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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS ON THE DRAFT LAW ON REGOGNITION, RESTITUTION AND COMPENSATION OF POPERTY OF THE REPUBLIC OF ALBANIA

by

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1. Introduction

By way of introduction, two preliminary observations may be made:

- Some of the ambiguities or inconsistencies noted in the following comments may be explained by the English translation provided to the Venice Commission.

- The Draft was submitted to the Commission without an Explanatory Memorandum; some of the amendments suggested here could alternatively be achieved by an explanation in an Explanatory Memorandum.

2. Comments on an Article-by-Article basis

1. In Article 1 of the Draft, among the objects of the Law, there should also be reference to the object of regulating judicial review, which regulation is to be found in Article 20, paragraph 3.

2. The first paragraph of Article 2 of the Draft (in the English translation) speaks of the taking of property by the state "according to legal acts, sub-legal acts, criminal court decisions *or any other unjust form*". It is striking that legal acts and sub-legal acts (presumably statutes and regulations of lower rank are meant here), as well as court decisions are qualified as "unjust" forms of the taking of property.

It might be argued that *any* governmental act under the former Communist regime is now considered "unjust", but the provision is not restricted to that period, since it refers only to a starting date (29.11.1944), but not a closing date. Article 19, paragraph 1 of the Draft seems to imply that the closing date is the entering into force of the Law. Consequently, also the State's taking of property after the reform is intended to be covered by the Draft.
If the English translation is correct, the provision has to be rephrased.

3. The second paragraph of Article 2 refers to an annexed list of Statutes and a Presidential Decree, and provides that expropriations or limitations amounting to expropriations that have been imposed by the State in the implementation of the laws provided in the Annex are considered expropriations in the public interest.
This formulation raises two questions:

a) Are the words "the laws" intended to exclude the Presidential Decree mentioned in the Annex? If not, the Presidential Decree should be explicitly mentioned in this paragraph.

b) The provision contains a legal presumption with respect to the requirement of a public interest. Does that mean that an appeal to a court, as provided for in the third paragraph of Article 20 of the Draft, does not cover the legal issue of whether any of the expropriations or limitations carried out under one of those laws was in the public interest? If that were the intention, the provision would conflict with Article 6 of the European Convention on Human Rights, which provides that in the determination of his or her civil rights everyone is entitled to a hearing by an independent and impartial tribunal. The right to property is doubtlessly a civil right in the sense of Article 6, and the issue of whether the expropriation is in the public interest concerns a "determination", since the person concerned is entitled to restitution if the

expropriation is held not to be in the public interest. According to the Strasbourg case-law, this right of access to court implies that the court shall have "full jurisdiction". Consequently, the issue of "public interest" must be subject to judicial review. This should be reflected in the wording of Article 2, paragraph 2.

In this context, it is pointed out, that Article 41, paragraph 5 of the Albanian Constitution contains a guarantee of access to court for disputes concerning only the extent of compensation, which, in the light of Article 6 of the European Convention on Human Rights, is too restricted.

In view of the above observation, a recommendation is made to delete paragraph 2 of Article 2, in accordance with Option II of Article 7, paragraph 1 under f.

4. The formulation of Article 3, under a. of the Draft should make it clear that "unjustly" is meant to be a qualification of "dispossessed" only, and not of "expropriated" and "confiscated".

5. Article 3 under b. restricts the scope of the Draft Law to "immovable" property. Article 1 of the First Protocol to the European Convention on Human Rights does not contain such a restriction of the right to peaceful enjoyment of possessions. And, indeed, movable possessions such as art objects, jewellery and the like may be very valuable, and may be subject to confiscation. Movable possessions, therefore, would seem to require the same kind of protection.

Article 5 of the Draft presents two options to deal with movable property. Both options are acceptable, but in order to avoid the impression that the right to peaceful enjoyment of movable possessions is of a different character or a lower rank, there is a certain preference for option 2.

Since in that case the definition of "property" in Article 3 under b will have to be revised, it must be stated explicitly in the articles that follow if any of the provisions do not apply to movable property.

