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ROLE CONSTRUCTIVE NOTICE COULD PLAY TO FORMALIZE PROPERTY RIGHTS IN KOSOVO

Property Rights Program (PRP)

FEBRUARY 2017

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ACRONYMS AND ABBREVIATIONS

CoM	Courts of Merit
GoK	Government of Kosovo
HPD	Housing and Property Directorate
KCA	Kosovo Cadastral Agency
KJC	Kosovo Judicial Council
KPA	Kosovo Property Agency
LUP	Law on Uncontested Procedure
MESP	Ministry of Environment and Spatial Planning
NATO	North Atlantic Treaty Organization
NSPR	National Strategy on Property Rights
OSCE	Organization for Security and Cooperation in Europe
PRP	Property Rights Program
RAE	Roma, Ashkali, and Egyptian
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo
USAID	United States Agency for International Development

ABSTRACT

For cultural and historic reasons property rights in Kosovo have been transacted outside the cadastral system creating widespread informality. This paper discusses reasons for informal land holdings in Kosovo, how they have been exacerbated by displacement caused by the 1998-1999 conflict, and recognition by the country's National Strategy on Property Rights of the need for an adjudicatory body applying streamlined administrative procedures to provide legal recognition of informal rights to update Kosovo's cadastral records and resolve informality at scale. Through legal analysis, the paper explains how the legal doctrine of "constructive notice" coupled with a statutory deadline within which rights must be asserted can be applied to administrative procedures to make the process of rights recognition more efficient. Constructive notice must, however, be delivered through robust public information and outreach campaigns to ensure any parties with an interest in the claimed property, particularly displaced persons and women, are provided with knowledge of the formalization proceedings and information required to assert their rights. Through more effective notification of formalization proceedings, the Government of Kosovo can efficiently resolve informality at scale while providing due process safeguards to protect the property rights of all its citizens.

I.0 INTRODUCTION

Kosovo's territory covers 10,887 square kilometers in the central Balkan region of Southeast Europe. It shares borders with the countries of Albania, Macedonia, Montenegro and Serbia. Kosovo is a multi-ethnic country with an estimated population of 1,883,000 inhabitants. Ethnic Albanians make up over 90% of Kosovo's population. Ethnic Serbs and Bosniaks (Slavic Muslims) comprise approximately 3% of the population. Other members of the country's non-majority communities include Roma, Ashkali and Egyptians (RAE), Turks and Gorani.

Kosovo was under rule of the Roman and Byzantine empires through the 7th century and became the center of the Serbian empire during medieval times. In 1389, Ottoman forces prevailed at the Battle of Kosovo beginning five centuries of Ottoman rule. Serbia regained control of Kosovo during the First Balkan War of 1912. Kosovo's present day boundaries were formed during the 1960s when it became an autonomous province of Serbia in the Socialist Federal Republic of Yugoslavia (S.F.R.Y). Kosovo's autonomy was revoked by Serbia in 1989. Following nearly a decade of tension and protests, armed conflict erupted between the ethnic Albanian population and Serbian security forces during the period 1998-1999. The conflict resulted in massacres of civilians and displacement of approximately 800,000 ethnic Albanians from Kosovo. International mediations to end the conflict were unsuccessful. In March 1999, the North Atlantic Treaty Organization (NATO) led military operations against Serbian military and police forcing their withdrawal. In the wake of their withdrawal approximately 200,000 ethnic Serbs were displaced from Kosovo. United Nations (UN) Security Council Resolution 1244 placed Kosovo under the administration of the UN Interim Mission in Kosovo (UNMIK) pending determination of its future status. The Kosovo Assembly declared the country's independence in 2008. Serbia has refused to recognize Kosovo's independence. The European Union continues to facilitate discussions between the governments of Kosovo and Serbia to regularize relations between the two countries.

