

Real Estate Property Rights in Albania between individual and community interests

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Abstract

Property rights are one of the most important institutions of the rule of law. This paper attempts to contribute to the debate on property rights, by reviewing property rights in the context of human rights and their application in Albania along its recent statehood.

Although difficult to determine a single standard for the application of property rights, as part of human rights, both at a national and international level, it is generally assumed that their application, which remains at state discretion must be followed by balanced weighing of the public and private interest. At the same time, the international practice has shown that the application of property rights must be followed by legal certainty and other standards.

In reflection of these principles, on an historical perspective, in Albania property rights have been applied in infringement of the principles of human rights. During the communist regime state interest has prevailed at an extreme extent over private interest, until the point where private property was completely abolished. While, after the '90's, in Albania's transition to democracy, legal uncertainty has been the main remark of legislative changes that have attempted to undo the property rights situation inherited from forty five years of communist rule.

Although, these legislative changes have attempted to hold at their core the human being and the fundamental human rights, they have not managed to give real solutions to the large number of conflicts that have arisen in the context of property rights. Thus, the drafting of laws in this field must be conducted by aiming the adoption of clear and stable laws, with no room for confusion or abuse.

Keywords: Private Property Rights; International legislation on property, Albanian legislation on property; Public interest; Private interest; Proportionality Principle; Legal Security; Human rights;

INTRODUCTION

The right to own property represents a social relationship, which due to its particular importance, is regulated by legal norms, and that nowadays has become one of the most important institutions of law. The stance that one society holds towards the right to own property defines, on its own, the political and economic system of that society. Thus, far leftist societies tend to marginalize private property according to the Marxist theory that defines the communist philosophy in a few words: “*abolition of private property*”. On the other hand, liberal societies tend to give as much space as possible to private property rights. However, a just political economy is the one that is based on the sacred right to own property, because this is the only order that will create the opportunity for the individual to improve the integrity of its own nature and to develop as a human being.¹

Property rights have not had a uniform historical development. They have changed with the development of the society, both in terms of the subjects and object of property (type of property), as well as in terms of the content and rights that hold different subjects on the property itself. Thus in the past, the right to own property belonged to powerful people, and the object of property could go as far as being human beings (in the case of slavery). Later on, during the Middle Ages and until the XIX century, large groups of the society were excluded from the right to own property, such as the Jews in England and women in western societies. With the society’s development and the state of the rule of law itself, property rights were not only recognized and sanctioned by the majority of the western countries, but they were also made part of a large number of international acts in in the framework of the protection of human rights. Even though the international law has failed to find a unified definition on property rights, it has however established compulsory principles and standards for the member countries, with the focus on keeping the balance between the private and the society’s public interest on property.

Albania is a signatory member of the European Convention on Human Rights since the year 1994, and as such it is obliged to apply in the domestic sphere the principles and standards in framework of this convention. The right to own property nowadays in Albania is a Constitutional matter, as part of the human rights. However, this has not always been the case in its historical development. Property rights have undergone enormous changes in terms of their treatment during the historical development of the Albanian state. This essay will try to demonstrate how the principles and standards brought forth in the framework of human rights, have (not) been reflected during the development of property rights in Albania, according to an historical perspective focused on two time periods: the first during the forty five years of communist dictatorship and the second after the ‘90s, which corresponds with the time of the system’s change, from centralized to open market economy.

The essay is divided in two main parts. Thus, in *the first part* it will elaborate on how property rights, in the framework of human rights and due to the debate on the position that this right must have in regard to other rights, are not uniform and differ from one international act to another. In general, their regulation has been left to the discretion of the member countries that are signatory to these acts. However, these countries are required to keep under consideration the finding of equilibrium between the public and private interest, when the violation or restriction of property rights is under question. Likewise, property rights are closely related to other principles and standards defined by international instruments of human rights and the judicial practice of the European Court of Human Rights (ECHR).

¹ Rousseau , 1755

Meanwhile, *the second part*, will try to discuss on Albania's legislative practice, by reflecting on the principles and standards brought forth by the international law. In this part, an analysis will be made on the evolution of property rights in Albania during the period from 1945 to 1990, when property rights, especially private property rights on real estate, underwent continuous shrinking until their complete abolition. Thus, the state in the name of public interest completely sacrificed the private interest without considering any equilibrium among them. Further on this section will continue with the review of the after '90s legislation, which recognized private property by adapting to the new system that was being installed and the international legislation in the field of human rights. However, this legislation even nowadays has not reached the status to provide answers to the real demands of the time, related to property disputes. This in part is also due to the lack of respect for the principles and standards provided by the international law, such as the principle of legal security, etc. As such, property rights nowadays in Albania are subject to a large number of social disputes. This is one more reason why the legislation needed to be applied in this field must be clear, stable, and without gaps that allow abuses and misinterpretations. Likewise this legislation must comply with the principles and standards in respect of human rights, sanctioned by the international legislation, where Albania is a signatory member country.

