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Research Article

JUSTICE IN PROPERTY MATTERS IN KOSOVO: A LESSON FROM A POSTWAR COUNTRY

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ABSTRACT

Background: *In the realm of property matters, or more precisely, the infringement of property rights and the pursuit of adequate justice, Kosovo stands out as one of the most unique cases. Its uniqueness stems not from a singular circumstance, law, or period but from a complex interplay of events, laws, and historical periods. The primary objectives of this paper revolve around property disputes stemming from ethnic conflicts, discriminatory laws, and wartime circumstances. The paper is grounded in two fundamental hypotheses. Firstly, it seeks to examine the property disputes that have arisen because of these conflicts, discriminatory laws, and war, particularly targeting certain segments of the population. Secondly, it aims to explore strategies for avoiding such consequences in the future and recovering material damages incurred. The context under observation is also important because of the significant involvement and influence of the international administration. In this sense, the case of Kosovo can serve as a typical example, theoretically and practically, for other societies and countries facing similar challenges. Lessons from the positive aspects of Kosovo's case should be considered while avoiding repeating numerous mistakes to prevent these countries from experiencing the consequences of such oversights.*

Methods: *The foundational sources used to develop this paper encompass scholarly works such as textbooks and scientific papers, legislative acts including international conventions, and judicial practice. Given the paper's unique nature and the problem it addresses, it further draws upon a range of research and reports from reputable international organisations that have systematically monitored the situation as impartial observers.*

The paper adheres to a specific methodology, with the historical method being indispensable in matters related to property. Through this method, the evolution of ownership, ideas, community consciousness, political and social movements that influenced the law, and international missions approaches that contributed to shaping distinctive legislation in Kosovo known as 'UNMIK Regulation' are unveiled.

This study predominantly employed the analysis method, synthesis method, and comparative method. The analysis method scrutinises relevant legal provisions and case law, while the synthesis method has been utilised within the framework of comparative methods. To a certain extent, the descriptive method was also employed to furnish readers with a clear overview of the events and relevant implementation mechanisms related to property rights.

Results and Conclusions: *The paper delineates three major types of property disputes arising from the unique circumstances characterising Kosovo: property claims deriving from ‘repressive measures’ (1990–1998), property claims deriving after the war (27 February 1998 – 20 June 1999); and property claims caused by the system of social property (after 1945)–subsequently deriving from its privatisation after 1999. For each of these violations of property rights, their causes, circumstances, and underlying purposes are examined and argued. The paper also discusses approaches for addressing these disputes. While it is concluded that addressing property claims deriving after the war (27 February 1998 – 20 June 1999) has been satisfactory, the same cannot be said for the other two categories of property disputes. In these instances, modern law remains largely silent. Therefore, although this paper is titled ‘justice’ in property matters it primarily grapples with the prevailing of ‘injustices’ in property matters. However, the paper offers ideas and suggestions on how modern law can address these categories of violation of property rights.*

1 INTRODUCTION

The evolution of historical and political circumstances has shaped the essence of property relations, rights, violations, and the nature of property disputes. Conversely, given that property relations form the foundation of any legal order, it is impractical to delve into them without considering the political and legal context. In the past, Kosovo has lacked a formal legal system of its own to regulate property relations aside from customary law.¹ Consequently, each system and foreign state apparatus that was established brought its own set of rules.

In its later history, post-1945, Kosovo unwillingly remained under the Socialist Federal Republic of Yugoslavia (hereafter: SFRY), precisely under the Republic of Serbia, with the status of “autonomous province”.² Throughout this period, the institution of social property, also known as socially owned property, occupied a central position, encompassing legal and

1 This type of law was neither written nor issued by any legislative body; rather, it embodies rules established and applied by society, with a vital role played by the precedents set by councils of elders—the most senior individuals familiar with the customs and rules of customary law. See, Syrja Pupovci, *Marrëdhënjet Juridike Civile në Kanunin e Lekë Dukagjinit* (Universiteti i Prishtinës 1971) 9.

2 Constitution of Socialist Federal Republic of Yugoslavia of 21 February 1974 [1974] Official Gazette of Socialist Federal Republic of Yugoslavia (SFRY) 01, ch 1 basic principles; Constitution of Socialist Autonomous Province of Kosovo of 28 February 1974 [1974] Official Gazette of SFRY 01, ch 1 basic principles. Also, Noel Malcolm, *Kosovo: A Short History* (Macmillan Pub 1998) 341; Fred Singleton, *A Short History of the Yugoslav Peoples* (CUP 1989) 209.

economic dimensions.³ This concept was ideologically directly connected with Yugoslav socialism. Despite the fact that private law in former Yugoslavia was regulated according to the civil law tradition, heavily influenced by Austrian law and the pandect system division, the legal institute of social property constituted a significant exception.

Social property did not come into existence accidentally; it was established through various laws and several phases of development. In fact, its genesis (starting in 1945) and subsequent evolution mark the origins of property issues. In the beginning, after 1945, socially owned property was state property, confiscated, nationalised, and expropriated by citizens.⁴ Land confiscated by the state was dedicated to the creation of a so-called "agricultural fund", which later allocated the land to economic organisations⁵ functioning as agricultural cooperatives. Land into possession of the cooperative was registered as a land of Socially Owned Enterprises (hereafter: SOE) in the capacity of social ownership, whereas the cooperative, in the capacity of a legal entity, was registered in public land records as possessor right holder. On this occasion, state property ("nationwide"), along with property in possession of cooperatives, was transferred into the socially owned property.⁶ Even though, at this point, one must also mention "agrarian reform", where part of the land from agricultural funds was allocated in use to farmers who did not possess any land or who did not possess enough, under specific conditions by proclaiming the principle that the land belongs to those who cultivate it.⁷ Later, socially owned property was embodied and built

3 Socialist property replaced the feudal property relations which were based on the Ottoman Empire *tapi* system. See, Iset Morina, *Die Entwicklung des Immobilienrechts im Kosovo* (Verlag Dr Kovač 2007) 38; Ejup Statovci, *Marrëdhëniet pronësore juridike në sendet e paluajtshme në KSA të Kosovës* (Universiteti i Prishtinës 2009) 172.

4 Law of the Federal People's Republic of Yugoslavia 'On Agrarian Reforms and Colonialization' [1945] Official Gazette of FPRY 64; Law of the Federal People's Republic of Yugoslavia 'On Confiscation of Property of War Criminals and Collaborators' [1946] Official Gazette of FPRY 61; Law of the Federal People's Republic of Yugoslavia 'On Transfer of Enemies' Property into State Ownership' [1946] Official Gazette of FPRY 63; Law of the Federal People's Republic of Yugoslavia 'On Amendment of Law on Expropriation' [1957] Official Gazette of FPRY 12; 53/62, 13/65.

5 Law of the Socialist Federal Republic of Yugoslavia 'On amendments and addendums of Agricultural Fund of Farmers Economy in Social Ownership and Allocation of Land to Farmers-Economic Organizations' [1965] Official Gazette of SFRY 10.

6 Abdullah Aliu, *E Drejta Sendore: Pronësia* (Universiteti i Prishtinës 2006) 295.

7 Law On Agrarian Reforms and Colonialization (n 8) art 1. The so-called agrarian reform was fundamentally unjust and discriminatory against the indigenous Albanian population. This is attributed to the fact that properties that exceeding 15 hectares were taken from Albanian owners and distributed to 'colonialists' from other Yugoslav countries, particularly from Serbia and Montenegro, who resettled in Kosovo. On the other hand, politically this was justified by the socialist principle of equality, asserting that land belongs to those who cultivate it. See Fatmir Sejdiu, *Politika agrare si instrument i shtypjes nacionale në Kosovë* (Universiteti i Prishtinës 2001) 120. In addition to this, during this period, a Turkish-Yugoslav "Gentlemen's" Agreement in 1953 was reached. According to this Agreement, the deportation obligations of the Albanian population to Turkey, where initially Turkey requested the deportation of 250,000 Albanian residents of the anticipated one million to be resettled. The property of these inhabitants was never even discussed; it was all taken without any documentation. See, Kosova Institute of History, *Expulsions of Albanians and Colonisation of Kosova*

based on constitutional and legal principles (norms).⁸ These provisions also determined categories of socially owned property.⁹ Therefore, in the former SFRY socialist system, socially owned property generally consisted of land and all production assets (apart from personal property assets of artisans), assets of social labour (assets in service of organisation of associated labour or particular body), as well as all minerals and other natural wealth.¹⁰

Conceptually, the best way to understand this kind of property is to compare it with the concept of ownership itself. There are at least four main identifying elements or main differentiating aspects between social ownership and private ownership. First, the aspect of who was the “owner” of socially owned property and which were authorisations (entitlements) over the social property. At this point, it is a commonly known legal fact that one can acquire ownership rights on no legal basis over this property and wealth (including municipalities, organisations of associated labour and foundations)¹¹ since these entities were only *bona fide* administrators of this property. The second aspect regards the function of social ownership, which consists of the fulfilment of collective needs, especially of those who work and administrate production and distribution.¹² The third aspect regards the institute of prescription, which could not be applicable for social ownership¹³ until the legislative change in 1996.¹⁴ Whereas the fourth aspect was about some cases of legal transactions of socially owned property. Indeed, this should have been “non-transaction” because such a procedure, in principle, could not be implemented, but only in specific cases and exceptionally when such ownership transactions served to increase the value in qualitative or quantitative aspects of socially owned property.¹⁵

(Kosovo Information Center 1997) ch 3, para 3 <<https://nointervention.com/archive/Yugoslavia/Kosovo/www.kosova.com/contents.htm>> accessed 14 December 2023. Also see, Fehmi Pushkollari, *Shpërnguljet e shqiptarëve në Turqi dhe Marrëveshjet Jugosllave-Turke* (Fjala 1994).