Pervasive informality characterizes Kosovo's land sector. Informal rights were created when a formal rights holder (a person whose rights are registered in the cadastre) transferred rights in property through extra-legal means. Informal rights are exercised in practice and generally respected by the community at large but cannot be registered in the cadastre. The two most common causes of informality are verbal contracts for the sale of land and immovable property and "informal inheritance" where the property of deceased persons is possessed by heirs who did not initiate and complete formal inheritance proceedings. Currently, a significant percentage of property rights in Kosovo remain registered in the name of formal rights holders who had extra-legally transferred rights in property, or are deceased rather than in the name of the informal rights holders who currently possess and exercises rights in the property.

Informal rights that cannot be registered in Kosovo's cadastre also cannot be formally transacted in Kosovo's land market, mortgaged by the rights holder to secure credit or loans, nor efficiently taxed by municipalities to generate revenue required for infrastructure and development. Immovable property over which informal rights are exercised is what Hernando de Soto described as "dead capital." For de Soto "dead capital" means unrealized asset potential, unconvertable assets, incapacity to generate capital, or inability of asset holders to secure their loans. (de Soto, 2000).

The Republic of Kosovo's Ministry of Justice, with technical assistance and logistical support provided by the United States Agency for International Development (USAID) Property Rights Program (PRP) in Kosovo, developed the country's National Strategy on Property Rights (NSPR) that was approved by the Government of Kosovo (GoK) on January 18, 2017. One of the NSPR's key objectives is to resolve widespread informality by developing more efficient administrative processes to provide informal rights holders with formal, legal recognition of their rights so they may then be registered in Kosovo's cadastre.

This paper provides a brief discussion of the cultural and historical context contributing to widespread informality in Kosovo's land sector today. It is followed by legal analysis of current

practices state institutions follow to formalize rights in property and discussion of how these practices are not conducive for efficient recognition of informal rights at scale and fully safeguarding the rights of other parties who may have an interest in the property, particularly persons displaced by the conflict and women heirs. This analysis is followed by discussion of how a lack of streamlined administrative procedures and due process safeguards have constrained GoK initiatives to formalize rights at scale. The paper then focuses on solutions proposed in the NSPR to address these constraints and the role constructive notice can play to increase efficiency, enhance provision of due process protections and provide finality to the rights recognized through administrative processes. The paper concludes with a discussion of the challenges that will need to be addressed to effectively utilize constructive notice in practice to advance implementation of the recommendations contained in the NSPR.

2.0 HISTORICAL CONTEXT: STATE, SOCIETY, AND CULTURE

A “culture of informality” in Kosovo’s land sector can be traced back to the 500 year period it was under Ottoman Empire rule. The Empire’s legal system prioritized the benefits of collectivities rather than those of individuals. (Aral, 2004). Although reforms contained in the Ottoman Land Code of 1858 recognized private land rights, land was owned by the state and the rights conveyed were in usufruct. (Aytekin, 2009). The Tapu Law of 1858 was passed soon after the Land Code to introduce title-deeds. (Tilsen, 2003). The purpose of Tapu, however, was more about improved tax collection rather than to strengthen property rights. (Minkov, 2000).

The registration provisions in the Tapu law were largely ignored. Ottoman subjects, including its subjects in Kosovo, believed customary practices of traditional society and oral evidence were sufficient to demonstrate rights in property. Landholders did not feel compelled to register their rights and often did so only when they wanted to sell them to another party. Moreover, registration fees, taxes and military service were obligatory for landholders. These created incentives for landholders not to register their rights or to under-report the extent of their landholdings. As a result, land was frequently registered in the name of someone other than the rightful landholder such as fictitious or dead individuals. Inaccurate cadastral records weakened security of land tenure for the Empire’s subjects. (Tilsen, 2003).

