

# EXTINCTION OF THE RIGHT OF REAL SERVITUDES IN KOSOVO COMPARATIVE ASPECT WITH SOME EUROPEAN COUNTRIES

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## **Abstract**

*An established as well as acquired easement right (recorded in the public real estate books) may have reasons that may lead to the termination of this right. The right of real servitude exists to perform a certain function, a certain social role. And when for some reason this function of the right of servitude can not be applied in practice, then the right of servitude ends or may be extinguished. As with all other legal relationships, and with the servitude relationships with which the legal relationship was created or changed, I can reach a point where that relationship is extinguished. When we talk about a legal relationship, we say that it is the relationship in which a legal title can be created, changed or even extinguished on a certain thing or right. In the present case, the right of servitude is created by a legal title or can be changed from the initial creation by a legal title. In this case, the legal title created either by a legal work or by any of the state bodies, may lead to the disappearance of the right. In all cases in which it is claimed that the right of real servitude can be extinguished, then it must be seen if there is any of the reasons provided by the legal doctrine. As well as regional laws, with the exception of the Kosovo LPDTS, which does not provide for any cause leading to the termination of a real servitude right, but only states that a real servitude right can be extinguished like other established rights. from a legal relationship. It would be very necessary if all the causes (reasons) which lead us to the disappearance of a right of real servitude, are mentioned in the laws.*

**Keywords:** real servitudes, extinction of real servitude, way of extinction, deregistration of servitude.

**JEL Classification:** K33, K34

## **1. Introduction**

The right of real servitudes is created, gained but the same can come to an end. When we are in immovable property, in case we want to delete a right of real servitude, then that right is extinguished in case we remove it from the register of immovables. The Law on Property and Other Rights in Kosovo stipulates that the right of servitude can be extinguished in the same way as it was. So first a legal title must be created and then that legal title must be sent to the cadastral situation to remove the right from the book of real estate. The same provisions provide for the legislation of other countries such as Germany, Austria, while the legislation of France and Austria, do not provide for the immovable property register when the right of servitude is created or when the right is extinguished.

Thus, the extinction of the right of real servitude will be discussed in more detail in the content of this paper. And not the extinction itself but also the comparison of the legislations in the provisions that provide for the extinction of the right of real servitude over the immovable property.

## **2. Extinction of the right of real servitude, according to the legislation**

In all the cases in which we come to the termination of the real servitude, it should be thought that this right has been terminated or ceases to exist, as there is no reason to continue for this right to exist.

The following are some of the reasons that lead us to the end of the servitude:

1. The right of real servitude can be extinguished at the request of the owner of the dominant (dominant) property;<sup>3</sup>

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<sup>3</sup> See: Law no. 03/L-154 on Property and Other Real Rights, Prishtina, 2009, article 260.

2. The right of true servitude may be extinguished at the request of the owner of the service property;<sup>4</sup>
3. When the holder of the right of servitude becomes the owner of that immovable property;<sup>5</sup>
4. When not used for more than 10 years;<sup>6</sup>
5. When the item is damaged or consumed to a degree that can not be used for their intended purpose.<sup>7</sup>

For the right of servitude to exist, the holder of that right must have a reason that he wants to create that servitude. Since if the person who wants to create the right of real servitude has no reason why he wants to create that servitude and what he needs, then he cannot create that right.

In addition to the reasons, the conditions on which he would create the right of real servitude must definitely be met. And in all cases when the reason and conditions for the creation of the right of servitude no longer exist, that servitude could not be created with any legal title (either by legal work, decision of a state body or by laws). If the right of servitude has been created and is now exercised only by the holder of this right, that right continues to be created as long as the reason of the owner of the dominant property exists and the conditions on which the created servitude stands. In all cases when the reason does not end and the conditions of the servitude no longer exist, then that servitude ceases to exist, or is extinguished.

The question is how will I finish an already created right?

Will *ex o fixio* end automatically, or how will the servitude right that has already been created be extinguished?

First, as I mentioned, there must be a legal interest of the party seeking to extinguish the created servitude. In order for the right of servitude to be extinguished, the same legal title must be created as when that right was created. Thus, the right of immovable servitude over an immovable property may be extinguished by a legal title created by a legal work, whether a contract or a will, as well as by a decision of a state body, in this case by the court, and can be extinguished by law itself. And in addition to the created legal title that has as its object the disappearance of the right of real servitude, it is definitely necessary to remove it from the public books,<sup>8</sup> or to deregister the right of servitude from the public book of cadastral status.<sup>9</sup>

As it was pointed out, the right of real servitude is created by legal work, ie by contract, and that this right created by contract, in case of its disappearance, then it can be extinguished in the same way. So it is possible that this right of servitude created is extinguished even with a contract.<sup>10</sup> In this case, the right of servitude already established, initially if it is supposed to be extinguished, then, in addition to the reason and conditions, there must be the will of the parties to extinguish this right.