- 8 Włodzimierz Brus, *Socialist Ownership and Political Systems* (Routledge & Kegan Paul 1975) 93.
- 9 Especially, Constitution of Socialist Federal Republic of Yugoslavia (n 2); Law of the Socialist Federal Republic of Yugoslavia ‘On Associated Labour’ [1976] Official Gazette of SFRY 53; Law of the Socialist Federal Republic of Yugoslavia ‘On Enterprise’ [1988] Official Gazette of SFRY 77.
- 10 Constitution of Socialist Federal Republic of Yugoslavia (n 2), ch 3 basic principles.
- 11 This determination was enshrined in constitutional provisions, see ch. 3 Basic principles of Constitution of Socialist Federal Republic of Yugoslavia. Also, Constitution of Socialist Autonomous Province of Kosovo (n 2) ch 3 basic principles.
- 12 Jovan Đorđević, *Sistemi Politik* (Universiteti i Prishtinës 1978) 415.
- 13 Law of the Socialist Federal Republic of Yugoslavia ‘On Basic Property Relations’ [1980] Official Gazette of SFRY 06. Article 29 of this Law deleted with amendments and addendums of Law No. 29/96.
- 14 Case AC-II-12-0187 *MM v Privatization Agency of Kosovo* [2013] Special Chamber of the Supreme Court of Kosovo 2013.
- 15 According to article 4 of the Law on Transfer of Immovable Property (Official Gazette of Socialist Autonomous Province of Kosovo 45/81), property in social ownership cannot be transferred to private persons, unless in special circumstance determined by the law. For example, the transfer of social ownership may take place with compensation for land deemed impractical for rational operation, such as small and isolated forests, enclaves, and semi-enclaves. The condition for this transfer is that the funds received must be utilized for the acquisition of another land of similar nature.

This form of organisation, for a short time, became dominant in the planned economy with the social plan, and as such, it grew and multiplied. Presently, social ownership in Kosovo constitutes the largest type of property.¹⁶ It is essential to emphasise that not all social property is deemed illegitimate; its legitimacy is contingent on its origin, explicitly involving confiscations, colonisations, nationalisations, and expropriations without compensation. In this aspect and in the context of property rights, the rule of law, and the democratic principles in our modern era, these processes that led to establishing social property are considered illegitimate and unjust.¹⁷

During the 1990s, the succession and disintegration of SFRY was began.¹⁸ These secessions marked the point of no return in the nationalisation of politics and rapidly escalated into war.¹⁹ During that time, the status of Kosovo changed drastically. On 28 March 1989,²⁰ Serbia employed various laws and measures (known as “repressive measures” or compulsory/emergency measures) to contest and destroy the autonomy of Kosovo.²¹ In

16 There were over 590 SOEs identified in Kosovo. SOEs were estimated to constitute 90 percent of Kosovo's industrial and mining foundation, 50 percent of commercial retail space, and less than 20 percent of agricultural land, encompassing prime commercial agricultural land and the majority of Kosovo's forests. The SOE sector employed around 20,000 individuals and operated across diverse sectors, including metallurgy, plastics, paper processing, tourism, mining, agro-industry, agriculture, forestry, construction, textiles, wineries and breweries, tobacco, as well as retail and wholesale trade. See, Privatization Agency of Kosovo, *Work Report August 2008 – August 2009* (2009) 6 <<https://www.pak-ks.org/page.aspx?id=2,40>> accessed 15 December 2023.

17 See for example, European Parliament, *Private properties issues following the change of political regime in former socialist or communist countries Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia: Study* (Policy Department Citizens' Rights and Constitutional Affairs 2010) <[https://www.europarl.europa.eu/thinktank/en/document/IPOL-PETI_ET\(2010\)425609](https://www.europarl.europa.eu/thinktank/en/document/IPOL-PETI_ET(2010)425609)> accessed 15 December 2023.

18 The declarations of independence by Slovenia and Croatia in 1991 signified the initiation of the dissolution of SFRY, subsequently resulting in three bloody wars in Balkan: Croatia 1991-1995; Bosnia and Herzegovina 1992-1995; and Kosovo 1998-1999). See, John R Lampe, *Yugoslavia as History: Twice there was a country* (2nd edn, CUP 2000) 365; Carsten Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (2002) 96(2) *The American Journal of International Law* 380, doi:10.2307/2693933.

19 Sabine Rutar, 'Nationalism in Southeastern Europe, 1970–2000' in John Breuilly (ed), *The Oxford Handbook of the History of Nationalism* (OUP 2013) 527, doi:10.1093/oxfordhb/9780199209194.013.0026; Ana S Trbovich, *A Legal Geography of Yugoslavia's Disintegration* (OUP 2008) 232, doi:10.1093/acprof:oso/9780195333435.001.0001; Vesna Pesic, *Serbian Nationalism and the Origins of the Yugoslav Crisis* (Peaceworks 8, United States Institute of Peace 1996) 5.

20 On March 28, 1989, the Assembly of the Republic of Serbia ratified Constitutional amendments 9-49, effectively transferring the powers of the self-governing bodies of Kosovo to the authorities of Serbia.

21 Among the key laws that should be highlighted, though not exclusively, is the Law on the Action of Republican Bodies in Special Circumstances in Kosovo, enacted on June 26, 1990. This law resulted in the dismantling of the structure overseeing the institutions of social and economic activities, leading to the dismissal of nearly 300 Albanian directors. Another significant law was the Law on Abrogation of the Activity of the Assembly of Kosovo and its Government, 5 July 1990. By that law Kosova was deprived of legislative and executive power; the Law on Labour Relations in Special Circumstances in Kosovo, implemented on July 26, 1990, is deemed an act of national discrimination against Albanian population.

summary, under these repressive measures, three policies were implemented: firstly, the dismissal of the majority of Albanian public servants and workers in the public sector; secondly, the conversion of all socially-owned enterprises into public enterprises under the administration of individuals loyal to Belgrade; and thirdly, the transfer of property rights/assets of SOEs in Kosovo to Serbian public enterprises.²² These measures were also strongly condemned by the United Nations General Assembly.²³ The end of Kosovo's autonomy was met with violent protests by Albanians, which were eventually quelled. Subsequent to the unrest, thousands of police were deployed from outside the province, leading to widespread repression, arrests, and imprisonments.²⁴ Ultimately, this situation culminated in the war from February 1998 to June 1999.²⁵

The enormous violations of property rights and other basic rights of the Albanian population in Kosovo were a catalyst for the war of 1998-1999. In June 1999, following the

It instituted a prohibition on all activities in the Albanian language, encompassing education, culture, science, and mass media. This legislation led to the banishment of 135,000 Albanian workers from their position of employment, significantly impacting their material well-being of their families; On 27 September 1990, Serbia approved its Constitution, further diminishing the autonomy of Kosovo. This constitution refers to Kosovo as 'Kosova and Metohija,' a term viewed by Albanians as emblematic of Serbian occupation. See, Kosova Institute of History (n 7) ch 4, paras 2, 3. Also see, Esat Stavileci, *Prënimet e Autonomisë së Kosovës (Shoqata e pavarur e juristëve të Kosovës 1992)* 43; Adil Fetahu, *Masat e përkohshme: akt i shkatërrimit të ndërmarrjeve ekonomike dhe institucioneve shoqërore të Kosovës (Bashkimi i Sindikateve të Pavarura të Kosovës 1992)* 8.

22 Malcolm (n 2) 345; Ted Baggett, 'Human Rights Abuses in Yugoslavia: To Bring an End to Political Oppression, the International Community Should Assist in Establishing an Independent Kosovo' (1998) 27(1) *Georgia Journal of International and Comparative Law* 461. Albanian ethnics faced ongoing expulsion from positions controlled by state-owned enterprises. Serbian militia, under the leadership of Z. Raznjatovic, intensified harassment against Albanians, characterized by Kosovar leaders as "ethnic cleansing in the quiet". The reported outcome was a significant Albanian emigration from Kosovo, with estimates reaching up to 500,000. See, Minorities at Risk Project, 'Chronology for Kosovo Albanians in Yugoslavia' (*Refworld*, 2004) <<https://www.refworld.org/docid/469f38f51e.html>> accessed 14 December 2023.