1. PROPERTY RIGHTS AND HUMAN RIGHTS

During the feudal period, property was related to the social status of the owner. It served as the basis for different titles, which in turn served to fulfill the rights for a certain standard of living. Thus for example, only the property owners had civil and political rights, such as that on suffrage. Later on, the property rights became an important matter in the early demands of people for political freedom, equality, and in their movement against the feudal control of property. With the historical development and the establishment of the modern states, due to the triumph of the capitalist system in a large number of countries, the concept on property rights in general changed. The increasing need for interaction in the international arena was based even more on the agreements that sanctioned the fundamental human rights, as natural rights that must be preserved and protected by the countries. The right on property today, even though part of a strong debate, is part of the human rights, recognized as such by a large number of declarations and conventions in many countries of the world.

Thus, in the Universal Declaration of Human Rights approved in 1948, on its Article 17, it is provided that: *"(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property."*² However the debate that existed at this time, regarding the question on whether the property rights should have been treated as fundamental human rights, and if yes to what extent, it is reflected also in the fact that the property right was not further foreseen in the two protocols of the Universal Declaration of Human Rights, namely in the International Convention of Economic, Social and Cultural Rights and the International Convention of Political and Civil Rights.³

In this context, during the negotiations on the content of the Universal Declaration of Human Rights, countries of Latin America were arguing that property rights ought to be limited to the protection of private property needed to make a decent living, but this suggestion was rejected. Meanwhile in the American Declaration of the Rights and Duties of Man, which was being

² Article 17 of the *Universal Declaration of Human Rights*

³ Doebbler, 2006, p. 141–142

negotiated simultaneously, but that saw the approval one year ahead of the Universal Declaration of Human Rights, in its Article 23, was foreseen that: *“Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”*⁴ While on Article 21, of the American Convention on Human Rights, where it is foreseen the protection of property and just compensation, as well as the prohibition of the practice of usury and exploitation of man by men⁵, it is stated that: *“Any person has the right to use and to enjoy his property. The law may foresee a use and enjoyment of the property according to the interest of the society. No one can be deprived of his property without a just compensation, for public aims and social interest and according to the procedures foreseen by law. Usury and any form of exploitation of man by men shall be prohibited by law.”*⁶ Furthermore, a large number of international instruments exist, which even though they do not treat property as an independent right, still protect it through other forms of dispositions against discrimination. Thus, according to the International Convention on the Elimination of all Forms of Racial Discrimination *“Any person has the right to be equally treated before the law...including the right to own property alone as well as in association with others and the right to inherit”*⁷. While the Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1979, foresees equal treatment and rights of the spouses on property⁸. Dispositions on the protection of property rights are also foreseen by the Convention on the Status of Refugees and the Convention on the Protection of Migrant Workers and Members of their Families.

At a regional level, the European member states of the Council of Europe, in order to give an effect to the Universal Declaration of Human Rights in the European context, signed in 1950 the European Convention on Human Rights. During the discussions on this Convention, in relation to property rights the main question revolved whether these rights were to be protected or not by the Convention. This debate has been the reason why the right of property has not found protection by the Convention itself, but by its First Protocol, signed on March 20th, 1952 according to which: *“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”*⁹

After taking note on the rights on property found in the numerous international legislative texts mentioned above, it would come natural to try to find a definition on the right to own property, for the sake of setting a standard. But, as it can be noticed, a single definition is not available. At first, this is due to the diverse forms of the concept of property rights, which differs both at a national and international level. Law practitioners, as Rudolf Von Ihering, state that *“...the content or aim of the norms is diverse and not universal. The laws must adapt to the real conditions of the society, the scale of civilization and the needs of time. The main standard of the law is not the truth which is absolute, but the aim which is relative...”*¹⁰

⁴ Article 23 of the *American Declaration of the Rights and Duties of Man*

⁵ Eide and Alfredsson, 1999, p. 370

⁶ Article 21 of the *American Convention on Human Rights*

⁷ Article 5 of the *International Convention on the Elimination of all Forms of Racial Discrimination*.

