISPLACEMENT, ACCESS TO JUSTICE AND HOUSING

The whereabouts of DPs are frequently unknown. This prevents delivery of notice required to provide them with information and knowledge of legal proceedings that impact their rights to property and deny them due process protections.

Fraudulent Transactions. In the chaotic environment immediately after the conflict, displacement created opportunities for a number of fraudulent property transactions through which immovable properties owned by DPs were sold without their knowledge. Policies must be developed to determine whether a party purchased in good faith and how to fairly and efficiently allocate liability. Issues for consideration include whether those who purchased property immediately after the conflict knowingly and willingly accepted the risk that the seller may not have rights in the property and should be held strictly liable if the sale is proven to be fraudulent. Policies will also need to be developed to determine the appropriate remedy in situations where the property was transacted several times and the current owners are good faith purchasers who paid value for the property years after the conflict.

The process of legalizing unpermitted constructions. Concerns have been raised that all citizens in Kosovo, especially those living in the diaspora and DPs, did not have sufficient information and time to comply with the requirements for legalization that were also criticized as having been overly complex. The human rights of any citizen whose property is demolished without sufficient notice and information to comply with the law will have been violated.

The on-going privatization process implemented by the Privatization Agency of Kosovo (PAK). The agency is required to publish formal notification to creditors in newspapers in the Albanian and Serbian languages in Kosovo, Serbia and Montenegro. Additionally, the procedure of mutual legal assistance followed by the Special Chamber of the Supreme Court of Kosovo on Privatization Agency-related matters facilitates the delivery of notice and court summons in privatization and liquidation processes. There are concerns under these procedures that sufficient notice has not been provided to meet human rights standards for due process.

Additionally, a number of Kosovo Serbs participated in restitution proceedings under the former regime.⁴⁰ The law in effect at that time has not been declared discriminatory and presumably has legal effect in Kosovo. The land restituted under these proceedings was socially owned and the rights restituted frequently were not registered in Kosovo's cadastre. There are cases where the restituted land was privatized by PAK or was deemed to have reverted to a municipality that then sold or leased it to third parties. The issue becomes whether the municipality knew or should have known that rights in the land had been transferred to the DP through the restitution law. Similar to the issue of fraud, legislative policy and guidance is needed to determine the appropriate remedy.

Land Expropriation. The notification provisions related to expropriation proceedings also require strengthening. Expropriation constitutes seizing private property. Seizing in the absence of due process of notification is a human rights violation. It is essential that notification procedures are strengthened to provide sufficient notice to DPs, as well as Kosovars in the diaspora and vulnerable communities in Kosovo.

Third Party Constructions. The KPA identified 35 cases where a structure was constructed unlawfully on the land of a successful claimant.⁴¹ KPA attempted to mediate amicable solutions between the parties; and some of 10 cases proved successful through mediation. Consequently, the legal remedy is the demolition of the unlawfully-built structure.⁴² The government has not yet provided the KPA with the

⁴⁰ Official Gazette of the Federal Republic of Yugoslavia. Law on Restitution of Land, 18/91, 41/91 and 44/91, 1991.

⁴¹ Data as per 31 October 2015.

⁴² Section 15 of the Law No. 03-L-079 (Law on Amending UNMIK Regulation 2006/50 on the Resolution of Claims Relating to Private Immovable Property, Including Agricultural and Commercial Property) provides the KPA with a wide range of remedies for the execution of final KPCC decisions and appeals panel judgments including, but not limited to, 'eviction, placing the property under administration, a lease agreement, seizure, demolition of unlawful structures and auction'.

funding it requested to carry out the demolitions, preventing it from implementing the legal remedy. The Constitutional Court of the Republic of Kosovo in its ruling on the so-called 'Jovanovic case' found that the non-execution of the KPCC decision by the KPA, due to lack of funding, was 'in contradiction with the principle of the Rule of Law and constituted a violation of the fundamental human rights guaranteed by the Constitution'.⁴³ Another 33 lawsuits have been lodged against the KPA at the Constitutional Court.⁴⁴

Implementation of HPD, "A" & "C" Category, Decisions. So called "A" category claims pertain to Kosovo Albanians who were terminated from employment due to discriminatory legislation enacted under the former regime. When their employment was terminated, they also lost their rights to socially owned apartments. Typically, the apartment was then allocated to a Kosovo Serb who was subsequently displaced, category "C". Under the legislation governing the Housing and Property Directorate (HPD), claimant "A" could be restituted the apartment and claimant "C" would receive compensation for the rights lost in the apartment. The cost of restituting the so-called "A" claimants is estimated at approximately €3,000,000. Similar to the third party constructions, the KPA has not been able to secure funding from the GoK to pay compensation and the claims of both the Kosovo Albanian and the Kosovo Serb with rights in the property remain unresolved.

Accrued Property Taxes and Utility Bills during Displacement. The Law on Taxes on Immovable Property, Article 5 (3), anticipates that the taxpayer shall be the physical or legal person that actually uses the property if the owner or lawful user of immovable property cannot be determined, or can be determined but has no access to the immovable property.⁴⁵ Nonetheless, selective interpretation of this paragraph in certain municipalities has resulted in DPs being held liable to pay property taxes that were left unpaid by an occupant of the property or a third party. Property taxes must also be paid from Kosovo proper. Moreover, issuance of personal documents is conditioned on payment of all taxes owed to the municipality. Under these circumstances, DPs are liable for tax debts they did not incur and are prevented from accessing personal documents required to exercise their human rights.⁴⁶

Similarly, DPs incur liability for utilities (electricity and water)⁴⁷ that they did not use. The relevant legislation, Law No. 03/L-204, does not explicitly exempt DPs from paying for utilities used in properties over which they do not exercise control and are responsible for the balance owed when they repossess their property.⁴⁸ UNMIK Administrative Direction 2008/5 states that KPA claimants are exempt from paying accumulated municipal public services for the period during which they did not exercise control over their property. An amendment to this Administrative Direction has been prepared for implementation by the KPCVA that will further strengthen protections for DPs.

Access to Justice. DPs are precluded from accessing free legal aid because they do not receive social assistance in Kosovo and possess rights in immovable property. Additionally, the Agency for Free Legal Aid (AFLA) lack resources to effectively provide legal services to meet the needs of DPs. Furthermore, the Law on the Use of Languages is a comprehensive legal document; however, in practice, "significant challenges remain in **access to services in official languages** both at the central and municipal level,

⁴³ Constitutional review regarding non-execution of the Decision GSK-KPA-A-001/12 of the Appellate of the Supreme Court and of the Decision of the Kosovo Property Claims Commission no. KPCC/D/A/114/2011. Constitution Court of the Republic of Kosovo, KI187/13, 16 April 2014.

⁴⁴ Informally confirmed in an interview with Srdjan Staletović, 15 February 2016.

⁴⁵ Law on Taxes on Immovable Property. Official Gazette of the Republic of Kosovo. Law no. 03/L-204, 07 October 2010, Article 5 (3).

⁴⁶ Such as Article 2 of Protocol No. 4 (freedom of movement) of the European Convention on Human Rights and Fundamental Freedoms (ECHR), Article 12 (the right to marry) of the ECHR, and Article 16 (the right to recognition as a person before the law) of the International Covenant on Civil and Political Rights.

⁴⁷ The rules for water supply, as provided by the Law Amending UNMIK Regulation 2004/49 on the Activities of Water, Wastewater, and Solid Waste Service Providers (No. 3/L-086) approved by the Kosovo Assembly on 13 June 2008 in accordance with the Constitution of the Republic of Kosovo, follows the same general principles and raises the same issues as electricity utilities, and will not be discussed separately.

⁴⁸ Article 33 (2) of the applicable Law No.03/L-201 on Electricity states that 'the terms and procedures for billing, bill collection, and payment shall be defined in the Regulation on the General Conditions of Energy Supply issued by the Energy Regulatory Office.' Law on Electricity. Official Gazette of the Republic of Kosovo, Law No. 03/L-201, 07 October 2010.

including languages used by minority communities.”⁴⁹ Finally, the **cost of proceedings and travel** could restrict DPs’ access to court. Under circumstances of displacement or socio-economic conditions, the requirement to pay court fees, along with the prospect of having to pay other related costs such as travel costs, is a *de facto* barrier to judicial review. According to Pinheiro Principle 13(2): “Everyone who has been arbitrarily or unlawfully deprived of property as a consequence of conflict should be able to submit a claim for restitution or compensation free of charge to an independent and impartial body.”⁵⁰ The KPA provided first instance legal review free of cost. However, about 6% of KPA claims were dismissed on procedural or jurisdictional grounds, which are now susceptible of being filed through the ‘normal’ civil court system.⁵¹

Social Housing/Land Allocation. Provisions have been made to assist repatriated persons with temporary shelter and provisional housing through Law No. 03/L-164 on Housing Financing Specific Programs and Law No. 04/L-144 on Allocation for Use and Exchange of Immovable Property of the Municipality. However, municipalities have not made consistent and regular use of this legal framework to assist repatriated persons.⁵² As such, repatriated DPs are at risk of becoming permanently displaced persons. Another issue at the central level is the delay in adopting a three year Kosovo-wide strategy on Social Housing.⁵³

Roma Camps/Settlements. About 100 informal settlements remain inhabited by different ethnic communities, the majority being Roma, Ashkali and Egyptian.⁵⁴ People living in such camps experience residential segregation, poor housing conditions and poor access to basic services and urban infrastructure, including water, electricity, waste collection and adequate public transportation and roads.⁵⁵ The major property-related issues they face are the lack of secure tenure, often due to a lack of property documentation, unregistered constructions and lack of assistance in reconstructing properties destroyed during and after the armed conflict of 1998-1999. The Strategy for Regularization of Informal Settlements 2011-2015 was never approved. Although most municipalities have approved spatial plans that include informal settlements as required by the Law on Spatial Planning, the implementation of these plans and their harmonization with the new requirements of Law no.04/L-174 on Spatial Planning is pending.⁵⁶

5.4 GUARANTEEING AND ENFORCING THE PROPERTY RIGHTS OF WOMEN

Article 46 of Kosovo’s Constitution guarantees the rights of all citizens to own property but women struggle to overcome cultural barriers to inherit immovable property from their birth families and spouses and widespread informality that prevents them from registering their ownership rights in the cadastre. According to the 2011 census, women make up 49.6% of the Kosovo population, yet only 15.24% of women have property registered in their name. When women do not control property, they cannot be full economic actors. Moreover, women’s asset ownership has been demonstrated to have a positive benefit for the well-being of families.

⁴⁹ European Commission, Kosovo Progress Report, 2015, p. 25.

⁵⁰ The same principle is implicitly contained in article 29.2 of the IDP Guiding Principles according to which competent authorities have the duty to assist returned and/or resettled displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon displacement.

⁵¹ See KPCC DEC 135, para 15: ‘Claims which are dismissed as falling outside the Commission’s jurisdiction or for procedural reasons and not on account of the merits of the claim may be capable of resolution through the local courts, subject to the applicable law. In such claims the Commission’s decision does not constitute a *res judicata*’.

⁵² See: ‘An Assessment of the Provision of Social Housing by Municipalities in Kosovo’, OSCE, December 2013 and ‘An Assessment of the Voluntary Returns Process in Kosovo’ OSCE, October 2014, p. 25.

⁵³ European Commission, Kosovo Progress Report, 2015 p. 23.

⁵⁴ Identified by the government in its Strategy and Action Plan for Prevention and Regularization of Informal Settlements in Kosovo 2009-2015 ‘Abandoned Minority’ ERCC, December 2011, p. 51

⁵⁵ See: Faces of Poverty, Faces of Hope: Vulnerability Profiles for Decade of Roma Inclusion Countries’, Bratislava: UNDP, 2005.

⁵⁶ Law on Spatial Planning. Official Gazette of the Republic of Kosovo. Law No. 04/L-174, 07 September 2013, Article 15 and 16.

Due to the fact that most property transfers through inheritance are not formalized, **there are problems with regard to the processes of inheritance.** As long as formal inheritance processes are not followed, it will be difficult to actualize any legal change that will promote asset ownership for women.

Research indicates that heirs are often omitted from the Act of Death, a declarative document that is issued by the Municipal Civil Registry Offices and is intended to list all the family members eligible to inherit immovable property. Courts, notaries and municipal cadastral offices have no independent means to verify if all members of the family eligible to inherit are included in the Act of Death. This creates ample opportunities for families to exclude women heirs.

Women's renunciation of their rights to inherit family property rights is another major obstacle that prevents women from becoming property owners in Kosovo. Due to tradition, cultural pressure and family expectations for women not to inherit the real estate from their birth families, women often decide to give up their property in favor of their brothers.

There are two paths to formalize inheritance: through a notary or through the courts. In both cases, there are **insufficient safeguards to ensure that female heirs who have a legal right to the estate of the deceased are identified.**

Provision for surviving spouses in Kosovo is often insufficient either because the shares of the estate are inadequate or because the marital home was not registered in the name of one of the spouses, but of a different family member, and therefore cannot be considered to be part of the marital property. The fact that property purchased during the marriage is rarely in the name of the female spouse contributes to this problem.

According to the Law on Inheritance, women who renounce their property rights also renounce the rights of their minor children. **There is no custodial oversight to ensure the well-being of minor children.** Not only is this practice outside of European standards regarding the rights of children, it is also a significant national welfare interest in a country where minors are a large percentage of the population.

5.5 USING SECURE RIGHTS TO PROPERTY TO FUEL ECONOMIC GROWTH

Promoting growth in the agriculture sector is a key component in the Government of Kosovo's program for fueling Kosovo's economic development.⁵⁷ Excessive fragmentation of land parcels and unpermitted construction over the past 15 years has significantly reduced the amount of arable land available for investment in Kosovo's agricultural sector, reducing agricultural productivity and potential for economic growth. Legislation and policies are required to treat the existing constructions and promote effective spatial planning to support land consolidation and prevent unpermitted construction in the future. They must also support the Privatization Agency of Kosovo (PAK) to increase the amount of arable land available to private sector investment by privatizing the remaining 17,000 hectares of arable agricultural land that was formerly socially owned and create incentives that will ensure investors use the land for agricultural production rather than speculation.

5.5.1. TREATING UNPERMITTED CONSTRUCTION

A significant portion of Kosovo's housing stock was destroyed during the conflict, creating an urgent need to construct shelter for its population. Construction began in the absence of adequate spatial plans permitting. Unfortunately the practice persisted long after the conflict.

In February 2014, the GoK enacted the Law for Treatment of Constructions without Permit⁵⁸ to regulate the process of legalizing unpermitted constructions. Although unpermitted constructions have contributed to extensive fragmentation of arable lands, the GoK took the policy decision to legalize, rather than attempt

⁵⁷ Government of Kosovo. Program of the Government of the Republic of Kosovo 2015 – 2018. Retrieved from: http://kryeministri-ks.net/repository/docs/Government_Programme_2015-2018_eng_10_mars.pdf.

⁵⁸ Law for Treatment of Constructions without Permit. Official Gazette of the Republic of Kosovo. Law No. 04/L-188, 26 December 2013. During the period of UNMIK administration it attempted to regulate building construction through UNMIK/REG/2000/53, 25 September 2000 "On construction in Kosovo", also known as "Rexhep Luci Regulation on Construction."

widespread demolition of unpermitted constructions which would devastate a significant portion of the country's housing stock and deprive citizens of their investments and right to shelter. Subsequent to adoption of this legislation, the Ministry for Environment and Spatial Planning (MESP) recently established a Registry of Unpermitted Constructions in which 352,836 buildings have been identified and registered. The policy rationale for treatment of unpermitted constructions has two objectives; the first is to formalize rights over buildings that do not jeopardize public health and safety to promote economic growth. Until rights in the building are legalized and registered in the cadastre, they cannot be transacted in the land market or used as collateral to secure finance for investment. Additionally, integration of these buildings into the cadastral system will make it easier for municipalities to levy and collect taxes to increase generation of own-source revenue (OSR). The second objective is to ensure unpermitted constructions are no longer the norm in Kosovo. To achieve this objective, spatial plans and construction permits must be rigorously enforced.

The law in its current form provides only the opportunity to formalize rights to occupy the unpermitted construction. It does not provide procedures through which to define rights in both the building and the land upon which it was constructed to form a single property unit that could be registered in the cadastre and transacted in the land market. The law is also not tailored to address characteristics of the different types of unpermitted constructions and the categories of land upon which they were built. For example, the law does not differentiate between unpermitted construction carried out on land owned by the constructor (i.e. an addition to an existing building registered in the cadastre) and a new building constructed on land over which the constructor possess no rights. In the absence of a framework to guide regularization of the entire spectrum of unpermitted constructions, rights in both the building and the land upon which it was constructed cannot be formalized and then registered in the cadastre.

The legislation also contains rigid criteria for excluding from the amnesty scheme, without exception, unpermitted constructions based on the type of land. All unpermitted constructions built on Public Property are excluded. This criteria serves to exclude a significant amount of the unpermitted constructions the law was intended to formalize. The bulk of unpermitted construction exists in city and town centers delineated as "urban land for construction" on land use maps produced under the former regime. Under the former legal framework this land was categorized as "socially owned land". Kosovo's Constitution transformed all socially owned land into Public Property. Unless the legislation is amended to address this issue, unpermitted constructions in city and town centers cannot be formalized and, according to current legislation, will have to be demolished, contradicting the policy objective the law was intended to achieve.

Similarly, unpermitted constructions on **consolidated and irrigated agricultural land** are excluded without exception. Large concentrations of unpermitted constructions exist on consolidated agricultural land in some areas of Kosovo. In the municipality of Vushtrri/Vučitrn, an estimated 80% of its unpermitted construction is found on this type of land.

The category of **natural parks or special areas and protected zones of cultural areas** is also problematic. The legislation provides no exceptions for existing unpermitted constructions on private property that was subsequently included in these areas and zones, i.e. the Bjeshkët e Nemuna National Park.

The law mandates inclusion of an unpermitted construction onto the "demolition list" in the event an application for formalization is not submitted by the deadline. Many Kosovars in the diaspora and DPs were not provided notice of the law's deadline and other requirements. Demolition of their unpermitted constructions would deny them due process and constitute a violation of their human rights to property. Appeals are to be lodged with the MESP reviewing body. Given the large number of buildings, there is a concern that the Ministry lacks the capacity to handle the potential number of appeals that may be lodged, further constraining due process.

The law also requires payment of fees that exceed the economic means of many Kosovars, creating an administrative barrier to formalization of their rights. Although exemptions are provided to recipients of social assistance, there are no "sliding scale" provisions for low-income families who might not qualify for social assistance. In addition to the concern that notification procedures may not have met human rights standards for due process, the law does not provide for an adequate appeals process.

5.5.2. LAND CONSOLIDATION THROUGH EFFECTIVE SPATIAL PLANS

The current formal spatial planning system was unable to meet the population's demand for housing and regulate large-scale and rapid urbanization that occurred after the conflict. Faced with insurmountable administrative and procedural barriers, and a permitting process that was non-transparent, unpredictable and often corrupt, a population in need of shelter constructed over 350,000 buildings outside the formal system. Unpermitted construction and urban "sprawl" has significantly reduced the amount of arable land and fragmented arable land parcels in rural areas. Based on data produced for the Kosovo Spatial Plan, the amount of arable land per capita is 0.24 ha/inhabitant, significantly below the European average of 0.52 ha/inhabitant. This has decreased agricultural productivity and limited opportunities to fuel economic growth through Kosovo's agriculture sector.

The GoK demonstrated its commitment to address excessive fragmentation of arable land by developing its National Strategy for Land Consolidation to complete the consolidation process begun nearly 30 years ago. Its purpose is to define or redefine tenure and land use rights and configuration of cadastral parcels to increase agricultural productivity. Challenges to completing the process include the failure to register reconfigured parcels in the cadastre and users of the land reverting to boundaries that existed prior to reconfiguration. As a result, perceived rights in the land and its actual use does not correspond to the agricultural activities that were planned under the consolidation strategy. Addressing these challenges and completing the consolidation process is a matter of priority to promote more efficient and productive management of the country's arable land.

Urban land was also fragmented due to the absence of effective spatial planning and regulation of construction. Land per capita is 0.15 ha/inhabitant, which is below the normative standard of 0.17 ha/inhabitant. Current planning practices were inherited by the former centralized socialist system and have not integrated market principles. This hinders a "land development process" through which public and private investment is synchronized to promote investment and wealth creation, stimulating further investment and improving the quality of life for urban inhabitants.

In 2013, the GoK passed a new Law on Spatial Planning,⁵⁹ to address past deficiencies in the planning process. The law's objectives are to promote more balanced and integrated urban and rural planning across the entire territory of a municipality; provide more standardized and transparent planning rules to strengthen the role of local and central government in the planning process; and to remove administrative barriers and streamline procedures to increase efficiency and reduce the time required to issue building permits. As the law is implemented, mechanisms to monitor implementation of the plans, coupled with stronger penalties for unpermitted construction will help prevent unregulated urban sprawl and encroachment onto arable land best suited for agricultural production. The GoK can also begin to move from a process focused solely on regulating spatial planning to a process that includes the development and management of land. This will provide incentives to encourage land consolidation projects in both rural and urban areas. In the course of developing and implementing spatial plans, the GoK must comply with Kosovo's Constitution and legislation, and the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) standards.

5.5.3. COMPLETE PRIVATIZATION OF SOE LAND TO INCREASE AMOUNT OF ARABLE AGRICULTURAL LAND AVAILABLE FOR INVESTMENT AND AGRICULTURAL PRODUCTION

The Privatization Agency of Kosovo (PAK) is mandated to privatize "socially owned" land consolidated⁶⁰ to increase investment in arable land to increase agricultural productivity. Thus far, 22,000 hectares of socially-owned arable land have been sold through spin-off privatization or asset liquidation. Some 17,000 hectares of arable land have yet to be privatized.

⁵⁹ Law on Spatial Planning, Official Gazette of the Republic of Kosovo, Law No. 04/L-174, 07 September 2013,

⁶⁰ See 'Ligji për Arondacionin, Komacionin dhe Riparcelimin e Tokës', Official Gazette of the Socialist Autonomous Province of Kosovo, 32/76; 'Ligji për Komacionin', Official Gazette of the Socialist Autonomous Province of Kosovo, 31/87.

Privatization has not produced the expected level of investment and productivity because spatial plans in place have not been effectively enforced. Poor enforcement has enabled investors to either build unpermitted constructions on arable land best suited for agricultural production or simply hold on to the land for speculative purposes rather than to grow crops. Moreover, PAK lacks the mandate to monitor how privatized land is used and to compel investors to use it in accordance with the terms of the privatization agreement. This has contributed to further land fragmentation.

A litigious environment surrounding the privatization process further inhibits productive use of arable land. By October 2015, PAK had received and processed 5,095 claims disputing PAK's liquidation of social owned enterprise assets, primarily land. Many of these claims could not be settled administratively and were appealed before the Special Chamber of Supreme Court, which has resolved nearly 3,000 claims since June 2003. Most claims were filed by so-called "former owners" who asserted they had rights in the land prior to its nationalization and requested restitution of the land or payment of compensation despite the fact there is no legal basis for such claims in Kosovo. Despite Supreme Court rulings that such claims lacked merit, they continued to be filed. Additionally, municipalities, who held rights over SOE land under the former regime have filed claims in court contesting the privatization of land it considers property of the municipality. This may account for PAK complaints that municipalities have prevented it from obtaining cadastral records for arable SOE land. In this litigious environment rife with rent-seeking behavior, the transaction (and social) costs of privatization are increased, and investors do not perceive their rights in the privatized land is secure. This reduces both investor confidence and willingness to make investments to increase land productivity required to fuel economic growth.

Arable land is privatized through a 99-year lease. This unfamiliar form of private land tenure concerns investors that do not accept the tenure as secure enough to justify making investments in the land in order to increase agricultural productivity. This perception of insecurity creates further incentives for speculative investments in the land.

Additionally, legislation has not been developed to enable PAK to implement its mandate to privatize or not socially owned forest lands. It is anticipated that legislation foreseen under this Strategy to further clarify the status of socially owned property and clearly define rights and obligations related to the categories of state and public property. While the Law on Forestry recognizes forests and forestry land as public property under state ownership, legislation on PAK treats them as socially-owned property.

5.5.4. CREATING INCENTIVES TO ENCOURAGE PRODUCTIVE USE OF ARABLE LAND AND GENERATE OWN SOURCE REVENUE FOR MUNICIPALITIES

Although fifty-three percent (53%) of the total land area in Kosovo is classified as agricultural land,⁶¹ much of it is left fallow. No cost is incurred when land is left fallow or possessed for speculative purposes. Currently, taxes are levied on buildings and it is foreseen that a tax on land will be introduced in 2017. A transparent, fair and effectively implemented land and immovable property tax regime will create an incentive for the owners of arable land to either produce crops to recoup the cost of taxes or sell or lease the land to others who will put the land to more productive use.⁶² A tax on land will also increase the amount own-source revenue (OSR) collected by municipalities to finance investments in public infrastructure

Tax rates are to be calculated according to market value.⁶³ The tax applies to all immovable properties located in the territory of Kosovo, with some exemptions,⁶⁴ regardless whether the property has formal

⁶¹ USAID. USAID Country Profile: Property Rights and Resource Governance, 2010, p. 4. Retrieved from: http://www.usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Kosovo_Profile.pdf

⁶² SIDA, STA, MoF, ProTax 2 Project Plan, 2014, p. 6.

⁶³ Law on Amending and Supplementing the Law on Tax on Immovable Property. Official Gazette of the Republic of Kosovo. Law No. 04/L-204, 20 April 2012, Article 6.

⁶⁴ Ibid., Articles 4, 8.

legal status. All natural or legal persons that own or use property are obligated to pay tax.⁶⁵ Since 2010, the amount of property tax revenue collected by local governments has increased by an average of 13% annually. Revenue in 2014 was approximately €20,400,000. Despite this progress, greater performance can be achieved.

A tax on property constitutes a restriction on an individual's property rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) explicitly recognizes the right of a state to impose taxes and take measures that are necessary to secure their payment.⁶⁶ Although jurisprudence of the European Court of Human Rights (ECtHR) provides states with a wide margin of appreciation for deciding what kind of tax policy to pursue, state power is not unlimited. A proper balance must be struck between the legitimate aim of generating revenue to achieve public policy objectives and mitigating risks of creating excessive demands on low income and poor families. Kosovo's tax law provides a deduction for primary residences valued at €10,000 or less. This amount, however, has not been adjusted to reflect the rise in property values. Additionally, any unused portion of the deduction cannot be applied to other taxes, including the tax on land. This may create an undue economic burden in poor and vulnerable families, including female-headed households and families among non-majority communities. The law also provides options to defer payment of taxes but imposes interest during the period of deferral.

The primary constraint to implementing a market value tax scheme is the development of a methodology to determine market value in the absence of accurate and reliable data about actual prices paid for immovable property. There is also limited capacity in the private sector, and almost none in the public, to conduct market-based valuations. Market value must be accurately determined in cases of state expropriation of private rights to property to ensure adequate compensation is paid and human rights are protected. Accurate market valuation will also inform development of multilayer value zones to determine land tax rates to generate OSR, municipal land development plans and support mortgage-based lending.

Municipalities face challenges identifying the properties to be taxed due to widespread informality and outdated cadastral records and the on-going process of assigning addresses to immovable property. Identifying the persons obligated to pay the tax is also challenging. A significant portion of rights in the cadastre are registered in the name of deceased people. The legislation does not specify who is responsible to pay taxes on the deceased's property. It also does not specify tax liability for properties co-owned or possessed and the party responsible for paying back taxes owed on transacted properties.

To address these challenges, municipalities have hired field inspectors to gather additional information from the field. But, this is time consuming and does not always produce accurate data. Municipalities do not have the capacity to consistently deliver tax bills to property owners and possessors on a yearly basis. Tax payers are not informed about their tax liabilities and are not diligent in making payments. This both reduces generation of OSR and contributes to accumulation of a debt in back taxes that may become insurmountable.

The municipal level lacks the capacity to collect taxes. Without accurate information about property owners and possessors, tax collectors cannot efficiently deliver tax bills.

⁶⁵ Ibid., Article 5.

⁶⁶ First protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art.1.

6.0 RECOMMENDED COURSE OF ACTION

6.1 RECOMMENDATIONS: SECURING RIGHTS TO PROPERTY BY STRENGTHENING THE LEGAL FRAMEWORK

The Civil Code will contain a stand-alone piece of legislation dedicated to regulating all rights to private property in Kosovo. A separate piece of legislation, not to be incorporated into the Civil Code, should regulate rights to all property that is not privately owned. This piece of legislation should address, in one law, issues related to socially owned, as well as public and state (including municipal) owned property.

6.1.1. TRANSFORMATION OF RIGHTS TO SOCIALLY OWNED PROPERTY

- The legislation will convert socially owned rights (to urban land for construction) and 99-year leases into a right of ownership in fee simple. The legislation should clearly state that the land and building constructed above it are joined into a single property unit.
- In cases where the buildings were legally constructed on the land according to the legal framework in place, the rights in fee simple over the single property unit (land and building) could then be registered in the Municipal Cadastral Office upon completion of the requirements for registration of rights.
- In cases where buildings were not constructed in accordance with the legal requirements for construction, procedures will be developed under the process for legalizing unpermitted constructions, as discussed below under Section 5.
- With regards to 99-year leases and “urban land for construction,” the new legislation will regulate the transfer of a right in fee simple. Once the rights in fee simple are created, they will be regulated by the Law on Property and Other Real Rights that will be incorporated into the Civil Code.

6.1.2. LEGISLATION GOVERNING PUBLIC AND STATE PROPERTY

- Legislation should be drafted to clarify that public property is a general legal category which consists of state property and municipal property. This would resolve confusion over the difference between public property and state property. The law would also list in detail all assets which are owned by the Republic of Kosovo as state property. The law could follow the ideas and suggestions established in the Government’s concept note on a draft law on public property when considering the management of state property.
- Municipal property would be defined as property where the municipality is registered as a holder of a right of use. Provisions should be drafted to govern the management and transfer of municipal property. Property registered in the name of the former Yugoslavia, Serbia and their administrative bodies and agencies, including former social-political organizations of Kosovo, should be transformed into State property. In all cases where there is a right of use of socially owned immovable property and it is not clear who is the holder of such right or if a registered holder still exists, the right of use would be transformed into state property; any person who, in this specific case, makes a claim to the contrary has the burden of proof.

6.1.3. RIGHTS OF FOREIGN CITIZENS TO OWN PROPERTY IN KOSOVO

In order to ensure Kosovo’s compliance with the Stabilization and Association Agreement concerning the treatment of EU nationals’ property rights in Kosovo, the recommended policy measure is to amend the Law on Property and other Real Rights. The revision must explicitly provide for the right of foreign nationals to acquire and transfer immovable property rights in Kosovo. The rights of foreign persons to acquire and transfer immovable property may, however, be restricted in certain geographic areas such as the practice in Croatia and Montenegro where the legislator determined that it is in the public interest to reserve ownership solely for nationals, provided such restrictions are in accordance with the Stabilization and Association Agreement. The legislator may also opt for a policy of no restrictions for foreigners to

acquire and transfer immovable property rights, as is the practice in Germany. However, it is necessary that foreigners' rights to acquire and transfer immovable property are codified in law in order to eliminate speculations about whether such rights exist and to establish a uniform administrative practice. The amendments to the Law on Property and other Real Rights would be supported by guidelines issued by the Ministry of Justice elucidating the rights of EU nationals to acquire and transfer immovable property rights.

6.1.4. REVIEWING THE LEGAL PROPERTY FRAMEWORK

A review of the legal property framework (the provisions between the legislation described above and the amended Law on Property and Other Real Rights) is necessary to eliminate inconsistencies and to provide suggestions for a uniform use and application of the developed definitions in the amended Law on Property Rights and other Real Rights and the new Law on Public Property. The review process would also suggest replacing or eliminating existing inconsistent or obsolete provisions, or even entire laws, which will have become outdated due to the new provisions.

6.2. RECOMMENDATIONS: SECURING RIGHTS TO PROPERTY BY ADDRESSING INFORMALITY IN THE IMMOVABLE PROPERTY SECTOR

Informality in the immovable property sector will be resolved when informal rights exercised *de facto* are recognized as law and cadastral records are updated to accurately reflect the rights recognized and in whose name they are registered. Progress made to formalize rights will be measured by the number of cadastral documents.

Five strategic initiatives are proposed to resolve informality at scale: (1) Develop new procedures and processes to make delayed inheritance proceedings more streamlined, efficient, predictable and affordable for citizens to encourage them to formalize rights; (2) Develop “enhanced” notification procedures and utilize the legal doctrine of “Constructive Notice” to increase efficiency while providing due process protections; (3) Utilize administrative processes to provide legal recognition of informal rights in order that they may be registered; (4) Develop procedures to formalize rights in unpermitted constructions (this is discussed under Section 6.5.1 below but noted here because of the large impact it will achieve to improve the accuracy of cadastral records); and (5) Create incentives and remove administrative barriers to encourage registration of formalized rights in the cadastre.

6.2.1. DEVELOP DELAYED INHERITANCE PROCEDURES

Development of procedures that will make uncontested inheritance proceedings simpler, faster and more affordable is a strategic measure to achieve impact to formalize rights and update cadastral records at scale. Up to 50% of cadastral records are registered in the name of deceased rights holders. The package of reforms required to encourage informal rights holders to initiate inheritance proceedings to obtain legal recognition of their rights are neither extensive nor difficult to implement and will achieve significant impact to update and improve the accuracy of cadastral data. Once rights are transferred from the deceased rights holder and formalized, they can be transacted in the land market and used to secure loans for investment.

Analysis of delayed inheritance proceedings and recommendations to encourage informal rights holders to initiate uncontested inheritance proceedings are provided in the USAID Property Rights Program (PRP) Report “Informality in the Land Sector: The Issue of Delayed Inheritance in Kosovo”, attached as Annex 5. The report found that although both courts and notaries have jurisdiction over uncontested inheritance claims, the notary system was established to perform the exact type of administrative review required to process uncontested inheritance claims and can do so more quickly and efficiently than the courts. It was recommended that the MoJ, as a matter of priority, determine whether notaries or courts will have exclusive jurisdiction over such claims. The report also provided a comprehensive set of recommendations to streamline uncontested inheritance proceedings.

The report found that efficient resolution of these claims was constrained by the challenges faced to deliver notice of the proceedings to parties whose whereabouts are unknown. In the context of delayed inheritance, all potential heirs with an interest in the deceased property must be informed about the proceedings in order to be afforded the opportunity to participate in the proceedings and assert rights in the deceased's

property. Failure to provide notice of proceedings and the opportunity to participate would violate the human right to due process. Delivery of notice is frequently complicated and time consuming because of the large number of potential heirs living in the diaspora.

These challenges are not unique to delayed inheritance claims. They also constrain efficient court resolution of contested cases, KPA (now KPCVA) adjudication of DPs' rights and implementation of successful claims, and any other proceedings impacting the property rights of Kosovars in the diaspora, DPs, or vulnerable communities who do not enjoy easy access to state institutions. These proceedings include expropriation, demolition of unpermitted constructions, privatization of socially owned assets, duty to pay taxes, and any other claims seeking formalization of rights in property.

Legal provisions governing notice typically require hand delivery, publication in a Kosovo newspaper or posting on a municipal message board. Institutions often lack the personnel to deliver notice by hand; and local publication will not reach Kosovars in the diaspora or DPs. Notification procedures need to be "enhanced" to utilize digital technology and tailored to reach Kosovars outside the country to provide them with information and knowledge required to exercise and protect their rights to property. Because delivery of notice is a due process requirement for all proceedings impacting rights to property, development of more effective notice procedures should be treated as a strategic priority. Additionally, development of enhanced notification procedures, coupled with the legal doctrine of constructive notice, will increase efficiency of proceedings impacting rights while safeguard rights to due process.

6.2.2. DEVELOP "ENHANCED" NOTIFICATION PROCEDURES AND UTILIZE CONSTRUCTIVE NOTICE TO INCREASE EFFICIENCY WHILE PROVIDING DUE PROCESS PROTECTIONS

Enhanced notification procedures

The Republic of Estonia's MoJ official online publication and public electronic database for inheritance proceedings provides an example of an effective means for providing notice and complying with applicable human rights standards for due process. The purpose of establishing this publicly accessible database was to disseminate as much information as possible about inheritance proceedings conducted by notaries to protect the rights of persons entitled to inherit.

The populations of Kosovo, and its neighbors Serbia, Montenegro and the Former Yugoslav Republic of Macedonia, are starting to favor digital age technologies over newspapers to obtain information. The Internet penetration rate in Kosovo is 76.6%, a rate comparable to most developed countries. Availability and access to the Internet, popularity of social media and more affordable "smart" phones create opportunities to develop enhanced notification procedures to more widely disseminate notice of proceedings to the largest number of people. This makes publication of notice on the Republic of Kosovo and civil society websites and in social media a viable option. Other forms of mass media including newspaper, television, radio and SMS delivered via mobile phone networks could be utilized as well. Additional outreach could be implemented through Kosovo's embassies abroad to inform Kosovars in the diaspora.

It is essential, however, that notice procedures are robust enough to protect the rights of all Kosovars including those in the diaspora, DPs, or vulnerable communities who do not enjoy easy access to state institutions. They should be based on requirements and procedures in other European countries, such as Estonia, that have proven effective to achieve efficiency and protect rights.

Moreover, technology alone is not sufficient to ensure that rights are fully protected. The sources of notice and means of accessing information will need to be widely advertised to enable all parties with rights or an interest in the proceedings to obtain the knowledge and information required to assert their rights. It will be essential to carefully monitor and document the influence of the procedures to demonstrate that due process standards are met.

In regards proceedings involving DPs in neighboring countries, specific modalities for delivering notices could be prescribed through bilateral agreements between the Governments of Kosovo and Serbia, Montenegro and the Former Yugoslav Republic of Macedonia. Such modalities might address how to make

direct contact with displaced persons and government agencies and civil society organizations supporting the vulnerable. Through direct contact, additional information could be presented to increase awareness of the procedures, create a better understanding of how to participate in the proceedings and more diligently monitor rights through the use of digital technology.

Constructive Notice

Once enhanced notification procedures and mechanisms are in place to effectively disseminate notice outside Kosovo, the legal doctrine of constructive notice could be introduced to improve efficiency and safeguard the rights of due process. Constructive notice is currently applied in Kosovo. It is authorized under the Law on Non-Contentious Procedure (notice of the proceedings to be published in a Kosovo newspaper for 6 months if identity of heirs is not known) and immovable property registration regulations (notice of changes to cadastral information to be posted on the municipal notice board for 5 days).

Constructive notice is a legal doctrine that presumes all parties with an interest in the claim are provided with information and knowledge about the claim that can be acquired by normal means. This would include through websites and other technologies. Different from actual notice, where information is physically delivered to the parties, constructive notice is a form of implied notice deemed by law to provide parties with the information required to participate in the claim and the opportunity to do so.

The doctrine requires that once a notice of a claim or proceeding is disseminated, it is the responsibility of the parties with an interest in the proceeding to come forward to assert their rights. If the relevant parties do not come forward within a prescribed deadline, they are precluded from asserting their rights and the proceedings can then move forward. Provided the notification is sufficiently robust, constructive notice removes, for example the burden on potential heirs to ensure the participation of all potential heirs in uncontested inheritance proceedings. The doctrine also promotes finality of the rights registered in the cadastre. The doctrine will also help achieve finality of administrative decisions providing legal recognition of informal rights to enable their registration in Kosovo's cadastre.

6.2.3. UTILIZE ADMINISTRATIVE PROCESSES TO PROVIDE LEGAL RECOGNITION OF INFORMAL RIGHTS

Informal rights holders exercising *de facto* rights over immovable property must establish a “chain of title” to demonstrate that he or she acquired rights from a formal rights holder in a lawful manner before these rights can be legally recognized and then formalized through registration in the cadastre. Kosovo's court and cadastral systems do not provide citizens with access to streamlined administrative procedures and processes to adjudicate and offer legal recognition of informal rights. The only means available to citizens to formalize rights in property they exercise *de facto*, i.e. rights created through a verbal contract, is to initiate a contested claim in the courts, even if the rights are not contested. This is an inefficient use of the court's limited resources to resolve disputes. Moreover, court claims are expensive and time consuming. This creates disincentives to formalize rights and helps to perpetuate informality.

The Government of Kosovo recognizes the need to comprehensively and systemically resolve the legacy of informality that existed prior to the conflict, which was compounded by displacement during the conflict and that is now manifested in outdated and inaccurate cadastral documents. The recent legislation establishing the KPCVA provides an opportunity to utilize administrative processes to systemically adjudicate and provide legal recognition of informal rights. The KPCVA's Property Verification and Adjudication Commission (PVAC) is mandated to review and compare all cadastral documents returned from Serbia against Kosovo's cadastral documents to adjudicate (subject to right to appeal in the courts) the rights that will be finally registered in the Kosovo cadastre.

The PVAC's function is to confirm the “chain of title” that provides the basis for determining which rights will be registered. In carrying out its function, it will utilize streamlined administrative procedures informed by the practices developed by the KPA through adjudication of nearly 43,000 property rights claims. The KPCVA is also mandated to implement the backlog of KPA decisions filed by persons displaced by the conflict, the majority of whom were ethnic Serbs. Because one of the drivers of informality in Kosovo were informal contracts for the sale of immovable property between ethnic Albanians and Serbs, KPCVA

institutional capacity, effective and streamlined administrative adjudication procedures and best practices, could be applied in administrative proceedings to more efficiently resolve a root cause of informality.

Adjudicating and providing legal recognition of informal rights through administrative procedures from a relevant state institution would secure legal recognition of informal rights. Alternatively, the KPCVA could fulfill this function given KPCVA's prior experience and procedures already installed.

Regardless of which option is pursued, it is vital that the GoK initiate timely measures to encourage and enable citizens to access an efficient and affordable administrative adjudication process to obtain legal recognition of their informal rights and then register their rights in the cadastre. Utilization of enhanced notification and constructive notice procedures would serve to strengthen security and finality of rights adjudicated through administrative processes. Information about rights recognized and pending registration would be published and accessible to citizens who, through the exercise of reasonable diligence, would be provided with notice of proceedings impacting their rights to property. Currently, cadastral registration legislation requires only that notice of a change in the registry be posted on the municipal notice board for five days. Enhanced notice using digital technology and a longer period within which to file an objection would significantly increase the reach of notice and provide all interested parties the opportunity to contest the rights to be registered. If a party does not exercise reasonable diligence, he or she would be precluded from contesting the rights registered.

In the absence of such an adjudication process, few options exist to update and improve the accuracy of the country's cadastral data. The lack of an accurate and reliable property rights registry is the greatest constraint to ensuring the rights of all Kosovars: its men, women, members of non-majority communities as well as those displaced by conflict.

6.2.4. DEVELOP PROCEDURES TO FORMALIZE RIGHTS IN UNPERMITTED CONSTRUCTIONS

More than 350,000 homes, buildings and shops constructed without a permit lack legal status and the rights in them cannot be registered in the cadastre. This is a significant source of informality that impacts economic growth. One of the issues preventing formalization of rights in these buildings is delayed inheritance because applicants seeking to formalize rights in a building cannot demonstrate rights in the land upon which it is constructed. Reforms to make it easier to obtain an inheritance decision will make it easier to formalize rights over these buildings and achieve great impact to update and improve the accuracy of cadastral information. Additional recommendations to improve the process of treating unpermitted constructions are discussed below under Section 6.5.1.

6.2.5. CREATE INCENTIVES AND REMOVE ADMINISTRATIVE BARRIERS TO ENCOURAGE REGISTRATION OF FORMALIZED RIGHTS IN THE CADASTRE

Once informal rights receive legal recognition, they must be registered in the cadastre to complete the formalization process. Rights registered in the cadastre can be more efficiently exercised and enforced by the courts. It is essential that once rights are formalized, they are registered and never again transacted outside the system. Incentives need to be developed to encourage citizens to register their rights. Additionally, administrative requirements that increase cost and time, that are not transparent and lead to unpredictable results create barriers that will discourage registration of rights that are legally recognized.

As an overarching recommendation, the Kosovo Cadastral Agency (KCA) should, as a matter of priority, conduct a full business analysis of its procedures to ensure accurate registration requirements, which will help increase the efficiency, affordability, transparency and predictability of the registration process.⁶⁷ The objective of the analysis should be to identify any administrative barriers, high fees and inconsistent practices and develop recommendations to ensure consistent registration practices in all MCOs. In advance of this analysis, stakeholders provided the following recommendations to improve service delivery in the MCOs:

- A list of all documents eligible for registering property in the cadastre must be produced and included in legislation regulating the cadastral system;
- Strengthen the institutional relationship between the KCA and MCOs to establish uniform business processes and standards for delivery of services;
- Develop standard forms, templates and instructions to register and transact rights;
- Standardized templates and forms should be designed by the KCA, courts, notaries and relevant administrative agencies to provide information required to describe the property as well as include the descriptions in decisions or other legal acts that convey property rights. This will help resolve minor issues such as misspelled names or discrepancies in parcel numbering that can delay registration of rights;
- Create clear procedures and guidelines to ensure consistent registration practices in all MCOs;
- Develop a training program for MCO staff to improve service delivery;
- Design policies that distinguish between the recognition/formalization of rights and the transaction of rights and procedures, costs and fees respective to each;
- Subsidize or waive the fees and costs charged to citizens seeking only the recognition and formalization of rights as is currently done in cadastral zones selected for reconstruction;
- Design policies and guidelines for determining the circumstances under which cadastral surveys (typically the highest cost in the registration process) are required and those under which “general boundaries” are sufficient to demonstrate rights; and
- Design policies in consultation with the Ministry of Finance to provide tax incentives to encourage the formalization of rights – for example a one-time amnesty for the payment of back property taxes, possibly linked with some form of inheritance tax relief.

⁶⁷ At present, the World Bank, through its Real Estate Cadastre and Registration Project (RECAP) that provides the KCA with funding and technical assistance to reconstruct Kosovo’s Cadastre, is conducting a full business process analysis of its registration procedures and processes. It is expected that this analysis will identify registration fees and costs that exceed the economic means of the average Kosovo citizen; and registration requirements and procedures that are unnecessarily cumbersome, time consuming and unpredictable. Identifying and addressing such issues will help to remove barriers and disincentives to register rights conveyed through uncontested inheritance proceedings. The comprehensive recommendations the RECAP cadastral experts will produce to improve the registration process should be incorporated into this Strategy once they are completed.

6.3 RECOMMENDATIONS: GUARANTEEING AND ENFORCING THE PROPERTY RIGHTS OF DISPLACED PERSONS AND NON-MAJORITY COMMUNITIES

DPs are not a homogenous group and provision of an effective remedy depends on the needs and circumstances of each. Some have full ownership rights in their properties while others have only a right of use. They also possess rights over different types of property. A remedy appropriate to agricultural land may not be appropriate for a residential flat. Each DP will have different needs and desires regarding access to and exercising control over their properties.

The GoK must ensure that the full range of remedies currently provided in law will be made available to DPs and implemented after the temporary mandate of the KPCVA concludes. The most permanent remedy available to the successful claimant is restitution of his or her property. Registration of the KPA decision in the cadastre is the first step to ensure the right of successful claimants to request an eviction, is protected. The KPA decision provides the legal basis for an eviction. Registration of the decision would enable the successful claimant to contact the Kosovo Police or private bailiff to request an eviction. The police or bailiff could then check the cadastre to confirm a KPA decision has been issued for the claimed property and that the request for eviction is legally justified. Currently, the KPA has executed evictions free of charge. Policies should be developed to determine the circumstances under which successful claimants will be required to pay for evictions in the future. Consideration might be given to providing successful claimants with the right to request one eviction to be executed by the Kosovo Police free of charge and any subsequent evictions to be executed by a private bailiff for a fee.

The rental scheme currently operated by the KPA can serve as a model for implementing the additional remedies through the private sector. Under the rental scheme, a portion of the rent charged for the property is retained by the KPA to cover the costs of operating the scheme. Private real estate firms could follow a similar model and take over the rental of successful claimants' residential properties from the KPCVA. Similarly, private firms could act on the behalf of successful claimants to lease their agricultural land or offer for sale through auction other immovable property.

Improved means for communicating with successful claimants should be established to support the transition of functions from the KPCVA to private entities. Utilization of "enhanced" notice would help facilitate two-way dialog between DPs and state institutions. Through two-way dialog, successful claimants would be able to articulate their needs and preferences and the KPCVA would provide information they need to select and access available remedies.

The KPCVA should take the lead to develop processes for delivery of remedy through private sector entities during the 18-month period prior to which its mandate to administer and rent properties ends. It may be too ambitious to expect all its duties could be completely transferred to private entities during this period. The GoK should consider whether the KPCVA would continue to provide oversight of the transition after 18 months or whether another state institution, for example the Ministry for Minorities and Returns, should provide oversight.

6.3.1. ENSURE IMPLEMENTATION OF REMEDIES AVAILABLE TO DISPLACED PERSONS AFTER THE CONCLUSION OF THE KPCVA MANDATE

In advance of the conclusion of KPCVA's mandate to administer and rent successful claimants' properties, the following steps are proposed to be taken by the KPCVA to facilitate a "hand over" of its functions to private entities:

Step 1: Document that all HPCC, KPCC and PCC decisions recognizing the rights of successful claimants are registered in Kosovo's cadastral system. It is essential that these final and binding decisions are reflected in cadastral records to ensure the rights of the successful claimant will be recognized and enforced by state institutions, especially the right to request that an eviction be carried out by the Kosovo Police and private bailiffs. Registration also provides greater transparency about the rights of the successful claimant and provide due process protections in any proceedings that would impact his or her rights to property.

Step 2: Develop procedures and specifications to guide the handover of KPCVA functions to private entities. Clearly defined procedures must be developed to ensure successful claimants can directly request the Kosovo Police and/or private bailiffs to execute evictions. Procedures will need to be developed for successful claimants as well as police, bailiffs and the cadastre. KPCVA should pilot and test these procedures during the 18-month transition period. The requirements for renting, leasing and auctioning successful claimants' immovable properties should be defined, and procedures developed to provide successful claimants access to remedies. Procedures should also be developed to document that the remedies are available and accessible by successful claimants.

Step 3: Facilitate and strengthen two-way communication between the KPCVA and DPs. Enhanced notice procedures should be utilized to reduce the time required and burden on the KPCVA to directly contact each successful claimant. While Article 13 of the KPCVA law authorizes the use of public notice, it does not define its requirements. An Administrative Instruction should be developed to specify the requirements of robust, enhanced notice.

Through enhanced notice, successful claimants would be informed that the KPCVA will not contact them directly about a remedy, rather it is the successful claimants' obligation to contact the KPCVA to request remedy. This will improve efficiency while also safeguarding the rights of the successful claimant.

The KPA has established a call center to facilitate better communication with claimants to speed up processing of their claims. The call center would also serve as the means through which successful claimants would request remedy from the KPCVA during the transition period and through which successful claimants will be informed about how to request a remedy after the KPCVA mandate concludes. Because it may be too ambitious to expect the KPCVA to complete the transfer of its duties to the private sector and with procedures in place to enable successful claimants to request remedy from the private sector, the GoK should consider keeping the call center in place after 18 months.

Step 4: Prior to concluding its mandate, the KPCVA should document that procedures are in place to enable successful claimants to request evictions after the KPCVA mandate concludes and can access remedy from the private sector.

6.3.2. DEVELOP INTERVENTIONS TO ADDRESS ISSUES RELATED TO DISPLACEMENT, ACCESS TO JUSTICE AND HOUSING

The following interventions are proposed to address the most significant issues identified by stakeholders during the development of the NSPR as creating challenges for DPs and members of non-majority communities to exercise their rights to property and constraints to accessing justice and housing:

- To prevent illegal re-occupation after a KPA eviction, develop procedures that would require the KPCVA (or enable a successful claimant after two evictions of KPCVA or after two evictions of KPCVA or conclusion of the KPCVA mandate) to request the Kosovo Police or private bailiff to immediately enforce the original KPA eviction order prior to referring the matter to the Prosecutor's Office. Internal guidelines should be developed for prosecutors to seek criminal penalties for illegal re-occupation and be trained to effectively prosecute criminal charges to deter illegal re-occupation in the future.
- Develop judicial guidelines to prevent re-litigation of final HPCC, KPCC and PCC decisions. The Kosovo Judicial Council, through the Office of the Disciplinary Counsel, should initiate procedures to take disciplinary action against judges who willfully ignore the guidelines to hold them accountable.
- The GoK should either provide funds from its budget or seek donor funding to implement demolition of unlawful third party constructions on illegally occupied land, or to provide compensation for claims filed with the KPA on the grounds of third party constructions and to compensate the so-called "A"& "C" category claimants.
- Fully implement provisions contained in Article 5 of Law No. 03/L-204 "on Taxes on Immovable Property" to ensure DPs are not liable for taxes on properties over which they cannot exercise effective

control; and the provisions contained in the Administrative Instruction on ‘Exempting property rights holders from payment of utilities for properties under KPCVA administration.’

- Implement “enhanced notification” procedures in all proceedings impacting rights to property, including expropriation, demolition of unpermitted constructions, privatization, delayed inheritance proceedings and any other claims seeking formalization of rights in property to ensure DPs have access to information required to protect their rights to property.
- Ensure “enhanced notification” is applied to reduce instances where temporary representatives are appointed to represent the interests of DPs in court proceedings and establish accountability mechanisms to ensure that, in cases where temporary representatives must be appointed, the legal representation they provide is of sufficient quality to protect the rights of the DP.
- Develop policies to efficiently allocate risks and liability to achieve equitable remedies in cases of fraudulent sales of immovable property.
- Revise eligibility criteria for free legal aid to include DPs and persons residing in informal settlements; and, substantially increase government funding for the free legal aid Agency.
- Introduce unified court fee regulations, whereby DPs in precarious socio-economic conditions are exempted from paying court expenses (DPs’ occupied properties should not be counted as personal wealth).
- Fully implement in practice the provisions contained in Law No. 02/L-37 “On the Use of Languages” to ensure members of non-majority communities can access information and fully participate in proceedings impacting their rights to property.
- Adopt the three-year Kosovo-wide strategy on Social Housing and strengthen consistent implementation of Law No. 03/L-164 on Housing and Financing Specific Programs and Law No. 04/L-144 on Allocation for Use and Exchange of Immovable Property of the Municipality to ensure sustainable housing solutions for repatriated persons.
- Harmonize and implement the Strategy for Regularization of Informal Settlements 2011-2015 with provisions of the Law on Spatial Planning and procedures to regularize unpermitted constructions to provide comprehensive and sustainable solutions for the 100 informal settlements primarily inhabited by members of the RAE communities.

6.4 RECOMMENDATIONS: GUARANTEEING AND ENFORCING THE PROPERTY RIGHTS OF WOMEN

Although Kosovo’s Constitution guarantees women the same rights to immovable property as men, cultural norms and practices exert pressure on women to renounce their rights to inherit property from birth families and spouses. Minor children of women pressured to renounce are also prevented from inheriting family property. Women cohabitating with men in informal marriages face even greater challenges to inherit. Presented below are recommended procedural measures to prevent exclusion of women from inheritance proceedings and safeguard the rights of women and their minor children to inherit immovable property.

6.4.1. CONSISTENT RECOGNITION OF ‘FACTUAL’ MARRIAGES

While the Family Law recognizes ‘Factual’ marriages immediately after they have occurred, the Inheritance Law does not treat them as equivalent to a registered marriage, excluding spouses from property claims after the other’s death, unless they were married for ten years, or 5 years with children. The Laws on Inheritance and Family should be amended and harmonized to provide legal recognition of cohabiting relationships as marriages after 5 years or 3 years if there are children from the relationship to prioritize the well-being of children to align with the practices of other countries in the region. Additionally, consideration should be given to creating a legal option for the registration of cohabiting relationships in which the parties

do not wish to be married. This would align Kosovo practice with other European countries where more couples choose to cohabitate without being married,

6.4.2. DEVELOPMENT OF SAFEGUARDS IN CASES OF EXCLUSION AND RENUNCIATION

In the absence of independent means through which judges and notaries can verify the identity of family members eligible to inherit immovable property, heirs who bring an inheritance action to a notary or a judge should be required to swear upon penalty of law that they are not concealing any known heirs. In parallel, the data management capacity of the Civil Registry System should be improved to enable municipal offices to produce an accurate and reliable list of the deceased's family members.

Any heirs declaring their intent to renounce their right to inherit should be required to make this declaration at a special session before a judge or notary. It is essential that during this session, female heirs are fully informed about their rights and the value of their portion of the estate that they intend to renounce before taking a final decision. Additional procedural safeguards are discussed in the Delayed Inheritance report attached as Annex 5 to protect against the exclusion and concealment of female heirs,

The Law on Inheritance requires division of an estate among all surviving heirs as soon as the inheritance procedure is completed, which can occur immediately following death. This makes it legally possible for a surviving spouse to lose their residence soon after the death of their spouse if the property is divided into shares and distributed.

To foreclose the possibility that a surviving spouse will lose the right to inhabit his or her home, the Law on Inheritance should be amended to delay the mandatory estate distribution until after the death of the surviving spouse to allow the living spouse access to the marital home and property until death. An alternative approach would be to allow the surviving spouse use rights to the marital home and property until their death or remarriage. Both of these mechanisms protect the welfare of the surviving spouse and can be implemented regardless of whether a female spouse took steps to renounce her rights to inherit from her spouse.

6.4.3. PROTECTING THE INHERITANCE RIGHTS OF MINOR CHILDREN

Currently, any heir that renounces the right to inherit also renounces the inheritance of their minor children, without any external actor involved to ensure the best interests of the child. While on most occasions parents appropriately represent the minor's interests, when it comes to the renunciation of inherited property, virtually all countries involve non-family legal representation to guarantee the best interests of the child. This special protection does not undermine the primary responsibility of the parent or legal guardian to care for the child, but is a state action to protect the interests of future citizens.

Article 130.3 of the Law on Inheritance currently states, "If his successors are minors, permission for the renouncement from the custodian body shall not be required." This law needs to be altered to require oversight of a custodial body whenever courts decide on cases regarding the renunciation of the rights of minors. However, if uncontested inheritance cases are heard before they are notarized, there also needs to be procedural safeguards, outside of the family, that provide oversight of the best interests of the child. Indeed, given that uncontested inheritance cases handled by notaries are inconsistent, it is necessary to have some sort of custodial oversight that protects the rights of minors. Custodial oversight is recommended for contracts "inter-vivos" to ensure that the interests of minors are protected.

The custodial body described in Kosovo's draft Law on Child Protection is a municipal-based body for protection of the interests of the child, consisting of a group of experts that operates in the Centre for Social Work. This body is the most appropriate type of oversight for the protection of the best interests of the child in uncontested inheritance cases as it safeguards the interests of minor children in other legal contexts. Because inheritance cases can be legally complex and young people may not be able to fully assess the benefits or disadvantages to them; it has been suggested that the custodial body provide advice to young adults up to age 21 as to their best interests.

6.5 RECOMMENDATIONS: USING SECURE RIGHTS TO PROPERTY TO FUEL ECONOMIC GROWTH

Recommended interventions under this Objective are intended to mitigate the harmful effects of unpermitted constructions by clarifying the legal status of rights in both the building and the land upon which it was constructed to form a single property unit that can then be registered in the cadastre and transacted in the land market. This will unlock the economic benefits that can be realized from the investment in the construction (i.e. use it as collateral to obtain financing for investment) and market transactions of formalized rights. At the same time, spatial plans must be enforced to prevent unpermitted constructions from encroaching on fragmenting arable land needed for increasing agricultural productivity and growth of Kosovo's agricultural sector. Spatial plans can also be used to create incentives to consolidate land to promote development. Interventions are also recommended to increase the amount of arable land privatized, provide greater security for investors and create incentives to help ensure agricultural land sold to investors is used for agricultural production and not as a speculative investment.

6.5.1. TREAT UNPERMITTED CONSTRUCTIONS

The current legislation provides applicants only the opportunity to formalize their rights to occupy the unpermitted construction. Amendments should be developed that create incentives to encourage formalization and provide the legal mechanism through which applicants can formalize rights in both the building and land as a single property unit and then register their rights over this property unit in Kosovo's cadastre.

The amended legislation should be tailored to efficiently formalize rights according to the circumstances surrounding each type of unpermitted construction. In cases where the applicants possess rights in the land on which the unpermitted building was constructed, fees should be less and procedures simplified to create incentives to formalize rights that exist *de facto* and do not impact the rights of third parties or present risks to public health and safety. Under such circumstances, the legal mechanism for registering rights over a single property unit in the cadastre should also be streamlined and made affordable for all applicants.

Legislation should also address circumstances under which the unpermitted construction encroaches, in whole or in part, on land owned by third parties. Under these circumstances policies and legislative guidance is required to arrive at a fair and equitable solution to assign clear legal status to the rights in the land and the building. Options include allowing the parties to resolve the issue themselves. They could, for example, agree a price to be paid by the constructor for the land encroached upon, or agree that the land owner would take rights in the unpermitted construction. Another option would be for the state to expropriate the land in question and then pay market-based compensation to the land owner. Ideally, an accurate and comprehensive market value map of Kosovo will be developed to determine fair compensation in compliance with applicable human rights standards.

It is essential that due process safeguards are in place to ensure land owners have information and knowledge to protect their rights. Enhanced notification procedures should be utilized to ensure all land owners, especially those in diaspora, DPs and members of non-majority communities are provided notice to enable them to participate in the proceedings.

To ensure the overarching objective of the amnesty scheme is not frustrated, exemption clauses should be developed to provide a more flexible approach to determine eligibility. This is preferable to rigid categorical exclusions that would preclude large numbers of otherwise suitable unpermitted constructions from being formalized.

The formalization process must be accessible to all Kosovars. Fees should be reduced for Kosovars with low incomes and cumbersome administrative barriers, such as the requirement to provide architectural drawings with applications, should be eliminated. Incentives should be developed to encourage women headed households to formalize their property rights.

6.5.2. LAND CONSOLIDATION THROUGH EFFECTIVE SPATIAL PLANS

Before effective land consolidation initiatives can have effect, it is first necessary to prevent unpermitted constructions from further fragmenting land parcels in rural and urban areas. Procedures to obtain building permissions should be made simpler, more affordable and transparent to encourage citizens to follow planning procedures and to reward them for doing so.

Municipalities should increase emphasis on monitoring and enforcing spatial plans and strengthen enforcement powers of building inspectors to prevent unpermitted construction at the time actual construction begins. Penalties in Kosovo's Criminal Code and administrative instructions should be rigorously enforced to serve as an effective deterrent. In parallel, outreach and education campaigns should be targeted at both municipal officials and the public at large to inform them of the severity of the issue and the penalties for not complying with the spatial plan.

After strengthening mechanisms to enforce spatial plans, municipalities should begin to implement Land Value Capture (LVC) tools to encourage land consolidation and promote development objectives. Such tools emphasize planning as a development process rather than a mechanism to regulate construction of residential buildings. The tools also create incentives for land owners to contribute land and invest in larger scale public development projects.

In parallel, it is important to conduct a review of policies and legislation on land consolidation focusing on unfinished agricultural land consolidation projects initiated in 1980s.

Transformation of forest and forest land from socially-owned property to state property and harmonization of the Law on Forest and PAK Legislation also has implications on effective use of land. Any public development projects that require expropriation of private land must comply with the provisions of Kosovo law and applicable human rights standards. This requires clear criteria for determining whether the expropriation serves a public interest and, if so, that adequate compensation based on the market value of the land expropriated is paid to its private owner.

6.5.3. PRIVATIZATION OF FORMERLY SOCIALLY OWNED ARABLE LAND

Investors who purchased SOE land through privatization procedures must perceive their rights in the land as secure before they will make the level of investment required to increase agricultural productivity and help fuel economic growth. Conversion of the 99-year lease issued by PAK into rights of ownership in fee simple will help to strengthen tenure security for investors. Investors also need to be protected from ungrounded lawsuits seeking restitution for land consolidated under the former regime. The Kosovo Judicial Council should apply sanctions against judges who allow claims not grounded in law to proceed against purchasers of privatized SOE land.

Once privatized, mechanisms must be strengthened to ensure that purchasers put arable agricultural land to productive use rather than as a speculative investment. If PAK lacks the mandate or resources to monitor and enforce the terms of the privatization sale, the GoK should either expand its mandate and resources or create another body to carry out this function.

6.5.4. CREATE INCENTIVES TO ENCOURAGE MARKET TRANSACTIONS AND PRODUCTIVE USE OF ARABLE LAND

Imposition of a tax on land will create an incentive for owners of arable agricultural land to either use the land for agricultural production or lease the land to someone that will. Imposition of a rational and fair taxation scheme is constrained by a lack of information about actual market prices with which to determine rates at which land will be taxed. Procedures must be developed to guide market-based appraisals and require reporting of actual prices paid for immovable property and recording this information in the cadastre. The use of private appraisers should be considered.

The purpose of the appraisal is to provide market data with which to determine tax rates. The tax rates imposed by the GoK, however, should be calculated not to exceed the ability of Kosovars to pay. Policies will need to be developed to provide tax relief for poor and vulnerable members of Kosovo society.

Once an accurate, fair and equitable tax rate is established, capacity at the municipal level must be built to efficiently deliver tax bills and collect taxes. Effective collection of tax revenue will significantly increase the amount of OSR generated by the municipality.

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MINISTRIA E DREJTËSISË / MINISTARSTVO PRAVDE
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2. Në cilësinë e ekspertëve ftohen përfaqësues të Programit për të Drejta Pronësore të USAID-it, përfaqësues të Projektit Kodë Civil dhe të Drejtat Pronësore i financuar nga BE që zbatohet nga GIZ, si dhe sipas nevojës dhe interesimit të tyre edhe institucione dhe ekspertë tjerë vendorë dhe ndërkombëtarë.

3. Sekretarinë e Grupit Punues nga pika 1 e këtij Vendimi, e përbëjnë:

- 3.1. Ruzhdi Osmani – Udhëheqës i Divizionit për Integrim Evropian – MD;
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4. Grupi punues mund të krijojë në mënyrë *ad hoc* nëngrupe punuese për të adresuar tema të caktuara që do të përfshihen në strategji. Përbërja e nëngrupeve punuese varet nga temat që këto nëngrupe adresojnë.

5. Grupi Punues obligohet ta përgatitë strategjinë nga pika 1 e këtij vendimi dhe dokumentet përcjellëse, ashtu siç kërkohet me Udhëzimin Administrativ Nr. 02/2012 për procedurat, kriteret dhe metodologjinë e përgatitjes dhe miratimit të dokumenteve strategjike dhe planeve për zbatimin e tyre.

6. Grupi Punues, strategjinë nga pika 1 e këtij vendimi duhet ta dorëzoj te Sekretari i Përgjithshëm i Ministrisë së Drejtësisë, brenda afatit ligjor.

7. Vendimi hyn në fuqi në ditën e nënshkrimit.



Vendimi i dërgohet:

- Anëtarëve të Grupit Punues;
- Kabinetit të Ministrisë, dhe
- Arkivit të MD-së.



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MINISTRIA E DREJTËSISË - MINISTARSTVO PRAVDE - MINISTRY OF JUSTICE

NATIONAL STRATEGY ON PROPERTY RIGHTS

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NATIONAL STRATEGY ON PROPERTY RIGHTS

DONORS/INTERNATIONAL PARTNERS THAT WERE REPRESENTED DURING THE PROCESS OF
DRAFTING THE NATIONAL STRATEGY ON PROPERTY RIGHTS

ANNEX 3

1.	USAID Kosovo
2.	USAID Property Rights Program
3.	USAID Partnerships for Development Program
4.	USAID Contract Law Enforcement Program
5.	USAID AGRO
6.	USAID Engagement for Equity Project
7.	EU Office in Kosovo
8.	EU Support to Civil Code and Property Rights Project
9.	IRUSP Implementation and Enforcement of Rural Spatial Planning
10.	Norwegian Mapping Authority
11.	Swiss Cooperation Office
12.	World Bank Real Estate, Cadastre and Registration Project (RECAP)
13.	SIDA - ProTax 2 Project
14.	OSCE Kosovo
15.	UNDP Kosovo
16.	UNHCR



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PROPERTY RIGHTS PROGRAM (PRP)

CONCEPT NOTES TO INFORM DEVELOPMENT OF THE MINISTRY
OF JUSTICE'S NATIONAL STRATEGY ON PROPERTY RIGHTS FOR
KOSOVO

APRIL 2016

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ANNEX 4

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PROPERTY RIGHTS PROGRAM (PRP)

CONCEPT NOTES TO INFORM DEVELOPMENT OF THE MINISTRY
OF JUSTICE'S NATIONAL STRATEGY ON PROPERTY RIGHTS FOR
KOSOVO

ANNEX 4

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BACKGROUND AND PURPOSE

Utilizable land is a crucial factor in any society's economic prosperity and growth. The overall economic flourishing of an entire country depends largely on the **general ability to create viable and efficient land markets** and thus, in essence, “**move land into more efficient and productive hands**”¹ (closer examined in Pillar 2). Inversely, land lying fallow (both literally and figuratively) inherently exerts a paralyzing effect, stifling progress and inevitably leading to or perpetuating poor economic performance.

Against that background, Kosovo is particularly dependent on a vibrant land market, since one of the country's major challenges currently is the exigence to evolve and **transform its growth model** from one driven by remittances and consumption to one promoted by investment and trade.

This involves not only the need to **incentivize productive use of land**, but, on a broader and more fundamental note, to **clearly define and protect property rights** (discussed in further detail in Pillar 1), which will ensure sufficient legal certainty to inspire confidence and faith in investors and provide the basis for efficient transferability and economically optimized allocation of land. In order to accomplish these goals, a functional legal infrastructure needs to be implemented, one that will streamline the mechanics of registries and provide for a competent administration of the system, specifically aligned to the particular challenges and circumstances of Kosovo's parameters and underlying conditions. In connection with that, the recognition, determination and protection of property rights in Kosovo needs to be clarified and streamlined in order to **adequately and efficiently regulate the acquisition of property in Kosovo** (examined in pillar 3).

At the same time, striving for optimized economic applicability cannot be pursued limitlessly, but has to be approached under the **encompassing regime of relevant Human Rights**, an example of which is vividly illustrated by several property related issues affecting minority communities in Kosovo (discussed in Pillar 4) as well as the pressing concern of promoting equality by guaranteeing and enforcing the Property Rights of Women (discussed in Pillar 5).

¹ Dam, Land, Law and Economic Development, 2006, p. 4.

PILLAR # 1

DEFINITION OF

PROPERTY

RIGHTS IN

KOSOVO

ANNEX 4

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1. RATIONALE

1.1 Situation Assessment

Rule of law and legal certainty with respect to property rights are essential prerequisites for a vibrant market economy and for the protection of the human right to property. This is particularly important in the current context especially in view of the Stabilization and Association Agreement (SAA) between the European Union and Kosovo as well as Kosovo's National Development Strategy 2020 (NDS) and the Economic Reform Program 2016 (ERP). The rule of law standards in Kosovo are set by the Constitution of the Republic of Kosovo which follows the European Convention on Human Rights and Fundamental Freedoms and its Protocols. The principle of legal certainty, a critical component of rule of law, requires property rights to be clearly defined by law. It is important that the law clearly prescribes the different types of property rights, that it determines who is entitled to which property rights under which circumstances, and what are the rights, entitlements and obligations associated with each type of property right.

Against this background, Pillar 1 serves as the fundamental groundwork with a horizontal scope, ultimately aiming at providing, on a more basic level, the preconditions for the overarching theme of putting land to economically beneficial use, taken up by Pillar 2 in a more concretized way with individual problem areas in mind² and further specified in the remaining pillars.