6. The definition of "expropriated subject" in Article 3, sub. c. is not complete, since it does not cover "any other unjust form" of nationalisation, expropriation or confiscation", as mentioned in Article 2, paragraph 1.

7. Article 4 of the Draft excludes several types of expropriation, confiscation and other forms of acquisition of property by the State from the application of the Law. This again raises the issue of judicial review. If the Law does not apply to these takings of property by the State, does that mean that judicial review is also excluded, or do general rules of legal protection apply? If the former were the case, it would conflict with the requirement of access to court as laid down in Article 6 of the European Convention on Human Rights. This point has to be clarified.

8. The first paragraph of Article 5 of the Draft (in Option 2) implies a presumption of State ownership and contains an enumeration of means to prove private ownership. The inclusion of the word *"etcetera"* makes the enumeration open-ended. It is preferable to state explicitly that private ownership may be ascertained by all means provided for in Albanian law (see the Judgment of the European Court of Human Rights of 9 December 1994 in *The Holy Monasteries v. Greece*, para. 58).

9. The exception of restitution referred to in Article 7, paragraph 1 under e (special cultural and historical property) is not self-evident. Why is State ownership required in those cases in the public interest? The law may provide the necessary guarantees for their preservation and use, for public access *etcetera*, as is the practice in many countries, in the form of legislation concerning the protection of monuments and other objects of cultural heritage. Indeed, the second paragraph of Article 1 of the First Protocol to the European Convention on Human Rights explicitly recognises the right of the State to control the use of property in accordance with the general interest.

It is true that the European Court of Human Rights leaves a broad margin of appreciation to the domestic authorities as to what "public interest" requires (see the above-mentioned judgment in the *Holy Monasteries* case, para. 69). On the other hand, European standards common in most European States are also of relevance here.

10. In view of Article 181 of the Constitution, it is recommended that the exception of restitution referred to in Article 7, paragraph 1 under f (Option I) be deleted in accordance with Option II. See the observation at the end of point 3 of this opinion.

11. The second paragraph of Article 8 of the Draft is based on the principle of protection of acquired rights of the State or third parties, which results in the obligation of the expropriated person to pay compensation for the investment or to resign him- or herself to the expropriation. The only condition for entitlement of the third party to compensation for the investment is that the investment was made "in conformity with legislation in force". It is submitted that not only should the investment have been made in conformity with the applicable law, but the third party should also have made the investment in good faith as to his or her property right at the relevant moment. Otherwise, the obligation to pay compensation or to resign oneself to the expropriation would amount to, for the expropriated person, a limitation of the enjoyment of possessions that is not proportional. Indeed, why should the beneficiary of the expropriation enjoy better legal protection than the original owner of the building site?

12. The second paragraph of Article 11 of the Draft states that the Local Commission on Restitution and Compensation of Property must take a reasoned decision. It does not provide for any criteria on the basis of which the Commission decides whether to accept the request of the expropriated person or to opt for another form of compensation. This makes it difficult for a court to review the decision of the Commission, since in general in administrative law cases, the court should not substitute its own choice of several options for that of the administrative body appealed against. The addition of a provision should be considered requiring the Commission to honour the request of the expropriated person if feasible, or otherwise opt for the form of compensation that is most comparable to the one proposed by that person.
After all, as a rule, compensation should approximate to *restitutio in integrum* as closely as possible in order to be proportionate. (As a good example, see Article 12 of the Draft, which purports to come as close as possible to *restitutio in integrum)*.

13. It is not clear what "purpose" in the second paragraph of Article 13 of the Draft means in relation to the valuation.

14. In the third paragraph of Article 13, in addition to "expert group" there should be reference to "any other person appointed by the Commission by virtue of the first paragraph".

15. It would be advisable to include in the third paragraph of Article 13 of the Draft, or delegate for subordinate regulation, a procedure for challenging a member of the Commission or an expert for conflict of interest, with a reference to Article 16, paragraph 1 under j.
It would seem to be more logical to combine Articles 11 and 14 of the Draft, since Article 14 enhances the position of the expropriated person *vis-à-vis* the compensation.

