



## Necessary Passage: A Comparative Analysis between the legislation of Kosovo and Albania

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<http://dx.doi.org/10.47814/ijssrr.v7i9.2215>

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### **Abstract**

This abstract analyzes the concept and practice of mandatory transition in the civil laws of Albania and Kosovo. In the context of property justice, necessary passage refers to the need to seek and allow passage through the property of another person when there is no other possible way out or when this passage is necessary for great economic benefit to the owner of the privileged thing. The comparative analysis based on the legal provisions of the Albanian Civil Code and the law on ownership and other real rights in Kosovo marks the differences and similarities in interpretations and judicial practice regarding this issue. Through an in-depth look at these laws, it is determined how they differ from and relate to the legal tradition of easements in both countries, including the criteria and conditions for allowing and compensating for necessary passage. In the end, the paper argues for the importance of this institute in maintaining the balance of rights and interests of real estate and owners in different legal and social contexts.

**Keywords:** *Necessary Passage; Civil Code; Law; Rights*

### **Introduction**

#### **Necessary Passage: Overview**

Whether the necessary transition was recognized in Roman law seems to be a controversial issue. According to the author (Glucku), similar to the passage through the cemetery, the necessary passage was also known in other cases. According to some other authors (Derenburg, Winscheid, etc.), Roman law did not recognize the necessary transition for other cases.

But it is important that the necessary passage is introduced as a result of a necessity, which arises to pass through the land of another at a certain level of socio-economic development, of private property relations in a certain society. German and French law base the necessary transition on the principle of neighboring rights. One land had to communicate with another; isolated or enclosed land had to be

opened to communicate with the public road. The neighbor had to allow passage through his land whenever there was a need to "open" the other's land for the purposes of its economic use, connecting it to the public road. The right of necessary passage according to the French Civil Code belongs to the owner, whose land is closed and does not have any access to the public road, to request the passage through the neighbor's land in order to use his land, taking obligation to remove the damage it may cause.

The French theory has interpreted this extensively, so that the necessary passage is created only for the needs of the land, but also for houses, factories, for the extraction of stones, and similar needs like these. Also according to the provisions of articles 917-918 of the German Civil Code, in order to allow the necessary right of way, it is required that for the regular use of a land, there is no connection with the public road, so that the lack of the road is not the result of any action arbitrary of the owner of this land and to remove the bull caused by allowing the necessary passage through the foreign land. The Italian Civil Code, and to a large extent the Albanian Civil Code, allowed the necessary passage, when the owner of a land did not have access to a public road or when such a passage could not be found without difficulty or great expense, with purpose of working or using one's land properly. Here two conditions for allowing the necessary passage can be deduced; the lack of connection with the public road and the passage should serve the cultivation of the land and its better use. In addition to what was said, according to the Albanian Civil Code, the crossing must be made through the shortest possible route to connect with the public road, causing as little damage to the land through which the crossing is made.

What is the truth, the Albanian Civil Code, as well as the former Italian Civil Code, distinguishes the necessary passage in the narrow sense of the word, due to the lack of a road, etc. (Article 994) or as it is called in the literature, a strengthened passage and necessary passage or as it is called in the literature, forced entry into the land of another for the construction of a work. The awareness of the necessity of property restrictions for the benefit of the neighbor in the people has long been developed and matured. Due to a good neighborliness, the neighbor has never spared to allow him to pass through his land in order for the neighbor to use and exploit his property. The neighbor has not closed the door to the neighbor and has never left him "without a door". This is even less likely to happen when such a thing was necessary. In fact, not only was the passage allowed "without a word", but it was done for free ("if I came to your door tomorrow, they did the same"), no compensation was paid for creating the necessary passage. This was "rewarded" with mutual help in the field of servitudes or any other field of neighborly or life relations. This understanding among the people about the necessary transition is connected with the common life in the kinship relations in the historical past, with the relations of joint (collective) ownership; with the subjugation or fusion of the ego or the individuality of the individual in a social ego in the framework and through which the expression of the individuality of man related to the process of debauchery of the collective ownership of the tribe, brotherhood, village, joint (large) family, etc. This solidarity of blood and kinship will be preserved for a long time even after the "separation" of the individual's ego from the social ego, almost with the same strictness as it was before the separation. Individuality - the personal ego is presented as wax.