⁸ Article 16 of the *Convention on the Elimination of All Forms of Discrimination against Women*

⁹ Article I of Protocol I of the *European Convention of Human Rights*

¹⁰ Kongoli, 2010, p. 248

Meanwhile, in order to better understand the position that property rights hold within the human rights context, we must return and focus once again on the principles sanctioned by the European Convention of Human Rights and the standards defined by the judicial practice of the European Court of Human Rights (ECHR). The Court functions as an institution that enforces the application of the dispositions of the Convention and its accompanying Protocols.

The Convention contains twelve fundamental rights, which are classified in two main groups: in unlimited (absolute) and in limited rights. In the first group belong such rights as that on the right to live, on prohibition of slavery, torture, the right to an unbiased judgment, etc. While the second group deals with such rights as that on speech, family, property, etc. In the case of the violation of norms that belong to the absolute rights' group, the ECHR is sufficed to find proof that such norms have been violated, and does not accept any justification whether such violations done by the state have been based on valid reasoning, or not. In regard to the second type of rights, the Court beside the violation of the norm must also evaluate the reasons or "justification" of the state in regard to the violation. Stated differently, the public authorities in regard to the absolute rights (norms) category, cannot undertake any limitations no matter the reasoning behind it, while in regard to the second category of rights, the states can set limits according to preset conditions, which will be discussed later on. Meanwhile, it is evaluated that nowadays, the right to own property is not classified as an absolute right, despite the fact that great scholars of all times do consider the right to own property as such. Thus, James Wilson, one of the Founding Fathers of the United States and judge to the US Supreme Court writes that:

The Government's role in protecting the property depends on the worldview on the right itself...As such the question that might be raised is whether the government has been established as a mean of the people, or the people are the mean of the government, a division that takes us to the case of absolute rights and whether property is one of them. It is certain that in its undeveloped stage, the human being had the natural right of property, personality, freedom and own security, which by being absolute rights could not be sacrificed in the case of conflicting interests. Often governments are faced with challenges of choosing between the two rights, in order to sacrifice one and please the other.¹¹

On the same line of thought is also the philosopher John Locke, according to whom the right to own property is a natural right of the kind that has been existing before the creation of the states and their jurisdictions. In his book "*Two Treaties on Government*", Locke in a summarized way states that men through the social contract gave to their governments some of their rights in order to protect and secure the right to live, the right of freedom and property. Thus, the right to own property is absolute, and consequently, according to Locke, guaranteeing private property must guide the objective of legislation in this field, because otherwise it cannot be understood how laws violating the right to own property can be accepted by men, since the protection of private property is the reason and justification behind the government's own existence. Under this point of view, a government that functions against the objective of its creation is a government that cannot be legitimized.¹²

In front of these standpoints, returning to the analyses of the property rights as sanctioned by Article 1 of the First Protocol of the European Convention, three norms can be identified in the field of the protection of property: the first one is general in nature and sanctions the right of

¹¹ Wilson, 1790.

¹² Locke, 1690

each individual for the peaceful enjoyment of his possessions; the second contains the limitations of the property rights by the states; while the third recognizes the authority of the states in controlling the use of property in compliance with the general objective. All these three norms are distinctive and unrelated to each other. The second and third norm have to do with particular interests of state intervention in the right of peaceful enjoyment of property by the individual, thus they must not be interpreted in light of the stated general principle of the first norm. In regard to the second and third norm, the public authority may not take the property and neither place limitations on it without sound reasons for such actions. In this understanding, this authority must proceed according to the laws, and must put to balance the public's interest on one side (that must also be the justification for the limitation of the property right) and the private interest on the other. Likewise, if the public interest prevails over the private one and the property of an individual is expropriated from him, then the latter must be compensated for it. However, the Convention leaves room to the States to decide for themselves which is the proper balance between the public and private interest.

Different states have given different answers to this issue, and the legislation of one country differs from that of another depending on the historical and political context. The reason behind these differences stands on the fact that the legislation reflects the development of a nation through century long norms and traditions. According to Roscoe Pound, an American philosopher of modern times, *"the law is a process of social regulation, which reflects the interests and the dominating values of the society."*¹³ Accordingly, there are these dominating interest that put pressure on a government, which then gets reflected in the legal system. In the view of other scholars *"a legal right is a social mechanism, meaning equilibrium among the competing interest of a society."*¹⁴ On the other side, Savinji, a German philosopher, saw the law as being an unplanned, almost unconscious reflection of the spirit of the people of a given society. In this regard, the legislative change could be explained only historically, as a slow response to social changes.