Each property rights type has its specific bundle of rights associated with, and this bundle of rights must be clearly defined. In accordance with the case law of the European Court of Human Rights, the law that defines property rights must be sufficiently accessible, precise and foreseeable in its application in order to avoid any risk of arbitrariness.³ The law must be written with sufficient clarity and accounted for a legitimate purpose to give the individual adequate protection against arbitrary interference.⁴ **The legal system as such must ensure legislative clarity and coherence in order to avoid uncertainty and ambiguity for the persons concerned and prevent conflicting interpretations of legal provisions.**⁵

Property rights legislation in Kosovo lacks this standard of legal certainty. A report prepared by the Organization for Security and Cooperation in Europe in 2006 portrayed the property rights situation in Kosovo as follows:

The legal framework regulating property rights is so confusing and disperse, that it creates an extra difficulty for the courts in applying the law. The property laws currently in force are numerous and scattered through several legal texts, regulating all different aspects of property rights and often making reference to institutions which no longer exist. To complicate the situation further, since 1999 several UNMIK Regulations have consecutively been adopted on property matters that were previously regulated by the Yugoslav laws, resulting in tremendous legislative confusion, with no clarity as to the interaction between the many pre-UNMIK laws on property rights and the successive amendments to the system by new UNMIK Regulations. This prolific and unsystematic legislative production has created an extremely complicated legal framework difficult to understand and to apply by the courts dealing with property transactions (let alone by the individuals who are supposed to follow the legal requirements in property contracts), thus affecting the resolution of property disputes.

Since then the legal situation has not necessarily improved. To the contrary, an additional layer of legal complexity was added by Kosovo's declaration of independence in 2008 and the adoption of the new

² Cf. Concept Note Pillar 2.

³ Novik v. Ukraine, No. 48068/06.

⁴ Olsson v. Sweden (No. 1), No.10465/83, §61, A 130.

⁵ Tudor v. Romania, no. 21911/03, judgment of 24 March 2009, final on 24 June 2009.

Constitution of the Republic of Kosovo. New property rights legislation was subsequently adopted by the institutions of the Republic of Kosovo, sometimes explicitly repealing prior legislation, sometimes leaving it in force, and sometimes just amending it. There are now three layers of legislation that regulate property rights, i.e. pre-1989 laws of the former Yugoslavia, UNMIK legislation and legislation adopted by the Republic of Kosovo.

The Constitution of Kosovo guarantees the right to property and the right to judicial protection when the right has been violated or denied. The constitutional provisions on property rights reflect the human rights standard established in the European Convention on Human Rights and must be interpreted in accordance with the case-law of the European Court of Human Rights.

Private property rights are reasonably well defined in the Law on Property and other Real Rights and addressed in a number of related laws, such as the Law on Obligational Relationships, the Law on Inheritance, the Law on Non-Contentious Procedure, the Law on Contentious Procedure and the Law on Establishing the Immovable Property Rights Register. The Law on Property and other Real Rights defines ownership as the most comprehensive property right on an asset authorizing the owner to freely use the asset, dispose of it and exclude others from any interference with it (Article 18). The law also clearly distinguishes between ownership and possession, the latter being the factual control of an asset which entails certain legal consequences. Any possible “real rights” related to immovable property are defined in the law, such as mortgages, servitudes and similar encumbrances (e.g. a newly introduced right of construction). The contractual transfer of immovable property requires a valid contract between the transferor and the transferee as a legal basis and the registration of the change of ownership in the immovable property rights register. An effective property rights registration system is therefore of utmost importance for the functioning of the property rights system and for ensuring legal certainty and clarity, a matter that is addressed in Concept Note #3.

Non-private property rights types, such as state property, socially owned property, public property, or municipal property, lack a comprehensive and consistent legal framework and the necessary level of definition and clarity. This leads to legal uncertainty and ambiguity with respect to who owns what rights under these property rights types. These different property rights types are used in legislation without proper terminological consistency and with uncertainty as to their meaning and content. **It is not always clear who is indeed the owner of public property or of state property, it is unclear what is precisely socially owned property and whether it indeed still exists as a property right in Kosovo, and, last but not least, it is not clear who has which entitlements and obligations under these different property rights types. There is also uncertainty if and to what extent foreigners may own immovable property in Kosovo. The relevant provisions in the Constitution are ambiguous and allow for different interpretations which lead to an inconsistent application of the law in practice.**

The purpose of this Concept Note is therefore to address the above issues and make recommendations for improving the quality of legislation to enhance legal certainty and clarity with respect to the definition of these property rights.

1.2 Current Policies

The Ministry of Justice has initiated the development of Kosovo’s strategic framework on property rights which will guide the Government of Kosovo’s reform efforts to achieve that property rights are clearly defined in the legal framework.⁶ One of the key objectives of the strategy is the development of a legal framework that clearly defines rights and creates legal conditions for marketable land rights consistent with the European Union Acquis. The Ministry of Justice has identified the following issues which are considered important to be addressed in order to achieve this objective:

⁶ Ministry of Justice, “National Strategy on Property Rights – Issues Document”, July 2015, at 2.

1. Transformation of socialist-oriented rights defined in the legal framework of the former Socialist Federal Republic of Yugoslavia (SFRY) still applicable in Kosovo today into rights more compatible with development of a vibrant land market
2. Addressing the legal status of construction land in urban areas to create one clearly defined legal right over the building and the land upon which it was constructed
3. Clarifying the rights of foreign citizens to own property in Kosovo
4. Clarifying the status of 99-year leases.

This is clear evidence that the Ministry of Justice has identified that the lack of clearly defined property rights leads to legal uncertainty and to an erosion of rule of law in the area of property rights which creates not only serious impediments for investment, business and the development of a market economy but also allows for arbitrariness and interferences with the constitutionally guaranteed right to property.

The present policy initiative of the Ministry of Justice was preceded by the establishment in 2012 of the position of a Coordinator of Property Rights within the Office of the Prime Minister. The establishment of this position was considered necessary in order to have a focal point at highest political level to coordinate across government ministries and agencies property rights policies and related issues. The effectiveness of the Coordinator of Property Rights in ensuring inter-ministerial coordination in developing property rights related policies and legislation was limited. At present, this position is vacant and its functions are not being exercised at all.

According to Regulation 02/2011 on the Areas of Administrative Responsibility of the Office of the Prime Minister and Ministries, as amended by Regulation 07/2011, there is no specific ministry which is responsible for issues related to property rights policies, standards and regulations. This is the reason why individual ministries prepare legislation which affects property rights with limited coordination and cooperation with other ministries and agencies, and this bears the risk of fragmented and incoherent legislation and definition of property rights.

Following the signing of the Stabilization and Association Agreement with the European Union, the Government prepared in December 2015 a National Program for the Implementation of the Stabilization and Association Agreement (National Program). The National Program specifically refers to Article 119 (1) of the Constitution of the Republic of Kosovo and concludes that the Constitution recognizes public and private property and constitutional categories of property rights. The National Program sets out that since the different property rights types are determined by Constitution, the definition of the scope and content of these property rights types is delegated to the legislative branch. While the Law on Property and other Real Rights deals with private property rights, there is no law which deals with public property in general. However, the statement made in the National Program that the Constitution only recognizes public and private property, ignores the existence of state property and municipal property as distinct types of property rights.

Different draft laws, which have an impact on property rights, are currently in process. The Ministry of Justice has prepared a concept document on a draft Law on Public Property which intends to define what public property is and how such property should be managed. A draft Law on the Kosovo Property and Comparison Agency intends to replace the existing Kosovo Property Agency and to address the discrepancies between the original pre June 1999 cadastral records removed from Kosovo by Serbian authorities and the present day cadastral records in Kosovo with respect to private property, private commercial property and private property of religious communities, and finish the mandate of the KPA. A new draft Law on Forests intends to amend the existing legislation on forests and to establish a comprehensive regulatory framework for the management of forests and forestland. A draft Law on Strategic Investments includes provisions authorizing the government to transfer property rights over state and publicly owned property to strategic investors qualified as such by the

government. A key problem with this draft law is that it considers the property of publicly owned enterprises as the property of the Republic of Kosovo without taking into consideration that the Republic of Kosovo is only a shareholder in these enterprises, which have a completely separate legal personality from the state. The Government may transfer the property of a publicly owned enterprise to a strategic investor, i.e. to expropriate the enterprise, and the draft law does not require any compensation to be paid to the enterprise for such expropriation. This example shows again the consequences of a lack of clearly defined property rights system where it is not clear who owns what and who has which entitlements under which property rights type.

Overall, current policies related to defining and coordinating property rights are weak with the exception of the current efforts of the Ministry of Justice to develop a strategic framework on property rights. This is reflected in the EU's Progress Report on Kosovo 2015 which plainly concludes that "there was no progress on property rights".

1.3 Problem Definition

The problems with legal certainty concerning property rights are structured into five interrelated groups. The first group relates to the systemic problems with property rights definition at constitutional level. **The lack of a precise definition in the Constitution of the different property rights types trickles down and results in the same lack of precise definition of property rights in legislation.** This is primarily reflected in the second group, i.e. socially owned property, which according to the argument made in this Concept Note, does no longer exist as it has been transformed into state property. However, this transformation is not accurately reflected in legislation and it has significant implications especially for the 99-years leasehold in socially owned property and urban construction land, which by law is also still socially owned property. Given that socially owned property does not exist by virtue of the Constitution, the third group relates to legal differences between state property and public property. Again, lack of legal clarity as to the difference between these two property rights types in the Constitution is reflected in primary legislation and leads to legal uncertainty. The fourth group deals with municipal property as another non-private property rights type and the problems associated with the precise content of this property right type and its relationship to state property. Last but not least, the question addressed in the fifth group, i.e. if foreigners are entitled to own immovable property in Kosovo, is of fundamental importance for the development of a competitive market economy and ensuring effective protection of human rights.

1.3.1 Overall Property Rights System

There is uncertainty as to which types of property rights actually exist in Kosovo's property rights system as set out in the Constitution. The legal terminology in laws is not consistent and that leads to confusion about the meaning of terms being used, such as state property, public property, socially owned property, municipal property, private property, and property of public interest.

The Constitution provides that the types of property should be defined by law (Article 121.1). This provision creates the impression that the Constitution is silent as to the different types of property rights and that the types of property rights will be defined by legislation. However, the Constitution is not silent as to the different types of property rights. Article 119.1 mentions explicitly private and public property, which means that both types of property rights are recognized by the Constitution as legal institutions. However, the Constitution does not define these two property rights types, which leads to various interpretations of their meaning and content. These different interpretations lead to legal uncertainty and ambiguity in legal practice.

Private property is specifically recognized and protected by the Constitution through Article 46, which guarantees the right to own property. This provision must be interpreted in accordance with Protocol

I of the European Convention on Human Rights which is directly applicable in Kosovo (Article 22). Private property rights are also defined with sufficient precision in the Law on Property and other Real Rights which follows the Continental-European concept of private property.

The use of the term “public property” is less clear in regard of its meaning and content. Article 121.3 of the Constitution mentions publicly owned resources which would include natural resources and publicly owned infrastructure. Article 122.1 refers to natural resources of the Republic of Kosovo which include water, air space, mineral resources and other natural resources including land, flora and fauna, other parts of nature, immovable property and other goods of special cultural, historic, economic and ecologic importance (Article 122.2). However, the denomination “natural resources of the Republic of Kosovo” does not necessarily imply that they are owned by the Republic of Kosovo. If all immovable property, which is included as a natural resource of the Republic of Kosovo, was owned by the Republic of Kosovo then the existence of private property rights to immovable property, which is also guaranteed by the Constitution, would be negated. The same argument applies if all natural resources, including immovable property, would be indiscriminately publicly owned.

The Constitution also refers to state property. Article 119.9 of the Constitution provides that the Republic of Kosovo exercises its ownership function over any enterprise it controls. It is not clear if state property is the same as public property. If it was the same, then the question is why the Constitution uses two different terms for the same property rights type. In the alternative, state property and public property are two different property rights types. But then it is not clear where the difference is between the two property rights types. The questions is also, if the state owns state property, who owns then public property?

The Constitution, in its original version of 2008, also referred to socially owned property. Article 159.2 of the original version of the Constitution of 2008 determined that all socially owned interests in property and enterprises in Kosovo are owned by the Republic of Kosovo. This provision was important in two aspects: (i) it acknowledged that socially owned property was a property type that existed at the time when the Constitution was adopted, and (ii) it transformed by direct operation of the Constitution socially owned property into property owned by the Republic of Kosovo. The transformation of socially owned property into state property was also confirmed by the Constitutional Court of Kosovo.⁷

However, the amendments of 2012 to the Constitution deleted Article 159.2 and thereby contributed to confusion as to whether the transformation of socially owned property into state property was still valid, whether it was reversed, or whether the transformation of socially owned property into state property was completed in 2008 so there would be no further need for such a provision to be in the Constitution. These issues are still being discussed by Kosovo’s legal community and satisfactory answer has been found so far.

It can therefore be concluded that the Constitution explicitly mentions the following types of property: private property, public property, state property and socially owned property. Despite this, it is not clear where the differences are between state and public property, if there are any, what the precise content of these property rights is and who owns them. The Constitution has not resolved these questions and leaves room for various interpretations. There is also no authoritative clarification of these constitutional questions by the Constitutional Court. Pursuant to Article 121.1 of the Constitution, it is for the Assembly of Kosovo as the legislator to define the substance and content of these types of property rights, a task that so far is not accomplished.

1.3.2 Transformation of Socially Owned Property

⁷ Constitutional Court of the Republic of Kosovo, Judgment in Case No. KI 08/09 of 17 December 2010, at 65.

The argument made in this Concept Note is that socially owned property has already been transformed into state property but that this is not adequately reflected in legislation and legal practice. In Kosovo, as in all other components of the former Yugoslavia, most of the immovable property and enterprises were socially owned. The concept of socially owned property was a novel and, at the same time, a controversial feature of Yugoslav law, the legal nature of which remained unclear and disputed even during Yugoslav times. In very general terms, socially owned property was based on the premise that all property belongs to society as a whole and not to private persons or the state. It is a form of collective, though not state owned property, with the society being the supreme title holder.

Historically, socially owned property developed mainly from state property. At the end of World War II, the Yugoslav socialist regime embarked on a massive nationalization program targeting ownership of enemies, collaborators, the industrial sector and large private agricultural land owners. Subsequently, this state owned property was transformed into socially owned property by transferring it to socially owned enterprises for economic production. Socially owned property was in the custody, though not ownership, of a municipality, which decided to whom, and for what purpose, such property would be transferred. The content of socially owned property was not clearly defined. It remained largely vague as to its substance and it was only clear that a person who was entitled to the use of socially owned property would not own it. Such person would have a right to possess and use such property for personal benefit but would not be allowed to transfer or encumber it.

The legal nature of socially owned property was also a matter of controversy. In the most general sense, Yugoslav scholars were divided into those who considered socially owned property to represent a form of ownership, and those who claimed that socially owned property was not property but an economic relationship, while various further details remained in dispute respectively. The legal nature of socially owned property received attention at international law level from the Badinter Arbitration Commission in 1993 when discussing state succession between the Republics of the disintegrated Yugoslavia. The Commission established that socially owned property, which was held for the most part by “associated labor organizations”,⁸ would not be considered state property and would therefore not be subject to international law on state succession. On the other hand, if other organizations held socially owned property either at federal level or in two or more Republics, their property would have to be divided between the successor states if they exercised public prerogatives on behalf of Yugoslavia or of individual Republics. In other words, whether socially owned property had to be treated as private or a state property for succession purposes depended on who held such property.

Following the establishment of the United Nations Interim Administration Mission in Kosovo (UNMIK) in 1999, UNMIK determined that the laws applicable in Kosovo before 24 March 1999 would continue to apply in Kosovo unless such laws were in contradiction with Resolution 1244 or any subsequent regulations issued by UNMIK.⁹ The same regulation established that UNMIK would administer movable or immovable property, including monies, bank accounts, and other property of, or registered in the name of the Federal Republic of Yugoslavia or the Republic of Serbia or any of its organs, which was in the territory of Kosovo.¹⁰ Socially owned property was initially not included and was therefore not under the administrative authority of UNMIK. It was only in late 2000 that UNMIK amended this regulation by including socially owned property in the list of properties to be administered by UNMIK.¹¹

The Constitutional Framework for Provisional Self-Government in Kosovo of 2001 established that there would be public, state and socially owned property in Kosovo. The Constitutional Framework

⁸ These organizations were bodies with their own legal personalities operating in a single Republic and which were under the exclusive jurisdiction of a Republic.

⁹ UNMIK Regulation No. 1999/1, Section 3.

¹⁰ UNMIK Regulation No. 1999/1, Section 6.

¹¹ UNMIK Regulation No. 2000/54.

explicitly stated that the authority to administer public, state and socially owned property and the regulation of public and socially owned enterprises remained a “reserved power” of UNMIK. It was under this authority that UNMIK embarked in 2001 on a privatization program that would privatize socially owned enterprises.

Following Kosovo’s declaration of independence in 2008, the new Constitution of the Republic of Kosovo changed the legal nature of socially owned property. It provided that all socially owned interests in property and enterprises in Kosovo were owned by the Republic of Kosovo, effectively transforming socially owned property into state owned property. Thus, with the entry into force of the Constitution, socially owned property formally ceased to exist as a type of property right in Kosovo. The privatization of socially owned property, interpreted in consistency with the Constitution, was henceforth the privatization of state property. However, Article 159 of the Constitution was deleted in 2012 opening the door to controversies if socially owned property was reinstated as a property rights type or if the previous transformation of socially owned property into state property was still in effect.

The transformation of socially owned property into state property is presently reflected in the Law on the Privatization Agency of Kosovo which established the Privatization Agency of Kosovo as the successor to the Kosovo Trust Agency. This law explicitly states that any and all socially owned interests, including social capital, in any Enterprise or other legal entity, by operation of Article 159.2 of the Constitution, are now owned by the Republic of Kosovo. This provision remains in force despite the fact that Article 159 of the Constitution was deleted in 2012 when the Constitution was amended. By operation of law, socially owned property is therefore state property. This interpretation of the Constitution and of the law has certain implications for property types which are still considered to be socially owned property.

First and foremost it has implications for the 99-years leasehold on socially owned property. The 99-years leasehold is still regulated by UNMIK regulation 2003/13 as the Assembly of Kosovo has not yet passed a law on it. Socially owned enterprises were not the owners of the socially owned land, which they held. The privatization of a socially owned enterprise did not mean that the socially owned land in their possession was automatically privatized as well. A separate legal instrument was necessary to address the legal aspects of socially owned land for privatization purposes. UNMIK did not transform socially owned land belonging to a socially owned enterprise into private ownership. Instead, the right of use of socially owned land of the socially owned was transformed into a leasehold right for a term of 99 years and this was transferred to the enterprise which was privatized. Although the leasehold was not supposed to affect or change the underlying ownership of the land, it contained certain features which are specific for ownership rights. The holder of such a leasehold right was entitled to possess, transfer and encumber the property, and it could be inherited and transferred to third persons. The leasehold right was subject to expropriation pursuant to the same rules as ownership and the exercise of rights associated with such leasehold were subject to the limitations and restrictions set out by law for ownership rights.

The reason for this arrangement was the refusal of the United Nations to transform socially owned land into private ownership due to concerns about its mandate. On the other hand, the United Nations’ intention was to make socially owned land useful for privatization purposes, and for this reason there had to be the legal possibility of freely transferring and encumbering such land. Thus, without addressing the ownership question, the leasehold right was meant to be a legal equivalent to private ownership though not conveying, in a formal sense, private ownership. The expectation was that during the 99 years leasehold term, the question about Kosovo’s final political status would be resolved, and the final sovereign would then transform the leasehold into private ownership. The 99-years leasehold is therefore a property right which is unique in Kosovo and which has no equivalent in other states of the former Yugoslavia.

The transformation of socially owned property into state property means that the 99-years leasehold is now leasehold in state property. In the absence of legislation on state property it is not clear what this actually means in terms of property rights associated with the 99-years leasehold. The 99-years leasehold is also not harmonized with the Law on Property and other Real Rights. This law requires private ownership in order to establish mortgages and other encumbrances and to transfer immovable property as it explicitly does not apply to non-private property rights. A strict application of the Law on Property and other Real Rights means that the purpose of the 99-years leasehold, i.e. to make it a property right equivalent to private property, is frustrated due to inconsistent legislation.

A further complication follows from different terminology and legal concepts due to translation. The English word “leasehold”, which was used in the English version of the legislation establishing the 99-years leasehold, has a different legal content than the Albanian word “qira” or the Serbian “zakup”. “Leasehold” in English legal terminology and as a common law institute implies a private property right. However, the Albanian “qira” and the Serbian “zakup” are, following European civil law principles, contractual rights and not property rights. A literal translation of “leasehold” into “qira” and “zakup” has neglected the fact that these terms have different legal content depending on the legal culture and context within which they are used.

The transformation of socially owned property into state property has also implications for urban construction land. Construction land is still regulated by former Kosovo legislation which continues to be in force due to Article 145.2 of the Constitution. However, this law is not suitable to govern construction land in view of the fundamental political, social, economic and legal changes that have happened in Kosovo since 1976 when this law was adopted. The Assembly of Kosovo has not yet passed a law on construction land as it has done for example with respect to agricultural land.

Law 14/80 on Construction Land, as amended by Law 42/86, distinguishes between privately owned construction land and socially owned construction land. All land which is designated by spatial plans as construction land within urban zones is, by law, socially owned property. If in such zone, private property was automatically transformed into socially owned property and former owners into holders of a right of use. Land outside urban zones which were designated as construction land could be both, i.e. socially and privately owned. Urban construction land (socially owned) is under the overall administrative authority of the municipality where the land is located. Urban construction land may be used only for the purpose of construction buildings and facilities for residential or commercial purposes.

Natural and legal persons may acquire from the municipality a right of use of urban construction land. The right of use is granted based on a public auction followed by a contract entered into between the municipality and the grantee, which also specifies the compensation fee to be paid by the grantee. The fee is determined based on the surface area of the land which will be used for construction purposes. This right of use includes the use of the land which is underneath the building and the land which is necessary for the regular use of the building. While a person may have only a right of use of the land, and the land will otherwise remain socially owned, that person acquires private ownership of the building which is constructed on such land. Thus, the law separates between ownership of the land and ownership of the building.

The right of use of socially owned construction land may be transferred to a third party only together with the private ownership right on the building. The right of use exists as long as the building exists on the urban construction land. In the event that the building is destroyed or is depreciated, the owner of the building has a right of first refusal to re-construct the building. If this right of first refusal is not used, the land reverts to the administrative authority of the municipality which may then grant the right of use to another person. Urban construction land is also limited in respect of encumbrances. The law allows only for real servitudes to be established on such land which excludes mortgages. The Law on Property and Other Real Rights also explicitly provides that a mortgage may be established only based on a contract between the owner of the immovable property and the mortgage creditor.

Since there is only a right of use of urban construction land, it means that it cannot serve as collateral for mortgages. This diminishes significantly the use of such land for financing purposes.

The way how urban construction land is dealt with in the Law on Construction Land is problematic in several aspects. Firstly, the law in its entirety reflects a socialist mindset and economic relations which are in complete contradiction with the Constitution of the Republic of Kosovo. Secondly, the administration of urban construction land by municipalities causes higher transaction costs and administrative red-tape compared to such land being privately owned. Thirdly, since urban construction land (which is of high value) cannot be used as collateral for mortgages, its usefulness for financing purposes is significantly diminished and leads to economic inefficiencies. Fourthly, the separation between ownership of the building and right of use of the land creates legal complications when transfers are made. Due to weak contract drafting it is rarely specified which rights to which assets are actually transferred. Fifthly, a strict application of the Constitution would require treating socially owned urban construction land as state owned. This would lead to an additional layer of complexity concerning the relationship between the municipality as the administrator and the state as the owner. Legal uncertainty in respect of urban construction land is therefore abundant.

1.3.3 State and Public Property

The expressions “state property” and “public property” are used in legislation without a clear definition and distinction, often creating the impression that they are used synonymously and interchangeably. On the other hand, there are also instances where state and public property seem to be treated as different types of property. For example, Law 04/L-009 amending Law 2002/5 on the Establishment of the Immovable Property Rights Register refers to the rights of use of municipal, public, social and state property, thereby implying that municipal, public, social and state property are different types of property. Further to that, there is no legislation which defines precisely the content of state/public property. Question like who administers state/public property, and what the rights, entitlements, and restrictions are with regard to the use of state/public property remain completely unanswered.

The terminological inconsistency in the use of state and public property is the result of different layers of legislation which have accumulated over the years and which have never been clarified. The very first regulation adopted by UNMIK, Regulation 1999/1, defined state property as all movable and immovable property, including monies, bank accounts, and other property of, or registered in the name of the Federal Republic of Yugoslavia or the Republic of Serbia or any of its organs, which is in the territory of Kosovo. This property was placed under the administrative authority of UNMIK. A subsequent amendment to this Regulation, i.e. Regulation 2000/54, added socially owned property as another type of property, which was not private, under the administrative authority of UNMIK, while clearly differentiating it from state property. The different character of state property and socially owned property was maintained in subsequent legislation. Regulation 1999/23 on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission distinguished between private, state and socially owned housing.

The Constitutional Framework adopted in 2001 maintained the distinction between state and socially owned property but it also added public property as a new type of non-private property without defining it and without explaining the difference between public, state and socially owned property. However, a right of use as an immovable property right could only exist in respect of state property and socially owned property but not in respect of public property (Law 2002/05 on the Establishment of an Immovable Property Rights Register).

Law 2003/3 on Forests in Kosovo defined public forests as state and socially owned forests and forestlands and thus maintained the dichotomy between state property and socially owned property. Subsequent legislation began to be confusing regarding the terminology. Law 2004/24 on Water defined water infrastructure as public property without defining its meaning and if it was different from

state property or socially owned property. Law 2005/31 on Theatre provided in a similar way that theatres may be public or private, and that the National Theatre of Kosovo, Professional City Theatres and City Theatres were public property.

The use of the term “public property” was further complicated and confused in subsequent legislation. Law 02/L-88 on Cultural Heritage referred to public collections as owned by Kosovo public institutions without specifying which public institutions were meant. On the other hand, the same law qualified movable heritage dating prior to 1453 as the public property of Kosovo, which implied that it was owned by Kosovo. Law 02/L-44 on the Procedure for the Award of Concessions originally referred to public property. This was amended by UNMIK to refer to publicly and socially owned property. It is unclear if UNMIK considered socially owned property as public property, which would have been inconsistent with previous legislation, or if UNMIK considered that the original version of the law had to be supplemented by adding socially owned property. Whatever the interpretation, it is clear that UNMIK again used the term “public property” without precise definition. An interesting and perhaps more instructive example of the use of the term “public property” may be found in Law 02/L-18 on Nature Conservation. The original text, as adopted by the Assembly of Kosovo, provided that minerals and fossils were the property of Kosovo. This was amended by UNMIK to public Kosovo property.

All examples discussed above show that there was severe inconsistency in the use of the term “public property” by UNMIK. It is also evident that UNMIK was reluctant to qualify any property as Kosovo property which could be explained as a result of Kosovo’s unclear political status under Resolution 1244 (1999) and UNMIK’s intention not to prejudice Kosovo’s final status by directly or indirectly granting Kosovo separate legal personality. Irrespective of this, the use of the term “public property” seems to be a substitute for property owned by Kosovo. Instead of calling it Kosovo property, it was termed “public property” in order to avoid any political complications under Resolution 1244 (1999).

The Constitution of the Republic of Kosovo continues with the use of the term “public property” (e.g. *The Republic of Kosovo shall ensure a favorable legal environment for a market economy, freedom of economic activity and safeguards for private and public property, Art. 119.1*) without defining what it actually means. The Constitution also refers to publicly owned resources, including natural resources, and publicly owned infrastructure (*Foreign natural persons and foreign organizations may, in accordance with such reasonable conditions as may be established by law, acquire concession rights and other rights to use and/or exploit publicly owned resources, including natural resources, and publicly owned infrastructure, Art. 121.3*).

On the other hand, there are also references to state property. Publicly owned enterprises are owned by the Republic of Kosovo (The Republic of Kosovo shall own all enterprises in the Republic of Kosovo that are Publicly Owned Enterprises, Art. 160.1) and all socially owned interests in property and enterprises are also owned by the Republic of Kosovo (Art. 159.2).¹²

As regards primary legislation, there are several instances where explicit reference is made to property of the Republic of Kosovo or state property. Law 03/L-163 on Mines and Minerals provides that mineral resources, regardless of their origin, shape or physical state and which are under or on the surface and within the territory of Republic of Kosovo, are property of the Republic of Kosovo. Law 03/L-233 on Nature Protection provides that minerals, exfoliation, fossils and speleological objects are the property of Republic of Kosovo. According to Law 04/L-147 on Waters, water resources are assets of general interest and property of the Republic of Kosovo. According to Law 04/L-063 on Kosovo Railways, the existing railway infrastructure of common use in Kosovo is a state owned property. Pursuant to Law 2003/3 on Kosovo Forests, as amended by Law 03/L-153, public forests and forestlands are the property of the state of Kosovo.

Apart from legislation qualifying certain natural resources as state owned, there are laws which qualify certain other property as state property. Law 04/L-034 on the Privatization Agency of Kosovo

¹² Note that Articles 159 and 160 were deleted in 2012.

explicitly confirms that all socially owned interests, including social capital, in any Enterprise or other legal entity are owned by the Republic of Kosovo. According to Law 03/L-139 on Expropriation of Immovable Property, property expropriated by the Government becomes, upon completion of the expropriation process, the property of the Republic of Kosovo. Law 03/L-087 states that every central publicly owned enterprise is owned by the Republic of Kosovo. Law 04/L-140 on Extended Powers for Confiscation of Assets Acquired by Criminal Offence provides that if a court determines that assets were acquired due to activity similar to the criminal acts for which the defendant was convicted, it will order that the asset or property rights are transferred to the ownership of the Republic of Kosovo and that the necessary registration is made in the respective public registers.

However, there are still laws which use different terminology. For example, Law 03/L-184 on Energy refers to the property of the people of Kosovo (*All energy enterprises shall serve the interests of individual customers by providing a safe, efficient, and reliable supply of quality electricity, heat energy or natural gas, ensuring the efficient use of energy resources; respecting the protection of the environment; and preserving the health, life, and property of the people of Kosovo*). Pursuant to Law 04/L-250 on the Air Navigation Services Agency, all air navigation services infrastructure is owned by the Air Navigation Services Agency, which is a government agency of the Republic of Kosovo, and not by the Republic of Kosovo. Reference to public property is made in Law 04/L-087 on National Park “Sharri”, Law 04/L-066 on the Historic Center of Prizren (*every site, cultural monument under private or public property within the Historic Centre of Prizren*), Law 04/L-045 on Public-Private Partnerships (*no security interests may be created by Agreement over publicly owned property or other publicly owned assets or rights needed for the provision of a public service or a public infrastructure*), and in Law 03/L-142 on Public Peace and Order (*whoever knowingly, willfully or in a malicious manner causes damage or destruction of public or private property structure or any of its contents shall be punished*). Last but not least, Law 03/L-154 on Property and other Real Rights refers to public or common assets (*the provisions of this law do not apply to real rights in public or common assets, which are subject to specific legislation, unless specifically provided otherwise in this law*). None of these laws define what they mean with the property of the people of Kosovo, public property or public or common assets and thus create legal uncertainty as to what exactly they refer to.

A serious shortcoming with regard to state property is that there is no law which determines the precise content of this property right type. There are many unanswered questions, such as who administers state property on behalf of the state, what is the bundle of rights associated with state property, is it possible to establish mortgages and other encumbrances on state property, how does the state transfer state property to third parties? Except for expropriated property which becomes state property, all these issues are unclear and need to be defined.

Most significantly, the use of the term “public property” may lead to a serious complication for the process of the legalization of illegal constructions. Law no. 44/L-188 on the Treatment of Constructions without Permit prohibits the legalization of buildings which are constructed on public property. As outlined above, construction land in urban zones is, by operation of law, registered as socially owned property. Under the assumption that the Constitution has transformed socially owned land into state property, the consequence is that construction land in urban zones is also transformed into state property. If state property and public property are identical legal concepts and are used interchangeably, it means that legalization of buildings illegally constructed on construction land in urban zones would be prohibited. This would exclude a significant portion of commercially valuable property from legalization, which would be an unintended negative consequence of the use of the term “public property” in the absence of a proper definition of its meaning and content. Further details on this matter are dealt with in Concept Note #2.

A further problem with respect to state property is the unclear legal status of former Yugoslav and Serbian state property in Kosovo. Despite its declaration of independence in 2008, Kosovo as a new state has not addressed issues related to state succession to property. The Vienna Convention on Succession to State Property, Archives and Debts of 1983 is

not in force but most of its provisions reflect customary international law.¹³ Such customary international law applies in the event that the parties cannot reach an agreement on succession to property, as is the case between Kosovo and Serbia.

The general rule is that the immovable state property of the predecessor state which is located in the territory of the successor state (Kosovo) passes automatically to the successor state.¹⁴ In the case of immovable property situated outside the territory of the successor state, the international law rule is that, where the predecessor state continues to exist, this property remains with the predecessor state. The passing of state property of the predecessor state to the successor state takes place without compensation (Article 11 of the Vienna Convention). According to Article 8 of the Vienna Convention, state property means property, rights and interests which, at the date of the succession of states, were, according to the internal law of the predecessor state owned by that state. This means that the domestic law of the predecessor state, which was in force on the date of succession, determines the state property which passes to the successor state. The relevant date for the passing of the property is the date of succession and this is the date of independence.¹⁵

In this context, the argument could be made that the effective date of independence and hence of succession is not 17 February 2008, i.e. when Kosovo declared independence, but 10 June 1999, i.e. when Resolution 1244 (1999) was adopted by the UN Security Council and UNMIK took over the administration of Kosovo and the Federal Republic of Yugoslavia lost effective government control over Kosovo. This argument could be supported with reference to UNMIK Regulation 1999/1, the very first regulation adopted by UNMIK upon its deployment in Kosovo, which put all movable or immovable property under its administrative authority, including monies, bank accounts, and other property of, or registered in the name of the Federal Republic of Yugoslavia or the Republic of Serbia or any of its organs, which is in the territory of Kosovo. According to Article 145.2 of the Constitution, legislation applicable on the date of the entry into force of this Constitution continues to apply to the extent it is in conformity with the Constitution until repealed, superseded or amended in accordance with the Constitution. This means that UNMIK Regulation 1999/1 is still in force and that the Republic of Kosovo has assumed the administrative authority of UNMIK over all movable or immovable property under its administrative authority, including monies, bank accounts, and other property of, or registered in the name of the Federal Republic of Yugoslavia or the Republic of Serbia or any of its organs, which is in the territory of Kosovo.

Kosovo has not passed a law that would either determine that Kosovo has lawfully succeeded in former Yugoslav and Serbian state property or that it at least has succeeded in UNMIK's authority to administer such property as defined in UNMIK Regulation 1999/1. This creates legal uncertainty as to the legal nature of all immovable property registered in the immovable property rights register in the name of Yugoslavia or Serbia and if Kosovo is entitled to such property in accordance with international law on state succession.

1.3.4 Municipal Property Rights

There is no legislation which clarifies the scope and content of municipal property rights. The first UNMIK Regulation (2000/45) which established self-government of municipalities in Kosovo determined that municipalities had the right to own and manage property and it also referred to land and buildings owned or occupied by a municipality. However, it did not determine which properties were actually owned by a municipality. In addition to immovable property owned by a municipality, UNMIK also acknowledged that municipalities could have a right of use of socially owned immovable property (UNMIK Regulation 2005/13) and that they could allocate such property to a natural or legal person for up to 99 years subject to approval by the central authority. In practice, municipalities could

¹³ Shaw, *International Law*, at 986.

¹⁴ Shaw, at 987.

¹⁵ Shaw, at 988.

only allocate land that was registered in the cadastral records in the name of the respective municipality. UNMIK also permitted that socially owned immovable property which was administered by the Kosovo Trust Agency could be allocated to a municipality for public benefit purposes (UNMIK Regulation 2006/5).

The new Law on Local Self-Government (Law 03/L-040) restates previous UNMIK legislation and confirms that municipalities have the right to own and manage immovable property. Law 03/L-139 on the Expropriation of Immovable Property, as amended by Law 03/L-205, also provides that immovable property expropriated by a municipality becomes the property of the municipality. However, the law does not define what the entitlements, rights and obligations of the municipalities are with respect to such property.

Certain aspects of transfer of municipal property are regulated by Law 04/L-144 on the Allocation for Use and Exchange of Immovable Property of the Municipality defines immovable property of a municipality as any immovable property registered on behalf of the municipality in the immovable property rights register. However, it is not entirely clear if this means immovable property which is owned by a municipality or if it also includes immovable property where the municipality has a right of use. According to this law, a municipality may allocate immovable property to a third party subject to certain procedures set forth in the law. The municipality may also exchange municipal immovable property with immovable property administered by the Privatization Agency of Kosovo.

So far, the law continues, with some modifications, with procedures which were established by previous UNMIK regulations. However, the novelty is that, in addition to the above, a municipality has the right to reinstate immovable properties of former socially owned enterprises which are administered and managed by the Privatization Agency of Kosovo. Municipalities may prepare a list of all socially owned immovable property managed by the Privatization Agency of Kosovo which they should submit to the Government, for the purpose of exempting such properties from the privatization process, and to revert them to municipal ownership. This has the following implications. First, it implies that municipalities have residual ownership of all socially owned immovable property administered by the Privatization Agency, which is in contradiction with the constitutional rule and provision in the Law on the Privatization Agency of Kosovo that all interests in socially owned property are owned by the Republic of Kosovo. Second, it seems as if the municipalities may request any socially owned immovable property to be reverted to them without having to compensate the socially owned enterprise which holds such property. This may damage creditor and possible owner interests as it would diminish the asset base of the socially owned enterprise during the privatization purposes, and which may be in contradiction with the Law on Privatization Agency of Kosovo. Third, the procedure following submission of the list to the Government is not properly regulated. The law requires the Government to take legal action to revert the property to the municipalities without explaining how. If the Government takes legal action and transfers socially owned land of a socially owned enterprise to municipal ownership, it eventually amounts to an expropriation of the socially owned enterprise and a removal of that property from the administrative authority of the Privatization Agency of Kosovo. This process is governed by Law 03/L-139 on the Expropriation of Immovable Property, as amended by Law 03/L-205 which requires the Government to ensure that such transfer is for a public interest purpose only and that compensation is paid to the Privatization Agency of Kosovo. However, it is not clear if the municipality has to reimburse the Government for the compensation paid to the Privatization Agency of Kosovo or whether it should make any compensation payments directly to it.

1.3.5 Right of Foreigners to Own Property in Kosovo

There are different opinions within Kosovo's legal community if foreigners may own immovable property. The controversy is the result of different interpretations of Article 121.2 of the Constitution which provides that *foreign natural persons and foreign organizations may acquire ownership rights over immovable property in accordance with such reasonable conditions as may be established by law or international agreement*. One line of interpretation argues that, according to this

provision, foreign persons may only acquire immovable property in Kosovo if this is permitted by law or required by an international agreement. In the absence of a law or international agreement foreigners would not be permitted to acquire ownership of immovable property.

On the other hand, there are strong arguments which are against this interpretation. Article 121.2 of the Constitution is formulated in the affirmative, i.e. foreign natural persons and foreign organizations *may* acquire ownership rights over immovable property. Any conditions which may be attached to the acquisition of immovable property by foreigners must not only be reasonable but they may also not frustrate the affirmative stance taken by this provision. More specifically, no conditions may be attached where they would be contrary to the Constitution. In this respect, the Constitution requires the Republic of Kosovo to ensure equal legal rights for all domestic and foreign investors and enterprises (Article 119.2) which means that foreign investors and enterprises must have the same legal rights as domestic investors and enterprises to own immovable property. In addition to that, it could be argued that no conditions may be attached if they would be contrary to the fundamental values and principles of the Constitution, especially the positive obligation incumbent on the Republic of Kosovo to ensure a favorable legal environment for a market economy, freedom of economic activity and safeguards for private and public property. In view of this, any conditions restricting the acquisition of immovable property by foreigners would have to be strictly exceptional. As a consequence, Article 121.2 of the Constitution could be interpreted as implying a presumption in favor of the right of foreigners to acquire immovable property unless otherwise determined by law or international agreement.

This controversy seems to be theoretical rather than have real implications for legislation and practice. Law 04/L-220 on Foreign Investment defines a foreign investor as foreign person who has made an investment in the Republic of Kosovo. A foreign person includes (i) any natural person who is a citizen of a foreign country, (ii) any natural person who is a citizen of the Republic of Kosovo, but has residence abroad, and (iii) a legal person established according to the Law of a foreign country. This means that foreign nationals and foreign companies are foreign persons. They are a foreign investor if they have made an investment in Kosovo, which includes, inter alia, ownership of immovable property. The law further requires that the Republic of Kosovo provides foreign investments the same treatment, regardless of their citizenship, origin, residence, place of establishment of business or control. This means that any foreign person must be treated in the same manner as a national person, including when it comes to acquiring immovable property. The key provisions of the law, which are related to expropriation and nationalization, presume that a foreign person has the right to acquire property, including immovable property, and therefore lawfully owns property that can be expropriated.

However, despite this, **administrative practice shows that there is resistance in municipal cadastral offices to register foreigners as owners of immovable property.** This practice is based on an interpretation of the Constitution which does not allow foreigners to own immovable property in Kosovo. Consultations with representatives of the Ministry of Justice have confirmed that such administrative practice is widespread and a serious problem in establishing and enforcing property rights by foreigners. Unless corrected, this administrative practice may lead to a violation of the recently signed Stabilization and Association Agreement between Kosovo and the European Union. Article 65.3 of this Agreement requires Kosovo grant national treatment to EU nationals acquiring real estate on its territory within five years from the entry into force of this Agreement. Article 51.4 of the Agreement also provides that subsidiaries and branches of EU companies will have, from the entry into force of this Agreement, the right to use and rent real property in Kosovo. It also provides that subsidiaries and branches of EU companies will, within five years from the entry into force of this Agreement, have the right to acquire and enjoy ownership rights over real property as Kosovo companies and, as regards public goods/goods of common interest, the same rights as enjoyed by Kosovo companies respectively where these rights are necessary for the conduct of the economic activities for which they are established.

2. POTENTIAL SOLUTIONS BASED ON BEST INTERNATIONAL PRACTICES

2.1 Best Practices

For the purpose of establishing best practices especially with regard to the transformation of the socialist right of use of socially owned immovable property into other marketable ownership rights, and the reconstruction of public and private property following the abolition of socially owned property, Germany, Croatia, Serbia and Montenegro are used as an example. All these countries have in common that they had to transform socially owned property into other types of property rights, that they are free market economies, and that they have pursued, sometimes just slightly, different strategies on how to accomplish this task.

2.1.1 Germany

(i) Transformation of “people’s property” into private property

Following its unification with the former socialist East German Republic, Germany was confronted with the problem of transforming East German socialist property rights into the social market oriented property rights system of West Germany. East German socialist property was divided into (i) people’s property (*Volkseigentum*), (ii) property of socialist associations (*Eigentum sozialistischer Genossenschaften*) and (iii) property of citizens’ social organizations (*Eigentum gesellschaftlicher Organisationen der Bürger*). People’s property was the predominant form of socialist property. Like socially owned property in Kosovo, people’s property was limited in terms of entitlements. It could not be used as a collateral for mortgage, it was exempt from attachment and protected from third party claims. A right of use of people’s property was the only legal entitlement that an individual could possess and the state could take it away almost at will.

East Germany and West Germany signed the Treaty for the Creation of a Monetary, Economic, and Social Union (*Staatsvertrag*) in 1990. The Treaty provided for German unification by East Germany joining West Germany and for the application of the West German Constitution and laws to the territory of East Germany. The Treaty changed all East German laws which were not in accordance with the West German Constitution, including previous laws that prohibited the private acquisition of people’s property.

The Law for the Privatization and Reorganization of People’s Property (“Trust Law”) (*Treuhandgesetz*) was adopted establishing the Trust Agency (*Treuhandanstalt*)¹⁶ to privatize people’s enterprises, which were similar to Kosovo’s socially owned enterprises. The primary purpose of the law was to privatize people’s property as quickly as possible. For the purpose of privatizing people’s property, the Trust Agency transformed people’s enterprises into joint stock companies with the consequence that the their right of use of people’s property was transformed into private property.¹⁷ While the similarity between the privatization process in Kosovo and that in Germany is striking, the difference is that in Kosovo the right of use of socially owned property was not transformed into private property but into a 99-years leasehold which had all attributes of private property. As an exception to privatization, people’s property could be transferred by law to municipalities, cities, counties, the “Länder”¹⁸ and

¹⁶ The term Kosovo “Trust Agency”, the predecessor of the present Privatization Agency of Kosovo, is a literal translation of “*Treuhandanstalt*” (Trust Agency) as the idea to privatize socially owned property was conceptually initiated by the European Union Pillar of UNMIK (Pillar IV) whose German deputy head used the German *Treuhandanstalt* as a model.

¹⁷ The Trust Agency was also authorized to privatize military, forest and agricultural people’s property.

¹⁸ The “Länder” are the component states of Germany, which is a federal state.

the state. All people's property which was used for municipal public services had to be transferred to municipalities and cities. Property, which in the past was taken from local governments by the state and was transformed into people's property, had to be restituted to the respective local governments.

Despite these privatization efforts, there were still numerous immovable properties which continued to be registered as people's property and where it was not clear who had a right of use of them or who was otherwise entitled to them. This caused legal uncertainty and was widely perceived as hindering private investment. In order to clarify this, the Law on the Determination and Allocation of Former People's Property was adopted in 1991 (*Vermögenszuordnungsgesetz*). According to this law, certain entities were designated as authorized agents¹⁹ to dispose of and transfer people's property and, where it was impossible to determine such entity, the Federal Republic of Germany, represented by the Federal Agency for Immovable Property Issues, was designated as the default entity. This means that in all cases where there was uncertainty as to who was the holder of an immovable people's property, it was in effect the German government who was authorized to act as a fiduciary agent. The designated entities had to apply to the Trust Agency, respectively to the "Land", which would issue a decision determining the allocation of such property to the respective entity.

(ii) Unifying land rights and rights on buildings (the German "Construction Land" problem)

Germany had also to deal with the problem common to all socialist legal systems, i.e. the separation of ownership of an immovable property from the ownership of a building, which is also a current problem in Kosovo in respect of construction land. While the immovable property was people's property, an individual could be only the private owner of the building constructed on such land and have a right of use of the people's property for the purpose of using the building. Germany adopted in 1994 the Law on Clearance of Real Rights (*Sachenrechtsbereinigungsgesetz*) for the purpose of unifying ownership of immovable property and ownership of a building. According to the law, the user of a building had the option to purchase the immovable property and thus become the private owner of both immovable property and the building. The law provided that the purchase price of the immovable property would be 50% of the market value of the property. The alternative option was for the user to establish an inheritable building right (*Erbbaurecht*) on the immovable property, which is similar to the construction right as set out in Kosovo's Law on Property and other Real Rights. The owner of the building would have the right to use the immovable property for up to 90 years and pay a fee between 2% and 3.5% of the market value of the property to the designated holder of the immovable property.

(iii) Current problems with the transformation of people's property

In spite of all efforts to privatize socialist property, to allocate it to various public entities and to harmonize East German property law with West German property law, it is reported that in 2014 there were thousands of immovable properties which were still registered as people's property. The reason for this is the weak application of the Law on the Determination and Allocation of Former People's Property (*Vermögenszuordnungsgesetz*) as not all designated entities have applied for the allocation of property rights to people's property. Municipalities and cities are disadvantaged because of this situation as they have to pay for the maintenance of the properties although by law the Federal Government would have been required to do so. Another aspect is that the privatization and redistribution of socialist property by law was fraught with legal disputes before courts and it is still an ongoing process. In addition to legislative acts, the German judiciary has developed in numerous litigations complex case law, which is also further complicated by the other component of privatization of socialist property, i.e. restitution, but which is not the subject-matter of this concept note.

(iv) State property regime

¹⁹ The designated entities were: (i) municipalities, cities counties and the "lander" if they or their organs were registered as holders of an immovable people's property; and (ii) the Trust Agency, if an agricultural or forestry cooperative, or the Ministry of State Security is registered as the holder of an immovable people's property.

In regard of the organizational aspects of privatization in Germany, the Trust Agency was transformed in 1995 into the Federal Agency for Special Tasks related to Unification (*Bundesanstalt für Vereinigungsbedingte Sonderaufgaben*) and it ceased its operations in 2001. The administration and management of state property is split between the Federal government (*Bund*) and the component states of Germany (*Länder*). At the federal level, Germany established the Federal Agency for Immovable Property Tasks (*Bundesanstalt für Immobilienaufgaben*) with the responsibility for administering all immovable property of the Federal Republic of Germany. For this purpose, all property rights of the Federal Republic of Germany in immovable property are transferred to the Agency. The Agency operates under the authority of the Federal Ministry of Finance. The Länder have their own legislation that deals with the administration of immovable property of the Länder.

(v) Foreigners and property rights

German law makes no distinction between domestic and foreign nationals regarding investment or the establishment of companies. German law has no restrictions concerning the acquisition of immovable property rights by foreign nationals.

2.1.2 Croatia

(vi) General policy on the transformation of socially owned property

The Constitution of the Republic of Croatia of 1990 formally abolished socially owned property and initiated a legal process of transformation of socially owned property. The Constitution did not provide specifically how and into what socially owned property should be transformed and left this question to be determined by legislation. The Croatian legislator applied three methods to transform socially owned property: (i) the transformation of legal entities including their property, (ii) the transformation of property and its allocation to designated entities, and (iii) the transformation of specific socially owned property into state property by operation of law. As a general law, which applied in the event that no special legislation dealt with the transformation of a specific socially owned property, the Law on Property and other Real Rights (*Zakon o vlasnistvu i drugim stvarnim pravima*) provided that the owner of a socially owned property, which is not subject to transformation by special law, is the legal entity which is registered as the lawful holder of a right of use of that property. If no such legal entity could be identified, such socially owned property would become the property of the Republic of Croatia (state property). It is interesting to note that Kosovo has followed very closely the Croatian Law on Property and other Real Rights (even the title of the law is identical) but without adopting the provisions on the transformation of socially owned property.

(vii) Transformation of socially owned property through special laws

Croatia adopted a special law through which it transformed all forests and forestlands, which were not privately owned, into state property (*Zakon o sumama 1990*). Croatia was registered as the owner on the basis of a certificate issued by the Croatian forestry agency. The Law on Agricultural Land (*Zakon o poljoprivrednom zemljestu 1991*) provided that all socially owned agricultural land was owned by Croatia and the state was registered as the owner if the land was registered as socially owned land and was outside the zone designated as construction land. The Law on Associations (*Zakon o udruzama 1997*) transformed all socially owned immovable property to which former social organizations (associations) had a right of use into the property of Croatia.²⁰ By operation of law, Croatia also became the owner of the immovable property to which former communist political-social organizations, had a right of use (*Zakon o pretvorbi prava na drustvenim sredstvima bivskih drustvenopolitickih organizacija*) and of the socially owned immovable property inside the boundaries of a national park or a natural park (*Zakon o zastiti prirode*). The same law provided that socially owned immovable property located in special reservations and forest parks became the property of municipalities or of the City of Zagreb. Further, immovable property which was held and used by municipal courts and the

²⁰ An amendment of 2001 to the Law on Associations restituted former socially owned property (then state property) to the successor of the former social associations.

municipal public prosecutor was transformed into the property of Croatia (*Zakon o redovnim sudovima 1990; Zakon o javnom tuzilastvu 1990*).

(viii) Transformation of socially owned assets and entities and related property rights

While the above laws transformed specific socially owned immovable property into state property, other laws transformed all assets, including, but not limited to immovable property, into a different property rights type. The Croatian Government adopted a regulation which transformed all socially owned federal assets which were used by the Yugoslav People's Army and the Federal Secretariat for National Defense into state property (*Uredba o preuzimanju sredstava JNA i SSNO na teritoriju Republike Hrvatske u vlasništvo Republike Hrvatske 1991*). It was sufficient to register Croatia as the owner of the immovable property if the Yugoslav People's Army or the Federal Secretariat for National Defense were registered as holders of a right of use. Croatia also transformed the assets held by socially owned enterprises and other organizations, which operated in Croatia but had their seat in Serbia, Montenegro, Kosovo or Vojvodina, into the property of Croatia (*Uredba o zabrani raspolaganja i preuzimanju određenih pravnih osoba na teritoriju Republike Hrvatske 1992*). Croatian legislation on health institutions (*Zakon o zdravstvenoj zaštiti 1993*) and cultural and other social institutions (*Zakon u ustanovama 1993*) transformed public institutions into institutions owned by Croatia, including their immovable property.

The transformation of socially owned enterprises into joint stock companies or limited liability companies pursuant to the Law on the Transformation of Socially Owned Enterprises (*Zakon o pretvorbi društvenih poduzeca 1991*) included the transformation of the right of use of socially owned immovable property into private immovable property. Socially owned enterprises with their seat in Croatia had to apply to the Croatian Privatization Fund (*Hrvatski Fond za Privatizaciju*) to approve their transformation into a privately owned joint stock company or a limited liability company.²¹ Based on the approval of the Croatian Privatization Fund, the enterprise applied to the court to register as a joint stock company or as a limited liability company and to register as the owner of the immovable property to which it had a right of use. Upon registration of the immovable property as owned by a privately owned joint stock company or limited liability company, the immovable property was transformed from formerly socially owned into private property.²²

Since the court practice of registering private immovable property based on such transformation was initially not uniform, Croatia adopted the Law on Privatization (*Zakon o privatizaciji 1996*).²³ Based on the provisions of this law, the Croatian Privatization Fund issued a decision confirming the list of immovable properties to which the socially owned enterprise had a right of use. The courts aligned their practice to this law and used the decision of the Croatian Privatization Fund as the official document on the basis of which they registered the right of use of socially owned immovable property as the private immovable property of the new company. In 2006, Croatia amended its Law on Property and other Real Rights (*Zakon o vlasnistvu i drugim stvarnim pravima 1997*) and established criteria to determine when a newly created company could be considered the lawful successor of a former

²¹ The application included a list and valuation of the immovable property of the enterprise. In view of uncertainties and inaccuracies in the land registries, the Croatian government adopted regulations which permitted the use of different types of documents as evidence that a socially owned enterprise had a right of use of a certain socially owned immovable property. These documents included extracts from land registries, court decisions, decisions of administrative bodies and contracts.

²² Immovable property which by operation of law was transformed into state property, e.g. former socially owned agricultural land, could not be transformed into private immovable property.

²³ Some courts registered private property only with respect to the immovable property that was included in the approval of the Croatian Privatization Fund. Some courts also considered the property valuation list prepared by the former socially owned enterprise, while other courts requested evidence of the immovable property type in order to ensure that property types excluded by law, such as agricultural land, were not part of the transformation. However, the general practice was that courts usually registered private immovable property in all cases where the former socially owned enterprise had a right of use of socially owned immovable property.

socially owned enterprise and the owner of the immovable property held by such socially owned enterprise.²⁴

(ix) General law on transformation of socially owned property

As already stated, the default legal position with respect to socially owned property is set out in the Law on Property and other Real Rights (*Zakon o vlasnistvu i drugim stvarnim pravima 1997*). First, the person who is registered in the land registry as a holder of a right of use of a socially owned immovable property is presumed to be the owner of that immovable property. This presumption applies under the following conditions: (i) private property may be established on such property (e.g. public goods, such as air, the sea, water, etc., are excluded), (ii) the immovable property is not subject to transformation by special law, and (iii) the right of use was established in accordance with the law that was applicable at the time when the right of use was established. This provision has led to the transformation of socially owned construction land into private property, provided that the holder of the right of use was a private person. It also turned municipalities and counties into owners of former socially owned immovable property to which they had a right of use. Specifically, with respect to construction land and the split between the private ownership of a building constructed on socially owned immovable property, Croatian law unified ownership of building and land. The default rule in this respect is that the owner of the building acquired ownership of the (former socially owned) land.

Second, it is presumed that the Republic of Croatia owns all other former socially owned immovable property where it is not clear who owns such property or who had a right of use of such property. The burden of proof is with the party which makes a claim to the contrary. Croatian courts have applied the second presumption as including all socially owned immovable property and accepted its transformation into state property where the land registry did not provide any indications as to who had a right of use to such property. Croatian courts were criticized for have misinterpreted the law by ignoring provisions in other laws. For example, even when the land registry did not provide information as to who had a right of use of socially owned construction land, the former Law on Construction Land (*Zakon o gradjevinskom zemljištu*) provided that municipalities had a residual right to administer such property. According to this law, unclear registration of a right of use of socially owned construction land would then lead to the municipality acquiring ownership of such property, and not the Republic of Croatia. Another example is the former Law on the Registration of Socially Owned Immovable Property (*Zakon o uknjizbi nekretnina u drustvenom vlasnistvu*) which provides that if the documents, on the basis of which a right of use of a socially owned immovable right is to be registered, do not indicate who is the holder of the right of use of a socially owned immovable property, then the municipality, in whose territory the property is located, will be registered as the holder of the right of use. In such a case, it would be the municipality who would acquire private property, and not the Republic of Croatia. Despite this critique, Croatian courts have interpreted the law more in favor of the Republic of Croatia than of other entities.

(x) State property regime

The administration of state owned immovable property is regulated by the Law on the Administration and Disposal of Immovable Property Owned by the Republic of Croatia (*Zakon o upravljanju i raspolaganju imovinom u vlasnistvu Republike Hrvatske 2013*). The law includes a detailed list of all immovable property types which are owned by the Republic of Croatia. The State Agency for the Administration of State Property (*Drzavni ured za upravljanje drzavnom imovinom*) is authorized to exercise the ownership rights of the Republic of Croatia. The law provides detailed rules and procedures on the administration, sale and other transfer of state property.

²⁴ The criteria for transformation of socially owned immovable property into private immovable property are: (i) at the time of the valuation of the property for the purpose of applying for transformation, the immovable property was socially owned and the socially owned enterprise had a right of use, (ii) the socially owned immovable property could be legally transformed into private property, e.g. it was not transformed into state property, and (iii) the immovable property was included in the valuation list submitted to the Croatian Privatization Fund.

(xi) Foreigners and property rights

As regards the acquisition of immovable property rights by foreigners, certain immovable properties, such as agricultural land and forests, protected areas of nature, protected cultural immovable property cannot be acquired by foreign persons, unless otherwise determined under international agreements entered into by Croatia. Otherwise, EU citizens and legal entities from EU Member States can acquire immovable property rights in Croatia pursuant to the national treatment principle, i.e. under the same conditions as domestic individuals and legal entities. Foreign persons who are not EU citizens or legal entities of EU Member States may acquire immovable property rights in Croatia subject to prior approval by the Croatian Ministry of Justice and the existence of reciprocity between Croatia and the respective foreign country. No approval is required if the immovable property right is acquired by inheritance, provided reciprocity exists.

2.1.3 Serbia**(xii) General policy on property rights and transformation of socially owned property**

Compared to Croatia, Serbia has opted in certain aspects for a different approach regarding the transformation of socially owned property. The Constitution of Serbia provides for three types of property rights, i.e. public property (*javna svojina*), cooperative property (*zadružna svojina*) and private property. Public property consists of state property, property of the autonomous province and municipal property. The Serbian Constitution also mentions socially owned property but requires that such property is privatized in accordance with law. There is therefore a clear constitutional mandate to privatize all socially owned property. The Serbian legislator fulfilled this mandate partly by restituting certain immovable property, such as agricultural land which was nationalized through confiscation (*Zakon o nacinama i uslovima priznavanja prava i vraćanju zemljišta koje je preslo u društvenu svojinu po osnovu poljoprivrednog zemljišnog fonda i konfiskacijom zbog neizvršenih obaveza iz obaveznog otkupa poljoprivrednih proizvoda 18/91*), former immovable property of churches and religious communities (*Zakon o vraćanju imovine crkvama i verskim zajednicama 46/2000*), and rural pastures (*Zakon o vraćanju utrina i pašnjaka selima na korisćenje 16/92*).

However, Serbia has not privatized all socially owned immovable property. According to the Law on the Transformation of Socially Owned Property on Agricultural Land into other Types of Property (*Zakon o pretvaranju društvene svojine na poljoprivrednom zemljištu u druge oblike svojine 49/92*), socially owned agricultural land, which a legal person has acquired through agricultural reform or nationalization, was transformed into state property, i.e. property of the Republic of Serbia. Socially owned agricultural land, which a legal person has acquired through a contractual transaction was transformed into private property. Pursuant to the Law on Construction Land (*Zakon o građevinskom zemljištu 44/95*), urban construction land (*građevinsko zemljište*), which was formerly socially owned, was transformed into state property. The municipality was authorized to administer such state property and any transfer was subject to approval by the Government of Serbia. Other construction land, i.e. construction land in a construction zone (*građevinsko zemljište u građevinskom području*) and construction land outside a construction zone (*građevinsko zemljište izvan građevinskog područja*) could be both state and privately owned. The Serbian legislator changed in 2003 the former perpetual right of use of state owned construction land into a 99-years leasehold without changing the underlying state ownership structure.

(xiii) Reform of state property regime

In recent years, Serbia was confronted with two sets of property rights issues, i.e. the reform of the state property regime and the privatization of state owned construction land. State property was regulated by the Law on Assets in the Ownership of the Republic of Serbia (*Zakon o sredstvima u svojini Republike Srbije 53/95*). According to this law, there was only state property in the form of property of the Republic of Serbia. The autonomous province and municipalities could not own immovable property, and any immovable property which was used by them was owned by the Republic of Serbia. In order to remedy this situation, which was also not consistent with the Constitution, and as a

precondition for further EU integration, Serbia replaced this law in 2011 with the Law on Public Property (*Zakon o javnoj svojini 72/2011*). According to this law, public property consists of (i) the property of the Republic of Serbia as state property, (ii) the property of the autonomous province and (iii) municipal property. All immovable property which was registered in the name of the Republic of Serbia, the Federal Republic of Yugoslavia or the Union Serbia and Montenegro was transformed into state property owned by the Republic of Serbia. The registration of the Republic of Serbia had to be effected ex officio and by operation of law. Immovable property which was used by the autonomous province or the municipalities was transformed in the public property owned by the autonomous province or, respectively, the municipality. The new law defines in detail the property types which are publicly owned, the restrictions which apply to the use of such property, e.g. no enforcement or use as collateral, which entities are entitled to a right of use of public property and the administration and transfer of such property. However, the new Law on Public Property does not apply to the territory of Kosovo, since, according to this law, the former Law on Assets in the Ownership of the Republic of Serbia continues to apply in Kosovo. The consequence is that from a Serbian law perspective there is no public property in Kosovo in the sense of municipal property or property of the autonomous province but only state property of the Republic of Serbia.

(xiv) Transformation of socially/ state owned construction land

The other reform process, i.e. the transformation of state owned construction land, is still ongoing. The Law on Planning and Construction (*Zakon o planiranju i izgradnji 72/2009*) provides for the transformation of the perpetual right of use or, respectively, the 99-years leasehold on state owned construction land into private or public property. The guiding principle is that the owner of the building becomes the owner of the underlying construction land so that private ownership of the building and ownership of the land are unified into a private property. According to this law, the owner of the building, or, in the case of unconstructed construction land, the registered holder of the right of use of the construction land acquires private property of the construction land. The right of use of construction land registered in the name of the Republic of Serbia, an autonomous province or a municipality, or of a legal entity that was established by them, is transformed into public property. Foreign states acquire property on construction land to which they had a right of use and which they needed for their diplomatic or consular functions. Similar to the earlier Croatian reform of construction land, Serbia unified the legal regime of both the building and the underlying land treating them as one asset with the consequence that all private rights and encumbrances attached to the building are extended to the underlying construction land.

The law also provided for certain entities the transformation of the perpetual right of use or, respectively, the 99-years leasehold on state owned construction land into private property for consideration (payment). These entities included legal entities which were subject to privatization and former socially owned enterprises. However, the provisions of the law on the transformation for consideration were declared unconstitutional in 2012. In response to that, Serbia adopted in June 2015 a new Law on the Transformation of the Right of Use into Ownership on Construction Land for Consideration (*Zakon o pretvoravanju prava koriscenja u parvo svojine na gradevinskom zemljestu uz naknadu*). The implementation process has just started and it may be too early to make an objective assessment of the success of this policy.

2.1.4 Montenegro

(xv) Policy on property rights and current property rights reform

Montenegro embarked on a major property rights reform in 2009 by adopting a new Law on Property Rights Relations (*Zakon o svojinsko-pravnim odnosima 19/09*) and a Law on State Property (*Zakon o drzavnoj imovini 21/09*). Although the Constitution of Montenegro of 1992 had abolished socially owned property by transforming most of it into state property, such as construction land, the right of use still remained in force and was not transformed into private property. This was widely perceived as an anachronism and furthering legal uncertainty to the detriment of investment and economic development. In certain cases, socially owned property was restituted pursuant to the Law on the

Restitution and Compensation of Taken Property Rights (*Zakon o povracanju oduzetih imovinskih prava i obstecenju 21/04*) and by that transformed into private property but in most cases the right of use continued to exist. The property rights reform of 2009 transformed the right of use on former socially owned property, now state property, into private property. Unless otherwise determined by special law, the registered holder of a right of use was entitled to register as the owner of the respective immovable property. This applies equally to private persons and public entities, such as municipalities. The correction in the cadastral records was made upon application by the interested party.

(xvi) State property regime

The 2009 reform also comprehensively regulated state property, which includes the property of the state of Montenegro and that of the municipalities. The Law on State Property clearly defines which assets are owned by the state and which by the municipalities and it establishes rules and procedures for the management and transfer of such property. Montenegro also distinguishes between “dominium” which is the equivalent of private ownership, and “imperium” which is the state’s authority to administer certain property in the public interest without having ownership. Montenegro has “imperium” on natural resources and public goods, while on other assets it may have “dominium”. The law also explicitly provides, in synchronization with the Law on Property Rights Relations, that the right of use of socially owned or state owned property registered in the name of a municipality is transformed into municipal ownership. Thus, private property rights are now comprehensively regulated by the Law on Property Rights Relations, while state and municipal property is regulated by the Law on State Property. Both laws have, in harmonization with each other, transformed the former right of use on socially owned/ state owned property into an ownership right and thus contributed to transparency and legal certainty as regards property rights in Kosovo.

(xvii) Foreigners and property rights

The Law on Property Rights Relations has also defined the rights of foreign persons to acquire property rights in Montenegro. In principle, the principle of national treatment applies, i.e. foreigners may acquire property under the same conditions as Montenegrin nationals. However, the exception is that foreign nationals may not acquire ownership of (i) natural resources, (ii) public goods, (iii) agricultural land, (iv) forests and forestlands, (v) cultural monuments, (vi) immovable property in the state border zone, and (vii) immovable property which is determined to be of interest for national security matters. As an exception, a foreign person may acquire ownership of agricultural land, forests and forestland up to an area of 5000m² if the transaction is connected to a transfer of ownership of a building.

2.2 Assessment

All four countries have in common that, like Kosovo, they were required to transform socially owned immovable property into property rights types which are compatible with a market economy and to facilitate legal certainty and transparency with respect to property rights. All of them have pursued different legislative strategies but the end-result is the transformation of socially owned property into either private property or state property. Germany and Croatia used the privatization of socially owned enterprises for a whole-sale transformation of socially owned assets of these enterprises into private property, something which Kosovo did not do. Germany transformed most of its socially owned property into private property, while Serbia, and initially also Montenegro, transformed it primarily into state property. Croatia adopted a middle-path by giving priority to transformation into private property, and leaving state property only as an option if it was not possible to determine any entity that might be entitled to socially owned property. Croatia’s approach also avoided the problems that Germany faced with its attempt to regulate the allocation of socially owned property to certain entities by law, something that Germany is still struggling with. A common feature is that all countries have opted for the option to convert the person who is lawfully registered as the holder of a right of use of a socially owned property into the owner of that property. The new legislation adopted in Serbia shows that Serbia is still struggling with the transformation of the right of use on state owned

construction land into private property. In terms of legal clarity and certainty, Montenegro offers an elegant legislative solution as it avoids multiple special laws that transform socially owned property into other types of property rights. Montenegro has one law on private property and another of state property and both are harmonized with each other. The transformation of socially owned property is effected by a general transformation of the right of use into either private property or state property, depending on who is registered in the cadastral records. It thus avoids the complications of German law, it has less legislation than Croatia but the same result, and it is more advanced than Serbia with respect to the transformation of the right of use of construction land.

3. RECOMMENDATIONS REGARDING KEY POLICY MEASURES

3.1 Policy Measure #1: Establish Clear and Concise Definitions of Basic Property Types and Transform Socially Owned Property into Marketable Property Rights

The lack of a precise and clear definition in the Constitution of the different property rights types is reflected in legislation, which also lacks a harmonized definition of the various property rights types. There is no clarity about the proper and precise use of different legal terms, such as public property, state property, and municipal property. This problem is further aggravated by legal uncertainty if socially owned property still exists as a property rights type. There is no law which has explicitly transformed socially owned property, respectively, the right of use of socially owned property into other property rights types, such as a private property or state property. Former Yugoslav or Serbian government property has not been transformed into state property either including property formerly held by “social political organizations”, such as the League of Kosovo Communists or the Socialist League. There is also no specific law which addresses public/state property and municipal property, how it is managed, who is responsible for its management, and how such property can be transferred to third parties.

There are in principle three options how these problems could be approached:

Option 1: The Ministry of Justice develops guidelines and explanations with legal definitions and clarifications of the meaning and scope of private property, public property, state property and municipal property in line with the Constitution. These guidelines will be disseminated to all Kosovo institutions to ensure a harmonized and unified use of property rights terminology in future legislation and administrative and legal practice.

Option 2: The Government drafts, and the Assembly of Kosovo adopts, a Framework Law on Property Rights in Kosovo which will list and precisely define the different property rights types (private property, state property, and municipal property) and which will also clarify the difference between public property and state property. It will also clarify the legal status of socially owned property and the right of use thereto. The Framework Law will refer to special laws which deal in detail with the specific property rights types (e.g. Law on Property and other Real Rights for private property). Additional laws would have to be adopted, such as a Law on State Owned Immovable Property which would confirm the transformation of socially owned immovable property into state owned property in accordance with the Constitution, a Law on the Transformation of the 99-years Leasehold to transform it into private property (unconditionally, or conditional upon the fulfillment of performance requirements as suggested in CN # 2), a Law on the Transformation of Former Socially

Owned Construction Land in order to transform the right of use of former socially owned construction land into a (private or public) ownership right, and a Law on Municipal Property.

Option 3: Kosovo follows the predominant practice in the region, most notably the Croatian and Montenegrin approach and

- amends the existing Law on Property Rights and Other Real Rights to include provisions similar to those in Croatian and Montenegrin legislation which provide for the transformation of the right of use of socially owned property into the property of the person who is registered as the permanent holder of the right of use. Private owners of buildings, which are legally constructed on public property, are converted into private owners of the land where the building is constructed under conditions prescribed by law. Property, where the municipality or any of its organs is registered as a holder of a right of use, would become municipal property.
- adopts a new Law on the transformation of the lease hold rights on socially-owned immovable property into private ownership rights, which would replace and abolish UNMIK Regulation 2003/13. The Law, other than transforming-privatizing the right of ownership of socially owned immovable property, will also clarify the legal status of social property and its usage rights. This law would transform the 99-years leasehold on socially owned immovable property acquired during the privatization process into private property, under conditions prescribed by law. Private owners of buildings, legally built on socially owned property, be converted to private owners of the land on which the building was built, in accordance with the conditions prescribed by law, while making necessary adjustments on the conditions of the transformation, based on legally and illegally built buildings. Property registered in the name of the former Yugoslavia, Serbia, or their administrative bodies and agencies, and property registered in the name of former social-political Organizations of Kosovo, be transformed in the property of the Republic of Kosovo. In all cases where there is a right of use of socially owned property and it is not clear who is the holder of such right or if a registered holder still exists, the right of use would be transformed into the property of the Republic of Kosovo; any person who, in this specific case, makes a claim to the contrary has the burden of proof;
- adopts a new Law on Public Property which governs the property of the Republic of Kosovo and the property of municipalities. The law would clarify that public property is a general legal category which consists of state property and municipal property. This would clarify the difference between public property and state property. The law would also list in detail all assets which are owned by the Republic of Kosovo and which are owned by municipalities. As regards the management of state property, the law could follow the ideas and suggestions set out in the Government's concept note on a draft law on public property. In addition, clear provisions on the management and transfer of municipal property would be needed.
- Legislation on private property rights be codified in accordance to the Kosovo Civil Code.

