

The Creation of the Right of Real Servitude: Derivative and Original Method Based on the Kosovo and Some European Countries

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Abstract: Legal provisions define the right of servitude as a real right both in local legislation and in the legislation of European countries. Based on the local legislation, some shortcomings are encountered when it comes to the right of servitude, particularly the right of servitude in kind. An issue that will have to be addressed and compared with the legislation of other countries is the crime of the right of real servitude, based on the ways of creating this right. Based on the local legislation, it is emphasized that the right of real servitude can be created based on a legal title, the decision of a state body and based on the law. At the same time, no more detailed division is made to show which legal title belongs in which way, that of derivatives or original. In comparison, legislation of European countries such as Germany, Austria and France, as well as regional countries, it is emphasized that there are two ways for the crime of the right of real servitude. After the ways are mentioned, the separation of legal titles is done; such a thing should be defined in the legislation of Kosovo. Nevertheless, based on the provisions of the legislation in force, we note that where the legal titles for the creation of the right of real servitude are mentioned, there it is known that there are two ways of creating the right of real servitude that the derivative way and the original way of obtaining the right of real servitude, only that it would be more correct if they specified which legal title is considered a derivative title, which in our case is the contract and testament, and which would be considered an original title, which could be the decision of the state body such as that of the court or any administrative body.

Keywords: Real Servitude; Acquisition of Real; Acquisition; Local Legislation; European

1. Introduction

The right of real servitude as a real right over a foreign thing can be created on the basis of two ways, based on which a right of ownership is also created.¹ Based on the legislation of Kosovo, it is said that the right of servitude can be created by a legal title, with a decision of the state body and based on the law, this informs us that the right of servitude is created based on two ways of that derivatives and the original way. In the LPORR of Kosovo, it is not known or shared that this is how the right of servitude is created in a derivative way and thus in an original way, but only mentions how it can be created.

¹ Šumrada, Radoš, Miran Ferlan, and Anka Lisec. "Acquisition and expropriation of real property for the public benefit in Slovenia." *Land use policy* 32 (2013): 14-22.

At the moment, when it is emphasized that the right of real servitude can be created by a legal title, then we must know that here we are dealing with the derivative way of obtaining the right of real servitude, since the legal title can be a contract and a will which are titles derived from an ancestor. Whereas when the right of servitude is acquired by a decision of the state body, then here we have the original way of gaining the right of servitude,² since in the decision that the state body may take, the subject of the case may be the winning prescription, or any other sub-mode of in the original way, they informed that the right of real servitude can be created also based on the original way, specifically the original sub-way, which is the winning prescription.

Based on the legislation of European countries, it is defined that the right of real servitude is created in the form of derivatives, which as legal titles of this type can be legal works, more specifically contracts, wills, etc. In addition to the derivative method, the original method is also mentioned, which as a legal title may have the winning statute of limitations created by a decision of any state body. So it would be better if the legislation clearly defines the ways and sub-ways of obtaining the right of real servitude, so that problems are not encountered in practice!

2. Method

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

3. Results

Subjective civil rights, mainly real rights such as ownership, right of servitude, mortgage, real lien and right of construction, as it was emphasized in the chapters above, are created by a legal title. Legal title can be derivative title or original title. A derivative title can be a legal document such as a contract or a will. So at the moment when we have a contract and a will on the basis of which the right of real servitude is created, then we say that this right of real servitude was created by an ancestor, which is a derivative title. This means that the right which is created now was previously held by a person other than the current one. Just as it is said in the creation of the right of ownership, that the right of ownership is created by an ancestor.³ So, the right of servitude in kind can be created

² Yalpir, Sukran, Suleyman Sisman, Ali Utku Akar, and Fatma Bunyan Unel. "Feature selection applications and model validation for mass real estate valuation systems." *Land use policy* 108 (2021): 105539.

