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(VENICE COMMISSION)

COMMENTS ON THE DRAFT LAW ON RECOGNITION, RESTITUTION AND COMPENSATION OF PROPERTY OF THE REPUBLIC OF ALBANIA

by

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Draft Law on Recognition, Restitution and Compensation of Property of the Republic of Albania

While I agree with the comments made by Mr Pieter van Dijk, I prefer to raise general considerations to the concept of the Draft Law.

1.1. The Draft Law implements Art. 181 of the Albanian Constitution of 1998, which obliged the Assembly to "enact laws for the just regulation of various matters related to expropriations and confiscations which took place before the approval of this Constitution". The regulations shall be guided by Art. 41 which lays down the international usual guarantees of the right to property.[1] It is remarkable that a Constitution provides for such a question and that it occurs eight years after the change of system. Moreover, the "matters related to expropriations and confiscations" are not limited to the Communist rule; the period of time for "just regulation" extends from 1944 until November 1998 when the Constitution came into force. Apparently the new principles and rules of ownership settlement also apply to legal norms issued by the new regime between 1990 and November 1998. As the Constitution states in Art 181, para 2 the latter may only be applied in so far as they do not conflict with the Constitution. This means that Art. 181 has to be interpreted in connection with Art. 41, and this interpretation constitutes the common principles both for the new laws and for the application of rules issued before the Constitution.

The Venice Commission is not aware of any official interpretation of Art. 181 with regard to Art. 41. As the available decisions of the Constitutional Court of Albania show that the Court emphasised the regulation of restitution and compensation for expropriated property had to be based on the principle of equality. The Constitutional Court also noted that infringement of private property rights by the previous regime had to be remedied "by any means possible under the country's socio-economic conditions", and compensation had to be "fair".[2]

1.2. The Albanian Constitution requires "just regulation" and "fair compensation". Consequently there is no constitutional obligation to return expropriated or confiscated property in kind to the former owner. Compensation does not have to be full, but should be fair. This is in line with the jurisprudence of the European Constitutional Courts, which faced the same ownership problem in the nineties and elaborated theoretical grounds for the (re)privatisation of communist State property. None of these Courts held that the right to property would require the restitution of the property taken by the Communist regime.

The German Federal Constitutional Court stated that restitution or compensation was not based on the right to property but on the principle of fairness and justice, and further on the principle of the social state. This also means that there is no obligation for full compensation under the Constitution. To determine the amount of compensation for property losses, the financial situation of the State and its other obligations arising from the change of system shall also be taken into consideration. The main principle of compensation shall be equal treatment.[3]

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[1] *Expropriations and limitations in the exercise of property shall be ordered by law on the grounds of public interest and against fair compensation. However, Para 5 Art. 41 gives access to court only regarding the amount of compensation (and not whether the limitation was in public interest).*

[2] *Decisions of 21.03.2000 and 24.04.2001.*

[3] *Gerechtigkeit and Sozialstaatlichkeit. BVerfGE 84, 90 (121, 130).*

Similarly, the Hungarian Constitutional Court based its case-law on compensation based on the principle of equality.[4] The Court determined – among others – that full restoration of previous ownership in land and partial compensation for all other property losses would contradict the principle of equality. The Hungarian Court explicitly stated that the Compensation Act created a new title for the claims of former owners, which excluded claiming under old titles. The same also follows from the position of the German Constitutional Court, which denied that compensation could be based on the right to property.

Indeed, a thorough basis for the compensation issue presupposes the clarification of the relationship between the new law and the pre-constitutional law. The new, democratic Constitution has no retroactive force. It is also generally accepted in Europe that the unconstitutionality of a law, as a rule, has no practical effect on already closed legal facts and relationships. But even if the closed legal situation remains untouched, new (for instance: legislative) obligations will or can originate from its unconstitutionality in order to find a solution. The validity of earlier acquisitions by the (communist) State of property for which the legal basis had now become unconstitutional can be recognised; on the other hand the new Constitution can oblige the legislator to give compensation to the former owner. The legislator is free to choose the method of remedy. He may opt for the *in integrum restitutio*, or for a full or a partial compensation in money or in vouchers or shares, depending on the historical and economic conditions, on the sole condition that comparable groups of former owners are treated equally.