Option 3 is the preferred policy measure. The guidelines suggested in option 1 would not have the force of law and there is a risk that they would not be applied uniformly across all government institutions. It is also questionable if a legal interpretation of the executive branch would be binding on the judiciary in view of the principle of separation of powers and the independence of the judiciary. This could lead to further inconsistent interpretation of the meaning of different property rights between the executive and adjudicative branch.

A Framework Law, as suggested in option 2, would be of limited added value because it would have to be supplemented by special legislation. The same definitions as used in the framework law would have to be used in all special legislation. If there is legislative consensus on the definitions than the framework law would be redundant as the definitions could be used uniformly in all special laws. The adoption of different and individual laws on the transformation of the right of use of socially owned property bears the risk of further unintended inconsistencies between the laws and different interpretations in practice.

Option 3 follows the practice of countries in the region which have successfully transformed socially owned property into public or private property. With just one amendment to the existing Law on Property and other Real Rights the right of use would be uniformly transformed into an ownership right. With that, it would become clear when private persons, publicly owned enterprises, municipalities and the Republic of Kosovo would acquire ownership of an immovable property. A new Law on Public Property, which would be harmonized with the amended Law on Property and other Real Rights, would fill the existing legal lacuna which is caused by the lack of comprehensive law on public property. It would also be in line with the Government's National Program for the Implementation of the Stabilization and Association Agreement and the concept note on a draft law on public property. This option would also be consistent with the Constitution which refers to public and private property and which has, in the past, provide for the transformation of socially owned property into state property as a subcategory of public property. As a result, there would be one comprehensive law that governs comprehensively private property, and one other law that governs comprehensively public, i.e. state and municipal property. At the same time both laws would adopt the same approach to transform the right of use of socially owned property into either public (state or municipal) or private property.

Policy measure #1	Establish clear and concise definitions of basic property types
Solution	Amend Law on Property and other Real Rights to include provisions on the definition of property rights types, and the <ul style="list-style-type: none"> - transformation of the permanent right of use of socially owned property into a private or public ownership right, depending on who is registered as the permanent holder of the right of use - transformation of the 99-years leasehold into private property. - transformation of the legal private owners of buildings, built on public or social property, into private owners of land where the building is built, under the conditions specified by law. - transformation of properties of institution and bodies of ex-Yugoslavia, R. of Serbia and ex Social Political Organizations of Kosovo into the property of R. of Kosovo Draft Law on Public Property which will define public property as consisting of state property and municipal property and which will establish rules and procedures for the management of such property
Output	(1) Amendment to Law on Property and other Real Rights (2) Law on Public Property (3) Law on the transformation of right of ownership of immovable socially owned property
Outcome	There is legal clarity and certainty as the ambiguous socialist right of use of socially owned property is transformed into either a public or a private ownership right. It is clear who owns what kind of property. There are clear rules and procedures on how to manage state and municipal property. There is a clear delineation between private and public property rights.
Indicators	100% of property rights types are identified and clearly defined 100% of right of use of socially owned immovable property is transformed into private or public ownership.

3.2 Policy Measure #2: Introduce Harmonization of Terminology and Definitions across the Relevant Legal Framework Regarding Property Rights

The lack of legal clarity with regard to which property rights types exist, and the uncertainty in respect of their definition and scope has resulted in different laws using different and inconsistent legal terminology. This is a source of legal confusion which diminished the chances of a uniform application of the law related to property rights.

The recommended policy measure is to review all existing legislation which refers to property rights in order to identify and eliminate terminological inconsistencies, and to provide suggestions for a uniform use and application of the developed definitions in the amended Law on Property Rights and other Real Rights and the new Law on Public Property. The review process would also make suggestions for the replacement of existing inconsistent or obsolete provisions or even entire laws which became unnecessary due to the implementation of policy measure #1. The result would be a de-facto legislative guillotine in the area of property rights ensuring that all special laws adopted in the past are relevant, needed and harmonized with the amended Law on Property Rights and other Real Rights and the new Law on Public Property.

Policy measure #2	Introduce harmonization of terminology and definitions across the relevant legal framework regarding property rights
Solution	Review existing legislation to eliminate terminological inconsistencies Provide suggestions for proper implementation of the developed definitions in the legal framework and the related amending or replacement of existing inconsistent or obsolete provisions
Output	(Amendments to laws dealing with immovable property rights to harmonize use of legal terminology)
Outcome	Laws related to property rights are harmonized and there is legal certainty across all laws as to the definition and scope of immovable property rights
Indicators	100% of laws are revised and all terminological inconsistencies identified and eliminated

3.3 Policy Measure #3: Adjust Normative Provisions and Administrative Implementation of the Right of Foreigners to Own Property

In order to ensure compliance with Kosovo's international obligations under the Stabilization and Association Agreement concerning the treatment of EU nationals in Kosovo, including the acquisition and transfer of immovable property rights, the recommended policy measure is to amend the Law on Property and other Real Rights and to explicitly provide for the right of foreign nationals to acquire and transfer immovable property rights in Kosovo. The right of foreign persons to acquire and transfer immovable property rights may be restricted in certain areas, following the example of Croatia and Montenegro where the legislator considers that it would be good public policy to reserve ownership to nationals only, provided such restrictions are in accordance with the Stabilization and Association Agreement. The legislator may also opt for a policy of no restrictions for foreigners to acquire and transfer immovable property rights, as it is the practice in Germany. However, it is necessary that the right of foreigners to acquire and transfer immovable property rights is codified in law in order to eliminate current speculations about whether such right exists and to facilitate the establishment of a uniform administrative practice. The adoption of the amendments to the Law on Property and other Real Rights would be supported with the issuance of guidelines by the Ministry of Justice explaining in details the rights of EU nationals to acquire and transfer immovable property rights pursuant to the Association and Stabilization Agreement.

Policy measure #3	Adjust normative provisions and administrative implementation of the Right of Foreigners to own property
Solution	Clarify the legal status of foreigners to own property in Kosovo by amending Law on Property and other Real Rights if and to what extent foreigners may acquire state owned immovable property

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Output	<p>(1) Amendment to the Law on Property Rights and other Real Rights clarifying if there are restrictions to ownership of private property or any other rights related to public property by foreigners.</p> <p>(2) Guidelines issued by the Ministry of Justice on the rights of foreigners to acquire and use private and public immovable property</p>
Outcome	<p>There is legal certainty about the rights of foreigners to acquire and use private and public property. There are better incentives for foreigners to invest in Kosovo.</p>
Indicators	<p>100% of all cadastral offices register foreigners as owners of immovable property rights in accordance with law.</p>

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PILLAR # 2
PUTTING LAND
TO USE:
PROMOTION OF A
VIBRANT LAND
MARKET TO FUEL
ECONOMIC
GROWTH

ANNEX 4

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INTRODUCTION

This concept note identifies and addresses **four main issues of pivotal importance** and is structured accordingly.

In a first step, land consolidation should be expanded and **effective spatial plans**, particularly zoning maps, covering the entire municipality (urban and rural), need to be developed, harmonized, and enforced (issue # 1). The achievement of this objective will address the considerable friction between the need to expand urban areas and the necessity to protect and develop agricultural land. Furthermore, it will also have a positive effect on preventing unpermitted construction, and will promote the most productive and rational use of land, granting much needed benefits to the economy of Kosovo. Finally, when spatial plans lead to deprivation of property in the name of public interest, such deprivation should comply with **ECHR** standards.

Another pressing issue is the need to **treat unpermitted construction on arable land** (issue # 2). Arable land is a crucial asset to the prosperity of the agricultural sector in Kosovo and therefore is a focal aspect of its economic growth. Fragmentation and especially illegal construction both distinctly impair overall land availability for investment and thus cripple the land market. By appropriately regularizing unpermitted construction and sufficiently clarifying its legal status significant property value can be included in the land market and utilized to stimulate economic growth. Furthermore, developing and implementing swift and coherent action to prevent future illegal construction will avert detrimental factors regarding property value and disposability. There is an urgent need to address this issue, since the associated harmful effects are both extensive in impact and continuously progressing. Proper responses to unpermitted construction are themselves prerequisites for further activities introduced in this concept note. For these reasons, this issue needs to be treated as a top priority.

Furthermore, it is of significant importance to **develop policies and procedures to privatize arable agricultural land in order to increase investment and market transactions** (issue # 3). Socially owned land is generally unexploited and needs to be subject to effective and investment oriented privatization aimed at creating or increasing productivity, contributing to a vibrant land market and promoting growth in the agricultural sector. Through streamlining of the privatization process and introducing sufficient title security, investment will be facilitated and the elucidated economic benefits can be developed more timely and prolifically.

Modernizing and improving the property tax system, and in particular valuing and taxing land, is central to **creating incentives to encourage both market transactions and productive use of arable land, as well as to generate own-source revenue for municipalities** (issue # 4). The later mentioned measures may play an important role in adding transparency to the property market, and will counteract bidding retention of otherwise arable land, effectively facilitating its return to the land market, which in turn will contribute to a better functioning economy. In line with this, effective procedures for the enforcement of respective unpaid tax obligations need to be developed and established and debtors aggressively pursued. This will lead to the double benefit of not just inducing the efficient use of land favouring economic growth, but also generating much needed own-source revenues for the respective municipalities.

The **overall purpose of this analysis**, which lays out key findings and recommendations (based on discussions with key stakeholders), is to assist the Ministry of Justice (“Moj”) in developing a detailed property rights strategy that will address and resolve the issues tackled under this pillar.

Its **main objectives** are to analyze and comprehensively assess policy measures closely linked to incentivizing productive use of land and promoting a vibrant land market to fuel economic growth, and

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formulate an operational and realistic roadmap for reform that would identify the specific legal, administrative, and policy actions required to achieve progress in areas that impede sustainable economic growth. In so doing, it would provide detailed timelines and success indicators with clearly assigned responsibilities for implementation of key recommendations.

ISSUE # 1 LAND USE PLANNING

This concept note identifies and addresses **four main issues of pivotal importance** and is structured accordingly.

1.1 RATIONALE

1.1.1 Situation Assessment

1.1.1.1 Urbanization and Land Development

Since the end of Kosovo's war, the country has experienced a dynamic process of urbanization. The social, political, and economic dynamics have stimulated a frenetic urbanization process. Kosovo has one of the highest population growth rates in Europe, at 1.6% annually and one of the highest overall population densities (220 people/km²). Due to the population concentration toward urban centers this density is disproportionately higher in large cities such as in Pristina (900 people/km²).

It is estimated that some 40% of the population lives in urban areas, but there are clear trends that this ratio is increasing in favor of urbanization. This frenetic urbanization has exposed the urban centers, especially the more populous ones, to development pressures.

The Kosovo Spatial Plan emphasizes the pressure the urbanization process has exercised to land in the last 15 years *"The average urban growth for the last 20 years (1980-1999) or the area of each center has grown for 2.7 times. An estimate may be given only for the Pristina Municipality: in 1980 Pristina used to have 450 ha coverage, and after 20 years, it has grown into 1500 ha or at least 1000 hectares more"*.²⁵

It is argued that the system has failed to control the urban growth, resulting in urban sprawl. This process, especially in the absence of orienting planning policies, has brought considerable tension between the need to expand urban areas and the necessity to protect and develop agricultural land. The phenomenon of urban sprawl has exercised considerable pressure toward the urban planning system.

The main driving force behind land development in Kosovo is the process of urbanization, resulting in a feverish construction activity (mainly housing, since the process has failed to generate a diversified nature of development) in the urban centers, while agriculture presents a far less interesting profit/investment ratio. Besides this rationale, the construction activity has been stimulated by sometimes, wrong assumptions and expectations on the side of the developers, hence resulting often in a speculative activity as opposed to following market trends or market analysis. There are also concerns, according to which the speculative aspect of the construction activity would be an expression of the presence of grey and, sometimes, criminal financing sources. However, due to the fragmented nature of land, the land development process has resulted in a fragmented development pattern as well. In the end, the community quality of development is seriously obstructed, resulting in a low quality of urban 'product'.

Spatial Planning documents are meant to lead the land development process. The traditional planning approach that Kosovo inherited is based in the former centralized socialist system, which in the absence of a free market reality, was short of market projection, objectives and analysis. The absence

²⁵ Kosovo Spatial Plan 2010-2020, p.31.

of these dimensions, obviously weaken the quality of the planning documents, hence lowering the confidence of the public and the economic factors towards them. Due to the low confidence in these documents (which are frequently changed, mainly reflecting private singular influence), the process of land development is conducted almost outside of this framework. The synchronization between public and private investments, on which planning documents should be based, is scarce and this compromises the reliability of the land development model.

The formal spatial planning and land development system in place in Kosovo has not accommodated for adequate housing in the face of the large-scale urbanization process. This has led to roughly 400,000 objects across Kosovo that have been developed without permit. This phenomenon is, on one side the expression of the need of the population to invest in housing, and on the other side, the strenuous difficulty of being provided with construction permits due to the exhausting procedural, bureaucratic and technical barriers that the traditional planning system promotes. Therefore, because the considerable flow of investments in housing was never streamlined and oriented within the system due to this lack of response from municipalities (in many cases creating the basis for corruptive practice), many could only address the housing issue outside the system by building without a permit. In fact, the informal development is a striking expression of the failure of formal systems in providing for housing and infrastructure, or accommodating private investments within the system.

Therefore, the land development model has resulted in: (i) fragmented low quality of urban and rural 'product'; (ii) a conflict between the public interest for urban quality and a private interest in maximizing construction intensity; and (iii) informal settlements.

1.1.1.2 Shifting Role of the Government

Since the fall of communist regimes in Europe, Eastern European governments, including that of Kosovo, have gone through institutional changes that have affected the urban planning system. In the former socialist system, the government was the provider for housing, infrastructure, and employment. In the new context, the private market forces are the ones that provide housing and employment opportunities for the population.

The shift of the government's role from a 'provider' into an 'enabler' for development processes, together with the strengthening of the market forces, has led to the change in the working environment and the necessity to adopt a more modern planning system.

1.1.1.3 Land Privatization and Fragmentation

Kosovo has gone through a dynamic process of land privatization, especially in the rural and agricultural areas. This process aimed at allowing market forces to play their role in investing in the land development process.

Statistics show that the land share in Kosovo is approximately as follows:²⁶ 53% Agriculture; 41% Forest; 4% Water; 3.5% Natural parks; 0.6% Residential.

However, due to the feverish urbanization process and sprawl phenomenon, it is estimated that the urban area is increasing rapidly, seriously threatening the country's agricultural potential. Furthermore, according to the Kosovo Spatial Plan, the land per capita is estimated to be 0.15 ha/inhabitant, which is below the critical limit of 0.17 ha/inhabitant (while the arable land 0.24 ha/inhabitant, critically below the European average of 0.52 ha/inhabitant), compromising the ability for agricultural production.

²⁶ Kosovo Spatial Plan 2010-2020, p. 41.

Kosovo has some 577,000 fertile agricultural land plots and roughly 88% of the total amount of agricultural land is privately owned. Previous research studies financed by USAID and conducted by RIINVEST²⁷ have shown that the land size per farm is relatively low, at around 2.2-2.4 ha per family. In fact, the majority of families have very small farms; 40.2% have farms of 0.1-1.0 ha, while 24.4% have farms of 1-2 ha, and 25.3% have farms 2-5 ha, while only 8% have farms of 5 ha. Around 2 % of families do not have land at all.

In a 2006, in a Statistical Office of Kosovo information cited in the EU Commission financed study²⁸ the farm structure is as follows:

	2005 Survey		Share in Agricultural area (%)
	Number of holdings	% of holdings	
Total	171.739	100	100
Up to 2 ha	133.473	77.71	45
Above 2 ha to 5 ha	32.325	18.82	36
Above 5 ha to 10 ha	4.893	2.84	11
Above 10 ha to 100 ha	1.048	0.61	7
Above 100 ha	--		

This table illustrates again the high level to fragmentation of the agriculture land. Fragmentation is a phenomenon that it is assumed to have been extended also in the urban areas.

It is generally accepted that the fragmentation of the land and the small size of agriculture plots have seriously hindered the agricultural development, hence reducing the opportunities for economic promotion.

In rural areas, land fragmentation has reduced agricultural production capacities. In urban areas, it has also reduced the opportunities for proper urban development, resulting in an inferior land development process.

Therefore, land consolidation is considered to be a major reform that Kosovo needs to commit to. The GoK has developed a national strategy to address the land consolidation objectives.

Land consolidation is a process that has started in the 1980s, lasting for 6 years and managing to re-organize (based on the irrigation system) some 38,600 ha, out of which only 26,000 ha have been developed. Additionally, due to the time distance between the actions taken and the social-economic dynamics of the last 30 years, there are noticeably large discrepancies between what was planned in the land consolidation process, and the reality on the ground.

It is estimated that, after examining the situation in the cadastral zones where the project has been implemented, different issues are present, such as; [i] despite the efforts in consolidating land, the process has not been finalized and reflected in the cadastral system and property registration [ii] the agricultural activity is developed based on the consolidated configuration of the land, while the property configuration is completely different [iii] in some cases the property configuration has switched back to the situation, prior to the consolidation stage, and this is unfortunate since it somehow reflects a step back in the process.

²⁷ Rural Development in Kosovo (2004) – Promoting economic development through civic society – financed by USAID.

²⁸ Kosovo Report (2006) – Study on the state of Agriculture in Five Applicant Countries, conducted by Arcotrass, Vakakis International SA, EuroCare GmbH and AKI.

The land consolidation project is considered an unfinished process and it needs new efforts and engagement in order to create some sound basis for a better and efficient management of the agricultural land.

The strategy identifies several approaches of the land consolidation, such as; [i] freewill approach, which basically reflects the consolidation that occurs when landowners realize the necessity to engage in a consolidation process and they take the initiative on their own [ii] public agencies intervention, which basically reflects the necessity of re-organizing land tenure based on the public investment intervention. A typical case is the re-organization and consolidation that would occur as a necessity after investments, such as; highways, dykes and dams, or a new irrigation system network [iii] intervention of government in contest mediation [iv] finalizing an unfinished consolidation process.

In fact, the agricultural land legal framework has accommodated the concept of land consolidation and developed the principles, objectives and procedures for the land consolidation. The strategy has also recognized the need to improve the legislation on land regularization.

The importance of establishing a sound and solid land use and spatial planning system is evident in order to synchronize the land consolidation efforts. There is an essential need to coordinate these efforts with public investment in agricultural infrastructure and not only with the land consolidation process and projects.

1.1.1.4 Spatial Planning System

In assessing the situation of spatial planning system a premise should be done. Kosovo is in the process of reforming the spatial planning system. A new Law on Spatial Planning is in place and the regulatory framework is in the process of being completed.

The assessment focuses in carrying out the issues, problems and challenges of the inherited traditional planning in Kosovo rather than advancing a critical view on the reform itself. The reform has been undertaken to address some of the issues listed in the assessment, and it would need a fair amount of time to judge over the achievements and success of such reform.

1.1.1.4.1. Statutory vs Strategic. The spatial planning in Kosovo has followed the conventional approach of the urban planning system of the Eastern European countries in general, and former Yugoslavia in particular. The centralized nature of the economy has defined the nature of the urban planning as well. As a result, Kosovo's planning system is very much based in the 'statutory' component of the planning, while the strategic component is considered relatively less important.

The absence of strategic thinking in the planning system, combined with the peculiar land tenure situation of Kosovo has allowed for informal and unlawful development in many areas around large urban centers.

1.1.1.4.2. Provider vs Enabler. Urban planning has traditionally sought to provide and organize only land for housing, retail, recreation, social services, and infrastructure for a population via a centralized planning decision. The planner was not supposed to approach the task from an economic development or environmental protection perspective. Rather, the planner's main task was to physically accommodate for the functions required, based on some strict norms of projection.

The failure to include the influence of market forces in the urban planning system led to a disruption between land tenure and, to a certain extent control of the population's migration. This failure has seriously limited the strategic dimension of the planning system.

1.1.1.4.3. Public vs Private. The growing pressure of the urbanization process, the increasing private interests that the land development process and real estate activities have generated, and the absence of a proper legal and planning framework, have led to a conflict between the private interest of housing and land development with the public interest, including open spaces, services, and parks. The planning system has not yet addressed this tension.

In the spatial planning process, the use designation of land parcels process does influence the value of these properties. Designation uses for “private” development increase the value of the property, while “public use” designation, depreciates the value of the land, which calls for some sort of compensation. This dynamic is in the basis of the tension and put lots of difficulties toward the public sector.

Indeed, for the public sector (especially in the local government) it is rather difficult to mobilize appropriate resources to provide for public spaces, kindergartens, schools and other public services and amenities.

1.1.1.4.4. Fragmentation vs Consolidation. The fragmentation of the land tenure has also contributed to the lack of quality of urban development. The same process similarly risks to affect the rural and agricultural development process. The planning system is not yet able to provide the adequate instruments to allow for some sort of development consolidation that would increase the chances for higher quality of urban development.

The general underlying approach to address the fragmentation of the agriculture land is through physical and legal consolidation of the agriculture land. The national strategy of consolidation describes the scenarios of consolidation. However, they all come down to rearranging the cadastral parcel in a form, shape or tenure that would promote productivity.

The National Strategy for Land Consolidation states “*Land consolidation is very deliberate strategy that can cope with all kinds of issues that surface when the transformation of agricultural land in a given locality is in focus. It can be widely defined as a change of form, ownership and land use - in any combination*”.²⁹

In the urban development sector, the underlying would have to be similar, but not necessarily identical. The consolidation would be focusing on the development (or improvement), rather than in the land parcel itself. Hence the concept of ‘development consolidation’. Indeed consolidated urban development (that would not necessary call for intervention in the property rights itself), would have been a way to promote; [i] land use efficiency and productivity [ii] quality of urban development, and [iii] fair land development process.

1.1.1.4.5. Urbanization vs. Balanced Development. With the urban centers experiencing dynamic growth, but without proper development plans, it could be expected that the infrastructure and utilities would have a hard time coping with the increasing demand from the population.

The spatial planning system needs to establish a set of clear and transparent rules and regulations that would allow for more balanced development in the face of rampant urbanization. Agricultural land, forests, and environmental resources should enjoy protection and development through a strategic balanced economic and spatial development process. The spatial planning system should be able to provide a methodology that would accommodate the natural urbanization process, without compromising the resources that provide the basis for existing and future economic, social, and environmental development.

It should be recognized though, that the Spatial Planning System is going through an important reforming process. A new spatial planning law is in place, and the respective Administrative Instructions

²⁹ Ministry of Agriculture, Forestry and Rural Development, Strategy for Land Consolidation, 2010-2020, p.6.

are in the process of being drafted. The new legal framework is aiming at addressing some of the issues and problems analyzed in the traditional planning system in Kosovo.

The new legal framework aims at a better harmonization between the strategic aspect of planning with the physical and regulative aspect of zoning. It is worth mentioning that the new legal framework is developing mechanisms to better address the need for a balanced (urban vs rural) development through a more decisive and predictable land use and zoning process.

The newly reformed spatial planning system is expected to promote transparent rules and regulations that will promote predictability and stability in land use. This will attract long-term investments in the country. Transparency, predictability, and public involvement in the planning process will also have an impact in a fair distribution of the benefits of land development.

1.1.1.4.6. Capacities. Departments concerned with urban and rural spatial planning and rural management within the municipalities generally lack qualified and experienced staff. Since the new Law “On spatial planning” has obliged the municipalities to prepare their Municipal Development Plans (“MDP”) using their own employees, most of the municipalities have articulated the need for guidelines on spatial planning principles and procedures that will help explain basic principles and indicators.

General capacity building tends to be at an acceptable level, but vocational capacity is sorely missing in activities related to planning processes, GIS, database construction, engineering environment, (waste) water, construction, horti-/arboriculture, and legal surveying. Local professionals have limited exposure to international learning experiences, thus prohibiting implementation of current good practices in spatial planning procedures and methodologies. Since publications related to spatial planning are scarce, municipalities are heavily dependent on training sessions in order to build their capacities.

1.1.1.5. Deprivation and Restrictions on the Use of Property. The implementation of a considerable number of land use plans or other public work projects aimed at developing the general economic and/or social welfare of the country may require expropriating private immovable property. Such expropriation should take place only in the public interest and in the exchange of prompt, adequate, and effective compensation of the expropriated persons.

On the other hand, zoning regulations contained in the land use plans can cause widespread interferences with the use of property. Even when property it’s not expropriated and title remains with the property owner, the planning restrictions may be as radical in nature (such as if a property is zoned for strict environmental protection and no development is allowed, or when property is allocated for a public use in the future but not actually expropriated) as to deprive the owner of all economic use of his or her property. In such cases, complete deprivation of all economic value should be recognized as an act of taking requiring public authorities to award fair compensation to the property owner.

In accordance with ECtHR jurisprudence, the state authority’s right to interfere with private property is treated as justifiable, as long as the interference is directly linked to the accomplishment of a legitimate public interest and subject to the conditions provided by domestic law, which in turn must comply with the rules of international law.³⁰ Above all, it is imperative that the state authority preserves a fair balance between the public interest and individuals’ property rights.

The lack of a solid system for protecting property rights is inevitably linked with slow economic development. The risk of arbitrary deprivation of property may have a discouraging effect on investment.

³⁰ Dragoljub Popovic, *Protecting Property in European Human Rights Law*, (2009), p. 31.

1.1.2 Current Policies

In 2002, Kosovo engaged in designing a national strategy for spatial development, which was concluded with the Spatial Plan of Kosovo (“SPA”) that was approved by the Kosovo Assembly in 2007. The same strategy was amended and approved in June 2010 and laid out a strategic plan for a period of 10 years.

During the same period, some municipalities engaged in the process of designing their own MDPs. Of Kosovo’s 38 municipalities, only 30 have adopted municipal development plans. Several municipalities in the north have analogous plans, but they are not as strategic as an MDP. Most of these documents are realized through contracting design bureaus. However, some sort of public participation has been secured during the planning process.

These municipal plans are considered to be a good effort of the municipalities as planning exercise. They have gone through a technical as well as a public consultation process. However, these plans face some limitations. Due to the traditional planning culture that remain from socialist periods, these plans engage in profiling the situation rather than articulating clear policies, strategies, and actions that address adequately urban development challenges. Furthermore, professionals in these municipalities claim on several occasions that these plans made use of outdated data regarding population, land development progress, land use and property and land tenure records.

From a technique standpoint, due to the fact that Kosovo does not have a well-articulated planning system, it should be emphasized that these plans do not use a standardized ‘planning’ language, terminology or even methodology, which impacts on the quality of these plans.

Unsurprisingly, many of these plans are not used as real guides to orient development through public investments or mobilization of private investments. They are mainly used to organize the conditions of issuing building permits in a context of feverish construction activity. In many cases, the exercise is considered to be a one-time process, which results in dismissing the plans instead of using them as real working documents in the daily operations of the municipalities.

In 2003, Kosovo approved the Law No. 2003/14 “On spatial planning”, which was in force until 2013, when Kosovo Assembly approved the Law No. 04/L-174. The main aim and rationale for the new spatial planning law was the creation of a better business climate for the construction sector, which is considered to be one of the main contributors in the economy of Kosovo. On the other side, the continuous and in some cases ‘sprawling’ nature of the urbanization process has raised concerns over the speed with which agricultural land is wasted by being converted to urban land. Therefore, the aim of the law is to create a more balanced development by establishing a better monitoring of the land use process.

The main objectives of the new spatial planning system are:

- To lower the procedural, bureaucratic, administrative, and technical barriers for investors in the land development process by using the zoning approach to set known and transparent development conditions;
- To encourage central and local level planners to set achievable development priorities and action plans;
- Creating clear, standard, and transparent zoning rules in order to increase the control of the public sector in the land development process; and
- Creating planning instruments that address a more balanced urban-rural development by shifting from urban development plans into integrated spatial development plans that cover the entire administrative boundaries of the municipalities.

Furthermore, the legal framework of spatial planning is in the process of being completed with the respective bylaws.

However, the spatial planning law does not address the issue of urban land fragmentation, therefore it cannot be considered an instrument for a consolidated urban land development process. Fragmentation still remains a crucial obstacle in the land development process. The median size of an agriculture parcel is 0.36 ha according to Kosovo Cadastral Agency statistics. In the rural context, there are some singular attempts to address the issue. The Law No 02-L-26 “On agriculture land” has made some attempts to stimulate land consolidation. A voluntary mechanism of land consolidation is introduced, but the effectiveness of such mechanism is still in doubt.

The Government of Kosovo assisted by different donors has also attempted some pilot initiatives for land improvement through land consolidation projects. However, the challenges to introduce an effective mechanism, as well as good practices in land consolidation, still remain.

With respect to preventing unpermitted construction, Kosovo began instituting reforms to the construction sector in 2011 with the adoption of a new Law on Construction, No. 04/L-110. This Law was an important first step to combating the problem of unpermitted construction, as it eliminated delays and created a legal structure for issuing permits that is fair and predictable. It also removed an economic barrier to proper permitting by requiring administrative permit fees that are objective, able to be calculated, and rationally related to the government services provided.

Due in part to changes made by the new Law on Construction, Kosovo improved its ranking in the World Bank’s Doing Business Report from an overall ranking of 119 in 2011 to 75 in 2015 (a 44 point improvement). And for the indicator of Dealing with Construction Permits, Kosovo improved from 173 in 2011 to 135 in 2015 (a positive increase of 38). In fact, through these reforms, Kosovo has had the 3rd best improvement in construction reform in the world during the period.

The second phase of construction reform is found in the new Law on Spatial Planning, No. 04/L-174 which provides a transparent and easily accessible way for owners to determine development conditions for their property. Once the new spatial planning concepts are implemented, it will be much easier and faster to obtain a construction permit.

Deprivation and Restrictions on the Use of Property

Kosovo has experienced a bitter past in regard to violation of human rights in cases of expropriation.³¹ Consequently, the need to overcome fears originating in the past and protecting property from arbitrary state interference becomes paramount. Article 46.3 of the Kosovo Constitution provides that the state authority may proceed with expropriation of property only if it is: (i) authorized by law; (ii) necessary or appropriate to achieve a public purpose or promote the public interest; and (iii) followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated. In addition to this, paragraph 4 of the same Article lays down the foundations for due process protections and entrusts the courts with the responsibility of settling disputes that might arise from the expropriation process.

In the same line, the European Convention for the Protection of Human Rights and Fundamental Freedoms (as it has been interpreted and applied by the European Court of Human Rights (“ECtHR”)) demands the fulfillment of three main conditions for state interference with property. They can be summarized as: (i) lawfulness; (ii) legitimate aim; and (iii) fair balance or proportionality.³²

³¹ OSCE Mission in Kosovo, Expropriations in Kosovo, December 2006. The report identifies violations of property rights in cases of expropriations conducted in Kosovo.

Furthermore, during Yugoslav times, a large number of owners lost their private property due to state actions that were based on legal acts that were in total contradiction with universal norms and human rights.

³² *Id.* at 52.

Law No.03/L–139 “On Expropriation of Immovable Property” (the “Expropriation Law”), as amended by law No.03/L-205, regulates the state authorities’ right to (i) expropriate a person’s ownership or other rights in or to immovable property and (ii) temporary seize and use immovable property in Kosovo. For the purpose of properly implementing the Expropriation Law the Ministry of Finance (“MoF”) has issued a sub – legal act establishing a methodology for calculating the compensation to be paid for expropriated property and expropriation-related damages.³³

The competent public authorities for carrying out the expropriation of immovable property are the Municipality and the Government.³⁴ A separate entity, the Immovable Property Valuation Office at the Property Tax Department (“IPVO”) is responsible for valuing any immovable property that is subject to an expropriation procedure and calculating the amount of compensation to be paid to the expropriated persons.³⁵ The Government is the only body that may decide and authorize the taking of any immovable property in temporary use.³⁶

The legal framework governing the expropriation and temporary seizure and use of immovable property sets out a large number of rules, conditions, and rather complex procedures under which the expropriation and temporary seizure may be performed. It provides a novel set of procedures and rules for the expropriation, temporary seizure, and valuation of properties that are different from those previously applied in Kosovo. It also foresees procedural guarantees, including the right to challenge in court: (i) the legitimacy of an expropriation and the adequacy of compensation;³⁷ (ii) the legitimacy of a decision authorizing the temporary use of property;³⁸ or (iii) any other act taken or decision adopted by a public authority under the law.³⁹ The legislator was careful to introduce in the Expropriation Law new notification means and a long notification procedure to make sure that the affected persons, and especially those displaced due to the conflict, have adequate knowledge of the proceedings that may lead to deprivation of property.⁴⁰ However, the Expropriation Law⁴¹ requires individual notification of the affected persons (i.e. an individual written notice or other official communication sent to each affected person) only if their address may be readily ascertained from the available cadastral and other official immovable property records in Kosovo, including the records of the Kosovo Property Agency and the most recent property tax records. Consequently, all those persons whose current addresses are not listed in these official records are precluded from being notified of the expropriation (an issue closely examined under Pillar 4).

The Constitution of Kosovo and other human right instruments⁴² that are integrated in Kosovo’s legal framework offer broad guarantees for private property rights. While the right to property is guaranteed, Article 46.2 of the Constitution of Kosovo and the second paragraph of Article I of the first protocol to the ECHR (particularly important for planning decisions) allow public authorities to regulate the use of property in accordance with the public interest. As the ECtHR noted in its judgments, the scope of the control/regulation rule is very wide but it is not absolute. It may be argued that it comprises all measures that are necessary to regulate the use of property in the name of public

³³ Administrative Instruction No. 02/2015 – “On the approval of technical valuation methods and criteria for calculation of the compensation amount for the expropriated immovable property, and expropriation related damages”.

³⁴ Law No.03/L–139 “On Expropriation of Immovable Property”, as amended, Art. 4.

³⁵ *Id.* at Art. 21

³⁶ *Id.* at Art. 29.

³⁷ *Id.* at Art. 35, 36.

³⁸ *Id.* at Art. 35, 38.

³⁹ *Id.* at Art. 39.

⁴⁰ The Expropriation Law foresees that the decisions of the expropriating authority (the decision authorizing the conduct of preparatory activities, the decision accepting an application for further processing, the preliminary decision and the final decision) shall be published in the Official Gazette and in a newspaper enjoying wide circulation in Kosovo. Apart this, the expropriating authority is obliged to hold a public hearing on the requested expropriation in each municipality where the concerned property is located.

⁴¹ See Law No.03/L–139 “On Expropriation of Immovable Property”, as amended, Art. 5 and 42.

⁴² The Universal Declaration of Human Rights, Art.7, the European Convention for the Protection of Human Rights and Fundamental Freedoms Art. I, First Protocol to the Convention.

interest, provided that they do not amount to deprivation of property. However, in some cases the interference with property can be so severe as to amount to a *de facto* taking of property, thus placing individuals under “unusual” and “excessive” obligation in the absence of adequate and effective compensation.

In this context, when developing new spatial planning documents, especially zoning maps setting generalized development conditions, public sector actors will necessarily be making planning decisions that will have broad effects on existing private property interests. Uses or development opportunities that previously were allowed may, in the future, be prohibited by the zoning map. While this is a normal part of the planning process, the legal framework for evaluating planning decisions vis-à-vis private property rights is not fully defined.

1.1.3 Problem Definition

In elaborating the challenges of the planning system, it is of crucial importance to develop a premise. The problems identified, analyzed and exposed are mainly referred to the traditional spatial planning system in Kosovo. However, it should be emphasized that the spatial planning system is undergoing a major reform that intends to address the majority of the issues, which are identified as problematic for a good performance of the system.

The new legal framework for Spatial Planning is in the process of being completed and the results of the new system performance will be realized in the next few years. Nevertheless, reforming and improvement of the Spatial Planning system is a ‘perpetual’ effort.

The traditional spatial planning system has faced serious difficulties and has failed to address some of the main issues of land development in Kosovo.

1.1.3.1 Misleading Land Development Process

The system has failed to provide guidance for the land development process. Land development is conducted in a rather informal way and spatial planning is lagging behind having difficulties to cope with the frenetic rhythm of urbanization. As a result, estimates place over 400,000 illegal constructions that Kosovo is trying to address through a formalization and legalization process.

The plans are supposed to synchronize between the public and private investment and interests. In reality, however, the plans have only been used to approve building permissions mainly for residential purposes.

The system has failed to serve as an orientation to the public and private investments. Indeed, there is little strategic thinking in the spatial plans, and almost weak relationship to the public budgeting decision-making process. Therefore, the creation of a sustainable and long-term budgeting and investment policy is seriously challenged.

The legal framework should ensure that the spatial planning documents serve as the basis of the decision making, not only for land construction purposes, but also for infrastructure development projects, rural development policies and strategies, and for special programs for environment protection and development.

It should be said the undergoing reform intends to address the strategic role of the spatial plans by [i] strengthening the role of the MDPs, which constitute the set of territorial strategies of the government, and [ii] increase the predictability of the zoning maps.

1.1.3.2 Lack of Sufficient Instruments to Prevent Future Unpermitted Construction

Mostly due to lack of technical and financial capacity informal settlements and unpermitted constructions in general are not integrated in the planning, hindering efficient pre-emptive measures on a structural level. Furthermore, while both the Law on Construction and the respective implementing administrative instructions are clear about the illegality of building without a permit, a more deterrent penal framework could be helpful, adequately qualifying relevant violations as punishable and introducing appropriate sanctions. While Article 368 of the Criminal Code of Kosovo penalizes unlawful construction work, the provision only applies if the life or body of people or property valued at € 5000 or more are endangered. Sufficient deterrence however might require a comprehensive legislative approach designed towards the protective purpose of the legality of construction itself. Any such approach would have to account for the severity of infractions, for example by introducing high value thresholds regarding the respective construction. By subjecting only unpermitted constructions of significant value to the strict regime of criminal justice, proportionality can be maintained by excluding minor violations. At the same time, there is a strong incentive to refrain from future unpermitted constructions of considerable scope, like building a hotel.

In connection with this there's still a significant lack both of understanding regarding the enforcement power of inspectors as well as of proper support from prosecutors and courts. Finally, there are no expedient monitoring mechanisms in place. These issues need to be addressed swiftly and consequently in order to effectively address the problem at its root and, wherever possible, avoid further need to react to and treat already established symptoms altogether.

1.1.3.3 Fragmentation of Arable Land Due to Unpermitted Construction

Besides inheritance processes (as further examined in issue #4 of this Concept Note), unpermitted constructions are the most relevant factor in facilitating extensive fragmentation, significantly reducing the amount of arable land potentially to be used for investments in the agriculture sector. Restructuring and development of effective policies/strategies for spatial planning (further examined under issue #3 of this Concept Note) become a necessity to address these issues. Beyond that, developing and implementing concepts to prolifically treat existing unpermitted constructions and effectively prevent future occurrence, taking into consideration the aspects elaborated above, are an essential requirement for an adequate approach to the fragmentation of arable land.

1.1.3.4 Unbalanced Land Development; Urban vs. Rural

The existing planning and land development process has led to an unbalanced land development process. This imbalance has been exacerbated by Kosovo's urbanization process, which has adversely affected agriculture land, threatening the natural resources and compromising the sustainable development of the country. Indeed, the spatial planning system and its instruments have failed to accommodate and moderate the sharp conflict between the urban expansion and the need to protect agriculture land potential and natural resources.

The new regulatory framework has brought, though, a new element in the process. The spatial plans, unlike the traditional system when spatial plans focused only in the urban areas, are supposed to integrate urban and the rural development.

1.1.3.5 Unbalanced Land Development; Public vs Private

Urbanization has led to a need to develop and invest in real estate. This need is in conflict with the need to organize public space for infrastructure and services. On the other hand the closed and not very transparent process of land use has together with the barriers of the system due to the lack of professional capacities in providing abundant planning documents, has created fertile condition for land speculation and, in some cases room for corruption, hence compromising the outcome of the urban planning.

Land allocation for private investment (mainly housing) is seen to produce more high value short term interest for individuals, private and landlords, while land allocation for public purpose does produce long term value for the general public (but not for the individual landlords). Therefore, there is a high pressure towards planning to allocate land for, mainly housing, instead of allowing adequate land for public amenities.

1.1.3.6 Limited Source of Finance for Public Infrastructure

The process denies to the public sector the capturing of the value form the land development process, hence limiting the possibilities of the government to invest adequately in infrastructure and services, resulting in a low quality of amenities therefore hindering the value of the real estate and the urban product.

Indeed, the mechanisms to capture some of the value increased of the land due to public intervention (such as planning, investment in infrastructure and regulatory framework) are not properly addressing the issue of sources of finance for public purpose. The system only makes use of one of the mechanism; the fiscal one. However, there are regulatory mechanisms that would increase the chances for the government to wave the right of capturing the added value in the process of land development.

1.1.3.7 Interaction

The spatial planning system has always been seen as a segregated system accessible only by technicians, with almost no interaction with systems that impact the land development process. Indeed, there is minimal formal and legal interaction of the planning system with systems that focus on the land tenure. Lack of such interaction has hindered the government and the public sector's ability to have some sort of control over the land, or at least some noticeable influence on the land development process. The undergoing reform devotes a part of the legal framework in addressing the public participation in the process of planning through public consultation.

1.1.3.8 Quality of Planning Instruments

Planning documents in Kosovo focus more on profiling their localities rather than identifying strategies for development. The problem is rooted in the traditional planning methods in Kosovo. New approaches with more strategic thinking instruments need to be adopted and local professionals and decision-makers need to be trained in order to adopt and implement these approaches.

1.1.3.9 Implementation of Strategies and Plans

The Implementation Plan has not been properly addressed in the new spatial planning law, although it will be addressed in secondary legislation. The new legal framework has devoted some attention to the monitoring of the planning and development process. However, needs to be emphasized the importance of the implementation stage through developing the right mechanisms and harmonizing the spatial planning law with other relevant systems in order to maximize the performance of spatial planning. It is crucial for the system to properly synchronize with the cadastral legal framework, land tenure system or public budgeting and investment system. Indeed, the reform intends to address the

issue of implementation through mechanisms that strengthen the reporting and monitoring dimension of the process.

1.1.3.10 Deprivation and Restrictions on the Use of Property

The legal framework for evaluating planning decisions vis-à-vis private property rights is not defined. While the current legal framework governing the expropriation and temporary seizure and use of immovable property is fairly well established and it honors at a good extent the constitutional and EU human rights standards with respect to providing a legal foundation for the taking and considering whether the taking serves a public purpose. However, there remains a need for intervention in at least three major areas: (i) compensation; (ii) legal remedies; and (iii) implementation.

(i) Compensation

As discussed above, planning regulations may have the effect of depriving the owner of uses and some or all development rights. It is obvious that in the latter case, the interference does not take the shape of definitive and complete deprivation of property and the owner is not fully stripped of his/her property rights. However, the owner may be deprived of all economic uses of the property and the property itself may suffer significant loss of value due to these development-control decisions.

In fact almost all spatial planning decisions may cause interferences with property. But there is a distinction between (i) a planning regulation depriving the owners of all existing rights of use and development rights if their privately owned parcels are suddenly zoned for strict environmental protection, and (ii) a planning regulation depriving the owners of some – but not all - existing economic benefits, such as in the case of a planning decision limiting development to three-floors single family houses.

Unfortunately, neither the legal framework nor the case law of the Kosovo courts have established any reduction-in-value threshold standard, or precise definition on the extent and intensity of limitation, which can qualify the interference as being so substantial and severe as to amount to a taking of property. In the absence of this, it is difficult to determine which limitation (interference with property) constitutes deprivation or a substantial interference with the peaceful enjoyment of property⁴³ requiring compensation and which merely amounts to regulation of the use of property.

Furthermore, there is no explicit constitutional ground for takings and compensation because of land use regulation, but it can be argued that some form of legal ground may be found in the Expropriation Law. Indeed, the Law does not distinguish between partial and complete deprivation of property, but rather defines expropriation as: “any act by an expropriating authority that involves (i) the taking of *any* lawful right or interest held or owned by a person in or to immovable property, or (ii) the compulsory establishment or creation of *any* servitude or other right of use over immovable property”.⁴⁴ It also lists the implementation of an urban and/or spatial plan as one of the reasons that can trigger the expropriation (as defined above) of the immovable property provided the conditions and legal requirements are satisfied.

Another problem is attributed to the lack of necessary legal procedures that would compel the public authorities to comprehensively assess the potential impact of planning regulations on private property, and to find out eventually if it is necessary for the competent authority to request the initiation of the expropriation procedure based on the Expropriation Law.

⁴³ In a number of cases concerning planning regulations, the Strasbourg Court found that construction prohibitions without paying compensation do not fall within the ambit of the control or deprivation rule but rather constitute an interference with the peaceful enjoyment of possessions (the general rule).

⁴⁴ Law No.03/L –139 “On Expropriation of Immovable Property”, as amended, Art. 2 (emphasis added).

Next, at any time before the initiation of an expropriation procedure, an expropriating authority may authorize the conduct of preparatory activities to determine the potential usefulness of one or more immovable properties for a public purpose.⁴⁵ The Expropriation Law does not determine if, and which, public authority may ask for an authorization and what the application should contain. But it can be interpreted that it is the same public authority that may submit an application for expropriation if it is eventually decided that the immovable properties fulfill the necessary preconditions to be used for the public purpose.

The Expropriation Law recognizes the right of any person whose property is subject to preparatory activities to be compensated for any loss of use or enjoyment of the property during the conduct of the preparatory activities, and any other damage caused to the property or to the person.⁴⁶ Although the Law requires compensation for persons whose property is subject to preparatory activities, it fails to: (i) set out clear rules and procedures for calculating the actual amount of compensation for any loss of use or enjoyment of the property, and any other damage caused to the property during the conduct of the preparatory activities; (ii) establish a fixed legal deadline for the payment of such compensation (whereas the Law does set a two years deadline in cases of formal expropriation);⁴⁷ and (iii) identify the competent body that is responsible for calculating such compensation.⁴⁸

Similar critiques to the current legal framework can be made in cases of temporary seizure and use of immovable property. For instance, in cases of temporary seizure and use of property, the Expropriation Law do not provide for clear rules and procedures for calculating the amount of compensation and a fixed legal deadline for the payment of such compensation.

Chapter V of the Expropriation Law stipulates the basic rules governing the determination of the amount of compensation to be paid to the expropriated persons. Articles 15.6 and 41 of the Law provide that the Ministry of Finance has the power to issue secondary legislation establishing a detailed methodology for calculating the compensation to be paid for expropriated property and expropriation-related damages.

However, neither the Expropriation Law nor the Ministry of Finance's sub – legal act establishing the methodology for calculating the compensation to be paid for expropriated property and expropriation-related damages has defined any concrete, detailed rules that can be used in determining the amount of compensation, if any, to be paid in the cases of partial deprivations of property due to planning decisions or the compulsory establishment or creation of any servitude or other right of use over immovable property.

Furthermore, the sub-legal act issued by the Ministry of Finance is incomplete and does not establish any detailed rules, technical criteria, or valuation models that should be taken into account or used when calculating compensation to be paid in those cases when an expropriation of immovable property results in the termination of a: (i) real servitude; (ii) personal servitude; (iii) construction right; (iv) right of preemption; (v) usufruct; (vi) right of use (vii) lease contract; (viii) partial expropriation; or (ix) causes other expropriation related damages. Although the Law recognizes the right to compensation, it fails to set out clear rules for calculating the amount.

(ii) Legal Remedies

The amendments and supplements made to the Expropriation Law only one year after its entry in force were aimed at accelerating the expropriation process. The goal was to make land readily available for implementation of many important public work projects aimed at developing the general economic

⁴⁵ Law No.03/L –139 “On Expropriation of Immovable Property”, as amended, Art. 5.

⁴⁶ *Id.* at Art. 7.

⁴⁷ Law No.03/L –139 “On Expropriation of Immovable Property”, as amended, Art. 16(6).

⁴⁸ The Office of Immovable Property Valuation is competent only for valuing immovable properties that are subject to an expropriation procedure.

and/or social welfare of the country. As a result, a large part of the procedural deadlines in the Law were shortened and new conditions were set for the courts⁴⁹ in order to prioritize expropriation disputes and to avoid possible delays during the expropriation process (due to violation of legal deadlines by the Kosovo's courts).⁵⁰

Among many amendments, Article 35 (on complaints challenging a preliminary decision on the legitimacy of a proposed expropriation) of the Expropriation Law was significantly changed when a new provision was introduced. That provision provides that if a court reviewing a complaint against a preliminary decision fails to issue a judgment within thirty days, the court shall be deemed to have issued a judgment rejecting the complaint in its entirety immediately upon the expiration of such thirty day period.⁵¹ It appears that the legislator was not satisfied with existing provisions providing treatment of expropriation cases as a matter of extreme urgency and with the shortening of many legal deadlines (including the period of time for the issuance of a court decision, which was shortened from ninety days to thirty days),⁵² but also sought to have a strong guarantee that would discourage delays in courts.

The above mentioned provision imposes a heavy burden on claimants, whose complaints might be rejected without being examined due to significant caseload in the Kosovo courts. It also allows judges to arbitrarily dismiss complaints without providing an actual ruling (and their reasoning). Therefore, it undermines the reasonable relationship of proportionality between the means employed and the (pursued) aim sought to be achieved.

Additionally, in accordance with the Expropriation Law, the competent court for reviewing complaints against the decisions adopted by the municipality's expropriating authority is the relevant municipal court. On the other hand if the expropriating authority is the Government, the complaints should be filed and reviewed by the Supreme Court of Kosovo.⁵³

In fact, the Expropriation Law treats unequally two categories of interested persons. Those persons whose immovable property is proposed to be expropriated *by the municipality* may have their claims potentially heard and examined in all three levels of the judiciary (including the Supreme Court); whereas those proposed to be expropriated *by the Government* can only file their claims with the Supreme Court, allowing no further opportunity for review. This discrepancy denies some property owners their right to appeal⁵⁴ and thereby denies them the opportunity to obtain redress for the breaches alleged.

(iii) Implementation

The final challenging issue that should be stressed is the implementation of the law in practice. Even in this aspect, there is a considerable gap between the law's achievements at the regulatory level and their due implementation in practice. Expropriation procedures are not strictly respected, while expropriation requests often lack the required legal elements and necessary documentation.⁵⁵

⁴⁹ See Law No.03/L-205 "On Amending and Supplementing the Law On Expropriation of Immovable Property".

⁵⁰ We have to emphasize here the fact that based on Art. 11.2 of the Expropriation Law, if any complaint is filed under Art. 35 with respect to a Preliminary Decision, the expropriation procedure shall be suspended until the date on which the competent court has issued a final judgment on all such complaints.

⁵¹ See Law No.03/L –139 "On Expropriation of Immovable Property", as amended, Art. 38.5.

⁵² Law No.03/L-205 "On Amending and Supplementing the Law On Expropriation of Immovable Property", Art. 2 (1.7).

⁵³ Law No.03/L –139 "On Expropriation of Immovable Property", as amended, Art. 35.2, 36.2, 37.2 and 38.1.

⁵⁴ Id. Art. 35.10, 36.7 and 37.6. Although the Expropriation Law provides for a right to appeal, the decisions issued by the Supreme Court cannot be challenged, since there is no other superior judicial body in the judiciary system of Kosovo vested with the authority to review the Supreme Court decisions adopted by the later as a court of first instance. Therefore, this legal remedy it's simply not available.

⁵⁵ Source: Immovable Property Valuation Unit.

1.2 POTENTIAL SOLUTIONS BASED ON BEST INTERNATIONAL PRACTICES

It is of enormous importance to establish a solid link between the land tenure and the land use planning system in order to fuel economic growth. The land development model needs to be changed and the solutions and recommendations focus in some simple, but straightforward mechanisms that work to improve such a model.

It should be said the traditional system and the reform focus on the planning side of the process. Indeed, the Law 04-174 focus on spatial planning process and there is needed a moderate timeframe to mature the results of such reform.

However, in a fairly moderated timeframe, the authorities might want to reflect about the need to shift from a spatial planning framework into a land management and development regulatory framework.

The very first recommendation of the Concept Note as far as spatial planning is concerned is to insist on the implementation of the undergoing spatial planning reform. Indeed, much needs to be done in implementing the existing planning tools. There is need for a great deal of support for the central and local governments in improving the MDPs, assisting them in designing the zoning maps and develop mechanisms for monitoring and implementation of these planning documents.

However, looking at the near future, the Concept Note would recommend the introduction of a variety of Land Value Capture (“LVC”) mechanism as simple but basic tools to address some of the pitfalls of the existing system of land use planning and development. These mechanisms would be tools for planning and land use, which would:

- **Distribute the land use parameters/indicators of development equally** among a development zone per each development parcel. The tool intends to address the issue of inequalities in the benefits of the land development process.
- **Stimulate consolidated development.** The tool sets barriers for small-scale fragmented development, while generating bonuses for large-scale consolidated projects. Therefore, landowners would be encouraged to come together and agree on the development. The tool intends to address the issue of the fragmentation of the tenure and development.
- **Stimulate the development of services as opposed to sole housing.** The tool provides incentives for developers to invest in services and long-term projects as opposed to short-term housing projects.
- **Stimulate land acquisition for public interest.** The tool provides development incentives for landowners when making private land available for public services or other public interest purposes. The last two objectives intend to address the issue of ‘unbalanced development’ and the conflict between ‘public’ and ‘private’ interest’.

The non-fiscal LVC mechanisms would be tools that build on contexts and cases similar to Kosovo. Southern European countries, where housing and land tenure works very differently from northern European countries, have tried in different ways to introduce tools and mechanisms that address the fragmentation of development, along with the unbalanced development model.

Spain and Italy have tried to introduce similar mechanisms. The “Perequazione urbanistica” is a tool example of how Italy has tried to address the issue by stimulating some sort of compensation formula for development, with the intent to generate some sort of consolidated development.

If the government, in the future, would prefer to upgrade the Spatial Planning legal framework from a Spatial Planning legal framework into a Land Development and Management one, the adoption of the fiscal and non-fiscal LVC tools need to be introduced in the legal planning framework.

The second recommendation is the inclusion of mechanisms and tools in the legal framework, which put the government in a 'proactive' mode in the land development process, as opposed to a 'reactive' one as it is in the existing context. The intent of this recommendation is to improve the government and public value capturing capacity of the land development process. Indeed, the major part of the benefits of the process go to the private developers and landowners, although the government generates no less significantly in the land development process.

The land development scheme should be changed in order to allow the public and the government to capture some of the added value of the development.

Spain has studied the phenomenon and has tried to introduce mechanisms that partner the government with the development actors, hence the government is put in the position of benefiting from the process, capturing the value added by the governmental actions of planning and investing in infrastructure.

In order to help prevent further unpermitted construction, in Albania the Assembly has amended the Criminal Code, qualifying "illegal construction" as a criminal offense punishable with administrative fine and/or imprisonment.

Deprivation and restrictions on the use of property

The ECtHR has emphasized in many judgments that the legal provisions on which an interference with property is based should always be clearly determined, foreseeable, and accessible.⁵⁶ In fact, the absence of a clear and predictable legal basis that strictly complies with the requirements of ECtHR jurisprudence and is sufficiently detailed to provide clarity and guidance to all the actors vested with responsibility to implement the legal framework (especially courts) and those that might be subject to state interference with property, leaves too much room for interpretations and may be the source of arbitrary actions from the state authorities. As a consequence, it places individuals in a state of uncertainty and it may upset the fair balance which has to be struck between protecting property rights and the requirements of the public interest.

In light of this, the applicable legislation on expropriation and land use planning should be amended and supplemented to provide the necessary clarity and guidance to all the actors responsible for implementing the legal framework, in order to ensure that private rights and public interest are properly balanced in each case.

Firstly, the legal framework on spatial planning should include legal procedures that will be used to comprehensively assess, based on clear and precise criteria, the potential impact of planning regulations on private property. Criteria such as the intensity (severity) of the imposed regulatory limitation and its duration,⁵⁷ or a reduction-in-value threshold standard, can be used to distinguish which planning decision constitutes a substantial interference with the peaceful enjoyment of property or deprivation of property requiring compensation and which merely amounts to a normal regulatory act. Such assessment would also help the authorities determine when it is necessary to request the initiation of the expropriation procedure by submitting an expropriation request based on the expropriation law. The approval of such request (that should contain among other things a detailed description of any and all rights that the applicant is requesting to be expropriated)⁵⁸ would trigger a valuation process to determine the amount of compensation to be paid to the affected person.

⁵⁶ Dragoljub Popovic, *Protecting Property in European Human Rights Law*, (2009), p. 53.

⁵⁷ The Strasbourg Court takes usually these two key criteria into account in cases concerning planning regulations.

⁵⁸ Law No.03/L-139 "On Expropriation of Immovable Property", as amended, Art.8 (1.4).

The European Convention on Human Rights and Fundamental Freedoms, as has been interpreted and applied by the ECtHR, needs to be thoroughly analyzed, as it may provide some guidance on the issue of deprivation of property due to planning decisions. Accordingly, when drafting additional legislation in the area of planning, the drafters may look to the ECtHR jurisprudence to identify principles and conditions that will serve to reconcile the right to property and land use regulation.

Second, it is necessary to supplement the legal framework on expropriation in order to set out detailed rules that can be used in determining the amount of compensation, if any, to be paid: (i) in the cases of deprivations of property due to planning decisions, or the compulsory establishment or creation of any servitude or other right of use over immovable property or (ii) in those cases when an expropriation of immovable property results in the termination of a real servitude; personal servitude; construction right; right of preemption; usufruct; right of use; lease contract; partial expropriation; or causes other expropriation related damages.

Finally, the legal framework on expropriation should: (i) set out clear rules and procedures for calculating the amount of compensation for any loss of use or enjoyment of the property, and any other damage caused to the property during the conduct of the preparatory activities or during the time the property is temporarily seized; (ii) establish a fixed legal deadline for the payment of such compensation; and (iii) identify the competent body that is responsible for calculating such compensation.

Convention Article 6.1, read in conjunction with Article 13, requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights. Additionally the ECtHR jurisprudence confirms that the existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness.

In this context, the Expropriation Law should be amended in order to have the complaints against decisions adopted by both the Government and the Municipality (acting as expropriation bodies) filed and reviewed in the first instance by the Basic Court in the municipality where the immovable property is located. This amendment would provide an additional benefit of distributing the workload among the local courts, rather than having it concentrated in the Supreme Court. On the other hand, Article 38.5 of the Expropriation Law, providing for the rejection of complaints against the preliminary decision upon the expiration of the thirty day period, should be repealed. Taking into account the importance and sensitivity of protecting property rights, as well as the complexity and the poor implementation of the legislation in practice, it is advisable that, in addition to amending and supplementing the current legislation, trainings are carried out to develop and strengthen capacities for the proper enforcement of the legal basis in practice. These trainings will help ensure that the legal provisions are uniformly interpreted and applied in a manner that complies with the European Convention on Human Rights and Fundamental Freedoms.

1.3 RECOMMENDATIONS REGARDING KEY POLICY MEASURES

1.3.1 Policy Measure #1: Fully Implement Spatial Planning Reforms

Amend the spatial planning legal framework, if the government, in the future decides to upgrade it, shifting from a spatial planning into a spatial planning, development and management legal framework.

Policy measure #1	Fully implement spatial planning reforms. Upgrade of the legal framework shifting from a spatial planning into a spatial planning, development and management legal frame-work.
Solution	All municipalities develop zoning maps. Develop monitoring mechanisms for implementation. Conduct further study to determine LVC mechanisms and introduce these mechanisms in the legal framework
Output	Support provided to municipalities for drafting zoning maps. The results of the research and amendments to the legal framework on spatial planning.
Outcome	Land use is predictable and transparent. Issuing construction permits is streamlined. Kosovo improves in World Bank Doing Business ranking. Zoning Plans and Detailed Regulatory Plans are developing and implementing LVC.
Indicators	Percentage of municipalities with municipal zoning plans. Fair and transparent distribution of development indicators is ensured.

1.3.2 Policy Measure #2: Implement Normative and Administrative Instruments to Encourage Consolidated Land Development Projects

Introduce and implement mechanisms that generate facilities for consolidation land development projects.

Policy measure #2	Implement normative and administrative instruments to encourage consolidated land development project
Solution	Conduct further study to determine if urban land consolidation policy would be beneficial
Output	Possible drafting of Law on Construction Land
Outcome	The Planning documents reflect and elaborate their action plans for development consolidation
Indicators	Land acquisition for public investment is processed faster and initial purchasing cost lowered Fair and transparent distribution of development indicators between land owners is ensured Indicators for land allocation between built-up activities for public and private interest are balanced

1.3.3 Policy Measure #3: Implement Normative and Administrative Instruments to Effectively Monitor and Prevent Unpermitted Construction in the Future

The streamlined construction permitting procedures set in the Law on Construction and associated Administrative Instructions should be fully implemented by municipalities to reduce costs and eliminate unnecessary administrative obstacles. This way formal and legal construction can be incentivized and the likelihood of resort to unpermitted construction reduced.

On the other hand, an adequately deterrent penal framework needs to be implemented, qualifying relevant violations as punishable and introducing appropriate sanctions. Penal procedures currently established in the Criminal Code and in administrative procedures (particularly administrative instruction 20/2013, setting fees and penalties for unpermitted construction) should be utilized. Another option would be, following the Albanian model, to amend the Criminal Code to particularly qualify unpermitted construction as a criminal offense. However, in order to maintain proportionality, in Kosovo the provision should be subjected to a reasonably high value threshold for the unpermitted construction, effectively excluding minor violations. Furthermore, the punishment should be limited to administrative fine rather than foresee imprisonment.

All municipalities should draft their municipal zoning maps, setting development conditions for the entire municipality with consideration of unpermitted constructions and informal settlements.

Adequate monitoring mechanisms need to be developed and implemented. In that context, the enforcement powers of inspectors have to be strengthened and supplemented with better support from prosecutors and courts. Awareness among both the general public and the relevant authorities needs to be enhanced through targeted visibility measures regarding the severity of the issue as well as the available instruments *de lege lata* and *de lege ferenda*.

Policy measure #3	Implement normative and administrative instruments to effectively monitor and prevent unpermitted construction in the future.
Solution	<p>Significant streamlining of construction permitting procedures, reducing cost and eliminate unnecessary administrative obstacles</p> <p>Implementation of an adequately deterrent penal framework, including prosecution of unpermitted construction as a criminal offence.</p> <p>Strengthening of enforcement powers of inspectors and of support from prosecutors and courts.</p> <p>Raising awareness for the issue and current and future instruments to approach it.</p>
Output	<p>Full implementation of the Law for the Treatment of Constructions without Permit, (No. 04/L-188) and the Law on Construction (No. 04/L-110).</p> <p>Possible amendment of the Criminal Code of Kosovo.</p> <p>Targeted visibility measures.</p>
Outcome	Further unpermitted construction contained
Indicators	Number of buildings constructed with a permit

1.3.4 Policy Measure #4: Ensure that Deprivation of Property and Substantial Interference with Property Complies in Each Case with ECHR Standards

Amend the Expropriation Law and the methodology for calculating the compensation to be paid for expropriated property and expropriation-related damages to ensure that full and adequate compensation is paid to the person or persons whose legitimate rights or interests have been deprived.

Include explicit procedures and clear and precise criteria in the legal framework on spatial planning that will be used to determine the potential impact of planning regulations on private property, and determine if it is necessary for the competent authority to request the initiation of the expropriation procedure.

Amend the Expropriation Law in order to have the complaints against decisions adopted by both the Government and the Municipality filed and reviewed in the first instance by the Basic Court in the municipality where the immovable property is located.

Repeal Article 38.5 of the Expropriation Law, providing for the rejection of complaints against the preliminary decision upon the expiration of the thirty day period.

Continuous training of the responsible actors vested with responsibility to implement the legal framework governing the expropriation of property and land use planning.

Policy measure #4	Ensure that deprivation of property complies with ECHR standards.
Solution	<p>Include explicit procedures and clear and precise criteria in the legal framework on spatial planning that will be used to determine the potential impact of planning regulations on private property, and find out whether it is necessary for the competent authority to request the initiation of the expropriation procedure.</p> <p>Clear rules that can be used to determine the amount of compensation, if any, to be paid: (i) in the cases of deprivations of property due to planning decisions or the compulsory establishment or creation of any servitude or other right of use over immovable property or (ii) in those cases when an expropriation of immovable property results in the termination of a real servitude; personal servitude; construction right; right of preemption; usufruct; right of use; lease contract; partial expropriation; or causes other expropriation related damages.</p> <p>Clear rules and procedures for calculating the amount of compensation for any loss of use or enjoyment of the property, and any other damage caused to the property during the conduct of the preparatory activities or during the time the property is temporarily seized; (ii) establish a fixed legal deadline for the payment of such compensation; and (iii) identify the competent body that is responsible for calculating such compensation.</p> <p>Complaints against decisions adopted by both the Government and the Municipality (acting as expropriation bodies) are filed and reviewed in the first instance by the Basic Court in the municipality where the immovable property is located</p> <p>Repeal Article 38.5 of the Expropriation Law, providing for the rejection of complaints against the preliminary decision upon the expiration of the thirty day period.</p> <p>Continuous training of the responsible actors vested with responsibility to implement the legal framework.</p>
Output	<p>Amendments to the Law “On Expropriation of Immovable Property” are drafted and passed in Parliament within 1 year.</p>

ANNEX 4

	<p>Amendments to the methodology for calculating the compensation to be paid for expropriated property and expropriation-related damages are drafted and approved by the MoF within 6 months. (MoF leads the drafting process).</p> <p>Amendments to the legal framework on spatial planning. (Ministry of Environment and Spatial Planning leads the drafting process).</p>
<p>Outcome</p>	<p>The legal framework is sufficiently detailed to provide clarity and the necessary guidance to all the actors vested with responsibility to implement the legal framework (especially courts).</p> <p>The distinction between a planning decision that constitutes a normal regulatory act and one that constitutes a substantial interference with the peaceful enjoyment of property or deprivation of property requiring compensation, is clarified thanks to clear and precise criteria that help to determine the borderline between the two cases.</p> <p>The impact of planning decisions on property is properly assessed.</p> <p>Due process protections are improved.</p> <p>Private rights and public interest are appropriately balanced.</p>
<p>Indicators</p>	<p>Full and adequate compensation is paid to the person or persons whose legitimate rights or interests have been deprived.</p> <p>Infringement of property rights are significantly minimized due to a better legal framework and continuous training of the responsible actors vested with responsibility to implement the legal framework.</p>

ISSUE # 2 TREAT UNPERMITTED CONSTRUCTION ON ARABLE LAND

2.1 RATIONALE

2.1.1 Situation Assessment

Arable land is a crucial factor in Kosovo's economic prosperity, not just due to the significance of the agricultural sector in general but also as a valuable property asset and an indispensable component of a vibrant land and real estate market. Its preservation and prolific utilization therefore are a prime concern and the elimination of impediments to those goals essential to the economic growth of the country. One of the most detrimental obstacles in that regard is unpermitted construction. Illegally overbuilt land is economically "dead", no longer available for agricultural exploitation, unfit to be transformed into beneficial capital and just like the respective building precluded from the market and any effective contribution to Kosovo's economy. Furthermore, it leads to land fragmentation, a harmful phenomenon preventing rational agricultural and sustainable rural development in general.⁵⁹

The construction sector has played an important role in Kosovo's economy over the past 15 years and citizens have shown great industry in rebuilding after the conflict. However, while usually land development is preceded by planning, in Kosovo extensive construction happened in the absence of a plan as a result of an urgent demand for housing not met by the existing capacities of the relevant institutions. Unfortunately, for a variety of reasons, many of those constructions were also built without a construction permit. It has been (unofficially) estimated that the proportion of new buildings without a building permit could be as high as 50%.⁶⁰ And yet construction permits are not just a formalism. They serve several important functions, helping to ensure that buildings are placed in locations that are consistent with spatial plans so that there is proper infrastructure and social services as well as preservation of agricultural land and open space. That they are safe for people and the environment around them, properly entered into the Cadastre so that property records are accurate and reliable and entered into the property tax database so that municipalities can collect own source revenue that enables them to provide needed services to citizens.

Against that background, the wide prevalence of unpermitted construction has a myriad of negative ramifications and finding ways to respond to this situation is paramount. The developing of an adequate approach however has to account for various legal, structural and sociological aspects of considerable complexity.

When faced with the task of dealing with an illegally constructed building, on a basic level the potential options come down to an abstract dualism of demolition on the one and "amnesty" on the other hand. While it may feel intuitively obvious to tear down a building which has been built illegally, on closer examination this approach meets several severe difficulties. First and foremost, since the urgent demand for housing had been a driving force behind the high number of unpermitted constructions to begin with, the respective residents' right to housing in many cases constitutes a pivotal antipole,

⁵⁹ D. Demetriou, *The Development of an Integrated Planning and Decision Support System (IPDSS) for Land Consolidation*, Springer Theses, DOI: 10.1007/978-3-319-02347-2_2, Springer International Publishing Switzerland 2014. Since the aspect of fragmentation has major implications related to inheritance and women's rights, material facets will also be covered in the respective pillars 3 and 5.

⁶⁰ "National Building Energy Efficiency study for Kosovo: Final Report", WB (World Bank), 2013, pg. 126.

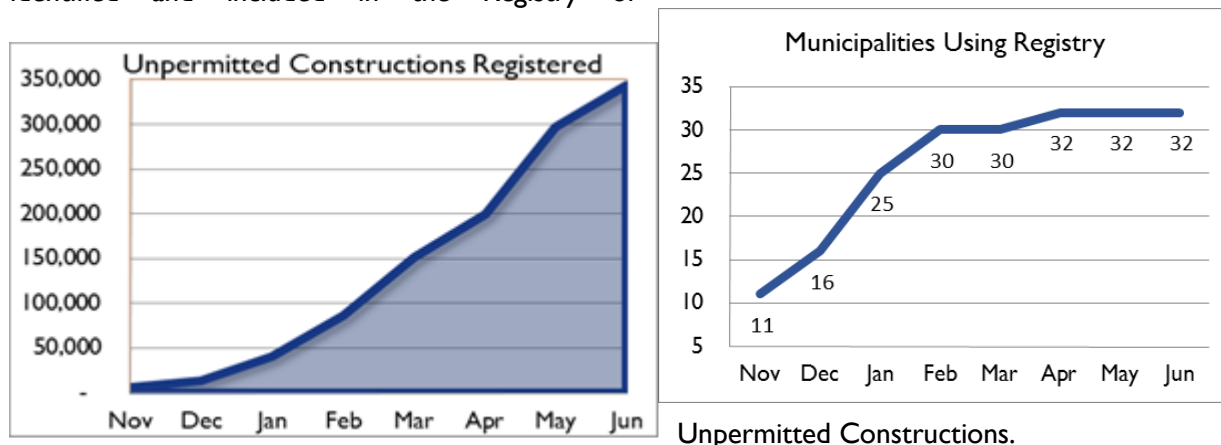
raising human rights issues and creating significant potential of social discord in the context of demolition efforts. Furthermore, such course of action entails considerable local and central level expenditure in addition to wasting the entire investment in the affected buildings. The aggregate of these detrimental factors is substantially exacerbated by the vast number of cases potentially concerned. Against that backdrop, alternative strategies will prevalently be more feasible or even necessary, trying to find ways to “heal” the legal defectiveness and optimally utilize affected property assets; in other words: grant amnesty through an adequate legalization process. A formally regularized construction enables owners to capitalize on the benefits of registration allowing for orderly marketing of properties and potential mortgaging while the state will benefit in tax revenue. However, any manifestation of such “amnesty” imperatively has to preserve the balance between individual rights and public interest (in particular the protection of arable land). The corresponding assessment and weighing of interests can be exceedingly intricate and challenging in the light of the numerous difficulties potentially occurring in the process.

2.1.2 Current Policies

The Law for Treatment of Constructions without Permit, No. 04/L-188, which went into effect on February 5, 2014,⁶¹ provides a systematic and objective approach to “legalize” certain unpermitted constructions, providing health and safety standards, enabling property owners to fully realize their property rights, and helping to integrate the unpermitted constructions into the Cadastre and property tax system.

Since then, the Ministry of Environment and Spatial Planning and the majority of municipalities have made substantial progress in implementing the law with support from international partners. Implementation included training, drafting sublegal acts, development of a database software that works in coordination with GIS software and orthophotos to identify and list unpermitted constructions, and conducting public outreach campaigns.

During the first stage of the legalization process a total of 352,836 unpermitted constructions were identified and included in the Registry of



The next stage of the legalization process is for citizens to apply for legalization by submitting technical documentation and undergoing a basic health and safety inspection. The successful outcome of the process will be the issuance of a legalization certificate, which has the legal effect of a certificate of occupancy.