Kosovo society today is still shaped by traditional values, strong family structures and a belief that custom and oral evidence is sufficient to support an individual’s claim to property. A customary practice prevalent among Kosovo’s ethnic Albanian population is the honor code “Besa”, which means “word of honor” or to “keep a promise”. (Kushova, 2004). This notion of honor is deeply rooted in Albanian culture and may have contributed to the proliferation of verbal contracts in Kosovo and a perception that registration of rights in the cadastre added little value to securing rights.

Further contributing to informality was discriminatory legislation passed by the former regime prohibiting the sale of land and immovable property between Kosovo’s ethnic Serb and ethnic Albanian populations. Because such transactions were illegal, they could not be registered in the cadastre.

The strength of family structures also meant that families frequently did not initiate formal inheritance proceedings to transfer property rights from deceased rights holders to family heirs. Typically, families would come to agreement about which members would possess the decedent’s property. In the absence of a formal inheritance procedure, however, rights of the possessors cannot be registered in the cadastre and are informal. (USAID, 2016). The USAID/Kosovo PRP conducted a National Baseline Survey on Property Rights in 2015. The survey found that Kosovo citizens perceive rights based on possession of family property as having similar legal effect as rights based on a court decision or formalized sales contract. It also found that 57% of the survey’s respondents reported their birth family had never initiated inheritance proceedings to transfer rights in property. (USAID, 2015).

3.0 CURRENT PRACTICE TO FORMALIZE RIGHTS IN IMMOVABLE PROPERTY

Kosovo has yet to develop legislation to regulate formalization of rights acquired informally through verbal contracts and informal inheritance. Courts have also yet to develop jurisprudence on this subject. The USAID/Kosovo PRP analyzed the procedures currently available to formalize rights in property. Essentially, they require the informal rights holder to demonstrate that he or she acquired rights from a formal rights holder through means that were not unlawful.

Formal rights in property were typically created under the former regime's legal framework and registered in the cadastre at that time. Many of the formal rights holders registered in the cadastre under the former regime subsequently transacted their rights through verbal contracts, or died and their rights were informally transferred to heirs, or a combination of both. Because these extra-legal transactions occurred outside the cadastral registration system, rights remain registered in the name of the original formal rights holder. Informal rights holders are required to demonstrate a "chain of title" demonstrating that they acquired rights from the formal rights holder (either directly or through a chain of transactions) through means that were not unlawful.

In the absence of legislation or court jurisprudence, the term "unlawful" is not legally defined in the context of property rights formalization. According to the law in effect when much of the extra-legal transfers occurred, possession of property would be unlawful if it was acquired through "force, deceit, or misuse of trust." Acquisition of rights through any of these means would constitute a transgression against the rights of another person.

Therefore, informal rights holders are required to demonstrate that they did not acquire rights in property through a transgression. In other words they need to prove a negative which, in terms of logic, is difficult. In practice, if there are no other persons who contest the informal rights holder's claim to the property then there is sufficient evidence that the informal rights were not acquired through a transgression. Kosovo has also not yet established a simple, accessible, efficient and low cost administrative process through which its citizens can formalize their rights to property. As discussed in more detail below, the only option currently available to formalize rights acquired through a verbal contract is to file a contested claim in the court to obtain a decision recognizing the existence of the contract. Citizens in possession of property they informally inherited must initiate uncontested inheritance proceedings with a notary to formalize their rights.

3.1 RECOGNIZING RIGHTS ACQUIRED THROUGH VERBAL CONTRACTS

The USAID/Kosovo PRP is working closely with the Kosovo Judicial Council (KJC) and four selected Courts of Merit (CoM) to conduct case flow analysis of claims processing practices. Preliminary findings show that 43% of the cases comprising the backlog in the CoM are property related. Of the property related cases, 70% seek legal recognition of rights in property acquired informally. The legal grounds available to the claimant to obtain legal recognition of rights acquired through a verbal contract and exercised informally is "substantial performance" and/or "positive prescription." Neither doctrine, however, was developed to address the level of informality found in Kosovo's land sector and are not directly applicable to formalizing property rights in the context of Kosovo today.