This is the common solution to the problem in the post-socialist States.[5] It is to be noted that the "recognition" of former ownership in the sense that the original title was not lost in the expropriation by the communist State would raise difficult theoretical and practical problems as to the validity of the pre-constitutional law in general. Of course there may exist cases where the expropriation was not lawful even under the then valid law, and the State may also have legal obligations from earlier laws, when for instance the compensation foreseen in those laws was not actually paid. Such claims may be brought before the court, but the enforceability is usually doubtful because of problems of evidence or the statute of limitations having run out. Such cases remain however the exception. Considering the vast number of property losses under Communism the above-mentioned solution is practicable: the Restitution/Compensation Acts create the title for (re)gaining property. "Recognition of ownership" means in that case that the former owner has a right to restitution or compensation under the Restitution/Compensation Act.

1.3. The settlement of property issues after Communism is different from other large-scale changes in ownership which occurred during history. It is not comparable with the nationalisation of whole industries (as for instance mining) or the secularisation of church property. It is only comparable with the process of establishing the Socialist collective ownership, which was aimed at the total liquidation of private property. Reinstitution of private property and market economy in post-communist States is an equally extraordinary historical process. While privatisation of the former State or collective property and compensation for

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[4] *Decisions 21/1990: 4 October 1990 and 16/1991: 20 April 1991. in: Sólyom/Brunner: Constitutional Judiciary in a New Democracy, The Hungarian Constitutional Court. Ann Arbor, 2000, 108, 151; Comments by Sólyom, ibidem 30-35. Full text of further compensation cases (27/1991; 10/1992; 64/1993) in: Brunner/Sólyom: Verfassungsgerichtsbarkeit in Ungarn. Analysen und Entscheidungssammlung 1990-1993. Baden-Baden, 1995.*

[5] *It's also a common phenomenon that former owners insist on the idea that nationalisations and expropriations under Communism had no legal effect.*

victims must be in conformity with the new Constitution and the new international obligations of the State, it cannot be measured in all details by requirements, which have been created for normal conditions. It is not by chance that for instance Estonia and Hungary ratified the European Convention on Human Rights with the reservation/declaration that Art. 1 of the First Protocol to the ECHR does not apply to issues of privatisation and compensation. Exceptions from restitution/compensation concerning certain types of property (movables, land subject of agrarian reforms after WWII, urban apartments) or of owners (juristic persons, bodies corporate) may be permissible.[6]

1.4. The Albanian legislator is free to decide on the restitution of ownership as a main form of remedy for takings under Communism. He is also free to provide full compensation instead of restitution in cases where the public interest requires that the property remain in public use. Although the lawmaker is not obliged by the Constitution to do so, this maximum compensation surely meets the constitutional requirement of just regulation and fair compensation under Arts 181 and 41. However, some conceptual issues of the Draft Law should be reconsidered.

2.1. The "recognition of ownership to property" (Art 6 of the Draft Law) may be interpreted in various ways, some of which raise theoretical and practical difficulties. The Constitutional Court of Albania does not seem yet to have enlarged on the problem of the original validity of Communist expropriations. It shall also be noted, that the Draft Law applies not only to Communist expropriations but also to giving former State property (within this surely formerly expropriated and confiscated property) to new owners by law of the new regime. The beneficiaries of such redistribution of property were not necessarily the original owners. "Recognition" of ownership as recognition of continuous existence of ownership titles with no regard to the laws that changed the ownership could question the validity of laws of the new regime. The exclusion to the Draft Law of expropriations made against a just compensation (Art 4,b) means that in such cases the State became the legal owner. This would also contradict the above interpretation of "recognition". Unclarified questions should be avoided in the Draft Law.

For the purpose of the Draft Law it seems to be sufficient that the Law declares the right to restitution and compensation of the expropriated subject. It is recommended to delete "recognition" from the title and the text of the Draft Law.

2.2. Article 2 Para 2 of the Draft Law and Annex 1 raise doubts as to whether the principle of equality prevails. Restitution and compensation are not of the same value; compensation instead of returning the property to the former owner may be justified by the fact that the expropriated property is being used for public purpose. The laws and the decree listed in Annex 1 gave former expropriated property to private persons for private use. The presumption of "expropriation in the public interest" (Art 2, para 2) is hardly acceptable for these cases. The former owners of the property subject to Annex 1 are not treated equally with other owners whose property is used by third persons and serves no public purpose.

Deletion of Art 2, para 2 and Art 7, para 1 point f. is recommended.

3. The Draft Law seems to presuppose that, as a rule, all "takings by the State according to legal acts, sub-legal acts, criminal court decisions or in any unjust form", especially by way of

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[6] *In Estonia and in Hungary nationalised apartments were not returned to the former owners. The law gave the actual tenants option to buy the flats they were actually living in for a low price. In Hungary only natural persons were compensated for property losses.*

expropriation, nationalisation or confiscation between 29 November 1944 and November 1998 were "unjust" and violated the right to property of the owners; or are at least suspected of being unconstitutional if measured to the now valid Constitution, or (mostly the laws in Annex 1) seek revision and "just regulation" according to the Constitution as specified by the Draft Law. However, Art 4 determines broad exceptions. Albania's policy will maintain the result of post-war changes in ownership as the agrarian reform of 1945 and the consequences of the "extraordinary taxation" of the same year. From point b. of Art 4 follows that there were cases in which expropriation was made against just compensation and therefore they meet the requirement of Art 41 of the Constitution. Property donated to the State is also excluded for restutituion.