This servitude right which is extinguished by the agreement of both entities is considered to have been extinguished by a legal action or by a valid legal contract. As stated in the chapters above, we can now say that in order for a contract to be legally valid, it must be created on the basis of the necessary norms and must have the agreement of both parties. In case of termination of the servitude, an agreement must be created between the owner of the dominant item and the owner of the service item, and as the object of the agreement to have the termination of the servitude right. So, to consider that a real servitude right has been extinguished by contract, there must be an agreement between the current owner of the service item and the current owner of the dominant item.

Both holders of both immovables must express their free will to extinguish the established right of servitude through the agreement that will now be created by both parties together. To enter

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<sup>4</sup> Ibid, article, 260 par 1,

<sup>5</sup> Ibid, article, 260 par 2.

<sup>6</sup> Civil Code of Albania, article 293.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> See: Law no. 03/L-154 on Property and other real rights, Prishtina, 2009, article 260, paragraph 1; Civil Code of Albania, article 293, which defines the ways of extinguishing real servitudes.

<sup>10</sup> Andria, Games, Marko, Petroviq, *Stvarno pravo*, Beograd, 1981, p. 248.

into an agreement only by both parties occurs only when the right of servitude is created only to one owner of an immovable property.<sup>11</sup> There are other cases when the right of real servitude is created in more than one owner, or more precisely in the co-owners. In these cases when we have co-ownership, the consent of all co-owners must be obtained.<sup>12</sup> In these cases when we have co-ownership, the consent of all co-owners must be obtained.

If the co-owner does not give his consent for the termination of the right of servitude, then that servitude can not be terminated by contract. We say that it can not be terminated by contract as it is based on legal provisions, which define any legal work which is created against the will of the contracting parties that the legal work may be absolutely invalid,<sup>13</sup> and may also be relatively invalid.<sup>14</sup>

So, in the case in question there are cases when it is done in violation of the law, but any legal work created in violation of the law or the will of the contracting parties, that legal work is invalid and does not produce legal effect. In this case the servitude right can be terminated only if all the co-owners give their consent for the termination of the servitude right, otherwise any action that may be taken by other right holders is invalid.

This way of extinguishing the right of servitude was provided in the early law, specifically by Roman law, which stated that the right of servitude could be extinguished through an agreement created between the owner of the official thing and the owner of the dominant thing. Thus, this right of real servitude to be extinguished through the contract, was required in *iure cessio*<sup>15</sup>.

Any subjective civil right that is created can even lead to the disappearance of that right. And the right of real servitude, as a subjective civil right, can come to its extinction. Once established, the right of servitude may be extinguished. So, with a legal action as well as with the deregistration from the public books of real estate. Initially, in order to extinguish an established right, whether the right holder or any other party having a legal interest, I may seek termination of the easement right. It is very simple when the holder of the right of servitude declares that he no longer needs the right of servitude and he can go to court as well as the cadastral situation to deprive him of this right. But when another party and not the holder of the right of servitude requests that the right of real servitude be extinguished, then he together with the request must present the reason why he requests this. In this case e.g. may be the owner of the service seeking to extinguish the right of servitude to pass through his land. Since this for the service owner is a burden, I have to bear from the dominant owner. Such a thing he can ask the dominant holder to remove him right from the cadastral status.

And in case you can not create an agreement with the dominant holder of the right of real servitude, then the service holder can address the judicial system by initiating a lawsuit, as in this case only a dispute is created between the two parties, i.e. service owner and dominant owner. So, in these cases it would be more appropriate to turn to the judicial system for the development of a controversial civil procedure, and from it to make a decision which represents the end of the right of servitude. It should be noted that even after the court decision, the right of true servitude has not been extinguished, but now the owner of the service property has a legal title which declares that the right of true servitude has been extinguished.

After this legal title, i.e. after receiving the court decision, the interested party must continue the procedure in the cadastral situation for the removal of the right of immovable servitude from the public book of immovable property. This should be done, as the right of real servitude has now been extinguished by a court decision but since it is in the book of real estate, it is still in force as a right. Thus, the party must address the situation to the cadastral situation by submitting a request, in which he must request the removal of the right of immovable servitude from the book of immovable

<sup>11</sup> See: Civil Code of Albania, article 293, which defines the ways of extinguishing real servitudes.

<sup>12</sup> See: Law no. 03/L-154 on Property and Other Real Rights, Prishtina, 2009, article 44.

<sup>13</sup> Andria, Games, Marko, Petroviq, *Stvarno pravo*, Beograd, 1981, p. 248.

<sup>14</sup> Nuni, Ardian, Hasneziri, Luan, *Civil Law II (Property)*, Tirana, 2010, pp. 45, 46.

<sup>15</sup> See: Civil Code of Albania, article 293, which defines the ways of extinguishing real servitudes and Law no. 03/L-154 on Property and Other Real Rights, Prishtina, 2009, article 44.

property.