3.1.1 SUBSTANTIAL PERFORMANCE

Judicial practice in claims involving substantial performance is not consistent. Some courts have held that to meet its requirements, claimants (informal purchasers) must demonstrate they paid the purchase price and took possession of the immovable property. The courts look to the actions of the claimant after the "sale" to demonstrate a verbal contract was executed and, therefore, rights in the property were conveyed.

Because claimants must initiate a contested court claim to obtain recognition of their rights, however, they are required to name the formal rights holder who informally sold the property as the defendant in the claim and secure their presence in the proceedings. If the formal rights holder can be located, appears in court, and confirms the verbal contract was executed and performed, the court will issue a decision confirming the claimant is the lawful owner of the property. Based on this decision, the claimant then can request cadastral officials to update the cadastral record to reflect legal rights were conveyed from the formal rights holder to the claimant, and these rights can then be registered in the cadastre in the claimant's name.

3.1.2 POSITIVE PRESCRIPTION

In many cases the formal rights holder who informally transferred rights cannot be located and compelled to testify. Often this is because the formal rights holder left Kosovo after the sale to seek economic opportunity elsewhere or was displaced by the conflict. When the formal rights holder cannot be compelled to testify, the claimant must rely on the doctrine of "positive prescription" to demonstrate rights in the property. The applicable legislation lists four elements of a positive prescription claim the claimant must meet to acquire rights in property: (1) legal holdership, (2) conscientiousness, (3) the passing of the statutory period of time, and (4) possession of the property right by another. (OSCE, 2009).

Legal analysis produced by the Organization for Security and Cooperation in Europe (OSCE) explained that the applicable legislation does not require the claimant to demonstrate legal holdership if he or she can demonstrate possession of the property for the 20 years statutory period of time. Additionally, conscientious possession of the property is to be assumed by the courts and the burden is on the defendant to introduce evidence to rebut the presumption. Therefore, in order to meet the requirements of a claim for positive prescription, the claimant is required to meet the third and fourth elements of the claim. To meet these elements and acquire rights in the property, the claimant only needs to produce evidence to demonstrate uninterrupted and uncontested possession of the claimed property for a period of 20 years. (OSCE, 2009).

3.1.3 ANALYSIS OF THE PROBLEM

The essential element that must be demonstrated to acquire rights under both doctrines is uncontested possession. As such, there is no actual dispute for the court to resolve. Uncontested possession can be determined through a simple administrative review of evidence. Nonetheless, to meet procedural requirements, the claimant must proceed as if there was a dispute and name the formal rights holder as the defendant. In effect, the court is asked to confirm the absence of dispute in order for the claimant's rights to be recognized. Filing a contested claim in the court for the purpose of confirming the claim is uncontested is both counterintuitive and an inefficient use of the courts' limited resources. Moreover, because formal rights holders frequently cannot be located to testify in proceedings, the requirement to initiate a contested claim has not proven effective to determine whether rights were acquired lawfully.

Much of the problem lies with ineffective court notification procedures. Those currently followed by the courts are largely inherited from the former regime. They were developed in the context where movement of the population was closely regulated by the state and registered with state security. This made it very easy to compel defendants to appear in court.

The security apparatus of the former regime no longer exists and displacement of Kosovo's citizens during and after the conflict severely constrain courts from effectively notifying parties. The OSCE noted that ad hoc procedures such as delivery of notice through the interim UNMIK Department of Justice and publication of notice in Albanian language Kosovo newspapers has not been effective. (OSCE, 2009). The USAID/Kosovo PRP case flow analysis preliminary findings show that just over half of the time required to dispose of a property claim was spent to complete notification procedures before the claim could move forward to the adjudication hearings.

When the formal rights holder defendant cannot be located, the court will appoint a “temporary representative” in order for the claim to proceed. This frequently occurs in cases of inter-ethnic sales. In these cases, the temporary representative is appointed to “stand in the shoes” of and represent the interests of the Kosovo Serb defendant in whose name rights are still registered and who subsequently left Kosovo.