⁶¹ Before there was an UNMIK Regulation dealing with the subject, UNMIK/REG/2000/53 from 25 September 2000 on construction in Kosovo, also known as “Rexhep Luci Regulation on Construction”.

Applications will be accepted through March 16, 2016. However, given the large number of unpermitted constructions and issues that have arisen during implementation, MESP has developed a Concept Document to propose amendments to the law. This Concept Document currently is posted for public comment.

2.1.3 Problem Definition

The impact of unpermitted construction in general (including the related phenomenon of informal settlements) on the real estate market, the availability of arable land and Kosovo's economic prosperity and growth as a whole is significant and the legal and sociological implications and underlying conflicts are intricate and highly complex. However, the specific problems as laid out below can be considered to be pivotal both for understanding and addressing the issue.

2.1.3.1 Unclear Legal Status of Buildings and Affected Land; Complexity and Sensitivity of Associated Issues Not Sufficiently Reflected in Applicable Legal Framework

The main concern at hand is that, presented with the **essential question of how to treat existing unpermitted construction**, the current legal framework needs to be expanded to account for all relevant circumstances and legitimate interests.

Particular problem areas and current normative limits to legalization

Under the current legal framework, the legalization of unpermitted constructions is notably impeded by the undifferentiated prohibition of such measures in several relevant situations.

For one, the existing law generally prohibits legalization of unpermitted constructions **on public property** without any exemption clauses accounting for e.g. potential use in the public interest. The term "public property" itself is currently not sufficiently defined and delineated (particularly in connection with "socially owned property") in the applicable legal framework (closer examined in the Pillar I Concept Note). This is especially relevant since urban land designated by spatial plans as construction land within urban areas is legally "socially owned property". However, against the background of the constitutional value system, this category is obsolete and to be regarded as public property. Therefore, all unpermitted constructions on urban land designated as construction land are subjected to the prohibition clause in question, mandatorily excluding them from potential legalization. In default of any exceptions, a large number of sociologically and economically harmful demolitions would have to be conducted in Kosovo.

The law currently also prevents legalization of any unpermitted construction built **on consolidated and irrigated agricultural land**, again without foreseeing any derogation. This creates the same problems as explained above, however aggravated by the fact that after the vast majority of unpermitted constructions have been identified, an even higher number of unpermitted constructions (e.g. for the Municipality of Vushtrri an estimate of 80% of all constructions within the municipality) fall within this classification.

Furthermore, according to the existing law, legalization of unpermitted constructions is generally prohibited if they are built **in natural parks or special areas and protected zones of cultural areas**, without any option for relevant authorities to determine exceptions on a case-by-case basis. This is particularly problematic since it leaves no normative room to account for constructions built on private property within these special areas which may even have existed before the special areas were declared (such as with the Bjeshket e Nemuna National Park).

Challenges for suitable implementation of legalization

But even where legalization is not obstructed by inflexible and undifferentiated provisions, there are several complex challenges to overcome regarding its implementation.

On an administrative level, the current **procedures, deadlines and fees** for application to legalize unpermitted constructions are partially inexpedient and overly deterrent. In particular, the constraints faced by citizens are related to time, costs and resolution of disputes. These issues need to be addressed urgently, since a legalization process with complicated procedures, high costs and unrealistic deadlines not only keeps valuable property assets from being properly utilized but also leads to the emergence of an informal market.

Regarding the aspect of time, the procedures required by law to complete and file the necessary documentation are very complicated and the stipulated 6-month deadline for the application in many cases doesn't allow sufficient time. This is particularly problematic for parties interested in legalizing buildings but resident outside of Kosovo. Moreover, in the current regime the legalization efforts of applicants may even effectively worsen their status, if those applicants are already included in the state registry of unpermitted constructions. In that case, failure to submit the application for legalization according to the applicable conditions and deadlines provided in Article 10 of Law No. 04/L-188 results in the unpermitted construction being automatically transferred to the "list of demolition".

When it comes to costs, on top of the application fee (€ 100) there's a tax for legalization permission identical to the administrative tax for a construction permission, including every unpaid property tax registered until the moment of application. While there are exception regulations for houses up to 100 m², agriculture objects of up to 400 m² and recipients of social assistance, this can act as a significant impediment for applicants not covered by the exemption clause. Beyond that, the normative framework currently lacks adequate hardship provisions with respect to legalization fees and procedures, aiming at the reduction of obstacles for vulnerable groups of society to initiate and complete the legalization process. Additionally, there are no measures foreseen in the relevant regulations to account for and address the striking gender inequality, namely the extremely low percentage of women who have registered property in their own names (further examined in the Pillar 5 Concept Note).

With regard to potential disputes arising from the legalization process, the current regime provides for a comprehensive administrative appeals process,⁶² covering e.g. disputes over decisions for inclusion or exclusion from the Registry, decisions on late or incomplete submission of applications, decisions due to failure to meet basic health and safety requirements or due to ineligibility for legalization. However, the system has not been tested in practice yet. An aspect that might prove to be problematic is that to contest any decision issued by a municipality, the applicant has to always file a complaint directly to the Ministry of Environment and Spatial Planning as the first instance reviewing body. There are grounds for suspecting that the Ministry might become overburdened with a potentially huge number of complaints, leading to significant backlog.

Regarding the scope of legalization, the pivotal issue is that the existing law doesn't foresee **authorization beyond mere occupation**. Law No. 04/L-188 solely legalizes *occupancy* in an unpermitted construction without accounting for determining ownership over the unpermitted construction and the land underneath it. However, without a legal framework fully clarifying the legal status of the building and affected land, the "dead capital" can't be transformed into capital ready to be developed and included in the market. In the absence of any legal or sublegal instrument clearly determining how the affected property rights are to be defined and treated they cannot be categorized and consequently remain precluded from legal use in the civil circulation.

⁶² Appeals of legalization decisions are governed by the Law No. 04/L-188 for Treatment of Constructions without Permits, MESP Administrative Instruction No. 04/2015 on Appeals Procedures for Decisions on Treatment of Constructions without Permit, and Law No. 02/L-28 on Administrative Procedure.

This important clarification can be implemented more easily in cases where the construction was built on the applicant's own land. Especially if he or she built it a long time ago before it was even possible to obtain a permit or the construction merely exceeds the limits of an existing building permit, there are no noteworthy obstacles to granting him or her full ownership through the legalization process. This still holds true if the applicant built it without a permit although he or she could have obtained one, but still on their own land.

However, it is particularly difficult in cases where the **building and the land it is built upon belong to different subjects**. The Law on Cadastre currently doesn't allow for an isolated registration of a legalized building. While pragmatic considerations suggest the registration of a joint "property unit", this approach harbors intricate follow-up problems. For example, regarding the question whether the property should be registered under the name of the land owner or the building owner, a legal approach would, among other things, have to weigh the property right against the right to housing, an assessment very difficult to apply on an abstract-general basis, prone to yield very divergent results depending on the individual circumstances.

The situation is less controversial if the applicant's unpermitted construction merely exceeds the boundaries of his or her own land, provided the overlap doesn't cover a substantial area. Certainly if it happened without the applicant's knowledge, but even if he or she knew or should have known, it stands to reason to legalize the building by granting ownership of the affected land and registering this property unit in the name of the applicant. However, currently this situation is not regulated by the Law for Treatment of Constructions without Permit, but in Article 90 of the Law No. 03/L-154 on Property and other Real Rights, which doesn't foresee this option. Instead, the neighbor whose immovable property was infringed may demand from the owner of the building either that ownership of the building be divided taking into account the boundary line, that the owner of the building remove such part of the building which is located on the neighbor's immovable property or that the owner purchase the immovable property that has been covered by the infringing part of the building.

The most problematic constellation concerns constructions entirely built on land the applicant doesn't have any rights in at all or respectively, overlap of a scope that warrants a corresponding treatment, since in these cases there is necessarily a significant extent of external property affected. While the pragmatic reasoning to still aim for a joint property unit remains, developing the procedural implementation becomes even more challenging.

When it comes to this procedural level, an appropriate mechanism for transfer of ownership is necessary. If the unpermitted construction is built on the land owned by another private person, practices in other countries include expropriation based on public interest, which in turn requires determination of scope (the whole parcel or just a piece, if so, how much exactly?) and the nature of a corresponding compensation scheme. However, the specific approach depends again on the individual circumstances. If the overbuilt parcel was designated as urban construction land and therefore by law registered as "socially owned property" and transformed by operation of the constitution into public property, no expropriation is necessary. Provided the current categorical prohibition regarding unpermitted constructions on public property will be abolished, the respective owner, state or municipality, can simply sell the affected property to the applicant. The same principle applies in cases where the unpermitted construction is located on socially owned land under the administration of PAK.

Even more complex difficulties may arise if the predecessor of the current building owner passed away but the affected land is still registered under the name of this deceased person or if the affected land is subject to a property conflict, raising the question if an ongoing legalization procedure has to be suspended pending resolution of these issues.

These deliberations exemplify the exigency of a fully differentiated legal approach to the situation. While legislative efforts may draw on a wide array of options to address these various problem areas, it is obvious that they cannot remain unregulated.

2.2 POTENTIAL SOLUTIONS BASED ON BEST INTERNATIONAL PRACTICES

The necessity of establishing a proper and expedient legalization process and prevent further proliferation of unpermitted construction has been recognized by other countries structurally comparable to Kosovo, particularly since the unpermitted construction phenomenon has occurred in the relevant post-communist countries due to the unconsolidated market of real property after 1990. Particularly Croatia and Albania have developed and implemented approaches to these challenges and can therefore serve as model and reference in both matters.

In 2012, **Croatia** adopted the Law on Procedures Concerning Illegally Constructed Buildings (*Zakon o postupanju s nezakonito izgrađenim zgradama*). The general purpose of the law was to enable the legalization of as many illegally constructed buildings as possible with the exception of those that were constructed on planned public roads, national parks, protected historical areas or on protected coastline. Illegally constructed buildings included buildings for which no building permit was issued or which were constructed in violation of a building permit, and which were included on the digital map of the Croatian cadastral office as of June 21st 2011. Sanctions were attached to illegally constructed buildings, for example, businesses operating in such a building could not obtain a business permit, such buildings could not be registered in the cadastral records and no access to public utilities was granted. While these sanctions might exert a certain deterrent effect, they do not achieve the goal of getting properties registered in the Cadastre and also raise human rights issues over the denial of utilities. Following the expiry of the deadline for legalization, i.e. June 30th 2013, one day before Croatia's formal accession to the EU, Croatia implemented a strict enforcement policy by consequently demolishing and removing illegally constructed buildings which were not legalized. Between 2003 and 2012, the Croatian building inspectorate issued a total of 37.735 decisions on the demolition of illegally constructed buildings whereas 4.478 buildings were demolished. Prior to any demolition procedure there was a detailed verification whether the building was uninhabited or if occupants possess other relevant real property. The building would only be torn down if these criteria were met. A significant amount of affected buildings were illegally constructed holiday homes, for example on the island of Vir, which was almost entirely informally overbuilt. While in this case additional police presence on the island was requested for the start of demolition, overall there were no reports of violence or other relevant incidents during the enforcement of demolition decisions. Until June 2013, over 200 000 requests for the legalization of illegally constructed buildings had been filed with the Ministry of Building and Physical Planning.

Croatia had to adopt this strict approach as a prerequisite for EU membership. A previous legalization wave had failed due to limited compliance and lack of effective enforcement. However, legalization was preceded by the establishment of clear legal title to land. Croatia first transformed all socially owned urban construction land into private property and then proceeded with legalization. Kosovo has so far been doing the opposite, trying to legalize but without transforming the right of use of urban commercial land to private property.

In **Albania**, the Law on Legalization, Urban Planning and Integration of Illegal Constructions, provides procedures for legalizing illegally constructed buildings. The law also sets up a mechanism for transferring ownership of land on which a legalized building is constructed to the applicant, which was successfully implemented. About 60000 buildings have been legalized this way. The legal framework also includes a right of compensation for the former owner and a formula for calculating such

compensation. 30% of the revenue of the sale goes to the local government for investment in infrastructure and urban plan preparation, while 70% of the amount goes to a compensation fund for expropriated owners.⁶³ However, the process governing compensation was driven by presumed electoral benefits and substantially flawed, determining prices way below market value and operating without objective parameters or an accurate formula. As a consequence, the generated revenue was insufficient. Kosovo will have to learn from these mistakes and improve the compensation scheme. Furthermore, an implementation of expropriation in Kosovo will have to account for the effect on displaced persons and take into consideration the large number of ‘inheritance cases’ among Kosovo properties, that are in the family but not registered to current owners.

The law also established the Agency for Legalization, Urban Planning, and Integration of Informal Areas/Constructions (ALUIZNI). ALUIZNI is mandated to process legalization applications and coordinate the legalization process. A specific problem is that about one-third of all unpermitted constructions were constructed on land which is owned by another person. To address this issue, ALUIZNI is authorized to propose to the Government the expropriation of such privately owned land. Once it is expropriated and becomes state owned, it is transferred to the applicant.⁶⁴ However, the law applies only to buildings constructed before June 27th 2014 and for which legalization applications were submitted by September 30th 2015. The law also does not apply to constructions in existing urban areas, land within the borders of urban areas, or constructions within 100 meters of a national road, except in designated areas. As the application deadline has passed by now, the possibility of legalization no longer exists for those who failed or were ineligible to apply. According to World Bank estimates in 2012, there are still at least 80,000 buildings which remain illegal.

2.3 RECOMMENDATIONS REGARDING KEY POLICY MEASURES

2.3.1. Policy Measure #1: Amend Legal Framework to Establish an Adequate and Comprehensive Legalization Process and Properly Clarify the Legal Status of Illegally Constructed Buildings and the Affected Land as well as Contribute towards a More Complete and Accurate Immovable Property Rights Registry and Property Tax Database

An adequate legalization process requires the establishment and implementation of consistent parameters for the treatment of illegally built constructions and the respective land affected that particularly foresee authorization beyond mere occupation. While the present law is limited to examining the case and the provision of legal certificates solely for the use of the object, modifications are needed providing solutions for ownership rights both regarding the building and the overbuilt

⁶³ According to the annual report on the legalization process issued by ALUIZNI (available in Albanian at: <http://www.aluizni.gov.al/wp-content/uploads/2015/10/Raportimi-i-statistikave-p%C3%ABr-periudh%C3%ABn-2014-2015.pdf>), from the total revenue (1.9 billion) as collected from the transfer of the construction parcel property during 2014-2015, approximately 1.3 billion are transferred in the compensation fund to be used for those owners whose properties are overbuilt with unpermitted constructions.

⁶⁴ The property transfer is regulated in articles 15-35 of the Law on Legalization, most recently amended on June 11th 2015. ALUIZNI offers the land to the applicant to acquire. After the legalization permit is approved and the land agreement is signed ALUIZNI sends the legalization permit to the cadastral offices in order to be recorded. This mechanism is applicable even when the unpermitted construction is built by the applicant on state owned land. 80% of the total amount that is collected from this process goes to the compensation fund account to reimburse expropriated landowners.

parcel, taking into consideration potential separate ownership of building and affected land. In this context, a joint “property unit” should be aimed for, including the implementation of a suitable mechanism for transfer of ownership.

- For applicants that own both the construction and the land where it is built, streamline procedures and reduce costs to legalize the construction and to register both construction and land ownership (if necessary) in the Immovable Property Rights Registry. Create automatic mechanism to register in the Property Tax Database.
- For constructions that are built on land owned by the family but not registered in the name of the current owner/user (“inheritance cases”), streamline procedures and reduce costs to resolve inheritance issue, legalize the construction, and register in the Immovable Property Rights Registry. Create automatic mechanism to register in the Property Tax Database.
- For constructions that are built in whole or in part on land that is owned by another private person or entity, streamline procedures and reduce costs to legalize the construction. Experiences in comparable countries suggest an expropriation mechanism for the immediately affected parcel, accompanied by a fair compensation scheme with the parcel being offered to the building owner for purchase. The provisions need to clearly determine whether the whole parcel should be transferred or just a part, and if so, clearly define the size of that part or provide by which parameters it should be determined. Regarding unpermitted constructions that merely exceed the boundaries of a building permit, the current regulation in Article 90 of the Law on Property and other Real Rights should be rescinded to provide for a consistent and uniform approach. Alternatively, the provision could be retained, maintaining a divergent treatment for building over boundary lines, but potentially be integrated into the same law to offer a more streamlined solution.

Register the fact that the construction has been legalized in the Immovable Property Rights Registry. Register construction in the Property Tax Database with the current owner liable for paying property tax. Create streamlined procedures and reduce costs to resolve property ownership issues, taking into consideration notice issues to fully protect rights of all, including displaced persons, members of non-majority communities, and members of the diaspora.

Both sale and compensation should be based on the adequately ascertained market value of the property, using the appraised value (estimation of the market value). Ideally, an accurate and comprehensive value map of Kosovo can be established, as suggested under issue # 4, which can then be used as basis for compensation.

It is advisable to include provisions for temporary suspension of the legalization process in cases where the legal status of the affected land is under dispute or the land is registered under a deceased person’s name, pending resolution of these conflicts or, failing that, expiration of a reasonable respite. Alternatively, the legalization process could be carried forward towards conclusion, transferring ownership to the applicant and registering the land in his or her name, while the compensation is temporarily transferred to a trust account and awarded to the respective party upon resolution of the conflict in question.

- Special provisions should be implemented to divide and partly utilize revenue (fees) from occurring ownership transfers for local government infrastructure and urban development activities, following the Albanian example. A part of that revenue could also be allocated to help fund the demolition of buildings which can’t be legalized.
- During and after the legalization process accompanying supervision measures should be implemented to effectively prevent applicants from further unauthorized construction (for example of extensions to the respective building) or demolitions.

- Furthermore, it is important to establish exemption clauses for prohibitions regarding the legalization of unpermitted constructions in the public interest and to avoid large-scale demolition entailing high expenditure and wasting the respective building investment.
 - For unpermitted constructions on public property public entities should be given the right to enter into agreement for use of the land in order to sell, lease, or otherwise allow the unpermitted construction to remain if after reasonable assessment doing so is justified in the public interest. Relevant criteria could be the impact on housing rights, namely if and how many people inhabit the respective building (similar to the Croatian approach) or whether compliance with health and safety provisions is ensured.
 - For unpermitted constructions built in natural parks or special areas and protected zones of cultural areas, the Law should foresee exemption clauses, enabling relevant authorities to determine on a case-by-case basis whether affected buildings can be legalized in the public interest following the conventional procedure. An essential criterion in that respect would have to be to which extent there is an actual negative impact on the protected elements.
 - For unpermitted constructions built on consolidated and irrigated agricultural land the Government should establish a special committee to study the issue and make recommendations about how to treat unpermitted constructions in these areas, taking into account economical and human rights issues, while preserving certain agricultural land for productive development.
- Tariffs on legalization should be lowered and separated into different groups based on time and place (zone) of construction and potentially also type of unpermitted construction (residential, agricultural, commercial or industrial buildings). Legislation concerning legalization fees and procedures should foresee further hardship provisions for vulnerable groups of society, offering options to reduce costs in qualified cases and generally aiming at the reduction of obstacles to initiate and complete the legalization process. In particular, the legal framework should be designed to incentivize registration of property in a woman’s name, for example by a flat reduction in fees, to help balance the extremely low percentage of women who have registered property in their own names.
- Given the complexity and potential duration of ownership transfer procedures and possible disputes (even if legalization is carried forward towards conclusion), it is advisable to amend the Law on Cadastre to allow for isolated registration of a legalized building, even if ownership is still unclear, providing a publically available record of the legal status of the construction to give notice to potential buyers and other parties with legitimate interest in the matter.
- The further formalization and recording of unpermitted constructions should be promoted and expedited. The entire legalization effort should be supported by the Government and relevant ministries, with primary coordination through the Ministry of Environment and Spatial Planning.

Policy measure #1	Amend legal framework to establish an adequate and comprehensive legalization process and properly clarify the legal status of illegally constructed buildings and the affected land as well as contribute towards a more complete and accurate Immovable Property Rights Registry and Property Tax Database
Solution	<p>Clearly defining the legal status of the illegally constructed building and the land, including authorization beyond mere occupation</p> <p>Implementing suitable mechanism for transfer of ownership and adequate expropriation mechanisms including a fair compensation scheme</p> <p>Establishing exemption clauses for prohibitions regarding the legalization in specific areas</p> <p>Lowering tariffs on legalization and separating them into different groups based on the time and location (zone) of construction and potentially also type of unpermitted construction (residential, agricultural, commercial or industrial buildings)</p> <p>Reduction of obstacles to initiate and complete the legalization process, including hardship cases</p>

ANNEX 4

	Allowing for isolated registration of a legalized building
Output	<p>Amendment to the Law for the Treatment of Constructions without Permit, (No. 04/L-188), and, if necessary, the Law on Property and other Real Rights and the Criminal Code</p> <p>Amendment to the Law on Expropriation</p> <p>Amendment to the Law on Notaries and Law on Cadastre as necessary to stream-line resolution of property ownership issues</p>
Outcome	<p>Full property titles on unpermitted constructions</p> <p>Harmonization of ownership of unpermitted construction and affected land respectively</p> <p>Vast majority of unpermitted constructions and illegally overbuilt land returned to the real estate market</p> <p>More accurate and complete Cadastre</p> <p>Increased municipal own source revenues by increased registration in Property Tax Database</p>
Indicators	<p>Number of un-permitted constructions subject to a legalization process</p> <p>Number of properly registered buildings initially built without permit and of properly registered affected parcels</p>

ISSUE # 3 DEVELOPING POLICIES AND PROCEDURES TO PRIVATIZE ARABLE AGRICULTURAL LAND TO INCREASE INVESTMENT AND MARKET TRANSACTIONS

3.1. RATIONALE

3.1.1 Situation Assessment

Agricultural development is crucial to reduce dependency on expensive food imports and raise household incomes in rural areas. In Kosovo, the historically low penetration of the state in rural localities and the process of post-socialist transition have caused a persistence – indeed, an intensification – of low-productivity subsistence agriculture.⁶⁵ To promote agricultural investment and thereby transition to higher-productivity farming, an important issue is land consolidation. Unit cost reductions and scale economies cannot be achieved in the context of severe land fragmentation, especially for export-oriented cash crops and cattle breeding. Consequently, rural incomes are bound to remain low unless production is scaled up.

Effective and investment-oriented land privatization is one strategy available to Kosovo to leverage and expand the land consolidation already achieved through the socialization of property in the 1950s-1960s.⁶⁶ So far, 22,000 hectares of socially-owned land have been sold through spin-off privatization or asset liquidation. Some 17,000 hectares remain to be sold. In some cases, privatization has led to successful agri-business development, as in the (export-oriented) wine sector in Rahovec/Orahovac and Prizren. However, the privatization of agricultural land (and agricultural development, more generally) is beset by several enduring issues:

- *Issue I – Commercial and Technical Obsolescence:* Due to obsolescence, lack of investment, import liberalization or underlying uncompetitiveness, many agricultural Socially Owned Enterprises (“SOEs”) have ceased all production. At the same time, many of them employ workers (e.g. guards) and face on-going financial obligations, including arrears. This means that private buyers are often faced with the daunting task of re-activating production after years of inactivity and/or poor maintenance. However, investment may be risky in an insecure business environment.
- *Issue II – Land Fragmentation:* The Privatization Agency of Kosovo (“PAK”) sometimes has to split the assets up into distinct lots to make them attractive to buyers and maximize financial returns.⁶⁷ In addition, it is common for buyers to further subdivide and sell agricultural land following

⁶⁵ USAID Country Profiles, Property Rights and Resource Governance: Kosovo.

⁶⁶ See ‘Ligji për Arondacionin, Komasonin dhe Riparcelimin e Tokës’, Official Gazette of the Socialist Autonomous Province of Kosovo, 32/76; ‘Ligji për Komasonin’, Official Gazette of the Socialist Autonomous Province of Kosovo, 31/87.

⁶⁷ PAK (2014), *Annual Report 2013*, Privatization Agency of Kosovo: Prishtina, p. 10.

privatization. This leads to land fragmentation and promotes what is often a suboptimal asset configuration from the point of view of economic development. Furthermore, many buyers convert (scarce) arable land into land for residential construction or for commercial development (e.g. petrol stations, depots, etc.). While existing laws require that buyers should maintain the land destination as stipulated in the existing municipal spatial plan,⁶⁸ many buyers do not comply. At the same time, PAK has no mandate to monitor the post-sale destination of privatized land (except for special spin-off sales).

- *Issue III – Politicization and (Over-)judicialization:* Land privatization has been – and continues to be – a site of intense political and legal contestation. Former workers, creditors, pre-nationalization owners and (to a lesser extent) the beneficiaries of the pre-1999 Yugoslav privatizations have all contested the sale of socially owned property by filing thousands of claims with the Special Chamber (SC) of the Supreme Court of Kosovo, as well as in local courts. Former workers regularly strike to protest lay-offs, enterprise closures and liquidations. Since 1999, the municipalities have often laid claims to the SOEs located within their jurisdiction.⁶⁹ On some occasions, the municipality has attempted to appropriate a socially owned enterprise by illegally changing its status to municipal property.⁷⁰ Additionally Law No. 04/L-144 “On Allocation for Use and Exchange of Immovable Property of the Municipality”, allows the municipalities to file requests for the release of socially owned property from PAK and their reinstatement as municipal property.⁷¹ Neither the above-mentioned law nor the sub –legal act⁷² issued for its implementation has defined any concrete, detailed conditions based on which the municipalities may request the release of socially owned assets from PAK’s jurisdiction (apart the general requirement of public interest).

All these factors, some of which may be driven by purely rent-seeking motives, worsen the business environment and reduce investor confidence after privatization.

- *Issue IV – Illegality:* Socially-owned land under PAK administration is often illegally occupied or subject to illegal construction. At times, the premises of former SOEs are subject to theft and material damage. This delays privatization and further exacerbates the problem of asset-stripping that has afflicted many industrial facilities during and after the war.

These problems have prevented the privatization process from facilitating further land consolidation and agricultural investment over the past 15 years. Consequently, privatization in Kosovo has failed so far to promote the structural transformation of rural economies, and rural development has stagnated. The laws and policies that have governed the privatization process are partly to blame for these enduring problems and for the poor capacity of privatization to spur growth in the agricultural sector.

3.1.2 Current Policies

Between 2002 and 2005, the privatization regime in Kosovo was guided by a highly “legalistic” approach that sought to maintain, while at the same time clarify and formalize, *existing* property relations. Because of Kosovo’s unresolved status, the UN interim administration felt that it did not have a mandate to redefine or reallocate property rights. Thus, the property system was never fundamentally restructured and the distinctively Yugoslav concept of “social ownership” (as distinct

⁶⁸ Law No. 02/L-26 (2005), “On Agricultural Land”, Art. 11.

⁶⁹ Grasten M., Uberti L. J. (2015), “The Politics of Law in a Post-Conflict UN Protectorate: Privatization and Property Rights in Kosovo”, *Journal of International Relations & Development*, pp. 13-15.

⁷⁰ As in the case of SOE “Fapol” in Podujevo. See PAK (2014), p. 16.

⁷¹ See Law No. 04/L-144 “On Allocation for Use and Exchange of Immovable Property of the Municipality”, Art.12.

⁷² Regulation No. 23/2013 “On the Determination of Procedures on the Allocation for Use and Exchange of Immovable Property of Municipality”.

from “state ownership”) has remained the cornerstone of Kosovo’s property system into the post-independence period.⁷³

Privatization and Legal Claims

Under the 2002 privatization regime, PAK had an obligation to establish its authority over an SOE on a case-by-case basis before executing a sale. This led to a privatization deadlock and prompted an overhaul of the privatization regime in 2005. In contrast, the post-2005 regime, which is effectively still in force,⁷⁴ reflects what has been called a “privatize-first-litigate-later” approach:⁷⁵ PAK has authority to sell *all* SOEs under its administration. As under the 2002-2005 regime, PAK does so by separating SOEs’ assets and liabilities, establishing joint-stock companies (NewCOs) owned by the SOE, and selling the asset-holding NewCOs on behalf of the SOE. The proceeds are then used to extinguish the SOE’s liabilities. Successful claimants (creditors, former owners, pre-1999 buyers, etc.) have a right to monetary compensation. Moreover, claimants have a right to appeal PAK decisions by filing claims with the Special Chamber (“SC”).

Land Assets

It is generally agreed that, in most cases, the most valuable SOEs’ assets are their land assets. In the context of *land* privatization the existing law stipulates (following the Ahtisaari Plan) that when awarding remedies relating to SOEs’ assets, the SC should “apply the principle of compensation instead of physical restitution”.⁷⁶ Most litigation involving immovable property relates to four collectivization waves that took place in the 1950s and 1960s. Yet, unlike in other post-socialist contexts, Kosovo does not have a law on restitution or de-nationalization. In other words, the law does not provide for a right of *former* (pre-nationalization) owners: the case is adjudicated in favor of the claimant only when he or she can produce evidence (i.e. regularly registered title deeds) that he or she is the *current* owner of the disputed land. Pre-nationalization title, or evidence of historical violence on the part of the authorities or sale under duress do not constitute sufficient grounds to award cases in favor of the claimant.⁷⁷ Although this system has been criticized for potentially violating the human rights of putative owners,⁷⁸ it provides a better platform to promote economic (and agricultural) development than its pre-2005 predecessor regime. In addition, avoiding disputes regarding the process of socialist collectivization limits further partitioning of agricultural SOEs’ land, enabling PAK to sell reasonably sized plots. At the same time, favoring monetary compensation over in-kind restitution avoids disrupting privatization sales; it also increases the likelihood that the productive capital of SOEs may be reactivated more quickly.

Leasehold System

Despite its merits, the current privatization regime retains many of the features of the pre-2005 regime. Under the 2002 legislation (which remained largely unchanged in 2005), the former land use rights of SOEs were to be converted by PAK into 99-year leaseholds, and transferred to the NewCOs together with the SOE’s assets.⁷⁹ The leasehold system allowed UNMIK to avoid altering the underlying structure of property rights – namely, social ownership of land: the residual “freeholder” of Kosovo’s land was to remain society as a whole. At the same time, leaseholds formally incorporate

⁷³ Grasten and Uberti (2015).

⁷⁴ UNMIK Regulation 2005/18. The content of this law was carried over almost verbatim into the post-independence Law on the Privatization Agency of Kosovo (Law No. 03/L-067, 2008), later amended by Law No. 04/L-034, 2011.

⁷⁵ John A. Gould, “Technocracy Challenged: UNMIK’s Privatization Policies in Kosovo, 2003-2008”, mimeo, Colorado College, US.

⁷⁶ Law No. 04/L-033, “On the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters”, Art. 11.2

⁷⁷ Effectively, the SC rules in the claimant’s favor only in case of clerical error on the part of PAK (e.g. PAK sets out to sell land which is actually registered in the name of a private person), or in case of ethnic discrimination in recognizing title deeds.

⁷⁸ OSCE (2008) *Privatization in Kosovo: Judicial Review of Kosovo Trust Agency Matters by the Special Chamber of the Supreme Court of Kosovo*, Pristina: Monitoring Department/Rule of Law Division, Organisation for Security and Cooperation in Europe, p. 28.

⁷⁹ UNMIK Regulation 2003/13 (art. 2). Under Yugoslav law, socially owned enterprises had a right to use socially owned land. In other words, land was not “owned” by the SOEs.

all the rights typically enjoyed by leaseholders in common law jurisdictions: rights to transfer, rent, bequeath and to establish encumbrances (e.g. use land as collateral). The UNMIK “Land Use Regulation”⁸⁰ – as it is informally known – was never repealed or replaced after independence (unlike the other legal instruments comprising the privatization regime) and provides the legal basis for land privatization to this day. Yet, this Regulation gives way to ambiguity with regards to the rights of leaseholders to lease, bequeath or encumber their property.

3.1.3 Problem Definition

Overall, the legal regime for land privatization is not explicitly focused on promoting agricultural development and economic growth. In particular, there are three main problems with the current privatization regime that contribute to the persistence of the four issues discussed above, thus inhibiting agricultural growth and rural development.

3.1.3.1 Lack of Clear Title

The leasehold system represents a hybrid fusion of common law with an idiosyncratically Yugoslav legal category – namely, social ownership. As such, it sits uncomfortably with Kosovo’s legal culture, which is rooted in civil law. For this reason, leaseholders’ perceptions of security of title may be negatively affected. Economic agents may be less inclined to make long-term capital investments, and financial institutions may be biased in assessing the creditworthiness of borrowers. Furthermore, insecure property titles may provide perverse incentives for leaseholders to change the destination of their land and engage in speculative investments involving land subdivision. Thus, this feature of the privatization regime contributes to the persistence of Issues I and II.⁸¹

The current legislation on legalization does not clearly address the problem of unpermitted constructions located on socially owned land. As noted in issue 2, since in some cases demolition may be uneconomical, raise human rights issues and create significant potential of social discord, the law may set out procedures for allowing illegal occupiers to acquire secure ownership titles over unpermitted constructions and the plots they occupy. This would allow PAK to clearly demarcate out the occupied plots and speed up the privatization of unencumbered land suitable for agriculture.

Another issue is the transformation of forests and public forest land from socially owned to state owned property. Although the Legislation for the establishment of the Privatization Agency of Kosovo (PAK) and its predecessor the Kosovo Trust Agency (KTA) give it authorization to administer and sell the right of usage of all assets of SOEs, according to a reached agreement, the administration nor privatization of forests and socially-owned forestry land has not been done. This agreement has not been followed with the adequate legislation. While the Law on Forestry recognizes forests and forestry land as public property under state ownership, Legislation on PAK treats them as state-owned property.

3.1.3.2 High Levels of Rent-Seeking and Contestation over Property Rights

While the principle of “privatize-first-litigate-later” insulates leaseholders from the outcomes of property rights litigation, it has actively contributed to the post-war rise in levels of contestation over property rights (Issue III) In fact, at times legal and political contestation has taken the form of organized rent-seeking and profiteering.

⁸⁰ UNMIK Regulation 2003/13.

⁸¹ A related issue that requires further consideration is the legal status of forestry land registered in the name of PAK-administered SOEs. While privatization law implies that these plots should be treated as socially owned property (and thus administered and sold by PAK), forestry law considers them publicly owned.

By October 2015, PAK had received and processed 5095 claims regarding SOE's assets (including, chiefly, land). Many of these claims could not be settled administratively and were appealed before the SC, which has closed up to 3000 cases regarding immovable property since June 2003. Since most claimants appeal to their "rights" as former owners and cannot produce valid title deeds, the overwhelming majority of property claims were struck down as ungrounded. The volume of new claims does not seem to be reduced by the low success rate of claimants to date.

Furthermore, if the disputed land is yet to be privatized, the claimant can request an injunction and ask the court to enjoin PAK from selling the property.⁸² This creates delays to the process of privatization and lowers security of title in case the injunction is issued after payment procedures have been initiated. In 2013 alone, eight privatization sales (including three agricultural enterprises) suffered delays owing to court injunctions.

Until 2003, immovable property claims were heard before local courts, with many claims being adjudicated *ultra vires*, or awarded to the claimant corruptively.⁸³ Illegal hearings in local courts continued after the establishment of the SC in 2003 and large tracts of attractive land⁸⁴ were transferred to the putative former owners on flimsy legal grounds.⁸⁵ Approximately, some 1000 court hearings were adjudicated illegally in local courts and some 65% of cases brought before the SC were previously heard by local courts acting without jurisdiction.⁸⁶ Reportedly, lawyers agree to pressing unwinnable claims in order to earn legal fees. The PAK's reported difficulty in accessing municipal cadastral archives suggests that politically powerful claimants may be able to manipulate municipal institutions and block access to information. Overall, legal contestation and rent-seeking increase the transaction (and social) costs of privatization, reducing economic growth.

3.1.3.3 Land Privatization is De-Linked from (Agricultural) Development Needs

While the objective of land privatization should be maximizing long-term investment and growth in the rural economy, PAK's limited mandate over the SOEs turns privatization into a game of short-term financial maximization (not least to meet the plethora of claims by former workers, owners and creditors). Unless an SOE is privatized by special spin-off, PAK has no right to monitor post-privatization firm development. Thus, buyers often turn to speculative, rather than productive, investments, or make no serious investment at all. Even for firms privatized by *special spin-off*, the monitoring of performance conditionalities is often inadequate.⁸⁷ The lack of an explicit policy focus on agricultural restructuring and rural transformation, coupled with the thin mandate of privatization bodies, contributes to the persistence of Issues I and II.

3.1.3.4 Administrative Problems

Several SOEs hold unclear property titles, which causes delays in the process of privatization. At the same time, PAK reports administrative delays in accessing cadastral maps and documents from

⁸² OSCE (2008), p. 29.

⁸³ The classic case regards the former agricultural combine "KBI Kosova Export" (Fushe Kosove/Kosovo Polje). Several local judges were later charged with taking bribes and convicted by a court presided over by EULEX judges in 2014.

⁸⁴ For instance, the land of the "Fshati Nderkombetar" gated community near Pristina was transferred through a restitution award issued by a local court. Some socially owned land held by a Rahovec winery prior to privatization was also transferred to the putative former owners by a local court.

⁸⁵ The most commonly cited legal basis for restitution awards in local courts is the SRS Law on Trade of Immovable Property, Amendment – Official Gazette of the Socialist Republic of Serbia, 28/87, 23 July 1987 (no claim to property restitution was ever granted by the SC on these grounds).

Art 8-A reads: "A contract on trade of immovable property is null and void if one of the contracting parties was subject to pressure or violence or if the contract was concluded under circumstances which did not safeguard [...] personal security and property and civil freedoms, [...] or the rights and the equality of nations and nationalities". According to the SC, restitution on this basis is invalid.

⁸⁶ In 2010, EULEX paid attention to illegal hearings in local courts and asked the judges to transfer them to the SC.

⁸⁷ Knudsen, R. (2010): *Privatization in Kosovo: The International Project, 1999-2008*, Norwegian Institute of International Affairs: Oslo.

Municipal Cadastral Offices (MCOs). This creates opportunities for corruption (Issue III) and acts as a brake on asset reactivation and agricultural development (Issue I).

3.2 POTENTIAL SOLUTIONS BASED ON BEST INTERNATIONAL PRACTICES

The objective of land privatization should be *agrarian transformation*: that is, the emergence and consolidation of (export-oriented) capitalist agriculture in rural localities. Harnessing privatization for development involves shifting away from a narrow focus on “privatizing for the sake of privatizing”. Rather, it involves embracing a more developmental approach to redefining property rights. This approach should be based on two pillars:

- The objective of property rights reassignments should be transferring assets away from low-productivity uses to higher-productivity uses. This means that the administrative allocation and judicial enforcement of property rights should be more explicitly linked to *economic growth*;
- *Contestation* over property rights (not to mention *rent-seeking* behaviors by private persons and lawyers) should be severely curtailed in order to reduce the transaction costs of privatization, enhance security of title, and stamp out the illegal dismemberment of SOEs’ land at the hands of local court. Expansive avenues for legal contestation might generate perverse incentives for land appropriation and profiteering, and shift resources and entrepreneurial effort away from productive agriculture.

The positive economic effects of (growth-oriented and contestation-free) property rights reassignments are evident in the experience of post-socialist agrarian transformation in Kazakhstan. Kazakhstan (together with China) offers an instructive example of successful post-socialist transition in a middle-income economy. Since 2001, GDP per capita in Kazakhstan grew at an average annual rate of 6.5% (versus 4.8% in Kosovo); agricultural value-added growth per annum was 4.2% (versus 0.5% in Kosovo).⁸⁸

Since pre-Soviet Kazakhstan had no history of sedentary agriculture, privatization was not vitiated by the parallel process of “land restitution”, and could be carried out with no reference to the “rights of former owners”.⁸⁹ Land on Soviet state farms was partitioned and allotted to the former workers, who were given two years (starting in 2003) to either purchase the full title from the state or acquire a 49-year leasehold with the *state*, rather than ‘society’, acting as a “freeholder”. Owners and lessees were under a legal *obligation* to either farm individually or contribute their land to the land stock of newly established agricultural firms, on pain of losing their leasehold.⁹⁰ A supportive state committed to agricultural development enhanced security of title for emerging rural capitalists (conditional on performance), discouraged rentierism and non-productive investment, and enhanced agricultural growth.

Furthermore, many former workers who had reverted to subsistence farming had low opportunity costs (and limited cash) and thus decided to sell their allotment. Thus, agrarian transformation in Kazakhstan led to a highly concentrated and corporatized pattern of land distribution where 62% of total arable land is held by industrial agri-business firms, and large family-owned peasant farms account for the bulk of the remaining share. Corporatization promoted mechanization, productivity growth and an overall transition away from subsistence, informal and low-productivity farming practices.

⁸⁸ World Bank, *World Development Indicators*, various years (2007-2014, for Kosovo; 2001-2013 for Kazakhstan).

⁸⁹ Toleubayev K., Jansen K., van Huis A. (2010), “Knowledge and Agrarian De-collectivization in Kazakhstan”, *Journal of Peasant Studies*, pp. 353-377.

⁹⁰ Toleubayev et al. (2010), p. 357.

3.3 RECOMMENDATIONS REGARDING KEY POLICY MEASURES

With a view to improving land privatization for agricultural and broader economic development in Kosovo, some of these policy recommendations may be considered:

3.3.1 Policy Measure #1: Secure Property Titles Conditional on Performance

- Transform leaseholds held by *already privatized* agricultural (and industrial) NewCOs into fully-fledged private property rights conditional on fulfilment of performance requirements (e.g. investment or output levels, export targets, or – less preferably – employment levels etc.).
- Abolish leasehold system for all future privatizations of socially owned agricultural land, and transfer rights in land to buyers as full ownership titles conditional on fulfilment of requirements as specified by law.
- Draft and adopt a new Law on the transformation of the lease hold rights on socially-owned immovable property into private ownership rights, to succeed UNMIK Regulation 2003/13.

The conversion of leaseholds into full titles is effected administratively, rather than judicially, and is approved by a competent ad-hoc committee located within a line ministry, and *not* by PAK⁹¹ (e.g. Ministry of Agriculture, Forestry and Rural Development for agricultural NewCOs, Ministry of Trade and Industry for industrial NewCOs). This measure would provide the state some leverage vis-à-vis privatized firms, and empower Kosovo’s economic bureaucracy to monitor, ‘nudge’ and exact performance from agricultural producers and other former SOEs’ owners.

All procedures could be laid out in the new Law on the transformation of the lease hold rights on socially-owned immovable property into private ownership rights to be adopted as the successor instrument to UNMIK Regulation 2003/13. This new law should be drafted jointly with the input of technical personnel (agronomists, engineers) in the Ministry of Agriculture, Forestry and Rural Development and the Ministry of Trade and Industry, rather than just by the Ministry of Justice.

Policy measure #1	Secure property titles conditional on performance
Solution	<p>Transform leaseholds held by (already privatized) agricultural NewCOs into fully-fledged private property rights conditional on fulfilment of performance requirements.</p> <p>Abolish leasehold system for all future privatizations of socially owned agricultural land, and transfer rights in land to buyers as full ownership titles conditional on fulfilment of requirements as specified by law.</p> <p>Draft and adopt a new Law on the transformation of the lease hold rights on socially-owned immovable property into private ownership rights to succeed UNMIK Regulation 2003/13.</p> <p>Transformation of forests and forestry land from socially-owned property to state property and harmonization of Law on Forestry and PAK legislation.</p>
Output	The new Law on the transformation of the lease hold rights on socially-owned immovable property is drafted and passed in Parliament within 1 year.

⁹¹ This should reduce opportunities for collusion between buyers, PAK and performance monitors.

	All leaseholders submit applications to the relevant line Ministry within 12 months of the law being passed, and all applications are approved or rejected within 3 months of the final deadline.
Outcome	Security of title is increased.
Indicators	Increase in agricultural investment within 3 years.

3.3.2 Policy Measure #2: Decrease Court Caseload and Clamp Down on Illegal Court Hearings

- Adopt sub-normative acts stipulating basic (but relatively strict) conditions that property claims must fulfil in order to be heard before the Special Chamber (SC).
- Include *explicit* provisions in the new Law on the transformation of the lease hold rights on socially-owned immovable property into private ownership rights to clarify that old Yugoslav or Serbian laws do not constitute legal grounds to award restitution, and clamp down on *ultra-vires* court hearings in courts other than the SC.
- Until the new Law on the transformation of the lease hold rights on socially-owned immovable property into private ownership rights is drafted, violations could be tackled by instituting procedures within the Kosovo Judicial Council and bar associations to monitor and sanction judges and lawyers that defend or do not dismiss illegal restitution cases.

Policy measure #2	Decrease court caseload and clamp down on illegal court hearings
Solution	<p>Adopt sub-normative acts stipulating basic (but relatively strict) conditions that property claims must fulfil in order to be heard before the SC.</p> <p>Include explicit provisions in the new Law on the transformation of the lease hold rights on socially-owned immovable property into private ownership rights to clarify that old Yugoslav laws do not constitute legal grounds to award restitution, and clamp down on <i>ultra-vires</i> court hearings in courts other than the SC.</p> <p>Until the new Law on the transformation of the lease hold rights on socially-owned immovable property into private ownership rights is drafted, violations could be tackled by instituting procedures within the Kosovo Judicial Council and bar associations to monitor and sanction judges and lawyers that defend or do not dismiss illegal restitution cases.</p>
Output	<p>The SC, with input from the Ministry of Justice, drafts the sub-normative act within 3 months.</p> <p>The KJC and the bar association issue a notice to all judges and registered lawyers about the illegality of restitution cases.</p>
Outcome	The transaction and social costs of land privatization are reduced.
Indicators	<p>Court caseload at the SC is reduced by 50% within 2 years.</p> <p>Occurrence of illegal court hearings outside of SC is eliminated within 2 years.</p>

3.3.3 Policy Measure #3: Contain the Effects of Economically Harmful Rent-Seeking Practices

- Amend the respective sub-normative act issued to implement Law No. 04/L-144 “On Allocation for Use and Exchange of Immovable Property of the Municipalities” to clarify under what

conditions the municipalities may request the release of socially owned assets from PAK's jurisdictions.

The reinstatement of socially owned property to municipal ownership should be based on a cost-benefit analysis: the social use that a municipality could make of the land in question should be weighed up against the potential for economic use. The government should avoid transferring land to municipalities when doing so may result in illegal appropriations for speculative uses further down the line.

Policy measure #3	Contain the effects of economically harmful rent-seeking practices
Solution	Amend the “Law on Allocation for Use and Exchange of Immovable Property of Municipality” to clarify under what conditions the municipalities may request the release of socially owned assets from PAK's jurisdictions
Output	Art.55 of Law No. 04/L-033 (“On the Special Chamber...”) is repealed within 6 months. The amendments to the respective sub-normative act for setting out the criteria for transfers of socially owned property to the municipalities are drafted and approved by the Government within 6 months.
Outcome	Land privatization is accelerated and land assets are returned to economically productive uses more quickly
Indicators	Privatization delays due to court litigation (injunction requests) and illegal appropriations by municipal entities are (almost completely) eliminated

3.3.4 Policy Measure #4: Improved Inter-Institutional Coordination Mechanisms

- In a new “Land Use Regulation”, include clear law-mandated terms and procedures regulating access by PAK or other state agencies to municipal cadastral archives. These provisions should include clear terms for the disclosure of cadastral maps and certificates.

The disclosure of maps and certificates at PAK's request should take place within about two weeks of the request being forwarded. The new Law on the transformation of the lease hold rights on socially-owned immovable property into private ownership rights should also provide judicial remedies for PAK to seek court orders in case the MCOs do not provide access to cadastral documents.

Policy measure #4	Improved inter-Institutional coordination mechanisms
Solution	In a new Law on the transformation of the lease hold rights on socially-owned immovable property into private ownership rights include clear law-mandated terms and procedures regulating access by PAK or other state agencies to municipal cadastral archives. These provisions should include clear terms for the disclosure of cadastral maps and certificates
Output	The new Law on the transformation of the lease hold rights on socially-owned immovable property into private ownership rights drafted and passed in Parliament within 1 year.
Outcome	Inter-institutional coordination is improved and likelihood of manipulation of local institutions by powerful individuals diminished.
Indicators	Administrative delays to obtain cadastral maps and other documents from MCO are significantly reduced or eliminated.

ISSUE # 4 CREATE INCENTIVES TO ENCOURAGE MARKET TRANSACTIONS AND PRODUCTIVE USE OF ARABLE LAND AND TO GENERATE OWN SOURCE REVENUE FOR MUNICIPALITIES

4.1 RATIONALE

4.1.1 Situation Assessment

The agriculture sector is considered as one of the most viable areas to fuel economic development in Kosovo. Fifty-three percent of the total land area in Kosovo is classified as agricultural land.⁹² Unfortunately, much of it remains unexploited. As long as the land is not taxed, the owners have no powerful incentive to efficiently use their land.

Property tax is a fair and foreseeable tool to generate own source revenues for municipalities.⁹³ It is hardly avoidable since its object (the immovable property) is difficult to conceal. Moreover, it has proved to be a strong source of local finance these last years. However, the tax is more than merely an instrument for strengthening municipalities and transforming them into financially sustainable bodies.

In fact, the improvement and modernization of the property tax system in Kosovo is an indispensable reform with ramifications that transcend the main goal of increasing property tax revenues. As will be discussed below, the reform in this area may play an important role in inducing the most productive use of land.⁹⁴ In addition to this, it is expected to encourage market transactions and promote a transparent property market.⁹⁵

In order to tax land, its value must be determined. For fairness and compliance reasons, the land's appraised value must reflect to the largest possible extent the land's actual market value. Mass valuation of land is constrained by the absence of an active and transparent land market,⁹⁶ as well as a considerable number of non-realistic sales contracts.

Determination by a state authority of an accurate value for the land will serve the purpose of having a rational basis for taxation. But it can also be of vital importance for other processes and areas, such as calculation of compensation for expropriated property, privatization of state property, land use planning, insurance and credit markets, and others.

⁹² USAID, Property rights and resource governance in Kosovo, Country Profile, 2010, p.4.

⁹³ SIDA, STA, MoF, ProTax 2 Project Plan, 2014, p.6.

⁹⁴ *Id.* at p.6.

⁹⁵ *Id.* at p.7.

⁹⁶ Ministry of Justice's National Strategy on Property Rights, Issues Document, June 2015, p.9.

According to the jurisprudence of the ECtHR, states enjoy a wide margin of appreciation for deciding what kind of tax policy to pursue. However, this power is not unlimited. A proper balance between the need to generate revenues and other public policy objectives should always exist. Therefore, it is necessary to have measures in place that allow governments to tax property, but minimize adverse implications and do not create excessive demands on low income and poor families.

4.1.2 Current Policies

The imposition and collection of immovable property tax is a legitimate restriction of the right to property. The European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) explicitly recognizes the right of a state to impose taxes and take measures that are necessary to secure their payment.⁹⁷

In Kosovo, the first property tax legislation was issued in 2003. UNMIK Regulation No. 2003/29 “On Taxes on Immovable Property in Kosovo” laid down the legal foundations for the implementation of a modern market value based immovable property tax. The above mentioned regulation was repealed in 2010 by Law No. 04 / L-204 “On Taxes on Immovable Property” (the “Law”), which in turn was amended in 2012.⁹⁸ The Law along with eight sub legal acts issued for its implementation regulates the administration of the immovable property tax by the Municipalities and the Ministry of Finance.

The Law imposes a market value-based⁹⁹ tax on all immovable properties located in the territory of Kosovo, with some exemptions.¹⁰⁰ All natural or legal persons that own or use property in Kosovo are obligated to pay immovable property tax.¹⁰¹ Notwithstanding whether the person is an owner or possessor, or whether the property is deemed legal or not, a given property should be identified, valued, and taxed as long as it constitutes an immovable property under the Law.

Although the immovable property tax has been imposed since 2003 on all types of immovable property in Kosovo, it has so far been applied only to buildings and not land. Hence, an important component of the tax base goes untaxed due to various political and technical reasons.

The immovable property tax is a local tax. Under the present system, the revenue collected from the tax is allocated to the municipality and used by it in compliance with Law No. 03/L – 049 “On local government finance”.¹⁰² The Law provides that municipalities are responsible for administering key areas of the immovable property tax process in respect of immovable properties within their jurisdiction. Such responsibilities include identification and registration of properties, valuation, billing, collection and enforced collection of the property tax, review of complaints, and others.¹⁰³ Additionally, the Law seeks to preserve a satisfactory balance between local autonomy and legal certainty by recognizing the municipalities’ right to set property tax rates for different property categories within a range determined in the law.¹⁰⁴ On the other hand, The Property Tax Department at the Ministry of Finance is responsible for guiding and supervising the work for the implementation of the legal framework in all the municipalities of Kosovo.

In order to issue bills and collect property taxes, the municipalities have to fulfill certain preconditions and be awarded with an authorization from the Ministry of Finance.¹⁰⁵ Such an authorization may be

⁹⁷ First protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art.1.

⁹⁸ Law No. 04 / L-100 “On Amending and Supplementing the Law on Taxes on Immovable Property”.

⁹⁹ Law No. 04 / L-204 “On Taxes on Immovable Property”, amended, Art.6.

¹⁰⁰ *Id.* at Art.4, 8.

¹⁰¹ *Id.* at Art.5.

¹⁰² *Id.* at Art.2.

¹⁰³ *Id.* at Art.11.

¹⁰⁴ *Id.* at Art.6.

¹⁰⁵ Law No. 04 / L-204 “On Taxes on Immovable Property”, amended, Art.23.

revoked by the Ministry of Finance if a municipality is found to be in material noncompliance with the applicable legal framework and does not undertake appropriate measures to address the problems that are identified in the Property Tax Department inspection report.¹⁰⁶

As regards the protection of vulnerable groups within society, the Law provides for two measures of reducing the property tax burden owed by low income families: (i) a 10,000 Euro general deduction from the appraised value of the building unit that serves as a primary residence;¹⁰⁷ and (ii) an option to defer property tax payments.¹⁰⁸

Finally, since the correct registration of all immovable properties and appurtenant ownership rights in the Kosovo Cadastral Agency (“KCA”) registers was and still is a gradual and time consuming process, a fiscal cadaster (property tax register) was established to support the implementation of the law. It is worth emphasizing that moving from a *de facto* situation to a *de jure* one with all properties registered with the KCA will have a positive impact on the well-functioning of the property tax system.

With the help of a project financed by the Swedish International Development Cooperation Agency (“SIDA”) aimed at improving the property tax system in Kosovo, as well as other donors, revenues from property taxes have increased annually since 2010 on an average of 13%.¹⁰⁹ Around 20,400,000 Euros in property tax revenue was collected in 2014.¹¹⁰

However, the numbers are modest when taking into account the revenue potential, if land is incorporated into the tax base,¹¹¹ and other key policy and administrative aspects are significantly improved.

Much progress has been achieved in this area in the last six years. But there remains considerable room for improvement. In light of this, the Ministry of Finance, supported by another SIDA-founded project, is committed to carrying out a major reform aimed at incorporating land into the property tax base and further strengthening the property tax framework.

4.1.3 Problem Definition

The property tax process is technically and politically challenging in Kosovo due to a multitude of factors. However, its core processes may be improved and revenues from property tax may increase significantly if concrete steps are taken to properly address the following identified problems at an administrative and policy level. In addition to this, the reform in this area will have a direct impact in adding transparency to the property market, stimulating the most productive use of arable land, and encouraging market transactions, contributing in this way to a better functioning economy.

4.1.3.1 Registration

Under the present system, all immovable properties (with some exemptions) are included in the definition of taxable property regardless of ownership issues and whether the property is deemed as legal or not. Defining property as taxable is not an end in itself. In addition to this, all immovable

¹⁰⁶ *Id.* at Art.23.

¹⁰⁷ *Id.* at Art.9.

¹⁰⁸ *Id.* at Art.16.

¹⁰⁹ Source: Property Tax Department, Revenues from property taxes have increased 18% in 2010; 7% in 2011; 2% in 2012; 11% in 2013; and 27% in 2014.

¹¹⁰ *Id.*

¹¹¹ SIDA, STA, MoF, ProTax 2 Project Plan, 2014, p.4. Based on a rough estimation it was concluded that if a tax rate of 0.15 percent, which is the lowest applicable tax rate, is levied on land, the possible revenues, after residential deductions and exemptions, would be three times higher the current revenue.

properties, taxable or not, should be adequately identified in practice, registered, valued with few rationale exemptions, and most importantly, connected to a specific person (the owner or possessor).

The property tax register should be based upon existing data at the disposal of different state agencies. Apart from the KCA, which plays a vital role by continuously providing information from the immovable property rights register, there are many other public authorities that have the necessary information at their disposal to populate the property tax register and contribute to the well-functioning of the property tax process.¹¹² Hence, institutional cooperation between these public authorities is essential.

However, communication procedures and deadlines for the exchange of information between these entities are not legally regulated. And in practice, the required cooperation may not exist at all or may not function at the desired level.

As a complementary measure, the registration process requires field inspections (surveys) and administrative investigations to: (i) verify and update the existing official information; (ii) identify new immovable properties; and (iii) identify the responsible person to pay the tax obligations in accordance with the law.

Another significant problem that the property tax authorities currently face (and that is going to be aggravated when land is going to be taxed) is that many immovable properties are registered under the name of deceased persons, due to the deceased's family not formally initiating inheritance proceedings. These properties are often informally transferred within the family, but those transfers are not registered; therefore, the tax authorities do not have accurate information as to the properties' current owners. Additionally, neither the law nor the jurisprudence of the Kosovo courts provide much clarity related to liability for tax obligations in cases where: (i) the ownership/possessions of the immovable property has been transferred to another person within the same tax year; (ii) a natural person taxpayer is dead or a legal person has ceased to exist; (iii) the immovable property has been transferred to someone else without paying outstanding debts; or (iv) the same immovable property is under the co-ownership/possession or joint ownership of two or more persons.

The current legal framework does not contain any notice provisions that would inform owners/possessors that their immovable property will be subject to surveying activities, nor does it provide any specific rules on how the surveying activities shall be conducted in order to reasonably minimize the amount of inconvenience or interference to any person using the immovable property.

4.1.3.2 Appraisal

The appraisal process under the authority of the municipalities has proven to be totally ineffective. Starting from year 2003, only buildings were subject to the appraisal process; land was neither appraised nor taxed. Most municipalities failed to carry out the reappraisal of properties in compliance with the determined legal deadline and in the worst cases, didn't reappraise them at all after the initial appraisal.

In 2012, the law was amended such that the lowest applicable property tax rate increased from 0.10% to 0.15%. Soon thereafter, the Municipal Assemblies of seven municipalities lowered the appraised values of buildings, thereby openly violating the law. Other municipalities followed shortly after. As a result of these issues, the appraised values of many buildings fail to reflect their actual market value.

¹¹² For example, the competent authorities implementing Law No. 04/L-188 on Treatment of Constructions without Permit can provide useful information from the Registry of Unpermitted Constructions and afterwards from the legalization process. Thus far, nearly 350,000 constructions have been listed there. In addition to this, cooperation with other state institutions like the Ministry of Agriculture and Rural Development, Kosovo Property Agency, Civil Registry ect is also crucial.

As the above mentioned indicators show, the majority of the Municipalities lack professional competence to perform this important function, and these failures will further complicate matters when there will be a need to appraise land as well. Indeed, appraisal is a purely specialized and technical area that requires in-depth knowledge and that should be totally out of the reach of political interference.

The real estate appraiser profession is relatively new in Kosovo. There is some professional competence in this area, but mainly within the private sector. However, the development of a valuation capacity in Kosovo is progressing mainly due to the efforts of the Ministry of Finance, the Kosovo Chamber of Commerce, and the Kosovo Appraisers Association. At the time of this concept note, more than one hundred real estate appraisers have been licensed.

Administrative Instruction 04/2011 "For determination of the immovable property value and valuation standards" determines the methodology that should be used by the property tax authorities to appraise properties for taxation purposes. It sets out general rules and valuation methods, but does not provide for the creation of multilayer value zones to accurately capture transaction data for all types of properties and better reflect market value differences among various properties. Moreover, it does not require the development of valuation models that take into account specific attributes and characteristics (value factors) that individual immovable properties may have. The involvement of these value factors would make property tax fairer and further improve revenues and equity.

Open access to valuations and market transactions must also be improved. Value zones, the appraised value of properties, any attributes affecting the appraised value, and general information from transactions (e.g. transaction date, transaction price, etc.) that are used in immovable property appraisals, are not published on any publicly available website, impeding the so wanted transparency of the property market. This hinders appraisers and interested investors who seek to follow changes in the property market and take part in it.

Finally, mass valuation is constrained by the absence of an active and transparent market,¹¹³ as well as a significant amount of market speculation. Kosovo lacks an effective capital gains tax that would compel buyers and sellers (with conflicting interests) to state in the contract the real price of the transaction.

4.1.3.3 Collection and enforced collection

One of the weaker points of the property tax process is linked to the bottom part of the system: collection and enforced collection of taxes. The deficiencies of the collection system are mainly related to the absence of an efficient collection policy, both at the local and central level that would ensure: (i) prompt an accurate delivery of tax bills; (ii) payment facilities and incentives; and (iii) stricter enforcement.

Although property tax bills are required to be delivered once a year, they are not routinely distributed and as a result, people are not adequately informed of their tax liabilities. This situation can be attributed to the absence of other notification means, poor administration, lack of a comprehensive and accurate address system, and inaccurate or missing addresses of persons. Furthermore, enforcement is seriously hindered by a very ambiguous and unclear legal basis, personal and political affiliations, as well as poor administration.

4.1.3.4 Other policy issues

Twelve years after Kosovo set the first comprehensive property tax legislation that imposed a tax on all types of immovable property, the law is partially enforced and land remains unvalued and untaxed.

¹¹³ Ministry of Justice's National Strategy on Property Rights, Issues Document, June 2015, p.9.

The pursued policy has implications that go well beyond the aspirational objective of increasing property tax revenues and strengthening municipalities. Indeed, as long as the land is not included in the tax base and taxed, there will be no incentive to induce its efficient utilization.¹¹⁴

Measures to address social issues bear a significant weight, requiring ways that work to reduce adverse implications for taxpayers of limited means and balance social benefits against lost revenue. As explained above, the Law provides for such measures. However, the 10,000 Euro primary residence deduction that was designed as one of the key policy measures to protect the vulnerable groups of society has not been adjusted to reflect increased prices in the property market.¹¹⁵ Furthermore, in those cases where the appraised value (the tax base) of the building unit is less than 10,000 Euros,¹¹⁶ the remaining part of the deduction cannot be applied to other tax obligations, such as the tax on the actual land on which the building sits. Thus, the unused part of the deduction would not benefit the taxpayer of limited means in any way, when land is going to be taxed.

Therefore, it is of key importance to find the best approach for having a smooth introduction of tax on land and generating proportionate levels of own source revenues for municipalities without creating excessive demands on low income and poor families.

Many of the above mentioned challenging issues are essentially rooted and derive from a problematic legal framework. Some of the identified problems that are not mentioned above include:

- The absence of some of the basic concepts of property tax;
- The absence of rules for the classification of properties in different property categories;
- The absence of clear responsibilities of the central level in the administration of property tax;
- Unclear rules regarding access to property tax information;
- An unsuitable valuation methodology;
- The absence of rules for payment of tax obligations and distribution of payments;
- The absence of alternative notification means;
- Unclear appeal procedures;
- Lack of a reimbursement rule for excess tax obligations paid by a person;
- Lack of effective sanctions in cases of noncompliance with the law;
- The existence of contradictions, ambiguities, and legal gaps in many other provisions.

4.2 POTENTIAL SOLUTIONS BASED ON BEST INTERNATIONAL PRACTICES

With a view to improving the property tax system and contributing to a better functioning economy, some of the potential solutions that are underpinned by equity, effectiveness, strong efficiency and other economic arguments are prescribed below.

Revenues from property tax may increase substantially even without changing the current very low tax rates,¹¹⁷ provided the legal framework is properly adjusted, land is taxed, property registrations are improved, appraisals are fair and accurate, property tax bills routinely delivered and collection significantly enhanced. If tax is levied on the land the cost of not using it would be greater and more

¹¹⁴ Ministry of Justice's National Strategy on Property Rights, Issues Document, June 2015, p.9.

¹¹⁵ Since the deduction was established in 2003, prices in the real estate market have increased.

¹¹⁶ According to officials at the Property Tax Department, there are buildings classified as Primary Residences that are valued at less than 10,000 Euros.

¹¹⁷ As reported by the Property Tax Department the average tax rates applied to different property categories for tax year 2014 are: 0.15 % for residential properties; 0.20% for commercial properties; 0.18 % for industrial properties; and 0.15% for all the other property categories.

apparent.¹¹⁸ The tax constitutes an incentive for landowners to use their scarce arable land for its most productive purpose or eventually transfer it to others that can efficiently use it. Best practices may be offered by many states that apply a modern market value based property tax on all types of immovable property (including land) like Estonia, Latvia, Lithuania and Slovenia. The imposition of a lower tax on cultivated arable land, or its exemption from property tax could be an additional incentive to stimulate growth in the agriculture sector.

Appraisal is a purely specialized and technical area that under the present system is totally ineffective. As a consequence, it requires a comprehensive and tailored intervention. Because of political interference, lack of valuation skills, and lack of institutional capacity and supporting technology at the disposal of municipalities in Kosovo it should be moved to the central level and ideally be resident within a central public authority such as the PTD. This would ensure an effective appraisal process and enable municipalities to focus on other key responsibilities such as registration, billing and collection. In Estonia, Latvia, Lithuania, Bosnia and Herzegovina, and Sweden the valuation function is established at the central level.¹¹⁹ Furthermore, the involvement of private appraisers (professional competence within the private sector is growing) as widely applied in Sweden should be considered to add more quality to the appraisal process.

Another critical issue closely linked with the radical transformation of the process of appraising properties is the valuation methodology. A methodology that requires the creation of multilayer value zones and takes into account specific characteristics (value factors) that individual immovable properties may have helps to accurately capture transaction data for all types of properties and better reflect market value differences among various properties.¹²⁰

Establishing the proper methodology is not an end in itself. Mass valuation is still constrained, among other things, by a significant amount of market speculation. Albania tackled this issue by introducing an effective capital gains tax¹²¹ that compels buyers and sellers (with conflicting interests) to declare the real price of the property transaction. Establishing such a tax and applying it to the capital gain (i.e. the difference between what it cost to the person and what he/she will receive when he/she disposes the property) that derives from the disposition of an immovable property will help bring confidence to the property market. The imposition of such tax may be accompanied by the issuance of a sub legal act that would offer immovable property owners the possibility to officially value or revalue the property within a given period of time and at a reasonable cost, and will also foresee other necessary procedures that will support the proper implementation of the capital gains tax, following the Albanian example.¹²² Additionally, in those cases when an immovable property is sold and the sale price specified in the contract is lower than the price (appraised value of that specific property, or if not available, of the immovable properties with similar characteristics in that value zone) determined by the property tax authorities as described below, the latter may considered and apply as the selling price the for the purpose of calculating the tax.

Determination by a state authority of an official value for immovable properties and publication of the same (along with any attributes affecting the appraised value and general information from transactions) in a publicly available website, as in the case of Sweden, will contribute to a more transparent and active real estate market.¹²³ It will serve the purpose of having a rational basis for

¹¹⁸ SIDA, STA, MoF, ProTax 2 Project Plan, 2014, p.6.

¹¹⁹ Responsibility for valuation: Bosnia and Herzegovina - Central Tax Administration; Estonia – Central National Board; Latvia – Central State Land Service; Lithuania - Central State Enterprises Centre of Registers; Slovenia - Central Surveying and Mapping Authority; Sweden - National Land Survey.

¹²⁰ SIDA, STA, MoF, ProTax 2 Project Plan, 2014, p.5.

¹²¹ Article 11 of Law No. 8438, dated 28.12.1998 “On Taxes on Personal Income” imposes a 15% tax on capital gains in case of transfer of ownership of immovable properties.

¹²² For more information, see Joint Instruction of the Minister of Justice and Minister of Finance No.9, dated 26.02.2008 “On Taxes in case of transfer of ownership of immovable properties,” as amended.

¹²³ SIDA, STA, MoF, ProTax 2 Project Plan, 2014, p.7.

taxation and may also be crucial for economic and political decisions and for other purposes, such as calculation of compensation for expropriated property, privatization of state property, land use planning, legalization, insurance and credit markets, calculation of the capital gains tax, etc. It will also make it easier for investors and appraisers to follow changes in property prices and participate in the property market.¹²⁴

The ECtHR has reiterated in many of its judgments that states enjoy a wide margin of appreciation for deciding what kind of tax policy to pursue. However, a proper balance between the need to generate revenues and other public policy objectives should always exist. In order to reduce the property tax burden on vulnerable groups of the society, two international best practices appear particularly effective: (i) a uniform deduction from the appraised value of the building that serves as primary residence; and (ii) an option to defer property tax payments for low income persons.

These two protective measures are already in place in Kosovo. But the 10,000 Euro primary residence deduction should be revised to reflect recent increases in the property market. Moreover, for this measure to be fully effective and serve the main purpose it was designed for (i.e. protection of vulnerable groups of the population, especially in the new context where land will be taxed) another amendment to the existing law could be useful. In all those cases where the appraised value of the building is less than the primary residence deduction,¹²⁵ the remaining part of the deduction may be subtracted from the appraised value of the parcel where the building is constructed. In addition, rules for deferring property tax payments should be clarified and the imposition of interest during the deferral period should be repealed.

Lastly, a sudden increase of the property tax burden (due to tax on land) is not advisable. Therefore, it is necessary to apply a uniform deduction to the appraised value of land (the tax base) over the first few years of implementation.¹²⁶ A scaled deduction schema applied to the tax base over the first five or ten years of implementation would allow for a smooth introduction of tax on land and would enable taxpayers to gradually become familiar with the obligation and habit of paying their land tax.

4.3 RECOMMENDATIONS REGARDING KEY POLICY MEASURES

4.3.1 Policy Measure #1: Extend and Improve the Property Tax Register (Fiscal Cadaster) with New Registered Properties, as well as More Complete Property Registrations. (Increase Revenues from Property Tax)

- Properly regulate communication procedures and set out deadlines for the exchange of information between the property tax authorities and state agencies or bodies that possess (have at their disposal) the necessary data to populate the property tax database (fiscal cadaster) or that are otherwise related to the property tax process. Cooperation should be required both at the regulatory level and in practice.
- Allow the respective municipality to submit a request for issuance of the certificate (decision) of inheritance, if such a request is not submitted or refused to be submitted by the interested

¹²⁴ *Id.* at p.7.

¹²⁵ Source: Property Tax Department.

¹²⁶ SIDA, STA, MoF, ProTax 2 Project Plan, 2014, p.5.

party/parties (in cases when the taxpayer or debtor has died and has not been issued a certificate (decision) of inheritance.

- Amend the legal framework governing the property tax process to provide for new registration, surveying and investigation procedures as well as self-declaration/surveying forms to identify, verify or complete the needed information.

Policy measure #1	The property tax register (fiscal cadaster) with new registered properties, as well as more complete existing property registrations. (Increase revenues from property tax)
Solution	<p>Properly regulate communication procedures between the property tax authorities and state agencies or bodies that possess the necessary data to populate the property tax database or that are otherwise related to the property tax process.</p> <p>Allow the respective municipality to submit a request for issuance of the certificate (decision) of inheritance, if such a request is not submitted or refused to be submitted by the interested party/parties (in cases when the taxpayer or debtor has died and has not been issued a certificate (decision) of inheritance).</p> <p>New registration, investigation and surveying procedures.</p>
Output	<p>The new law on immovable property tax is finalized and passed in Parliament within 1 year.</p> <p>The new sub-legal act on registration is drafted and approved by the MoF within 6 months of the law on immovable property tax being passed. (MoF leads the drafting process)</p> <p>The sub-legal act on communication procedures is drafted and approved by the Government within 6 months of the law on immovable property tax being passed. (The Government leads the drafting process)</p>
Outcome	<p>Cooperation between the property tax authorities and state agencies or other bodies is regulated both at the regulatory level and in practice.</p> <p>Better provisions on registration, investigation and surveying procedures.</p>
Indicators	<p>New registered properties (including parcels) within 1 year.</p> <p>Property registrations are more complete and accurate within 1 year.</p> <p>The tax base is increased within 1 year.</p> <p>Property tax revenues are increased within 1 year, and as a consequence also the means available for capital investments</p>

4.3.2 Policy Measure #2: Significantly Improve the Process of Appraising Properties (Promote a Realistic, Transparent and Active Property Market)

Amend the property tax framework to provide:

- The centralization of the valuation function (valuation should be a PTD function);
- Incorporation of elements of open market data into the appraised values of the immovable properties;
- The introduction of a new procedure and valuation methodology that requires the creation of multilayer value zones, allows for statistical testing and provides for the development of valuation models that take into account specific characteristics (value factors) that individual immovable properties may have;
- The introduction of a rolling schema for the reappraisal of different property categories;
- The property tax authorities' right (possibility) to make use of private appraisers;
- The publication (in a publicly available website) of value zones, the appraised value of properties, any attributes affecting the appraised value, and general information from transactions (e.g. transaction date, transaction price, etc.); and
- Amend the Law on Taxes on Personal Income to allow the introduction of an effective capital gains tax.