16. Article 15 of the Draft has to clarify if, and to what extent, the proposals made by the President, the parliamentary majority and the opposition are binding nominations for Parliament. If not, the question arises what is the added value of appointment by Parliament. In principle, it is not in conformity with the status of Parliament for it to have to take decisions that leave no choice.

17. In Article 15, paragraph 2 under e. of the Draft, the word "crime" should be further defined to make clear that a minor offence or a very light penalty would not disqualify the candidate.

18. A deletion is suggested of the words "if he has been working in public administration" in Article 15, paragraph 2 under f. of the Draft. If, for example, a lawyer working in a private law firm has a disciplinary measure taken against him or her by the (Chairman of the) Bar for a serious matter, he or she should be disqualified as a candidate as well.

19. In Article 16, paragraph 1 under a of the Draft, the words "except for the case provided in Article 19 of this Law" should be clarified. It is understood to mean that, in the event that a Local Commission for Restitution and Compensation of Property has not taken a decision within three or four months, as the case may be, there is no appeal to the Committee but the Committee deals with the case *ex officio*.

20. In Article 16, paragraph 1 sub. c. of the Draft, there should be a reference to Article 17, paragraph 3. Moreover, for the sake of clarity "nominates" should read "appoints" or "approves" (see Article 17, paragraph 2 and Article 21, paragraph 2).

21. It is suggested, with respect to Article 16, paragraph 1 under g of the Draft, that the Regulation of the Committee for Restitution and Compensation of Property should not be approved by the Committee itself, but by Parliament or the Government for the sake of an additional guarantee of the legal protection of the expropriated persons and of third parties.

22. It is recommended that the second paragraph under a of Article 16 include the violation by a Local Commission of its rules of procedure.

23. It should be clarified how the provisions of Article 16, paragraph 2 under b. and under c. relate to each other. It would seem that a case under c. automatically results in a case under b.

24. In relation to Article 17, paragraph 3 under b. and d., the same observation may be made as was made in relation to Article 15, paragraph 2 under e. and f.

25. If the wording of Article 2, paragraph 1 of the Draft is broadened to include other expropriations, that should be taken into account in the wording of Article 18, paragraph 1 under a.

26. To the words "at the end of the term for appeals" in Article 18, paragraph 4 of the Draft should be added "and if no appeal has been lodged".

27. Article 20 of the Draft seems to suggest that no appeal to a court lies from a decision of the State Committee for Restitution and Compensation of Property on procedural issues. It is clear, however, that decisions by the Committee concerning the jurisdiction or competences of a Local Commission in the sense of Article 16, paragraph a and decisions by the Committee concerning the issue of the documents on which a Local Commission has based its decision may lead to a "determination of a civil right or obligation" in the sense of Article 6 of the European Convention of Human Rights. Excluding an appeal to a court would therefore be in conflict with the right of access to court guaranteed in Article 6 and also with the last paragraph of Article 41 of the Albanian Constitution.

28. In the first paragraph of Article 21, the word "nominates" should be replaced by "appoints" (see the first paragraph of Article 15).

3. General conclusion

As a general conclusion, it may be stated that the Draft does not raise many objections from a point of view of constitutionality, the rule of law, and human rights. The main doubts expressed concern:

- possible limitations of the right of access to court;
- limitations of, or lack of clarity with respect to the right of the expropriated person to have, in principle, his or her choice of compensation honoured;
- certain exceptions to the right to restitution of property taken by the State;
- lack of damages for the period during which an expropriation appears not to have been in the public interest; and
- nomination to and composition of the State bodies created for the implementation of the Law.

Some of these concerns will have to be addressed in any case. Others would no longer apply if the scope of application of the draft Law were reduced, making it applicable only to takings of property carried out under the communist regime (or at least prior to the entry into force of the European Convention of Human Rights).