³ Aliu, Abdulla, Property Law, Pristina, 2014, pg. 249.

over an immovable object, the holder of which was a prior holder, so that the right passes from one subject to another subject.⁴ However, in contrast to the right of ownership, to the right of servitude, the holder acquires the right of servitude over the property of the other owner, and based on this acquired right, the holder can use the property to meet his own needs, and not even to alienate that right which he gains.

The right of servitude may be created by a previous holder, but that holder was the owner of that thing, and that the owner of that thing continues to be the owner of the thing even after the creation of the right of servitude. But only with the creation of the right of servitude to the holder of the thing as owner is the right limited, respectively I have to endure another person to use his thing to fulfill his needs to the dominant thing.⁵ In this case, the prior holder should not be thought of as the holder of the right of ownership, but rather as the holder of the right of servitude.

For example, person A, as the current holder of the right of servitude for passage, will transfer the right of servitude for passage to person B. So, person A will pass the right of real servitude for passage, to person B, and that through the contract. In the contract, it should be stated that person A, as the holder of the right of servitude until now, will transfer the right of servitude to person B. It would be very easy to think of the transfer of the right of servitude by contract from an owner of the thing. After the owner of the immovable object gives his consent that his right may or may not be transferred to another person. Hence, when we say that the right of real servitude over an immovable object can be created by an ancestor, then the ancestor should be understood as the owner of the immovable object over which the right of servitude is being created, but not as owner of the right of servitude. This means that the predecessor cannot be the owner of the servitude and another person can acquire the right from him. In order to create a right of servitude and to consider this right as a derivative, then it should be thought that the right of servitude was created by a holder of the right of ownership.

The question is raised, can the servitude right be created by a current servitude holder? For example, Person A, as the current holder of the servitude, may allow him to transfer his right of servitude to another entity. Based on the studies so far, it is thought that the right of servitude which is created on an immovable object, that right is related to the right of ownership of the dominant property, which leaves it to be understood that the right of servitude created, can be transferred to other persons but not without the consent of the owner of the servient land, e.g. if we created the right of material servitude with a contract between the owner of the servient item and the owner of the dominant item, then the owner of the dominant item, even if he acquires the right of servitude, cannot transfer that right to a person other by contract or by will in case he does not give his consent and the owner of the service item, respectively the owner of the item that allows him to use his item to meet his needs. This happens in the contract since the contract is an agreement between both parties, and it is valid inter-parte. So all the rights and duties created in that contract were created with the agreement of both parties and that the purpose was only to allow the owner of the dominant thing to make solutions to

⁴ Summary from the Practice of the Supreme Court of the Republic of Kosovo, Pristina, 2019, p. 220.

⁵ Kozilo, Helmut, und Welser, Grundriss des bürgerlichen Rechts Band II, Sachenrecht, Familienrecht, Erbrecht, Wiene, 1996, p. 62.

meet his needs arising from the dominant property and not for another person. Such a thing also happens with a will. The current holder of the right of servitude cannot allow his right of servitude to be transferred to someone else after his death, since he was not the owner of the thing. In these cases, there would be exceptions only if the person had acquired the right of servitude by a decision of a state body or by law. In both of these cases, it will be possible for the right of servitude to be transferred to someone else either by contract or by will, but such a thing remains to be seen!

The right of real servitude is related to the specific thing, and in case the owner of the thing bequeaths that thing to someone else, then the heir will become the owner of the thing and together with the right of ownership over that thing I will also inherit the right of servitude that someone else may have had. In this case, the heir of the thing who is charged with the right of servitude of the thing must respect it and not oppose it since now that right only exists and cannot be denied! It should be noted that real servitudes are related to the thing and the conveyance together with the right of ownership over the thing, e.g. if the thing for the benefit of which the road is created is sold, the servitude right of way passes along with the sale of the thing, and the owner of the servient land cannot stop this and deny it, unless the servitude was created as a personal servitude. Also, the right of servitude can be created by any other legal fact, respectively by legal titles which the law considers as legal titles in an original way. This means that the holder of the right of servitude does not acquire this right from any predecessor. Based on the above, the right of servitude, but not in all cases, can be created in a derivative way and in an original way.⁶