From the moment the request from the cadastral status is approved, then the right of servitude is removed from the real estate register, and from this moment we can say that the right of servitude which has been acquired, no longer exists, so it is now extinguished. According to the domestic legislation and the legislation of other countries, several ways of extinguishing the servitude are mentioned, which we will mention some of them in the following.

Thus, according to local legislation, the right of real servitude is extinguished in the following cases:

- When the owner of the dominant item becomes the owner of the service item;
- When the right of real servitude is not used for more than ten (10 years);
- When items are damaged or consumed to an extent that makes it impossible to use this item;
- Also, in the legal doctrine is mentioned the case when the holder of the servitude right declares himself that he no longer needs the servitude rights and thus gives up that right.

Thus the servitude holder may waive the right of real servitude, but such a statement must be made at the request of the custodian presented in the judicial system, and then after receiving the court decision that the right of real servitude, the same should address the cadastral situation to deregister the right of servitude.<sup>16</sup> There are other cases mentioned either by the doctrine or by the legislations of other countries, so for example it is said that if it becomes impossible to exercise the right of servitude, then it is a question of the abolition of that right. Here it would be possible to think, that in case the thing on which the right of real servitude is created becomes impossible to use, then that right created on it is extinguished.<sup>17</sup>

In the case when the owner of the dominant thing becomes the owner of the thing over which the right of servitude has been created, it is considered that there is no longer a reason for the servitude to exist. Since in order for the right of servitude to exist, there must be two different owners, namely one owner of the dominant immovable property and one owner of the service immovable property. In no way is it allowed to be the same owner of the predominant thing and the service thing, as he is the owner of both immovables and uses them as he wishes to the extent permitted by law as owner.<sup>18</sup>

Thus, the right of servitude over an immovable property ends when the ownership of the service property and the dominant property is acquired by the same person.<sup>19</sup>

So, when the same person becomes the owner of both real estate as service and dominant, then it is considered that the right of true servitude ends (extinguished). Under other rights, it is considered the main and most common way that can occur and that leads to the termination of the real servitude. Thus, it is considered that the right of immovable servitude over an immovable property ends in case the valid immovable property and the service immovable property are merged into one holder. In these cases the annulment of the servitude right becomes ex lege, and that in legislation like that of Austria it is stated that the right of servitude over an immovable property is extinguished if a person becomes the owner of the land of service and rule, this servitude is extinguished automatically.<sup>20</sup> In addition to other legislation, the French Civil Code<sup>21</sup> states that the right of servitude is extinguished if the holder of the right of servitude becomes the owner of the

<sup>16</sup> Sprankling, G, Johan, *Understanding property law, Prit the United states the America*, 2017, chapter 3, 01.

<sup>17</sup> See: Law no. 03/L-154 on Property and Other Real Rights, Prishtina, 2009, article 18.

<sup>18</sup> See: Skrame, Olti, *Commentary on the Civil Code of the Republic of Albania*, first volume, Tirana, 2011, p. 280.

<sup>19</sup> See: Civil Code of Albania, article 293, paragraph 1.

<sup>20</sup> See: Austrian Civil Code, Article 526, paragraph 1. For more details see: For more details see: For more details see: [https://www.trans-lex.org/602100/\\_austrian-civil-code/](https://www.trans-lex.org/602100/_austrian-civil-code/). Retrieved on: 04.11.2020.

<sup>21</sup> As noted, the French Civil Code also provides for several ways of extinguishing the right of servitude and that based on the French Civil Code in Article 703 to Article 710, which states that: The right of way is valid for 30 years, but may end earlier in some cases. If the land is no longer closed to the ground, for example if a road has connected it to the public road, then there is no longer a need for a priority. Both owners can amicably decide to terminate the right of way, or refer the matter to justice. Articles 703 and 710 of the Civil Code recognize 4 ways to terminate a right of way: inability to use it; Confusion of servants and dominant backgrounds; Do not use after 30 years; Conventional modification or waiver by the dominant landowner.

service real estate.<sup>22</sup>

As noted above, the right of servitude in these cases when we have the same holder in both cases, the easement is extinguished by itself, but we must keep in mind that this is not enough, but the deregistration of the right must be done anyway. of the easement from the real estate book. So, the servitude right which was charged over the immovable service should always be removed from that immovable property. All this is done at the request of the party that has an interest to remove the right of servitude already extinguished.

What if we have not paid the easement right from the real estate register? According to the Legal Doctrine,<sup>23</sup> the same servitude will be valid, in case he has not left the real estate service.<sup>24</sup> Asht and the legislation stipulate that: if later one of the immovable properties sold and if the servitude has not been paid from the public book, then the new holder of the dominant property is authorized to serve with the servitude.<sup>25</sup>

Except when the holder becomes the owner of both immovable properties and with this the right of servitude is extinguished, so the other case is when the right of real servitude is not used for more than ten (10 years). According to the positive law as well as the doctrine, it is said that the right of servitude which is not exercised for a certain period of time and that of 10 years, then the created right must be extinguished. So, if within 10 years the right of servitude has not been used, then it is considered a sufficient basis for the owner of the service property to request that the right of servitude be removed from his property.