Policy measure #2	Significantly improve the process of appraising properties. (Promote a realistic, transparent and active property market)
Solution	<p>Centralize the valuation function; Introduce a new valuation methodology and recognize the property tax authorities' right (possibility) to make use of private appraisers;</p> <p>Publish the appraised value of properties, any attributes affecting the appraised value, and general information from transactions.</p> <p>Introduce an effective capital gains tax.</p>
Output	<p>The new law on immovable property tax is finalized and passed in Parliament within 1 year.</p> <p>The new sub-legal act on valuation is drafted and approved by the MoF within 6 months of the law on immovable property tax being passed. (MoF leads the drafting process).</p> <p>Amendments to the law on taxes on personal income are drafted and passed in Parliament within 1 year.</p> <p>A sublegal act (to support the implementation of the capital gains tax is drafted and approved by the Ministry of Finance within 6 months of the amendments to the law on taxes on personal income being passed. (MoF leads the drafting process).</p>
Outcome	<p>The appraisal process is fairer and more effective.</p> <p>The appraised value of different property categories is updated in compliance with the determined legal deadline.</p> <p>Sales transaction data for all types of properties are accurately captured.</p> <p>The application of uniform standards of practice and valuation methods throughout Kosovo.</p> <p>Valuation competence within the private sector is used to further improve the appraisal process (the engagement of private appraisers).</p> <p>Property tax is fairer.</p> <p>Revenues and equity are further improved.</p> <p>The appraised value of properties, any attributes affecting the appraised value, and general information from transactions are published in publicly available website.</p> <p>Buyers and sellers state in the contract the real price of the property transaction thanks to an effective capital gains tax.</p>
Indicators	<p>Appraisal is significantly improved and the appraised value of properties reflects the current market value better within 3 years.</p> <p>A more transparent and active property market is ensured within 3 years.</p> <p>Market speculation is significantly reduced within 3 years.</p>

4.3.3 Policy Measure #3: Significantly Enhance Collection Efforts and Introduce Effective Collection Mechanisms (Increase Revenues from Property Tax)

- Formulate an efficient collection strategy that would ensure: (i) prompt an accurate delivery of tax bills; (ii) payment facilities and incentives; and (iii) stricter enforcement.

Amend the property tax legal framework to:

- Provide new notification means and notification procedure for tax bills, notices or other official communications;
- Provide a new enforcement procedure and new enforcement mechanisms; an
- Make use of the private bailiff service.

Policy measure #3	Significantly enhance collection efforts and introduce effective collection mechanisms. (Increase revenues from property tax)
Solution	Formulate an efficient collection strategy that ensures: (i) prompt and accurate delivery of tax bills; (ii) payment facilities and incentives; and (iii) stricter enforcement. Utilize utility companies such as electricity/water suppliers to deliver bills. Provide new notification means and notification procedure; Stipulate new enforcement procedure and mechanisms; Make use of private enforcement agents.
Output	PTD in cooperation with the municipalities drafts a collection led strategy within 3 months. The new law on immovable property tax is finalized and passed in Parliament within 1 year. (MoF leads the drafting process)
Outcome	Property tax bills are routinely delivered and persons properly informed of their obligations. Payment facilities and payment incentives are in place. Delinquent taxpayers are aggressively pursued by the application of those measures prescribed in the new legislation. Enforcement is improved thanks to the engagement of private bailiffs that enjoy all the necessary legal, institutional and professional attributes to carry out effectively the enforcement of unpaid tax obligations.
Indicators	Property tax revenues are increased within 1 year. The number of delinquent taxpayers is reduced within 2 years.

4.3.4 Policy Measure #4: Establish a Fair and Effective Property Tax System (Increase Revenues from Property Tax, Stimulate the Most Productive Use of Arable Land and Encourage Market Transactions)

Amend and adapt the legal infrastructure governing the property tax process to ensure:

- Clear and concise definitions for all the basic property tax related concepts;
- The imposition and effective implementation of property tax on all types of immovable property in Kosovo including land, with few rational exemptions;
- The imposition of a lower tax or exemption from tax for cultivated arable land;
- The application of a uniform deduction to the appraised value of land that will gradually decrease in the first years of implementation of tax on land;
- The introduction of clear rules for the classification of properties in different property categories;
- An increase of the 10,000 Euro primary residence deduction;
- Full effectiveness of the primary residence deduction;
- A clear division of responsibilities in the administration of property tax between the municipalities and PTD;
- Clear and strengthened powers of PTD;

- Clear rules regarding access to property tax information, payment of tax obligations, distribution of payments, and deferral of property tax payments;
- Cancellation of interest that is applied during the period of time the property tax payment is deferred;
- Clear appeal procedures;
- The introduction of a reimbursement rule for excess tax obligations paid by a person;
- Effective sanctions in case of failure to apply for the registration of the immovable property, failure to declare a change in the use or increase of value of the immovable property, abuse with the right of primary residence deduction, refusal of inspection, etc.;
- The elimination of existing contradictions, ambiguities, and legal gaps in other provisions.

Policy measure #4	Establish a fair and effective property tax system. (Increase revenues from property tax, stimulate the most productive use of arable land and encourage market transactions)
Solution	<p>Clearly specify basic property tax related concepts;</p> <p>Impose and effectively implement property tax on all types of immovable property in Kosovo including land, with few rational exemptions;</p> <p>Impose a lower tax or exempt cultivated arable land;</p> <p>Apply a general scaled deduction measured in the land value in the first years of implementation of tax on land;</p> <p>Introduce classification rules;</p> <p>Increase the amount of the primary residence deduction and apply the remaining part of it to the appraised value of land where the building is constructed;</p> <p>Clearly divide responsibilities in the administration of property tax;</p> <p>Clarify and further strengthen PTD powers;</p> <p>Provide clear rules regarding access to property tax information;</p> <p>Stipulate clear rules for payment of tax obligations, distribution of payments and deferral of property tax payments;</p> <p>Provide clear appeal procedures;</p> <p>Introduce a reimbursement rule for excess tax obligations paid by a person;</p> <p>Stipulate effective sanctions;</p> <p>Eliminate existing contradictions, ambiguities, and legal gaps in the legal framework.</p>
Output	<p>The new law on immovable property tax is finalized and passed in Parliament within 1 year. (MoF leads the drafting process).</p> <p>A sublegal act (to support the implementation of the legal provision on a lower tax or exemption of cultivated arable land from property tax) prescribing in detail procedures that will be used to define which parcels are cultivated and provision of this information to the property tax authorities is drafted and approved by the Ministry of Agriculture, Forestry and Rural Development within 6 months of the law on immovable property tax being passed. (Ministry of Agriculture, Forestry and Rural Development leads the drafting process).</p>
Outcome	<p>A fair and effective property tax system is established.</p> <p>Arable land is used by the landowners for its most productive purpose or it is transferred to more efficient and productive “hands”.</p>

ANNEX 4

	Legitimate rights of individuals are further protected
Indicators	<p>A substantial increase of the number of parcels that are used for agriculture purposes within 5 years.</p> <p>An increase of market transactions within 5 years.</p> <p>The tax base is radically increased within 1 year.</p> <p>Property tax revenues are radically increased within 1 year.</p>

ANNEX 4

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PILLAR # 3
ACQUIRING
PROPERTY IN
KOSOVO:
INFORMALITY
AND
UNCERTAINTY

ANNEX 4

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1. RATIONALE

1.1. Situation Assessment

Pursuant to the Constitution of Kosovo, *the right to own property is guaranteed (Article 46) and everyone enjoys the right of judicial protection if any right guaranteed has been violated or denied and has the right to an effective legal remedy if found that such right has been violated (Articles 54).*

Courts are thus at the core of the determination and protection of property rights, although quasi-judicial mechanisms and other state authorities have been created over time to deal with specific property matters, that is matters related to the 1999 conflict and the ten year period that preceded it. The historical development of Kosovo and the upheaval caused by the 1998-1999 conflict have resulted in a property system that lacks the various forms of written, authentic documentation that underpins a functioning property system. Although the mechanisms that had been set-up to bring clarity to the property situation managed to provide effective remedy in thousands of cases, the matter requires further attention so that the legal status of most, if not all, property in Kosovo is clarified and ownership rights registered.

Number of state authorities is or has been dealing with property rights in Kosovo, from courts and temporary quasi-judicial mechanisms to notaries and municipalities. The legal framework regulating the activity of these authorities is however at times lacking clarity and consistency with regard to roles and responsibilities they are called to play, as often authorities have found themselves mandated to perform functions already in the sphere of responsibility of others (courts vs. notaries) or have been left without guidance or appropriate support (courts vs. HPCC/KPCC). This has often been the result of hasty decisions to establish new institutions on the margins of an existing system in order to either tackle issues rooted in the situation pre 1999 and the conflict that emerged thereon or to bring the justice system up to modern standards.

In 1990 the 'special measures' introduced by the Socialist Republic of Serbia resulted in most Kosovo Albanians being dismissed from their positions in public institutions, and public and socially-owned companies, subsequently losing their occupancy rights, which were reallocated to Kosovo Serbs; thus the 1992 Law on Housing served mostly the Serb occupancy right holders. In addition, the *Law on Changes and Supplements of the Law on the Limitations of Real-Estate Transactions* enacted in 1991 restricted the inter-ethnic transfer of property.¹²⁷ As a result, the number of informal, undocumented, property transactions has considerably increased, in a society already dominated by informality and traditionalism. For instance, inheritance was dealt with formally only exceptionally, and today we see a significant number of property rights still registered in the name of deceased persons. Consequently, existing cadastral and immovable property rights records do not always reflect reality.

The temporary quasi-judicial mechanisms that were created after the conflict were meant to address the widespread informality caused by the discriminatory practices and the conflict. Given the magnitude of the pre and conflict related informality, the informality caused by other reasons - i.e. tradition, especially in inheritance matters - was unfortunately overlooked by policy-makers. These other cases of informality occurred not only before 1999 but also after. In practice, these transfers translated into verbal contracts between sellers and buyers sealed by a handshake and estates passed from deceased persons to heirs without a court or notarial procedure.

¹²⁷ The purpose and effect of the law was in fact to prevent transfers of property from Kosovo Serbs to Kosovo Albanians as a means of ensuring that the Serb population did not decline. As of 1999, 43% of the property in Kosovo was non-private, that is socially or state-owned, and most of the 57% private property was comprised of socially owned apartments which had been privatized under the 1992 Law on Housing.

Courts were nevertheless called to adjudicate as owners without documents sought a regularization of the status of their property, mostly in cases of informal sales. Courts deemed fairness a sufficient ground to rule, based on witness evidence, that ownership had indeed been transferred to the claimant, although under Kosovo and previously applicable Yugoslav law conditions of formality and registration had to be fulfilled in order to effectively transfer property rights over immovable property, that is written contract concluded before court or notary and registration of the right in the immovable property rights register.¹²⁸

The lack of registration by property rights holders of their rights, ownership in particular, is an issue even more extensive than the verbal transmission of property, as it also affects property that was transmitted on the basis of written and *verified* contracts. In the past, a legal procedure was followed whereby courts, upon verification of a contract, transmitted the original to the municipality in order to make the appropriate registration in the cadastre; the new Kosovo law no longer foresees this obligation on courts and leaves the responsibility of the registration to the buyer, without however imposing any constraints. It appears that registration has been largely circumvented, even after 1999, due to such reasons as lack of awareness, failure to see the advantages or prohibitive fees. Registration is however, according to the law, a necessary step to an effective transmission of the right from the seller to the buyer. Without registration the legal status of the property in question is affected by uncertainty as its very existence can be brought into question and the seller could easily re-sell the same property to another.

The lack of specific legal provisions to address informality, combined with a lack of comprehensive evidentiary rules to be used at trial, courts employed various legal provisions and doctrine to compensate for these legislative gaps; for instance, the use of the legal doctrine that a contract is considered concluded upon consent of the parties or upon fulfilment of their obligations to validate verbal transfers of rights over immovable property is an unfortunate choice as such transfers are an exception to these rule due to the legal requirement of form; besides, the law offers more appropriate mechanisms to determine ownership in such circumstances, such as prescription (long term possession).

In addition, limited understanding among courts of the nature of the proceedings before the abovementioned temporary mechanisms and the choice of the lawmaker to leave certain matters pertaining to cases adjudicated by these mechanisms to be determined by courts, made them face the difficult task of ruling on side legal issues, such as assessing the discriminatory character of an act, without being able to make a full determination on the merits of the case. Furthermore, number of cases were identified where the exclusive jurisdiction of these mechanisms was not respected, fact which often resulted in contradictory decisions being rendered in regard to the same property.

Publicity through registration in the Immovable Property Rights Register (IPRR), not only of property rights, but also of easements and encumbrances, would bring much sought certainty to the property scene. The registration process is however hampered by inadequate and varying practices across municipalities and notaries are not entrusted with the task of mandatory verification of the IPRR prior to the authentication of a transfer, nor with mandatorily performing the registration on behalf of clients following authentication. Such a function could help overcome the issue of the wavering weight given in court to cadastral/IPRR documentation, as notarial verification procedures would increase the level of certainty of these documents. It is not to believe however that such documents are to be treated as indefatigable, as courts may look for additional evidence or accept claims challenging the rights registered. Article 124 of the Law on Property and other Real Rights only creates a legal presumption on the registration: *if a right has been registered in the immovable property rights register for the benefit of a person, it is presumed that such person is entitled to the right so registered*. Presumptions can be reversed, but clearer rules of evidence are needed in order to specify what is admissible evidence in order to

¹²⁸ See Article 36 of the Law No. 03/L-154 on Property and other Real Rights and Article 52 of the Law No. 04/L-077 on Obligational Relationships.

reverse presumptions and what is the weight of certain types of evidence in relation to others (for instance, registration based on authentic documents should not be overturned based only on witness testimony).

1.2. Current Policies

A series of policies have been put in place since 1999 to deal with the determination and protection of property rights, starting from the creation of temporary quasi-judicial mechanisms to the adoption of new legislation, a reform of the court system and the introduction of new legal professions.

1.2.1 Creation of Mass-Claims Mechanisms to Deal with Pre and Conflict Related Property Matters

In 1999, UNMIK took responsibility for a court system in disarray, worn down by persistent underfunding as well as a lack of adequately trained judges and court officials. The shortages in well-qualified judges were mostly determined by the pre-conflict period between 1989 and 1999 when systematic ethnic discrimination prevented Kosovo-Albanians from holding official positions and accessing education and the departure of most Kosovo Serb judges in the aftermath of the conflict. In order to prevent the courts from being burdened by pre- and conflict related property matters, UNMIK set up mass-claims mechanism, described below, to handle such matters. The courts have nevertheless had jurisdiction for complementary or follow-up matters and, to a certain extent, for appeals.

In 1999, UNMIK established the Housing and Property Directorate (HPD), mandated to receive and manage residential property claims related to the pre-1999 discriminatory period, and the Housing and Property Claims Commission (HPCC), its quasi-judicial body, to settle these claims.¹²⁹ The mechanism was temporary, with a deadline set for individuals to file claims by 1 July 2003. The HPCC had exclusive jurisdiction over three types of claims:

- Category A claims concerning claims by individuals whose ownership, possession or occupancy rights to residential property had been revoked subsequent to 23 March 1989 as a result of discriminatory legislation;
- Category B claims concerning informal transactions of ownership rights entered into freely by parties subsequent to 23 March 1989 when inter-ethnic transfers of property were prohibited; and
- Category C claims concerning displaced claimants who were owners, possessors or occupancy right holders of residential property prior to 24 March 1999 and who did not enjoy possession of the property and where the property was not voluntarily transferred.

By 2007 when its mandate ended, HPCC had decided on all 29.160 claims filed. The decisions rendered by the HPCC were final and legally binding.

In 2006, the Kosovo Property Agency (KPA) was established, an independent agency charged with resolving all outstanding property disputes related to the conflict, involving not only residential property but also commercial and agricultural property. The Kosovo Property Claims Commission (KPCC), the quasi-judicial body of the KPA, issued decisions on property matters referred to it, subject to review by the Supreme Court of Kosovo. The KPA was responsible for implementing KPCC decisions through enabling property rights holders to re-possess their property or, where re-possession was not possible, through administration of the property including via an established rental

¹²⁹See UNMIK Regulation No. 1999/23 of 15 November 2000 on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission and UNMIK Regulation No. 2000/60 of 31 October 2000 on Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission.

scheme. The deadline set for individuals to file claims with KPA was December 2007. After this date, any such claims fall under the jurisdiction of courts.

Initially, KPA's function was to receive, register and assist the courts in resolving ownership claims, with KPCC delivering only a 'conclusion' which was to be submitted to court for confirmation or rejection. This configuration only existed for six months, from March to October 2006, as a subsequent UNMIK Regulation 2006/50 substantially changed KPA's mandate to resolving property claims falling under its jurisdiction. From October 2006, KPCC was thus issuing decisions, subject to review only by the Supreme Court.

In December 2014, the KPCC finalized the adjudication of 41.849 (41.606 ownership claims and 510 user right claims) out of a total of 42.749 claims the KPA received. As of January 2016,¹³⁰ the KPA had implemented approximately 29.673 KPCC decisions, including by executing evictions of illegal occupiers of administered properties.¹³¹ 554 claims are still pending with the Supreme Court.

1.2.2 Attempts to Streamline Property Related Matters by Enacting New Substantive and Procedural Civil Legislation; the On-going Codification Process

Number of laws has been enacted in Kosovo after 1999 to replace outdated Yugoslav laws. Relevant to this concept note are the *Law No. 03/L-154 on Property and other Real Rights (LPRRR)*, the *Law 04/L-077 on Obligational Relationships (LOR)*, the *Law No.2004/26 on Inheritance (LoI)*, the *Law No. 03/L-007 on Out Contentious Procedure (LOCP)* and the *Law No. 03/L-006 on Contested Procedure (LCP)*, the *Law No. 2002/5 on Establishment of the Immovable Property Rights Register, as amended by Law No. 2003/13 (the LIPRR)* *Law No. 03/L-10 on Notary*. Although these laws are a great improvement compared to the pre 1999 ones, certain matters seem to have slipped the vigilance of the lawmaker, as certain legal institutions are regulated too briefly (e.g. prescription was kept but the matter is regulated only in brief; accession was kept only in respect of the building right; right of pre-emption appears only as a contractual obligation) and inconsistencies can be found not only in between these laws but also within the same law (e.g. *Law on Out Contentious Procedure* not aligned with *Law on Notary* in respect of notaries' competence over non-contested inheritance matters; the form required for donation contract in the LOR is inconsistent with provisions related to the form of contracts when rights over immovable property are transferred).

In March 2015, a codification process of the civil law – already contemplated in 2004 - has been initiated. It is intended that the future civil code will harmonize and bring all civil laws currently in force, including those related to property, up to date.

1.2.3 Introducing New Legal Professions

Three new categories of legal professions were introduced in Kosovo in 2008 and 2012, notaries, mediators and private bailiffs. Their introduction has made an impact on the property rights scene, as certain matters were taken off courts and placed under their authority in an attempt to speed up the time one would spend when acquiring or seeking determination or protection of property rights.

Mediators. In 2008, with the *Law No. 03/L-05 on Mediation (LoM)*, an alternative dispute resolution method was introduced in Kosovo.¹³² The mediation has received a fair amount of attention, as it was perceived as a modern and appropriate tool to alleviate courts and reduce backlog, and to promote

¹³⁰ Statistics provided by the Kosovo Property Agency.

¹³¹ As of October 2015, the KPA had 13,033 properties under its administration (10,958 from KPA, and 2,075 from HPD). The KPA rental scheme rents out 1,157 of the properties and the rental income is provided to the displaced property right holders.

¹³²The first two pilot Mediation Centers were established in July 2011 in the municipalities of Peja/Peć and Gjilan/Gnjilane and in October 2011 the first court case was referred to mediation. Currently, there are seven mediation centers throughout Kosovo and around 170 certified mediators.

an amiable and swift way of solving disputes, including property related disputes. The Law on Mediation is currently being revised and the protocols on referring cases to mediation centers will be updated accordingly.

Notaries. Also in 2008 Kosovo laid the foundation for the establishment of the Latin notarial system by adopting the Law on Notary. The system only became functional in May 2012. Currently, there are 74 sworn notaries throughout Kosovo. Two main competences relevant to property matters were awarded to notaries: authentication of contracts for transferring immovable property and non-contested inheritance proceedings. As a result, verification of contracts and inheritance procedures have gradually shifted from courts to notaries, with people seemingly favouring the notaries due the swiftness of the process. However, the failure to adapt the existing legal framework to the newly introduced profession resulted in a dual court and notary competence over certain matters, creating confusion and potentially discouraging the public to use notaries over courts. The LoN affords notaries competence over non-contested inheritance proceedings, duplicating that of courts in the matter foreseen in the Lol and LOCP. It was intended for the latter laws to be harmonized with the LoN (within a year of LoN's adoption) in order to eliminate the dual court and notary competence, however to date this has not happened. Dual competence exists also in respect of authentication of contracts, with the LPORR, in the English language version, clearly stating in Article 36 that the contract must be concluded *'in the presence of both parties before a **competent court or a notary public**'* [emphasis added], while the Albanian language version states that " The contract for the transfer of ownership of an immovable property must be concluded in written in the presence of both parties before a competent body." The lack of harmonization of laws leaves room for interpretation for dual competency, even though the validation of sales contracts of immovable property is now only done by notaries. There is also lack of clarity in the LoN with regard to the functions notaries are to perform and the procedures they are to follow when performing their functions; a major shortcoming is the lack of thorough regulation of the judicial control of notarized documents, the law limiting itself to stating that *notarized deeds enjoy the benefit of dual presumption of legality and accuracy of content; they may be contested only through judicial channels* (Article 3 of the LoN).

Private enforcement agents. With a judiciary short of resources and facing heavy backlogs, the entry into force in 2012 of the Law No. 04/L-139 on Enforcement Procedure brought a much-awaited change as responsibility for enforcement has been passed from courts to private enforcement agents. The transitioning began in 2010 and was finalized in 2014 when the Ministry of Justice swore in the first 12 private enforcement agents. Enforcement of titles and authentic documents, with few exceptions, is now in the hands of private enforcement agents, thus relieving courts of thousands of cases and allowing them to focus on adjudicating on substantive matters. Private enforcement agents do not currently perform evictions¹³³ and this is a much-sought matter for them to take into their hands.

¹³³Information provided by the Chamber of Private Enforcement Agents.

1.2.4 Reconstruction of the Cadastre and Establishing the Immovable Property Rights Registry

Kosovo Cadastral Agency (KCA) was established in 2000 and is currently a government agency under the Ministry of Environment and Spatial Planning. KCA is in charge of the Information System of Land and Cadastre as well as of the Registry of Immovable Property Rights. At the same time, Municipal Cadastral Offices (MCO) function in all Kosovo municipalities, and are under either the Directorates of Cadastre, Property and Geodesy, the Directorate for Economy or other forms of organization. MCOs are responsible for the maintenance of the cadastre and the registration of immovable property.

The Immovable Property Rights Register (IPRR) was established in early 2000s with the purpose of registering rights held over real estate and also easements and encumbrances.

The cadastre had been severely affected prior to 1999 by lack of accurate data, and therefore its reconstruction was made a priority.¹³⁴ Like in many other states, the purpose of the cadastre/IPRR in Kosovo is to provide accurate mapping of the real estate and authoritative documentation of who owns what property. Although almost the entire territory of Kosovo has been surveyed, the IPRR is still in need of updating, as registration is often a forgotten step in the process of transfer of property rights.

In 2012, Kosovo government initiated the drafting of a new law establishing the **Kosovo Property Comparison and Verification Agency (KPCVA)** as a successor of the Kosovo Property Agency (KPA). The proposed KPCVA is meant to carry out a comparison between the pre-1999 dislocated cadastral archives currently in Serbia¹³⁵ and the Kosovo reconstructed cadastre with the aim of correcting and updating the Kosovo cadastre.¹³⁶ The draft law has been criticized on several grounds that are discussed in Concept Note #4.

¹³⁴ A specific effort worth mentioning in this regard is the project funded by the German Federal Ministry for Cooperation and Development and implemented by the GIZ (started in 2008) on 'Land Management/Cadastre' that aims at strengthening the legal security of land by improving procedures and data quality in line with EU best practices.

¹³⁵ The Kosovo cadastral records that were dislocated to Serbia continue to a certain extent to be in use in Serbia, as displaced persons residing in Serbia continue to be issued with official cadastral documents, including certificates of ownership or possession of property in Kosovo.

¹³⁶ The KPCVA will be mandated to receive, register compare and, through the Property Comparison and Verification Commission (PVAC), resolve discrepancies between the two sets of cadastral records. In addition, through the Property Claims Commission, the KPCVA will be mandated to resolve claims directly related to or resulting from the armed conflict, as well as ownership and use rights claims with respect to private immovable property, including agricultural and commercial property. The KPCVA will be responsible for implementing the decisions of PCC, PVAC and HPPC.

1.3. Problem Definition

1.3.1 Lack of Formality in Transferring Property Rights over Immovable Property via Contracts

As already indicated above, number of transactions have taken place informally, with people transacting immovable property without concluding a written and ‘verified’/authenticated contract or without registering the change in ownership in the IPRR, as required by the LPRR. Article 36 of the LPRR foresees that ‘*transfer of ownership of an immovable property requires a valid contract between the transferor and the transferee as a legal ground and the registration of the change of ownership in the immovable property rights register*’ and that ‘*the contract for the transfer of ownership of an immovable property must be concluded in written in the presence of both parties before a competent court or a notary public*’. In light of this provision, in order for ownership over immovable property to be transferred – be it via sale or donation - two conditions are required: one of form – authenticated contract, and one procedural – registration in the IPRR. Therefore, a contract that does not cumulatively fulfil these conditions is null as clearly stated in Article 55 of the LOR -*a contract that was not concluded in the prescribed form has no legal effect*.

In addition, the LOR also states in its Article 51 that ‘*no particular form shall be required for the conclusion of a contract, unless stipulated otherwise by law*’, and further in Article 52, ‘*a contract pursuant to which the title to real estate is transferred or through which another material right is established on real estate must be concluded in written form*’. No other conditions are mentioned however, but Article 115 of the LPRRR expressly foresees that the ‘*acquisition, variation, transfer and termination of ownership, a right of pre-emption or a limited right relating to immovable property require a legally valid contract and registration of the relevant transaction in the immovable property rights register*’. Furthermore, Section 7.1 of the LEIPRR states that ‘*once the Register is established, no subsequent transfer of rights in immovable property shall be effective unless registered in accordance with the present law*’. Registration in the IPRR is however an often forgotten step and several reasons preventing persons from registering have been identified. In spite of these regulations, in many instances the written authenticated form is not used and in many more instances the registration is not performed.

(i) The condition of written and authenticated contract

The choice of the wording *in the presence of* is not the most fortunate, as it does not expressly indicate that the contract is thereby authenticated; thus one can wonder whether the legal conditions for authentication –verification of parties’ identity, capacity, consent, etc. (see Chapter VII of the LoN) - are to be applied [*sic*]. In addition, there is no procedure foreseen in the law on how courts are to treat the conclusion of a contract *in their presence*.

The *authenticity attaching to acts of public authority* translates into a presumption of legality and accuracy (Article 3 of the LoN), and courts should be provided with appropriate tools to enable them to determine whether a contract is authentic and assess its legal weight against other types of evidence.

The dual competence of courts and notaries to authenticate contracts as expressed in Article 36 of the LPRR (English version) and the lack of harmonization of the Law on Notary and Law on Out Contentious Procedure creates confusion and defeats the purpose of alleviating the courts of such matters. In addition, it makes it difficult to keep track of transacted immovable property, as the law no longer foresees an obligation for the courts to keep copies/registries of ‘verified’ contracts whereas the LoN does for notaries (as acts *en minute*, Article 3 of the LoN).

The authentication procedure in the LoN has certain shortcomings, the most stringent one being the manner of certifying the identity of the parties. Article 38 states: *Where the Notary does not know the parties personally and by their names, he shall ascertain their identity on the basis of the available official documents such as their identification card or their passports. [...] where the Notary is not satisfied of the*

identity of the parties in view of the documents produced, their identity must be confirmed by another Notary, or two (2) witnesses, advising them for responsibility. It is only in case of doubt as to the authenticity of official documents produced by the parties, that the law allows for the possibility for the Notary to consult the relevant official registries.

(ii) The condition of registration of the change of ownership

The Law on Establishing the Immovable Property Rights Register (LEIPRR) and its subsequent amendments,¹³⁷ as well as the Administrative Instruction on Implementing the Law on Cadastre¹³⁸ governs the process of registering rights in the IPRR, through Municipal Cadastre Offices (MCO). However, none of these laws and bylaws manages to provide a clear description of the registration process.¹³⁹

Rights to be registered. Article 2 of the LEIPRR as amended foresees that the immovable property rights that are to be registered in the IPRR include: ‘(a) Ownership; (b) Mortgages; (c) Servitudes; (d) Rights of use of municipal, public, social and state property; and e) Property burdens and charges’. Interesting enough, other real rights, such as the usufruct (which appears in the LPRR under the chapter on the rights of use) or the building right, for which the LPORR foresees registration, seem to be left out.

A significant concern relates to the documents required for registration. Except for Article 3 of the LEIPRR, there are no other legal provisions available. Oddly, Article 3 states that ‘*the Applicant requesting the registration of an immovable property right shall attach to the request the documentation to support the immovable property right as required by the Applicable Law*’ [emphasis added]; one can only wonder which law would that be if not this very one.¹⁴⁰ Furthermore, according to the same Article 3, the documents based on which rights on immovable property may be registered (i.e. title determinations) are:

- a) *omnipotent court decision;*
- b) *the decision of state administrative body;*
- c) *contract for transfer of immovable property rights certified by the competent body;*
- d) *decision or contract for the privatization issued by the Kosovo Privatization Agency;*
- e) *the Commission’s decision for the Reconstruction of Cadastre;*
- f) *the Commission’s decision for the regulation of lands; and*
- g) *other document that by special Laws there is foreseen the property rights registration.*

The enumeration is quite limitative and gave rise to many inconsistent practices. Notarized deeds are not specifically foreseen in the enumeration and cases have been reported of MCOs refusing registration based on such documents, requiring instead court certified documents; this, in spite of the Law on Notary specifically foreseeing notaries’ competence to authenticate legal transactions. Although the enumeration includes as legal basis for registration ‘b) the decision of state administrative body’ and ‘g) other document that by special Laws there is foreseen the property rights registration’, HPCC or KPCC decisions have also been refused registration. It is to be noted that the decisions of the KPCC constitute title determinations and as such are to be registered in the IPRR. Also, certain

¹³⁷ Law No. 2002/05, ‘on Establishing the Immovable Property Rights Registry (including Law No. 04/L-009 amending Art. 3.7 of Law No. 2002/05 and Law No. 2003/13 on Amendments and additions to Law No. 2002/05).

¹³⁸ Administrative Instruction No. 02/2013 on Implementing the Law on Cadastre

¹³⁹ The World Bank report ‘*Doing Business 2014*’ highlights that it takes 6 procedures and 27 days to finalize the registration of a property in Kosovo. While the report considers only the formal process as prescribed, experience shows that in practice the duration is much longer as often deadlines are not respected.

¹⁴⁰ Considering the dependency of the cadastral offices on the MCOs and bearing in mind their horizontal and vertical organization, the lack of sub-legal acts standardizing the application process has contributed to the appearance of multiple standards. Anecdotal information suggests that cadastre offices in some municipalities request various documents, for instance certification that the municipality is not interested to purchase the property. Larger municipalities tend to be more unified, but difficulties are noted particularly in the smaller ones. Incongruence is found in the procedures for the cadastral registration, and more importantly there is no consistency in how the respective responsible departments are organized or even named.

decisions issued by HPD/HPCC directly order the registration of the right in the IPRR, and as such they undoubtedly fall under point g). In addition, point b) refers to contracts for transfer of rights, thus excluding contracts constitutive of rights (whereby a right which did not exist before is created by the very contract, e.g. usufruct).

Article 174.1 of the Law on Out Contentious Procedure does indicate though that *'in the act judgment of inheritance the court orders that after it becomes of a final judgment should be done the necessary registration in the public book, in accordance with the rules in such book'*. The situation is different when it comes to notary determinations on inheritance, as they are completely left out of the enumeration, although pursuant to the Law on Notary they *'deal with all non-contested inheritance procedures'*; however, the Law on Notary fails to provide for a notarial procedure in inheritance and thus there is no mentioning of what kind of deeds notaries are to draw-up in inheritance cases, which could also be used as basis for registration of the property right so acquired.

The fees for registering property rights in the MCO's are defined in the MESP's Administrative Instruction No. 08/2014 which foresees a fixed registration fee based on the value of the property.

Transaction Value	Registration Fee Rates
Up to 10,000	20
10,001- 30,000	30
30,001- 50,000	35
50,001- 100,000	50
100,001 and each exceeding 50,000	30 for each exceeding value but overall not exceeding 300

It has however transpired that in reality certain municipalities apply additional fees, for registration, categorized as 'municipal fees, charges and penalties', and not cadastre fees.

Such is the issues of the municipal transaction tax set by some municipalities. The amount of the tax varies across municipalities (e.g. Pristina charges 150 euros per cadastral unit) and the payment of such a tax is mandatory for registration of property at the MCO. This in spite of Article 1 of the LEIPRR which clearly states that *'KCA by a sub-legal act shall determine the level of payments for services provided for the registration of immovable properties rights in compliance with the cost of services performance'*.¹⁴¹ The overall authority of the KCA seems to be overlooked by the MCOs, although Article 1 of the same law could not be clearer: *'The Kosovo Cadastral Agency (hereinafter the "KCA") shall have the authority for the overall administration of the Register in compliance with the provisions of the Applicable Law. The Municipal Cadastral Offices (hereinafter the "MCO") shall record immovable property rights in the register under the authority of the KCA and in compliance with the provisions of the present law and administrative guidelines issued by the KCA.'*

In addition, registration of property that is owned jointly in the name of only one of the owners is concerning, as the data does not reflect reality. Hence, if the registered owner decides to sell the entire property without the knowledge or consent of the other party, he/she could do so freely based on the certificate attesting him/her as owner. This issue seems to significantly affect women as most of the time property held jointly is registered in the name of the husband only. The problem lies also with the Family Law of Kosovo No. 2004/32, which in Article 50 ambiguously states that: *'(1) Rights of spouses regarding immovable objects, which are their joint property as provided for in Article 47 of this Law, are recorded in the public register for immovable property on behalf of both spouses as joint property with undetermined shares. (2) When only one of the spouses is registered as property right holder of the joint property in the immovable property rights register, it shall be considered as if registration was carried out on*

¹⁴¹ However, Article 8 of the same law states: *'The Ministry of Public Services shall issue administrative instructions for the implementation of the present law'* (sic).

behalf of both spouses. The property cannot be alienated or administered without the consent of both spouses as defined by the applicable law. (3) When both spouses register in the public register relating to immovable property as joint owners for determined shares, it shall be considered that they have portioned out the joint property'. If registration is done as per point (2), then a buyer would not necessarily know that the property is held jointly and whether the registered owner is married or not.

In addition, for registration of collective ownership of property, the registration fee is paid per number of owners and not per cadastral unit. Such practice seriously hampers the registration of property acquired through inheritance, as each heir must pay the registration fee.

Institutional issues have also been identified. One of the biggest problems in this regard is the inconsistency of municipal policies on cadastral registration with those of the KCA. Municipal lack of knowledge and deficient prioritization of KCA policies has created inconsistency with respect to registration procedures in different municipalities. In this regard, such practices as refusing registration due to the absence of a certificate (issued against a fee) indicating that the municipality is not interested in exercising its pre-emption right have spread. This condition is based on the Yugoslav Law on Transfer of Real Property nr. 45/81, 29/86 and 28/88, repelled by the new Kosovo Law on Property and Other Real Rights.

A problem often raised is the difficulty to access the register, not only in the case of individuals interested in obtaining cadastral extracts, but also in cases where individuals are interested in registering their rights. As noted in Concept Note #4, in many cases, the successful claimant is displaced and cannot access the municipal cadastral office where the property is located. The law provides no alternative mechanisms of registration when it cannot be done in person or through a representative. Regarding the accessing of cadastral/IPRR data for information purposes, Section 7 of the LEIPRR states that '*entries in the Register shall be made accessible to the general public*'; therefore, for whatever purpose it may be, an interested individual may access cadastral and IPRR data, by submitting a written request to the institution, paying a fee and waiting for a response that is to be provided within a certain deadline.¹⁴²

The unwieldy cooperation between the cadastre and other public authorities, including courts, has also been highlighted. Without swift access to cadastral data, courts and notaries cannot perform their functions accurately in their dealings with property rights.

(iii) Transparency and data protection

Significance of transparency and privacy rights. While the transparency of cadastral/IPRR data is commonly accepted as a matter of public interest, concerns over compliance with the sensitive issue of protection of personal data have been expressed as the right to privacy may be interfered with. The provisions of the Law No. 03/L- 172 on Personal Data Protection are applicable in the matter according to the defined purpose¹⁴³ and scope,¹⁴⁴ since information to be made transparent in this context is "*relating to an identified natural person (data subject)*" and therefore "*personal data*" as stipulated by Article 2 section 1.1. The KCA and the municipalities falling therein as data processors of personal data of holders of registered rights.

Lawfulness of data processing. According to Article 5 of said law, personal data may only be processed if one of the preconditions listed in the subsections is fulfilled. Given the crucial significance of

¹⁴² Law on Cadastre: Article 25: '*Any person shall have the right to obtain extract or copy of the recorded data in the Cadastre against payment of a fee set in compliance with applicable legislation proposed by the KCA*'; Article 26 '*Data for Official Use Government and local institutions shall acquire the data from the Cadastre, according to the manner defined with legislation into force proposed by the KCA*'.

¹⁴³ Article 1 states: '*This Law determines the rights, responsibilities, principles and measures with respect to the protection of personal data and sets up an institution responsible for monitoring the legitimacy of data processing.*'

¹⁴⁴ Article 4.1 states: '*This Law shall apply to the processing of personal data by public and private bodies. This Law shall not apply to the processing of personal data if it is done for purely personal purposes.*'

transparent and accurate cadastral data for the overall functioning of the property registry system and its institutional implementation as an essential matter of public interest, the processing of cadastre data by public entities in the performance of official duties *is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed* (as provided for by Article 5 section 1.5), and therefore lawful and permissible. While the processing has to remain limited to data effectively required to fulfil the respective function, this condition is indubitably met in respect of the designated scope at hand.

Also, in the case of private individuals seeking access to cadastre/IPRR data, such access is deemed lawful as long as a legitimate interest in obtaining the information exists. This could be any economical, legal or non-material interest, such as the intention to buy a certain property. Article 5 section 1.6 allows for such processing, since it is *necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed*. Even though the legitimate interests in accessing that data may be *overridden by the interests for fundamental rights and freedoms of the data subject* (Article 5 section 1.6), the occurrence of such situations is rather limited, given the superficial nature of the respective data and the at best very remote connection to the respective data subject's personality. Furthermore, in some cases the processing might still be based on section 1.5 (exercise of official authority), for example if the accessing is performed by a notary on behalf of an individual.

While certain details related to the accessing procedure – justification of legitimate interest, submission of a request, waiting times and fees - remain debatable, the public access to cadastre/IPRR data is in line with data protection laws. Free public access, while desirable from the point of view of legal policy,¹⁴⁵ remains contested and ultimate clarification is up to the legislator.

1.3.2 Lack of Formality in Transferring Property Rights over Immovable Property via Inheritance

Although not expressly mentioned in the LPRR, inheritance is one of the main means of acquiring/transferring property rights, and the Law on Inheritance (LoI) clearly states in Article 1 that *'inheritance is a transfer of a person's property based on the law or based on a will (inheritance) from a dead person (decedent) to one person or several persons (heirs or legatees)'*, and in Article 2 that *'the things and the rights belonging to individuals can be inherited'*.

Yet the formal procedures to inherit are largely ignored by the population in Kosovo. Consequently, a significant number of immovable properties remain registered in the name of deceased persons. As already mentioned, this is seemingly due to the perception that formalization of rights in immovable property does not provide real benefits or to the presence of significant disincentives to formalizing these rights. Anecdotal evidence suggests that 40% of properties in Kosovo remain registered in the name of deceased persons because heirs have not initiated inheritance proceedings to transfer rights from the deceased to the heirs.¹⁴⁶

Non-contested inheritance claims have not been considered a priority by courts and have been treated last, thus discouraging heirs to address courts to formalize their acquiring of rights, especially since they are under no legal obligation to do so. Heirs may choose to own inherited property without title indefinitely. They will however face problems if they decide to transfer the inherited property formally, as per the requirements set in the law.

¹⁴⁵This is not just due to the fact that in the current state of affairs regarding property rights in Kosovo, easily accessible cadastre data is of paramount importance. The requirement to substantiate a legitimate interest effectively introduces an additional obligatory bureaucratic step. However, compared to EU member states like Germany or France, this is a disproportionately higher obstacle because of the still very inefficient administrative procedures currently involved in cadastre access in Kosovo.

¹⁴⁶USAID/Kosovo Property Rights Report, *Mapping of the intergenerational inheritance procedures in Kosovo* (draft report, 2016)

The absence of a legal possibility to incite heirs to formalize inherited rights, such as the prescription of the right to claim the inheritance, is therefore a major obstacle to preventing informality in inheritance matters. The Law on Inheritance foresees a deadline, though it is a deadline of a different nature and purpose. Article 138 foresees that the right to claim inheritance prescribes *vis-à-vis a bona fide possessor* within one year from the day the heir knew about his right and about who the possessor is, and in any event no later than within 10 years counted, for the legal heir from the death of the decedent, and for the testamentary heir from the day the will was announced. Paragraph 2 foresees the case *vis-à-vis a mala fide possessor* when the right prescribes within 20 years. The law seems to confuse the nature of one's right (and at the same time obligation) to express intention on whether to accept inheritance or not and the owner's right acquired through inheritance to prevent a possessor from acquiring ownership based on the prescription foreseen by Article 40 of the LPRR. Therefore, under Kosovo law there is no deadline for heirs to express their intention under penalty of the estate becoming vacant, and that leaves the door open to heirs not opening formal inheritance proceedings. As the LoI regulates the renunciation to inheritance, it would make sense for acceptance to be regulated as well. Acceptance could be express or tacit, where tacit acceptance translates into an effective taking into possession of a certain asset of the estate.

With the introduction of the notary system that became functional in 2012, a substantial decrease in the number of non-contested inheritance claims filed in the courts was observed. Although notaries appear as competent as judges to process non-contested inheritance procedures and do so much faster, the LoN does not contain any specific rules of procedure on how notaries are to deal with inheritance matters. In contrast, the Law on Out Contentious Procedure still foresees a detailed procedure for courts in non-contested inheritance matters. Also, as indicated above, registration in the IPRR based on *notarized deeds of inheritance* may prove difficult as no such deed appears to be regulated in the law.

At the same time, the Kosovo notarial system is not fully functional and the limitations of its internal and external accountability do not help in building citizens' trust in it. Also, the fees charged by notaries for their services have been criticized as too high in relation to citizens' income.¹⁴⁷ As a result, although limited, cases of non-contested inheritance continue to be filed with the basic courts.¹⁴⁸

	Year	2012	2013	2014	Jan to Sep 2015
Non-resolved cases inherited from the previous years		4575	4266	2748	1694
New received cases		4014	997	398	363
Total cases in process		8589	5263	3146	2057
Resolved cases during the reporting period		4424	2576	1452	548
Non-resolved cases at the end of the reporting period		4165	2687	1694	1509

*Statistics for the non-contested inheritance cases in courts operated in 2012, 2013, 2014 and during January to September 2015

1.3.3 Other Means of Acquiring Property - Shortcomings

Kosovo law foresees two other ways of acquiring ownership over immovable property, prescription and building right, which is a type of accession. Given the widespread informality in the Kosovo property sector, these two modalities are of crucial importance as they provide good alternatives to formalizing property rights.

¹⁴⁷World Bank Group, *Doing Business in Kosovo*, 2015

¹⁴⁸An USAID report *Rapid Assessment on the Adjudication of Property Cases in Kosovo* (draft, 2015) found that there is no unity of practices; some courts refuse to accept claims for non-contested inheritance, while others do not, saying that the Law on Notary does not disinvest them of jurisdiction, as long as the Law on NCP is not amended *mutatis mutandis*.

Prescription. Articles 40-41 of the LPRRR indicate prescription as a modality to acquire ownership over immovable property. Prescription is used worldwide as a means to acquire ownership however certain conditions must usually be fulfilled besides the passing of time. Such conditions usually require that the possession have certain characteristics, namely to be uninterrupted, public, undisturbed and exercised with a real intention to own. Kosovo law attaches only two conditions, those of continuity and good faith (*bona fide*). According to Article 40 of the LPRR, *a proprietary possessor acquires ownership of an immovable property, or a part thereof, good faith, after twenty (20) years of uninterrupted possession; and after 10 years if he is registered as the proprietary possessor in the immovable property rights register and no objection against this registration is filed during this period.* The English version of the Law does not mention the *bona fide* condition; however this is mentioned in the Albanian and Serbian version of the Law. This law does not define *bona fide* possession.

Further, the law defines the proprietary possessor in Article 110, but only by making reference to movable property - *the person possessing movable property that is owned by that person is a proprietary possessor.* This definition is not quite accurate; a person who possesses property that is owned by him is actually an owner.¹⁴⁹

The previously applicable SFRY Law on Basic Property Relations was much clearer in the matter: *The conscientious and legal holder of the real estate, over which somebody else disposes of the property right, shall acquire the property right over such object through positive prescription after expiration of ten years.* The required possession period is raised to 20 years in the event the possessor was not a legal holder of the property (Article 28). Article 72 of the same law further clarified that possession is legal if it is based on valid legal ground that is necessary for acquisition of the property right and if it is not acquired by force, deceit, or misuse of trust, and that it is conscientious if the holder hasn't known or couldn't have known that the property he/she is holding is not his/hers. The failure of the Kosovo LPRR to include similar provisions makes ownership easily acquirable through prescription, which may be seen as penalizing real owners too drastically.

The LPRR thus changed the rules on prescription by removing the requirement of and legal possession, and the clarifications defining the *bona fide* (*conscientiousness*) and legal character of the possession, as existing under the previous SFRY law. This brought the provisions on acquisitive prescription closer to the doctrine of adverse possession that typically enables the acquisition of ownership irrespective of whether the person holding property knew that another person is the actual owner. A report *Acquisition of Property Through Prescription and the Illegal Occupation of Immovable Property of IDPs from Kosovo*¹⁵⁰ argues that 'in the context of Kosovo, where the post-conflict property restitution is far from complete and the widespread instances of illegal occupation especially affect the property belonging to IDPs, the given changes of the doctrine of acquisitive prescription could run contrary to a number of international human rights standards'. Courts should therefore be provided with appropriate legal provisions to allow them to make fair determinations in ownership claims based on prescription.

Accession. Accession, as a means to acquire ownership over immovable property, is foreseen only partially in Kosovo law, under Chapter VI of the LPRR which regulates the 'building right'. A building right is described in Article 271 as the *right to ownership of a building on or under the surface of an immovable property.* Accession appears here as a consequence of the termination of the building right: *upon the termination of a building right, the building becomes part of the immovable property (Article 280).* Hence, the owner of the land acquires ownership of the building erected on it. However, accession

¹⁴⁹ Proprietary possessor has been defined in other legal systems (e.g. Germany) as the possessor who possesses an asset as if it was his own, as opposed to possessing in another's interest.

¹⁵⁰ The European Union's Program for the Republic of Serbia, *Further Support to Refugees and IDPs in Serbia, Property Through Prescription and the Illegal Occupation of Immovable Property of IDPs from Kosovo* (November 2012) - under a project funded by the European Union and implemented by Diadikasia Business Consultants S.A. in consortium with Hilfsverk Austria International, ICMPD and Group 484.

can be used as a modality to acquire ownership in more situations than those currently described in Kosovo law, notably the situation where a building is erected on another's land without a building right, a rather common problem in Kosovo. Courts do not have therefore any legal provisions to make determinations in ownership disputes between bona and mala fide builders and owners of the land upon which buildings were erected.

1.3.4 Courts' Practices in Dealing with Informal Transfers of Property

Under UNMIK Regulation 2000/60 on HPD/HPCC, 'informal transaction' means 'any real property transaction, which was unlawful under the provisions of the Law on Special Conditions Applicable to Real Estate Transactions (Official Gazette SRS 30/89, as amended by the laws published in Official Gazette SRS 42/89 and 22/91) or other discriminatory law, and which would otherwise have been a lawful transaction'.¹⁵¹ Article 2 of the Regulation declares valid any property transaction that took place between 23 March 1989 and 13 October 1999, was unlawful under the provisions of the aforementioned laws and would have otherwise been lawful. Therefore, only informal transactions fulfilling all the above requirements would fall under the jurisdiction of HPD/HPCC and give rise to orders allowing for the registration of ownership in the public record. Hence, matters involving transactions concluded verbally outside the abovementioned timeframe for reasons other than discrimination fall outside the jurisdiction of the HPCC. Such transactions did occur, mostly in rural areas, based on a handshake in the presence of witnesses, as 'physical possession of the land, recognized by the community, was perceived as providing more security than a certificate issued by the cadastre'.¹⁵²

These transactions gave rise to claims before courts whereby claimants were seeking 'validation' of their ownership right. According to OSCE findings,¹⁵³ there have been many cases where courts granted ownership claims stemming from oral contracts, based on witness testimony; a questionable practice as the law does not allow for such 'validation'. The courts deemed however that the verbal transaction was a valid basis to acquire ownership on account of the parties having substantially fulfilled their obligations (to pay the sale price and deliver possession of the object), a possibility foreseen by Article 73 of the SFRY Law on Obligational Relations,¹⁵⁴ which states that *a contract whose conclusion is made dependent on the written form shall be considered valid although not entered into in such form, after contracting parties have performed, entirely or substantially, the obligations arising from such contract, unless something else obviously results from the purpose of prescribing the form.*¹⁵⁵ It is with reluctance that we see this article as an acceptable legal basis for transferring ownership over immovable property. Written authentic form has been legislators' choice of predilection for contracts of transfer of ownership over immovable property as it is meant to ensure transparency and guarantee certainty in the real estate market - a matter of public interest that would fall under the condition *unless something else obviously results from the purpose of prescribing the form*. In addition, as expressed by the OSCE, 'this provision can only substitute for the necessity of a written contract when the only thing required for a complete transaction is a written contract. This is not the case for immovable property transactions, where written contracts verified in courts are required because that is the vehicle for cadastral registration'.¹⁵⁶ Indeed, the registration requirement for an effective transfer also foreseen by the SFRY law¹⁵⁷ renders Article 73 inapplicable. Article 73 could only be used to validate the absence of the prescribed form (that is written); it could not be used to compensate for the lack of registration;

¹⁵¹ UNMIK Regulation 2000/60 on Residential Property Claims and the Rules of Procedure and evidence of the HPD and the HPCC, Section 1 – Definitions, Official Gazette, 31 October 2000

¹⁵² OSCE Report, *Litigating Ownership of Immovable Property in Kosovo* (March 2009)

¹⁵³ Idem

¹⁵⁴ Law on Obligational Relations (also translated Law on Contracts and Torts), SFRY Official Gazette Nos. 29/78, 39/85 and 57/89

¹⁵⁵ Article 455 of the SFRY Law on Obligational Relations prescribes the form: *a contract of sale of real property must be in written form, otherwise it shall be null and void.*

¹⁵⁶ OSCE Report, *Litigating Ownership of Immovable Property in Kosovo* (March 2009)

¹⁵⁷ Article 33 of the SFRY Law on Basic Property Relations: *On the basis of legal affairs, the right over immovable property shall be acquired by registration into the cadastral books or in some other way that is prescribed by law.*

Article 73 could have been applied solely to contracts the only formal requirement of which was a written form.

Hence, one could argue that the courts have incorrectly determined ownership in these cases, as due to the failure of the parties to fulfil the formalities required by law for the validity of the transaction, the transfer of ownership from the seller to the buyer did not operate. Where the validity of a transaction depends on the fulfilment of legal requirements, in the absence of these requirements, the transfer of the right does not take place and Article 55 of the Law on Obligational Relationships clearly sanctions the lack of necessary form: *a contract not concluded in the prescribed form has no legal effect*. While acknowledging the challenges courts had to face in these cases given the situation on the ground in Kosovo, we find that the use of witness testimony solely, is redundant in such cases.

The situation is different in cases where the claimant seeks to obtain a court decision to confirm ownership where the court decision would replace a written contract that existed but had been lost or destroyed. Witness testimony could be legally used in such cases to prove the existence of the contract concluded in the form required by law. Even in such cases witness testimony should be used with care. It should be mentioned in this regard that the Law on Contentious Procedure does not provide judges with any tools to help them in assessing evidence, The Law simply states that judges can decide ‘which proofs will be taken under considerations’ (Article 319).

Traces of ‘verified’ contracts could be found in court archives or at MCOs. Until 2010 when the notary system was introduced in Kosovo, courts were the only ones authorized to ‘verify’ (authenticate) contracts, and once a contract stamped as verified, a copy was filed in the court archives (by type and in chronological order), one copy given to the party and the original sent to the MCO for registration. In spite of having an extensive register of transactions, courts’ archives have rarely been used for title searches or to find evidence of transactions. Courts archives could be goldmines for the reconstruction of the cadaster as they could provide reliable information about changes in ownership or other rights. However, many court archives are not well organized and searches could prove laborious.

An issue that has been often raised in court is the legal value of the registration of a property right in the IPRR. It is to be noted that Article 124 of the LoPRR sets a legal presumption: ‘1. If a right has been registered in the immovable property rights register for the benefit of a person, it is presumed that such person is entitled to the right so registered. 2. If a registered right is deleted from the immovable property rights register, it is presumed that such right does not exist anymore. Section 7.2 of the LEIPRR brings more clarification to the presumption as it states that ‘entries in the Register of immovable property rights enjoy the presumption of accuracy, truthfulness, and legality until and unless corrected by means of the procedures established by this law.’ Registration is therefore not indefeasible and can be challenged in court. Information could not however be obtained on the type of evidence judges admit in order to overturn the presumption. Again the law is silent on how presumptions can be rebutted and we fear a potentially extensive use of witness testimony to rebut presumptions.

2. POTENTIAL SOLUTIONS BASED ON BEST INTERNATIONAL PRACTICES

2.1. Enhancing the Role of Notaries in Matters Related to Immovable Property, Including Transfers and Non-contested Inheritance

Clarifying the conclusion of authentic contracts and easing the registration process could drastically reduce informality in the future. Reinforcing the role of notaries in this regard is of paramount importance, as the existence of notarized deeds and procedures increases the level of certainty in transactions and not only reduces the expected level of litigation, but also facilitates the assessment of evidence in court.

(i) Transfers through contract

In most civil law states, authentication of documents and real estate operations fall under the exclusive competence of notaries. Although many players are involved in real estate operations, notaries are at the heart of the process; they gather the necessary preliminary information and expertise, draw up the contracts and in most cases conduct the subsequent formalities, including registration in the public registers and collection and payment of taxes. In many countries, they act like a one-stop-shop.

Real estate transactions may not take place without prior checks of the land registry, to which notaries have privileged access, nowadays increasingly on-line, in order to obtain extracts and certificates of non-encumbrance. In some states, different types of extracts are issued to notaries; for instance in Romania, an authentic excerpt valid for 10 days will be provided; during the 10 day validity period, the Land Registry is not entitled to register any operation in the registry in respect of that property, save for the one for which the excerpt was required; the Land Registry is blocked during the aforementioned period, in order to ensure the security of the real estate transactions.

Notaries would also be the ones to obtain any other pre-required documents such as waivers of preemption rights from municipalities, zoning and environments certificates, etc. They may also be in charge of collecting the taxes and registration fees due (Germany, France) for onward transfer to the responsible authority. The moment the taxes and fees are due varies from state to state, it can be either at the time of the signing of the contract (Slovenia, Italy) or after but before registration (Austria, Germany).

In most states, the obligation to register falls on the notaries and they must do so within certain deadlines (from 24h in Romania to 30 days in France). They are also responsible to keep the original of the deed in their archives indefinitely or for long periods of time (75-100 years) and issue authentic copies.

(ii) Transfers through inheritance

Succession law is one of the main areas of notaries' activities in most European States. In some countries, notaries perform their duties simply at the request of potential heirs. Other countries, such as Austria and the Czech Republic, have a judicial procedure whereby the notary is involved as a representative of the court. Thus the roles assigned to notaries vary greatly, from advising on and drawing-up documents necessary for probate courts (Germany, Austria) to carrying-out the entire procedure and issue 'certificates of succession' (the Netherlands).

In order to ensure certainty over the situation of assets, many states foresee a legal deadline for heirs to express their intentions, accept or renounce an inheritance (i.e. France, *droit d'option successorale*); should the heirs fail to express their choice within the legal deadline (which ranges from one year in Romania to ten years in France, Belgium and Italy), heirs of the following rank are called to inherit or, where there aren't any or they do not wish to inherit, the estate becomes vacant and is claimed by the state. Other states (Switzerland) only foresee a deadline for renunciation, which if not expressed equals acceptance.

At the request of the interested parties, the notary will conduct an inventory of all the property in the estate under the conditions provided by the law. The inventory may be requested by any heir, by the executor of the will, by the creditors of the deceased person or of her/his heirs, or by any other person who can demonstrate an interest therein. The notary will determine the composition of the estate and the value of the succession assets or liabilities, as the case may be. The distribution of assets

is the final step in the settlement of an estate and it can take place at any time. If there is disagreement among heirs about how to assess or divide the assets, the matter must be put before the court. The heirs can also decide not to divide up the estate, in which case they retain joint ownership. Until there is a distribution, the assets in the inheritance remain in joint ownership among the heirs. When the subject matter is real estate, the ownership of that property can only be transferred to the heir by the signing of an authentic instrument drawn-up by a notary (Netherlands).

Non-contested inheritance procedures usually end with the issuance of a certificate of inheritance by the competent authority, which can be a probate court (Germany), notary (the Netherlands, Romania) or other authority (e.g. municipalities in certain cantons in Switzerland, Ministry of Finance in Italy). The certificate of inheritance attests the identity of the heir, his/her status and the share of the estate inherited. Notarized documents such as the certificate of inheritance (which in certain states constitutes title) or the authentic instrument of division of assets may be used for the registration of rights in the land registry. It is noteworthy the recent EU Regulation No 650/2012 creating the European Certificate of Succession, a document that will enable heirs, legatees, executors of wills and administrators of the estate to prove their status and exercise their rights or powers in any EU country.

(iii) Registration of rights

All European states have mechanisms for registering immovable property although the purpose of the registration (e.g. legal security, taxation, land valuation and management) and modalities used vary considerably. As in Kosovo, there are usually two types of registration documents: graphic and textual. The graphic documents include the technical mapping and land survey, which is usually done by the cadastre and documents the boundaries of plots by the production of plans, charts, maps; and the textual documents include the registration of rights, encumbrances and easements over an immovable property, which is usually done in a register of titles (rights) and provides evidence of title in order to facilitate transactions and prevent unlawful disposal. Title registration requires a working cadastre system and an easy and permanent exchange of data with the cadastre. In most states, access to the information in the cadastre and title register is available to anyone interested (usually against a fee). Only a few states require a statement on the reasons why the information is requested (France).

In certain states, the cadastre and the register of titles function separately, under different authorities (as they serve different purposes); in other states, the two function separately but together they form part of the same institution – such as a land agency in Czech Republic, Hungary, Slovakia or the Land Information System in Finland and Sweden. The common law systems are the only ones where the land survey and the registration of titles are more or less merged, with one agency handling both functions in a single register (England, Ireland, Scotland). Whichever organizational structure is chosen, clear procedures have to be in place in order for the system to work.

However, registration is not always mandatory. Registration is mandatory where the law makes it constitutive of rights, that is where the creation or transfer of the right occurs only when the right is registered (Austria, Germany). In certain states, registration is optional as the law makes it declaratory, for publicity purposes; the creation or transfer of the right already takes place, between the parties, upon signature and authentication of the contract (France), and registration makes it opposable to third parties. However, even in states where registration is optional, the immovable property cannot be transacted if it is not registered. As already indicated, Kosovo law makes the transfer of the right dependent on registration; it is thus even more important to ensure, for purposes of transparency and certainty, that registration is effected and reflects reality on the ground. As explained above, notaries can play a significant role in easing the registration process.

2.3 Informal Transfers before Courts

In certain Eastern European states, during communist era, the law restricted or prevented the transfer of ownership over land between private individuals, which led to transfers taking places either orally

(with or without a receipt acknowledging receipt of the price) or more often on the basis of an unauthenticated contract. Following the fall of those regimes, courts found themselves seized of many claims seeking judicial determination of ownership rights. For instance, in Romania, courts adjudicated in such matters in two types of claims: 1) claims seeking determination of ownership based on acquisitive prescription; and 2) claims seeking the issuance of a judgment that would replace the invalid sales contract concluded in violation of the law. Many claims of the second type were granted – up until the applicable law was changed – based on the principle of conversion of legal acts. In this approach, the sales contract, null for the lack of prescribed form – was considered valid as a pre-contract giving rise to the obligation on both parties to conclude the sales contract in the prescribed form in the future; the law did not at the time foresee a specific form for the pre-contract for its validity (the new law now does). Many claims sought however determination of ownership based on acquisitive prescription.

Conversion of invalid contracts exists also in Kosovo law (both under the Kosovo LOR and the SFRY LOR, Articles 92 and 106, respectively).¹⁵⁸ However, Article 33 of the LOR imposes a requirement of form for the validity of the pre-contract, that is of the contract intended to be concluded: *Provisions on the form of the main contract shall also apply to pre-contracts if the prescribed form is a condition for the validity of the contract.* A similar provision exists in Article 45 of the SFRY Law on Obligation Relations. The conversion cannot therefore be used in Kosovo to ‘validate’ informal transactions and thus prescription remains the most appropriate legal means to determine whether ownership has been acquired where no valid documentation can be produced.

3. RECOMMENDATIONS REGARDING KEY POLICY MEASURES

3.1. Policy Measure #1: Reduce and Prevent Informality by Introducing New Legal Concepts and Enhancing the Role of Notaries

A detailed **notarial procedure for transacting property** rights should be introduced, with three mandatory steps to be performed by the notary:

STEP 1: Preliminary checks: establish the identity of the parties based on identification documents and checks with the Civil Registration Agency and their civil status; establish the situation of the immovable property based on documents presented by the seller, cadastral and IPRR documentation, fiscal information; establish whether the seller is the sole owner of the property; obtain all necessary certificates and permissions from authorities (e.g. pre-emption); ensure taxes and registration fees are paid either directly to the responsible authority or to the notary through an escrow account;

STEP 2: Drawing-up, signature and authentication of the contract;

The Law on Property and Other Real Rights foresees that registration in the IPRR is mandatory in order to validate the transfer of ownership. However, as discussed throughout the paper, this step is often omitted in practice. The new draft Law on Notary gives notaries the possibility to represent the parties, hence notaries with authorization from the party, can complete the documents and send them

¹⁵⁸ Article 92 of the Law on Obligational Relationships: *If a null and void contract fulfils the conditions for the validity of another contract the other contract shall apply between the contracting parties if in accordance with the purpose viewed by the contracting parties when they concluded the contract and if the contract can be deemed to have been concluded when they learnt of the nullity of their contract.* Similar wording in Article 106 of the SFRY Law on Obligation Relations.

for registration in the IPRR, in the cadaster offices. In order to boost competitiveness and diligence in providing their services, the law should foresee only maximum values for notarial fees.

With regard to **inheritance**, three new legal concepts should be included in the Law on Inheritance:

- *Prescription of the right to claim the inheritance* under penalty that the estate goes to the heirs of next rank or becomes vacant and is claimed by the state. Acceptance should be declared within a certain deadline before a notary in authentic form;
- *Certificate of inheritance* to be issued by the notary following acceptance and be considered title determination as basis for registration of inherited rights in the IPRR; a detailed procedure for non-contested inheritance foreseeing rules for establishing the identity of the heirs, an inventory of the estate and its value, use of witnesses and experts, etc. should also be included;
- Acceptance to be not only *express* (when it is done before the notary) but also *tacit*. Tacit acceptance appears when an heir takes possession, uses or disposes of assets of the estate as if he/she were the rightful owner. Tacit acceptance could then be used as legal basis to obtain title determination; this would enable formalizing ownership over the multitude of properties currently registered under deceased persons.

As in the case of transaction of property, a copy of the documents attesting the change in ownership should be sent to the Municipal Cadastral Offices for information purposes. The issue of renunciation and exclusion of rightful heir from the Death Act is treated in detail in Concept Note #5.

Policy measure #1	Reduce and prevent informality by introducing new legal concepts and enhancing the role of notaries
Solution	<p>Eliminate the dual competence of courts and notaries, especially in matters of transaction and non-contested inheritance of property rights</p> <p>Introduce a detailed notarial procedure for transacting property rights including: perform preliminary check on identity and status of the parties, status of the immovable property, obtain certificates and permissions from authorities, ensure payment of taxes and fees, draft and authentication of contract and completion of documents and registration in the IPRR, in the cadaster offices</p> <p>Abolish the fixed values for notarial fees in order to boost competitiveness and diligence.</p> <p>Notarial registers and archives are kept by all notary offices and by the Chamber, at national level</p> <p>Three new legal concepts to be included in the Law on Inheritance: a) Prescription of the right to claim the inheritance; b) Certificate of inheritance; c) Acceptance to be not only express (when it is done before the notary) but also tacit.</p>
Output	<p>(1) Amendment to Law on Property and other Real Rights</p> <p>(2) Amendment to the Law on Notary</p> <p>(3) Amendment to the Law on Inheritance</p> <p>(4) Amendment to the Law on Cadastre</p>
Outcome	<p>The role of notaries is enhanced their role and there is legal certainty of the operations performed.</p> <p>The second legal requirement of transferring ownership - IPRR registration - is fulfilled in all cases when the transfer took place before a notary.</p> <p>Notarial fees are decreased by their free choice, making their services more accessible for citizens</p>
Indicators	<p>100% of non-contested inheritance claims are handled by notaries</p> <p>Decreased number of notarial acts challenged in courts</p>

	<p>Information on operations performed by notaries readily available</p> <p>Number of property related cases handled by notaries</p> <p>100% of notary verified transfers of ownership is registered in the IPRR</p> <p>100% of right of use of socially owned immovable property is transformed into private or public ownership.</p>
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3.2 Policy Measure #2: Streamline IPRR Registration Procedures

It is recommended that an integrated Law on Cadastre be drafted, that would include Law on Cadastre, Law on EIPRR and Law on Mortgage. The new Law would require the vertical organization of the Cadastre; Municipal Cadastre Offices will be transformed into local Registration Offices and will answer to KCA in all matters related to cadastre and registration of real rights, easements and encumbrances. Vertical organization of the Cadastre would ensure that procedures and fee for registration in the IPRR are uniformly applied throughout the municipalities:

- a) For services regarding the registration of property in IPRR, only tariffs explicitly indicated in the AI nr.08/2014 should be collected
- b) A certificate indicating that the Municipality is not interested in purchasing the property in question (pre-emption) should not be requested for IPRR registration purposes as there is no legal basis for it
- c) Payment of Municipal Transaction Tax should be explicitly indicated in the Law, otherwise it should not prevent registration
- d) To ease as much as possible the procedure of registration in the IPRR

Provisions of the UNMIK Regulation 2004/2 on the Prevention of Money Laundering and Related Criminal Offences (Section 8) and of the Law No. 03/L-196 on Prevention of Money Laundering and Terrorist Financing (Article 27) indicate that when a transfer of immovable property rights involves a transaction of a monetary amount in excess of €10,000, the transaction shall be made by payment order or bank transfer. Municipalities do not have the legal authority to apply these provisions retroactively therefore, transactions that took place prior to 2004 should not be subject to such requirements. Further, legislative solutions should be found to legalize property related cash transactions (higher than 10,000 euros) that took place after 2004 due specific challenges of those times (not many citizens had bank accounts). For example, the buyer could give a statement before a notary that the transaction took place in this way and the statement to be forwarded to Financial Intelligence Unit (FIU) for information purposes.

The articles regarding the procedure for registering rights, easements and encumbrances in the IPRR should be made clear and detailed and the documents that are to be used as basis for registration well defined (they should specifically include HPCC/KPCC decisions, HPD/KPC orders, and notarized instruments).

Specific guidance should be provided to MCOs on how to perform registration; for instance, in case of co-ownership, the register should reflect all owners; should not all owners wish to register, the IPRR should reflect the part of the property that the co-owner that want to register owns. Further, procedure of registering joint property (married couples) should be made easier.

Legislation should foresee to increase transparency in cadaster and access to cadastral documents and to avoid obstacles that arise from the Law no. 03/L-172 on Protection of Personal Data. The issuance of extracts (certificates) from the register should also be regulated, especially when certificates are provided to notaries. For instance, in order to prevent fraud (by multiple sale of the same property), no certificate should be issued to anyone for a number of days since a notary requested a formal certificate on behalf of a client in order to perfect a transaction.

All Kosovo authorities should be obliged to notify the KCA/IPRR of any change in the legal status of an immovable property (courts, notaries, municipalities, etc.).

Identify the number of title determinations made by KPCC that were not registered in the IPRR and consider ways that would facilitate registration remotely or through KPA/KPCVA on behalf of the owners or at least the option to notify KPA/IPRR of such a decision for the purpose of making mention of it in the IPRR.

It is recommended to waive the registration fees for a determined period of time in order to encourage people to register their rights should the government consider property registration as a priority and a matter of public interest.

Policy measure #2	Streamline IPRR registration procedures
Solution	<p>Vertical organization of the Cadastre</p> <p>Clear procedure for registering rights, easements and encumbrances in the IPRR</p> <p>Clearly define and define the documents that are to be used as basis for registration in IPRR</p> <p>Identify legislative solutions to legalize property related cash, pre 2005, transactions higher than 10,000 euros</p> <p>Provide specific guidance to MCOs on how to perform registration in regard to joint ownership and co-ownership</p> <p>Increase transparency in cadastre and access to cadastral documents</p> <p>Consider ways to facilitate registration remotely or through KPA/KPCVA</p> <p>Make a mention in the IPRR for properties over which a KPCC/HPCC decision has been issued</p> <p>Waive the registration fees for a determined period of time</p>
Output	<p>(1) Draft new Law on Cadastre</p> <p>(2) Amend the Law on Property and other Real Rights</p> <p>(3) Amend the Law on Prevention of Money Laundering and Terrorist Financing (if required)</p> <p>(4) Amend the Law on Law no. 03/L –172 on Protection of personal Data (if required)</p>
Outcome	<p>Municipal Cadastre Offices will be transformed into local Registration Offices and will answer to KCA in all matters</p> <p>Procedures and fee for registration in IPRR are uniformly applied throughout municipalities</p> <p>Procedures for IPRR registration are clear and simplified</p> <p>Facilitated access to cadastral data especially to notaries, courts, private enforcement agents and other interested parties</p> <p>Fraudulent transaction of properties is prevented</p> <p>Citizens are incentivized to register their property rights</p>
Indicators	<p>Increase in number of rights registered in IPRR, including those based on HPCC/KPCC decisions, notarized instruments (including contracts and certificates of succession)</p> <p>Data is shared swiftly and time for registration of property rights is decreased</p> <p>Decrease of property fraud</p>

3.3 Policy Measure #3: Amend the Legal Framework in Order to Clarify the Modalities for Acquiring Ownership and Other Real Rights

The review of the legislation related to real rights should focus on regulating the modalities of acquiring ownership and other real rights. Particular attention should be given to the prescription (long-term possession). Other means of acquiring real rights should be explicitly stated in the LPRR such as inheritance, or should be introduced, such as accession (which can prove particularly useful in cases where a person without a building right erects a building on the land belonging to another) or natural causes (e.g. alluviums). In addition, the LCP should provide detailed rules of procedure on the administration of evidence in property related matters, in order to enable courts to make accurate determinations of rights and ensure protection for the rights holders.