In this understanding, the abovementioned authors, by emphasizing the influence of the dominating interests and values of the society, undermine the standpoints of the positivists that view the law as simply a command of a political authority.¹⁵ From what is presented above, it can be said that the European Convention of Human Rights, and its dispositions relating to property rights, must be seen as a legal instrument that does not substitute the domestic law, but that places a minimum standard under which member states neither can, nor must fall.¹⁶ This means that the states despite their social conditions and their historical development, in order to comply with the Convention must not approve laws or any legal acts that lead to a more unfavorable and negative situation for their citizens, than that foreseen by the Convention.

Even though, there cannot be found a particular definition on property rights, in the Convention it is self-implied that any definition of the content and limitations must respect the fundamental dispositions of human rights, according to their primary meaning, and similarly be in harmony with the other norms of the Convention among which we could particularly mention: the principle of equality, legal security, proportionality, etc. However, the interpretation and standards related to these principles remain at the discretion of the European Court of Human Rights (ECHR) and its judicial practice, as it will be discussed below.

¹³ Mallor et al, 1997, p. 8

¹⁴ Mayneni, 2007, p. 511

¹⁵ Mallor et al., 1997, p. 9

¹⁶ Albanian Center for the Rehabilitation of Trauma and Torture, 2010, p 26.

First, under the interpretation of Article 1 that guarantees property rights, it is of great interest to define the field of work of this Article, as to what is included in the concept of “property”. In relation to this the Court has held this position: *“The notion of property in Article 1 of the Protocol it is not limited in the possession of the material goods; also some rights and other interests that constitute property means may be considered as “property rights” and as such properties as regards the objectives of this disposition.”*¹⁷

While in the case Beshiri against Albania the Court does not consider as property what is expected to be gained as a result of the legislation on property expropriation. The court states that:

*“A complainant may pretend a violation of Article 1 of the Protocol 1 only for as long as the contested decisions have been related with his properties within the meaning of this disposition. The properties might be “existing properties” or assets, including claims in regard to which the complainant can argue that has at least “a legal expectation” to win an effective enjoyment of the right to own the property. By comparison, the expectation to have a property right recognized, which has been impossible to be effectively exercised, cannot be considered as a “property” within the meaning of Article 1 of Protocol 1, and the same holds even for a conditional claim that comes as a result of the lack of fulfillment of the condition.”*¹⁸

Continuing with the interpretation of Article 1, the second sentence found within states that: *“No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”* In relation to this the Court considers *“property deprivation”* in compliance with the Protocol only if these conditions are fulfilled in a cumulative manner:

1. The deprivation must be legal, in accordance with the principle of legitimacy. The court accepts as legal any action that is in compliance with the principles of the rule of law. This means that not only the deprivation must be based on law, but also the followed procedures must be in respect of the law, within the principles and standards of the rule of law.¹⁹ For the Court, if the criteria of legitimacy are not fulfilled then we have an illegal intervention on the property rights, and in this case the existence of the general interest or the principle of proportionality is not analyzed any further.²⁰
2. The preservation of proportionality.²¹ In order to evaluate the respect of proportionality during the intervention of the lawmaker, with the consequence of the infringement of the individual’s rights provided by the Constitution and the law, there must be taken under consideration the balance between the mean used to achieve and/or protect the public interest and the damage caused to the individual by such use of the means. In other words, the state, within its possibilities, must limit the intervention at a minimum, by seeking alternative solutions, and in general by tempting to achieve the objectives in the least harmful manner in regard to human rights.²² The Court emphasizes that in the case

¹⁷ Gasus Dosier und Fodertechnik GmbH v. The Netherlands, 1995

¹⁸ Beshiri and others v. Albania, 2006; and Marckx v. Belgium, 1979.

¹⁹ Grgic et al. 2007, p 13

²⁰ Iatridis v. Greece, 1999

²¹ Pressos Company Naviera SA v. Belgium, 1995; Broniowski v. Poland, 2004

²² Hatton and others v. United Kingdom, [2001]

of the limitation of rights, a measure, in order to achieve its objectives, must be as much appropriate as proportional.²³

3. The deprivation must be made in the public's interest. The concept of public interest is a flexible concept that changes according to the particular interests of a society and time. In this context, the public interest remains at the discretion of the governments of the member states of the Convention, and the Court is not concerned and does not analyze the cases when exists a public interest able to prevail over the private one. However, it has been accepted in general lines that the public interest is the one that serves to the community, and this is noted and evaluated case by case. In this understanding, in order to somehow unify the practice of the member countries, but without dictating specific cases of 'situations in the public's interest', the Court has set some standards. The expropriation of property from an individual can be legitimized when the aim of such action is to undertake social, economic, educational or other reforms.²⁴ In the Court case *James against the United Kingdom* a thorough analyses has been made on the regulation of the "public's interest" issue.²⁵ In sum of the above, in regard to this principle the reasoning of the Court has now been unified in that although it is at the discretion of the states to evaluate the cases that fall under the "public interest", the court reserves the right to determine whether the undertaken measures by the government of a country have been in proportion with the infringement made to the interests of the individuals.