It will be mandatory in cases where you have created the right of real servitude, to use that right and need the right that has been created. Otherwise, if not used then that right should be extinguished. This should happen in all cases when we are dealing with subsequent servitudes, since in subsequent servitudes the period of non-exercise of the right of real servitude begins to be calculated from the moment when the servitude is not used as a consequence of an act or fact that prevents this exercise. Whereas when it comes to non-continuous servitudes, the deadline for not exercising the right of real servitude begins to be calculated from the last time when the right of servitude was used.

So, in all cases when we are dealing with subsequent servitudes, which means servitudes that are used every day, then these servitudes in case they are not used, then the deadline set by law begins to be calculated from the day it is no longer used. the right of servitude.

Concrete case for example: the servitude for the transfer over the immovable (land) of person A, must pass the holder of the servitude, i.e. person B. In case person B does not pass through that immovable property, then the owner of the immovable concrete person A starts to notice it and he must count it from the day when person B no longer passes on his land. So, from the moment person B no longer uses person A to cross the land. From that moment ten years after the day when the right of real servitude is not used, this right can be extinguished.<sup>26</sup>

The question may be asked how long the term should be, which in case the right of real servitude is not exercised, leads to the termination of this right. Based on the legislation of different countries, there are changes in the time period that leads to the termination of the servitude right in case it is not exercised. For example, according to the law in Kosovo, there is no period of time within which the right of real servitude can be extinguished if that right is not used. But it would be appropriate and reasonable that this time period should not be more than 10 (ten years).<sup>27</sup>

A similar period of time is determined by the KCSH, according to which it is stated that: in successive and non-successive servitudes, the term for not exercising the right of servitude begins to

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<sup>22</sup> See: French Civil Code, and that: Article 705 Creation Loi 1804-01-31 promulgated on 10 February 1804 All servitude is due to the funds which are due, and all which are due, are restored in the main body. According to which it is said that: Every bondage is extinguished when the fund to which it owes and the one to which it owes, join in the same hand.

<sup>23</sup> In these cases when the legal doctrine is mentioned, it is about the writings of Albanian authors such as: Prof. Abdulla, *Cooperative aspect*, Prishtina, 2009.

<sup>24</sup> Shih: <https://www.labase-lextenso.fr/code-civil/LEGISCTA000006150129#LEGIARTI000006430499>. Retrieved on: 26.10. 2020.

<sup>25</sup> See: Austrian Civil Code, Article 526, paragraph 2. For more details see: [https://www.trans-lex.org/602100/\\_/austrian-civil-code/](https://www.trans-lex.org/602100/_/austrian-civil-code/). Retrieved on: 04.11.2020.

<sup>26</sup> Luarasi, Aleks, *Civil Code with Judicial Practice*, Tirana, 2003, p. 132.

<sup>27</sup> See: Civil Code of the Republic of Albania, article 293.

run in the period of 10 years from the moment when that right does not exercised. So, it is emphasized that the right of real servitude is extinguished when it is not used for more than ten (10) years in a row. While the legislations of other countries provide for other periods of time which in case of non-exercise of the servitude lead to the termination of that right. Thus, the LPDTS of the Republic of Macedonia declares that the right of real servitude will be extinguished in case the holder of the right of real servitude has not exercised his right for three (3) consecutive years. Also, the legislations of other countries provide for this cause as a way to extinguish the right of real servitude, but with a change in the time period which in cases of non-exercise of servitude during that time leads to the disappearance of the right. Thus, in addition to regional laws, the legislation of European countries provides that the right of real servitude is extinguished by non-exercise.

Just as the current owner of the dominant thing does not exercise his right of servitude, and by this it is understood that he is no longer interested in exercising the right of servitude over the foreign thing. So, this time period varies from state to state, so e.g. The Civil Code of France also provides for this cause leading to the extinction of the true servitude. This time period is thirty (30) years.<sup>28</sup>

Thus, according to the LCF, the right of real servitude is extinguished by not exercising it by the dominant owner, in case it is not exercised for thirty (30) consecutive years. A request for the prescription of this right can be submitted by the holder of the right of direct servitude, as well as the owner of the service item. Other countries that also provide for the same condition, ie the period of time within which the right of real servitude is not exercised, are like the Austrian Civil Code, which defines the time period of twenty (20) years from the moment of not exercising the right of real servitude.<sup>29</sup>

Regarding this cause, which leads to the disappearance of the right of real servitude, does not provide any provision LPDTS of Kosovo, but it would be appropriate to provide in the legislation of our country a period of time which leads to the disappearance of the servitude real. And based on the regional legislations and the legislation of Kosovo, it would be appropriate that the period of time which in case of non-exercise of the right of servitude will lead to the termination of the right can be not less than ten (10) years without interruption. And it should be considered whether they are continuous servitudes or non-continuous servitudes, because as mentioned above, in the following servitudes it is easier to understand from which moment the right of real servitude is no longer used.