23 Situation of human rights in the territory of the former Yugoslavia: violations of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro) (adopted 20 December 1993 UNGA Res 48/153) <<https://digitallibrary.un.org/record/283503?ln=en>> accessed 15 December 2023. Inter alia, strongly condemns specific measures and discriminatory practices, as well as human rights violations against ethnic Albanians in Kosovo. It highlights the extensive repression carried out by Serbian authorities, including police brutality against ethnic Albanians, arbitrary searches, seizures, and arrests, along with torture and ill-treatment during detention. Discrimination in the administration of justice contributes to a climate of lawlessness, allowing criminal acts, particularly against ethnic Albanians, to occur with impunity. The discriminatory removal of ethnic Albanian officials, especially from the police and judiciary. This includes the mass dismissal of ethnic Albanians from professional, administrative, and other skilled positions in state-owned enterprises and public institutions. This also encompasses the removal of Albanian teachers from the Serb-run school system and the closure of Albanian high schools and universities, etc.

24 Tim Judah, *Kosovo: What Everyone Needs to Know* (OUP 2008) 67.

25 Florian Bieber and Zidas Daskalovski (eds), *Understanding the War in Kosovo* (Frank Cass 2003) 3.

capitulation of Serbia and the conclusion of the war in Kosovo, the United Nations Mission was deployed in Kosovo, and hereby, the Interim Administration of the United Nations Mission in Kosovo (hereinafter: UNMIK) was established.²⁶

As a post-war aftermath, UNMIK and Kosovo society faced many issues, such as war crimes, internal displacement of ethnic groups, reconstruction of burned settlements, peacebuilding, the rule of law strengthening, retribution, institutional establishment, and functioning, etc.²⁷ Moreover, land and property became pivotal concerns as they are intricately linked to the conflict and injustices from the past. Therefore, establishing effective mechanisms for resolving property disputes, coupled with appropriate approaches, emerged as a critical priority.

From 1999 to 2008, the international administration had legislative, executive, and judicial power and determined which laws were applicable. Also, in the sense of property rights, UNMIK administered movable and immovable property (excluding private property) across the entire territory of Kosovo, particularly in cases where there were reasonable and objective grounds to believe that such property was registered under the former Yugoslavia or Serbia, or any other relevant body, and was socially owned.²⁸

Kosovo experienced a rapid transition from a country with socialist/communist traditions and a history governed by hundreds of discriminatory laws to a country governed by a more developed Western legal framework after 1999.²⁹ This marked a significant and swift transformation in the legal and governance structure.

26 UN Security Council Resolution 1244 (1999) [On the Deployment of International Civil and Security Presences in Kosovo] (adopted 10 June 1999) <[https://undocs.org/S/RES/1244\(1999\)](https://undocs.org/S/RES/1244(1999))> accessed 15 December 2023; UNMIK Regulation no 1999/1 of 25 July 1999 'On the Authority of the Interim Administration in Kosovo' <https://unmik.unmissions.org/sites/default/files/regulations/02english/E1999regs/RE1999_01.htm> accessed 15 December 2023.

27 Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000) 99-128, doi:10.1093/0199243093.001.0001; Gjylbehare Bella Murati, *UN Territorial Administration and Human Rights: The Mission in Kosovo* (Post-Conflict Law and Justice, Routledge 2020) 28; Flora Ferati-Sachsenmaier, 'Postwar Kosovo: Global and Local Dimensions of Interethnic Reconciliation Processes' (2019) 13(2) *International Journal of Transitional Justice* 310, doi:10.1093/ijtj/ijz004.

28 Art. 6 of UNMIK Regulation no 2000/54 of 27 September 2000 amending UNMIK Regulation 1999/01 of 25 July 1999, as amended, on the Authority of the Interim Administration in Kosovo.

29 During the execution of their responsibilities, individuals performing public duties or holding public office in Kosovo are required to apply internationally recognized human rights standards: (a) The Universal Declaration on Human Rights of 10 December 1948; (b) The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto; (c) The International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto; (d) The International Covenant on Economic, Social and Cultural Rights of 16 December 1966; (e) The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965; (f) The Convention on Elimination of All Forms of Discrimination Against Women of 17 December 1979; (g) The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984; and (h) The International Convention on the Rights of the Child of 20 December 1989. These legal acts shall be considered to have become

In February 2008, the Assembly of Kosovo declared its independence, proclaiming it an independent and sovereign state.³⁰ In April 2008, the Assembly of Kosovo also adopted its Constitution, which entered into force on 15 June 2008.³¹ The significance of this Constitution lies in the fact that it represented the international community's engagement in finding an internationally accepted solution to Kosovo's political status.³²

With this momentum, the transference of authorisations occurred (from UNMIK to Kosovo's institutions).³³ However, Kosovo did not make substantial changes; rather, it followed the existing framework. Furthermore, after gaining independence, Kosovo consistently demonstrated loyalty and coordination with its partner states and international organisations,³⁴ particularly in actions that impacted its citizens' vital rights.³⁵

effective as of June 10, 1999. See, UNMIK Regulation no 1999/24 of 12 December 1999 'On the Law Applicable in Kosovo' <https://unmik.unmissions.org/sites/default/files/regulations/02english/E1999regs/RE1999_24.htm> accessed 15 December 2023.

30 Kosovo Declaration of Independence of 17 February 2008 <<https://www.refworld.org/legal/legislation/natlegbod/2008/en/56552>> accessed 15 November 2023. Kosovo declared its independence from the Republic of Serbia. The United Nations Security Council Resolution 1244 (1999) is still into the force. As of now, Kosovo officially is recognized as an independent state by one hundred and seventeen states. See, Robert Muharremi, 'Kosovo's Declaration of Independence: Self-Determination and Sovereignty Revisited' (2008) 33(4) *Review of Central and East European Law* 401, doi:10.1163/157303508X339689; Colin Warbrick, 'Kosovo: The Declaration of Independence' (2008) 57(3) *The International and Comparative Law Quarterly* 675.

31 Constitution of the Republic of Kosovo of 15 June 2008 (with amendments I-XXVI) <<https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>> accessed 15 December 2023.

32 Robert Muharremi, 'The Republic of Kosovo: Introductory Note' (Oxford Constitutional Law, 2008) <<https://oxcon.oup.com/display/10.1093/law/ocw/law-ocw-cm471.document.1/law-ocw-cm471?rskey=2xyhfg&result=768&prd=OXCON>> accessed 15 December 2023.

33 Martti Ahtisaari, Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, Addendum: Comprehensive Proposal for the Kosovo Status Settlement, art 14 <<https://digitallibrary.un.org/record/595359?ln=en&v=pdf>> accessed 15 December 2023.

34 Hajredin Kuçi, 'International Legal Cooperation between Kosovo and other States and Organizations' (2018) 43(3) *Review of Central and East European Law* 314.

35 Wolfgang Benedek, 'Final Status of Kosovo: The Role of Human Rights and Minority Rights' (2005) 80(1) *Chicago-Kent Law Review* 215; Beti Hohler and Barbara Sonczyk, 'The Role and Impact of the European Convention on Human Rights Beyond States Parties: The curious case of the ECHR in Kosovo' in Stephanie Schiedermaier, Alexander Schwarz and Dominik Steiger (eds), *Theory and Practice of the European Convention on Human Rights* (Nomos 2022) 261; Remzije Istrefi and Iliriana Islami, 'Incorporation of International Human Rights into National Legislation: The Case of Kosovo' (2017) 20(1) *SEER Journal for Labour and Social Affairs in Eastern Europe* 119.

2 THE NATURE OF PROPERTY DISPUTES AND JUSTICE

Concerning common property disputes among individuals, Kosovo upholds the traditional property protection system rooted in Roman law and modern civil law principles.³⁶ Under the influence of Roman law concerning the protection of property and other property rights in general, a series of lawsuits were employed to seek protection for these rights. Examples include *actio reivindicatio*, *actio publiciana*, *actio negatoria*, *interdictum retinendae possessionis*, etc.³⁷ However, considering the circumstances in Kosovo, it is evident that after 1999, apart from these property disputes filed before regular courts, there are three major kinds of property disputes: property claims deriving from “repressive measures” (1990-1998), property claims deriving after the war (27 February 1998 - 20 June 1999); and property claims caused by the system of social property (after 1945)–subsequently deriving from its privatisation after 1999.³⁸

To handle these disputes efficiently, Kosovo has instituted specialised mechanisms and bodies with administrative, judicial, and quasi-judicial functions. The judiciary system in Kosovo comprises the following courts: Basic Courts, Court of Appeals, and Supreme Court.³⁹ Relevant to our topic and the nature of property matters is the establishment of specific judging panels to address these specific issues. In this regard, within the Supreme Court framework, a Panel of Appeals was created for property issues handled by the Kosovo Property Agency, as well as a Special Chamber for property problems arising from privatisation under the Privatisation Agency of Kosovo.⁴⁰

The establishment of these mechanisms was undertaken to enhance efficacy in resolving property matters even though the repercussions stemming from these types of disputes and the mechanisms established for their resolution have intricately complicated the contemporary process of codifying civil law.⁴¹

36 Berat Aqifi, Petrit Nimani and Artan Maloku, 'The Right of Ownership and Legal Protection in Kosovo' (2023) 6(3) Access to Justice in Eastern Europe 228, doi:10.33327/AJEE-18-6.3-a000310; Iset Morina, 'Sachenrecht im Kosovo' in Herbert Grziwotz, Johanna Schmidt-Räntsch and Gerhard Ring (eds), *Bürgerliches Gesetzbuch: BGB*, band 3: *Sachenrecht* (5 Aufl, Nomos 2021) 2525; Ejup Statovci, *Mbrojtja e Pronësisë: Studim Komparativ* (ribot, Enti i Teksteve 2009) 46. Also, Law of the Republic of Kosovo no 03/L-154 of 25 June 2009 'On Property And Other Real Rights' [2009] Official Gazette of the Republic of Kosovo 57/20, art 93–103.