This practice often results in excessive delays in court proceedings contributing to case backlog. Of greater concern, the OSCE cautioned that the use of temporary representatives “carries great human rights implications as it relates to the right to a fair trial and the right to property.” (OSCE, 2009, p.20). It explained that conducting trials without the participation and knowledge of the defendant prevents the defendant from presenting his or her case, violating the principle of equality of arms that is an important aspect of the right to a fair trial. Additionally, there were concerns that due to displacement of Kosovo Serbs during the conflict, positive prescription risked usurpation of property from displaced persons. This may not be true for the majority of such cases but its possibility serves to cast a “cloud” of doubt over rights transacted informally.

3.2 INITIATING DELAYED INHERITANCE PROCEEDINGS

The second contributing cause to informal land rights in Kosovo is the practice of ‘delayed inheritance’ within families. These are inheritance proceedings initiated many years after death of the registered rights holder, not uncommonly 20 years or more. 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. Such claims may include up to 30 or more potential heirs, some of whom reside in the diaspora. Frequently, the potential heirs have taken informal possession of land parcels still registered in the cadastre in the name of their deceased ancestor, informally sub-divided it and constructed their homes and made other investments on the parcel.

The Law on Uncontested Procedure (LUP) requires that all the potential heirs are required to declare during a hearing session whether or not they will take their statutory share of the estate. Similar to procedures governing contested court claims, the provisions contained in the LUP were largely inherited from legislation developed during the former regime. These provisions describe a safeguard mechanism to ensure the rights of all potential heirs to inherit the property are protected. Under the mechanism, the civil status office is required to generate and certify a list of all potential heirs (known as the Act of Death) with rights to inherit the deceased’s immovable property. The civil status office then provides the list to the court who is responsible to serve notice of the inheritance proceedings to all potential heirs.

3.2.1 ANALYSIS OF THE PROBLEM

In practice, the civil status office does not notify the courts when a death occurs and does not certify the identity of the decedent’s heirs. Instead, it is typically the potential heirs in possession of the property and who have the greatest incentive to formalize their rights in the property who initiate the proceedings. They then bear the responsibility to notify all the potential heirs. They must also obtain identification documents and birth records for each living potential heir, and death certificates for those who died. It is not uncommon for potential heirs, especially those living abroad and are not interested to take their share in the immovable property, to refuse to participate in the proceedings which can then delay the process indefinitely. (USAID, 2016).

The absence of the safeguard mechanism produces two negative impacts. First, heirs acting in good faith find the requirements to notify, collect documents and compel the other heirs to participate in the proceedings to be time consuming, cumbersome and at times, overwhelming. This has the effect of discouraging rights formalization. Second, it creates opportunities for potential heirs acting in bad faith to exclude potential heirs, especially women, from the proceedings and denying them their rights to inherit.

Although women make up 49.6% of the Kosovo population, only 15.24% of women have property registered in their name. It is well documented that women struggle to overcome cultural attitudes and tradition creating expectations that women should forego their rights to inherit family property in favor of male family members. It is not uncommon for families to conceal the identity of female heirs to ensure property remains in the hands of males. (Joireman, 2015).

Because the Act of Death document is not created and/or certified by the civil status office, in practice it is a testimonial document created by the heirs initiating inheritance proceedings. For this reason, courts and notaries have no independent means to verify that the document accurately lists all heirs entitled to inherit. This makes it very easy for male heirs to exclude women family members from inheritance proceedings by simply omitting their names from the Act of Death document and concealing their identity.

4.0 CURRENT INITIATIVES TO FORMALIZE PROPERTY RIGHTS IN KOSOVO AT SCALE

Two major initiatives underway include reconstruction of Kosovo's cadastre following the end of the conflict in 1999, and the legalization of unpermitted constructions that flourished after the conflict. Neither initiative, however, has addressed the core challenge to rights formalization. Namely, establishment of a legal mechanism to provide formal, legal recognition of informal rights required for their registration in the cadastre.