But such a thing can not happen with discontinuous servitudes, because their continuity is invisible and it can not be seen whether it is used every day by the holder or not. However, even in the case of non-continuous servitudes in case of non-continuous exercise, this will lead to the termination of this right. But it would be appropriate to set two time periods, one for non-consecutive servitudes which would have to be longer than subsequent servitudes. So, when a non-continuous servitude is not used for a period of 15 years, then that right of servitude can be extinguished, at the request of interested parties. While in the following servitudes the time period would be 10 years from the moment when that right is no longer used by its holder.

Apart from the passage of time, within which if the right of servitude is not exercised, that right is extinguished, the other issue provided by the doctrine as well as the legislations of different countries is when the items are damaged or consumed to a degree that made impossible to use that item. In all the presented cases, the right of real servitude is extinguished in case the time of not exercising it passes, and in case the item is destroyed, or its value is lost and the same can be improved, again the right of real servitude is i extinguished on the grounds that the time for non-exercise of the right by the right holder has expired.<sup>30</sup>

In addition to the above cases, stated in the legislation and legal doctrine is also when items

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<sup>28</sup> See: French Civil Code, Article 706.

<sup>29</sup> See Austrian Civil Code, Article 1027. For more details see: For more details see: For more details see: [https://www.translex.org/602100/\\_austrian-civil-code/](https://www.translex.org/602100/_austrian-civil-code/). Retrieved on: 11.11.2020.

<sup>30</sup> See: French Civil Code, Article 704, Law of Creation 1804-01-31 promulgated on 10 February 1804, according to which the article states that: They come to life if things are restored in such a way that they can be used; unless sufficient time has elapsed to raise the presumption that the easement has been terminated, as stated in section 707.

are damaged, or consumed to a degree that makes it impossible to use this article. So, in all cases when the thing on which the right of servitude is created, is damaged or consumed to a degree that makes it impossible to use it, then comes the disappearance of the right of servitude over that thing. It must be understood that dominant property and that of service can be damaged and can be destroyed to the point where it loses its social destination.

So, since the right of servitude is a right created by the subjects but always the object is the immovable thing, and that if there is no thing or subject of the agreement then we come to the settlement of the agreement between the subjects. But even if the right of servitude is created without the agreement of the parties but with a court decision, but even in this case the item on which the right of servitude is created is damaged, and is destroyed, then the right of servitude is extinguished. And in this case the owner who has a legal interest in extinguishing the right of servitude, must go to the court system for a decision which declares that the right of servitude has really been extinguished since the destruction of the thing. And then, after we get the decision from the court, the deregistration from the cadastral status must be done, because if we do not delete it from the public book of real estate, that servitude will always remain until it leaves!

In addition to the above, there are other opinions that are thought to be included in the legislation of states and that by claiming that when the right of servitude is established with the will of both parties, then that right may have been extinguished also by the will of both parties.<sup>31</sup> Thus e.g. in case the deadline specified in the legal action of creating the servitude is met. In this case we can take the example when the right of real servitude is created by a legal work, respectively by a contract. In all cases when the right of servitude is created by a contract, then it is known that that right is being created with the agreement of both parties and that the contractual provisions can provide for how long this right will last. servitude.

This time is determined by the will of both parties to the contract, e.g. it could be three years or ten years or fifty years. Thus, the right of real servitude exists within these years, at the moment when these years mentioned in the contract pass, this right of servitude is extinguished. But either the owner of the service or the dominant owner must also refer to the cadastral status for the settlement of the right of servitude already extinguished, but in any case, must be deregistered from the cadastral status.<sup>32</sup>

Another case is when the parties terminate by agreement the contract by which the right of servitude is created. This can come e.g. in case the dominant owner no longer needs the easement right and that it should be extinguished while the dominant owner has made other choices.<sup>33</sup>

Also, another case can be considered, and when the settlement condition set out in the act of creation of the servitude is met.<sup>34</sup> At the moment when the condition for which the right of servitude is created is fulfilled, then that right is extinguished, but in any case, the deregistration from the book of public real estate must be done.<sup>35</sup>

In addition to the cases presented above, the right of real servitude is extinguished in other ways, based on the legislation of different countries, while according to the legislation of Kosovo, the right of real servitude is extinguished in some cases but not in the cases mentioned above. The cases defined by the local legislation, which extinguish the right of real servitude, will be presented in the following.