Besides the above, during the judgment of specific cases, the Court has interpreted the Articles of the Convention by referring also to other principles sanctioned by the Convention, although they have not been claimed to have been violated. Under this understanding the violation of Article 1, of Protocol 1 of the Convention by the side of the state, it is also closely related with other principles such as that on legal security. In regard to this principle, it generally requires that a state must fulfill the legal expectations of its citizens. The principle of legal expectations has at its core the protection of the gained rights: the continuance of application of the law; the prescription in relation to the legislative decision making, ect. To illustrate this, for instance, if a country has taken over the responsibility by law to restitute and compensate the properties of the former owners that were unlawfully expropriated by a former regime, then this undertaken obligation cannot change along the way based on reason of financial difficulty.

The principle of legal security implies also the demand that the law in its thoroughness must have clear, well defined and understandable dispositions. The avoidance of legal gaps is in function of the principle of legal security. Thus, in the case of *Silver and others against the United Kingdom*, the Court has reasoned that in order for the laws to be valid they must be accessible, clear and predictable.²⁶

In summarizing the above, but without setting limits on the cases mentioned, on a general and practical overview, the property rights result to be not absolute, and the states themselves have rooms to set limits on such rights. Property rights are ranked as human rights, but as more flexible when compared to other rights within this grouping. Primarily, the European Convention of Human Rights sets the principles, which must guide the political activity of the lawmakers of any member country. Often a conflict exists among the principles and the policies as part of the

²³ Hentrich v. France, 1994.

²⁴ Hentrich v. France, 1994, paragraph 38 and Mellacher v. Austria [19 December 1989], paragraph 45.

²⁵ James v. United Kingdom, 1986; and Former King of Greece v. Greece, 2000

²⁶ Silver and others v. United Kingdom, 1983

legal activity within a government. In relation to this, Dvorkin in his publication *“Taking Rights Seriously”* states that:

“I consider a principle to be a standard, which must be taken under consideration not because it will bring the desired political, economic or social situation, but because it is a request of justice, or honesty, or of any other dimension of morality.”²⁷

In the following part of this paper, the discussion will focus on the development of the Albanian practice of property rights in respect of the set standards, in the context of human rights. The focus will be on two important time periods for the development of property rights: the first one during the period of communism, and the second after the systemic change and transition to democracy.

2. PROPERTY RIGHTS IN ALBANIA

2.1. Legal relationships on real estate property in the years 1944 – 1990.

With the end of the Second World War, Albania became part of the eastern socialist camp and the economic model that it followed in the forty five subsequent years was that of a planned economy, reflecting the structure of the soviet model. The communist party that had led the National Liberation War placed itself in power immediately afterwards. The communist party, once in power and under the pretext of reconstructing a country torn by the war, as well as in light of the struggle against the domestic and international enemies, put under its control the economy and wealth of the Albanians. This was made possible through the approval of the National Liberation Anti-Fascist Council, which served as a legislative body until it was substituted in 1946 by the People’s Assembly, The accumulation of wealth, especially by putting under their possession real estate properties, as we will see in this section, was achieved through four processes:

1. By ‘forcefully’ expropriating the property and then re distributing that from one category of citizens to another.
2. Through the Agrarian Reform.
3. Through the transformation of property from private to state owned, through such forms as seizure, confiscation and expropriation for state reasons.
4. Through the tax legislation and mainly through the so called extraordinary taxation.

At first, the government of that time disrupted the continuance with the legislation drafted before April 7th, 1939. Further on, a number of laws such as the ones on: *“Confiscation of movable and immovable property of political fugitives”* 1944, *“Confiscation of properties of Italian and German citizens in Albania”* 1945, *“General dispositions on the confiscation of private property”* 1944, *“Confiscation of property and implementation of the confiscation procedures”* 1948, *“Organization and functioning of military courts”* 1944, were all approved with the aim of

²⁷ Dvorkin as cited in Kongoli, 2010, p 220.

confiscating properties. The implementation of these laws was initially oriented towards the political fugitives and Italian and German citizens, who were considered enemies, but later on they were implemented against all those that opposed the regime, by using confiscation of property as a punishment for both criminal and political offenses. Laws on confiscation of properties of political opponents were not new in Albania's history, but never before this phenomenon had reached such extraordinary and extreme proportions as it did now. The confiscated assets were then distributed to the families that had their houses burned during the war and to the families of the partisans, while what remained left was used for the needs of the army and the population in general.²⁸ The same destiny was reserved to the properties of the religious communities, which were also confiscated and transferred to state ownership. Likewise, by means of the special law on "*Control of the assets accumulated during the previous regimes by state functionaries and entrepreneurs*" 1946, there were also confiscated the properties of all political functionaries such as former government officials, parliamentarians, state and municipality officials. In this regard, the properties of entrepreneurs that had benefited from contracts made with the above mentioned functionaries were also confiscated.