Policy measure #3	Amend the legal framework in order to clarify the modalities for acquiring ownership and other real rights
Solution	Accurately regulate the modalities of acquiring ownership and other real rights Further regulate prescription and accession as means of acquiring real rights. Clear definition of bona fide possession of immovable property. Provide detailed rules of procedure on the administration of evidence in property related matter
Output	(1) Amend the Law on Property and other Real Rights (2) Amend Law on Inheritance (3) Amend the Law on Contested Procedure (4) Amend Law on Non Contested Procedure
Outcome	The laws are harmonized, there are no inconsistencies between legal requirement Courts and notaries have additional tools enabling them to accurately determine ownership
Indicators	Number of laws amended Number of properties with unclear ownership minimized

3.4 Policy Measure #4: Unify Court Practices towards the Use of Prescription over Validation of Verbal Transfers

Kosovo specific tailor-made trainings on the means to acquire property rights and the appropriate use of evidence should be offered to judges countrywide. Particular attention should be given to confirmation of ownership when the basis of the claim is a verbal transfer. Where the alleged transaction took place during the discriminatory period of 1989-1999, the principles developed by HPCC and KPCC should be adhered to. Where the claim is not one that would have triggered the jurisdiction of the HPCC/KPCC, the practice of validating informal transfers based solely on witness testimony and the legal fiction of the obligations fulfilled should be discontinued; instead, judges should consider determining whether ownership has been acquired based on prescription; however this should be handled with great care the continuous dispossession of the real owner might be due to insurmountable factors external his/her will.

Judges should take into consideration HPCC/KPCC' jurisdiction and immediately verify, directly with the KPA (and KCVP when created), whether a decision had been issued by the HPCC or KPCC with regard to the property subject of the claim submitted to their attention and if a decision exists, be

bound by it and dismiss the claim. In order to maintain consistency in judicial dealings with conflict related property matters, a compendium of HPCC and KPCC principles and jurisprudence should be made available to all judges, to be used for the adjudication of claims lodged with the courts after the deadline for the KPPC passed. It is also advisable for the Supreme Court to produce and disseminate opinions on specific property matters.

Policy measure #4	Unify court practices towards the use of prescription over validation of verbal transfers
Solution	<p>Profiling of judges that adjudicate in property rights cases</p> <p>Tailor-made trainings for judges on complex property matters, including on assessing evidence</p> <p>Set-up of case-management systems in all courts</p> <p>Verify if a decision had been issued by the HPCC or KPCC with regard to the claimed property and dismiss the claim if so</p> <p>Apply HPCC and KPCC principles in cases where the informal transaction took place during the discriminatory period of 1989-1999</p>
Output	<p>Amend the Law on Property and Other Real Rights</p> <p>Amend the Law on Inheritance</p> <p>Amend the Law on Non-contested procedure</p> <p>Draft compendium of HPCC and KPCC principles and jurisprudence and be made available to all judges</p> <p>The Supreme Court to produce and disseminate opinions on specific property matters</p>
Outcome	<p>Judges have clear understanding of applicable laws and adequately apply them to property cases</p> <p>There is uniformity in courts' practices in similar property matters (informal transactions)</p>
Indicators	<p>Number of fraudulent transactions decreased</p> <p>Disposition time of property cases reduced</p>

ANNEX 4

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PILLAR # 4
STRENGTHENING
PROPERTY
RIGHTS FOR
DISPLACED
PERSONS (DPS)
AND NON-
MAJORITY
COMMUNITIES IN
KOSOVO

ANNEX 4

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1. RATIONALE

Property rights especially of minority communities and Displaced Persons (DPs),¹⁵⁹ including the right to return, are by now universally regarded as human rights. They are included in numerous transnational treaties,¹⁶⁰ as well as the European Convention of Human Rights and its Protocols,¹⁶¹ all of which are directly applicable in Kosovo. The Stabilization and Association Agreement (SAA) in its preamble and its Article 4, moreover reiterates Kosovo's commitment to the protection of minority rights, including the right to return. Resolving property issues, especially as they pertain to DPs and minority communities has thus become key to Kosovo's progress towards the SAA and, beyond that, towards a full-fledged EU membership.

Recently, and following the 'Principles on Housing and Property Restitution for Refugees and Displaced Persons', also known as 'Pinheiro principles',¹⁶² the concept of return as understood by the international community has come to include 'not simply the return to one's country for refugees or one's city or region for DPs, but the return to and re-assertion of control over one's *original home, land or property*; the process of housing and property restitution'.¹⁶³ This shift from a humanitarian to a rights-based approach (and thus to a form of restorative justice) has had tremendous impact in bringing housing, land and property restitution to the fore as basic human rights and in complexifying the concept of 'restitution' in international as well as national legal instruments. This not only as including the return of one's property but also as the 'restoration of liberty, [the] enjoyment of human rights, identity, family life and citizenship; [the] return to one's place of residence, [and the] restoration of employment'.¹⁶⁴ The policy move to a rights-based approach to property restitution has also been influenced by the 'de Soto school'¹⁶⁵ according to which legalizing property rights and adopting a formal, homogenized property legislation enable greater economic development.

The present Concept Note critically draws on both these approaches to advocate policy recommendations that not only aim at restoring and securing property rights to minority communities and displaced persons, but also, and most importantly, at promoting social justice and the democratic control of property-related resources equally between majority and non-majority communities.

The creation of legal instruments and administrative structures that will enable DPs to enjoy their property rights (very broadly put, and thus including civil, political, economic and cultural aspects of

¹⁵⁹ In the Concept Note, we have opted for using the term 'Displaced Person' (DP) rather than 'Internally Displaced Person' (IDP). The reason for such choice is one of political correctness. While many international bodies continue using the term IDP to refer to Kosovo Serbs and other minorities that were displaced outside the borders of the Republic of Kosovo as a result of the armed conflict, the term 'Displaced Person' is gaining popularity — including in OSCE and UNHCR reports — as it respects the integrity of Kosovo's borders without taking a stance with regard to the ongoing political negotiations with Serbia.

¹⁶⁰ Art. 13 (2) of the Universal Declaration of Human Rights, G.A. Resolution 217A (III), UN Doc A/810 at 71, 1948; Basic Principles and Guidelines on the Right to a Remedy and Repatriation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Commission on Human Rights Resolution 2005/35, E/CN.4/2005/L.10/Add. 11, Articles 19 and 20.

¹⁶¹ i.a Protocol I, Articles 1, 6, 8, 13, 14, 17.

¹⁶² See Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons: Final Report of the Special Rapporteur, Paulo Sergio Pinheiro: E/CN.4/Sub.2/2005/17 (28 June 2005) and see also Gomez, M., New Draft Principles on Housing and Property Restitution before the UN Sub-Commission for the Promotion and Protection of Human Rights, Housing and ESC Rights Law Quarterly, Vol. 1, No. 3, December 2004, Centre for Housing Rights and Evictions, Achieving Housing For All, available on www.cohre.org.

¹⁶³ UNHCR, et al. 2007. Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the 'Pinheiro Principles': Inter-Agency, p. 10.

¹⁶⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law, based on existing human rights and humanitarian law principles.

¹⁶⁵ Starting with de Soto, H. 2000 'The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else', Black Swan, UK.

those rights) without the prior necessity of physical, long-term return is paramount to fostering good governance and economic growth. The legalization of property rights, especially for DPs and minority communities requiring improving access to state institutions in order to exercise their rights to property. Therefore, the policy recommendations suggested in this concept focus on those remedies, including restitution, that would allow DPs and members of minority communities to fully enjoy their property rights and thus take part in Kosovo's social and economic development.

1.1 Situation Assessment

A 2011 assessment estimates that there are still around 97,000 people displaced as a result of the 1998-99 war living in Serbia who 'still have needs related to their displacement', the majority of which are ethnic Serbs.¹⁶⁶ OSCE accounts for another 1,100 DPs in Macedonia and 8,560 in Montenegro. As of July 2015, the UNHCR accounts for 17,086 DPs in Kosovo, which includes 9,265 Kosovo Serbs and 7,078 Kosovo Albanians. The remainder are Roma and smaller numbers of Ashkali and Egyptians (Albanian-speaking minorities).¹⁶⁷ Of these, many had lost their properties during the war, and, 17 years later, continue to face significant challenges in exercising their property rights.¹⁶⁸ Non-majority community members face relatively similar structural challenges to enjoying their property rights, even if they were not displaced, or were able to return to their homes.¹⁶⁹

Kosovo's commitment to restore, secure and promote property rights of DPs and minority communities is evident. In practice, however, citizens continue to face a number of remaining obstacles in order to fully enjoy their property rights. While these challenges hold true for the population at-large, displacement and indirect discrimination compound these issues for DPs and non-majority community members. Although physical displacement from the war and social exclusion are different causes, the socio-political and economic effects for each of these groups are somewhat similar, due to their relatively weak social position in contemporary Kosovo. Strengthening overall property rights with special attention to DPs and minority communities will thus help address structural issues and mitigate the challenges faced by both groups.

Considering the overarching objective of the five Concept Notes of fostering economic growth through the promotion and safeguard of property rights, people need not only to be able to exercise their fundamental property rights, but also to be able to exercise their socio-political and economic rights over their property, including sales and capital investment within an inclusive, non-discriminatory and efficient rule of law framework. Economic growth must, moreover, be distributed equitably between majority and non-majority communities.

1.2 Current Stakeholders

Kosovo has seen the establishment of two post-conflict mechanisms for the restitution of private property. The **Housing and Property Directorate (HPD)**, set up in 1999, was mandated to deal with residential property claims emanating both from the 1980s and from the 1998-99 war. Its successor agency, the **Kosovo Property Agency (KPA)**, established in 2006 and whose adjudication phase ended in December 2014, focused not only on housing but on all categories of private immovable property, including agricultural and private commercial property, this time solely as they pertained to property loss directly related to the 1998-99 armed conflict. Between 2006 and 2007, the KPA received 42,749 (of which 41,849 were adjudicated by KPCC, were reject by Executive Secretariat

¹⁶⁶ Information retrieved from <http://www.internal-displacement.org/europe-the-caucasus-and-central-asia/serbia/figures-analysis>. Accessed 26 November 2015.

¹⁶⁷ Information retrieved from <http://www.internal-displacement.org/europe-the-caucasus-and-central-asia/kosovo/figures-analysis> accessed 26 November 2015.

¹⁶⁸ These challenges will be detailed below.

¹⁶⁹ In its 'Problem Definition' and 'Policy Recommendations' sections, the Concept Note differentiates and specifies further which of the issues discussed pertain to both groups, or to the specific needs and challenges faced by DPs on the one hand, and minorities on the other.

which bring the total 42,116 and 633 claim are withdraw by claimants) from 6304 claimants, a vast majority of these belonging to non-majority groups. These restitution mechanisms have assisted dispossessed property right holders in regaining legal possession of their properties. The KPA is currently implementing the final decisions of its adjudicatory commission, the KPCC, by executing evictions for repossession at 2,143 cases (655 eviction warrants have been issued to date), placing properties under administration (10,972 properties from 14,441 requests for property administration, 3,021 not fulfil criteria's for administration) and concluding lease agreements (in 1,170 cases), or closing cases either at the request of claimants (for 1,759 claims), or in case of 'non-cooperation' (i.e. when claimants did not reply to the KPA's decision notice, in 13,193 cases).

Several issues arise with regard to the implementation of KPCC decisions, among them the question of whether the legal remedies available to the KPA other than repossession and administration (which is arguably only a temporary solution) constitute fair, effective and final remedies that actually allow successful claimants to fully enjoy their property rights. A fair and effective final remedy is a remedy that would objectively allow claimants to regain full rights over their properties. In this sense, eviction without actual repossession and closure on the basis of non-cooperation cannot be considered final remedies. Therefore, while the KPA maintains that most of its implementation backlog has now been dealt with (and within the remit of its mandate, this is a fair assessment), another look at the institution's statistics that focuses solely on the number of claims that were implemented through fair, effective and final remedy — thus solely through repossession (2,143 cases) and requested closure (1.759 cases), adding another 13,193 claims that were closed for non-cooperation because the property was sold — shows a totally different picture, with 17,095 out of 34,496 claims granted by Commission (part of claims are refused or reject and no need for implementation of decisions) (thus some 50% of all claims) effectively implemented.

Moreover, taking into consideration that properties currently under administration will have to be re-implemented at the inception of the KPCVA mandate and the termination of the administration program, the KPA implementation backlog, from the perspective of providing fair, effective and sustainable remedies, still amounts to approximately 50% of all claims. This does not account for the remaining 13,193 or so claims closed for non-cooperation for which claimants could potentially still request implementation through eviction or closure. Regardless, it is clear from the KPA figures that in the overwhelming majority of cases, claimants either chose administration or not to choose any remedy at all. This issue and several inter-related concerns will be further detailed and analyzed in the following sections.

In 2012, the government of Kosovo initiated the drafting of a law with the aim to set up a new, independent agency, **the Kosovo Property Comparison and Verification Agency (KPCVA)**. The need for drafting the Law and establishing the agency stems from the agreement on the return of cadastral documents to Kosovo reached between Kosovo and Serbia in Brussels. The KPCVA draft law is now pending for approval with the Assembly. The KPCVA is intended, on the one hand, to succeed the KPA and take over its present mandate. It will thus have to implement and provide final remedy to KPA claims that have not yet been implemented, have been closed on the basis of 'non-cooperation', or are currently under administration (with repossession or closure as available remedies for the two last sets of claims). It is important to ensure that the KPCVA enables the backlog of KPA decisions to be implemented in a timely manner and to provide claimants with legal remedies that comply with applicable human rights standards.

Other stakeholders include the **Privatization Agency (PAK)** and its **Special Chamber**, the regular courts and the police and Prosecutor's office. While PAK explicitly stated that the 'liquidation process was designed to respect and protect the interests and human rights of minorities'¹⁷⁰ and has a notification system across Kosovo and in Serbia, no other particular policy provision is in place concerning the protection of interest of assets of DPs and other minority groups in the liquidation

¹⁷⁰ 'Information to Stakeholders' dated August 2011 p. 3 and 12. http://www.pak-ks.org/repository/docs/Information_to_Stake_Holders_august_2011_eng_ver_FINAL..pdf.

process. As for the **courts**, a substantial backlog of civil cases, especially those relating to property issues, limits the actual legal remedies that these legal arenas can provide to DPs and minority groups.

The **Kosovo Police** and the **Prosecutor's Office** play a key role in assisting the implementation of eviction orders and acting against illegal re-occupations by arresting serial re-occupants and handing them over to the courts based on the provisions deriving from the Criminal Code of Kosovo.¹⁷¹ The inability of the police to assist the KPA during evictions in the north of Kosovo has hampered the KPA led eviction process. After the conclusion of an agreement between the KPA and the Kosovo Police in 2009 and several years of negotiations, evictions in North Mitrovicë/Mitrovica resumed in March 2014. Since then, several evictions were carried out with the assistance of the Kosovo Police, showing that a solution can be found through dialogue and political will.

1.3 Problem Definition

This Concept Note identifies and details three clusters of interconnected issues. These are linked, first, to the implementation of KPCC decisions, and finding equitable and sustainable legal remedies for successful claimants in the KPA process. Second, there are due process issues, or systemic problems at institutional and judicial level. Third, there are challenges that can be subsumed under Access to Justice, which includes financial and administrative remedies to ease access to legal procedures for DPs and minority communities. In addition, there are two independent issues that also fall under the remit of this pillar, Social housing and land allocation, and Roma camps and settlements. These issues pose the main obstacles for DPs and non-majority groups to freely enjoy their property rights. The Concept Note then develops policy recommendations for each of these points in the subsequent sections.

1.3.1 Implementation of KPCC Decisions to Provide Displaced Persons with Fair Effective and Final Remedy and Prevent Illegal Reoccupation

As pointed out earlier in this note, providing fair, effective and final legal remedies to successful KPA claimants and prevent illegal reoccupation are crucial elements for the Government of Kosovo to successfully solve DP-related property issues. The following sub-sections provide detailed descriptions of some of the most pressing KPA implementation-related concerns that are impeding the effective implementation of final legal remedy for successful KPA claimants.

Discontinuation of KPA administration of properties

As of 11 March 2016, the KPA has 13,009 **properties** under its administration (10,972 from KPA, and 2,035 from HPD) out of 14,441 requests for property administration. 1,170 of these have been taken under the KPA's rental scheme, which provides minimal rental income for displaced property right holders.

According to the draft-law, the KPA will discontinue the administration and rental of properties 18 months after the KPCVA legislation enters into force. Property rights holders, however, may request repossession or case closure after this 18 month deadline. The reasoning behind this decision, according to the KPA, is that security issues have much improved lately and that administration is simply not necessary anymore. Indefinitely continuing administrating properties on DPs behalf would, in this perspective, be a barrier to return. The administration of properties by the KPA has, however, proved a popular remedy with claimants, and discontinuing KPA administration of these properties, without establishing a sustainable mechanism to monitor, track and provide information on the number and state of these properties, may increase the number of illegal occupants.

¹⁷¹ Especially articles 332 and 414.

More importantly still, beyond concerns of increased illegal occupation, and **considering the relatively low number of repossessions (2,143) compared to the number of properties under administration (14,441), administration appears to have been the most effective remedy available to date. The draft KPCVA law is intended to end this remedy and provides as options re possession or request for closing the case.**

The draft KPCVA legislation in its current form requires claimants to choose eviction or closure of their case, as administration would no longer be an available remedy. The choice of eviction followed by repossession would constitute a fair, effective and final remedy. In case simple closure of their claim is the only other option available, however, the question remains whether closure would constitute an effective, fair and final remedy that complies with international and EU human rights standards, and, therefore, Kosovo's obligations under the SAA.

While it is beyond the scope of this CN to propose a final solution, the Strategy could begin to map the way forward. Based on the discussion in this CN, three possible solutions could be considered:

1. According to Pinheiro principle 2 'all refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land/or property that is factually impossible to restore as determined by an independent, impartial tribunal'. **Compensation** could thus be an alternative for of final remedy. Although compensation is not mentioned in the SAA itself, one can posit that such issue will have at some point to be taken into consideration as part of implementation of Property Verification and Adjudication Commission of KPCVA for Kosovo to align its legislation with international human rights instruments. Several issues remain unanswered in the present version of the draft law: In what circumstances would compensation be required? How will compensation be determined? How will it be funded? Could the properties be sold and the proceeds transferred to the claimant? Also, what would happen to respondents being evicted from a property after KPCVA adjudication, wouldn't they also be entitled to some sort of compensation? Would it be reasonable to find a bona fide purchaser (perhaps the second or third purchaser, 10 years after the fraudulent transaction) who paid value for the property equably liable, to be damaged because of illegal action of seller or fraudulent transaction. It is not uncommon policy in other jurisdictions to hold the bona fide purchaser safe and requiring the harmed party to seek remedy from the one who perpetuated the fraud.
2. A **permanent rental scheme** would be another possible option. But would such a scheme meet applicable human rights standards? As stated above, fears are that this option might be detrimental to the number of returns, too.
3. Could the **properties simply be left vacant** after eviction for re possession if the Kosovo Institutions ensures they are never re-occupied? Would this constitute an effective remedy? This third option would only work if the issue of illegal re-occupation were effectively taken care of and to ensured eviction mechanisms in the case of re occupation after two evictions, by KPA, for re-possession.

Serial re-occupations after KPA eviction

Serial, illegal re-occupation of property following KPA eviction is an issue that has gained significant attention. Findings published in a 2015 OSCE report show that **the Prosecutor's office and the courts should provide greater attention to serial re-occupation cases due to slow implementation.** According to its mandate, the KPA re-evicts illegal occupants a second time after the initial eviction when the property is re-occupied within 72 hours. Subsequent re-occupations, or those taking place outside of the 72-hour window, do not fall within the mandate of the KPA, and repossession requests have to be referred to private enforcement agents and prosecuted according to the Criminal Code of Kosovo.

The same OSCE report identifies **deficiencies in the authorities' response to illegal re-occupation cases, which prevent the effective resolution of these cases**.¹⁷² According to the report, 'between 2008 and 2013, the Kosovo Property Agency (KPA) referred a total of 326 cases of illegal re-occupation of properties under its administration to the prosecution [...] Over 95 percent of these involved property owned by members of the Kosovo Serb community that was being illegally re-occupied by members of the Kosovo Albanian community'.¹⁷³ The OSCE report specifically highlights the 'slow reaction at the prosecution and judicial level, [as] the cases take on average two years and three months to process from the time the cases were submitted by the KPA to the prosecutors' offices to a final judgement being rendered by a Basic Court'.¹⁷⁴

Although the number of cases concerned only amounts to about 60 per year, the issue of serial re-occupation after a second KPA eviction is an important human rights and rule of law issue that needs to be addressed in order for KPA claimants to be ensured final and effective remedy of their claims. However, the issue of whether eviction provides a fair and final remedy remains open to conjecture. A good example is provided in a draft PRP report on issues pertaining to minorities and DPs property rights: in some cases DPs had requested eviction so that prospective buyers could view a vacant property. When the deal fell through the property was left unoccupied and subsequently illegally re-occupied. This would appear to indicate the need for a more permanent solution to the core issue of a final remedy.¹⁷⁵ In other words, if preventing illegal reoccupation does not actually appear to facilitate repossession, as is the case in the example given above, it would mean that eviction is not necessarily a final solution.

Re-opening of HPCC and KPCC cases by civil courts

The final decisions of the KPCC and decisions by the Supreme Court on appeals against KPCC (as well as previous HPD decisions) decisions are legally binding and not subject to challenges or reviews. However, there have been cases where the **courts have allowed re-litigation of disputes adjudicated by valid HPCC or KPCC decisions**.

Prior monitoring of such cases by EULEX has ensured that Courts to conduct research and contact KPA whether such cases have already been adjudicated by HPCC or KPCC. In total, the Courts have submitted 307 requests for verification, whereas only in 2015, 142 verifications were conducted.

Nr. Kosovo Court	Number of Requests
1 Basic Court of Pristina	45
2 Basic Court of Prizren – Suhareka Branch	8
3 Basic Court of Mitrovica – Skenderaj Branch	8
4 Basic Court of Pristina- Podujevo Branch	0
5 Basic Court of Peja	5
6 Basic Court of Mitrovica	1
7 Basic Court of Gjilan – Viti Branch	57
8 Basic Court of Gjilan – Kamenica Branch	0
9 Basic Court of Prizren	4
10 Basic Court of Ferizaj	1
11 Basic Court of Gjakova	1
12 Basic Court of Gjilan	1
13 Basic Court of Pristina–Lipjan Branch	4
Total number in 2015:	142

¹⁷² OSCE 2015 report, 'Review of Illegal Re-Occupation Cases in Kosovo', page 2.

¹⁷³ OSCE 2015 report, 'Review of Illegal Re-Occupation Cases in Kosovo', page 6.

¹⁷⁴ *ibid*, page 2.

¹⁷⁵ 'Issues affecting the ability of members of minority communities in Kosovo to exercise their property rights', DRAFT, Property Rights Program, February 2016.

To avoid re-litigation of final decisions, it is imperative that such disputes be identified and dismissed as inadmissible. Such re-litigation goes against the *raison d'être* of the HPD and the KPA, which were set up in part to free the regular court system of certain categories of conflict-related cases. As a result, in order to avoid re-litigation, it is crucial for the KJC to institute clear guidelines that oblige courts to verify such cases.

Third party constructions

The KPA identified 35 cases where a structure was constructed unlawfully on underlying land claimed with the KPA, and where the KPA mechanism recognized the property right to the owner of the underlying land.¹⁷⁶ Although the KPA has proceeded with mediation between the parties in order to find an amicable solution, none of the cases have until now been resolved amicably. As a consequence, the legal remedy would normally be demolition of the unlawfully built structure.¹⁷⁷ Funding requests by the KPA to the government for the demolition of such structures have not been approved until now, and the Agency was, consequently, unable to enforce final decisions which would require demolitions.

The Constitutional Court of the Republic of Kosovo in its ruling of the so-called 'Jovanovic case' found that the non-execution of the KPCC decision by the KPA, due to lack of funding, was 'in contradiction with the principle of the Rule of Law and constituted a violation of the fundamental human rights guaranteed by the Constitution'.¹⁷⁸ Another 33 lawsuits have been lodged against the KPA at the Constitutional Court.¹⁷⁹

Lack of funding for the Compensation Scheme as a legal remedy has not been implemented yet.

As the successor to the Housing Property Directorate (HPD), KPA has been responsible for creating and administering a compensation scheme for implementing the decisions of A & C of HPCC. Scheme was supposed to relate with property claims established by HPCC where the discrimination had led to what holders of residential property (applicants "A") to forfeit this right, which later were allocated or sold (privatized) to the third parties (applicants "B"). HPCC has decided the residential property to be restituting to applicants "A", while claimants "B" to be compensated. KPA has prepared an assessment and procedures for the compensation, according to which the amount of 3 million is needed to implement the scheme.

In 2011, in cooperation with KPA, Ministry of Finance has established a trust fund for the compensation scheme. KPA has continued sending fundraising letters to various actors for this scheme. This issue is later addressed to the Government of Kosovo in order to seek the necessary funds for implementation of the scheme. Thus far, no fund is being allocated, which means that the implementation of the scheme hasn't been possible.

According to the KPA mandate, there is no mandate to decide the claims for this compensation. Claims for compensation filed in the court (in cases of destroyed or damaged property), the majority of cases are dismissed by the courts. This is due to the fact that, probably, NATO and the Kosovo Government cannot be held accountable for the destruction of property in connection with the conflict.

¹⁷⁶ Number as per 31.10.2015.

¹⁷⁷ Section 15 of Law 03-L-079 amending UNMIK Regulation provides the KPA with a wide range of remedies for the execution of final KPCC decisions and appeals panel judgments including, but not limited to, 'eviction, placing the property under administration, a lease agreement, seizure, demolition of unlawful structures and auction'.

¹⁷⁸ Case reference K1187/13.

¹⁷⁹ Informally confirmed in an interview with Sjerdan Staletović, 15 February 2016.

1.3.2 Due Process Issues

While the previous section addressed issues specifically related to the KPA process, the following issues are linked to wider, systemic problems in Kosovo's institutional landscape, namely at the level of courts and municipal administrative bodies. Some of the due process issues under this section require changes and improvements to judicial and administrative procedures, while some relate specifically to the inability to locate and deliver notice to DPs.

Law 04 L-188 on the legalization of unpermitted constructions

Kosovo is currently undertaking a process of legalization of unpermitted constructions on its territory in order to boost investments. The law provides strict deadlines including an initial phase of recording of illegal constructions, and the publishing of a list of illegal constructions. The application period during which citizens are able to apply for legalization started in September 2015 and will end in March 2016.¹⁸⁰ The application period will be followed by a series of fixed deadlines for the publication of a 'demolition list', the physical notifications of unpermitted constructions and the warning of the imminent demolitions. A public objection period shall precede the actual demolitions.¹⁸¹

Article 5 (1.4) of the aforementioned law makes it the responsibility of the municipalities to conduct a broad public awareness campaign at the local level starting from the enactment of the Law and lasting throughout the application phase. Pursuant to Article 6 (4), if there is no application submitted for legalization within the set deadline, 'unpermitted construction shall be included in the "Demolition List" and will be demolished'. Article 6 (1.2) further states that 'requests shall be submitted to the municipality in the territory in which the unpermitted construction is located'.

As pointed out in the EU Progress Report 2015, **these deadlines and the submission criteria raise concerns with regard to the treatment of unpermitted constructions belonging to displaced persons and minority community members who failed to apply for legalization within the aforementioned (and ongoing) period because they were not properly informed.**¹⁸² The non-implementation of the notification procedure (i.e. the collaboration with, i.a., the KPA and the UNHCR) set up in article 4 paragraph 3.5 and 3.6¹⁸³ means that the situation of these groups is not properly taken into consideration. This raises questions regarding the legality of the demolitions that would be undertaken without sufficient notice and due process. In line with ECHR Protocol I Article 1 and the 'right to property', the demolition of an illegal structure without proper notification should be considered as a human rights violation. Moreover, Article 113.2 of the Law on Administrative Procedure requires that 'in special cases by the nature of the act, the person shall be invited to be personally serviced the act'. **A situation of displacement and/or of lack of access to information should be considered in line with Article 113.2 as a 'special case'. DPs and persons belonging to minority communities should be personally notified of the pending demolition.**

Beyond the issue of notification, which is heightened by the strict and poorly advertised deadlines mentioned above, **the legalization procedure as set up according to Law 04 L-188 has been criticized for its high cost (to be borne by the claimants), and its complexity.** The Ministry of Environment and Spatial Planning has itself recognized that, for these reasons, people are reluctant to undergo the procedure as it stands. An amendment to the present law, which would hopefully be passed before the demolition phase starts, is intended to solve some of these issues.¹⁸⁴ Concept Note

¹⁸⁰See Article 4 and 5 of the Law 04 L-188 for treatment of construction without permit.

¹⁸¹Ibid.

¹⁸² EU progress report 2015 p. 23.

¹⁸³http://www.kryeministri-ks.net/repository/docs/PL_per_Trajtimin_e_ndertimeve_pa_leje_20_12_2012_versioni_final.pdf.

¹⁸⁴ Interview with the acting Director of the Spatial Planning Department, Xhemal Metolli, Ministry of Environment and Spatial Planning, 19 February 2016.

2 address this issue and recommends extending the deadline, streamlining procedures, and decrease legalization tariffs.

Privatization and liquidation without effective notification

According to Article 49 of law No.04/L-034 on the Privatization Agency of Kosovo, formal notices of notification of **privatization** to creditors '1. shall, at a minimum, be published as follows: 1.1. in both the Serbian and the Albanian languages in a newspaper enjoying wide circulation in Kosovo; and 1.2. in the Serbian language in one or more Serbian language newspapers enjoying wide circulation in Serbia and in Montenegro [...]'. Moreover, Article 13 on the Composition of the Liquidation Authority 1, Paragraph 2 of the same law stipulates that 'If a **Liquidation** Authority is not comprised of Professional Service Providers, the PAK Board shall ensure that at least one member of that Liquidation Authority is a representative of a minority community'. Moreover, the procedure of mutual legal assistance stipulated in LAW No. 04/L-033 On the Special Chamber of the Supreme Court of Kosovo on Privatization Agency related matters was set up to facilitate the delivery of notices and court summons to DPs in the liquidation process. This, however, remains a real challenge.¹⁸⁵

Thus, despite the aforementioned safeguards most minority community members (especially Roma), DPs and returnees are not in a position to access the published information on ongoing privatization and/or liquidation.¹⁸⁶ Therefore, **DPs are not generally aware of the privatization and/or liquidation process for properties over which they have purportedly claims. This has for consequence that the formal deadlines set for complaints and appeals are not met, resulting in gross indirect discrimination.**

Legal representation (temporary representatives and PoA issues)

Appointing temporary representatives for absent respondents is a widespread practice. Temporary representatives may be appointed pursuant to Article 79 of the Law on Contested Procedure No. 03/L-006 under three conditions: (1) the respondent's location is unknown, (2) the respondent does not have a representative, and (3) 'if the regular procedure for the appointment of a legal representative would take a long time, thus causing detrimental consequences to one or both parties'.

In many lawsuits for confirmation of ownership, the respondent cannot be located. Often, the property transfer occurred in the discriminatory period, and could thus not be recorded in the cadastral records, and the respondent subsequently moved.¹⁸⁷ Many other cases involve property transfers where the seller fled, disappeared, or was displaced as a result of the conflict. Therefore, the practice of appointing temporary representative affects non-majority populations in a disproportionate way.¹⁸⁸ It also seems to occur most often in property cases. As noted by the OSCE Legal System Monitoring Section, '[F]ailure of courts to contact the competent administrative body or use reasonable alternative means to locate the defendants violates domestic law and possibly the right to a fair trial',¹⁸⁹ especially when the respondent belongs to a minority community or is a displaced person.

Land expropriation (Law No. 03/L-139) and sales by municipalities (Law Nr. 03/L-040 on Local Self-Government) without appropriate notification

¹⁸⁵ Article 19 of LAW No. 04/L-033 ON THE SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PRIVATIZATION AGENCY RELATED MATTERS.

¹⁸⁶ See: 'Privatization in Kosovo* From IDPs' Perspective' – February 2014, Branislav Ristic, <http://www.pravnepomoc.org/web/images/stories/privatisation.pdf>.

¹⁸⁷ Due to discriminatory laws in place at the time prohibiting the transfer of immovable property between members of different communities, until 13 October 1999 and the promulgation of UNMIK Regulation 1999/10 on the 'Repeal of the Discriminatory Legislation Affecting Housing and Rights in Property'.

¹⁸⁸ OSCE Mission in Kosovo, Litigating Ownership of Immovable Property in Kosovo, March 2009.

¹⁸⁹ OSCE Mission in Kosovo, Department of Human Rights and Rule of Law, Legal System Monitoring Section, The Appointment of Temporary Representatives in Property Disputes Involving Minorities as Respondent Parties, April 2008, p. 4. See also European Court of Human Rights, Neumeister v. Austria, 1936/63, Judgment, 27 June 1968, and paragraph 22.

The procedure for notification of **expropriation** of immoveable assets by the Government or a Municipality is set out in Law No. 03/L-139 (amended 03/L-205). The preparatory activities for expropriation are stipulated in Article 5 and are subject to i.a. the following conditions: 5.1. 'The Expropriating Authority... shall provide any Person who is or who claims to be an Owner or Interest Holder with respect to property that will be subject to preparatory activities at least twenty (20) Business Days advance written notice of the times during which such activities will be conducted on each parcel of property; provided, that such notice is required to be given only to: 5.1.1. Such Persons whose names and addresses may be ascertained from the cadastral and other official immovable property records in Kosovo, including the records of the Kosovo Property Agency and the most recent property tax records'.

According to Section 5.1.1, thus, written notice shall be delivered to a person who is registered as having a formal property right over the property and whose address can be readily found in valid property documents issued by Kosovo institutions (see also Article 42 of the same law). However, in accordance to the definition of 'special cases' given in Article 113.2 of Law No. 02/L-28 on the Administrative Procedure, **the failure to ascertain the persons' names and addresses from recent official documents issued in Kosovo should not preclude such persons from being notified in writing of the pending expropriation.** Those individuals should therefore be notified in person, wherever they may reside. We further note that the provisions for mass-notification provided in Article 114 (1)c has a negative impact when applied to the special case of DPs as they may not be able to access Kosovo newspapers and public spaces notice board from their temporary places of residence. Although notification by publication is considered legally appropriate, actions should be undertaken to protect the property rights of DPs in cases of expropriation.

Furthermore, Article 35.8 of Law No. 03/L-139 (amended 03/L-205) stipulates that if the court fails to issue a decision about a complaint filed by a property right holder who challenges the legality of an expropriation within the timeframe foreseen by the Law (i.e. 30 days), the complaint is *de facto* rejected. This provision allows the court to reject complaints without having to justify itself, which has direct implications on the right to an effective legal remedy.

With regard to the **sale of land by Municipalities**, article 14.2 of the Law Nr. 03/L-040 on Local Self-Government provides Municipalities with 'the right to sell and lease the immovable and movable property.' The discrepancies existing between the Kosovo-based and the dislocated cadaster have led to cases where socially-owned properties restituted to non-majority community members following a denationalization process in the early 1990, continues to be listed in the Kosovo cadaster as municipally owned, and is thereafter allocated to a third party by a Municipality.

Concerns have been raised that this restitution process was implemented in an irregular manner by the regime in power back then, as the beneficiary property rights holders were mainly Kosovo Serbs. Moreover, not all decisions were recorded in the cadaster at that time, due partly to the need to pay compensation, taxes or fees, or due to the land register displacement and subsequent reconstruction only appearing in the cadasters in Serbia. The pertinent Yugoslav restitution law¹⁹⁰ has, nonetheless, not been ruled discriminatory, and the decisions made according continue to be considered valid in Kosovo.

In parallel, and as part of the decentralized structure of land registers in Kosovo, the operations of the cadaster are managed by the Municipality Cadaster Offices, which are also considered as 'municipal bodies'.¹⁹¹ This promotes a regime where both the actual ownership, administration and cadaster registration is controlled by the same institutions, the municipalities. This might be to the potential detriment of DPs and minority community members who purport property rights to what are, or have been, properties registered as municipal land.

¹⁹⁰ Law on Restitution of Land, Official Gazette 18/91, 41/91 and 44/91

¹⁹¹ Pursuant Article 5.1 of Law on Cadaster No. 04/-L-013.

This issue highlights the need for increased transparency and potential division of roles in the current land register administration, to ensure that all property rights, including those of the more vulnerable DPs and minority community members, are duly upheld.

Accrued property taxes and utility bills during displacement

Accrued property taxes and utility bills constitute a further impediment for non-majority populations and DPs to enjoy their property rights, especially in terms of due process and equity. **Paragraph 3 of Article 5 of Law No. 03/L-204 ‘on Taxes on Immovable Property’ already foresees that the taxpayer shall be the physical or legal person that actually uses the property if the owner or lawful user of immovable property cannot be determined, or can be determined but has no access to the immovable property.** Nonetheless, selective interpretation of this paragraph has allowed Kosovan institutions at the municipal level to hold DPs liable to pay property taxes that were left unpaid by an occupant of the property or a third party.

However, if DPs do not exercise possession, or receive rental income from their property, it is unfair to compel them to pay for utility bills and taxes, and to be penalized for outstanding payments, especially given that they often do not have access to the utility company or tax offices. Therefore, finding solutions how to implement this legal provision is key. Based on our fieldwork, it is still unknown if any and how many DPs or persons belonging to minority communities have been exempted from back payments based on this article. The competent municipal tax-collecting bodies must find proper mechanisms/tools how best to address this issue.

Issues of particular concern for displaced persons are on the one hand **that the issuance of personal documents at municipal level depends on being able to present official records of tax payments,**¹⁹² which constitutes a breach of human rights standards.¹⁹³ On the other hand, **property taxes can only be paid from Kosovo proper,** making it harder for DPs to do so.

As is the case for property tax, a concern about the payment of **utility bills** (electricity and water supplies)¹⁹⁴ is that **there are no provisions in Law No. 03/L-204 that explicitly consider DPs and non-majority persons, who might not be in continual possession of their properties and thus who might incur debts due to illegal occupation and disconnection when they repossess their property.**¹⁹⁵ UNMIK Administrative Direction 2008/5 nonetheless provides that KPA claimants be exempted from paying accumulated municipal public services, including electricity and water bills, during the period they had been prevented from having access to their properties. An amendment to this Administrative Direction has been prepared to regulate accumulated municipal public service matters under the new KPCVA. The KPCVA AD foresees releasing displaced property rights holders for the period during which the property was unlawfully occupied or during the period the property was used based on the Agency’s rental scheme. The entry into force of this regulation is, however, dependent on the new KPCVA mandate and government will.

¹⁹² OSCE Mission in Kosovo report, Access to civil registration in Kosovo, July 2012, <http://www.osce.org/kosovo/92331?download=true>.

¹⁹³ Such as Article 2 of Protocol No. 4 (freedom of movement) of the European Convention on Human Rights and Fundamental Freedoms (ECHR), Article 12 (the right to marry) of the ECHR, and Article 16 (the right to recognition as a person before the law) of the International Covenant on Civil and Political Rights.

¹⁹⁴ The rules for water supply, as provided by the Law Amending UNMIK Regulation 2004/49 on the Activities of Water, Wastewater, and Solid Waste Service Providers (No. 3/L-086) approved by the Kosovo Assembly on 13 June 2008 in accordance with the Constitution of the republic of Kosovo, follows the same general principles and raises the same issues as electricity utilities, and will not be discussed separately.

¹⁹⁵ Article 33 (2.) of the applicable Law No.03/L –201 ON ELECTRICITY states that ‘the terms and procedures for billing, bill collection, and payment shall be defined in the Regulation on the General Conditions of Energy Supply issued by the Energy Regulatory Office.’

I.3.3 Access to Justice

Legal aid

Law No. 04/L-017 on 'Free legal aid' and the setting up of the Agency for Free Legal Aid (AFLA) establishes three types of criteria that need to be fulfilled in order for individuals to qualify for legal aid. These are: 'qualification'; 'financial' and 'legal'. Accordingly, 'primary legal aid' is provided to all persons who receive social assistance, while 'secondary legal aid' is offered to persons whose family income is lower than average.¹⁹⁶ Most DPs, however, do not qualify for either of these categories. Being displaced, they do not usually receive Kosovan social assistance. On the other hand, although in practice they do not actually possess their property, the value of their property usually exceeds the defined threshold below which they might be eligible for secondary legal aid.¹⁹⁷

As they stand, the qualification criteria remain elusive and too restrictive. While a lack of legal aid services impact majority and non-majority communities alike, statistics provided by the AFLA show that only a very small number of persons belonging to minority communities sought, or succeeded in seeking help with the Agency. Beyond the displacement-related issues faced by DPs in succeeding to seek legal aid assistance, the **lack of financial support and of specialized training in property law are major factors preventing the Agency to reach out to all populations and have a substantial impact in the field of property law.**

The Agency has initiated a request for legislative amendment with the MoJ, which is still pending. The lack of appropriate funding also means that, contrary to the law, the agency's offices do not cover the entire territory of Kosovo (only 5 offices for the entire territory – 8 having had to close down for lack of funds).

Language (use of Serbian in different court and administrative proceedings)

Although from a law perspective, Law No. 02/L-37 on the use of languages is a comprehensive legal instrument, a 2014 OSCE report states that 'more than seven years after its promulgation, **the Law remains only partially implemented** due to insufficient human and financial resources, often accompanied by lack of sufficient understanding of obligations and/or lack of political will'.¹⁹⁸ In its 2015 Kosovo Progress Report, the EC furthermore reports that '**significant challenges remain in access to services in official languages both at the central and municipal level, including languages used by minority communities**'.¹⁹⁹ This directly impacts the capacity of DPs and minority communities to exercise their property rights, both at all levels.

Cost of proceedings and of travel

Article 450 of Law no. 03/L-006 on Contested Procedure provides that: 'Each party carries its own costs caused by its own procedural deeds'. Implicitly, this also includes travel costs. Articles 452 and 453 further elaborate that the losing party is required to pay all costs undergone by the winning party as any costs covered by intermediaries. Article 468, moreover, states that when the payment of those costs would result in harmfully impacting the vital support of the party him/herself and his/her close family, the party will be exempted from paying those fees.²⁰⁰ Exemption from the payment of court

¹⁹⁶ S&D Consulting interview with Ramadan Gashi, Executive Director of AFLA and Anita Kalanderi, Personnel Manager, 15 December 2015. A second interview was conducted with Anita Kalanderi on 16 February 2016.

¹⁹⁷ See: Access to Justice for Internally Displaced Persons from Kosovo, The European Union's Programme for the Republic of Serbia, p. 29.

¹⁹⁸ 2d and 3d paragraph of OSCE report on 'Municipal language compliance in Kosovo' JUNE 2014 <http://www.osce.org/kosovo/120010?download=true>.

¹⁹⁹ 2015 EC Kosovo Progress Report, p. 25.

²⁰⁰ Article 468 para. 1 of Law No. 03/L-006 on Contested Procedure.

fees is to be requested by the party to the proceedings and is decided by the court of first instance.²⁰¹ However, a 2012 report shows that civil courts only seldom rule on those exemption requests in the first place.²⁰² **Under circumstances of displacement and/or precarious socio-economic conditions, the requirement to pay court fees, along with the prospect of having to pay other related costs such as travel costs, is a *de facto* barrier to judicial review. This could be regarded as a restriction to the right of access to court for DPs and non-majority community members.**²⁰³ Moreover, about 6% of KPA claims were dismissed on procedural or jurisdictional grounds. While the KPA arguably provided first instance legal review free of cost, these conflict-related, dismissed restitution claims are now susceptible of being filed through the regular civil court system.²⁰⁴ Therefore, the requirement to pay court fees in conflict-related cases also goes against Pinheiro Principle 13(2) according to which ‘Everyone who has been arbitrarily or unlawfully deprived of property as a consequence of conflict should be able to submit a claim for restitution or compensation free of charge to an independent and impartial body’.²⁰⁵

Fraudulent property transactions and the role of the courts in prosecuting those

Fraudulent property transactions largely took place in the immediate aftermath of the 1998-99 conflict, enabling perpetrators to sell property on behalf of or ‘personally’ by the owners who remain displaced from Kosovo and have not consented to the transaction. In most of the cases the rightful owners have no control over their property, and have only found out about the fraudulent transaction by coincidence, when the transaction was already completed and someone else was registered as the owner. The legitimate owners were usually displaced from Kosovo and had no access to cadastral records. They were thus unaware that their property had been transacted, and even registered by the buyer in the cadaster.²⁰⁶

In addition, there are instances where people forged documents in order to sell unoccupied immovable properties. Forgers take advantage of the current situation of displacement of real owners and, using falsified documents, follow formal procedures of verification to ‘legalize’ the fraud. Such illegal property ownership transfers have in some cases also resulted in inaccurate property registration in the cadaster.

These fraudulent transactions should be legally processed at two levels: through criminal procedure in order to establish their existence and through civil procedure in order to declare the fraudulent contracts null and void. Challenges to the resolution of these issues are the lengthy time of resolution, both of civil and criminal proceedings. Also, authorities have not been very forthcoming in prosecuting and trying the perpetrators of such cases. Prosecutors sometimes appear to have undercharged the suspects as well.

²⁰¹ Article 469 of Law No. 03/L-006 on Contested Procedure.

²⁰² ‘Access to Justice for Internally Displaced Persons from Kosovo’, The European Union’s Programme for the Republic of Serbia 2012, p.s 23-4.

²⁰³ See *Kreuz v. Poland*, Application No 28249/95, 19 June 2001. See also *Weissman and Others v. Romania*, no. 63945/00, 24 May 2006.

²⁰⁴ See KPCC DEC 135, para 15: ‘Claims which are dismissed as falling outside the Commission’s jurisdiction or for procedural reasons and not on account of the merits of the claim may be capable of resolution through the local courts, subject to the applicable law. In such claims the Commission’s decision does not constitute a *res judicata*’.

²⁰⁵ The same principle is implicitly contained in article 29.2 of the IDP Guiding Principles according to which competent authorities have the duty to assist returned and/or resettled displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon displacement.

²⁰⁶ The OSCE identified a significant number of sales of property belonging to displaced Kosovo Serb that were sold without their knowledge. The means by which these properties were sold varies but include falsified personal identification documents, and court stamps. According to OSCE findings, properties appear to have been sold fraudulently through various methods: a) with powers of attorney certified with a false court stamp, b) with powers of attorney certified in courts outside Kosovo with a regular court stamp but by using falsified identification documents, c) by certifying contracts before Kosovo courts using falsified identification with the name and surname of a real owner, and d) by using falsified court judgments to register property in cadastral books. See: OSCE Report ‘Fraudulent Property Transactions in the Pejë/Peć Region’, August 2009, p. 5.

Moreover, civil courts appear to often have failed to declare the fraudulent transactions null and void, even if the same case had been previously tried in a criminal court in favor of the plaintiff (thus going against Article 14 of the Law on Contested Procedure according to which the civil court should be bound to the effective judgment of the criminal court by which the defendant was found guilty).

In order to provide plaintiffs with an effective remedy, additional issues need to be taken into account, especially regarding the subsequent reselling of properties that were originally sold/acquired fraudulently: should there be a presumption that purchasers immediately after the conflict should be held strictly liable if the purchase was based on fraud and be required to release the property? If the property was bought and sold several times, should the last, bona fide purchaser be required to give up the property? If not, should the DP be entitled to receive compensation for his or her property sold fraudulently? Policy should also be developed to determine the status of bona fide purchasers who bought property without knowledge of the fraud and paid value for the property.

Additional safeguards to mitigate opportunities for fraud might include requiring registration of all HPCC/KPCC decisions in the cadaster to provide cadastral officials with notice about properties that were lawfully possessed by DPs at the time of the conflict.

1.3.4 Other issues

Social housing/Land Allocation

Provisions have been made to assist repatriated persons with temporary shelter and provisional housing through Law No. 03/L-164 on Housing Financing Specific Programs and Law No. 04/L-144 on Allocation for Use and Exchange of Immovable Property of the Municipality. **However, municipalities have not made a consistent and regular use of this legal framework to assist repatriated persons.**²⁰⁷ As such, repatriated DPs are at risk of becoming permanently displaced persons. Another issue concerns the stalling at central level in adopting a three-year Kosovo-wide strategy on Social Housing.²⁰⁸

Roma camps/settlements (issues of the non-implementation of the Law on Spatial Planning and of the pending approval and implementation of the Strategy for Regularization of Informal Settlements)

As noted by the OSCE in a 2014 report,²⁰⁹ there are still about 100 informal settlements inhabited by different ethnic communities, the majority being Roma, Ashkali and Egyptian.²¹⁰ People living in such camps experience residential segregation, very poor housing conditions and poor access to basic services and urban infrastructure, including water, electricity, waste collection and adequate public transportation and roads.²¹¹ Beyond this, however, the major property-related issues they face are **the lack of secure tenure, often due to a lack of property documentation or unregistered constructions and the lack of assistance in reconstructing properties destroyed during and after the armed conflict of 1998-99.** The OSCE reports little progress in the legalization of informal settlements: the Strategy for Regularization of Informal Settlements 2011-2015 is still pending approval with the Office of the Prime Minister. Although most municipalities (almost all, except the northern municipalities) have approved spatial plans that include informal settlements as required by

²⁰⁷ See: 'An Assessment of the Provision of Social Housing by Municipalities in Kosovo', OSCE, December 2013 and 'An Assessment of the Voluntary Returns Process in Kosovo' OSCE, October 2014, p. 25.

²⁰⁸ EU progress report 2015 p. 23.

²⁰⁹ 'An Assessment of the Voluntary Returns Process in Kosovo' OSCE, October 2014, p. 15-16

²¹⁰ Identified by the government in its Strategy and Action Plan for Prevention and Regularization of Informal Settlements in Kosovo 2009-2015 'Abandoned Minority' ERCC, December 2011, p.51

²¹¹ See: Faces of Poverty, Faces of Hope: Vulnerability Profiles for Decade of Roma Inclusion Countries', Bratislava: UNDP, 2005.

the Law on Spatial Planning, **the implementation of these plans and their harmonization in accordance with the new requirements of Law no.04/L-174 on Spatial Planning seems to be pending.**²¹²

2. POTENTIAL SOLUTIONS BASED ON NATIONAL AND INTERNATIONAL BEST PRACTICE

2.1 Legal Aid

Although the modalities for free legal aid have improved in the last few years, the existence of the Agency for Free Legal Aid remains unknown to more than 50 per cent of the population in Kosovo. Moreover, as they stand, the AFLA qualification criteria as defined in Law No. 04/L-017 constitute a barrier for DPs, returnees and refugees to benefit from the program. Finally, a lack of expertise in property law and of funding jeopardizes the agency's capacity to fulfill its mandate.

Beyond amending Law no.04/L-017 to explicitly include DPs, returnees and refugees as categories of persons formally eligible to receive legal aid, adopting the criteria used by the UNHCR for assessing and prioritizing legal aid needs of all categories of applicants would be an appropriate solution to make AFLA a more inclusive platform for free access to justice.

The following criteria, based on UNHCR guidelines,²¹³ could serve as a baseline to establish clients prioritization: Poverty/Income (although dispossessed property should not be counted in the income calculation); female or male single head of household; physical disability; mental disability; lack of or limited freedom of movement; security concerns; unaccompanied/separated minor; elderly; sexual and gendered-based violence survivor; discriminatory practices.

2.2 Notification

The issue of notification covers the full legal institutional spectrum. The challenge to locate parties involved in a court procedure means that temporary representatives are too often called in, which has bad consequences with regard to the right to a fair trial, especially for displaced persons and minorities involved in property cases.

Moreover, while notification by publication is prescribed as a reasonable means of notification in several laws, including the law on privatization, liquidation, expropriation and demolition of illegal structures, it has obvious flaws. According to a recent STIKK report, Kosovo enjoys a 76,6% Internet penetration rate based on users.²¹⁴ Websites, social media and e-Governance (as well as mobile telephones) thus create significant opportunities to disseminate notice globally and to meet due process standards for notice. This said, the number of DPs and non-majority community members who receive information of these legal procedures by reading the newspaper, watching a TV add broadcast in Kosovo, or surfing the Internet remains open to question. Notification by publication

²¹² Law No. 04/L-174 on Spatial Planning, 7 September 2013, Article 15 and 16.

²¹³ As used by CRP/K. See also: <http://www.unhcr-centraleurope.org/en/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines.html>

²¹⁴ Kosovo Association of Information and Communication Technology (STIKK), Internet Penetration and Usage in Kosovo, 2013, p. 9, 18. According to the same report, the internet penetration rate based on households is 84,8 %.

might thus not be appropriate considering that DPs and minorities might not easily have access to such published material. Three alternative solutions to notice by publication can already be found in Kosovo law:

1. Article 4 paragraphs 3.5 and 3.6 of *Law 04 L-188 on the legalization of unpermitted constructions* suggests that a collaboration be set up between municipalities involved in the legalization process and international agencies such as the UNHCR, or national agencies that have liaison offices in Serbia such as the KPA, in order to implement a notification mechanism across national borders. This provision, which could also be applied to other processes such as court notification, expropriation or privatization, has however not been implemented yet.
2. Article 113.2 of the Law on Administrative Procedure requires that ‘in special cases by the nature of the act, the person shall be invited to be personally serviced the act’. A situation of displacement and/or of lack of access to information should be considered in line with Article 113.2 as a ‘special case’. DPs and persons belonging to minority communities should therefore, according to the law, be notified in person of the ongoing legal procedure. The practical feasibility of such clause is of course problematic, especially if international notification is required.
3. As noted in Pillar 3, The Law on Contested Procedure covers number of situation on how service should be executed. However, it fails to address the situation where the address of the respondent is unknown. Notification of parties through diplomatic channels when they live abroad is also difficult as it entails extensive deadlines (most states require that summonses be received by their central authorities at least two months before the date of the hearing indicated in the summons). Fraught diplomatic relations between Kosovo and Serbia further complicates this possible course of action.

On top of these solutions based on national law, German and Polish expropriation laws²¹⁵ suggest that a good way to force institutions to effectively notify parties is to require their physical involvement from an earlier stage in the procedure by promoting mediation as first course of action. While this obviously wouldn’t apply to all the legal procedures mentioned in this note, it could possibly be applied to privatization and expropriation.

Lastly, the legal principle of ‘constructive notice’, or the legal fiction according to which ‘reasonable’ persons are supposed to have made enquiries relating to certain facts and are therefore supposed to know those facts, even if in practice they don’t, could also be applied to legal procedures that, based on the Law on Administrative Procedure, would require notification in person. As discussed in the PRP ‘Informality in the Land Sector: The Issue of Delayed Inheritance in Kosovo’ (Delayed Inheritance) report, constructive notice would resolve the issue of insufficient notification discussed above: ‘Constructive notice can both provide effective due process to displaced persons while allowing their claims to move forward to a final disposition more efficiently’.²¹⁶ From a black letter law perspective, constructive notice would indeed be a neat and effective solution. However, some questions remain as to the appropriateness of the application of such principle in the context of DPs especially. Can a displaced person be considered a ‘reasonable’ person? Does potential access to social media and the internet make a person ‘reasonable’ *per se*? Could one reasonably assume that persons such as DPs (or minorities for that matter) — people living in dire condition — check all the different government institutions’ websites on a regular basis in order to make enquiries relating to their potential rights? As mentioned in the Delayed Inheritance report, ‘attitude change’ and raising public awareness would be crucial elements for constructive notice to be effective. Finally, should ‘constructive notice’ be applied to such extraordinary legal procedures such as legalization while in other legal systems it usually applies to more mundane procedures such as property transaction, contract, etc.?

²¹⁵ See ‘Land Expropriation in Europe’, January 2013, p. 16: <http://www.mreza-mira.net/wp-content/uploads/Expropriation-in-Europe-Jan-2013.pdf>.

²¹⁶ Draft Report, “Informality in the Land Sector: The issue of Delayed Inheritance in Kosovo”, page 5

3. RECOMMENDATIONS REGARDING KEY POLICY MEASURES

The policy recommendations as detailed below can be defined broadly as pertaining to four different categories of measures to be taken. First, the issue of access to information, which regards improving the **processes of notification** and increasing knowledge about available support measures for concerned parties. Second, a series of **legislative changes** are necessary to streamline legislation, make it compatible with European and international guidelines, and remove/amend potentially discriminatory articles to promote minority rights. Third, laws and judicial decisions need to be **enforced**, which requires strengthening the institutional capacities of implementing institutions but also — the fourth point — additional **funding** for enforcement and accompanying measures. These measures are diverse; a holistic approach to strengthening property rights for minorities and DPs will require a consolidated policy strategy. Most importantly, however, in line with Administrative Instruction No. 02/2012 on the ‘Procedures, Criteria and Methodology for the Preparation and Approval of Strategy Documents and Plans for their Implementation’, which has been approved by the Government of Kosovo, these policy guidelines and the measures outlined therein need to be endorsed by political actors at the highest level in order to actually be implemented.

3.1 Policy Measure #1: Provide Displaced Persons with Fair Effective and Final Remedy and Prevent Illegal Reoccupation

- Introduce a monitoring system for property under KPA administration in order to prevent re-occupation.
- Develop an effective set of final remedies for KPA claimants under KPCVA legislation.
- Develop instruments to prevent serial re-occupations after KPA evictions and improve response times and resolution mechanisms in case of occurring re-occupation, particularly at the prosecution and judicial levels.
- Effectively prohibit re-litigation of already validly adjudicated HPCC and KPCC disputes.
- Create an institutional mechanism to enforce decisions to destroy unlawful third-party constructions (in line with Constitutional Court ruling).

Policy measure #1	Provide Displaced Persons with Fair Effective and Final Remedy and Prevent Illegal Reoccupation
Policy measure #1.1	<i>Prevent illegal occupation of properties under KPA administration in case administration is discontinued</i>
Solution	Introduce a monitoring system for property under KPA administration
Output	Effective protection of DP properties
Outcome	Final legal remedy implemented
Indicator	Vacant properties protected against illegal occupation
Policy measure #1.2	<i>Develop an effective set of final remedies for KPA claimants under KPCVA legislation</i>
Solution	Amend KPCVA draft law to include alternative remedies in addition to closure and eviction
Output	Effective protection of DP properties

Outcome	Final legal remedies delivered
Indicator	KPCVA provides balanced and sustainable legal solutions for DPs and minorities
Policy measure #1.3	<i>Prevent serial re-occupations after KPA evictions and improve response time and resolution mechanisms in case of re-occurring occupations, particularly at the prosecution and judicial levels</i>
Solution	<p>Provided costs are not to be borne by claimants, subsequent evictions of after 2d KPA to be undertaken by private bailiffs. Alternatively, amend KPA bylaws to allow the institution to re-evict as many times as necessary</p> <p>Ensure that cases are being regularly followed-up with Kosovo Police and the prosecutors²¹⁷</p> <p>Ensure that courts treat re-occupation cases according to due process</p> <p>Apply lessons learned under 2.3</p>
Output	KPA legal remedy efficiently implemented
Outcome	Successful KPA or HPD claimants are able to repossess (or sell) their properties
Indicator	Serial re-occupations substantially diminished
Policy measure #1.4	<i>Effectively prohibit re-litigation of already validly adjudicated HPCC and KPCC disputes</i>
Solution	Provide information and training to all civil court judges on the competences and jurisdiction of the KPA, as well as their precise jurisdiction regarding the resolution of that were not filed with the KPA in the first place
Output	Increased legal value of HPCC and KPCC decisions
Outcome	<p>Efficient enforcement in line with the European Commission for the Efficiency of Justice's good practice guide on 'enforcement of judicial decisions' (2015)</p> <p>Achievement of targets set in the National Backlog Reduction Strategy (2013) and the Kosovo Judiciary Strategic Plan 2014-2019</p>
Indicator	Number of re-litigations substantially reduced
Policy measure #1.5	<i>Enforce decisions to destroy unlawful third-party constructions</i>
Solution	Provide appropriate funding, infrastructure and political support to the KPA to implement destruction of structures
Output	KPA legal remedy efficiently implemented
Outcome	No more unlawful third-party constructions; existing structures destroyed or rightful property rights holders compensated
Indicator	Enforcement of Constitutional Court ruling
Policy measure #1.6	<i>Consider applying compensation as final remedy after KPCC adjudication for compensation claims filed in civil courts</i>
Solution	Strengthen the civil courts' capacity to efficiently deal with KPA compensation claims that were dismissed on jurisdictional grounds

²¹⁷ For a more comprehensive list of recommendations, see: 'Review of Illegal Re-Occupation Cases in Kosovo', OSCE, January 2015, p. 25

Output	Application of the UN principle of adequate compensation, ²¹⁸ and Pinheiro Principles 21.1 and 21.2
Outcome	Compensation mitigates against costly future reparation claims at the European Court of Human Rights and other international Human Rights bodies, once Kosovo becomes a signatory state
Indicator	Compensation mechanism in place

3.2 Policy Measure #2: Develop and Implement More Robust and Enhanced Notification Procedures and Streamline Due Process

- Amend Law 04 L-188 on the legalization of unpermitted constructions to ensure effective notification (special case scenarios and, possibly, ‘constructive notice’).
- Improve notification mechanisms regarding the privatization, liquidation and expropriation where DPs’ and minority communities’ interests are at stake.
- Ensure that all efforts to contact DPs are exhausted before nominating a temporary representative, and set up a procedure to ascertain the quality of the representation.
- Implement new Amendment’s exemption for DP owners from payment of accumulated property tax during the period they had been prevented from accessing their properties.

Policy measure #2	Develop and implement more robust and enhanced notification procedures and streamline due process
Policy measure #2.1	<i>Amend Law 04 L-188 on the legalization of unpermitted constructions to ensure effective notification</i>
Solution	For unlawful structures where no applications for legalization were made, in the case of displaced persons or members of a minority community, undertake further actions to notify these persons of the legalization process and the possibility to appeal (see 2.2 on special case notification); Extend the deadline for application and organize information campaigns Prevent approval for legalization of structures deemed illegal by final administrative or judicial act
Output	Include special case scenarios in demolition-related provisions of the Law for Treatment of Constructions without Permit (Law 04 L-188) Apply ‘constructive notice’ provided all necessary human rights safeguards are in place
Outcome	Increased percentage of DPs and persons belonging to minority communities properly informed of legalization procedure in accordance with article 4 paragraph 3.5 and 3.6 of the Law
Indicator	Increased percentage of DPs and persons belonging to minority communities properly informed of legalization procedure in accordance with article 4 paragraph 3.5 and 3.6 of the Law
Policy measure #2.2	<i>Implement effective notification mechanisms in privatization, liquidation and expropriation</i>
Solution	Use best practice guidelines on effective notice (see 2.2)
Output	Effective notice ensured

²¹⁸ See the report of the United Nations Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees, UN Doc. A/41/324, 13 May 1986, para. 66(f), endorsed by G.A. res. 41/70 of 3 December 1986.

Outcome	Sustainable and fair procedures
Indicator	Ensure the integrity of the privatization, liquidation and expropriation processes against potential scrutiny by international human rights bodies Kosovo might join in the future
Policy measure #2.3	<i>Ensure that all efforts to contact DPs are exhausted before nominating a temporary representative, and set up a procedure to ascertain the quality of the representation</i>
Solution	Use best practice guidelines on effective notice (see 2.2) Draft the specifics of the quality-check procedure (including PoA verification) Establish extended periods of appeals for claims already adjudicated under 'temporary representatives' and issue an instruction to judges to automatically approve fee exempt Motions to Reopen cases of DP claimants and claimants living in informal settlements
Output	Number of temporary representatives substantially reduced and/or quality of the representation improved
Outcome	Substantially reduced number of appeals
Indicator	Not residing in Kosovo no longer undermining equal rights of representation in court
Policy measure #2.4	<i>Implement new Amendment's exemption for DP owners from payment of accumulated municipal public services during the period they had been prevented from accessing their properties</i>
Solution	Implement article 5 of Law No. 03/L-204 'on Taxes on Immovable Property' whereby in case the property rights holder does not have access to the related property, any occupant of the latter would be the primary tax subject Implement Administrative Instruction on 'Exempting property rights holders from payment of utilities for properties under KPCVA administration'
Output	Improved tax collection
Outcome	Discourage illegal occupation by making it less financially lucrative
Indicator	Tax collection fair and streamlined

3.3 Policy Measure #3: Access to Justice

- Amend Law No.04/L-017 in order to create a more inclusive platform for free legal aid, explicitly including DPs and persons residing in informal settlements facing property issues in Kosovo as beneficiaries. Also, substantially increase government funding for the free legal aid program.
- Allocate more financial and institutional resources to the effective implementation of the principle of equality of all official languages in judicial and administrative proceedings.
- Introduce state-wide, unified court fee regulations whereby DPs in precarious socio-economic conditions are exempted from paying court expenses (DPs' occupied properties should not be counted as personal wealth).
- Strengthen actual procedures to effectively tackle fraudulent transactions, both with respect to the establishment of their nature (criminal procedure) as well as their declaration as null and void (civil procedure).

Policy measure #3	Access to Justice
Policy measure #3.1	<i>Amend Law No.04/L-017 on Free Legal Aid and secure funding</i>

Solution	For DPs and persons residing in informal settlements in Kosovo, proof of property-related issue sufficient to receive legal aid Apply UNHCR prioritization criteria (see 2.1) Increase government funding by 60 to 70%
Output	Substantial increase in number of DPs and minorities who would be benefitting
Outcome	Inclusive and efficient free legal aid
Indicator	Clear demonstration of AFLA's involvement and positive effect on DP and minority communities property issues
Policy measure #3.2	<i>Allocate more financial and institutional resources to the effective implementation of the principle of equality of all official languages in judicial and administrative proceedings</i>
Solution	Raise public awareness on language rights, as well as on the role and mandate of the Office of the Language Commissioner, including available compliant mechanisms as foreseen by Regulation 07/2012 Broad-scale monitoring instead of complaint-driven monitoring; Development of standardized bilingual forms to be used by all Kosovo courts Amend Law on Contested Procedure to include a provision stipulating that the legal time-limits shall run only from the moment each party receives a court order, instruction or decision in the official language chosen by the party ²¹⁹
Output	Removing of language barriers
Outcome	Compliance with policy recommendations of the European Charter for Regional or Minority Languages (1992, CETS 148), especially parts II and III
Indicator	Implementation of the principle of equality of all official languages substantially Improved
Policy measure #3.3	<i>Introduce state-wide, unified court fee regulations whereby DPs in precarious socio-economic conditions are exempted from paying court expenses</i>
Solution	Amend Article 7.2 of Administrative Instruction No. 2008/02 on Unification of Court Fees. ²²⁰ Amend Article 450 of the Law on Contested Procedures to insure that non-payment of court fees in other litigations does not prevent claimants to submit other claims or petitions, if such a claim or petition is accompanied by an application for exemption of payment of court fees and proceedings.
Output	Access to justice for DPs and minorities made easier
Outcome	DPs and minority persons are empowered to defend and assert their property rights, irrespective of their financial situation
Indicator	State-wide, unified court fee regulations applied

²¹⁹ See the Report on 'Municipal language compliance in Kosovo', OSCE, June 2014, p. 25–27 and the report on 'Access to Justice for Internally Displaced Persons from Kosovo', June 2012 of The European Union's Programme for the Republic of Serbia, p. 22-23.

²²⁰ Amend as follows: 'Unless evidence is presented to the contrary, the judge assigned to the case shall presume that a person cannot afford to pay a fee as described in Section 7.1 if: [c. The person can provide evidence that he or she has a status of a displaced person and that the claimed violation of the property right is consequence of conflict and/or displacement.]'.

Policy measure #3.4	Strengthen actual procedures to effectively tackle fraudulent transactions, both with respect to the establishment of their nature (criminal procedure) as well as their declaration as null and void (civil procedure)
Solution	Police and public prosecutors to swiftly and rigorously investigate and prosecute criminal activities related to property transactions Courts to systematically declare the fraudulent contracts as null and void
Output	Procedures to effectively tackle fraudulent transactions enforced
Outcome	Increased overall trustworthiness of land registers; increase in the number of transactions and investments in the property sector
Indicators	Number of fraudulent transactions substantially reduced

3.4 Policy Measure #4: Other issues

- Effectively and consistently implement Law No. 03/L-164 On Housing and Financing Specific Programs and Law No. 04/L-144 on Allocation for Use and Exchange of Immovable Property of the Municipality to ensure sustainable housing solutions for repatriated persons
- Approve, extend and fully implement the Strategy for Regularization of Informal Settlements 2011-2015.

Policy measure #4	Other issues
Policy measure #4.1	<i>Implement legislation to ensure sustainable housing solutions for repatriated persons</i>
Solution	Prevent delays caused by the respective municipality when allocating municipal land for use; The decision of the Municipal Assembly must stipulate the criteria for allocating municipal land for use, according to which are the beneficiaries (individual names) and the duration of use are determined; User rights registration procedure regarding the over the municipal land must be completed <i>ex officio</i> by the municipality itself in order to secure the tenancy rights of beneficiaries
Output	Law No. 03/L-164 on Housing Financing Specific Programs and Law No. 04/L-144 on Allocation for Use and Exchange of Immovable Property of the Municipality enforced
Outcome	Ensure sustainable returns
Indicators	Substantial improvement in municipalities' monitoring and implementation of social housing schemes
Policy measure #4.2	<i>Approve, extend and fully implement the Strategy for Regularization of Informal Settlements 2011-2015</i>
Solution	Review strategy to reflect current situation and implement strategy accordingly Municipalities to harmonize and implement spatial plans
Output	Measurably improved standards of living for Romas and other minority communities in compliance with applicable laws
Outcome	The fundamental right to adequate housing ²²¹ is duly implemented

²²¹ Article 25 of the Universal Declaration of Human Rights, <http://www.un.org/en/universal-declaration-human-rights/>.

Indicators	Appropriate legal instruments for the legalization of informal settlements implemented
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PILLAR # 5
GUARANTEE AND
ENFORCE THE
PROPERTY
RIGHTS OF
WOMEN

ANNEX 4

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1. RATIONALE

1.1 Situation Assessment

In Article 46 of Kosovo's Constitution citizens are guaranteed the right to own property. Yet women face impediments to achieving this right, a matter that warrants attention, as obstacles to women's property ownership hamper both economic growth and social welfare. When women do not control property they cannot be full economic actors. Addressing the issue of women's property ownership will strengthen the rule of law, promote economic growth and support EU integration. Moreover, women's asset ownership has been demonstrated to have a positive benefit for the well-being of families.

Context

Economic growth in Kosovo has been an ongoing and significant concern for citizens and for the government. Kosovo is managing major economic challenges from three main sources: a post-war economy; problems of non-recognition; and the incomplete privatization of socially owned enterprises. Economic growth is essential to provide for the 40,000 young men and women who finish their studies every year and begin looking for jobs.²²² Now that Kosovo is on the path towards European Union membership, it is developing laws and an institutional setting that will facilitate its engagement with the EU while promoting economic growth. Creating a modern, efficient and fair system of property rights in Kosovo is the foundation for economic growth.

Gender equality is a stated goal of the Government of Kosovo which is committed to apply the Convention on the Elimination of All Forms of Discrimination against Women and protects gender equality by law.²²³ The Government would like to increase the labor force participation of women.²²⁴ Gender equality is also a significant human rights concern as there are obvious and harmful problems of discrimination in Kosovo affecting women and children. The UNDP ranked Kosovo as 0.76 on its Gender Development Index, the lowest in the Balkan region.