37 Herbert Hausmaninger and Richard Gamauf, *A Casebook on Roman Property Law* (OUP 2012) 205; Paul du Plessis, *Borkowski's Textbook on Roman Law* (OUP 2015) 219, 229, 231.

38 Ardit Gashi, *Mbrojtja e pronësisë: Një studim sipas të drejtës në Kosovë dhe Konventës Evropiane për të Drejtat e Njeriut* (Alb-Juris 2021) 188.

39 Law of the Republic of Kosovo no 06/L-054 of 23 November 2018 'On Courts' [2018] Official Gazette of the Republic of Kosovo 22/3, art 8.

40 *ibid*, art 25. Details regarding the scope and competences of these mechanisms will be discussed below.

41 Ardit Gashi, 'Codification of Private Law in the Republic of Kosovo: The Influence of European Codifications, European Law and Challenges' (2022) 10(2-4) *International Journal of Private Law* 199, doi:10.1504/IJPL.2022.129672.

3 PROPERTY CLAIMS DERIVING FROM “REPRESSIVE MEASURES” (1990–1998)

As mentioned above, immediately following the destruction of the status of autonomy that Kosovo had until then, during the 1990s, a direct offensive on property relations ensued through a series of measures and laws. There are three primary laws entirely issued on a discriminatory basis against the Albanian population:

- Law on Changes and Supplements on the Limitation of Real Estate Transactions (hereafter: Law No. 22/91);
- Law on the Conditions, Ways, and Procedures of Granting Farming Land to Citizens Who Wish to Work and Live in the Territory of the Autonomous Province of Kosovo and Metohija (hereafter: Law No. 43/91).
- Law on the Conditions and Procedures for the Transformation of Social Property into Other Forms of Ownership (hereafter: Law No. 48/91).⁴²

These laws were not merely conventional statutes; they constituted programs with specific missions to provide residences for officials and encourage the influx of individuals from other countries who desired to live in Kosovo. The underlying objective appeared to be a classic form of re-nationalisation of property⁴³ and a push for recolonisation. On the other hand, there appeared to be attempts to compel Albanians to emigrate from their ethnic land.

Thus, through Law No. 22/91, it was stipulated that individuals of Albanian ethnicity did not possess the right to acquire and purchase real estate. On the other hand, Albanian citizens were only permitted to sell their properties to individuals who were not Albanian (like Serbs, Croats, etc.). The transfer of immovable property necessitated a written contract between the transferer and the receiver on a legal basis, coupled with registration in the property rights register.⁴⁴ This condition could never be fulfilled by the Albanians because the agreement for the transfer of rights of an immovable property had to be completed and verified before a competent court—that, in this case, this discriminatory

42 Law of the Republic of Serbia ‘On Changes and Supplements on the Limitation of Real Estate Transactions’ [1991] Official Gazette of the Republic of Serbia 22; Law of the Republic of Serbia ‘On the Conditions, Ways, and Procedures of Granting Farming Land to Citizens Who Wish to Work and Live in the Territory of the Autonomous Province of Kosovo and Metohija’ [1991] Official Gazette of the Republic of Serbia 43; Law of the Republic of Serbia ‘On the Conditions and Procedures for the Transformation of Social Property into Other Forms of Ownership’ [1991] Official Gazette of the Republic of Serbia 48; 75/91, 8/94.

43 They decided to terminate socially owned first through various procedures of “renationalization” and after to gain ground and take measures for privatization process. In this manner, there was a reduction in workers’ rights, accompanied by an increase of government control exercised by state representatives on management committees. See, Milica Uvalic, ‘Privatization in Serbia: The Difficult Conversion of Self-Management into Property Rights’ in Virginie Perotin and Andrew Robinson (eds), *Employee Participation, Firm Performance and Survival* (Advances in the Economic Analysis of Participatory & Labor-Managed Firms 8, 8th edn, Emerald 2004) 224, doi:10.1016/S0885-3339(04)08009-3.

44 Law On Basic Property Relations’ (n 13) art 33; Law on Transfer of Immovable Property (n 15) art 10.

law did not permit.⁴⁵ In this way, this law flagrantly violated the fundamental principle of freedom of contract as a fundamental component of the liberal theory—*laissez-faire*. This legal framework applies the principle that everyone should be granted the autonomy to make their own choices.⁴⁶

What were the consequences of this injustice? This situation resulted in numerous illegal property relations—known as informal transactions. Such transfers commonly involved a property agreement that was orally and discreetly concluded, possibly with witnesses present, and kept in the possession of the buyer. These agreements were never certified by a court, and consequently, the transaction was not registered in the immovable property rights register/cadastral records.⁴⁷ This implies that concerning the same property, there can be a registered formal holder and a *de facto* holder of the property who exercises their power over the property. These issues and property uncertainties concerning transactions came to the forefront after 1999, following the liberation of Kosovo. A new category of property disputes was introduced into the judicial system.⁴⁸ These lawsuits have a distinct name, referred to as lawsuits for verifying ownership.⁴⁹ The most appropriate legal solution for this issue is the validation of these transactions and contracts based on a standard of the legislation on obligation relations whereby the contract, for the conclusion of which the written form is necessary, is considered binding even if it was not completed in this form,

45 The act of registering rights over immovable property is crucial and bears a 'constitutive effect'. This implies that the acquiring of possession/property, alteration, transformation/termination of ownership to immovables necessitates a contract that holds legal validity and the registration of the relevant transaction in cadastral records—*modus acquirendi*. See, Christoph U Schmid, Christian Hertel and Hartmut Wicke, *Real Property Law and Procedure in the European Union: General Report, Final Version* (European University Institute, Deutsches Notarinstitut 2005) 27. The same principle holds true for former Yugoslavia and Kosovo as well. See, Andrija Gams, *Bazat e së drejtës reale* (Universiteti i Prishtinës 1978) 182.

46 Morris R Cohen, 'The Basis of Contract' in Richard A Epstein (ed), *Liberty, Property, and the Law: Contract - Freedom and Restraint* (Routledge 2011) 3; Jan M Smits, *Contract Law: A Comparative Introduction* (Edward Elgar 2014) 10; Roscoe Pound, 'Liberty of Contract' (1909) 18(7) *The Yale Law Journal* 456, doi:10.2307/785551.

47 This issue was observed by international organizations operating in Kosovo in a supervisory capacity, such as Department of Human Rights of the Organization for Security and Co-operation in Europe - Mission in Kosovo. See, OSCE, *Litigating Ownership of Immovable Property in Kosovo* (OSCE Department of Human Rights and Communities 2009) 5 <<https://www.osce.org/kosovo/36815>> accessed 15 December 2023.

48 OSCE, *Kosovo: First Review of The Civil Justice System* (OSCE Department of Human Rights and Communities 2006) 7 <<https://www.osce.org/kosovo/19401>> accessed 15 December 2023; OSCE, *Property Rights Mass-Claim Mechanism: Kosovo experience* (OSCE Pub 2020) 14-20. <<https://www.osce.org/mission-in-kosovo/454179>> accessed 15 December 2023. Ardit Gashi, 'Causes of Procedural Delays During the Settlement of Civil Cases at First Instance Courts' (2010) 14(1) *E Drejta - Law* 110.

49 This is not associated with the three well-known lawsuits for the protection of property like *actio reivindicatio*, *actio publiciana*, *actio negatoria* or *interdictum retinendae possessionis*.

provided that the parties–creditor and debtor have fulfilled, wholly or predominantly, the commitments arising from it.⁵⁰

Law No. 43/91 constituted the legal basis for the unfair distribution of property and public assets based on ethnic grounds, particularly favouring the Serbian minority. The Serbian regime transported numerous Serbian families from various countries as settlers/colonists.⁵¹ A second wave of recolonisation commenced on 10 August 1995 and continued afterwards. Serbian refugees from Croatia reached around 8,000 by 31 August 1995.⁵² However, the statistics acknowledge the possibility of claiming that only half of the plan for settling 20,000 Serbian colonists in Kosovo has been fulfilled.⁵³ To describe this situation more accurately, the International Helsinki Foundation for Human Rights referred to it as a policy of "Serbianization" in Kosovo while also identifying a series of restrictions imposed on the freedom of movement of ethnic Albanians, denying the right of use of the Albanian language and the possession of the private property.⁵⁴ The property and goods distributed to the colonists did not belong to Serbia; instead, they were the property of Albanians and social enterprises developed and cultivated by the Albanian population constituting around 90 percent at that time.⁵⁵

Law No.48/91 violated the property rights of socially owned entities, which, as mentioned above, were built by the efforts of the workers–constituting almost absolutely Albanians. In the socialist system, as mentioned earlier, socially owned enterprises were organised under

50 This exception applies if there is nothing else, except the stipulated form. See, Law of the Socialist Federal Republic of Yugoslavia 'On Obligation Relations' [1978] Official Gazette of SFRY 30/78, art 73. Also, Case no KI 60/12 Rev no 58/2007 (15 March 2010) [2012] Constitutional Court of the Republic of Kosovo.