However, the laws on seizure and confiscation of properties were not only implemented against the political fugitives and prisoners, or the collaborators with the enemy, but also against merchants, who were kept under continuous pressure of losing their property through the legislation in the field of taxation, such as the law on "*Extraordinary taxation*" 1945. This legislative background served as the basis for the seizure and confiscation of real estate or movable property of all those that failed to pay off the debt with the state that was created as a consequence of the burden placed by these laws. In this way, the taxation legislation at this time, made possible the transfer of the merchant's property at the hands of the state. The real estate property that was confiscated was then registered in favor of the state based on the decision of the seizure commission, which would substitute for the role of the notary by drafting the purchase act in favor of the new owner, now being the state.

Simultaneously, within the Ministry of Economy was established the Central Commission for the Registration of the Assets of the Political Fugitives and Collaborators with the Enemy, which did an inventory and registered the assets and land not only of the higher and middle classes, but also of the small land owners. These measures prepared the ground work for the agrarian reform that would follow. The law on the "*Agrarian Reform*" 1945 had its legal base on Article 12 of the Constitution, according to which "*the land belongs to those who work it*". The agrarian reform was also implemented in other countries of the communist bloc, but in Albania this reform had its own particularity, because different from what happened elsewhere, the peasants in Albania were not allowed to have under their ownership any plot of land at all, not even for meeting their family needs.

Initially, the agrarian reform of 1945 started with the expropriation of the big landowners and with the distribution of land to the landless peasants. However, with the distribution of land in their favor, the peasants had just won the right to use it but not to own it, since the law prohibited the right to transform, to put on mortgage, to divide or even to give the land on lease. In this way, the agricultural land could not be an object of civil circulation. However, the remaining part of the land owners and the peasants that had benefited land for their use would lose these possessions because they were soon forced to form *the cooperatives*. These were economic organizations that were set up by gathering the properties of their members in order to create the

²⁸ Saraci, 2012

so called collective property, which however did not belong to the members of the organization, but rather it was to the service of the public.

During the years 1946 – 1947, the transfer of property in favor of the state continued through expropriations for state reasons, by which the state resulted to be the exclusive owner of all the strategic sectors. This process gradually took large proportions, by being spread in all the economic sectors. The legal base for undertaking such extreme measures was the Constitution of March 14th, 1946, which was then completed with the amendments of 1950. In principle, this Constitution had a general democratic nature, with such guarantees for private property and private initiative in the economy, although with limitations dictated by the “general interest”. However, this same Constitution had many dispositions that sanctioned the supremacy of the state and the possibility of expropriating the private property for state reasons, when such action was required by the general interest. All the expropriated properties after being transferred in favor of the state were reorganized in state owned enterprises in different sectors. Expropriations for state reasons continued also in 1947, a time when free trade was banned and when those few factories that were not affected by the actions of 1946 were also expropriated. Further on, during 1948, expropriation without compensation received greater proportions with the implementation of the law on “*Expropriations of private property for the general interest*” 1948. At the end, in order to conclude with the process, expropriations took place also on the living houses and other buildings that up to that time had remained under private ownership. In this way, the Albanian economy was completely centralized, and private property was continuously shrinking until it was completely vanished in 1969. Under the ownership of the individuals remained just the items of personal use. The Constitution of 1976 gave the *de jure* status of what had happened in reality, by sanctioning the complete ban on private property. Only two forms of property were recognized at this time, the state and the collective one on the agricultural cooperatives. The agricultural and non-agricultural land was declared an exclusive property of the state. Even the plots of land underneath the houses that were built for personal use were considered state property. As a consequence, the real estate properties were taken off the civil circulation. These relations with private property remained unchanged as such for as long as the communist regime ruled the country. After the ‘90s, with the system’s change and the beginning of work of the new pluralist legislature, the first changes that were sanctioned in legislation transformed the state’s approach towards private property.