### 3. Termination of an easement right according to the legislation

According to the legislation in Kosovo, the right of real servitude is extinguished based on the two ways mentioned above, based on: the claim of the dominant (dominant) property holder and

<sup>31</sup> Alishani, Alajdin, *Practicum from the Law of Obligations*, Prishtina, 1984, 332, 334. In these cases when the thing is destroyed or lost then the relationship of obligations is extinguished or more specifically destroyed. In this case, the right of servitude which is created by a relationship of obligations such as the contract, and in cases where the item on which the right of servitude is created is destroyed, then the right of servitude which was created is extinguished.

<sup>32</sup> See: Skrame, Olti, *Commentary on the Civil Code of the Republic of Albania*, first volume, Tirana, 2011, p. 382.

<sup>33</sup> See: Civil Code of Albania, Chapter V, Extinction of Easements, Tirana, 2011, article 293.

<sup>34</sup> See: Skrame, Olti, *op. cit.*, 2011, p. 382.

<sup>35</sup> See: Civil Code of Albania, Chapter V, Extinction of Easements, Tirana, 2011, article 293.

the claim of the service property holder.

According to the LPDTS in Kosovo, it is stated that the right of immovable servitude can be extinguished based on the statement of the owner of the dominant property to give up the right of immovable servitude as well as the registration of immovable rights in immovable property.<sup>36</sup> This can happen for reasonable reasons by the owner of the dominant item himself. If the owner of the thing prevailing over the servitude right sees that it is no longer useful to use the service owner's property, then he must declare that this right has been removed, more precisely to extinguish the existing servitude right.

In order for the servitude right to be extinguished, it is necessary for that declaration to be submitted in the cadastral status and based on that, to request the deregistration of the servitude right from the public books. Thus, the right of immovable servitude must be removed from the public books, otherwise that right will exist as long as it is registered in the public books of real estate. The same was stated by the LPDTS of Kosovo, based on which it is stated that the right of servitude to be extinguished, there must be a statement of the owner of the dominant thing. This declaration must then be sent to the cadastral status so that that right of servitude is removed from the public real estate book.<sup>37</sup>

In addition to the owner of the property prevailing over the service immovable property, the owner of the service property may also request the annulment of the immovable servitude right. Such a thing is determined by the LPDTS of Kosovo, stating that: the owner of real estate charged with the right of servitude can request the payment of real servitude. This happens if the right of real servitude is no longer necessary for the use of the dominant immovable property, or the circumstances have changed substantially.

When it comes to the fact that the right of servitude is no longer necessary, then here it is thought that in case the owner of the service item, notices that the owner of the dominant item has another way out to meet his needs. In this case, it is thought that the right of servitude that already exists, there is no reason to continue to exist, but the statement of the owner of the service property requires that this right of servitude be extinguished.<sup>38</sup> Also the other case when the circumstances have changed substantially, it seems to me that the holder of the servitude right may have become the owner of the service vacancy. In this case, the right of servitude is extinguished, as it can not be the same owner of both items, especially of both real estate as service and predominant.

We have emphasized such a thing in the above chapter, specifically in the principles of the right of real servitude, where in one of the principles such as the one who can not have the right of real servitude, in two immovable properties in which the same is determined owners. So, there should definitely be two properties with different owners.

For the other cases provided by the legal doctrine, and for which the law has not made any specific definition, they see the following:

- When the holder of the right of servitude becomes the owner of that immovable property;
- When not used for more than 10 years;<sup>39</sup>
- When the item is damaged or consumed to a degree that can not be used for their intended purpose.

Thus, according to the legislation in Kosovo, the right of immovable servitude is extinguished with the declaration made by the dominant owner of the immovable property. The holder of the right of real servitude must declare that he waives the right of real servitude, and also in addition to the declaration he must also remove the right of real servitude from the real estate register. According to the LPDTS of Kosovo, the holder of the right of servitude, especially the dominant owner is the one who should take the initiative to give up the right of servitude, but not in all cases.

For example, the holder of the easement right may declare that he renounces the easement

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<sup>36</sup> See: Law 03/L-154 on Property and Other Real Rights of Kosovo, Prishtina, 2014, Article 260, par 1.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid, article, 260 par 2.

<sup>39</sup> See: Law 03/L-154 on Property and Other Real Rights of Kosovo, Prishtina, 2014, Article 260, par 2.



right because he no longer needs that right, but there are other cases that although the dominant owner has found other ways to get out of it he does not waive the right of servitude.

In these cases when the owner of the service property provides that the right of servitude is not necessary with the dominant owner, then the possibility is not excluded that the owner of the service addresses the judicial system for the termination of the right of real servitude. But we think that the dominant owner is correct and in case there is no need for the right of real servitude, he should submit a written statement, through which he should address the cadastral situation, and ask it to remove the right of real servitude from the immovable property which is already encumbered with that right. But if the dominant owner only submits a statement to the serving owner and does not present the same in the cadastral status, then the servitude still exists over the immovable property. As long as the easement is not removed from the real estate register, this right will continue to exist in the future.