The Kosovo Cadastral Agency (KCA) has completed systematic reconstruction of 159 out of the country's 1305 cadastral zones. Data generated from this activity indicates that approximately 30% of landholders in reconstructed cadastral zones cannot register and formalize rights in the land they possess because rights in the land are still registered in cadastral records in the name of long deceased ancestors. (USAID, 2016). This figure may even be higher across the country. The Ministry of Environment and Spatial Planning (MESP) is implementing a national initiative to formalize rights in unpermitted constructions so the rights in these buildings can be registered in the cadastre. Thus far, approximately 350,000 applications have been submitted to obtain legal recognition of rights in unpermitted constructions. The NSPR notes anecdotal information indicating that up to 50% of the applicants will be prevented from registering rights in the constructions because the land upon which they were built also remains registered in the name of deceased ancestors. The number of cadastral records still registered in the name of an informal seller has yet to be determined but recognition of rights acquired through verbal contracts constitutes the overwhelming majority of "disputed" property claims in selected courts. Although the exact number is not known, the available evidence points to a significant volume of outdated cadastral records requiring a solution at scale.

5.0 SOLUTIONS PROPOSED IN THE NSPR AND THE ROLE CONSTRUCTIVE NOTICE PLAYS IN THEIR IMPLEMENTATION

A reform priority identified in the NSPR is to update cadastral records to accurately reflect informal rights and to include in the cadastre more than 350,000 unpermitted constructions to provide them with legal status. Recognition and registration of rights will strengthen the rule of law, empower Kosovo citizens, particularly women and displaced persons, to exercise and enforce their rights and help stimulate a more vibrant land market.

The NSPR recognizes that updating between 30% and 50% of rights registered in Kosovo's cadastre is a massive undertaking. To update this volume of records at the pace required to sustain a functioning land market, the NSPR envisions creation of an administrative adjudicatory mechanism and development of procedures to efficiently recognize and formalize rights at scale.

The administrative processes foreseen for rights formalization are similar to those employed for cadastre reconstruction. They would provide for an administrative review of evidence presented by persons claiming rights to property to ensure it meets prescribed criteria. If it does, the rights claimed are made known to the public. If the rights are not contested, they are recognized and the process concludes.

For this reason, the current legislation governing cadastre reconstruction provides precedent and a model that could be adapted to regulate a streamlined administrative process that could be instituted to formalize rights at scale. Discussed below are the essential elements of existing cadastre legislation that could be applied to an administrative process with broader powers to formalize rights in property. These elements include: an administrative adjudicatory body; robust and widespread public information and outreach providing information about public display of rights data on a government website; and "constructive notice" to interested parties informing them that any objections to the rights data must be raised during a statutory deadline.

It should be noted that legislation regulating cadastral reconstruction does provide for the establishment of an administrative Commission with the authority to formalize rights created through informal transactions. Commissions have been established for the 159 cadastral zones included in systematic reconstruction but it appears they have never performed this function in practice. Possibly because subsequent cadastral legislation defining the Commission's duties in greater detail makes no reference to this function. Moreover, the legislation is silent on the procedures the Commission would follow to formalize rights.

Additionally, conflicting legislation may also prevent the Commission from providing legal recognition of informal rights. Although the Commission's decisions provide the legal basis for registering rights, earlier legislation states that only documents issued by the competent court can convey rights eligible for registration in the immovable property register. It should also be noted that the role of the Commission appears limited to cadastral zones included in systematic reconstruction. It is not clear if its role extends to registration of rights in other cadastral zones.