51 Rifat Blaku, *Shkaqet e eksodit shqiptar, shpërngulja e shiptarëve gjatë shekujve* (Prishtina 1992) 203.

52 See, Kosova Institute of History (n 11) ch 4, para 7.

53 A statement released by the Committee for Human Rights and Freedoms in Kosovo cautioned that a large-scale conflict might erupt in Kosovo if the resettlement of Krajina Serb refugees persisted. The statement highlighted that between August 9th and 31st, approximately 8,356 refugees from Krajina had been resettled in 23 locations in Kosovo, and prior to that, around 2,947 Serb refugees from Bosnia had also been relocated to the region. See, Minorities at Risk Project (n 22). In the Municipality of Prizren: one thousand two hundred eighty colonist were settled; in the Municipality of Prishtina: two thousand forty; in Municipality of Peja: one thousand; in municipality of Istog: six hundred and sixtyseven; in Municipality of Gjilan: five hundred; in Municipality of Gjakova: four hundred twenty; in Municipality of Mitrovica: three hundred and eighteen; in Municipality of Vushtria, Municipality of Suhareka and Municipality of Zubin Potok: two hundred fifty colonists were settled. etc. See, Kosova Institute of History (n 11) ch 4, para 7.

54 Minorities at Risk Project (n 26). Also, Human Rights Watch, 'World Report 1996 – Federal Republic of Yugoslavia' (*UNHCR Refworld*, 1 January 1996) <<https://www.refworld.org/docid/3ae6a8b08.html>> accessed 15 December 2023; Llibert Cuatrecasas and Vasili Likhachev, 'The Crisis in Kosovo: Explanatory Memorandum CG (5) 7 Part II' (*Council of Europe*, 22 May 1998) <<https://rm.coe.int/the-crisis-in-kosovo/1680718a71>> accessed 15 December 2023.

55 Statistical Office of Kosovo, *Demographic Changes of the Population of Kosovo for the period 1948–2006* (Population Statistics, SOK 2008) 19; Hivzi Islami, *Demographic Studies: 100 Years of Kosova Demographic Development of Kosova* (Kosovo Academy of Sciences and Arts 2008) 205, 212.

the self-government system and were led by workers' councils. The destruction of the autonomy of Kosovo resulted in the displacement of 135,000 Albanian workers from their employment.⁵⁶ Consequently, through Law No.48/91, the workers' councils of socially owned enterprises were replaced by bodies composed of loyalists sent from Belgrade in the capacity of management bodies. This law stipulated the conversion of SOEs into joint-stock companies, granting exclusive authority to the management body of the enterprise to decide on the transformation into joint-stock companies, as well as the issuance of shares.⁵⁷ It has been proven that in this way, the capital of socially owned enterprises, represented by shares, is transferred predominantly into the hands and ownership of the Serbian and Montenegrin population.⁵⁸ Besides that, there are also rights in socially owned housing, which were closely tied to employment.

Consequently, a significant number of Albanians were forcibly evicted from their homes. Many of these properties were then reallocated to Serbs and Montenegrins under preferential terms. In addition to losing their homes, the evicted Albanians also forfeited financial assets deposited in employment-linked housing funds and the right to purchase the socially owned apartment they had lived in and had accumulated during years of employment.⁵⁹

The damage and legal chaos brought about by the laws of this decade will likely be irreparable, and as it seems never avoidable.

After 1999, one of the most sensitive issues was the establishment of the legal infrastructure while simultaneously addressing a series of discriminatory laws. This responsibility fell to UNMIK, acting as the administrator in Kosovo in harmony with the authorisations granted by the United Nations.⁶⁰ In this context, the applicable law consisted of UNMIK regulations and secondary legal acts/instruments (administrative directions) issued thereunder (approved and signed by the Special Representative of the Secretary-General), as well as the law in force in Kosovo before 1989 (prior to the destruction of autonomy and repressive measures in Kosovo). In the event of a conflict between these laws, the UNMIK regulations and secondary legal instruments issued by UNMIK were given primacy.⁶¹

Law No. 22/91 and Law No. 43/91 discussed above were repealed specifically as discriminatory legislation.⁶² These laws have been repealed, and it is evident that they will remain part of history. However, the consequences are significant.

56 Stavileci (n 21).

57 Law On the Conditions and Procedures for the Transformation of Social Property into Other Forms of Ownership (n 42) art 7.

58 Nekibe Kelmendi, 'Problemët pronësoro-juridike në Kosovë: si të zgjidhen ligjërish' (1999) 4 Kosova Law Review 75.

59 Scott Leckie, 'Resolving Kosovo's Housing Crisis: Challenges for the UN Housing and Property Directorate' (2000) 7 *Forced Migration Review* 12-3.

60 UN Security Council Resolution 1244 (1999) (n 26); UNMIK Regulation no 1999/1 (n 26).

61 UNMIK Regulation no 1999/24 (n 29).

62 UNMIK Regulation no 1999/10 of 13 October 1999 'On the Repeal of Discriminatory Legislation Affecting Housing and Rights in Property' <<http://www.unmikonline.org/regulations/1999/reg10-99.htm>> accessed 15 December 2023.

The question can now be raised: What happened to those transactions that took place during those years based on these laws? What happened to the judgments that were issued based on these laws? And what occurred to the cadastral records of immovable properties that were made based on these laws and judgments? Unfortunately, nothing has been done. The reason is that UNMIK did not have the mandate to rectify or repair the injustices of the past, and secondly, UNMIK did not possess the capacity or mandate to provide long-term solutions as a state would.

On the other hand, even after Kosovo gained independence in 2008, the state has not taken measures in this direction. This is particularly due to political realities on the ground,⁶³ with a focus on avoiding further tensions with the Serbian minority and facilitating negotiations between Kosovo and Serbia.⁶⁴ What reality is created by this situation? With the liberation of Kosovo from Serbian occupation⁶⁵ in June 1999, more than 90 percent of the Serbian minority was displaced to Serbia and its surrounding areas. Consequently, their properties were predominantly occupied by Albanians.⁶⁶ These property disputes are called property claims derived from the war (27 February 1998 - 20 June 1999) and will be addressed in the subsequent section, focusing on property claims arising from this period.

As for Law No.48/9, UNMIK decided that the transformation of SOEs into other forms of organisations would be recognised only if it happened prior to 1989 or thereafter but was implemented/based on a non-discriminatory law and procedures.⁶⁷ This meant that based

63 See extensively, James Ker-Lindsay, *Kosovo: The Path to Contested Statehood in the Balkans* (IB Tauris 2009) 25; Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence* (OUP 2009) 165.

64 Bardhok Bashota and Afrim Hoti, 'The Role of the EU in Facilitating a Hard Implementation Dialogue: Normalization of Kosovo-Serbia Relations' (2021) 45(3) *Southeastern Europe* 4, doi:10.30965/18763332-45010001; Leon Hartwell, *The Serbia-Kosovo Dialogue: Ripe for Resolution?* (Center for European Policy Analysis 2021) 2.

65 As the Ottoman Empire crumbled, leaving Kosovo in a state of anarchy, the Serb army under King Peter invaded from the north and occupied all of Kosovo. The Conference of Ambassadors, meeting in London from December 1912 to August 1913 to discuss events in the Balkans, confirmed the independence of Albania itself, but agreed to recognize Serb rule over Kosovo, thus excluding 40 percent of the Albanian population in the Balkans from Albania itself. It was a tragic mistake that haunted the Balkans right to the end of the 20th century. See, Robert Elsie, *Historical Dictionary of Kosovo* (Historical Dictionaries of Europe 79, 2nd edn, Scarecrow Press 2011) 57; Malcolm (n 2) 251.

66 Department of Human Rights and Rule of Law of the Organization for Security and Co-operation in Europe focus attention on the absence of directions on the actions to be taken to ensure a harmonized approach in addressing property rights violations. Issues such as illegal occupation, unequal access to mechanisms for the protection of property rights, and the existing uncertainty in the law, especially considering the domestic applicable law enacted prior to 1989, highlight the necessity for comprehensive legal reform. See, OSCE, *Property Rights in Kosovo* (OSCE Department of Human Rights and Communities 2002) 5 <<https://www.osce.org/kosovo/13062>> accessed 15 December 2023.

67 UNMIK Regulation no 2002/12 of 13 June 2002 'On the Establishment of the Kosovo Trust Agency' <https://unmik.unmissions.org/sites/default/files/regulations/02english/E2002regs/RE2002_12.pdf> accessed 15 December 2023.

on the criterion of discrimination of these laws, no transformation of SOEs was recognised. As a result, their legal status until 1989 will remain in force, making them eligible for inclusion in the privatisation process.⁶⁸

4 PROPERTY CLAIMS DERIVING AFTER THE WAR (27 FEBRUARY 1998 – 20 JUNE 1999)

In post-war countries, beyond property issues, there exists a right under international law that safeguards the turnback of displaced humans to their homes.⁶⁹ This right, often referred to as the right to return, asserts that individuals forced to flee their homes due to conflict, persecution, or other emergencies have the right to return to their original homes or places of residence once conditions permit, and as such has undergone significant evolution as a human rights norm. Protecting these rights is instrumental in advancing long-term peace, stability, economic vitality, and justice.⁷⁰ Hence, since the inception of the UNMIK engagement in Kosovo, property matters and housing rights have consistently held a prominent position on the agenda. Recognising this, UNMIK⁷¹ established quasi-judicial and administrative bodies to expedite the resolution of property claims related to the conflict. This was done to prevent the overwhelming number of claims from burdening the regular court system.