Under this regulation the restitution/compensation will be decided on a case-by-case basis. The Local Commissions verify the validity of documents, which prove that the property was taken on the grounds of legal/sub-legal acts or criminal court decisions,[7] and they will surely have to identify the cases where just compensation was already paid and to determine the other cases excluded from the application of the Draft Law. The court will deliver the final decision on whether the property is within the scope of the Draft Law. (Art 20, para 3) Although the State Committee will make decisions to unify the practice of the Local Commissions and also the Supreme Court can provide for the uniformity of court decisions, it seems that the scope of application of the Law is not determined with sufficient certainty either at the input or the output. Considering the huge number of cases to be dealt with, it would be desirable to determine more exact criteria for property falling under the Law in the Draft Law itself and less to leave the decisions to the Commissions and courts.

As to the "input", nationalisations and expropriations occurred also under Communism on a legal basis. In those highly centralized regimes expropriations of a different kind of property (land, houses, banks, and factories of certain size, even movables such as jewellery, gold, silver, private libraries and archives, or objects of art) were often part of political campaigns. That is, the laws, decrees *etc.* on the grounds of which mass expropriations and confiscations were carried out can be identified. On the other hand there may be nationalisation laws that provided for fair compensation, which was then in fact paid. There may be laws that ordered confiscation of property, but even under today's constitutional standards these cases may not be objected to, such as for instance confiscation of property of war criminals. Similarly, not all criminal court decision that confiscated property can be considered as "unjust taking". The latter applies to political processes, which were characteristic in the Communist regimes in the fifties. However, confiscation of property, for instance in smuggling or bribery cases deserves no restitution.

As to the uncertainties at the output, the determination of excluded cases under Art 4 lacks sufficient criteria. Donations to the State might have been enforced by political pressure. (For instance peasants who were unable to fulfil the duty of surrendering the products quota to the State offered their land to the State and moved into cities in order to escape criminal punishment. See also the political pressure against ethnic Germans to give up property rights in Czechoslovakia.[8]) By what criteria can it be decided whether compensation was "fair" under the economic and social milieu forty or fifty years ago? The very existence of "public interest" can

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[7] *The "other unjust ways" mentioned in Art 2, para 1 (and Option II to Art 5) seems to play no further role and should be deleted.*

[8] *The former fact – common for many Communist States – was taken into consideration by the Hungarian Constitutional Court in the above cited decisions, for the latter see Decision of the Constitutional Court of the Czech Republic, Az IV.ÚS 205/97, Nr. 144/1997.*

only be judged fair if one considers the differences between the historical periods immediately following WWII or the changes which occurred during the long Communist rule.

Deciding on such essential questions – and probably developing uniform criteria after a large number of requests have already been decided – is neither a matter for administrative agencies, such as the Local Commission, nor for the judiciary. These are questions of policy concerning a genuine problem of democratic transition, the settlement of property rights as a part of establishing market economy based on private property. As such, these problems shall be covered exclusively in the decision of the legislator and of the Constitutional Court.

Considering the nature of these questions and also the need for a uniform rule applicable in a large number of cases it is recommended that the Draft Law change the method of regulation. The Law on Restitution/Compensation should determine and list all the laws, decrees and other sub-legal acts on the basis of which expropriation, confiscation and other taking was made during the period between 1944 and 1989. The catalogue can also include laws the consequences of which the Assembly has revised. (such as Annex 1 in the present Draft). The legislator can omit those laws of which it will not change the effect (for instance the 1945 laws on agrarian reform) or those laws on the basis of which the takings had been fairly compensated. This is the best way to solve the problem of restitution/compensation for movables.[9] The Constitutional Court can review the catalogue of legal norms, which determine the scope of restitution/compensation. The constitutional review guarantees that the principle of equality and fair compensation is complied with. On the other hand the Constitutional Court will determine the constitutional limits of the margin of appreciation that is necessary for the legislator in this highly political issue of transition.

[9] *The proposal of the Draft Law has no limitation as to the movable objects for which restitution/compensation can be requested and the discretion of the Commission to decide whether the taking was "unjust" is also unlimited. This solution is constitutionally questionable and practically boundless and endless.*