Nonetheless, the establishment of a Commission to oversee rights registration in reconstructed zones recognizes the need for an administrative adjudicatory body to recognize rights at scale. An administrative adjudicatory body supported by robust public information, outreach and display processes can provide recognition of rights more quickly than the courts while more effectively safeguarding the rights of interested parties, particularly persons displaced by the conflict. Application of more efficient administrative procedures and lower standards of evidence than those required in contested court proceedings would enable the adjudicatory body to more quickly and

efficiently review evidence submitted by the informal rights holder to demonstrate uninterrupted possession of the claimed property for the requisite statutory period.

The public outreach and display processes described in the cadastral legislation also provide due process safeguards to protect the rights of interested parties, particularly displaced persons, during the adjudicatory process. A robust public information and outreach campaign must be implemented in advance of public display of rights information. It informs the public about the dates and location of the display and the requirement to submit complaints during the display period. Provided the public information and outreach campaign is sufficiently robust, it can be deemed that “constructive notice” of the claim has been provided to all parties with an interest in the claimed property.

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. Different from actual notice, where information is physically delivered to the parties, constructive notice is a form of implied notice presumed by law to provide parties with the information required to participate in the claim and the opportunity to do so.

The cadastral legislation requires the rights data for the claimed property be presented on a government website for a period of 60 days. After all interested parties have been constructively notified of the public display period, any party who contests the accuracy of the rights data must file a complaint with the adjudicatory body within the 60 day period or forfeit the right to do so. Rights that are not contested are formally recognized by the adjudicatory body. If a dispute arises, the adjudicatory body has the power to facilitate an agreement. If an agreement cannot be reached, the dispute is referred to the courts.

There are several benefits to this approach. First, public information outreach and display are more effective than current court practices to determine whether the informal rights holder’s possession is uncontested and, therefore, provides stronger due process safeguards. Requiring the informal rights holder to name a defendant in order to proceed with a court claim for rights recognition and to prove that all interested parties have been notified has not effectively safeguarded the rights of displaced persons. For example, if the informal seller is deceased, his or her heirs would need to be named as defendants. Informal rights holders may not have this information, despite their best efforts. In the case of informal inheritance, concealment of female heirs by male heirs seeking to formalize their rights is not uncommon. A well implemented and wide reaching public outreach and display makes the proceedings more transparent and increases the likelihood that all interested parties will be provided the opportunity to assert and protect their rights.

Moreover, it would help to ensure that only claims where there is an actual dispute are referred to the courts. This is a far more sensible use of limited court resources.

Constructive notice of a statutory deadline within which to contest the claim of a formal rights holder also makes logical sense in the context of informality in Kosovo today. In cases where there is no dispute, interested parties may have no interest or motivation to respond to notice of a claim, even if it was hand delivered. This would occur, for example, in cases where the informal seller was paid the purchase price, left Kosovo (either voluntarily or through displacement) and started a new life elsewhere. Additionally, it is not uncommon for informal rights holders to have been in possession of the claimed property for twenty or more years. If during that time the possession was not contested, and remains uncontested after sufficiently robust public outreach and display, it can be reasonably determined there are no other parties with rights in the property and it is appropriate to issue a final decision not subject to appeal to formalize rights in the property. Such an outcome will provide an acceptable balance between finality and certainty of rights and due process safeguards.

6.0 CONCLUSION: CHALLENGES AHEAD

The recent adoption of the NSPR was a significant milestone for this new nation. For the first time after emerging from ethnic conflict and declaring its independence it has conducted a comprehensive assessment of its property sector to identify and define the major constraints to securing land tenure and property rights for all Kosovo citizens. It signals the country's commitment to take concerted action to strengthen property rights, address widespread informality, and update its cadastral records. Now that the NSPR is adopted, the heavy lifting must begin. A number of challenges will need to be addressed before the doctrine of constructive notice can be introduced into streamlined administrative procedures that will efficiently formalize rights while providing effective due process safeguards to protect the property rights of all Kosovo citizens, particularly displaced persons and women. A few of the major challenges and opportunities to address them are highlighted below.