3.1. The derivative way of creating the right of servitudes

When we say that the right of servitude is created derivatively, it must be understood that that right was created by an ancestor. The ancestor will have to be understood as the owner of the real estate, but not as the holder of the servitude. For the creation of the right of servitude, two conditions must be met: the legal title and the way of earning. The legal title for the creation of the right of real servitude can be a contract or a will, while the way of earning is registration in the register for the registration of real rights in real estate.⁷ So the right of real servitude can be created by contract as well as by will, and the main party in these two cases must be the owner of the real estate. So only the owner of the thing can express his will that another person come over his thing and use his thing to meet his needs. For example, the owner of the real estate, respectively of the

⁶ Games, Andrija, Basics of Real Law, Pristina, 1958, p. 146.

⁷ When it comes to the creation of real servitudes in the original way, then we can say that the right of real servitude cannot be acquired under the same original way as the right of ownership is acquired. So e.g. The right of servitude cannot be created by occupation, and then it cannot be created even by finding the lost thing, since in the event that it is found, you can become the owner of that thing and not acquire any other real right, such as it is the right of servitude. An exception can be made to the prevailing prescription as under the original method, on the basis of which the right of real servitude can be created over an immovable object, which right is not spoken of by the Civil Code of Kosovo, but by the Civil Codes of the country's others, almost the majority, allow a servitude right to be created by the prevailing statute of limitations.

land surface of 10 m in length and 5 meters in width, expresses his will to give that part of the land for use to his neighbor, who had no other way out.⁸

We can define a concrete case, when a right of servitude is created through a contract between the owner of the servient item and the owner of the dominant item. At the moment when the right of servitude is created by contract, then it is understood that we are dealing with the derivative method. It means when we have an ancestor as the holder of that right that a person now acquires, this is considered a derivative way of acquiring the right of servitude, just as it is with the right of ownership. The same happens when the right of real servitude is created by will,⁹ and in this case the right passes from the predecessor to the legal successor. Such a thing cannot always happen in the decisions made by state bodies, e.g. in the event that the right of servitude in kind over an immovable object is required to be acquired on the basis of the winning prescription, then the party addresses the court with a lawsuit. In this case, we are not dealing with the derivative way but with the original way of acquiring the right of servitude. So in order to consider that a real servitude right has been created by an ancestor, then it must be considered that that ancestor was the owner of that immovable object, that now the right of servitude has been acquired over it either by contract or by will.¹⁰ According to the legislation in Kosovo,¹¹ at the moment when it is said that the right of servitude can be created by a legal work, a decision of a state body or by the law, I leave it to be understood that the legal title which is obtained from these three cases are legal titles acquired in a derivative way but also in an original way.

3.2. The original way of creating the right of servitudes

One of the basic elements of real rights such as the right of servitude is the transferability of this right, respectively the constitution of the right of servitude. Unlike other rights which cannot be specifically transferred from one holder to another such as personal rights, other rights can be transferred such as real rights in general.¹² As it was emphasized above, real rights in general, except for the derivative way which includes the legal title created by any legal work whether a contract or a will, as well as by any decision of state bodies such as: Court and administrations, but at the moment when we say that the right of real servitude can be created by law, then here we make it known that there is also the original way of obtaining the right of real servitude.¹³ So the right of

⁸ Karlova, Brinz, Lend, were of the opinion that the right of real servitude was created by a legal title, and in cases where this legal title was a contract, that contract must be formal, and that in addition to the contract, there must also be a *modus aquirendi*, to be considered that the right has been acquired by a subject.

⁹ Statovci, Ejup, *The right of servitude (Comparative aspect)*, Pristina, 2009, pg. 183

¹⁰ See: Law no. 03/L-154 of ownership and other real rights, Pristina, 2009, article 251, par. 1 and 2.

¹¹ See: Law no. 03/L-154, of ownership and other real rights, also see: Law No. 2002/5 On the Establishment of the Register of Real Property Rights, Pristina, 2008, Article. 2, par. 2.2.