To achieve an efficient and effective resolution of claims concerning residential property, several key measures and processes need to be in place. Some of these include a clear, comprehensive legal framework outlining the procedures for resolving property claims, defining the rights of claimants and the obligations of relevant authorities. At the same time, specialised bodies or tribunals are dedicated to handling property claims with their expertise and resources. In this sense, with the aim of offering comprehensive guidance on property rights in Kosovo, the Housing and Property Directorate has been established.⁷² This includes the establishment of the Housing and Property Claims Commission as an independent body of the Housing and Property Directorate, which will resolve private disputes (non-commercial) concerning residential property referred to by the Housing and

68 *ibid*, ss 1, 2. Also, Ardit Gashi, 'Die Umwandlung des gesellschaftlichen Eigentums im Kosovo' (2018) 59(6) *Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung* 282.

69 Marcus Cox and Christopher Harland, 'Internationalized Legal Structures and the Protection of Internationally Displaced Persons' in Joan Fitzpatrick (ed), *Human Rights Protection for Refugees, Asylum Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures* (Transnational Pub 2002) 521.

70 Scott Leckie, *Housing, Land, and Property Restitution Rights of Refugees and Displaced Persons: Laws, Cases, and Materials* (CUP 2007) 1-3.

71 UN Security Council Resolution 1244 (1999) (n 26) art 11.

72 UNMIK Regulation no 1999/23 of 15 November 1999 'On the establishment of the Housing and Property Directorate and the Housing and Property Claims Commission' art 1 <<https://reliefweb.int/report/serbia/unmik-regulation-no-199923-establishment-housing-and-property-directorate-and-housing>> accessed 15 December 2023.

Property Directorate.⁷³ The creation of the Housing and Property Directorate resulted in the removal of jurisdiction for all housing cases from domestic courts, aligning with standard legal interpretation in Kosovo.⁷⁴ However, implementing this change was contingent upon the creation of rules of procedure for the Housing and Property Directorate.⁷⁵ This situation created a void in property rights cases.⁷⁶

These quasi-judicial bodies dealt with three categories of applications/disputes:

- a) Applications by individuals/natural persons whose property, possession or occupancy rights to residential real property have been revoked subsequent to 1989 on the basis of discriminatory legislation;
- b) Applications concerning possible validation of unofficial/informal contracts or transactions⁷⁷ of residential real property based on the free will of the parties after 1989; and
- c) Applications by individuals/natural persons who were the owners, possessors, or occupancy right holders of residential real property prior to 1999 and who do not have possession of their property and where the property has not willingly been transferred.⁷⁸

In post-conflict societies, also mistrust often persists among parties that were once in conflict. For this purpose, the formation of these bodies could only be facilitated by the UNMIK.

It is observed that the primary challenge impacting property rights in Kosovo stems from the unlawful occupation of both residential and non-residential properties. The proceedings before the Housing and Property Directorate can extend up to four years,⁷⁹ and there is a lack of an effective remedy to address the prolonged duration of these proceedings and/or

73 *ibid*, art 2.

74 Morina (n 36).

75 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' <<https://docs.pca-cpa.org/2016/01/UNMIK-Regulation-2000-60.pdf>> accessed 15 December 2023.

76 Anneke Rachel Smit, 'Housing and Property Restitution and IDP Return in Kosovo' (2006) 44(3) *International Migration* 67.

77 Contracts or unofficial/informal transactions, in this context, pertain to those transactions occurring after 1989, which, under discriminatory laws were deemed illegal and not permitted. Otherwise under normal circumstances, absent discriminatory laws, these contracts would be considered legal transactions. See, Law of the Republic of Serbia 'On Special Conditions Applicable to Real Estate Transactions' [1989] *Official Gazette of the Republic of Serbia* 30; Law On Changes and Supplements on the Limitation of Real Estate Transactions (n 42).

78 UNMIK Regulation no 1999/23 (n 72) art 1.2.

79 In this regard, there was also criticism voiced by Venice Commission. See, *Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms* no 280/2004 (11 October 2004). <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2004\)033-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2004)033-e)> accessed 15 December 2023.

decisions on the merits. This situation has created an environment of impunity concerning violations of property rights. In addition, a significant challenge that adversely affected the Albanians was the inability to furnish ownership proofs and evidence. This challenge came from the informal transactions (non-registration) between 1989–1998, compounded by the impact of the war in 1998–1999, which included the burning of houses and the loss of everything during the displacement in Albania.

Furthermore, it is crucial to highlight an exceptionally significant and unprecedented fact: the Serbian military forces, upon concluding the war and withdrawing from Kosovo, took the cadastral registers with them. The lack of cadastral records further complicated the situation, contributing to an even deeper chaos regarding ownership evidence.⁸⁰ In practical terms, the situation unfolded with Albanians holding *de facto* possession of the property—considered unlawful possessors, while the Serbs had the last ownership evidence—“papers”. Given these circumstances and considering that a significant number of Serbs did not consider themselves indigenous (with many arriving in the 1990s), they opted to sell these properties to the Albanians.⁸¹

To address disputes over private property, encompassing agricultural and commercial property, significant legislative changes were introduced in 2006. These changes aimed to implement a mass claims resolution methodology.⁸² These changes transformed the Housing and Property Directorate into a new agency called Kosovo Property Agency.⁸³ The central mandate of the newly established Agency was to ensure the effective and efficient resolution of property disputes related to private immovable property, encompassing agricultural land and commercial property.⁸⁴ In substance, the Kosovo Property Agency was

80 Regarding to this issue in 2011 within the European Union facilitated negotiations (between Kosovo-Serbia) was reached the Brussels Agreement on Cadastre (2 September 2011), which has never been fully implemented. See also, Shpetim Gashi and Igor Novaković, *Brussels Agreements Between Kosovo and Serbia: A Quantitative Implementation Assessment* (Friedrich-Ebert-Stiftung 2020) 2.

81 In the opinion of the author of this article, the choice made may not be deemed a good or just option. However, it appears that such decisions were driven by circumstances to mitigate potential conflicts. In transitional justice, such methods may be considered at times, but it is essential that any actions occur with the full and voluntary consent of the parties involved. See for example, Rhodri C Williams, *The Contemporary Right to Property Restitution in the Context of Transitional Justice* (Occasional Paper Series, ICTJ 2007) 51; Edward Tawil, *Property Rights in Kosovo: A Haunting Legacy of a Society in Transition* (Occasional Paper Series, ICTJ 2009) 49-50.

82 Regarding the term ‘mass claims’ see, Howard M Holtzmann, ‘Mass Claims’ *Max Planck Encyclopedia of Public International Law* (Oxford Public International Law 2008) <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1891>> accessed 15 December 2023.

83 UNMIK Regulation no 2006/10 of 4 March 2006 ‘On the Resolution of Claims relating to Private Immovable Property, Including Agricultural and Commercial Property’ <<https://docs.pca-cpa.org/2016/01/UNMIK-Regulation-2006-10.pdf>> accessed 15 December 2023.

84 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc S/205/335 (23 May 2005) § 67 <<https://undocs.org/S/2005/335>> accessed 15 December 2023. Also, Margaret Cordial and Knut Rosandhaug, *Post-Conflict Property Restitution: The Approach in Kosovo and Lessons Learned for Future International Practise* (Martinus Nijhoff Pub 2009) 216, doi:10.1163/ej.9789004155602.i-1849.

an administrative body. However, it was also quasi-judicial and had some reduced competencies. However, it was authorised to assist the courts in resolving war-related claims from the war—between 27 February 1998 and 20 June 1999. Its primary focus was on ownership claims concerning private immovable property, including agricultural and commercial property. Additionally, this Agency handled claims related to property use rights for private immovable property, covering agricultural and commercial holdings, especially when the claimant could not exercise such property rights.⁸⁵ Kosovo Property Agency decisions could be challenged through the judicial process only in the Appeals Panel of the Supreme Court of Kosovo.⁸⁶

The sociohistorical context in which the legal framework is created, with the aim of restoring rights that existed during the war, indicates that the legislator intended to establish a law specifically for the restitution of property rights held by individuals at the outbreak of the 1998–1999 war. Consequently, any property rights acquired after the eruption of the war—*post factum* should be addressed through regular civil procedure mechanisms within the framework of the standard civil court system.⁸⁷

According to the relevant legal framework, for an applicant to obtain a positive decision or order, they must present evidence substantiating ownership of private immovable property, encompassing agricultural and commercial holdings. Alternatively, the applicant needed to provide documentation supporting a use right for private immovable property, including agricultural and commercial property, especially in cases where the applicant could not exercise such property rights.⁸⁸ But, for applicants, particularly those of Albanian descent, demonstrating proof of ownership posed a significant challenge. Many of their evidential documents were either burned/destroyed or lost during the war. In such cases, their recourse was limited to presenting witnesses or any available evidence associated with the possession of the property. This could include details about the cultivation of the land, crops grown over a specific period, or similar factors.