Currently, Kosovo has one of the lowest rates of women's economic participation of any country in the world. The chart below, which uses data from the World Bank, demonstrates that Kosovo's labor participation rate for women is below Albania, Macedonia, and Serbia.²²⁵ Even taking into account that many women may work in the agricultural sphere and do not report themselves as employed when working on family farms, this is very low. Low rates of women's labor force participation is important, as the most recent research on the subject indicates that increasing women's economic engagement is correlated with 'higher growth, more favorable development outcomes, and lower income inequality.'²²⁶

Figure 1: Female Participation Rate for Selected Countries 2002-2013

²²² Dérens, Jean-Arnault, and Bashkim Iseni. "Serbia/Kosovo: The Diaspora Can Be an Important Pillar of Development." *Interview*, edited by Thomas Jenatsch and Cyril Werndli. Bern: Swiss Agency for Development and Cooperation, 2009, <http://reliefweb.int/report/serbia/serbiakosovo-diaspora-can-be-important-pillar-development>.

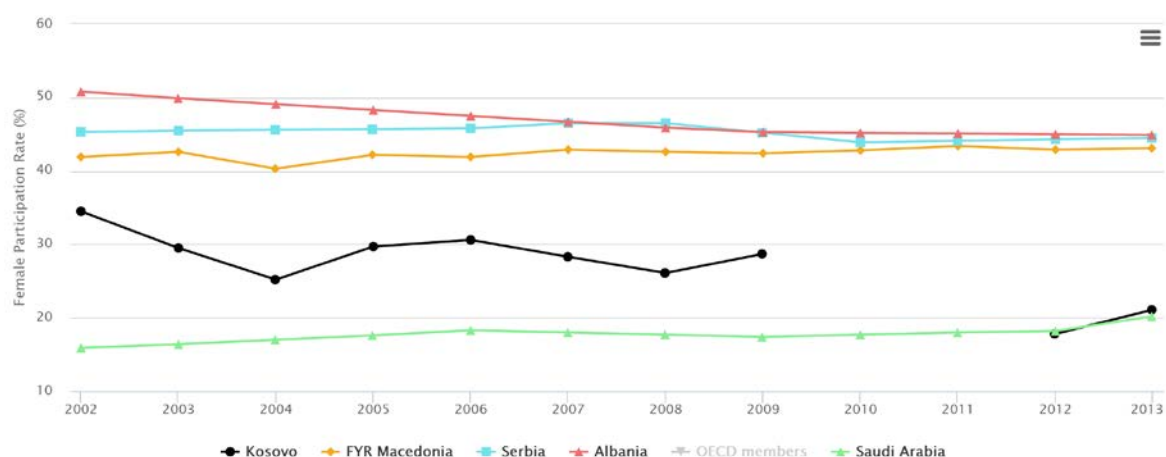
²²³ Assembly of Kosovo. 2015. "Law on Gender Equality." In *05/L-020*. Pristina, Kosovo.

²²⁴ Draft PLAN document

²²⁵ Romero, Brett. 2015. *Women in the Workplace – Where is Everyone?* OpenData Kosovo, August 11, 2015 2015 [cited December 16 2015]. Available from <http://opendatakosovo.org/blog/women-in-the-workplace-where-is-everyone/>.

²²⁶ Gonzales, Christian, Sonali Jain-Chandra, Kalpana Kochhar, Monique Newiak, and Tlek Zeinullayev. 2015. "Catalyst for Change: Empowering Women and Tackling Income Inequality." In *IMF Staff Discussion Note*. Washington, DC: International Monetary Fund. <https://www.imf.org/external/pubs/ft/sdn/2015/sdn1520.pdf>.

ANNEX 4



Source: Romero, 2015

The low percentages of women's overall economic engagement is also reflected in the percentages of women who are in management positions in businesses or own a business themselves.

Table I: Economic Engagement of Women in the Balkans²²⁷

Country	% of Firms with Female Ownership, 2009	% of Firms with Female top Manager, 2009
Kosovo	10.9	.3
Macedonia FYR	36.4	19.1
Montenegro	26.0	24.5
Serbia	28.8	15.9
Bosnia and Herzegovina	32.8	13.5
Bulgaria	33.9	25.8
Romania	47.9	24.7
Hungary	42.4	13.8

Source: GenderStats, The World Bank and UNDP

Women need to fully participate in the economy in order for the country to achieve higher rates of growth. The lack of women's economic participation in the economy is not the result of lower levels of educational achievement. Indeed, data from the Kosovo Statistical Agency shows that the percentage of girls in public, upper secondary education from 2012-2014 was 47% across reporting municipalities. Women are being educated at a slightly less than equal rate, but are not economically engaged at anywhere near the same rates as men or to the level for which their educational achievements prepare them.

In Kosovo women have legal property rights, but struggle to overcome cultural barriers to the use of those rights and a culture of informality which excludes them from property ownership. According to the 2011 census women make up 49.6% of the Kosovo population, yet only 15.24 % of women have property registered in their name. In this regard, Kosovo lags behind other countries in the region.²²⁸

²²⁷ Joireman, Sandra F. 2015. "Resigning their Rights? Impediments to Women's Property Ownership in Kosovo." In *Global Trends in Land Tenure Reforms: Gender Impacts*, ed. C. Archambault and A. Zoomers. New York: Routledge.

²²⁸ Tonchovska, Rumyana, Kathrine Kelm, and Renee Giovarelli. 2014. "ICT in Support of Evidence Based Policy Making: Land and Gender in the Western Balkans." In *World Bank Land and Poverty Conference*. Washington, DC: World Bank, pg 4. The same study identified female ownership of property in the following countries as: Albania 29%, Federation of Bosnia and

Women's asset ownership is critical as it is directly related to their income earning potential. The legal recognition of women's property rights is a key component to their role as economic actors.²²⁹

Issues

Women have not yet reached parity in their educational attainment rates related to men. In the labor market employers complain of skills shortages, while the unemployment rate remains high.²³⁰ This is suggestive of problems in the nature and quality of the educational system. For both women and men, a skills deficit will impact their ability to find employment, but again women are disproportionately underrepresented. That said, women are clearly using their education and literacy in areas outside of employment. The internet penetration rate for Kosovo is 76.6%, a rate comparable to most developed countries and half the users are female.²³¹

An overall low quality of education contributes to an environment in which there is a lack of awareness regarding the benefits of formalized property rights and the mechanisms via which formalization occurs. It is unusual for people in Kosovo to formalize property transfers within the family or to formalize inheritance. Homes and farms are often passed from father to son informally and property is frequently titled in the name of an older male relative, often long dead. In a National Baseline Survey conducted in Kosovo in 2015, 57% of respondents said their birth family had never gone through an inheritance proceeding.²³² The survey also showed a general lack of knowledge about the basic documents needed to make a real estate transaction. 39.3% of respondents of Albanian ethnicity, 42% of non-Serb minority ethnicities and 23.9% of Serb respondents claimed to have knowledge of basic documents needed to make a real estate transaction.²³³ Without the habitual practice of formalized inheritance, there are generations of Kosovars who do not see the importance of formal property ownership and inheritance or know the mechanisms via which it occurs.

The lack of formalization is evident in other areas of the culture and economy as well. Informal marriages are common in Kosovo. Often people do not register marriages or have marriages officiated by someone who is required to register them. Instead people have a family wedding and then consider themselves to be married when they begin cohabitation. A similar informality is evident in inheritance; when someone dies a family will transfer their property without updating the cadastral registry or going through the courts or a notary to formalize inheritance.

Informality impacts women in multiple ways. The most basic of which is that they are rarely recognized as property owners in either a sole or joint capacity. Upon marriage, women typically move into a home owned by the husband or into his family's home. Since a family home might be registered in the name of an older male relative, it is not necessarily the titled property of the male head of household and would therefore not become the property of his wife if he died. The baseline survey showed that 29% of women stated that are not owners of any immovable property, as opposed to 17% of men.²³⁴

Without asset ownership women are restricted in their ability to start businesses and access bank loans significantly limiting their role as economic actors in the Kosovo economy. Ownership of

Herzegovina – 25%, Bosnia and Herzegovina – Republica Strpska - 30%, Republic of Serbia – 39%, Montenegro 26%, FYR Macedonia – 17%.

²²⁹Hallward-Driemeier, Mary, and Tazeen Hasan. 2013. *Empowering Women: Legal Rights and Opportunities in Africa*. Washington, DC: International Bank for Reconstruction and Development.

²³⁰ Gallopeni, Bujar. 2013. "The (Mis)Match between supply and demand labor systems in Kosovo on employability skills: The moderating effects of personal attributes in transition to employment." *Business and Economic Horizons* 9 (2):34-52.

²³¹ Fazliu, Agron. 2013. "Depërtimin dhe Përdorimin e Internetit në Kosovë." Pristina, Kosovo: Shoqata e TIK te Kosovës (STIKK) p. 18.

²³² Tetra Tech. 2015. "National Baseline Survey for Property Rights in Kosovo." Pristina: USAID Property Rights Program, p.v.

²³³ Tetra Tech. 2015. "National Baseline Survey for Property Rights in Kosovo." Pristina: USAID Property Rights Program, p. 12.

²³⁴ Ibid, p.13.

property allows women to start their own businesses and can give them the capital necessary to do so through mortgages. In Kosovo not only are women far less likely to own property, they also "... mortgage their property much less often than men. In the other countries, even when the amount of land women own is low, the number of mortgages is proportionally higher. However, in Kosovo, men use their property as collateral ten times more than women."²³⁵ If women cannot start businesses or own assets they are also unlikely to be able to become self-employed or to employ others, thus harming the overall employment and growth rates.

Gender equality is a founding value of the European Union. As Kosovo moves toward EU integration, it will harmonize laws and policies with EU standards. This means developing laws, policies and practices that promote gender equality with the goal of achieving tangible outcomes. The EU has recently recast its gender equality directives to cover equal pay, equal treatment, equal access, protection for pregnant workers and parental leave, and perhaps most importantly, a new requirement stemming from EU case law that the burden of proof in cases of discrimination within the legal system lies with the defendant.²³⁶

Challenges

Women face a variety of challenges with regard to economic engagement, property ownership and inheritance. Some of those challenges are cultural. As noted above, many women do not own the homes that they live in. The society in Kosovo is both patrilineal and patrilocal, in other words, inheritance follows the male line of descent and women move in with their husband or with his family. Homes are often the primary residence for multiple generations of a family. Immovable property, particularly the family home and land, follows the male line. There is strong resistance to leaving property to women and thereby transferring it outside the family of origin. Moreover, those women who seek to inherit family property often face significant obstacles. Women who claim inheritance rights are thought to shame their family, and harm family relationships, particularly with their brothers. Shame and embarrassment are terms frequently used by women when they describe keeping or inheriting family property.²³⁷ In the baseline survey, 80% of men, and only 47% of women, reported owning property that belonged to their parents.²³⁸ Many women in Kosovo choose to renounce their inheritance rights as a result of these social norms. This is similar to practices in other Western Balkan Countries such as Albania or Bosnia, where there is also a tradition of female renunciation of inheritance.²³⁹ However, women's asset ownership is lower in Kosovo than anywhere else in the Western Balkans.²⁴⁰

Another cultural challenge with regard to women's property ownership is that immovable property that is purchased during the marriage is often registered exclusively in the name of the male spouse, even if the wife has contributed to the purchase. There is then no legal evidence of her contributions or ownership.

²³⁵ Tonchovska, Romyana, Kathrine Kelm, and Renee Giovarelli. 2014. "ICT in Support of Evidence Based Policy Making: Land and Gender in the Western Balkans." In *World Bank Land and Poverty Conference*. Washington, DC: World Bank, p. 24.

²³⁶ European Commission. 2015. *Implementing and modernizing EU legislation on the equal treatment of men and women*. European Commission, 3/6/2015 2015 [cited December 16 2015]. Available from http://ec.europa.eu/justice/gender-equality/rights/european-law/index_en.htm.

²³⁷ Joireman, Sandra F. 2015. "Resigning their Rights? Impediments to Women's Property Ownership in Kosovo." In *Global Trends in Land Tenure Reforms: Gender Impacts*, ed. C. Archambault and A. Zoomers. New York: Routledge and Muhamet Brajshori, Menekse Tokyay, and Ivana Jovanovic. 2012. "Women struggle to have equal access to property." *Southeast European Times*, December 18, 2012, 1.

²³⁸ Tetra Tech. 2015. "National Baseline Survey for Property Rights in Kosovo." Pristina: USAID Property Rights Program, p. 14.

²³⁹ Stanley, Victoria, and Samantha Di Martino. n.d. "Assessing Land Administration Project's Gender Impacts in the Western Balkans ". Washington, DC: World Bank.

²⁴⁰ Land Tenure Team. "Land and Gender – Improving Data Availability and Use in the Western Balkans." In *Newsletter on the Responsible Governance of Tenure*. Rome: FAO, 2014.

Many men and women believe that daughters as well as sons ought to inherit property. 84.2% of women and 75.4 % of men surveyed replied that male and female children should inherit equally. Yet, when that question was narrowed to inheriting property from their natal families only 56% of men and 63% of women agreed.²⁴¹ As the second question did not talk about children, it perhaps encouraged respondents to think about their own claims to property vis-à-vis their brothers and sisters, rather than their own children. The survey results demonstrate more egalitarian attitudes than we see in practice even given the differences in results for men and women. However, as noted above, those who might hold egalitarian attitudes do not necessarily understand or go through the process of formalizing inheritance to make the distribution of their estate between children of both genders a reality.

Constraints

In addition to these cultural challenges, there are legal ambiguities related to women inheriting property. Two will be mentioned here: the first is the disagreement between the Family Law and the Law on Inheritance regarding informal marriages, the second; the availability of two legal fora in cases of uncontested inheritance.

In the Family Law, Article 14 defines Marriage as “a legally registered community of two persons of different sexes, through which they freely decide to live together with the goal of creating a family.” However, people without registered marriages are also viewed to be married (in what is referred to as a ‘factual relationship’ or an ‘out-of-marriage relationship’) if “...they: 1. are eligible to marry, but did not obtain a legal marriage, and 2. have cohabitated openly as a couple.” This is inconsistent with the Inheritance Law which sets much higher standards for the recognition of a spouse in a factual relationship. According to The Inheritance Law, Article 28, “ A man and a woman cohabiting in a non-marital relation may inherit each other as spouses if: a. The non-marital relation with the decedent up to the moment of death has lasted for at least 10 years, or children were born from this relationship, for at least 5 years, and b. At the moment of the decedent’s death, neither of the cohabiters was legally married to a third person, or if the decedent was legally married to a third person, he had filed a petition for divorce or annulment of his marriage, and after his death such petition was found to have merit.” The Article goes on to note that “Cohabiters shall not be compulsory heirs” and “A cohabiter shall not inherit if the couple has not been living together for a long time.”

Cohabitation without a formally recognized marriage puts the cohabiters in a legal grey area with regard to property rights if one of them dies. While their marriage may be recognized by the state, claims on the property of their spouse, if he or she dies, will not be recognized unless they have been living together for 10 years or for 5 years with children. For women, this is particularly problematic as there is legal ground for them to be excluded from inheritance processes. They also need proof of cohabitation, which may be difficult to get if there is a desire by other relatives to exclude them from inheritance.

Ending cohabitation is treated legally as the same as divorce. The Inheritance Law Article 27.2(c) states that the marriage is legally over “If the cohabitation with the decedent ceased to exist due to the surviving spouse’s wrongdoings, or based on a written agreement with the decedent.” Wrongdoings is not further defined and this Article enables an exclusion of spouses from inheritance claims if they cease to cohabit, even if the reason for doing so might be domestic violence. There is also no provision in the Inheritance Law for divorced spouses who are receiving alimony to claim a portion of the deceased’s estate. This could be problematic if the spouse receiving alimony is engaged in the care of minor children, or is too old to find employment. The Family Law is more specific in noting (Article 69) that a factual marriage is viewed as dissolved given “an unreasonable interruption of factual cohabitation for more than one year.”

²⁴¹ The first question was “Do you believe sons and daughters should inherit equally?” The second question was, “In your opinion, should women inherit property from their birth families?” Tetra Tech. 2015. “National Baseline Survey for Property Rights in Kosovo.” Pristina: USAID Property Rights Program, pp. 20-22.

Given the frequency of informal marriages in Kosovo, The Inheritance Law provides insufficient protection for spouses in unregistered relationships. Indeed, it strips cohabiting spouses of the title of compulsory heirs and thereby removes them from the first rank of inheritors and allows them to be excluded in cases where there is a written will.

The second ambiguity is the problem with regard to fora in which an inheritance case can be disposed. Currently the Law on Uncontested Procedures identifies the courts as the place where inheritance should be handled, but the Law on Notaries identifies Notaries as the proper venue for inheritance cases. Notaries are more efficient in finalizing the inheritance procedures than the courts are. When a proceeding is initiated by a notary it can be completed in 10 days. In the courts, the same process takes 2-4 years.²⁴² The delay in court proceedings is due to the backlog of cases and limited resources in comparison to the total caseload. There is no disagreement over the fact that a contested inheritance case should be heard in the courts. However, both courts and notaries are receiving and processing uncontested inheritance cases. This is a problem insofar as competing narratives regarding the process to follow can be a potential barrier to legalizing inheritance.

1.2 Current Policies

As has been identified above, there is a culture of informality with regard to legal and administrative processes in Kosovo. It is uncommon in Kosovo for people to write wills. Consequently, the Law on Inheritance, which provides for the allocation of the estates of those who die intestate, is the main legal vehicle for intergenerational property transfers. Currently the Inheritance Law in Kosovo follows the format of many European Civil Law countries in identifying ranks of inheritors for those who die intestate. Spouses and children, as compulsory heirs in the first rank of inheritors, split the shares of the estate equally.²⁴³

Children are recognized as heirs whether they are born within or outside of marriage. Surviving spouses inherit the same amount of the estate as surviving children. In the case of a large family this may leave a surviving female spouse with very little to ensure her survival. Assessments of gaps in the current Civil Code have identified circumstances under which the current law awards a greater share of an estate to a child born out of wedlock than to an existing spouse.²⁴⁴

Beyond the lack of clarity over the process of inheritance cases, there is also a discrepancy in terms of the method of initiating the procedure. While Article 127 of the Law on Inheritance provides that the inheritance procedure is initiated by the court, as soon as the latter is informed of a person's death, in practice, the inheritance procedure is started by the interested party. Or, as so often happens, nothing is initiated and the estate is shared informally among the surviving family without any transfer of property title and the immovable property held by the male descendants.

Once a case is initiated in the courts it can be delayed due to the backlog of cases. The court also has to notify the heirs that the case is being considered. The process of notification is often ineffective in identifying all heirs either because they are difficult to locate within the country or because they are not present in Kosovo.²⁴⁵ There is additional evidence that the head of household is allowed to sign a summons on behalf of all family members.²⁴⁶ If this is the case, then married daughters not resident in the family home, may be unaware that a formal inheritance process is occurring. Lack of awareness is the first way in which women can be excluded from inheritance. Courts in Kosovo face a variety of

²⁴² Tetra Tech, *Delayed Inheritance Report*, 2016.

²⁴³ Inheritance Law Articles 12.1 and 12.2

²⁴⁴ GIZ. CCPR. 2015. "Impact Assessment of Existing Legislation on Civil Code Related Areas: The Law of Inheritance." In *Support to Civil Code on Property Rights*. Pristina: GIZ, p. 15.

²⁴⁵ Tetra Tech, *Delayed Inheritance Report*, 2016.

²⁴⁶ Advocacy Training and Resource Center. 2014. "Findings and Recommendations of Local Organizations from Court Monitoring Activities." Pristina, Kosovo: USAID.

challenges in notifying citizens of cases in which they have an interest. Notification is addressed in Concept Note #3 and is an issue which impacts all citizens in Kosovo, not just women.

The second way in which women can be excluded from inheritance is when they are not named in the Testimony of Death, a document which is supposed to identify all the heirs and assets of a person who has died. This document is taken to a notary or to the court in order to begin an inheritance proceeding. The Testimony of Death, however, is created based on the report of the person seeking the document to the Civil Service Officer who issues it. This document is not verified by a search of records. It is therefore relatively easy to exclude potential heirs. One might suggest that a possible solution to this problem would be to have the Civil Registry Office search records to correctly identify heirs, however it is not clear that is possible.²⁴⁷ These first two methods of excluding female heirs are predicated on preventing them from knowing that a transfer of property is occurring.

The third method in which women can be excluded from inheriting a family estate is via their formal renunciation of the property before a judge or a notary. The willing adherence of female heirs to customary norms, keeps the estate of the deceased within the patrilineal line. However, women can also be pressured into renouncing their rights by the loss of family ties, loss of access to home, stigmatization or even threats.

A last way in which women can be excluded from inheriting their property rights is through *inter vivos* transactions in which property from a family estate is exchanged prior to death. Women can be illegally excluded from these agreements. The Inheritance Law states that *inter vivos* exchanges are only legal if all heirs agree. But few women realize that they have the legal grounds to contest these agreements in court if they are excluded.

The cumulative effect of a culture of informality combined with these four methods of excluding women from inheriting is twofold. First, very few women own property. The National Baseline Survey on Property Rights found that of the total respondents, 62% could not recall any cases in their circle of acquaintances when a daughter had inherited property, while 19% could recall one case.²⁴⁸ In the same survey, 78% of respondents said that there are no female members in their household registered as property owners, while 16% said that there is one female household member registered as a property owner.²⁴⁹ The second impact of the exclusion of women from inheritance is a social welfare concern. High profile, anecdotal reports exist of women losing their homes when their spouses die because they are forced to leave by their husband's family.²⁵⁰ The nature of the inheritance law also requires the division of the family estate into shares, which may leave the surviving spouse with inadequate means for survival.

The exclusion of women from inheritance of a family estate is a significant problem for any minor children in their care. Article 130.2 of the Inheritance Law notes that the renouncement of inheritance of the estate applies to the descendants of the person renouncing the property, unless that person states that they are renouncing only on their own behalf. Article 130.3 notes that if the rights of a minor are renounced, that the permission of the custodian body is not required. This allows parents to renounce the inheritance of minor children with no custodial oversight.

Given the major problems with women's inheritance rights - their legal exclusion from the inheritance process and the coercion or pressure they may face from other family members to renounce their rights – it is imperative that safeguards be put in place to ensure that children are not disinherited and

²⁴⁷ Tetra Tech, Delayed Inheritance Report, 2016.

²⁴⁸ Tetra Tech. 2015. "National Baseline Survey for Property Rights in Kosovo." Pristina: USAID Property Rights Program, p. 23.

²⁴⁹ Ibid., p.5.

²⁵⁰ Joireman, Sandra F. 2015. "Gender, Property and Economic Opportunity in Kosovo." Property Rights Program. Pristina, Kosovo: Tetra Tech/USAID.

left destitute. The provision and care for children is vital to the national interest as according to the 2011 census 34% of the population of Kosovo is under the age of 18.

As Kosovo looks to EU integration, the lack of protection for children's property rights will be problematic. The EU recognizes the autonomous rights of children and adheres to principles embodied in the Convention on the Rights of the Child which states that the best interests of the child should be a primary consideration in decisions made for and about them. Moreover case law from the European Court of Human Rights would also point to the need for changes in the Inheritance Law with regard to the renunciation of children's property rights. A recent legal review for the Civil Code and Property Law project called for the Inheritance Law to both secure the best interest of the child and to ensure that the child is heard in inheritance matters and suggested the implementation of external oversight by the court or a custodian body.²⁵¹

²⁵¹ GIZ. 2015. "Legal Assessment of Existing Legislation on Civil Code Related Areas in Light of the European Standards and Best Practices: The Law of Inheritance." In *Support to Civil Code and Property Rights*. Pristina: EUO in Kosovo, p. 25.

1.3 Problem Definition

Cultural norms favor patrilineal inheritance with female heirs renouncing their property rights in favor of their male relatives. While women should have the ability to make this choice, it is important that they are fully informed, knowing their rights under law. **Many women are not aware that they are legally able to initiate inheritance proceedings and entitled to inherit from their parents and from their spouse.** Women are pressured into renouncing their rights through family expectations and social norms.

Women typically do not own their family homes nor do they inherit property from their parents. **Few women own immovable assets in Kosovo, limiting their ability to be fully engaged economic actors.** There are no restrictions on the ability of women to purchase property, but social norms exclude them from inheritance of immovable assets.

While most property transfers through inheritance are not formalized, **there are problems with regard to the processes of inheritance.** As long as formal inheritance processes are not followed, it will be difficult to provide any legal change that will promote asset ownership for women.

There are two paths to formalize inheritance, through a notary or through the courts. In both cases there are **insufficient safeguards to ensure that female heirs who have a legal right to the estate of the deceased are identified.** The current inability to verify rightful heirs to an estate through the Civil Registry Office creates an opportunity to exclude women in formal inheritance procedures.

Provision for surviving spouses in Kosovo is often insufficient either because the shares of the estate are inadequate or because the marital home was not registered in the name of one of the spouses, but of a different family member, and therefore cannot be considered to be part of the marital property. The fact that property purchased during the marriage is rarely in the name of the female spouse contributes to this problem.

According to the Inheritance Law women who renounce their property rights also renounce the rights of their minor children. **There is no custodial oversight to ensure the well-being of minor children.** Not only is this practice outside of European standards regarding the rights of children, it is also a significant national welfare interest in country where minors are a large percentage of the population.

Prevalent informality regarding marriage places women in a vulnerable position with regard to their property claims. Women who have informal marriages are more easily excluded from the inheritance. They are also prevented from inheriting from their spouse under the Inheritance Law until they have been cohabiting for 10 years or for 5 years with children.

Informality, conflicting legal procedures, inability to check complete list of heirs, ease of exclusion all create problems for women to inherit property. Since inheritance is one of the main mechanisms via which people acquire assets, these impediments to women's inheritance significantly curtail their economic engagement.

2. POTENTIAL SOLUTIONS BASED ON INTERNATIONAL BEST PRACTICES

Other countries provide a variety of safeguards to protect the inheritance rights of women and children. While none of these countries have the specific cultural issues of Kosovo, they provide ideas for safeguards that might be applied.

- a) Recognition of cohabitation after 3 years (Croatia).
- b) Universal succession with a time limit for renunciation of inheritance (Germany)
- c) Full information for heirs who are renouncing their inheritance rights (US, Germany, Austria).
- d) Protection of the property rights of surviving spouses. (The Netherlands).
- e) Provide for custodial oversight of any renouncement of the property rights of minor children (UK, US, Germany).

The European Court of Human Rights recognizes cohabitation as a form of family life. In many Western European countries such as **Portugal, Ireland, France and the UK** cohabitation is recognized, but the partners do not have the same rights as married couples, particularly with regard to inheritance of assets. However, most former Yugoslavian countries have more progressive laws because Yugoslavia recognized informal relationships between heterosexual couples and protected them legally in the 1970s. It is therefore instructive to look to neighboring states for best practices.

Croatia requires three years of cohabitation before a relationship is recognized, or less if there is a child born to the couple.²⁵² Croatian law regulates cohabitation for heterosexual couples in the Family Act. It is nearly equivalent to marriage.²⁵³ Only those people who could be married can be considered as in a legally recognized cohabitation. In other words, they cannot be cohabiting or married to someone else, they must have reached the age of majority, and cannot be close relations. "Cohabitation implies legal effects: a. during the relationship: property rights and liabilities, personal rights and liabilities, adoption rights, medical reproduction rights, the right to protection against domestic violence, social rights and obligations, the right to be exempted from testifying in criminal proceedings etc.; b. when the relationship ends: maintenance rights and liabilities, the right to protection against domestic violence, inheritance rights and liabilities, pension rights and liabilities etc."²⁵⁴ However, a cohabiting partner cannot remain in the home against the will of the partner who owns the residence. Croatian law does not recognize informal relationships if one partner is married to someone else or multiple informal relationships.

Germany follows a principle of universal succession in which all heirs legally inherit the estate of the deceased at the moment of death without any need for a legal process to occur. They hold the estate as a 'community of heirs'. Heirs that wish to renounce their inheritance have six weeks after the death to do so, or six months if they live outside of the country. The heirs then have the ability to collectively agree on a division of the estate, or to sell their share with the co-heirs having a pre-emptive right to purchase. Many countries require that full information regarding the value of an estate be provided to any heir who wishes to renounce his or her claims. In common law countries renunciation is referred to as a "disclaimer of interest" or "deed of variation". Many **US** states require that anyone requesting a disclaimer of interest must do so voluntarily, with legal representation, and there must be a full financial disclosure of the value of assets and documentation in conspicuous, plain language. **Germany** and **Austria** similarly require that heirs are fully informed of the value and physical location of assets in an estate.

Most civil legal systems that allocate an estate based on shares, make an effort to protect the surviving spouse in their legislation. **Swiss** law allows the testator to allocate use rights of the surviving spouse to the estate until his/her death, even if there are other heirs and even in the event that the spouse has waived his or her inheritance rights. In **The Netherlands** the law on inheritance was similar to that of Kosovo until 2003, but was changed to give more support to the surviving spouse.²⁵⁵ Under

²⁵² Article 11 paragraph 1 of the Croatian Family Act. Informal relationships are governed by the Croatian Family Act and the Croatian Partnership Act.

²⁵³ <http://ceflonline.net/wp-content/uploads/Croatia-IRI.pdf>

²⁵⁴ Branka Rešetar and Nataša Lucić, National Report: Croatia, Informal relationships – CROATIA, January 2015, <http://ceflonline.net/wp-content/uploads/Croatia-IRI.pdf>, accessed January 11, 2016, p. 4.

²⁵⁵ Reinhartz, Barbara. 2006. "Recent changes in the Law of Succession in the Netherlands: On the road towards a European Law of Succession?" In *Electronic Journal of Comparative Law*: Citeseer.

the revised law the heirs take possession of the estate at the time of death, like the German policy of universal succession. They also have the right to renounce their inheritance. A certificate of inheritance, issued by a notary, gives the heirs the right to dispose of the estate. Dutch inheritance law is similar to that of Kosovo in that it specifies ranks of inheritors, with the spouse and children in the first group. Under the revised Dutch law, a widow inherits the same portion of the estate as she did before, *but holds the entirety of the estate until her death*, at which point the children will receive their shares. In other countries this is referred to as a life interest. “To protect the surviving spouse, Dutch inheritance law provides that all property of the estate vests in the surviving spouse. The surviving spouse must discharge all liabilities of the estate. The children receive a pecuniary claim equal to their share in the estate that in principle can only be collected upon either (i) the death of the surviving spouse or (ii) the bankruptcy of the surviving spouse or the application of a debt rescheduling arrangement. In his last will and testament a testator may include other events upon which the claim can be collected, such as remarriage of his spouse. This so-called statutory division (*wettelijke verdeling*) applies automatically unless the deceased has provided otherwise in his last will.”²⁵⁶

The **UK** requires that any renunciation of inheritance on behalf of a minor must have the approval of a court. A parent may not sign a deed of variation on behalf of a child. In the **US** some states will appoint a ‘property guardian’ to look after the property interests of minors. **Germany** uses a guardianship court to oversee the property interests of minors. In all these countries, the rights of minor children are monitored by a legal representative outside of the family to ensure that the best interests of the child are protected.

3. RECOMMENDATIONS REGARDING KEY POLICY MEASURES

Making changes to the inheritance law that better safeguard the interests of women and children is a necessity. The low levels of women’s property ownership impede their ability to be full economic actors and the common practices that are in place that enable the exclusion of women from inheriting property are human rights violations. Many of the policy measures addressed in the preceding Concept Notes will benefit women, as they are citizens of Kosovo and will gain from improvements in the institutional environment governing property rights. Changes in notification strategies and a more frequent use of notaries, both suggested changes from Concept Note #3 will improve the situation of women. In the case of notification procedures, a system that is not based on a single mailed notification to the male head of household will prevent the exclusion of married daughters from notification of an inheritance case. In other words, the first noted method of exclusion above, is addressed by the recommendations in CN #3 so they will not be repeated here.

Co-ownership of marital property and the registration of property rights in the names of both male and female spouses are both currently legal, supported by the government, yet infrequently practiced. Sensitization efforts should be made to increase the number of registered female property owners. While improving the overall functioning of the courts and municipalities in terms of the registration of property will also assist women in realizing their property rights, there are still specific changes that need to be made in the Family Law, the Inheritance Law and in the practices of judges and notaries. There are several ways in which these changes can be made. Important questions that should be addressed in determining the best path forward are:

- 1) What safeguards can be put in place that will prevent the exclusion of women from property ownership?

²⁵⁶ Alain Nijs Dirk-Jan Maasland Frank Deurvorst Wouter Verstijnen Theo Hoogwout Lourens de Waard Greenille. 2012. *The Netherlands International Estate Planning Guide Individual Tax and Private Client Committee*, Brussels, pg, 3

- 2) What changes in law will bring Kosovo in line with the *acquis communautaire* of the European Union so that the laws do not need to be further revised?
- 3) How can law and policy facilitate and accelerate a more egalitarian political culture in Kosovo?
- 4) What strategies will minimize the role of the courts which are already overburdened with a backlog of cases?

In an ideal world it would be possible to provide oversight of every inheritance case and register every marriage. However, citizens of Kosovo have for decades practiced an informality with regard to the records of the state that impact marriage, inheritance and property. This informality has allowed for the exclusion of women from property ownership and harmed the potential for economic growth of the country. While that informality had its source in a resistance to the state that is no longer present, it is difficult to change cultural practices overnight.

3.1 Policy Measure #1: Consistent Recognition of ‘Factual’ Marriages

The prevalence of informal marriages in Kosovo demands a clear and consistent recognition in law. For many couples, the intent of their cohabitation is the creation of a long-term, stable relationship. These couples are viewed by their neighbors and families as married, whether or not they have gone through the process of registering their marriages with the state. While the Family Law recognizes these ‘Factual’ marriages immediately after they have occurred, the Inheritance Law does not recognize them as equivalent to a registered marriage, and would thereby exclude spouses from property claims after the death of one of them, until they have lasted for ten years, or 5 years with children. These laws should be harmonized, we suggest following the Croatian model in recognizing them after three years, or less if there are children involved. This would prioritize the well-being of children as well as aligning more quickly with societal norms.

However, the National Property Rights Strategy should also be forward looking. If Kosovo follows the trends in other European countries²⁵⁷ there will be a growing number of cohabiting couples who do not consider themselves to be married. There is a need for the development of an alternative form of legal recognition of those partnerships. Some couples who choose to cohabit without getting married, do not view themselves as married and should be given an option of registering their partnership as an alternative arrangement. Allowing partners to formally register cohabitation relationships will prevent them from being considered as married by law and prevent their inheritance as ‘statutory heirs’ if one should die. Creating this option at the present moment will give those who do not want their relationships recognized as marriage an alternative option as well as preparing for possible future societal changes.

Policy measure #1	Consistent Recognition of ‘Factual’ Marriages
Solution	<p>Encourage the registration of marriages.</p> <p>Recognize cohabiting relationships as marriages after 5 years or 3 years if there are children from the relationship.</p> <p>Create a legal option for the registration of cohabiting relationships which is not the same as marriage</p>
Output	<p>Harmonization of the Inheritance Law and Family Law with regard to the recognition of factual marriages.</p> <p>Legal recognition of cohabitation that is equivalent to marriage after 5 years or 3 years if there are children.</p>

²⁵⁷ "Carriage and Horse: Unwed Parents and the Law." Jan 17, 2016. *The Economist*. London: The Economist Group.

	Development of a legal recognition of cohabiting relationships requiring registration which is not treated as equivalent to marriage in terms of property rights
Outcome	Behavioral change regarding marriage registration. Opportunity to register cohabitation relationships. More factual spouses recognized as compulsory heirs.
Indicators	An increase in registered marriages. An increase in registered cohabiting relationships both those that are equivalent and those that are inferior to marriage

3.2 Policy Measure #2: Development of Safeguards in Cases of Renunciation and Exclusion

The exclusion of women from inheritance, through legal procedures and informal process, is both a human rights issue and a major economic concern as it curtails women's asset ownership and limits their full potential as economic actors. The solutions to exclusion are mostly embedded in the notification processes identified in CN #3. However, the ability to renounce an inheritance is an important legal right and should not be eliminated in Kosovo, in spite of its misuse. Because of the importance of keeping renunciation as a right, the suggested measures below are mostly procedural, focusing on safeguards to prevent the exclusion of women.

Currently in inheritance procedures, for an heir to renounce their property rights they simply sign an agreement before a judge or a notary. This process should change to ensure full information. One way to address the issue of fully informed renunciation measures is by making every case involving renunciation a contested procedure so that court oversight happens automatically. In this instance, the court could hold a separate session with female heirs renouncing their rights, ensuring that they are fully informed as to the extent of their legal rights and the value of the estate. Since the difficulties women face claiming their legal rights are a human rights concern, the courts are a logical place to ensure oversight. However, court procedures are slow and can take years to resolve. If the court option were to be followed it would benefit women greatly if inheritance cases with women renouncing their property rights were identified as priority cases. Yet, even if contested inheritance was treated as priority it would still take a considerable amount of time to resolve these cases given the current delays in court proceedings.

An alternative approach entails safeguarding the property rights of women involved in inheritance cases handled by notaries. Notaries are legally able to process any uncontested inheritance cases, including those that involve renunciation. They can handle an inheritance process in 10 days, as opposed to the years that inheritance cases take through the courts. Therefore, there is an argument to be made on the basis of efficiency that notaries should handle cases involving renunciation. Moreover, it is consistent with the principles outlined above that recommendations not place a further burden on the courts, which already have a large backlog of cases.

If notaries follow the procedural changes suggested, providing full information regarding the inheritance rights of female heirs, providing a clear valuation of the estate, and requiring those initiating the inheritance process to take an oath that they are not excluding any known heirs, minimal safeguards will be in place that should improve the current situation.

In cases where there is no identified renouncing heir, the heirs bringing the case to the notary or the judge should be required to swear that they are not excluding any known heirs. A clause should be added to the Act of Inheritance which specifies the presence of renouncing heirs, and compels that heir(s) to verbally affirm their renunciation before a notary or a judge after receiving full information

regarding their legal rights and the value of the estate. These changes in procedure would be an improvement to current practices and would put in place minimal safeguards for renouncing heirs.

None of the safeguards above deal with the protection of the social welfare of spouses who renounce their inheritance. Nor do they address the problems created by an inheritance law that requires the division of an estate among all surviving heirs as soon as the inheritance procedure is completed, which can occur immediately following death. This means that it is legally possible for a surviving spouse to lose their residence soon after the death of their spouse, if the property is divided into shares and distributed. Any National Property Strategy for Kosovo must encourage the formalization of property rights, which means promoting formal inheritance processes. The government should seek a means of ameliorating the potential harm to surviving spouses that can occur through the correct and rapid application of the inheritance law as well as when a spouse renounces their inheritance claim.

There are at least two ways to encourage and promote the current inheritance process and to protect surviving spouses at the same time. The first method is to follow the model of The Netherlands which faced the problem of providing for the welfare of surviving spouses with an inheritance law similar to that of Kosovo. When they changed their Inheritance Law they retained the same shares for statutory heirs and the same inheritance mechanisms, but delayed the mandatory estate distribution until after the death of the surviving spouse thereby allowing the spouse access to the marital home and property until death. A second way of achieving the same goal is to allow the surviving spouse use rights to the marital home and property until their death or remarriage. Both of these mechanisms protect the welfare of the surviving spouse and can be implemented whether or not renunciation of inheritance rights has occurred.

Policy measure #2	Development of Safeguards in cases of Renunciation and Exclusion
Policy measure #2.1	<i>Concealment</i>
Solution	Those heirs bringing an inheritance action to a notary or a judge must swear upon penalty of law that they are not concealing any known heirs. Require contract for legally recognized <i>inter vivos</i> transactions. Enhanced notification procedures (addressed in Concept Note #3)
Output	Develop a written form for <i>inter vivos</i> transactions to be completed by judge/notary providing full information to all parties. Engagement of notaries in training regarding the application of new inheritance procedures.
Outcome	More female heirs involved in inheritance processes. Inheritance processes that provide safeguards for excluded heirs, both women and those living abroad.
Indicators	Increased percentage of women owning property. Decrease in contested inheritance proceedings.
Policy measure #2.2	<i>Renunciation</i>
Solution	Require that anyone renouncing their right to inherited property be fully informed of their legal rights and the value of the estate. Enable full use rights to surviving spouse of marital home until death or remarriage.
Output	Change to the Inheritance Law providing life interest in marital property to surviving spouses whether they renounce their inheritance or not.

	<p>Creation of a statement for all notaries to add to any testamentary documents assuring that they have provided full information and complete valuation of the estate to renouncing heirs.</p> <p>Engagement of notaries in training regarding the application of new inheritance procedures.</p>
Outcome	<p>More female heirs involved in inheritance processes.</p> <p>Better provision for surviving spouses.</p>
Indicators	<p>Increased percentage of women owning property.</p>

Women will benefit from two additional factors that are outside of the recommendations above. Formalization of property titles and the barriers to joint registration of property, which have recently been removed, will widen the pool of potential properties to which women can claim ownership. As a new generation of young people get married and face decisions on work, property and inheritance we can also anticipate attitudinal changes that will lead to an increase in women's property ownership and hopefully, greater women's economic engagement.

3.3 Policy Measure #3: Protecting the Inheritance Rights of Minor Children

Under the current law, any heir that renounces their inheritance rights also renounces the inheritance of their minor children, without any external actor involved to ensure the best interests of the child. While on most occasions minor's interests are adequately and most appropriately represented by their parents, when it comes to the renunciation of inherited property, virtually all countries involve non-family legal representation to guarantee the best interests of the child. This special protection does not undermine the primary responsibility of the parent or legal guardian in caring for the child, but is an action of the state in protecting the interests of future citizens.

The Law on Inheritance needs to change. Article 130. 3 currently states "If his successors are minors, permission for the renouncement from the custodian body shall not be required." This law needs to change in order to require oversight of the custodian body whenever cases regarding the renunciation of the rights of minors are in the courts. However, if uncontested inheritance cases are heard before notaries there also need to be procedural safeguards providing oversight of the best interests of the child that occurs outside of the family. Indeed, given that there may be a shift of all uncontested inheritance cases to be handled by notaries, it is necessary to have some sort of custodial oversight that protects the rights of minors in uncontested cases.

The custodian body in the Law on Child Protection (draft) is a municipally based body for protection of the interests of the child, consisting of a group of experts that operates in the Centre for Social Work. This body is the most appropriate type of oversight for the protection of the best interests of the child in uncontested inheritance cases as it is engaged in safeguarding the interests of minor children in other legal contexts. Because inheritance cases can be legally complex and young people may not be able to fully assess the benefits or disadvantages to them; it has been suggested that the custodian body also provide advice to young adults up to age 21 as to their best interests.

Policy measure #3	Protecting the Inheritance Rights of Minor Children
Solution	<p>Require oversight by Custodian Body whenever the property interests of minor children are at stake.</p> <p>Expand oversight to include all children under 21 to ensure that young adults receive adequate advice.</p> <p>Require safeguards to inter vivos transactions that impact the inheritance of minor children</p>

ANNEX 4

Output	<p>Change to the Inheritance Law</p> <p>Develop procedures for notaries to follow which engage the Custodian Body in assessing the best interests of the child.</p> <p>Train notaries in the appropriate procedures regarding the renunciation of the property rights of minors</p>
Outcome	<p>Protection of the child's best interests in inheritance cases.</p> <p>Provision of advice to young adult children regarding their best interests.</p>
Indicators	<p>Fewer children living in poverty.</p> <p>Increased percentage of women owning property.</p>

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PROPERTY RIGHTS PROGRAM (PRP)

Informality in the Land Sector: The Issue of Delayed
Inheritance in Kosovo

APRIL 2016

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INFORMALITY IN THE LAND SECTOR: THE ISSUE OF DELAYED INHERITANCE IN KOSOVO

APRIL 2016

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ACRONYMS AND ABBREVIATIONS

AI	Administrative Instruction
AoD	Act of Death
BCC	Behavior Change Communication
CCPR	EU-funded Civil Code and Property Rights Project
CRA	Civil Registration Agency
CSO	Civil Status Office
DCM	Differentiated Case Management
EU	European Union
GoK	Government of Kosovo
IT	Information Technology
KCA	Kosovo Cadastral Agency
KJC	Kosovo Judicial Council
KPA	Kosovo Property Agency
LCP	Law on Contested Procedure
LUCP	Law on Uncontested Procedure
MCO	Municipal Cadastral Office
MIA	Ministry of Internal Affairs
Moj	Ministry of Justice
OSCE	Organization for Security and Cooperation in Europe
OSR	Own-Source Revenue
PIN	Personal Identification Number
PRP	Property Rights Program
SMS	Short Message Service
USAID	United States Agency for International Development

EXECUTIVE SUMMARY

Data from the Kosovo Cadastral Agency (KCA) indicate that approximately 30% of all property rights in Kosovo are registered in the name of deceased rights holders. Even this figure could be a low estimate. Unofficial data from the Register of Unpermitted Construction indicate that up to 50% or more applicants seeking to formalize rights in unpermitted buildings cannot demonstrate rights in the land upon which the buildings are constructed because the underlying parcels are registered in the name of deceased rights holders. Rights remain registered in the name of deceased persons because inheritance proceedings have not been initiated to formally transfer property rights from the deceased to his or her heirs.

A National Baseline Survey on Property Rights conducted in 2015 found that 50% of the respondents consider that rights in property are rights possessed by their family without having gone through inheritance proceedings; while 58% believe that property rights are based on court decisions and 49% cited duly executed contracts as constituting property rights. It is not surprising that 57% of respondents in the same survey reported that their birth family had never initiated an inheritance proceeding.

If government initiatives encouraging citizens to register their rights in property and to regularize unpermitted constructions successfully change Kosovars' attitudes and behaviors about formalizing rights in property, there will likely be an increase in the number of inheritance proceedings initiated. The current legal framework governing uncontested inheritance claims contemplates that inheritance proceedings are initiated shortly after the death of the decedent (immediate inheritance proceedings). In practice, however, Kosovars have not initiated inheritance proceedings in a timely manner. As a result, a significant percentage of proceedings moving forward will be initiated long after the death occurred (delayed inheritance proceedings).

These two types of proceedings are distinguished by the length of time that has elapsed from the occurrence of death until the initiation of proceedings. During the intervening years between death of the rights holder and the initiation of (delayed) inheritance proceedings, it is not uncommon for the number of descendants of the rights holder (potential heirs) to have grown to thirty or more. It is also not uncommon for some of the potential heirs to have taken possession of the deceased's land parcel, constructed their homes on it and exercised de facto rights over the property.

Uncontested inheritance proceedings comprise a two-step process: review by a court or notary of the potential heirs' documents and issuance of a decision or act verifying their rights to inherit; and the registration of the verified rights in the Municipal Cadastral Office (MCO). For the government's formalization initiatives to have impact, uncontested inheritance proceedings and property rights registration processes must be improved to make them more streamlined, efficient, predictable and affordable, to ensure that citizens already predisposed not to formalize their property rights do not encounter further disincentives to doing so.

The purpose of this report is to critically assess provisions in the legal framework governing uncontested inheritance claims and the registration of property rights to identify potential options for making these improvements. The report also assesses the practices of both courts and notaries to identify and propose potential approaches for strengthening due process safeguards to ensure that all potential heirs, and especially women, can fully exercise their rights to inherit property. Findings from these assessments are then applied to the four most common scenarios or "fact patterns" emerging from delayed inheritance claims to inform recommendations for developing new procedures responsive to the circumstances unique to these claims to help increase efficiency, reduce disincentives to formalization and strengthen due process safeguards.

KEY FINDINGS AND RECOMMENDATIONS

REVIEW OF THE HEREDITARY ESTATE

Uncontested inheritance claims contain no issues of substantive law or fact to be adjudicated. They require only an administrative review of the documents presented by the parties. Although the legal framework currently provides both courts and notaries with jurisdiction over uncontested inheritance claims, it would seem that the notary system was established to perform the exact type of administrative review required by the Law on Uncontested Procedure (LUCP) to process these claims and can do so more quickly and efficiently than the courts.

Arguments in favor of courts retaining jurisdiction of these claims often cite the role of courts to implement safeguards to protect the rights of potential heirs to inherit property. There are two separate and distinct threats to the rights of potential heirs that must be safeguarded against: the coercion of heirs, especially female heirs, to renounce their rights to inherit; and the concealment and exclusion of potential heirs from the inheritance proceedings.

To safeguard against coercion, the USAID/Kosovo Property Rights Program (PRP) and the European Union-funded Support to the Civil Code and Property Rights (CCPR) project are assisting the Ministry of Justice (MoJ) in drafting a Concept Document that will propose measures to prevent potential heirs from being forced to renounce their rights to inherit. One proposal under consideration is to require a separate court hearing for heirs who indicate their intention to renounce.

Courts and notaries are similarly constrained to combat concealment because data management limitations in the Civil Status System prevent them from independently verifying the identity of potential heirs. Safeguards may be strengthened by developing enhanced notification procedures to ensure that all potential heirs have information and knowledge of the proceedings. Behavior Change Communication (BCC) messages could also be disseminated to change cultural attitudes and behaviors about the rights of women to inherit and to inform citizens that concealment is a criminal offense. These messages should be reinforced with the well-publicized prosecution of acts of concealment.

Regardless of which institution is provided exclusive jurisdiction over uncontested inheritance claims, the key for achieving efficiency is to ensure they do not become contested, since contested cases encounter long delays in the courts. Mediation appears to be an effective tool for assisting potential heirs to resolve disputes that may arise during the proceedings without going to court.

Recommendations

1. The MoJ should decide, as a matter of priority, which institution (either courts or notaries) have exclusive jurisdiction over uncontested inheritance claims and amend the legal framework to reflect this decision and eliminate the confusion that exists today.
2. In the event the MoJ determines the courts should have exclusive jurisdiction, courts should adopt notification practices used by notaries to communicate with potential heirs. These practices are demonstrably more efficient and reduce the time required to process claims.
3. The greatest opportunity for creating efficiency is to ensure that potential heirs have information and tools to resolve disputes that may arise during the uncontested inheritance process. Otherwise, the claim will become contested and subject to the long delays encountered by contested claims in the courts. This will also serve to reduce the burdens on an already overburdened court system. Citizens should be provided clear and easy-to-understand information about their rights and obligations in inheritance proceedings, to mitigate the risk of disputes occurring.

4. As mediation appears to an effective tool to resolve disputes, citizens should be provided with information about mediation services and these services should be expanded and made more accessible to citizens.
5. The Ministry of Internal Affairs (MIA) and the Civil Registration Agency (CRA) should assess the technical capacity of the civil registration system's IT and data management systems to generate a verified list of the deceased's family members; and if the system lacks the technical capacity to generate such data, should identify the actions that must be taken to produce the required technical capacity.
6. Safeguards against concealment of heirs may be strengthened by enhanced notification procedures to ensure all potential heirs are informed about the claim to make the proceedings more transparent. These procedures would be strengthened with BCC messages to encourage female potential heirs to assert their rights and to inform citizens that concealment is a criminal offense. These messages should be reinforced with the well-publicized prosecution of acts of concealment.

TRANSFER OF RIGHTS IN IMMOVABLE PROPERTY FROM DECEASED PERSONS TO THEIR HEIRS

Interviews conducted by PRP with staff in MCOs indicates inconsistent practices across MCOs regarding the requirements for completing cadastral surveys. It appears some MCO's require surveys to be completed whenever citizens request updates to cadastral data to formalize their rights, while other MCOs require a survey only when property rights are transacted. Similarly, some municipalities require citizens to pay any back taxes owed on the property before they will be issued a cadastral certificate, which is required to initiate inheritance proceedings. The cost of cadastral surveys and payment of back taxes owed may exceed the economic means of the average Kosovar and may prevent them from formalizing their rights in property.

Additionally, imprecise cadastral instructions may create inconsistent practices to correct technical inconsistencies between the property description contained in inheritance decisions and the existing cadastral data. Such inconsistencies would not appear uncommon in delayed inheritance claims because cadastral data will not have been updated to reflect changes to the property that have occurred during the intervening years between death of the rights holder and initiation of the inheritance proceedings. Such inconsistencies could delay registration of inheritance decisions, create confusion and frustration and led to unpredictable outcomes, which would create additional disincentives to formalization.

Recommendations:

1. Citizens will not be motivated to formalize their rights in immovable property (and initiate inheritance proceedings as a necessary step to formalize) unless they understand the benefits of formalization and are provided incentives to do so. Government formalization initiatives such as systematic registration of property rights and regularization of unpermitted constructions should be accompanied by intensive public information and awareness campaigns that include BCC messages to change the Kosovo public's attitudes about formalizing property rights.
2. The Kosovo Cadastral Agency should conduct a full business analysis of its procedures to ensure that registration requirements do not create barriers or disincentives to formalizing property rights. The analysis should be designed and implemented to identify opportunities to make the process more affordable, efficient, transparent and predictable. It should conclude with the development of:
 - standard forms, templates and instructions for registering and transacting rights;
 - clear procedures and guidelines to ensure consistent registration practices in all MCOs;

- training program for MCO staff to improve service delivery;
- a simple, plain-language “how-to guide” to make the entire registration process more understandable for citizens and to provide them the knowledge and information they require to register and formalize their rights;
- policies to distinguish between the recognition/formalization of rights and the transaction of rights, with correspondingly different procedures, costs and fees;
- options to subsidize or waive the fees and costs charged to citizens who are seeking only the recognition and formalization of their rights, as is currently done in cadastral zones selected for reconstruction;
- policies and guidelines for determining the circumstances under which cadastral surveys (typically the highest cost in the registration process) are required and the circumstances under which “general boundaries” are sufficient to demonstrate rights; and
- policies developed in consultation with the Ministry of Finance to provide tax incentives to encourage the formalization of rights -- for example a one-time amnesty for the payment of back property taxes, possibly linked with some form of inheritance tax relief.

FINDINGS AND RECOMMENDATIONS SPECIFIC TO DELAYED INHERITANCE CLAIMS

Under current inheritance practices it is the responsibility of potential heirs to notify and secure the participation of all potential heirs in the proceedings. In delayed proceedings it is typically potential heirs who have taken *de facto* possession of the deceased rights holder’s property that lead the process on behalf of all potential heirs in order to formalize their rights in the property. Because delayed proceedings are typified by large numbers of potential heirs, many of whom may live abroad, the responsibility to secure their participation in the proceedings can be time-consuming, cumbersome and frustrating. Under immediate proceedings, the court will assign a statutory share in the deceased’s land parcel to any potential heir who does not participate in the proceedings to declare his or her intent accept a share. This option does not appear feasible in delayed claims with large numbers of potential heirs because it could lead to excessive fragmentation of the land parcel and render it unproductive. It also appears the proceedings would not be concluded until all potential heirs come forward to declare their intent. If, despite best efforts to locate and secure the participation of all potential heirs in the proceedings, some cannot be located or simply refuse to participate, it will not be possible to formalize rights and the legal status of the land parcel could remain undetermined indefinitely.

Additionally, it is the potential heirs in possession of the land and leading the process who have the most to gain from the concealment of other heirs. Courts and notaries, which are unable to verify the identity of potential heirs from data generated by the Civil Registry System in immediate proceedings will be even more challenged to do so in delayed proceedings.

The legal doctrine of “constructive notice” could be applied to delayed proceedings to address these issues. Under this doctrine, potential heirs and parties with an interest in the claim are presumed to have been provided with sufficient information and knowledge about the claim to enable them to exercise their rights to inherit. The application of this doctrine must be accompanied by requirements to ensure that the means and manner by which notice is provided are reasonably calculated to be effective. Constructive notice would also be coupled with a statutory deadline within which potential heirs must either assert or renounce their rights to inherit. Once the statutory deadline has passed, potential heirs are then precluded from asserting their rights and the claim is finally concluded.

Provided that the constructive notice procedures are modeled on those that are successfully implemented in other European countries and meet European Union human rights standards for due

process, applying constructive notice would support the efficient processing of claims as well as safeguards to ensure that the rights of all potential heirs, especially women and members of non-majority communities, are protected.

Constructive notice places the responsibility on each potential heir to be diligent in asserting his or her rights in the property. This removes the burden of responsibility from a few of the potential heirs to lead the process on behalf of all the others, thereby making the process simpler, easier and more efficient. Constructive notice also protects the interests of potential heirs acting in good faith to formalize their rights by compelling all potential heirs to either participate in the proceedings to assert their rights within the statutory deadline or forfeit the right to do so.

Constructive notice procedures would accommodate the concept of a special court hearing, which the Ministry of Justice is considering as a safeguard against coerced renunciation. These procedures can also support safeguards against the concealment of heirs. By placing equal responsibility on all potential heirs to assert their rights, constructive notice helps reduce the influence and power of the potential heirs in possession of the land parcel who now typically lead the proceedings. This helps create “space” between them and the other potential heirs, which can help reduce pressure exerted on some heirs to remain concealed and encourages them to participate in the proceedings. Robust public information and outreach activities that support constructive notice, combined with BCC messages will also promote greater transparency and opportunities for all potential heirs to participate in the proceedings.

Constructive notice could also be applied to formalization of claims requiring the participation of members of non-majority communities displaced by the conflict. This would include claims filed with the Kosovo Property Agency (KPA). Constructive notice provides both effective due process safeguards to protect the rights of displaced persons while promoting efficiency and finality in the claims process.

Recommendations:

1. Policies on constructive notice should be consistent with EU guidelines on due process. The procedures should prescribe the frequency, duration and venue of notice (official websites, embassies, institutions, social and other forms of media). Procedures might, for example, provide for two stages of notice: the first when the inheritance claim has been filed, and the second after judgment has been issued. The procedures should prescribe deadlines within which potential heirs and other parties to the claim can assert their rights and/or appeal the final judgment.
2. In addition to ensuring that the constructive notice procedures meet EU human rights standards for due process, the procedures should also be negotiated between Pristina and Belgrade under the auspices of the EU to ensure effective notice is delivered to persons displaced by the conflict to safeguard their rights and enable more efficient processing of property restitution claims lodged with the KPA.
3. If the MoJ requires separate court hearings be held to ensure that potential heirs who renounce have not been coerced, courts should adapt the notification practices followed by notaries to ensure hearings can be scheduled and conducted quickly. Given the large number of potential heirs who may decide to renounce, policies might be developed to limit the ranks of heirs eligible to take a share. Lastly, procedures should be developed that would allow potential heirs living abroad to renounce their rights in their country of residence. A litany could be developed that would be read by the competent official to the potential heir prior to the potential heir making a sworn statement to renounce.

PROBLEM STATEMENT AND PURPOSE OF THIS REPORT

Data generated from the KCA systematic registration and cadastral reconstruction activities indicates that approximately 30% of all applicants attempting to formalize and register rights in immovable property are prevented from doing so because rights in the land they possess are currently registered in the name of ancestors who are long-deceased.¹ In addition, anecdotal information indicates that up to 50% or more of applicants seeking to formalize unpermitted buildings through the government of Kosovo's (GoK's) legalization program cannot demonstrate rights in the land upon which the buildings are constructed because the land is currently registered in the name of rights holders who are long deceased.²

Property rights remain registered in the name of deceased persons because family members of the deceased (the "potential heirs")³ have not initiated uncontested inheritance proceedings to formally transfer rights from the deceased to themselves. This is likely because, for cultural, historical and practical reasons, Kosovars have not perceived the value of formalizing their rights to land and immovable property.

Kosovar's attitudes and behaviors towards formalizing property rights were measured in a National Baseline Survey on Property Rights contracted by the PRP in 2015. Respondents most frequently defined rights in property as:

- "to own and use property as a result of court decision which recognized the property rights" (58%);
- "to own and use property which belongs to family even though the inheritance process was not initiated" (50%); and,
- "to own and use property which you or your ancestors have bought based on legalized or notarized contract (formal contract)" (49%).⁴

The survey results indicate that Kosovars perceive that rights based on possession of family property as having similar legal effect as rights based on a court decision or formalized sales contract. It is not surprising that 57% of respondents in the same survey reported that their birth family had never gone through an uncontested inheritance proceeding.

It should also be noted that Kosovar tradition recognized verbal contracts secured through a promise based on honor and executed in the presence of witnesses as an accepted way to transact rights in property. This tradition became further entrenched in the early 1990's when discriminatory legislation was passed by the former regime that banned inter-ethnic sales of immovable property,⁵ thereby preventing the formal recognition of rights transacted between Kosovo Albanians and Serbs.

¹ Email from World Bank Team Leader for the Real Estate Cadastre and Registration project in Kosovo to the PRP, November 05, 2015.

² The GoK program underway for legalizing unpermitted constructions may provide additional data on this question. To date officials have not yet gathered such information.

³ This report uses the term "potential heirs" to refer to descendants of the rights holders whose rights to inherit have not been formally recognized by a court or notary.

⁴ USAID 2015 report, Property Rights Program: National Baseline Survey for Property Rights in Kosovo.

⁵ USAID 2004 report, Land and Property Rights Assessment.

Verbal contracts not registered in the cadastre contribute to much of the informality currently existing in Kosovo's property sector.

Assuming government initiatives to systematically register rights in property and regularize unpermitted constructions succeed in changing Kosovars' attitudes and behaviors towards formalizing their property rights, there will likely be an increase in the number of inheritance proceedings initiated. The proceedings are required to transfer rights from deceased rights holders to the current possessors of land and immovable property in order for the possessors to then benefit from these formalization initiatives. The Law on Uncontested Procedures (LUCP)⁶ governs uncontested inheritance claims and contemplates that inheritance proceedings will be initiated in a timely fashion soon after a death has occurred. Timely initiation of proceedings is referred to in this report as an "immediate inheritance" claim or proceeding.

Because Kosovars have not been diligent in initiating inheritance proceedings in the past, a significant percentage of inheritance proceedings moving forward will be initiated many years after death of the registered rights holder, not uncommonly twenty years or more. Inheritance proceedings initiated many years after the rights holder's death are referred to as "delayed inheritance" claims or proceedings.

Delayed inheritance claims are characterized by circumstances created by the passage of time. The size of the deceased rights holder's family typically grew during the years after the death occurred, leaving a large number of family members who, as potential heirs to the estate, have a statutory right to the immovable property assets in the estate. It does not appear uncommon for delayed inheritance claims to include up to 30 or more potential heirs. Additionally, it does not appear uncommon for some of these potential heirs to have taken *de facto* possession of land parcels registered in the name of the deceased, informally sub-divided it and constructed their homes and made other investments on the parcel.

Provisions in the LUCP envisioning an immediate inheritance claim do not address the large numbers of potential heirs and any *de facto* property rights that may be exercised by potential heirs in the land parcel of the deceased. Anecdotal information indicates that citizens initiating delayed inheritance claims find the process to be overwhelming, confusing, time-consuming and expensive. Such experiences create disincentives to initiating such claims and discourage formalization. They also perpetuate a vicious cycle because the longer citizens wait to initiate delayed inheritance claims, the more complicated and difficult they will become to resolve.

For the government's formalization initiatives to have impact, new procedures must be developed to make delayed inheritance proceedings more streamlined, efficient, predictable and affordable for citizens. Otherwise citizens that appear already predisposed not to formalize their rights to property will encounter further disincentives to initiate delayed inheritance proceedings frequently required to register rights in property and regularize unpermitted buildings they have constructed.

The purpose of this report is to critically assess provisions in the legal framework governing uncontested inheritance claims and the registration of property rights to identify options for improving these process and support development of incentives for citizens to formalize their property rights. This report also assesses the practices of both courts and notaries to identify options for strengthening due process safeguards to ensure all potential heirs, especially women, can fully exercise their rights to inherit property. Findings from these assessments are then applied to the four most common scenarios or "fact patterns" emerging from delayed inheritance claims to inform recommendations for developing new procedures responsive to the circumstances unique to these claims that would help increase efficiency, reduce disincentives to formalization and strengthen due process safeguards.

⁶ Law No. 03/L-007 "Law on Out Contentious Procedure." N.B.: The English translation of the law uses the term "out contentious." This would appear to be an incorrect translation. The term "uncontested" is used in this assessment report. Accordingly, the acronym "LUCP" is used in reference to this law.

To help frame these issues for discussion, the first section of the analysis below provides an overview or “mapping” of the legal provisions and procedures that governs the processing of immediate inheritance claims. The second section presents a critical analysis of uncontested inheritance procedures through a discussion of the comparative roles of courts and notaries and provides general recommendations to improve efficiency and strengthen safeguards. The final section provides a targeted application of this analysis to four specific delayed inheritance scenarios or “fact patterns” that have emerged from the failure of potential heirs to timely initiate inheritance proceedings and fact-specific recommendations related to each.

METHODOLOGY

The analysis presented in this report was developed through a three-step methodology. First, a thorough desk review was conducted of the relevant substantive and procedural legislation governing inheritance proceedings, as well as civil society court monitoring reports of contested inheritance cases and other relevant secondary literature.

This was followed by in-depth interviews with key informants including judges, notaries, lawyers and officials in Municipal Civil Status Offices (CSOs) and Municipal Cadastral Offices (MCOs), to better understand the administrative and practical constraints impeding the efficient processing of uncontested inheritance claims. Judges interviewed also provided selected court case files for review. Please see Annex I for a complete list of interviewees.

PRP used the information gathered to produce a critical analysis of the current legal framework to identify options to make uncontested inheritance claims (both immediate and delayed) more streamlined, efficient and affordable to citizens and applied these to the four most common scenarios or “fact patterns” emerging from delayed inheritance claims, to develop specific recommendations for more efficiently resolving delayed inheritance claims and strengthening due process safeguards to protect the rights of potential heirs, especially women and members of non-majority communities to exercise their rights to inherit immovable property.

I.0 IMMEDIATE INHERITANCE CLAIMS

I.1 MAPPING OF THE UNCONTESTED LEGAL AND ADMINISTRATIVE PROCEDURES

Uncontested inheritance proceedings comprise a two-step process. Under the first, the potential heirs provide documents to the court or notary to demonstrate their rights as heirs of the deceased immovable property rights holder. Once these rights are verified by the court or notary, the heirs are issued a judgment or act that legally conveys to the heirs rights in the deceased's immovable property and provides the legal basis required to register these rights.

Before this process is mapped and analyzed below, we first discuss the preliminary issues of the jurisdiction of courts and notaries over uncontested inheritance claims; and the evidentiary data potential heirs are required to submit in support of their claims. This will help provide the reader with context and a better understanding of how uncontested inheritance claims are processed in practice.

I.2 JURISDICTION

Inheritance in Kosovo is defined as “a transfer of a person’s property based on the law or based on a will (inheritance) from a dead person (decedent) to one person or several persons (heirs or legatees).”⁷ The Law on Inheritance provides that heirs acquire the right to inherit upon the moment of death (Art. 4.1) or upon declaration of death (Art. 124.2).

Inheritance claims are treated as uncontested when the deceased died without a will (intestate) and his or her descendants (the potential heirs) are in agreement about all elements of the inheritance claim and there are no objections or disputed issues raised by any other parties with an interest in the claim.

Currently, both courts and notaries exercise jurisdiction over uncontested inheritance claims. This is not by design, rather it is the result of gaps in the legal framework.

The LUCP, enacted in 2008, provides courts exclusive jurisdiction over uncontested inheritance claims. The Law on Notary, enacted approximately one month later also provides notaries with jurisdiction over such claims.⁸

In an attempt to resolve this inconsistency, the Law on Notary includes a provision requiring the LUCP to be amended within one year of the Law’s passing (Art. 76.10) to harmonize the provisions of both laws and, presumably, clarify which institution has jurisdiction over uncontested inheritance claims. The required amendments have not been enacted, thereby creating confusion.

This confusion appears to have renewed the debate over which institution should exercise exclusive jurisdiction. To help frame issues to inform the debate, this report provides in the section of the legal analysis below, the “review of the hereditary estate,” a comparative analysis of court and notary capacity to efficiently process uncontested inheritance claims and implement safeguards to protect the rights of all potential heirs.

The references to “courts” in the discussion that follows reflects the language currently contained in the LUCP. In practice, however, these references also pertain to notaries who currently also have jurisdiction over uncontested inheritance claims.

⁷ Law No. 2004/26, “Law on Inheritance in Kosovo”, Article 1.2.

⁸ Law No. 03/L-10, “Law on Notary”, Article 29.1.4.

1.3 EVIDENTIARY DATA: ACT OF DEATH DOCUMENT

The act of death document serves two functions. It provides notice to the court that a death has occurred in order for it to initiate inheritance proceedings. It also serves to present information required by potential heirs as evidence to demonstrate their legal right to inherit from the deceased property rights holder. Although practitioners often describe the act of death document as being issued *ex officio* by CSOs, in both legislation and practice it is a declaratory document that contains unverified data provided by the potential heirs themselves.

According to the LUCP, the inheritance process begins “soon as the court is notified that a person has died or is announced dead by a court judgment” (Art. 127). The announcement of death is regulated by Articles 59–72 of the LUCP. Notice is provided to the court through the “act of death” that the “communal body of the competent service for the maintenance of the death recording book” is required to prepare and deliver within 15 days from the day the death was recorded (Art. 133, LUCP). It is presumed that the communal body referred to in this provision is the CSO.⁹

It appears that in practice CSOs do not notify courts or notaries when a death is registered. It should be noted that the Law on Civil Status, enacted after the LUCP, contains no provisions requiring the CSO to notify the court upon registration of a death.¹⁰ The Administrative Instruction (AI) providing the implementation procedures for registration of births, marriages and deaths is similarly silent on the requirement to notify courts or notaries of a death.¹¹ In the absence of notice from the CSO, it is left to the potential heirs themselves to initiate the proceedings. Additionally, there are no standard forms available to potential heirs to initiate the proceedings. Typically they submit only the act of death document.

The LUCP and more recent Civil Status legislation use different terminology regarding the act of death document. This appears to have created some confusion in practice.

The LUCP lists the data to be included in the act of death in Article 136.1:

- a) the name and surname of the dead person and the name of his parents, the profession, the date of birth and the citizenship of the dead person, whereas for the married dead person also the former surname possessed before the marriage;
- b) the day, month and year and if possible the time of death;
- c) the residence of the testator;
- d) name and surname, the date of birth, profession, the residence of the testator's spouse and the children born through marriage, outside the marriage and the adopted children;
- e) name and surname, date of birth, the residence of the other relatives which can be summoned by law in inheritance, and also of the other persons which have rights in the inheritance based on the testament; and
- f) the average worth of the real estate and especially the average worth of the testator's movable estate.

Sub-paragraphs d) through f) are most significant for verifying heirs and the contents of the estate.

⁹ N.B.: Although common practice is to refer to the office that issues documents related to death and birth as the “Civil Registry Office”, the applicable legislation governing the issuance of these documents refers to the “Civil Status Office.” This report references the Civil Status Office to be consistent with the applicable legislation.

¹⁰ Law No. 04/L-003, “Law on Civil Status”, Chapter VII, Death Act Registration, Articles 46-53.

¹¹ Administrative Instruction (MIA) No. 06/2015, On the General Registration Procedures of the Fact of Birth, Marriage and Death”, Chapter V, Death Registration, Articles 19-24.

The Law on Civil Status, however, describes the act of death differently. It limits the contents of the act of death document to facts about the death (i.e. time, location, cause, etc.) that are to then be included in the Death Certificate that legally certifies the death. (Art. 46). The facts listed on the act of death do not include information about the deceased heirs or the contents of his or her estate (Art. 46.3).

Additionally, the AI implementing the Law on Civil Status introduces a term not included in the civil status law, “testimony of death.” It provides that the “testimony of death” document is to include information about the deceased’s heirs and the contents of his or her estate.¹² In essence, the “testimony of death” document contains the same information and serves the same purpose as the act of death document described in the LUCP. It is not clear why the legislators changed the terminology. It does not impact the evidentiary requirements the citizens must meet to demonstrate their claims or how courts and notaries are to process the claims.

For the purposes of this report, the document described as the “testimony of death” is understood to contain the same information as the act of death document described in the LUCP. To be consistent with the terminology used in the more recent Civil Status legislation, however, this report will use the term “testimony of death.” Citations to LUCP that reference the act of death are applicable to the testimony of death.