¹² Gashi, Haxhi, *Registration of property and other real rights in Kosovo: A critical view in a comparative perspective*, published in *Magazine in Law*, Pristina, 2017, pg. 77; Gashi, Haxhi. "Acquisition and Loss of Ownership under the Law on Property and Other Real (LPORR): The Influence of the BGB in Kosovo Law." *Hanse L. Rev.* 9 (2013): 41.

¹³ More broadly see: <https://law.justia.com/cases/louisiana/supreme-court/1970/256-la-629-0.html>. Received on: 12.10.2020, 14:12.

real servitude can be created based on the original way, which is determined by the law itself. But even in this case, when the law states that the right of servitude is created by prescription, then, in addition to the legal provision, a request must be submitted to the cadastral state to register the right of servitude in kind over the immovable property.¹⁴ When we are about the ways of creating the right of real servitude, we can say that the original way is created based on some legal provision as we mentioned the case above. In contrast to the right of ownership, as under the original mode of occupation, that of occupation, as well as the acquisition of the right of real servitude with a winning prescription.¹⁵

3.3. Creation of the right of servitudes to property without an owner (occupation)

Based on the fact that the right of servitude is the same real right as the right of ownership, then one of the ways of acquiring the right of ownership was occupation, and on the same basis it has been discussed whether the right of servitude was acquired with occupation. Since the first written sources, specifically from the law of the XII Tables and continuously to the civil code of Justinian, the ways of obtaining property rights, specifically the right of ownership, have been divided. But do the same methods apply to obtaining the right of real servitude?

This issue is controversial in the chapter above, in which it is defined that the right of real servitude can be created based on the derivative method as well as on the basis of the original method. But when we are talking about the two ways, then it is thought that under the ways of the derivative and the origin ways, they are the same and in the creation of the right of servitude the same as in the creation of the right of ownership. Then also the derivative method is valid for the right of servitude, on the basis of which it is said that the owner of the right of servitude can become a person who acquires the right from a winning ancestor. This right can be created on the basis of any legal work, either a contract with the predecessor or a will. While it is debatable whether the original way to acquire a right of real servitude is valid, and more precisely which sub-type of the original way is valid today according to the law and legal doctrine, whether in Kosovo or beyond!

Likewise, on the basis of the original way, it is considered that the right of servitude can be created, which is considered that this right was created by the holder of the right of servitude, this right was not derived from any predecessor,¹⁶ but from other legal facts, respectively from the legal titles on the basis of which this right of real servitude is created. In this case, it must be a legal fact (legal title) as well as registration in public books in addition to the title. When we are in the original way of obtaining the right of real servitude, then we have to think about who these legal facts can be, on the basis of which fact the right of servitude is created. In the derivative way as a fact or legal title we had the contract or the will, but in the original way what can these legal facts be! Then,

¹⁴ See: Law no. 04/-L-013, for the Cadastral Status of Kosovo, Pristina, 2011, article 12, 13.

¹⁵ Vlahna, Kastriote, Hajredin Kuçi, and Argona Kuçi. "Acquisition Of the Right of Real Servitude Over Immovable Property According to The Legislation in Kosovo with A Comparative View with Some Legislations of European Countries." *Journal of Positive School Psychology* (2022): 11675-11682.

¹⁶ Aliu, Abdulla, property law, Prishtina, 2014, p, 140.

since the right of servitude is a real right over a foreign thing and there are differences from the right of ownership, since the owner of the right of ownership has multiple authorizations as well as a stronger legal basis, such as has the right to alienate his right when the owner himself wants. Such a thing cannot happen with the right of servitude, because this right is created only to satisfy a need of an owner of another thing, since if he did not exercise the thing of the current owner, it would be difficult for him to use it. of his thing.