In addition to the above case, the service owner may also request the termination of the right of servitude, created on his immovable property. This is permitted under the Kosovo LPDTS, under which the service owner may request termination of the servitude. This request can be made initially by agreement with the dominant owner, but in case both parties cannot reach an agreement, then the service owner must go to court with a lawsuit to confirm the completion of the servitude.

But the LCP,<sup>40</sup> requires that if a lawsuit is filed in court, then it must contain the fact and evidence on which the judge is based and continue to address the contentious legal issue. In the specific case, the service owner may request the termination of the servitude right in case the use of the service real estate is no longer necessary. This means that the dominant owner no longer needs to use the right of servitude, especially no longer needs the existence of the servitude. Or in general it can be proved by the serving owner, that the dominant owner has other options to exercise the right of ownership over his immovable property, without using the actual property charged with the servitude. Except in this case, the right of real servitude can be extinguished at the request of the owner of the service and in other cases, for which cases the legislator has not mentioned. But in the LPDTS, it is said that the right of real servitude can be extinguished at the request of the service owner and in cases where the circumstances have changed substantially. The question arises, what circumstances did the legislator think about this provision?

It can be thought that, here the legislator, leaves space, and for other cases which are mentioned above, e.g. the expiration of the time of non-exercise of the servitude, or in case the item on which the right of real servitude is established is destroyed and other cases, which the legislator summarizes with the words: that the right of real servitude can be extinguished with at the request of the service owner and in cases where the circumstances have changed substantially. Thus, if in case law, a case is filed for the extinction of the right of servitude, for which no provision is provided in the LPDTS of Kosovo, then the judge may invoke the provision of Article 260, paragraph 2<sup>41</sup>, and Based on the fact that the legislator has considered the case in question in this provision, respectively where it is stated that we may have other cases that may occur based on substantial circumstances.<sup>42</sup>

In addition to the declaration that must be made by the service owner as well as the dominant owner, the same must continue to the cadastral situation, to seek the payment of the right of real servitude, which is already in the register of real estate.

This must be done because if the right of immovable servitude is not deleted from the real estate register, it still exists, and if in the future the dominant owner is still known for use it has no right to be created for the latter, as it only exists.

The law of Kosovo provides only for these two cases, for which I do not mention them in more detail, unlike the laws of other countries, which taxively mention the ways of extinguishing

<sup>40</sup> See: Law no. 03/L-006 on Contested Civil Procedure, Prishtina, 2008, article 252, par 1, according to which it is stated that: The trial of a case in court begins with the filing of a written claim (obligation lawsuit, confirmation and change).

<sup>41</sup> See: Law no. 03/L-154 on property and other property rights of Kosovo, Prishtina, Kosovo, 2014, article 260, par 2.

<sup>42</sup> Shih: Ferguson, Marks, *Build A Commercial Real Estate Empire. How to scale to new heights with the Right Financing, Deals and Strategies*, InvestFourMore, 2020, p. 2, 10, 19.

the servitude.<sup>43</sup> Thus e.g. The LPDTS, of France, also provides that the right of servitude is real, as it has been created and may lead to the extinction of the right.<sup>44</sup> And that such a thing can be requested from the service owner and the dominant owner, but unlike the LPDTS, of Kosovo, in the provisions of the Law of France, the ways or cases according to which the termination of the right of true servitude. Thus, a concrete case is when the merger of immovable property takes place, i.e. the merger of the dominant property and the service property and that there is only one owner over both immovable properties. This issue can be the basis for initiating a lawsuit, as well as a very reasonable issue which leads to the termination of the right of immovable servitude. The question arises what should judges do in the Republic of Kosovo in case we have such a case, ie when the service and the dominant real estate are combined?

In my opinion, it would be okay for us to rely on the same provision of the KBA, so if the service and the dominant property are merged and the owner of both is the same person then it has no effect and is contrary to principles of the right of real servitude, if this right still existed. Thus, the judge will approve the litigation and extinguish the right of real servitude, arguing that the serving owner and the dominant owner are the person's intent and that the immovable property has been merged. However, in addition to this decision taken by the court, the right of servitude must be paid from the public real estate book. The same claims in the legal provisions are separated by the Law of Albania, as well as the Law of Macedonia, as well as other European countries, such as the German and Austrian Legislation.

#### 4. Termination of a servitude right according to case law

The right of real servitude, which has been created and acquired, the same can come to its extinction as a right. Just as the creation of the right has been done, we can also come to the extinction of this right.<sup>45</sup> In cases where there may be a dispute (dispute) between the owner of the service item and the owner of the dominant item, then the issue is claimed to be resolved through the judicial system.<sup>46</sup> The solution in this case would be the extinction of a real servitude, in case the same is now only acquired.