2.2. Property rights today

The change of the political and economic system in Albania after the year 1990, and the fall of the communist regime found the country not only devastated economically, but also with a legal system that was not appropriate for the new conditions that the establishment of the free market economy required. The new transforming process brought the need of reestablishing the notion of private property and the rights associated with it, which up to that point belonged exclusively to the state. Thus, the first pluralist legislature had the burden to draft new legislation, especially that relating to property rights. In this context, the legislative changes that followed had at their foundation the rights for guaranteeing private property, as a constitutional and a basic human right matter, which were prerequisites for market economy transactions.

The first law that prepared the groundwork for transforming the legislation on property was the law with the Constitutional character “For the Main Constitutional Dispositions”, which did not only abolish the Constitution of 1976, but also paved the way for sanctioning the constitutional

guarantees for the recognition and protection on an equal basis of all kinds of property. The effects of this law were stretched until the approval of the *Constitution of Albania 1998*, which under article 41 restated and reconfirmed once again the recognition and guarantee of private property, which could be limited only by law, for public interest and according to a just compensation.

Despite these positive steps, in order to understand the continuing problematic situation regarding property matters, it is worth looking into some more details in the first approved laws that constituted the legal bases for transferring the assets and the real estate property from the state to the favor of the private subjects. The directions that took the legislation on property and on benefiting the right to own real estate, still under continuous change, can be summarized as follows:

1. *Property restitution and compensation of the former owners:* According to the legal norms drafted for this aim, all the property owners that after the year 1944 had their properties taken unfairly from them by the state, would benefit from the right to have their properties restituted, and when this was not possible due to the changes in the urban plans they would be compensated according to market prices.
2. *Privatization Process:* The laws that oriented the process of privatization made possible the transfer of properties from the state to the private actors. Initially these laws had as their objectives the living houses, which were privatized by the citizens that lived in them. Later on the privatization process continued in the small economic sectors and this process is still underway in the important and strategic sectors of the Albanian economy.
3. *The distribution of agricultural land:* According to the respective laws the aim was to distribute the land of the former agricultural cooperatives in favor of their members.
4. *The legalization of informal buildings:* This legislation has also an historical context. During the years of transition, Albania was faced with a rapid domestic migration from the rural to the urban areas, a phenomenon that had its own consequences. The panorama was one with numerous buildings being constructed without a building permit and with vast occupations of land without the necessary legal authorization, especially in the outskirts of the capital and the coastal areas, by thus creating informal urban settlements. In total, all these buildings created a significant urban chaos, which to make matters worse resulted to be unmanageable by the competent state authorities. Faced with this fact, this situation had only two solutions, the first was to reconstitute the initial status of the land by demolishing the informal buildings, while the second was to accept the situation and establish a legal and urban discipline of these buildings. The legislators chose as the most appropriate the latter by thus approving the law on "*Legalization, Urbanization and Integration of informal buildings*" 2006.

The reforms and the orientations mentioned above went of course under a legislative process, which is still under development. This legislation has often spurred debate and conflicts. As such we can mention for instance the law on transferring the agricultural land in favor of the members of the agricultural cooperatives, which has created dissatisfaction among the former owners that are subject to the law on the restitution and compensation of property, who on the other hand also claimed this agricultural land, subject to this law. In the same way, the laws on privatization are put at the center of debate and criticism, because they did not give priority to the right of the former owners to participate as preferred parties in the privatization process, a right which on the

other hand is reserved to them under the dispositions of the law on the restitution and compensation of property. Criticism has not been absent also in regard to the law on the legalization of the informal buildings, which gave full ownership title to a subject that had informally built on the land that belonged to a former owner, while the latter would be vested off the right to re gain ownership on the land, by being obliged to accept a financial compensation. This compensation would be paid out of the state budget, by placing a burden on the taxpayers, which on the other hand spurs further debate on the logic of this law.

Thus, it seems that the state has failed to find the equilibrium among the public and private interest that was discussed in the first part of this paper. Likewise, the law on legalization of informal buildings has not set a deadline for the full reimbursement of the former owners. While according to this law, the owners of these informal buildings become immediately legal owners, the category of the former owners does not have a clear time line on when they will be compensated for the properties that were unlawfully expropriated from them. In this context, the standards set by the proportionality principle discussed in the first part, result to have not been respected. The cases mentioned above are only a few among the numerous ones that have spurred debate in this regard.