The right of servitude cannot exist under the same original way as they are in the right of ownership. Therefore, a right of servitude cannot be acquired based on the creation of a new thing, since you can become the owner of that thing, or another case is occupation as a sub-type of the original way, based on which it is thought to be created the right of servitude. This means that the occupation existed even when the right of real servitude was created. In the original way of occupation, it is thought that it could exist in the past, but today, according to positive law, it is not foreseen and it does not even happen from practice that a right of real servitude can be created without the consent of the owner of the service object. Such a thing can happen if the parties do not create an agreement, but in this case the court decides with a judicial decision to create a right of real servitude and in case the owner of the servient thing does not accept such a thing. But in this case, when we have a court decision, we cannot say that a servitude with occupation has been created.

As a clarification, occupation (*osupation*) means the taking (occupation) of someone's belongings in possession with the intention of establishing a real right over them, and the occupier, when he has created the actual power over these items, has also acquired a certain real right. In all cases where occupation is discussed, only the right of ownership is always thought of, but the creation of the right of real servitude with occupation cannot be excluded, but this could have happened only in the past, but not now. So, under the original way of occupation, there is no such strong basis when talking about the creation of a real servitude, since occupation is considered to be possible only with the things that were without an owner. Therefore, such a thing could not happen in the creation of a real servitude, since for the creation of a real servitude there must be two different owners to create the real servitude, which means the person who has can occupy an object that is without an owner, he can become the owner of that object but not the holder of any rights of real servitude, as it contradicts the principle of real servitude.¹⁷ Based on the conclusions so far, we emphasize that the right of real servitude cannot be created through occupation even in the past, while for now such a thing is not discussed, since the way of occupation does not exist even in the acquisition of the right of ownership, since now there is no property without an owner. This means that if there is no natural person who carries the right of ownership, then that right passes to the state, just so that no item is left without an owner. Therefore, occupation cannot exist even in the creation of the right of real servitude.

¹⁷ See Law no. 03/L-154 on property and other real rights, Pristina, 2009, 28. Here we are talking about any fact which comes from the original way of acquiring the right of servitude. Based on the right of ownership, and the right of servitude, we can claim that the right of servitude can be acquired by means of the winning prescription, and we can call this another legal fact apart from that of the contract or will.

3.4. Creation of the right of servitudes with a winning prescription as an original title

The right of real servitude can be acquired in an original way, and as an original title, prescription can be the winner. Thus, both the right of ownership and the right of real servitude can be created by means of the winning prescription which we can consider as a legal title for the creation of the right of real servitude. As it was said above, the LPORR of Kosovo does not define the winning prescription as an original way of acquiring ownership, but in practice I consider that it is possible to create a real servitude right by considering the winning prescription as a legal title. This can happen in those cases when the court takes a decision on the creation of the right of real servitude based on the conditions of the prevailing statute of limitations, such as: possession of the thing continuously for twenty (20) years, good faith of the party to the thing dominant.¹⁸ If these conditions are not met, then the court will not be able to approve the claim of the plaintiff, in the event that the object of that claim is the creation of the right of real servitude with a winning prescription. Therefore, according to the legislation of Kosovo, we think that it allows the creation of the right of real servitude by invoking the winning prescription, only that in these cases it should be based on the provisions of the same law, but on the articles where the winning prescription is defined in the right of ownership.¹⁹

The right of real servitude, to be created, it is acceptable that I can serve and any subtype of the original way of gaining this right. But how much is applicable in practice and defined in the legal provisions in force, remains to be seen. One of these under the mode of origin which can create the right of servitude in rem, is thought to be the winning prescription. So the right of real servitude can be created with a legal title derived from a subtype of the original method, which method is the winning prescription. Then, we say that the winning prescription in real property is a legal title for obtaining the right of ownership in an original way. But it cannot be excluded the winning prescription as a legal title for the acquisition of the right of real servitude.²⁰ Prescription winning both the right of ownership and the right of servitude has a special importance, because it is a legal title which is created by the possession of the thing in an uninterrupted way, for a long time and unimpeded by nobody. This means that the real right, either the right of ownership or even the right of servitude, can be created if the prerequisites for the winning prescription are met.