In instances where restitution was ruled in favour of applicants/claimants, they were granted the prerogative to select from three potential options for implementation: first, the applicant/claimant could opt for immediate repossession of the claimed property; second, the applicant/claimant had the choice to place their property under Kosovo Property

85 UNMIK Regulation no 2006/10 (n 82) art 2.

86 See, Law of the Republic of Kosovo no 06/L-054 (n 39).

87 Case no GSK-KPA-A-217/11 *BS v SK* [2012] Appeals Panel of the Supreme Court of Kosovo.

88 UNMIK Regulation no 2006/50 of 16 October 2006 ‘On the Resolution of Claims relating to Private Immovable Property, Including Agricultural and Commercial Property’ art 3.1 <<https://www.yumpu.com/xx/document/view/23938304/rregullorja-e-unmik-ut-2006-50>> accessed 15 December 2023. Also, Order no PCC/D/2/2007 Kosovo Property Claims Commission (KPA 2007) 2.

Agency temporary administration through a rental scheme, or the third option involved the closure of the claim file when claimants had sold or voluntarily disposed of the property.⁸⁹

In 2007, the Kosovo Property Agency claim intake concluded with a total of 42,749 registered claims by the end of the process, and by 2015, the adjudication process was within the mandate. About 10,646 claimed properties had been confirmed as inadmissible because of the damage to the houses and properties during the war, and as such was not conferred within the jurisdiction of these mechanisms to address claims for monetary compensation for damage or destruction of property, as it was explicitly excluded from consideration.⁹⁰ This category remains in the so-called "war reparations".

Compared to the duration of court proceedings in regular courts, it can be asserted that the Kosovo Property Agency successfully fulfilled its mandate because its decisions became executable fifteen days after the date of announcement of the decision to the parties,⁹¹ providing that no appeal has been filed before Appeals Panel of the Supreme Court of Kosovo. Hence, these decisions were directly executed by the Agency without the supervision of the court for administrative conflicts nor the application of enforcement procedure by the court provided by enforcement law.

In 2016, the Kosovo Property Agency was transformed into the Kosovo Property Comparison and Verification Agency.⁹² The establishment of the Kosovo Property Comparison and Verification Agency came as the result of the Brussels Agreement on Cadastre of 2 September 2011.⁹³ The scope of operation of this mechanism is to solve claims and legacy applications from the Kosovo Property Agency related to private property and continue affecting the authority for enforcement of the remaining decisions of the respective authorities, which are the Kosovo Property Agency or Housing and Property Directorate. In addition, and most importantly, comparing and resolving differences (identify any discrepancies, alterations, or missing information in the documents) between original cadastral documents dated pre-June 1999, which were taken by the Serbian forces during the war, and current cadastral documents in the Republic of Kosovo.⁹⁴ The absence of cadastral documents resulted in an unforeseen and challenging situation, creating chaos in

89 UNMIK Regulation no 2006/10 (n 82) art 2.6. After 2008, Law of the Republic of Kosovo no 03/L-079 of 13 June 2008 'Amending UNMIK Regulation 2006/50 on the Resolution of Claims Relating to Private Immovable Property, Including Agricultural and Commercial Property' [2008] Official Gazette of the Republic of Kosovo 32/1.

90 Around 37.641 claims (88.1% of the total received) relate to agricultural land, while 943 claims (2.2%) relate to commercial properties and 4.162 (9.7%) to residential property. For 98.8% of claims the claimants claim ownership rights over the claimed properties. See, Kosovo Property Agency, *Annual Report 2015* (KPA 2016).

91 UNMIK Regulation no 2006/50 (n 92) art 15. As amended by Law of the Republic of Kosovo no 03/L-079 (n 89).

92 Law of the Republic of Kosovo no 05/L-010 of 9 June 2016 'On Kosovo Property Comparison and Verification Agency' [2016] Official Gazette of the Republic of Kosova 37/21.

93 See, Gashi and Novaković (n 80).

94 Law of the Republic of Kosovo no 05/L-010 (n 92) art 2.

property relations that no one had expected or imagined. The resolution of such a complex issue required the intervention of the European Union and the implementation of various mechanisms. It involved the engagement of relevant stakeholders, including cadastral offices, archive institutions, property owners, communities, and religious institutions, to provide input and verify information.

5 PROPERTY CLAIMS DERIVING BY THE SYSTEM OF SOCIAL PROPERTY (AFTER 1945)

The third category of property disputes pertains to social property, which, in alignment with the demands of an open market economy, is scheduled to undergo the privatisation process. But, in the context of Kosovo, this process carries deeper significance and extends beyond purely economic considerations. Privatisation evokes emotional issues stemming from historical events such as confiscations and nationalisations of property after 1945—after the creation of socialist property and several subsequent property transformations. Therefore, this process is considered legally complex and politically difficult, with extensive consequences in an economy involving numerous former owners and employees.⁹⁵ Here, we are addressing the claims of former legitimate owners whose property was confiscated in the past, seeking its eventual return to them.

For illustrative purposes, let us refer to a case—a brief factual background from judicial practice:

“On 23 April 1946, after K.B. had been executed as an enemy of the people, the People’s Council of in the Municipality I./I. decided, pursuant to Art 29 of the Law on Agrarian Reform, to confiscate ... ha of land belonging to K. B. located in a place known as “Q.”, assigning that land to the district council of the trade union as a sports playground. On 21 December 1955, the confiscated land was given to the Agriculture Cooperative “D.” in “I./I.” for temporary usage. The People’s Council of the Municipality I./I. did not, at that time, render any permanent decision in regard to the concerned land...”⁹⁶

To fulfil the mission of transferring socialist property and socially owned enterprises into private capital through privatisation, the Kosovo Trust Agency was established as a competent body for administration, protection and selling part or all the shares of socially

95 OSCE, *Privatization in Kosovo: Judicial Review of Kosovo Trust Agency Matters by the Special Chamber of the Supreme Court of Kosovo* (OSCE Pub 2008) 5-6 <<https://www.osce.org/kosovo/32012>> accessed 15 December 2023.

96 Ondrej Pridal, Agnesa Vezgishi and Timo Knäbe (eds), *Jurisprudence Digest of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters*, vol 1 (EULEX Kosovo 2016) 155.

owned enterprises and publicly owned enterprises,⁹⁷ and especially with the capacity to conclude contracts, to take, maintain and to sue third parties, as well as to be sued on behalf of SOEs as legal representative.⁹⁸ After 2008, with the declaration of independence of Kosovo and after came into the force of the Constitution of 2008, the transfer of competencies occurred.⁹⁹ Within the scope of this transformation, the Privatization Agency of Kosovo was established as an independent public institution with complete legal liability as legal replacement/successor of the Kosovo Trust Agency with all rights and obligations. The Privatisation Agency, as the Kosovo Trust Agency, has executive competencies to administrate all enterprises in social ownership and assets placed in the territory of Kosovo, regardless of whether these enterprises undergo a transformation because of “repressive measures”.¹⁰⁰

For efficiency purposes, the Special Chamber within the Supreme Court of Kosovo was established,¹⁰¹ with exclusive competencies and authority over all cases and proceedings involving any claim alleging ownership or any other right or title/interest concerning assets of an SOE. In this way, property claims and creditors' claims in the liquidation or privatisation proceedings are subject to judicial protection. In the adjudication of these cases, provisions and rules of civil procedure law are applicable.¹⁰² Also, it is important to emphasise that when treating cases, the Special Chamber within the Supreme Court applies international standards regarding human rights, especially Prot. 1–1 of the European Court of Human Rights prevails in any Kosovo regulation or law. The Special Chamber within the Supreme Court operates in two instances, and judgements rendered by the second instance are considered final. They can only be argued before the Constitutional Court of the Republic of Kosovo.¹⁰³

97 At this point, the difference between Socially Owned Enterprises and Publicly Owned Enterprises comes to the surface. Socially Owned Enterprises means an enterprise that was created as socially capital managed and administered by workers' councils under the Law On Associated Labour (n 13); Law On Enterprise (n 13). Publicly Owned Enterprises means an enterprise that was created as publicly owned by a public authority (municipality or government) or other public organizations within the territory of Kosovo. Kosovo's legal doctrine also acknowledges and accepts this conceptual difference. See, Iset Morina (ed), *Fjalor juridik: e drejta private, e drejta publike, e drejta penale: pravni rečnik u privatnom, javnom i krivičnom pravu* (Akademia e Drejtësisë e Kosovës 2019) 669.

98 UNMIK Regulation no 2002/12 (n 67).

99 Kosovo Declaration of Independence (n 30); Constitution of the Republic of Kosovo (n 31).

100 Law of the Republic of Kosovo no 04/L-034 'On the Privatization Agency of Kosovo' [2011] Official Gazette of the Republic of Kosovo 19/1.