6.1 CULTURAL ATTITUDES

Constructive notice requires that persons with an interest in immovable property must be diligent to monitor and exercise their rights to property. Given Kosovo's culture of informality, there will need to be a shift of attitudes and behaviors of its people and institutions to fully embrace and give legal effect to the doctrine. Recent adoption of the NSPR signals a shift in attitude of government institutions and commitment to undertake bold and decisive reform to strengthen and protect property rights.

6.2 MORE EFFECTIVE NOTICE

In order for constructive notice to comply with due process requirements, public outreach and display must be sufficiently robust to ensure that parties with an interest in the property who are "reasonably" diligent will have accessed information about the claim through "normal" means. There is the risk that if notice procedures are not sufficiently robust the absence of a complaint was not because the claim was uncontested or the interested party was not diligent, rather it was because of deficient notification processes. This is certainly challenging in an environment of widespread informality and in the wake of ethnic conflict and displacement.

Concern has been raised that vulnerable displaced persons will not be able to access information about proceedings that may impact their property rights. This is a valid concern that must be considered carefully. It must also be considered that in the context of mass claims processing it is neither possible to hand deliver notice to each and every interested party nor to prove they have received notice in some form.

The Housing and Property Directorate (HPD) was established by UNMIK in the wake of the conflict to restitute immovable property to displaced persons through a mass claims adjudication process. The HPD initiated the claims process by conducting an extensive public information and outreach campaign in both Kosovo and in neighboring countries to inform displaced persons about the process, its requirements and the deadline for submitting a claim. Displaced persons who did not submit their claim prior to the deadline were precluded from obtaining remedy. The outreach conducted by the agency was deemed by the international community as sufficient to provide displaced persons with due process and to safeguard their human right to property. Its decisions are now being implemented by the Kosovo Property Agency.

The HPD used constructive notice to place responsibility on displaced persons to either assert their rights prior to the statutory deadline or forfeit their right to do so. The statutory deadline also helped to strengthen tenure security for all Kosovo's citizens. Until all claims were submitted, there would always be a possibility that the property could be the subject of claim, even after registration in the cadastre.

The GoK will need to carefully balance the need for expediency and finality to formalize and register rights at scale and to provide due process protections required to ensure the rule of law is fully respected. Developing more effective notification procedures will help to mitigate risk and strike the appropriate balance.

The GoK currently has the opportunity and means to not only replicate the outreach conducted by the HPD more than 15 years ago but to improve its effective reach through digital technology and the internet. As noted in the NSPR:

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.

While the opportunities are present, the requirements of an effective outreach campaign will need to be defined and strategies developed to reach Kosovo citizens displaced by the conflict and living in the diaspora. Outreach will also need to be implemented in cooperation with Kosovo’s diplomatic missions abroad.

The outreach campaign will need to be carefully monitored to ensure it is sufficiently robust. A monitoring plan and procedures will need to be developed, roles and responsibilities defined and resources allocated to conduct monitoring.

The appropriate state institution to host a GoK website that would publish notice of all claims related to recognition and/or transfer of rights in property will also need to be identified. These claims would include notice of administrative proceedings to recognize rights created through verbal contracts, inheritance proceedings, court cases, and, ideally, property rights transactions recorded in the cadastre. Currently, access to immovable property data on government websites is a controversial subject. There are contradicting interpretations of Kosovo’s data protection laws that has limited the data available on-line and access to it. The laws governing data protection will likely need to be amended before the website can be established.

6.3 LEGISLATION

Legislation will need to be developed to define the mandate and jurisdiction of an administrative adjudicatory body that will recognize and formalize rights in property. This body will also require an institutional home and detailed procedures to guide its work.

Amendments to the property code will be required to simplify requirements for acquiring rights in property through uncontested and uninterrupted possession. Implementing regulations will also have to be developed to provide evidentiary standards for demonstrating uncontested and uninterrupted possession and to provide due process safeguards.

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