The LUCP provides that information contained in the testimony of death is “compiled according to the data that were obtained from the dead person’s relatives, from the persons with which the dead person used to cohabit, and also from other persons that could give data that will be noted in the act of death” (Art. 134). It should be noted that the LUCP foresees that the data in the testimony of death would be compiled by the CSO. If the CSO is unable to compile the data about heirs, it is to send partial data to the court for it to obtain the data (Art. 133.2). Article 134 makes clear that it is the potential heirs that provide the data to be recorded in the testimony of death.

The more recent civil status legislation confirms that the required data is to be provided by the potential heirs. Although the testimony of death bears the signature and stamp of the civil status officer, the information it contains is not generated by the CSO. Instead, AI 25/2013 provides that “all civil status documents are issued from the civil status system except for the...death testimony” (Art. 8.4).

This provision appears to confirm that the information relied upon by courts and notaries to process uncontested inheritance claims is neither issued nor verified by the CSO. Instead, it is unverified data produced by the potential heirs themselves.

1.4 STEP I: REVIEW OF THE HEREDITARY ESTATE

Once the claim has been initiated, courts and notaries apply the provisions of the LUCP to conduct the review of the hereditary estate. The purpose of the review is to verify the:

- Identity of the heirs;
- Assets and value of the estate;
- Data about immovable property assets in the estate required for its registration in the MCO;
- Proportionate share of each heir to the estate.

The information verified is then included in the inheritance judgment (Article 171).

¹² Administrative Instruction (MIA) No. 25/2013, “On Civil Status Documents”, Article 5, paragraphs 11.10–11.14.

1.4.1 HEARING SESSION

The LUCP requires the review of the hereditary estate to be conducted through a court hearing session (Article 159.1). The hearing also serves as the venue through which potential heirs declare their intention to accept their share of the hereditary estate or not (Article 159.3). Notaries perform the same function by meeting with the potential heirs in her or his office.

In order to conduct the hearing, the court is required to summon the interested parties (Art. 159.2). The LUCP does not, however, provide notification procedures. In the absence of clear notification procedures, judges interviewed for this report informed they rely on the notification provisions contained in the Law on Contested Procedure.¹³ Notaries are not bound by the formal notification procedures prescribed in the LCP. Instead, they have the flexibility to directly communicate with the potential heirs who are their clients.

1.4.2 DATA TO BE REVIEWED

The LUCP envisions that the majority of data to be reviewed by the court or notary is to be presented in what is now referred to as the testimony of death document. This data is to be obtained prior to the hearing session or meeting with the notary.¹⁴

The LUCP does not describe evidentiary documents other than the testimony of death. In practice, courts and notaries require potential heirs to submit:

- Death certificate for the deceased;
- Identification documents of each potential heir;
- Extracts of the birth certificate of each potential heir;
- Death certificates for all deceased potential heirs;
- Certificate of ownership issued by the MCO for immovable property owned by the deceased. The certificate must not have been issued more than one month prior to submission; and
- Any potential heirs living abroad may submit notarized statements in lieu of attending the hearing

This information is then verified to confirm the identity of the heirs, assets and value of the estate and the proportionate shares of each of the heirs to the estate.

1.4.3 IDENTITY OF HEIRS

The LUCP provides that if the court has no information about the identity of heirs, it may issue a public announcement in the “Official newspaper of Kosovo,” the court’s announcement board and, if necessary, published in another appropriate manner for a period of six months (Arts. 161.1 and 161.2). After expiration of the six months, the court will proceed based on the declaration of the temporary representative and available data (Art. 161.4). The court may also summon other persons it believes have a right to inherit (Art. 163.2).

1.4.4 ASSETS AND VALUATION OF THE ESTATE

The LUCP provides that the “inventory and estimation (valuation) of the estate are done by the competent commune service” (Art. 141.1) or the “court official appointed by the judge” (Art. 141.2). The inventory of the estate includes both movable and immovable property (Art. 139.1). This

¹³ Law No. 03/L-006, “On Contested Procedure.”

¹⁴ LUCP, “The preliminary acts of procedure,” Paragraph b, sub-section 1, Articles 133–147.

information is provided in the testimony of death but as noted above, the information is not generated by the CSO, rather by the potential heirs themselves.

I.4.5 THE HEIRS' PROPORTIONATE SHARES IN THE ESTATE

The LUCP provides no procedures or guidance to determine each heir's proportionate share of the estate. The Law on Inheritance prescribes the ranks of inheritance in Articles 12 through 20 in descending order from the deceased's children and spouse, to the deceased parents and siblings and then grandparents. The law provides for equal shares between persons of the same rank. It appears that courts and notaries will apply the statute's provisions unless the heirs come to another agreement about their respective shares.

It also appears the LUCP favors such agreements. The law provides that the heirs and legatees may propose an agreement to the court to be incorporated into the judgment act (Art. 172). There is no language about the court reviewing or approving the agreement. It appears it is to be included in the judgment as long as none of the potential heirs object. The same would be true for claims processed by notaries.

I.4.6 JUDGMENT

The hearing concludes with a court judgment or notary decision verifying the evidence submitted by the heirs in support of their claims. The final judgment can be challenged by a party to the claim through a contested procedure (Art. 185.1 of the LUCP). The Law on Notary does not describe procedures to appeal the act issued by a notary.

If at any time in the proceedings the parties disagree about material facts related to the claim, the court is to suspend the proceedings and advise the parties to file a contested claim (Art. 166.1, LUCP). Notaries follow the same procedure.

I.5 STEP 2: TRANSFER OF RIGHTS IN IMMOVABLE PROPERTY FROM THE DECEASED TO HEIRS

The inheritance judgment or notary act provides the legal basis required by the MCO to update the immovable property rights registry to reflect the transfer of rights from the deceased to his or her heirs and then register these rights in the name of the heirs.¹⁵ The heirs are required to submit to the MCO the judgment or act together with an application for the registration of their rights. Once the application for transfer is submitted, the MCO is required to review the application within three days.¹⁶ No timeline is provided for issuing a decision to register. In practice it appears to take up to 2 weeks. After the decision is issued, it is to be posted on the MCO notice board for five days before it is finalized.¹⁷

In the event the MCO refuses to accept the request for registration, the applicant has 30 days to request the MCO to reconsider. If the MCO does not change its decision, the applicant can request the KCA to review the application. If the KCA upholds the MCO decision, the applicant can seek independent judicial review.¹⁸

¹⁵ Art. 4 of Law No. 04/L-009, amending Art. 3.7 of Law No. 2002/05, "On Establishing the Immovable Property Rights Registry."

¹⁶ Administrative Instruction No. 02/2013, "On Implementing the Law on Cadastre" (AI 02/2013), Article 8.5.

¹⁷ Law No. 2003/13 On Amendments and additions to the Law no. 2002/5 on the Establishment of the Immovable Property Rights Registry, Article 1 paragraph 3.3b.

¹⁸ Law on Cadastre, Law No. 04/L-013, Arts. 27 and 28.

LEGAL ANALYSIS

ANALYSIS OF UNCONTESTED LEGAL AND ADMINISTRATIVE PROCEDURES

Presented below is a critical assessment of the two steps mapped out above. The assessment identifies options and provides recommendations for developing more streamlined administrative procedures to achieve greater efficiency.

REVIEW OF THE HEREDITARY ESTATE

Currently both courts and notaries are mandated to review hereditary estates in uncontested claims and there is on-going debate over which institution should exercise exclusive jurisdiction over them. Presented below is a comparative assessment of the capacity of courts and notaries to efficiently process these claims and ensure that safeguards are implemented to safeguard the rights of all potential heirs, especially female heirs. This assessment considers: A.) Qualitative nature of the review; B.) Constraints faced by courts and notaries to provide effective safeguards to prevent exclusion of heirs and coerced renunciation of the right to inherit, especially by women; and C.) Efficiency of services delivered by courts and notaries.

A. QUALITATIVE NATURE OF THE REVIEW

Uncontested inheritance proceedings, by definition, do not contain any material issues of dispute. As such, the LUCP does not describe any evidentiary or adjudication procedures through which substantive issues of law or fact are to be determined. Instead, the law provides for a simple administrative review of the documents submitted by potential heirs in support of their claim to verify the documents' validity. Administrative reviews do not require judicial decision making and can be performed quickly and efficiently. The notary system was introduced into Kosovo to perform such functions.

Issues most prone to dispute during uncontested inheritance claims that would then trigger a contested claim in the court are valuation and division of the estate. Judges reported during a participatory assessment conducted by the PRP that these issues are the most complicated and time consuming to resolve. It is not surprising, therefore, that the LUCP encourages the potential heirs to form agreements on these issues and submit them to the court to be incorporated into the judgment of inheritance.

The key for achieving efficiency in processing inheritance claims is to ensure they remain uncontested and can be processed through a simple administrative review of documents. This requires providing potential heirs with assistance and the opportunity to resolve disputes that may arise during the process. Mediation appears to be an effective mechanism to provide this assistance.

For example, disputes over valuation of the estate often become protracted because of the absence of accurate and reliable market data in Kosovo. Market value is, however, the price that is agreed by the parties and actually paid for the property. Rather than relying on the court testimony of valuation experts to determine market value, mediation can assist the parties themselves to come to agreement over value. Assisting the parties to negotiate an agreement promotes both efficiency and a more sustainable outcome because it was achieved through consensus. It should also be noted that during a Differentiated Case Management (DCM) analysis recently completed by the PRP, it was found that although courts referred only a few contested property related cases to mediation (26 out of 1,829), all of those referred were successfully disposed through the mediation.

B. CONSTRAINTS FACED BY COURTS AND NOTARIES TO PROVIDE EFFECTIVE SAFEGUARDS

There are two separate and distinct threats to the rights of potential heirs that must be safeguarded against. The first is coercion of potential heirs, especially female, to renounce their rights to inherit the family immovable property and cede these rights to brothers. The second is concealment and exclusion of potential heirs, often women, from participating in inheritance proceedings.

There are at present limited safeguards available to courts and notaries to protect against concealment and coercion of heirs. The most common safeguard reported by courts and notaries is the practice of conducting “additional inquiries” when there are suspicions of coercion and concealment.

Although both judges and notaries reported such inquiries have been successful for identifying additional heirs or persuading a female heir to withdraw her request to renounce her rights to inherit, these reports are anecdotal. It does not appear that all courts and notaries follow a standard practice of making additional inquiries. Thus, this is an ad hoc approach to safeguarding rights, and there is no empirical evidence with which to measure its effectiveness.

There is a fundamental difference between coercion and concealment. The identities of potential heirs that have been coerced to renounce are known to courts and notaries because they are required to declare their intention to renounce their rights. The identities of concealed heirs are unknown. It is necessary to tailor safeguards to the specific circumstances of each.

Coercion can be manifested in the form of societal attitudes and behaviors about the rights of women to inherit property. Some women may believe that they have no choice but to comply with society’s expectation that they will give up their rights to immovable property to keep it in the male blood line. Coercion can also be manifested by the woman’s family exerting direct pressure on her to renounce her rights.

Societal attitudes regarding women’s right to inherit property are consistent across all ethnic communities for which data exist. The National Baseline Survey on Property Rights indicates that, when asked whether men and women should have equal rights to own land, 85.1% of the majority community, and approximately 82% the non-majority community respondents agreed.¹⁹ However, data on practices presents a different picture. When the same set of respondents were asked whether they could recall a case in their circle of acquaintances in which daughters inherited 65% of the majority community were unable to recall a single case compared to 17% and 39% of the non-majority communities (Serb and non-Serb respectively).²⁰ Non-majority communities were also more likely to report a registered female property owner in the household (41%) than the majority community (16%). Approximately one-third of respondents from all communities viewed cultural traditions to be the cause of different rates of property ownership for men and women.²¹

Currently, the MoJ, PRP and the European Union funded Civil Code and Property Rights Project are working together to develop more robust and systemic procedural safeguards to address the problem of coerced renunciation. Recommended safeguards may include the requirement that renunciation take place in special court hearings outside the uncontested proceedings. That said, while it may be recommended that renunciation take place outside uncontested proceedings, there is nothing that would prevent a court or notary from notifying the prosecutor’s office if they have suspicions that a potential heir is the victim of coercion.

This report will discuss in greater detail options for developing safeguards against the concealment of heirs that can be introduced into uncontested inheritance proceedings. These safeguards are

¹⁹ Tetra Tech. 2015. "National Baseline Survey for Property Rights in Kosovo." Pristina: USAID Property Rights Program, p. 21.

²⁰ Ibid. p. 23.

²¹ Ibid. p. 28.

presented in the section below, “discussion of specific recommendations to strengthen safeguards against concealment and exclusion.”

To provide context for discussing safeguards against concealment, it is important to understand the circumstances that prevent courts and notaries from verifying the identities of all potential heirs. The primary constraint to identifying all potential heirs is the apparent lack of IT and data management capacity in the Civil Registry System that prevents CSOs from generating a complete, accurate and verified list of the deceased’s family members. In the absence of this capacity, information contained in the testimony of death document is provided by the potential heirs themselves.

The lack of CSO capacity to verify the identity of heirs impacts courts and notaries equally. Additionally, neither have the capacity and resources to independently verify the list of potential heirs themselves.

CSO officials interviewed for this report explained that civil status documents have been digitized and documents such as birth, death and marriage certificates can be searched and cross linked through an individual’s Personal Identification Number (PIN). The system does not, however, contain search functions that would enable the system to generate an accurate list of an individual’s family members by linking them to the individual through his or her PIN.

The technical constraints preventing the use of a PIN to produce a list of family members have not yet been clearly defined. Potential explanations may be that the system’s design architecture does not enable such a functional search. Or, it may be because PIN data have not been entered onto all the documents required to link family members to the deceased. It appears further assessment is required to determine the system’s technical limitations and in order that practical solutions to address them can be developed.

It should also be noted that the Law on Civil Status provides for the creation of a “Family Brochure” that is to contain the birth and death records for spouses and children from the marriage (Art. 19). CSO officials reported these brochures are not being issued currently because the implementing regulations guiding issuance of the brochures have not been drafted.

The family brochure, however, appears to be more of an interim measure to address current gaps in the Civil Registry System’s data base. The family brochure is kept in hard copy and is presented to spouses upon marriage (Art. 19.1). It is then the responsibility of the family to manually enter information about the marriage and subsequent births and deaths within the family. It would appear that the brochure will contain unverified information, similar to the information already provided in the testimony of death document.

Also, even if the family brochure contained verified data about a family’s composition, the Law on Civil Status provides that only data entered into the brochure after establishment of the Civil Status Registry (presumably 2011) are valid (Art. 19.4). The brochure, therefore, may not contain relevant data for older inheritance claims.

C. EFFICIENCY OF SERVICES DELIVERED BY COURTS AND NOTARIES

As discussed above, because the LUCP does not prescribe notification procedures to initiate the review of the hereditary estate, courts rely on those provided in the LCP. The DCM assessment recently completed by the PRP documented disposition times for a representative sample of recently concluded contested cases. The assessment observed court management practices in the chambers of seven judges working in the Basic Courts of Ferizaj/Uroševac, Gjilan/Gnjilane, and Pejë/Peć that are also serving as “Courts of Merit” under the PRP project. The assessment documented that all seven judges applying LCP provisions waited approximately two years after the claim was filed to send out the notice of the hearing session. Additionally, judges interviewed for this report indicated that uncontested inheritance claims are not a priority for the courts and are treated last among the legal actions covered by the LUCP.

Notaries are not bound to follow the formal notification procedures prescribed in the LCP. As described above, unlike proceedings in the courts, notaries and potential heirs establish a service provider/client relationship. Notaries are more customer orientated and because they provide services in the market, they are incentivized to provide customer satisfaction. When notaries have questions or require additional information from their clients, they simply pick up the phone or send an email.

Simply by avoiding formal notification procedures and engaging in two-way communication with clients, notaries are able to process an uncontested inheritance claim in approximately 7–10 days.

It is not surprising, therefore, that citizens have been turning to notaries to process uncontested inheritance claims. Anecdotal information obtained from judges in three Basic Courts is that there has been a substantial decrease in the number of uncontested inheritance claims filed in the courts since the Law on Notary²² was introduced in 2008 to provide notaries with jurisdiction over such claims. Unofficial data obtained from the Lipjan/Lipjane branch of the Prishtinë/Priština Basic Court indicate a 50% decrease in the number of uncontested inheritance cases filed in 2013 from the previous year.

Despite the efficiencies that notaries bring to the process, recently proposed amendments to the Law on Notary do not resolve confusion over whether notaries or courts have exclusive jurisdiction over uncontested inheritance claims. Additionally, the proposed amendments foresee that courts will refer inheritance cases to notaries but do not differentiate the types of claims to be referred or deadlines for doing so. The absence of clear referral criteria and deadlines will likely contribute to confusion over jurisdiction and unnecessarily delay processing of citizens' inheritance claims and formalization of their property rights.

Proposed amendments also do not address concerns over the fees charged by notaries to process the transfer of property rights from the deceased rights holder to his or her heirs. Currently, the fees are based on the value of the property, rather than the service provided by the notary, thereby constituting a *de facto* tax on citizens. The cost of this *de facto* tax and other fees notaries are authorized to charge may be disproportionate to the financial resources of the majority of Kosovo's citizens.

Lastly, there are concerns that the proposed amendments do not provide sufficient safeguards to protect women against coercion to renounce their inheritance rights. As discussed above, the MoJ is exploring options to remove renunciation from uncontested proceedings and require that it occur in a special court hearing. Assuming these safeguards are enacted, it would appear they need not be addressed in the Law on Notary.

FINDINGS RELATED TO THE ROLE OF NOTARIES AND COURTS TO PROCESS UNCONTESTED INHERITANCE CLAIMS

The notary system was established to perform the administrative review prescribed by the LUCP. Provided the draft Law on Notary is further developed to address the issues discussed above, it would appear uncontested inheritance claims could be processed faster and more efficiently through the notary system.

Arguments in favor of courts retaining jurisdiction over these claims often cite the role of courts to protect rights and safeguard potential heirs, especially female heirs, from being coerced to renounce the right to inherit. Potential procedural safeguards being considered by the MoJ to protect against coerced renunciation, would appear to accommodate a process under which notaries would have jurisdiction to process uncontested claims to promote efficiency and courts would oversee the act of renunciation during a separate hearing.

²² Law on Notary, Law No. 03/L-10.

It should also be noted that the court system has limited resources and is faced with a significant, albeit decreasing, backlog of contested cases. The MoJ might consider reducing the burden on courts by providing notaries exclusive jurisdiction over uncontested inheritance claims to enable courts to focus their efforts to resolve contested cases and reduce backlog.

Regardless of whether notaries or courts are provided exclusive jurisdiction over uncontested inheritance claims, the key for achieving efficiency is to ensure they remain uncontested. Mediation appears to have significant potential to assist potential heirs to resolve disputes that may arise during the process. Mediation is not, however, widely used. Expansion of mediation services and educating potential heirs, courts and notaries about its benefits appears necessary.

While ensuring an efficient process helps create incentives for citizens to formalize their immovable property rights, it is essential it also provides safeguards to protect the rights of all heirs, especially women, to exercise their rights to inherit property. In addition to safeguarding against coerced renunciation, measures must be taken to prevent the concealment and exclusion of heirs.

Data management and IT limitations that prevent CSOs from producing a verified list of potential heirs creates opportunities to conceal and exclude heirs from inheritance proceedings. Both notaries and courts face the same constraints to independently verify the identity of all potential heirs. It is essential, therefore, to strengthen safeguards to protect against concealment and exclusion. These safeguards are discussed below.

DISCUSSION OF SPECIFIC RECOMMENDATIONS TO STRENGTHEN SAFEGUARDS AGAINST CONCEALMENT AND EXCLUSION OF POTENTIAL HEIRS

STRENGTHENING NOTICE PROVISIONS TO INCREASE TRANSPARENCY

As discussed above, it would appear necessary for the Civil Registration Agency to conduct an assessment of the Civil Status system's IT and data management capacity to determine if the system is capable of producing a verified list of potential heirs. If it transpires that the system is currently capable, or will have the required capability in the near future, this should help to significantly mitigate opportunities to conceal and exclude heirs.

The Civil Status system is, however, a nascent institution attempting to reconstruct a system whose data was significantly damaged and compromised in the aftermath of conflict. Consideration might be given to whether the data it produces moving forward will be of sufficient quality to ensure a completely accurate list of family members. The challenges may be considerable to produce an accurate list for immediate inheritance claims and will likely be greater for delayed claims in which the death occurred many years ago, especially if the deceased's PIN has not been entered into the system. For these reasons, it may be prudent to implement safeguards in addition to a CSO verified list of potential heirs. Publishing notice of the inheritance claim could provide an effective supplementary safeguard as demonstrated by experience from Estonia.

The 2008 amendments to the Estonian Law on Succession (ESL) include a mandatory requirement "that a notary shall publish a notice pertaining to the initiation of succession proceedings in *Ametlikud Teadaanded* not later than two working days after initiation of the succession proceedings (see §168 (1) of the 2008 LSA)."²³ The *Ametlikud Teadaanded* is an official online publication and public electronic database that is maintained by the Republic of Estonia's MoJ. The purpose of establishing the publicly accessible database and developing procedures to ensure widespread publication of notice "is to disseminate as much information as possible about succession proceedings being conducted by notaries, in order to provide maximal protection for the persons entitled to inherit."²⁴ The Government of Kosovo might consider requiring similar publication of notice for every

²³ Succession Law Procedure Coverage in Estonian Public Electronic Databases: *Ametlikud Teadaanded* and the Succession Register. <http://www.globalpropertyguide.com/Europe/Estonia/Inheritance>.

²⁴ Ibid.

uncontested inheritance claim and improving the quality and reach of the publication by developing enhanced notification procedures.

The internet penetration rate in Kosovo is 76.6%, a rate comparable to most developed countries.²⁵ Availability and access to the internet, popularity of social media and more affordable “smart” phones and similar devices create opportunities to develop enhanced notification procedures to more widely disseminate notice of proceedings to the largest number of people. Opportunities include publication of notice on Republic of Kosovo and civil society websites and in social media. Other forms of mass media including newspaper, television and radio and SMS delivered via mobile phone networks could be utilized as well. Additional outreach could be implemented through Kosovo’s embassies abroad to inform Kosovars in the diaspora.

Publication of notice should be based on requirements and procedures in other European countries such as Estonia that have proven effective and comply with European Union (EU) human rights and due process standards. To ensure that notice procedures meet EU standards, the Government of Kosovo might consider developing policies to guide their implementation in consultation with the EU and other international partners. Additionally, bilateral agreements with Serbia, Montenegro and the Former Yugoslav Republic of Macedonia might be considered so that publication of notice could provide due process safeguards to Kosovo Serbs displaced by the conflict who are parties in an inheritance claim.

Such enhanced procedures cannot effectively safeguard rights if they are not widely advertised and provide meaningful opportunities for potential heirs to obtain knowledge of the claim and information required to assert their rights. It will be essential to carefully monitor and document the actual reach of the procedures to demonstrate that due process standards are met.²⁶

While widely publicizing notice of claims will help to make the proceedings more transparent and to provide all potential heirs and interested parties knowledge required to assert their rights, this may not be enough to ensure that potential heirs that might otherwise be concealed come forward to assert their rights. Some potential heirs, especially women, may be coerced to remain concealed.

Enhanced notice procedures could be combined with and reinforced by initiatives undertaken by the Office of the President and PRP to implement BCC activities to change cultural attitudes and behaviors about the rights of women to inherit family property. Information campaigns could also be developed to raise citizens’ awareness that concealing potential heirs and coercing them not to assert their rights to the estate are criminal offences in Kosovo.

By making uncontested inheritance proceedings more transparent and by promoting a culture of awareness and understanding of the harm caused by concealing heirs, those being concealed or other parties with knowledge of the concealment will be encouraged to come forward to end the concealment. It is equally important that citizens fully understand the consequences of actions to conceal or coerce heirs. Prosecution of these criminal offences would provide an effective means to ensure a better understanding of the consequences.

CRIMINAL PROSECUTIONS

The Criminal Code of the Republic of Kosovo²⁷ provides that false statements or the omission of facts made under oath or in an affidavit is a criminal offense punishable to up to three years in prison (Art. 391). False statements made during court, minor offenses, and administrative proceedings, or before a notary are punishable by up to one year in prison. If the false statement is the basis upon

²⁵ Fazliu 2013: 18.

²⁶ Effective notice is important also because not all heirs of the decedent may be known, as in the case of a child born out of wedlock, for example.

²⁷ Criminal Code of the Republic of Kosovo, Code No. 04/L-082, Article 195.

which a final judgment is made, the prison term can be increased to up to three years (Art. 392). Additionally, Article 195 of the Criminal Code provides that acts of force or serious threat committed by one person to compel another to do or abstain from doing and act or to acquiesce to an act shall be punished by a fine or imprisonment of up to one year.

It is noted that judges and representatives from civil society who monitor inheritance cases in the courts have expressed the opinion that prosecution of these offences would serve as an effective safeguard but that courts and notaries rarely refer such cases to the prosecution.²⁸ Instead, they tend to take a “hands off” approach to family matters. Judges expressed the preference to encourage members of the family to resolve the issues themselves rather than referring the matter to the prosecutor’s office. It appears notaries may simply refuse to process the claim and take no further action. This allows the potential heirs to then look for a notary that will process their claim. The failure to consistently prosecute criminal acts may send a signal to citizens that they can commit such offences with impunity, thereby encouraging their perpetuation.

Both courts and notaries have the same authority to refer cases to the prosecutor’s office when they suspect fraudulent documents or statements have been presented to conceal the identities of potential heirs. And, even if procedures are introduced that require renunciation of rights to occur in a separate court hearing outside an uncontested procedure, there is nothing to prevent a court or notary who suspects that coercion is occurring in an uncontested case from referring the matter to the prosecutor’s office. It is important, however, that courts and notaries be sensitized to the gravity of these offenses and be held accountable by the KJC and/or the Chamber of Notaries for failing to notify the prosecutor’s office of their suspicions of concealment and coercion. The KJC and/or the Chamber of Notaries should consider the viability of prosecuting judges and notaries for the criminal act of fraud as defined by Article 336 of the Criminal Code if there is evidence that the judge or notary knowingly allowed potential heirs to conceal facts for the purpose of excluding heirs.

GENERAL RECOMMENDATIONS

1. The Ministry of Justice should decide, as a matter of policy and priority, whether courts or notaries should exercise exclusive jurisdiction over uncontested inheritance claims and amend the legal framework to reflect this decision to eliminate the confusion that exists today.
2. In the event the Ministry of Justice determines that the courts should have exclusive jurisdiction, courts should adopt the notification practices used by notaries for communicating with potential heirs, which have been demonstrated to be more efficient and reduce the time required to process claims.
3. The LUCP should be revised and amended to remove provisions that are inconsistent with Civil Status legislation and practices – for example, the requirements that CSOs notify courts when deaths are reported and prepare an inventory of the deceased’s estate.
4. The greatest opportunity for creating efficiency is to ensure that uncontested inheritance claims remain uncontested. This will also serve to reduce the burdens on an already over-burdened court system. Citizens should be provided clear and easy-to-understand information about their rights and obligations in inheritance proceedings, in order to mitigate the risk of disputes occurring.
5. Additionally, the LUCP should regulate and clearly describe the information that potential heirs need to submit in support of their claim; and simplified and standard forms for presenting the information should be developed and made available to citizens free of charge.
6. As mediation appears to be an effective tool to resolve disputes, citizens should be provided with information about mediation services through widespread and on-going media and grass

²⁸ Opinions expressed during the PRP facilitated roundtable in April 2015 to discuss findings presented in the “Gender, Property and Economic Opportunity in Kosovo” report produced by the PRP.

roots dissemination campaigns supported by the Government of Kosovo and donor-funded projects. Mediation services should be expanded and made more accessible to citizen and the impact of the services provided rigorously monitored and evaluated to ensure services are delivered effectively to the satisfaction of citizens, in order to increase demand for mediation.

7. The Ministry of Interior and the Civil Registration Agency should assess the technical capacity of the civil registration system's IT and data management systems to automatically generate a verified list of the deceased's family members. If the system lacks the requisite technical capacity, the actions that must be taken to generate this list should be identified and documented in an administrative procedure.
8. Intense public outreach and BCC campaigns should be implemented to inform citizens about the criminal penalties for concealment and coercion and change their attitudes and behaviors towards these criminal acts. Potential heirs should also be required to take solemn oaths and sign affidavits attesting to the truthfulness and accuracy of their statements. It is likely that only one well-publicized prosecution would send a strong message to the public and act as an effective deterrent against concealment and coercion of heirs going forward.
9. The Government of Kosovo should develop policies to guide development of more robust notification procedures that take advantage of the country's high rate of internet penetration and utilize new technologies and social media to disseminate notice and information about inheritance claims both in Kosovo and abroad. Procedures should be modeled on those demonstrated effective in other European countries to meet EU human rights standards for providing due process. BCC messages should also be disseminated with notice of the claim to help change cultural attitudes and behaviors about women's rights to inherit property. Sanctions, potentially including prosecution of judges or notaries who allow potential heirs to conceal facts for the purpose of excluding heirs, should be instituted to establish consistent rules and institutional standards that will help demonstrate government commitment to protect the rights of all heirs, especially women, to inherit and will strengthen efforts to change cultural attitudes towards the rights of women.

TRANSFER OF RIGHTS IN IMMOVEABLE PROPERTY FROM THE DECEASED TO HEIRS

This report does not attempt to provide a thorough and comprehensive business analysis of the entire immovable property registration process. Such an analysis, conducted in consultation with the KCA, would serve to identify registration fees and costs that exceed the economic means of the average Kosovo citizen; and registration requirements and procedures that are unnecessarily cumbersome, time consuming and unpredictable. Identifying and addressing such issues will help to remove barriers and disincentives to register rights conveyed through uncontested inheritance proceedings. Unless such barriers and disincentives to property rights registration are removed, efficiencies achieved in processing inheritance claims will be lost and government initiatives designed to encourage the formalization of rights will be frustrated. In lieu of a comprehensive business analysis, two issues are discussed below that could be addressed immediately and would make registration faster, easier and more affordable for citizens: the requirement of a cadastral survey in connection with registration; and municipalities' practice of requiring that all back taxes be paid as a condition for registration.

The Law "On Cadastre"²⁹ provides that a cadastral survey is required to "to enter a new cadastral unit in the cadastre or to change the data about an existing cadastral unit" (Art. 12). The Administrative Instruction (AI) "On Implementing the Law on Cadastre," however, is silent on this requirement.³⁰

²⁹ Law No. 04/-L-013.

³⁰ Administrative Instruction 02/2013.

Anecdotal information indicates that practice in some MCOs is to waive the survey requirement in inheritance cases where the applicant is seeking only recognition of his or her rights to the property, while requiring that a survey be conducted if the property right is to be transacted. This practice appears to recognize that property rights transactions (sale/purchase) involve the transfer of money, a portion of which can be used to pay the hundreds of Euros typically charged for a cadastral survey.

This practice appears, however, to be followed on an *ad hoc* basis and is not codified in the applicable legislation. It would appear that, in the absence of a transaction, many potential heirs seeking to only formalize their rights might lack the financial means to hire a surveyor. If so, the requirement to produce a cadastral survey could constitute an administrative barrier to formalization.

The AI “On Fees on Products for Registering Immovable Property Rights from Municipal Cadastral Offices”³¹ sets the fees for registering rights. Fees are tied to the legal grounds upon which the rights are conveyed. These include transaction, gift, administrative or judicial decision, division of joint property, and inheritance, or “change.”

It appears that in practice, however, municipalities have also instituted the additional requirement that any back taxes owed on the property be paid before the MCO will issue the certificate of ownership required to initiate inheritance proceedings. Municipalities should consider whether this is an effective mechanism for increasing the collection of property taxes for Own-Source Revenue (OSR). One reason back taxes have accrued in delayed inheritance cases is because the rights holder in whom the property is registered is deceased. There is little incentive for living heirs to have paid taxes over the years on property not registered in their names.

The requirement to pay back taxes before initiating formalization proceedings might serve to discourage potential heirs from formalizing their rights. It might also constitute an administrative barrier if the amount owed exceeds their financial means. This would then perpetuate the informality that contributed to the accrual of back taxes in the first place.

In addition to the costs associated with surveys and payment of back taxes, unclear and cumbersome registration practices that do not support predictable outcomes create further disincentives to registering rights. The AI “On Implementing the Law on Cadastre” provides that the judgment issued by the court or a notary act must contain information describing the property that is “identical with the data registered into the Cadastre (unit number, the area, etc.)” (Art. 8.2). There are several reasons why information contained in a recent judgment or act may not reflect rights registered in the past.

First and foremost is the subject of this report, *delayed inheritance*. Because of the failure to initiate timely inheritance proceedings, rights have remained registered in the name of long deceased persons and cadastral records have not been updated. Additionally, the KCA instituted a new system for numbering parcels after the conflict that may not exactly correspond to the numbers assigned to parcels prior to the conflict. The history of transactions on a parcel would also contain gaps if the parcel was transacted after the conflict in a parallel Serbian court based on cadastral documents removed from Kosovo to Serbia. For these reasons, the rights and property data currently registered in the cadastre may no longer reflect the reality on the ground today.

Although the Law “On Cadastre” provides MCOs the authority to correct technical errors such as misspelled topographical names on maps or incorrectly entered personal identification numbers (Art. 17 referring to the definition of technical errors in Art. 1.19), the legislation does not provide clear guidance to MCOs to differentiate between a “technical” and a “material” error. Additionally, AI 02/2013 governs data correction but also does not distinguish between technical and material errors (Art. 19).

³¹ Administrative Instruction No. 08/2014, Articles 2–7.

In the absence of clear legislative guidance, it would appear that MCOs have instituted inconsistent practices to resolve technical errors or discrepancies between the legal documents conveying property rights, and the data contained in the cadastre. Additionally, the KCA, courts, notaries and relevant administrative agencies have not developed uniform templates for providing information required to describe the property to be included in decisions or other legal acts that convey property rights. As a result, minor issues such as misspelled names or discrepancies in parcel numbering delay registration of rights indefinitely, even when there is no evidence the discrepancies affect any material rights in the property.

Practitioners interviewed also noted that certain administrative requirements are time consuming and cumbersome. For example, parties are required to pay registration and inheritance fees at the bank and then return to the municipality to provide proof of payment. This often requires several visits to the MCO and the bank. All these factors can confuse and frustrate citizens and lead to unpredictable outcomes.

RECOMMENDATIONS

1. Citizens will not be motivated to formalize their rights in immovable property (and initiate inheritance proceedings as a necessary step to formalize) unless they understand the benefits of formalization and are provided incentives to do so. Government formalization initiatives such as systematic registration of property rights and regularization of unpermitted constructions should be accompanied by intensive public information and awareness campaigns to change Kosovar's attitudes about formalization of property rights.
2. The Kosovo Cadastral Agency should conduct a full business analysis of its procedures to ensure registration requirements do not create barriers or disincentives to property rights formalization. The analysis should be designed and implemented to identify opportunities to make the process more affordable, efficient, transparent and predictable. It should conclude with the development of:
 - standard forms, templates and instructions to register and transact rights;
 - clear procedures and guidelines to ensure consistent registration practices in all MCOs;
 - training program for MCO staff to improve service delivery;
 - a simple, plain-language "how-to guide" to make the entire registration process more understandable for citizens and provide them the knowledge and information they require to register and formalize their rights;
 - policies that distinguish between the recognition/formalization of rights and the transaction of rights and guide the procedures, costs and fees citizens must follow and pay respective to each;
 - options to subsidize or waive the fees and costs charged to citizens seeking only the recognition and formalization of rights as is currently done in cadastral zones selected for reconstruction;
 - policies and guidelines for determining the circumstances under which cadastral surveys (typically the highest cost in the registration process) are required and those under which "general boundaries" are sufficient to demonstrate rights; and
 - policies developed in consultation with the Ministry of Finance to provide tax incentives to encourage the formalization of rights – for example a one-time amnesty for the payment of back property taxes, possibly linked with some form of inheritance tax relief.

2.0 DELAYED INHERITANCE: TARGETED APPLICATION OF ANALYSIS

2.1 APPLICATION OF THE CURRENT NON-CONTESTED INHERITANCE PROCEDURES TO THE MOST FREQUENTLY OCCURRING DELAYED INHERITANCE FACT PATTERNS

Immediate and delayed inheritance claims are distinguished by the length of time that has elapsed between the death of the immovable property rights holder and the initiation of inheritance proceedings. During the lengthy intervening period for delayed claims, it is not uncommon for property rights to have vested in some of the potential heirs, either *de facto* or through the legal doctrine of prescription.

The Law on Property and Other Real Rights³² provides that a “proprietary possessor acquires ownership of an immovable property, or a part thereof, after twenty (20) years of uninterrupted possession” (Art. 40.1). It would appear that, if the potential heirs meet this requirement, they could seek recognition of their property rights based, not on their status as heirs, but on the basis of their continuous possession of the property.³³

While not all potential heirs seeking formalization of their rights will meet the legal requirements for prescription, many have taken possession of the deceased’s land prior to initiating inheritance proceedings, made significant investments on it (often constructing homes) and are exercising *de facto* control over the property. It may also be that their possession of the property has been informally agreed to with the other potential heirs. The distinction between immediate and delayed inheritance claims is the latter can be characterized as a process to formalize rights that have, *de facto*, been exercised for years.

Additionally, during the period of time during which rights may have vested in the potential heirs who had taken possession of the deceased’s land parcel, the total number of potential heirs with a statutory share in the land will have typically grown large. All these potential heirs have the right to participate in the proceedings and will need to be contacted, making the process more cumbersome and time consuming.

In practice, the potential heirs who possess the deceased’s land typically take the lead to initiate inheritance proceedings to formalize rights they are actually exercising over the property. It is these heirs, therefore, who bear the responsibility to contact all the other heirs, obtain their documents and compel them to appear before a court or notary to either accept or decline their share in the estate. Additionally, these potential heirs are required to provide death certificates for any potential heir who died subsequent to the rights holder and prior to the proceedings, to demonstrate that he or she cannot inherit. Time consuming, cumbersome and frustrating requirements often dissuade potential heirs from seeking to formalize their legal rights.

The process can be even more difficult if a number of the potential heirs live outside Kosovo and have not maintained contact with the family. Additionally, some of these potential heirs, even if they can be located and contacted, may have no interest to participate in the proceedings. They may have started a life in a new country and are not interested to claim their share of the land parcel or they have no objection to the other potential heirs’ possession of the land and see no reason to involve themselves further.

³² Law No. 03/L-154.

³³ Pursuing a claim based on prescription, however, would require filing a contested claim with the court. This would not provide for an efficient and cost effective process for formalizing rights due to the time and expense of resolving contested claims in the courts.

It is essential, therefore, to develop delayed inheritance procedures to make it easier, faster and more affordable for potential heirs to comply with the procedural requirements to formalize their property rights. At the same time, the correct balance must be struck between efficiency and the provision of sufficient due process safeguards that are tailored to protect the rights asserted by all potential heirs and parties with an interest in the claim, especially women, from both majority and non-majority communities, who are subject to coercion to renounce their rights to inherit.

Presented below are the most common scenarios or “fact patterns” that have emerged from the failure to timely initiate inheritance proceedings and transfer rights in immovable property from the deceased to his or her heirs. Each is analyzed to identify issues that constrain efficiency and provide recommendations to address these constraints and to strengthen procedural due process safeguards.

FACT PATTERN I:

IMMOVABLE PROPERTY IS REGISTERED IN THE NAME OF A LONG DECEASED RIGHTS HOLDER AND CURRENTLY POSSESSED AND USED BY SOME BUT NOT ALL OF HIS OR HER POTENTIAL HEIRS.

This fact pattern appears to be the most frequently occurring and simplest to address with streamlined procedures. It also would appear to provide the greatest opportunity to quickly process a significantly large number of uncontested delayed inheritance claims to support government initiatives to assist citizens to formalize their rights to property.

Typical circumstances under this fact pattern are as follows: the immovable property is registered in the name of a rights holder who has been deceased for a significant period of time. During the intervening years, the number of potential heirs grew considerably (30 potential heirs would not be uncommon). Some of the potential heirs reside in Kosovo, others abroad. Only a few of the potential heirs exercise possession of the deceased rights holder’s land parcel because it is not large enough to sustain all the potential heirs. The potential heirs in possession of the property are those most interested to formalize their *de facto* rights in the property and are typically the ones who will initiate inheritance proceedings on behalf of all the potential heirs. Potential heirs who possess the deceased’s land parcel typically have informally subdivided the “mother parcel” registered in the name of the deceased rights holder and constructed their homes and other buildings on it. Because the subdivisions and changes to the mother parcel’s original land use designation (often referred to in cadastral documents as its “culture”) were not recorded in the MCO registry, cadastral records no longer reflect the current situation on the ground.

It is assumed for the purpose of analyzing this fact pattern that all the potential heirs are in agreement about all elements of the inheritance claim, including possession of the deceased’s land parcel by some of the potential heirs. For this reason, the claim can be treated as uncontested. It is also assumed that potential heirs who agree to the possession of the land parcel by other potential heirs will renounce their rights to take their statutory share of the land parcel. If the potential safeguard against coerced renunciation is enacted by the MoJ, renunciation under this fact pattern will need to occur under a separate court hearing.

Four Emerging Fact Patterns (FP):

FP 1: Immovable property is registered in the name of a deceased holder and currently possessed by heirs.

FP 2: Property registered in the name of a holder who informally sold it and then became displaced during the recent conflict.

FP 3: Property registered in the name of a deceased holder who informally sold it and the informal sale is not contested.

FP 4: Property registered in the name of a deceased holder who informally sold the property and the informal sale is contested.

INHERITANCE PROCEEDINGS

Under both immediate and delayed uncontested claims all the potential heirs are required to declare whether or not they wish to take their statutory share of the estate. The LUCP provides that the potential heirs' declarations will be made during a court hearing session. The LUCP also envisions that the CSO will provide the court with notice of death and a verified list of all potential heirs and the court will then summon the potential heirs to the hearing session. If any of the potential heirs do not come forward to declare their intent the court will then allocate the potential heir his or her statutory share of the estate.

These LUCP provisions are based on the assumption that the CSO's notice and court's summons practices are sufficient to ensure all potential heirs and interested parties are provided notice of the claim and an opportunity to participate in the proceedings to meet standards for due process. The default position to resolve any procedural deficiency is to provide a statutory share of the estate to a potential heir who does not appear at the hearing.

It is clear from the discussion above that CSOs are not performing the tasks described in the LUCP and that court summons' procedures are not efficient and likely not robust enough to reach potential heirs living outside of Kosovo. In practice, it is then left to the potential heirs to notify all potential heirs to ensure due process is provided. This can be a daunting task considering the large number of potential heirs and that many of them may reside abroad.

Moreover, the typically large number of potential heirs in delayed inheritance claims makes it infeasible to simply allocate statutory shares to the potential heirs who do not participate in the proceedings. This could result in the land parcel being sub-divided to the extent that it could no longer be put to productive use and/or that making decisions over its productive use extremely difficult if not impossible. Either outcome would be counter to the objectives of formalizing rights in land.

To remedy gaps in the LUCP as applied to delayed inheritance claims, enhanced notice procedures could be further developed to provide all potential heirs and interested parties with "constructive notice" of the claim. Constructive notice is a legal doctrine that presumes all potential heirs and parties with an interest in the claim are provided with sufficient information and knowledge about the claim that can be acquired by normal means.³⁴ Different from actual notice, where information is physically delivered to the parties, constructive notice is a form of implied notice deemed by law to provide parties with the information required to participate in the claim and the opportunity to do so. It also cannot be contradicted legally.

Constructive notice, coupled with a statutorily defined deadline within which all potential heirs and interested parties would need to participate in the proceedings, provides opportunities for creating a more streamlined administrative procedure to process and resolve uncontested inheritance claims. Once constructive notice has been provided, any potential heirs or interested parties who do not participate within the statutory deadline would then be precluded from asserting rights to the estate.

It should be noted that constructive notice is a standard best practice utilized by cadastral systems and is applied in Kosovo. As described above, legislation governing the Immovable Property Rights Registry requires MCO decisions approving the transfer of rights in property to be posted on the MCO notice board for 5 days. The purpose of the notice is to provide parties with an interest in the property information about the transfer to enable them to object to the transfer or otherwise assert their rights in the property before the transfer is finalized.

The policy rationale underlying this procedure is that citizens must be diligent in exercising their rights in property. Land cannot be put to productive use if the failure of citizens to assert their rights causes its legal status to remain undefined indefinitely. In other words, if citizens fail to exercise their

³⁴ In light of the 76.6% internet penetration in Kosovo, this would include notice on government and civil society websites, social media and any other form of mass media including newspaper, television and radio and SMS delivered via mobile phone networks.

rights despite being provided a meaningful opportunity to do so, it is in the public interest that these rights be forfeited. This rationale appears applicable to delayed inheritance claims as well.

POTENTIAL RISKS. The biggest potential risk is that the notice procedures are not sufficiently robust and the failure of a potential heir to participate in the proceedings was not because of a lack of diligence, but rather a lack of notice. Such risk is present in any process that employs constructive notice. The risk is deemed acceptable, however, if it is outweighed by the benefits of efficiency and finality in the adjudication of rights and if it can be mitigated with a notification process that is sufficiently robust. As discussed above, conditions for developing a robust notification process are currently present in Kosovo.

ADVANTAGES. Constructive notice procedures place the responsibility on each potential heir to assert his or her rights in the estate before the statutory deadline. This serves to remove from the potential heirs initiating the claim the responsibility for obtaining documents from all the potential heirs and ensuring their participation in the claim to either assert or waive their rights to the estate; thereby making the process simpler, easier and more efficient, thereby helping to encourage potential heirs to formalize their rights.

Allocating to each heir the responsibility for asserting rights would not, however, deviate significantly from current practice. The potential heirs most interested in formalizing rights will likely still have the incentive to “lead” the process to ensure that all potential heirs are in agreement to avoid the claim becoming contested. They would, however, no longer bear the sole responsibility to ensure the participation of all the potential heirs.

Constructive notice also protects potential heirs acting in good faith to formalize their rights from being prevented from doing so because not all potential heirs have participated in the proceedings to affirmatively declare their intent whether to accept or decline their statutory share of the estate. It may be that despite best efforts, the location of all potential heirs may not be known. Or, as noted above, there may be potential heirs who have no interest in the proceedings and simply refuse to participate in them.

As discussed above, under these circumstances the LUCP envisions that the court would assign a statutory share to any potential heir who does not participate in the proceedings. This remedy, however, is not feasible where there are large numbers of potential heirs who do not participate in the proceedings and awarding each a statutory share of the estate would result in the excessive fragmentation of the land parcel. Courts and notaries may, therefore, refuse to resolve the claim until all potential heirs make their intent known. In such cases, a potential heir’s unwillingness to participate in the proceedings may result in the legal status of the land parcel remaining undetermined indefinitely. The statutory deadline for asserting rights removes such uncertainties by providing a definite time period in which the rights of potential heirs will be recognized and clearly defined, thereby promoting finality and making the process more predictable.

SAFEGUARDS. While reducing the burden on potential heirs initiating the claim to secure the participation of all other potential heirs, constructive notice could also serve as a mechanism to make it more difficult for these same heirs who are already exercising rights to the land assets of the estate from increasing their share of the estate by coercing potential heirs, especially women, to renounce their rights to inherit or concealing or otherwise excluding other potential heirs from the proceedings.

COERCION/RENUNCIATION. As noted above, the MoJ, with the support of PRP and CCPR, is developing procedural safeguards against coerced renunciation that would be applied to immediate inheritance claims.

It is foreseen that these safeguards may include the requirement of a separate court hearing during which the court would ensure the decision to renounce was based on free will and with full knowledge of its economic impacts.

This potential safeguard could also be implemented under delayed inheritance proceedings that utilize constructive notice. Similar to immediate inheritance claims, potential heirs who do not wish to accept their share of the state would be required to renounce their rights in a separate court hearing. It should be noted, however, that there are qualitative differences between immediate and delayed proceedings that need to be taken into account when implementing this safeguard.

Under immediate claims, the safeguard is intended to prevent a harm from occurring. The potential safeguard of a special court hearing would serve to ensure that the potential heir's decision to renounce is freely made and informed with full knowledge of the economic consequences. If the court determines the potential heir's decision has been coerced, it can order the heir to take his or her statutory share of the estate.

In delayed inheritance, the harm has already occurred, when more powerful potential heirs coerced or otherwise prevented the other potential heirs from taking possession of the property. These potential heirs then typically constructed their homes and made investments on the land. In some cases, these potential heirs may have been in possession of the property long enough to acquire rights through prescription.

These circumstances, not uncommon to delayed proceedings, cast doubt on the feasibility of allocating statutory shares in the estate to potential heirs who were *de facto* coerced to give up rights in the property years ago and now wish to assert their rights, and limit the remedies available to them. Possible remedies might include a forced buy-out where the heirs in possession pay the excluded heir(s) the value of rights lost, or further sub-division of the mother parcel if possible. Pursuing such remedies would appear to require initiating a contested claim or possibly criminal prosecution. Even if the claim or prosecution is successful, enforcement of such remedies would likely not be without difficulty.

Considering the time required to obtain a court judgment, and the challenges of executing these remedies, it would be in the best interests of the parties to negotiate a settlement. Mediation would be a better alternative to contested court or criminal proceedings. Additionally, as discussed above, mediation is particularly well suited to address the types of complicated issues that would likely arise in such claims for remedy. It would also provide for a more peaceful and sustainable solution given the sensitive nature of the issues and the limited options for enforcing remedies such as a forced sale.

To promote efficiency, courts conducting the hearing should adopt the more customer-oriented approach followed by notaries. This would include establishing better two-way communication between the court and potential heirs to schedule and share information related to the hearing, to ensure that the hearings can be conducted quickly and in a timely manner. Otherwise, the efficiencies achieved through the constructive notice procedures may then be lost to excessive scheduling delays.

Consideration should also be given to the large number of potential heirs endemic to delayed claims. Because land parcels would be excessively fragmented and no longer productive if large numbers of potential heirs were given a statutory share, policies might be developed to limit the ranks of potential heirs eligible to claim a share of the land parcel.

Delayed claims typically also include potential heirs that live abroad. The LUCP provides that these heirs may submit notarized documents stating their intent to claim or not to claim their share of the estate. If safeguards are developed that would require renunciation to take place during a court hearing, procedures should be developed for potential heirs living abroad to meet this requirement by formally declaring in their country of residence their intention not to inherit. The procedures should be based on those developed to renounce rights in Kosovo to ensure that the potential heir's decision to renounce was made free from coercion or pressure and with full knowledge of its implications. It is likely the procedures would require development of a legal instrument that clearly describes the economic and property rights implications of renunciation. The instrument would also provide a template for providing a sworn declaration of the decision to renounce. A judge or notary

in the country of residence would read the information contained in the document and require the potential heir to confirm in writing that s/he understands the implications of renunciation. The sworn declaration would then be notarized and given effect in Kosovo.

CONCEALMENT. There is the risk for potential heirs to be coerced not to participate in the proceedings and, in effect, “conceal” themselves. Until such time that CSOs can produce a verified list of heirs, such coercion will be difficult to detect unless the court or notary has specific knowledge about the family.

Nonetheless, utilizing constructive notice could serve as a safeguard against concealment. The procedure allocates equally to all potential heirs the responsibility for asserting rights in the estate. This could reduce the influence and power currently wielded by those initiating and leading the submission of the claim (and who would benefit the most from concealing potential heirs). By equalizing the balance of power among the potential heirs, “space” could be created to help reduce pressure on potential heirs and encourage them to assert their rights.

Constructive notice procedures will also require implementation of a robust public outreach and education campaign to ensure that notice of the claim is disseminated widely to meet requirements for due process. This also serves to promote transparency, provide greater opportunities for potential heirs to participate in the process to help further safeguard against concealment and exclusion of heirs in the absence of a CSO verified list of potential heirs. Additionally, constructive notice would provide knowledge of the claim to interested parties who might not otherwise be notified because they are not required to be identified on the testimony of death document.

Combined with effective BCC strategies to change attitudes and behaviors towards women’s rights to inherit property and criminal prosecution for coercion, constructive notice procedures could empower weaker heirs to resist attempts to coerce them to forego their inheritance rights.

REGISTRATION OF RIGHTS IN THE MCO

Upon obtaining the inheritance decision, the heirs will need to request the MCO to update the property registry to reflect the property rights transferred to them. As noted above, the “mother parcel” registered in the name of the rights holder in the cadastre will typically have been informally sub-divided by the heirs in possession. In such cases it is possible that the requirement to prepare a formal survey for the informal sub-divisions might exceed the economic means of the heirs and create a barrier to formalization of their rights. Gaps in cadastral data, including the history of the parcel may also complicate registration of the heirs’ rights in the cadastre.

FACT-SPECIFIC FINDINGS AND RECOMMENDATIONS

Enhanced notice procedures providing effective constructive notice coupled with firm deadlines for asserting rights will serve to promote efficiency, timely resolution of uncontested and delayed inheritance claims and finality to the proceedings. Constructive notice procedures also accommodate the potential safeguards being developed by the Moj to prevent coerced renunciation and can help strengthen safeguards against concealment of potential heirs.

1. Policies on constructive notice should be consistent with EU guidelines on due process. The procedures should prescribe the venue of notice (official websites, embassies, institutions, social and other forms of media), frequency and duration of notice. Procedures might, for example provide for two stages of notice, the first when the inheritance claim has been filed and second, after judgment has been issued. The procedures should prescribe deadlines within which potential heirs and other parties to the claim can assert their rights and/or appeal the final judgment.
2. In addition to ensuring the constructive notice procedures meet EU human rights standards for due process, they should also be negotiated between Pristina and Belgrade under the auspices of the EU.

3. While separate court hearings could be held to ensure potential heirs who renounce are not coerced, courts should adapt notification practices followed by notaries to ensure hearings can be scheduled and conducted quickly. Given the large number of potential heirs who may decide to renounce, policies might be developed to limit the ranks of heirs eligible to take a share. Lastly, procedures should be developed that would allow potential heirs living abroad to renounce their rights in their country of residence. A litany could be developed that would be read by the court to the potential heir prior to the potential heir making a sworn statement to renounce.
4. To make it easier and more affordable for the heirs to register and formalize their property rights after obtaining the inheritance judgment, the KCA should consider developing registration procedures that would provide for a two-step process to formalize rights. The first would be to simply update the cadastral registry to reflect the heirs' joint ownership of the "mother" parcel. Once the rights of the heirs in possession of the property is recorded in the registry, they could complete formal subdivision at a later date, most likely when one of them wishes to transact his or her sub-divided parcel.
5. Cadastral registration procedures require that newly registered rights be published and publicly displayed for five days before they are finalized. To provide additional due process safeguards, however, the KCA might consider strengthening its notice provisions to extend the period of notification during which complaints against the registration may be lodged. At the conclusion of the deadline for filing complaints, the rights registered would be deemed final and the process would conclude.

FACT PATTERN 2:

PROPERTY REGISTERED IN THE NAME OF A RIGHTS HOLDER WHO INFORMALLY SOLD THE PROPERTY AND WAS SUBSEQUENTLY DISPLACED FROM KOSOVO AS A RESULT OF THE CONFLICT IN 1999

Because of the discriminatory legislation passed by the former regime during the 1990's, it can be expected that a significant number of informal contracts (verbal contracts not registered in the cadastre) will have been made between an ethnic Serb seller and an ethnic Albanian buyer. In such cases, the property remains registered in the name of the Serb who informally sold the property, although it is in the possession of the Albanian who informally purchased the property. Additionally, it is not uncommon for the informal Serb seller to have been displaced by the conflict and for his or her whereabouts to be currently unknown.

This makes it difficult for the informal purchaser to contact the informal seller and obtain evidence that the informal sale took place. Without this evidence, the informal purchaser cannot request the cadastral records to be updated to formalize his or her rights in the property. Moreover, because in many of these cases the informal seller was displaced, there is a potential risk that rather than being informal, the possession may have occurred illegally after the conflict.

Although this fact pattern does not fall neatly into the category of an inheritance claim, the primary constraints to formalization are similar to the fact pattern above. Under both, the current possessor of the land parcel seeking formalization is required to identify the parties, determine their location and provide them notice of the claim to secure their participation in the proceedings. Securing the participation of the party that informally sold the parcel (or his or her heirs if the seller is deceased), however, is perhaps even more challenging than locating family members in the fact pattern above because the seller may have no family ties to the purchaser.

Constructive notice appears particularly well-suited to help resolve such claims and provide an opportunity to quickly and efficiently formalize a significant number of property rights. Moreover, constructive notice could be applied to the backlog of decisions to be implemented by the KPA to finally resolve claims lodged by members of non-majority communities displaced by the conflict.

In the absence of constructive notice procedures there would appear to be few if any opportunities to formalize the rights of the informal purchaser through an uncontested procedure. It is unlikely that the informal seller (or his or her descendants if the seller is deceased) would have sufficient motivation to participate in the process even if s/he could be located and contacted by the informal purchaser.

Under current procedures, if the informal seller does not come forward to acknowledge that the sale occurred, the only options available to the informal purchaser to request the cadastral records to be updated to reflect his or her purchase of the property is to bring a contested claim against the informal seller to acquire rights in the property through prescription or obtain legal recognition of the informal contract.³⁵ Furthermore, as it appears unlikely that the defendant will be located, the court will need to appoint a temporary representative³⁶ before the case can go forward.

The Organization for Security and Cooperation in Europe (OSCE)³⁷ has expressed concerns about the quality of legal representation provided by temporary representatives to protect the interests of displaced members of non-majority communities. Additionally, the core legal issues to be determined in claims for prescription and recognition of informal contracts is whether the current possessor openly and continually possessed the property without objection from the formally recognized rights holder. This then raises the issue of whether parties to a claim in Kosovo who are currently displaced by conflict have adequate access to the property and to Kosovo institutions to diligently monitor and raise objections to occupation of his or her property. Such questions raise issues of both equity and applicable EU human rights standards.

The KPA is mandated to adjudicate property rights claims filed by displaced persons and provide remedies to enable claimants to repossess their properties. The KPA is required to fully implement approximately 30,000 of its decisions. A very significant challenge the Agency faces is to make contact with these claimants to provide them the opportunity to request a remedy.

The KPA reported during a PRP-facilitated workshop in June 2015 that of the approximately 30,000 decisions to be implemented, notice of the decision has been provided to 9,041 claimants that have not replied to the notice. There are an additional 7,660 claimants that will need to be contacted for the first time. There are also 2,749 claimants whose property is currently under KPA administration who will need to be contacted so that they may request an alternative remedy. The KPA expressed concerns that it does not have the resources to efficiently contact such a large number of claimants, the majority of whom are in Serbia. This challenge is further compounded by the political relations between Pristina and Belgrade.

The issues common to informal contracts between Serbs and Albanians and KPA decisions is to ensure that displaced persons currently registered as rights holders are provided sufficient information and notice of actions impacting their rights to property and sufficient access to institutions to provide the displaced rights holder a meaningful opportunity to participate in the actions and exercise their property rights. These issues highlight and underscore the need to develop policies for providing effective notice to parties involved in property rights claims that meet EU standards for due process.

Constructive notice provisions meeting standards for due process will safeguard the rights of displaced persons while at the same time efficiently moving the claim to final resolution to enable

³⁵ These causes of action are discussed in greater detail under Fact Pattern 4 below.

³⁶ Law on Contested Procedure, article 79 provides that if it is deemed that the regular procedure of the first instance requires too much time for appointment of the legal representative for the defendant, and that this may cause damaging consequences to one or both parties, the court shall appoint a temporary representative to the defendant. Article 79.3 further provides that the court may appoint a temporary representative for the defendant also in the circumstances: a) if the residence of the defendant is unknown or the defendant has no authorized representative; b) if the defendant or his or her legal representative that do not have an authorized representative are out of country and it was not able for the materials to be sent.

³⁷ OSCE Mission in Kosovo Spot Report, The Appointment of Temporary Representatives in Property Disputes Involving Minorities as Respondent Parties, April 2005.

rights of the current possessor to be formalized in accordance with the law. Similar to the fact pattern above, once constructive notice is provided, the responsibility is then placed on the displaced person to participate in the proceeding or otherwise assert his or her rights in the property. Failure to participate or otherwise assert a right will be deemed to be an act through omission demonstrating that s/he is not asserting a right in the property and the matter can be concluded.

FACT-SPECIFIC FINDINGS AND RECOMMENDATIONS

This fact pattern illustrates well the delicate balance to be struck between achieving efficiency and providing sufficient due process safeguards. It is essential that, fifteen years after the conflict, these outstanding property claims are brought to a final conclusion. It may well be that a significant number of displaced rights holders will not dispute the informal transaction and the rights of the possessors and, therefore, have no interest or motivation to participate in any way in a claim in Kosovo. If so, the possessors of the property are left with few options to formalize their rights. Constructive notice can serve to balance the need to provide the informal possessors of the property with the opportunity to formalize their rights and ensuring that the rights of the displaced are sufficiently protected.

1. In addition to ensuring the constructive notice procedures meet EU human rights standards for due process, they should also be negotiated between Pristina and Belgrade under the auspices of the EU.
2. Due to the human rights standards that need to be afforded to persons displaced by conflict, especially vulnerable populations and women members of non-majority communities, safeguards in addition to constructive notice should be considered. Such safeguards should ensure that properties subject to a KPA claim are clearly identified in the cadastral registry and rights over these properties are not updated in the name of or transacted by the current possessor until the claim is resolved. The KCA should ensure this information is readily available to displaced persons and the public at large to provide sufficient notice of the pending claim on this property.

FACT PATTERN 3:

PROPERTY REGISTERED IN THE NAME OF A LONG DECEASED RIGHTS HOLDER WHO INFORMALLY SOLD THE PROPERTY AND THE INFORMAL SALE IS NOT CONTESTED

This fact pattern is a variation on Fact Pattern 1. The property is registered in the name of a long deceased rights holder who, prior to death, informally sold the property to a third party through a verbal contract and the transaction was not registered in the cadastre. The third party purchaser or his or her descendants (referred to hereinafter as the “possessors”) possess the property and now seek formalization of their rights. The descendants of the deceased rights holder do not dispute that the sale took place. Because the descendants of the rights holder do not dispute the sale, it is possible to transfer rights to the possessors through uncontested inheritance proceedings provided the descendants of the rights holder who sold the property are willing to participate in the proceedings.

Altruism need not be the only motivation for the rights holder’s descendants to assist the possessors. While they may be willing to assist to maintain peace and good relations between the families, they may also be willing to assist to avoid being named as defendants in a contested claim for prescription (described below). Additional policies might also be developed to create incentives for families to transfer property rights out of the name of a deceased ancestor. For example, they may be offered limited tax breaks on the property they own themselves.

To effect the transfer, the descendants of the rights holder will need to initiate an uncontested inheritance procedure to transfer to themselves the rights registered in the name of the rights

holder. The descendants will likely be more disposed to cooperate if uncontested proceedings are made faster, more efficient and affordable and utilize constructive notice provisions.

Once the rights holder's descendants obtain an inheritance judgment confirming that they are the legitimate heirs of the rights holder and have rights over his/her property, they can then transfer these rights to the possessors. The rights can then be transferred through contract or gift.³⁸ (The cadastral fees on gifts are lower than those on contracts for sale.)

It should be noted, however, that the process described above could be viewed as a form of "legal fiction." The descendants of the rights holder initiate an inheritance procedure to obtain recognition as "heirs" but in reality they are not asserting rights in the property. Instead, they are assuming only a temporary right in the property so that they can then transfer it to the possessors (who are the undisputed purchasers of the property) to enable them to formalize their rights.

The risk is that the heirs of the informal seller could, once they obtain the inheritance judgment, refuse to transfer the rights and instead register the property in their names. To mitigate this risk, the parties could execute a notarized agreement before initiating the inheritance proceedings that would bind the informal seller's heirs to transfer their temporary rights to the possessors once the inheritance process is completed.

It should also be noted that if the informal purchaser has died, his or her heirs (possessors) would not need to initiate inheritance proceedings. Instead, the rights holder's "heirs," once they obtain rights in the property, could simply transfer these rights directly to the possessors. As such, the informal purchaser's heirs do not need to take rights in the property from the informal purchaser.

Because the transfer to the descendants of the informal seller is to facilitate an immediate transfer to a third party, rather than to take possession of the property themselves, cadastral procedures may also need to be streamlined to provide for a single transfer and registration procedure in the MCO rather than two separate transactions each requiring payment of fees.

In the event the descendants of the informal seller are not inclined to participate in the process, there appears to be two legal actions that the possessors could initiate through contested procedures in the court to gain recognition of their property rights: the acquisition of rights through prescription and/or the legal recognition of the verbal contract. Both are discussed further under the following fact pattern below.

FACT-SPECIFIC FINDINGS AND RECOMMENDATIONS

The difference between this fact pattern and the previous one is that the possessors of the property are not the heirs of the rights holder. This type of claim can be processed using the more efficient procedures described under the fact pattern above as long as the heirs of the rights holder perceive a benefit to participating in the process and the burden on their participation, in terms of cost and time, is minimal.

1. As part of any public information and outreach campaign to promote the registration and formalization of rights, descendants of rights holders should be provided positive messages to "sensitize" them to the challenges faced by the possessors of the property and to encourage them to assist the possessors. In addition to positive messages, the descendants of rights holders should also be informed that if they do not assist, they risk being sued in the court and incurring the costs and time demands such cases extract.
2. Rights holders' descendants could also be provided material incentives to assist the possessors. This might, for example, take the form of a limited reduction of the taxes they owe on properties they possess.

³⁸ Law on Obligational Relationships, No. 04/L-077, Articles 536–540.

3. The KCA should develop a standard agreement form that would bind the rights holders' heirs to transfer the property rights to the possessors immediately after obtaining the inheritance judgment. This would help to streamline the process and ensure consistent practices in all MCOs.
4. KCA should also develop streamlined procedures to enable the parties to transfer the rights through a single transaction rather than two that would require payment of two sets of fees. Developing such procedures would also help to promote uniform and consistent practices in all MCOs.

FACT PATTERN 4:

PROPERTY REGISTERED IN THE NAME OF A LONG DECEASED RIGHTS HOLDER WHO INFORMALLY SOLD THE PROPERTY AND THE INFORMAL SALE IS CONTESTED

This fact pattern includes instances where the descendants of the informal rights holder/seller are unwilling to assist the informal purchaser or his or her heirs to obtain recognition of their rights or, worse, contest the validity of the sale solely for the purpose of extracting payment for the transfer. Practitioners interviewed report that it is not uncommon for demands for payment to be accompanied by threats.

In these situations, it appears that the only possibility for the informal purchaser or his or her heirs in possession of the property (referred hereinafter as the "possessors") to obtain recognition of their rights is to file a contested claim in the courts.

The volume of such claims is not currently known, but may become more frequent as initiatives encouraging citizens to formalize their property rights intensify. Although such claims cannot be resolved through streamlined uncontested administrative proceedings, consistent court practices related to the causes of actions underlying the contested claims could be developed to promote efficiency and more predictable outcomes in the courts.

The contested claims could be brought on the basis of the legal doctrine of prescription as discussed above. The possessors may also initiate a contested claim to obtain legal recognition of the verbal contract as provided in the Law on Obligational Relationships. Article 58 provides that a "contract for which the written form is required shall be valid even if not concluded in this form if the contracting parties fully or partly perform the obligations arising there from, unless it clearly follows otherwise from the purpose for which the form was prescribed."

To demonstrate acquisition through prescription, courts require the claimant to prove their possession was open and continuous throughout the entire twenty year period. Such possession can be proved through documents including:

- Building permission issued by the municipality demonstrating that the claimant invested in the property and when the investment was made;
- Loans obtained for the construction;
- Utility bills;
- Receipts for payment of tax on the property; and
- Any other relevant documents.

Courts also take statements from persons who witnessed the agreement between the buyer and seller or who have knowledge of other facts that would demonstrate the requisite twenty years of uninterrupted possession. It is then the role of the court to determine the reliability and accuracy of

the witnesses' statements and weight of evidence provided by the documents to issue a judgment to determine whether the claimant has proved his or her case.

To obtain legal recognition of the verbal contract, the claimant must first demonstrate that a verbal contract for the sale of immovable property was made and then demonstrate that s/he performed acts according to the terms of the contract and the performed acts were foreseen under the terms of the contract.³⁹ With regards to a contract for the sale of immovable property, taking possession of the property, constructing buildings on it and otherwise using the property as it was owned by the claimant would appear to satisfy these requirements. As with acquisition of rights through prescription, determining whether the claimant performed according to the verbal contract requires the court to conduct a fact specific inquiry and issue a judgment on the basis of the evidence submitted.

The process of obtaining recognition of a verbal contract may be more difficult than prescription because the claimant must produce witnesses to the contract to establish its existence. Obviously, there would be no documents that could be relied upon to establish this fact. Once existence of the contract is proved, the remaining facts to be proved are essentially the same under both causes of action: that the claimant took possession of the immovable property and used it as if it was owned by him or her. The Law on Obligations does not, however, prescribe the period for which the claimant must perform the terms of the verbal contract before it is legally recognized. In practice, therefore, it may have the effect of reducing the time required to acquire rights by prescription. There is no provision in the law that would prevent a claimant who cannot demonstrate 20 years of uninterrupted possession from acquiring rights in the property through Article 58 of the Law on Obligational Relationships.

FACT-SPECIFIC FINDINGS AND RECOMMENDATIONS

The only difference between this fact pattern and Fact Pattern 3 is that here the rights holders' descendants are acting in bad faith and attempting to extort additional payments from the possessors. Notwithstanding the potential for filing criminal charges based on extortion, a more immediate sanction could be to require the descendants acting in bad faith to pay all legal fees and court costs of the possessors if the case is brought to court and judgment issued against them.

Recommendations for dealing with this fact pattern include the following, in addition to those made for Fact Pattern 3:

1. The information and outreach campaign discussed above could also be used to inform and educate descendants of rights holders acting in bad faith that they could be prosecuted for criminal offenses or required to pay all legal fees and court costs if their actions result in the filing of a lawsuit they lose.
2. Consistent judicial practice and "bench books" developed to help judges more efficiently, uniformly and predictably resolve claims for recognition of property rights based on prescription and legal recognition of a verbal contract.

³⁹ Training Manual "Pre-Contract Liability, Formation and Interpretation of Contracts, November 2013, USAID.

ANNEX I: LIST OF INTERVIEWEES

Location	Organization	Name	Position
(Prishtinë/ Priština)	Basic Court	Drita Rexhepi	Judge – Civil Division
	Basic Court	Hasim Sogojeva	Judge – Civil Division
	Appellate Court	Muhamet Rexha	Judge – Civil Division
	Appellate Court	Makifete Saliuka	Judge – Civil Division
	Notary	Faton Muslija	Notary
	Notary	Agon Vrenezi	Notary
	Department of Administration	Muhedin Nushi	Director of the DfA
	Municipal Civil Registry Office	Fehmi Kupina	Head of the MCRO
	Kosovo Chamber of Advocates	Ibrahim Dobruna	Head of the KCA
	Kosovo Chamber of Advocates	Yll Zeka	Staff of the KCA
	Private Attorney	Ekrem Smajli	Immovable Property Attorney
	Notary Chamber of Kosovo	Erdon Gjinolli	Executive Office
	Municipal Cadastre Office	Doruntina Peqani	Head of Legal Office
	Kosovo Civil Registry Agency	Shefket Ismajli	Dept. of Civil Registration and Civil Status
	Civil Society – KIPRED	Ariana Qosaj	Gender
Civil Society - Norma	Vjosa Nimani-Zylfiu	Retired Judge of the Supreme Court	
(Gjilan/Gnjilane)	Basic Court	Berat Spahiu	Judge – Civil Division
	Basic Court	Zyhdi Haziri	Judge
	Basic Court	Halil Zahiri	Judge
	Notary	Hivzi Murseli	Notary
	Municipal Cadastre Office	Sadudin Berisha	Director of Property, Geodesy and Cadastre
	Municipality CRO	Agim Velekinca	Head of the CRO
(Ferizaj/ Uroševac)	Basic Court	Faton Ajvazi	President
	Basic Court	Fejzullah Rexhepi	Judge – Civil Division
	Municipal CRO	Latif Berisha	Head of the CRO
	Municipal Cadastre Office	Fatmir Azizi	Director of Property, Geodesy and Cadastre

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