By taking a general view on the after '90s property legislation passed in Albania, we can also notice that this legislation has also not respected the principle of legal security, which as discussed previously means a legislation that is clear, understandable, and without overlaps. Furthermore, the frequent amending of a law is closely related and to the damage of the principle of legal security. In this view, another shortcoming of the legislation on property, after the '90s, is the vast number of laws approved in a relatively short period of time, and especially the frequency of their amendments due to the continuous need for improvement. For instance, the law on the restitution and compensation of property has changed 20 times within 20 years, thus averaging once a year. In general, the tendency to frequently amend the laws makes them more vulnerable to unjust implementation. There is no formula on the number of the changes that must be made to a law, and on the other hand if there is a need, the laws certainly must be changed, however these frequent changes affect the sustainability, importance and effectiveness of the law itself.

In regard to the above, the Albanian lawmakers seem to have been guided in their lawmaking activity by short term demands and political decisions, and they have failed to fulfill some well accepted standards by the international legislation. This problematic situation is also demonstrated by the increasing number of Albanian citizens that address the Court in Strasbourg. The total number cases pending to be considered by the ECHR was a significant 379 by the end of 2012. Referring to the statistics, the Albanian cases judged by the ECHR from 1959 to 2010 relating to property matters accounted for 22% of the total. According to the type of judgment the Court has found violations of the rights in 85% of the cases, as opposed to 4% without any violation being found.²⁹

To summarize, what was mentioned above is only a brief overview of the shortcomings of the laws on property that serves to create an idea on the problems derived by the development of this legislation. The listing and deepening in all the controversial issues created by this legislation, extends beyond the focus of this essay, and it can be very well subject to other studies. However, what we can state in general is the fact that the lack of a consolidated tradition in treating private property matters, and as a consequence the weak legislation in this field, has often yielded a negative result in regulating property relations.

²⁹Public relations Unit of ECHR, 2011

What can be stated in general is the fact that Albania, as a member country of the Council of Europe, with the ratification in 1994 of the European Convention of Human Rights, has the obligation to comply with the set norms by this Convention on property matters. Only in this way can the rights of the citizens be respected and the financial costs for the state budget minimized, costs that come as a result of the increasing number of cases that are won by the citizens when brought before the Court in Strasbourg.

CONCLUSIONS

Property, just like freedom, constitutes a fundamental right. Its recognition represents a declaration of high value and particular importance for the rule of law and the welfare state. Property is the most important institution of law, that defining the private from the public sphere. For this reason, this concept has a particular need for being regulated by normative acts and standards already accepted in the supra national domain.

Property rights, as seen in the first part of this paper, are not a concept given once and for all. It has changed over time, and nowadays for a democratic society to prosper economically and to be in respect of human rights it must guarantee respect for these kinds of rights. Likewise, property rights, in framework of human rights, are not unlimited, since states can intervene in this regard. The debate today revolves around the question on to what extent the property right must be unlimited, and to what length the state can place limitations of any kind on private property. In this view, we must accept that the international legal instruments in the protection of private property set a standard although at a minimum, around which policies may be undertaken.

Thus, the government representing a state, must in any case during a legislative process take under consideration two facts: at first the reason why the laws exist, which is the regulation of social conflicts for allowing the individual's and the society's as a whole pursuit of happiness, and secondly to properly weigh the interests of different groups when their respective rights are in conflict, being these rights in the public or private sphere.

In the second part we saw how during the communist dictatorship private property rights ceased to exist in Albania, by completely tossing the balance between the public and the private interest, to the latter's disfavor. This situation changed with the systemic change in the early '90s, a point in time when Albania started its pace towards democracy. The international practice of human rights, which now served as guidance, provided general principles and standards regarding the applicable legislation that concerns property rights, such as the principle of proportionality, legal security, etc. By reviewing the experience of Albania, it can be noted that these principles have not found their full application on the property legislation passed after the '90s. This legislation, although it has incurred various changes that have of course brought some positive effects, is not able to provide solutions for a great part of the society's real demands. This is reflected in the numerous conflicts that exist nowadays in relation to property matters. In reality, the laws on property nowadays in Albania, demonstrate a difficulty in being understood and applied and this also due to the fact that they have undergone numerous and frequent changes.

At the conclusion, it can be stated that the laws must always provide norms for keeping alive the social interests, as a precondition for ensuring the harmony and tolerance among the society's different strata. The legal framework in the property rights relations must follow and take under consideration the high level of the individual's sensitivity towards private property. This perspective, if taken under consideration, would aid in drafting laws in this field that are very clear, without rooms for abuse or misinterpretations, and that comply with the standards set forth

by the international legal practice. In this way, room for solution would be provided for one of the most conflicting issue that concern Albania nowadays. Rightfully tackling property matters would set Albania on the right track with the country's own Constitution and International Conventions ratified in this regard.

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