At this level of relations, it has never been a question of allowing passage through another's land for the purpose of using, exploiting the other's property. This eventually arose as a social rule, became part of the social consciousness and eventually became an unwritten but strictly observed right. Therefore, the customary rights of the peoples, even when there are no express rules for the necessary transition, they imply, accept, allow and respect it unwaveringly, although this may change and differ in some nuances from one country to another, carried with it the peculiarities of a locality, of a local right. Once upon a time, it was passed on to another's land even when the field was sown, without even asking the owner of the field, of the servient land. Elsewhere permission must be obtained, or the owner of the servient land must be notified.

But this rule on the necessary transition can also be taken for Albanian customary law, the spirit of which, either of what has been preserved from the summaries and notes of others, or from what we have recorded in the field, allows us to conclude that the necessary transition was respected, even is respected based on the conscience inherited from the relations of shared ownership in decline and up, in their final debauchery with the aim of regulating neighborly relations. This form can be removed through the rules that were preserved, according to which "the village wants the road, the village as the road is cut". Or "He who closed the capercell, should open another capercell, so that the village is not hindered". The main commandment is that no one can be left without a way. During life and during different legal systems, the application of customary law, for or against positive law, on the necessary transition has never been an issue. The people have implemented the right that was best for them.

The rules of customary law on the necessary transition can be applied even today when there are no positive provisions, because they do not "escape" much from these positive ones, of course if they are not in conflict with the latter.

Without going into other excursions related to the necessary passage, from what was said it follows that the necessary passage is created for the benefit of a current owner or possessor, of a dominant item through the service item of another current owner or possessor, and with the first request when there is no exit to the public road, or when this exit (connection) is difficult, inconvenient or insufficient.

So, the request for the necessary passage is conditioned by the necessity of a normal communication, the normal connection with the public road. This happens when the dominant thing is closed (enclave), when it is isolated and in order to be exploited economically by making a request, to allow the necessary passage through the land of another.

The lack of connection with the public road can be absolute - such that the dominant item as such does not have any connection with the public road, or relative - such that the dominant item does not have sufficient connection with the public road, for which reason the owner or the current possessor of the dominant item may use or use the item in a regular manner. The absolute lack of connection to the public road and total isolation must be the result of a voluntary act by the owner of the dominant property. Such closure is not the result of the will of the owner. The closure must be objective, accidental or the result of the actions of other entities, or of natural actions, of any force majeure. Among other things, the closure may be caused by the natural configuration of the land, as a result of the division of the property, by floods, by the change of the river bed or the construction of canals, by the change of the direction of the existing road for the construction of certain objects of social interest, etc.

The creation of the connecting road with the public road not only made possible its regular use, but also increased the overall economic value of the property. So, the creation of the necessary passage is conditioned by the necessity of exploitation and use of the thing, not convenience. For all damages caused to the service item in the case of necessary passage, the civil codes provide for the payment of damages. The holder of the dominant item waives the compensation.

According to the civil codes, compensation for damages is done proportionally with the damages caused by allowing the necessary passage or equivalent to the damage caused, or the payment of full compensation, or direct compensation, or compensation for any damages caused, or the compensation of the damage is done by the payment of annuity, or the damage is compensated in that way, by paying once and for all the fixed price.

The necessary crossing can be created for crossing on foot, with a cart, with motor vehicles, it can be the crossing of cattle, etc. (iter, actus, via). In the conditions mentioned above, if the owner of the dominant land has absolutely no other way to "grab" his land, or to reach his land, or to reach the public road. Otherwise, if the "closure" of the dominant thing occurs as a result of the will of the owner, the

neighbors will not allow the creation of the necessary passage, although the creation of the necessary passage is not always justified. The servitude of the necessary passage through the existing buildings, through the fenced yards, through the gardens, vineyards, etc. cannot be created.