In all cases in which we want to extinguish a right of servitude by means of a court decision, we must formulate a document which sets the court in motion in the disputed civil proceedings. The document that sets the court in motion in controversial civil proceedings is the lawsuit. In each trial, special attention should be paid to its object, as well as the evidence, specifically the legal interest for which the lawsuit was filed. As in the case of case law, it must be justified what is the legal interest of extinguishing the right of servitude through the initiation of a lawsuit. Thus, the party filing the lawsuit for the termination of the right of real servitude, must justify that lawsuit why and on what factual and legal basis he requests that the created right be extinguished. In case it is ascertained that the lawsuit is grounded and grounded, then the judge of the concrete case approves the lawsuit and decides on the case under review.

In practice, based on the developments that take place in the judicial system, from the findings so far, it is considered that the right of servitude in most cases is extinguished, by court decision. But always starting the procedural issue the party itself which has an interest to extinguish the right of servitude. Thus, the claimant to initiate a contentious civil proceeding, according to the Kosovo LPDTS, may be the owner of the service property and also the owner of the dominant property. But there are cases when the right of servitude has been extinguished in the past, but the parties have only established agreements between them, but have not deleted the right of servitude from the cadastral situation.

This may have consequences for the future, as long as the right is not removed from the immovable property register, that right still exists. For this reason, the Kosovo LPDTS states that

<sup>43</sup> Federal Rules of Civile Procedure, Edition 2020, Michingan, 2014-2020, p, 97.

<sup>44</sup> Shih: Shih: Ligjin nr, 03/L-006, për Procedurën Civile Kontestimore, Prishtinë, 2008, neni 252, par 1.

<sup>45</sup> Glannon, W, Joseph, *Civile Procedure* (Sixth Edition), United of America, ISBN 978-0-7355-7033-7, 2008, p, 345.

<sup>46</sup> Glannon, W, Joseph, Perlman M, Andrev, *Civile Procedure, Rules, Statutes, and Other materialis*, edition published by Wolter Kluw in New York, 2019, p, 223.

the termination of the right of servitude is done with the declaration of the dominant owner or the owner of the service,<sup>47</sup> but in any case, the termination of the right from the cadastral status is necessary.<sup>48</sup> So in case law, the right of servitude has been sought to prove that it is now extinguished. But even in these cases the judge of the case can not prove a right if he does not see what are the reasons that the plaintiff requests such a thing.

Therefore, it is as if he had filed a lawsuit for the termination of the servitude right and as if he had filed a lawsuit to prove the termination of the servitude. In both cases, if the judge finds a sufficient basis for the approval of the trial, he will force the defendant not to use the property of the serving owner, as the right of servitude has already been extinguished. And this also the judge of the case will force the parties to remove the right of servitude from the public book of real estate. Thus, in the following, a court process will be presented, which has as its object the confirmation of the completion of the real servitude.

In this case the plaintiff is the owner of the service item, who files a lawsuit against the dominant owner, stressing that he no longer needs to use his real estate to cross, as he had other avenues. Thus, although in the past there was an agreement that the right of real servitude be extinguished, it was never extinguished. Respectively, the dominant owner had not removed the right of servitude from the cadastral situation. Until now the owner of the service addresses the judicial system requesting that the right of servitude, which was extinguished by agreement, now the same disappearance be confirmed by taking a court decision. And for that court decision to serve as a legal title to address the cadastral situation for the deletion of the right of real servitude. Among other things, in the trial, the defendant requests that the defendant be obliged to cease the use of this route with the threat of violent execution within 15 days after the conclusion of this judgment. So, the Judge of the case is the party which after reviewing and investigating the case, will decide with a decision whether to approve the existing lawsuit or reject it!

## 5. Conclusion

The right of servitude as a real right over the foreign thing, once created and acquired, the same right may come to its disappearance. The disappearance of the right of real servitude is determined by the legal provisions in Kosovo, but with many changes from the legislation of other countries. According to local legislation, the right of servitude is extinguished by the declaration of the owner of the dominant property, as well as the owner of the service property. In addition to the declaration, the law stipulates that the right of servitude must be removed from the real estate register. In particular, the owner of the dominant property and service property must cancel the easement right from the real estate register. Apart from the rules to be followed, the legislation does not specify any way to extinguish the real servitude, unlike the legislation of other countries. Thus, in the legislations of other countries, the right of servitude can be extinguished in several ways, more precisely, the causes that lead to the disappearance of the real servitude over the real estate are determined. As defined in the content of the work, the right of servitude can be extinguished in case that right is not exercised for ten (10) years in a row, when the holder of the right of real servitude becomes the owner of the service property, as well as some other cases which should have been well defined in local legislation. However, although some of the reasons for the termination of the real servitude are not mentioned in the legislation, the same apply and are used as causes.

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<sup>47</sup> See: Law no. 03/L-154 on property and other property rights of Kosovo, Prishtina, Kosovo, 2009, article 260, par 1.

<sup>48</sup> Ibid, par. 2.

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