We know that all material rights must be registered in case we want to become the holder of any material rights. Likewise, in this case, the right of servitude in case it is thought to be acquired even with a winning prescription, it must be registered in the real estate books. For this reason, we can say that the winning statute of limitations is of great importance both in obtaining the right of ownership and the right of real servitude, because a large number of subjects of the right only have actual power over the thing

¹⁸ Aliu, Abdulla, op. cit., 2014, p. 249

¹⁹ See Law no. 03/L-154 on property and other real rights, Pristina, 2009, 28. And see: Aliu, Abdulla, op. cit., 2014, p. 250.

²⁰ Kastriote Vlahna and Hajredin Kuci. "Winner prescription as a way of gaining the right of real servitude according to the legislation in Kosovo with a comparative view with some European countries", Published by: Societatea de Stiinte Juridice si Administrative, 2021, p. 58.

and yes he possesses this right in good faith. It seems that people possess someone else's thing thinking that he only had the right to that thing, but the truth is that he had no legal right, that is, it was not registered in the public books of real estate to use the right one.²¹ In this case, we emphasize that the right of real servitude would have been created if that actual power could be registered in the real estate registers. But in order to be registered, the conditions that are defined in the winning prescription must be met. When it comes to the winning prescription, the LPDTS of Kosovo does not mention an original way that a real servitude right can be acquired by winning prescription.²² Based on the legislation of other countries, either regionally or beyond, it is said that the right of real servitude can be created through the winning prescription.²³

4. Discussion

The right of real servitude is created on the basis of two ways, which are the derivative way and the original way. The same thing is mentioned in the legislation of Kosovo, but in an indirect way, where it is stated that: The real servitude is created on the basis of a legal work, a decision of the state body or a law. In this case, the law tells us that the right of servitude can be created by a legal deed, and for us, a legal deed can be a contract or a will, both of which come from a person who is the holder of the right, and that of they want to give his right to another holder for exploitation. This happens in all those cases when the right of real servitude is created by the will of the parties, specifically by the will of the servient owner, who agrees that the thing in his possession be used by someone else to meet his needs. In this case, that contract or that will be considered legal titles derived from the derivative method. In addition to legal matters, the LPORR of Kosovo determines that the right of servitude can be created by a decision of the state body, and in this case this decision can be the decision of the court based on the object of the lawsuit, which in this case can be the statute of limitations winner, which the party requests, but in order for the lawsuit to be approved by the court, the conditions of the winning statute of limitations must be met, specifically the conditions mentioned in this paper! In addition to the local legislation, the legislation of European countries such as Germany, Austria and France defines the ways of the crime of the right of real servitude, and defining it more clearly than in the LPORR of Kosovo, but always with an almost similar conclusion.

5. Conclusion

The right of real servitude is created on the basis of one of two ways, the derivative and the original. In all cases where the crime of the right of real servitude is required, the legal title on the basis of which the right of real servitude is sought to be created must first be looked at. That created legal title tells us whether we are dealing with the original way or the derivative way of the crime of law. So e.g. when we are dealing with legal work, a

²¹ Kastriote Vlahna and Hajredin Kuci. "Registration of Property Right with special Emphasis on the Right of Ownership and Right of Real Servitude over Immovable Property According to legislation and Legal Practice", *International Scientific Journal Monte*, 4 no. 2, 2021.

²² Kastriote Vlahna and Hajredin Kuci, 2021, *Op.Cit*, p. 58.

²³ Luarasi, Aleks, *Civil Code with Judicial Practice (First Edition)*, Tirana, 2003, pg. 124.

contract or a will, we must know that we are dealing with the derivative method, which means that the right we want to create comes from an ancestor, while when we are dealing with a decision of a state body, either court decision or any decision of the administrative body, then here we are dealing with the original way, specifically with a new legal title. In addition to the local legislation which defines the legal titles that can create a right of servitude, the legislation of European countries such as Germany, Austria and France, defines the titles and from this it is understood that the local legal provisions and the aforementioned European countries are approximate when it comes to the ways of the crime of the right of real servitude, since it is understood that the right is created by two ways, derivative and original.

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