101 UNMIK Regulation no 2002/13 of 13 June 2002 'On the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters' <<https://www.yumpu.com/en/document/view/37815826/unmik-regulation-no-2002-13-kosovo-trust-agency>> accessed 15 December 2023. After 2008, Law of the Republic of Kosovo no 06/L-086 of 30 May 2019 'On the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters' [2019] Official Gazette of the Republic of Kosovo 12/1.

102 Iset Morina dhe Selim Nikçi, *Komentari i Ligjit për Procedurën Kontestimore* (Deutsche Gesellschaft für Internationale Zusammenarbeit 2012) 679.

103 Ardit Gashi, 'The Constitutional Protection of Property: The Case of Kosovo' (2019) 22(1) SEER Journal for Labour and Social Affairs in Eastern Europe 56, doi:10.5771/1435-2869-2019-1-53.

More precisely, the exclusive authority of the Special Chamber of the Supreme Court includes all the matters over the cases related to:

- Decisions/actions of the former Kosovo Trust Agency or the Privatization Agency of Kosovo;
- Allegations relating to ownership of property over which these Agencies have declared managerial authority by proclaiming the ownership of SOE on such property;
- Allegation relating to any investment, asset, capital, or money under the control of SOE;
- An application made by these Agencies of an SOE that has gone through or is under the liquidation procedures by these Agencies.¹⁰⁴

The problem is that privatisation in Kosovo was not followed by another important legal process for property rights: the denationalisation process. More precisely, this process involves restating lands to owners whose property was nationalised and confiscated after 1999. Denationalisation remains mainly characteristic and implemented in socialist and communist systems.¹⁰⁵

Today, there is a commonly known consensus among the societies of the countries in transition that the expropriation of assets under socialist regimes was not legitimate.¹⁰⁶ The failure to implement this process, as a consequence, created a huge number of property disputes. Certainly, from the perspective of property rights protection and to avoid injustice from the past, it would be more proper to conduct the denationalisation process prior to the privatisation process or at least in parallel.

Kosovo, as a part of the former socialist system of Yugoslavia after liberation, did not promulgate any law regarding property restitution or denationalisation. As a result, this kind of property dispute was presented in front of the Special Chamber within the Supreme Court because there were no other legal solutions.¹⁰⁷ Formally, the Special Chamber of the Supreme Court has exclusive competence for adjudicating these claims. However, there is a substantial legal gap in Kosovo's legal system.

104 UNMIK Regulation no 2002/13 (n 101) s 4. After 2008, Law of the Republic of Kosovo no 06/L-086 (n 101) art 5.

105 Jozef M van Brabant, *Privatizing Eastern Europe-The Role of Markets and Ownership in the Transition* (Kluwer Academic Pub 1992) 116.

106 Herbert Brücker, *Privatization in Eastern Germany: A Neo-Institutional Analysis* (Frank Cass 1997) 84.

107 Since its commencement in June 2003, the Special Chamber of the Supreme Court of Kosovo has encountered a total of 42,593 cases, successfully resolving 20,644 among them. Presently, there are approximately 21,949 pending cases before the Special Chamber of the Supreme Court, originating from disputes arising between parties engaged in the privatization of socially owned enterprises and their assets. See, Pridal, Vezgishi and Knäbe (n 96) [4].

Unusually, when adjudicating this nature of claims, the Special Chamber of the Supreme Court referred to the institute of *prescription*.¹⁰⁸ The legal period for the acquisition of ownership through prescription for social entities (municipalities, organisations, entities, SOEs) was very short. If a property became an asset in social/public ownership without any legal foundations or basis, its recovery could be sought within five years from the date a previous owner learned about the change but no later than ten years after the factual change of the property.¹⁰⁹ On this basis, the Special Chamber of the Supreme Court initiated the process of granting rights to social entities.

However, questions arose as to whether this interpretation was fair and just, particularly when the justifications of damaged parties that they were politically persecuted by the system and could not refer to courts run by the same politics were not taken into consideration.¹¹⁰ Logically, this inability of damaged parties automatically led to the commencement of acquisition prescription in favour of legal persons (municipalities, organisations, entities, SOEs) created by the socialist system. Recognising that this approach constituted a second injustice for the injured parties, the Special Chamber of the Supreme Court shifted its method of argumentation, and finally, the Special Chamber of the Supreme Court accepted that without a specific law which gives authorisation to Kosovo authorities to undertake actions regarding confiscation and nationalisation, the court could not decide over restitution of claimed property.¹¹¹ As well, without a definitive law or decision issued by a competent public organ–legislature in this case, which asserts acts of confiscations in the past as null and void, applicants cannot successfully restore confiscated property.

Similarly, the Constitutional Court of the Republic of Kosovo, in adjudicating a case on property restitution, recommended to the applicants initially to file a claim before the Special Chamber of the Supreme Court or to any other competent special court with the mandate to decide over this kind of property claims, without any constitutional recourse or recommendation.¹¹² The court later acknowledged the absence of a specific law in the Republic of Kosovo addressing property restitution. Consequently, claims for property restitution cannot rely on the protections outlined in Protocol 1–1 of the European Court of Human Rights, with necessary modifications–*mutatis mutandis*, the safeguards articulated in Article 46 (Protection of Property) of the Constitution. This limitation arises

108 A legal institute of property law which comes from Roman law (*usucapion* for movables, *praescriptio longi temporis* for immovables) as a mode of acquisition of property – the acquisition of title to property as a result of lapse of time. See, Adolf Berger, *Encyclopedic Dictionary of Roman Law* (American Philosophical Society 1953) 645; Reinhard Zimmermann, *Comparative Foundations of European Law of Set-Off and Prescription* (CUP 2002) 69.

109 Law On Associated Labour (n 9) art 268.

110 Supreme Court decided against claimant on reasoning that in the course of the socialist regime did not exhaust legal remedies. See: *Case MT v Department of Kosovo Roads* Rev no 43/2011 [2019] Supreme Court of the Republic of Kosovo.

111 Case no AC-I-15-0249 *HB v Kosovo Trust Agency* [2016] Special Chamber of the Supreme Court of the Republic of Kosovo.

112 Case no KI02/09 *KK v Ministry of Agriculture* [2010] Constitutional Court of the Republic of Kosovo.

from the fact that property restitution claims cannot be deemed a “legitimate expectation” without a legal framework governing property restitution, as elucidated earlier.¹¹³ This inherently implies that these parties still face obstacles in obtaining justice, and legally, they do not have any legal instrument available to realise their rights.

6 CONCLUSIONS

A comprehensive understanding of property disputes and property law in general requires an examination of their origin and progression. Insight into the historical factors is essential for intelligently comprehending the evolution of this legal institution, the nature of property disputes, and their proper resolution.

Concerning property disputes stemming from “repressive measures” (1990-1998), a fundamental lesson drawn from the case of Kosovo emphasises how discrimination based on ethnicity can irreparably undermine property relations. Indeed, in the truest sense of the word, this situation amounted to apartheid. Though these violations of property rights may belong to the past, their repercussions persist in the present day. Still, justice eludes the victims of that time. The institutions have consistently emphasised that, as new entities, they lack the budgetary and financial capacity to compensate for the illegal actions of the regime after 1990. Corrective justice must be instituted for these citizens as well. Achieving substantive corrective justice is inseparable from its consequential impact on those who reaped the advantages of apartheid politics. The last hope and potential opportunity for compensations at this stage lie in their incorporation into the category of war reparations—whenever there is a demand for them.

A comparable scenario, marked by an absence of response or justice, is also evident in the realm of property claims that derived after the events of 1945. This category of claims is largely being overlooked. Even so, there are no surviving former owners, and the number of direct heirs is diminishing rapidly, while third-generation heirs may face various problems in securing the right information and evidence. Currently, the constitutional framework of the Republic of Kosovo is founded on key principles, including but not limited to freedom, democracy, equality, respect for human rights and freedoms, the rule of law, the right to property, social justice, pluralism, etc. A glimmer of hope emerged with the establishment of the Constitutional Court of the Republic of Kosovo. However, the Constitutional Court assumed a passive role in this matter. It aligned with the European Court of Human Rights stance, affirming that it does not compel Contracting States to pass a final law on the restitution of property. It granted considerable latitude to the Contracting States in defining the parameters of property restitution and determining the associated conditions. Hence, in this sense and in alignment with these principles,

113 *Case no KI78/18 PM v the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters* [2019] Constitutional Court of the Republic of Kosovo.

particularly those of social justice and the right to property, it is imperative for Kosovo to promptly enact legislation that addresses the restitution process.

From 1999 to 2008, the international administration (UNMIK) had legislative, executive, and judicial power and determined which laws were applicable. The issue arose from the fact that the UNMIK displayed a lack of readiness to address historical injustices or, at the very least, mitigate the repercussions of the past. For UNMIK, the standard that all property, including residential property, commercial and agricultural lands, enterprises, and other socially owned assets, should have a clear and rightful possessor to take effective possession of their property was valid by not going back to the past and origin of property disputes and problems. This is evidenced by how the property claims derived after the war (27 February 1998 – 20 June 1999) and their successful handling. This occurred because the process was more streamlined for UNMIK; they possessed international experience, or at least the potential to acquire it. Additionally, they had more advanced logistics and, crucially, access to information through liaison offices and diplomatic channels. In the current context, Kosovo still encounters substantial challenges in meeting these prerequisites.

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