In judicial practice, it has been said that, in principle, the necessary passage cannot be created through domestic yards, except when there is no other way out or when it cannot be done without very large expenses. Or an easement of passage is not allowed through the backyard except when it is necessary. In the case of allowing the servitude of the passage with a carriage next to the house, other circumstances are also taken into account, such as unobstructed residence, tranquility, other personal rights of the owner of the servient object or of his family members, etc.

The necessary transition must also be ensured in the case of dividing the co-ownership. The co-owners provide the necessary passage to any part of the land, when this is necessary, since in this case it is not permissible to create the necessary passage to the neighbor's land, even though it might be more convenient to pass through the neighbor's land.

On the other hand, in case of need, the necessary existing crossing can be expanded, or its location can be requested or even its elimination altogether. Expansion is on the agenda, in the meantime, circumstances have changed, which make the existing transition even more difficult. For this, the circumstances must change, otherwise the expansion is not allowed.

Expansion is not allowed if, instead of taking the water out with a bucket, as before, this work is done with water installations. The place or direction of the necessary passage can be changed. This can be requested by the owner of the service item, if this also achieves the same servitude goal, while for the owner of the service item, this represents some relief, less expenses, etc.

It is not reasonable to have a necessary passage through the servient land, if the dominant land has "caught" another exit to the public road. However, in the meantime, a public road has been built, which you admit, better connects the dominant thing. This means that the change of the boundaries must be such that the existence of the necessary passage is made unnecessary or even unsuitable for crossing on foot, by carriage, etc. The right to request the creation of necessary passage is not prescribed. Meanwhile, the right to seek compensation for the damage caused is prescribed. But the latter has no influence on the necessary passage itself.

### ***Comparative Aspect***

Necessary passage provides a special legal institution, which comes into expression when there is a need for passage while there is no servitude of passage, and in this case the court allows the necessary passage under the conditions stipulated by law. The law on ownership and other real rights in Kosovo does not regulate the mandatory transition to servitudes, but this is regulated by neighboring law, where it is expressly provided that;

A necessary passage through an immovable property must be allowed, if the neighboring immovable property has no other access or if it is connected by a longer road and if the benefit to the immovable property, in favor of which the passage is allowed, is greater how much bull for immovable property, through which it must be passed.

The direction of the necessary passage must be determined in a way that provides the most suitable passage for the neighbor who requests the passage and least hinders the neighbor who allows the passage. The neighbor on whose immovable property the necessary passage is made must be

compensated with periodic remuneration for the use of the property as well as any damage caused during the passage. The required pass is terminated when the need for the pass ends.

The law on ownership and other real rights of the Republic of Macedonia provides for the necessary transfer in the framework of real servitudes and for this it is expressly provided that the necessary transfer can be requested by the owner of the privileged thing which has no exit on the public road or up to it can only be reached with excessive crossing and the necessary crossing can be presented as a field or domestic easement and that the necessary crossing is created by the decision of the court or the state body according to the request of the owner of the privileged thing. Although this law does not provide for compensation for damage caused by the owner of the privileged item, it does not mean that compensation for damage should not be paid because in any case when it is done at the request of a subject, it is natural to pay compensation for damage. The Albanian Civil Code also provides for the servitude of the mandatory passage, where it is provided that the owner who does not have access to the public road and cannot secure it except with great expense and difficulty, has the right to this passage from the land neighbors, for the appropriate use of their own property. The crossing should be the shortest way to the public road and with less damage to the service property. The Albanian Civil Code, when the servitude of passage is allowed, provides that the person who will pass on the land of another must pay the value of the land that is occupied, without deducting the taxes and other burdens related to the land, as well as the compensation for the damage caused including the damage that comes from the interruption of the land, from its non-use, from the deposit of extracted materials and the disposal of waste. The owner of the servient land has the right to remove the latter and use the surface of the land, but always without harming the normal exercise of the servitude. In case there is a need for passage, while the easement of passage is missing, then the court did this and in this case this institution is called a necessary passage. Necessary passage is created for the benefit of an owner or current possessor of a dominant object through the service object of another current owner or possessor and at the request of the former, when there is no exit to a public road, or when this exit is difficult. In this case, three conditions must be met; 1. There should be no access to the public road 2. The profit should be greater than the damage that will be caused to the servient property 3. Compensation must always be paid for the damage caused.

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