Strasbourg, 21 May 2007

Opinion no. 433/2007

Restricted
CDL(2007)060
Eng.Only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS ON THE LAW OF THE REPUBLIC OF ALBANIA ON LEGALISATION, URBAN PLANNING AND INTEGRATION OF UNAUTHORISED BUILDINGS

by

Mr Jan VELAERS (Member, Belgium)

1. The law nr. 9482, “On legalization, urban planning and integration of constructions without authorization” of 3 April 2006, aims at finding a solution to the problem that was created, on the one hand, by the illegal occupation by a considerable number of peasants and highlanders, during the last 15 years, of grounds in the area of Tirana and of other larger cities of Albania and on the other hand, by the building on these grounds of constructions for habitation or for other economic, social or cultural purposes, without the authorization of the respective state authorities and with violation of several urbanistic provisions.

The solution the law proposes is that, under certain procedural and substantial conditions, the illegal occupation of the grounds and the illegal building of the constructions can be legalized and that the property of the building sites can be transfered to the persons that have occupied hem.

The law raises different questions as to its compliance with the right of the private owners to peaceful enjoyment of their possessions, as guaranteed in article 1 of the First additional protocol of the European Convention on Human Rights and in article 17 of the Albanian Constitution.

In this opinion these questions will be examined in the light of the jurisprudence of the European Court on Human Rights on article 1 of the First additional Protocol which provides:

> “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.”

In the first part of this opinion, the general principles of this jurisprudence will be examined. In the second part the different allegations presented by the appellants before the Constitutional Court of the Republic of Albania, will examined in the light of the principles described in the first part of the opinion.

I. General Principles on the protection of property, derived from the jurisprudence of the European Court on Human Rights from article 1 of the First additional protocol to the European Convention on Human Rights and Fundamental Freedoms.

A. Deprivation of possessions: article 1, paragraph 1, second sentence of the First additional protocol

2. Article 1 of Protocol No. 1 comprises three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not, however, “distinct” in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.[1]

[1] ECHR, Sporrong and Lönnroth, judgment of 23 September 1982**, § 6**1; ECHR, James and others v. U.K., judgment of 21 February 1986, § 37; ECHR, Lithgow and others v. U.K., judgment of 8 July 1986, § 106; ECHR, Mellacher and others v. Austria, judgment of 19 December 1989, § 42; ECHR, Holy Monasteries v. Greece, judgment of 9 December 1994, § 56; ECHR, Malama v. Greece, judgment of 1

3. Although the measure provided for by the Albanian Law taken do not amount to a formal "expropriation" pursued in compliance with the general legislation on expropriation, it is clear that it has to be qualified as a "deprivation of possessions" within the meaning of the second sentence of the first paragraph of Article 1 of the First Additional Protocol. In order to determine whether there has been such a "deprivation of possessions" one must not confine oneself to examining whether there has been a formal expropriation. The loss of the ability to dispose of the land in issue, entail sufficiently serious consequences for the applicants de facto to have been "deprived of possessions".[2]

B. The principle of legality

4. The first and according to the European Court most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorizes a deprivation of possessions only "subject to the conditions provided for by law", and the second paragraph recognizes that States have the right to control the use of property by enforcing "laws". Moreover, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention.[3]

5. The principle of lawfulness presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application[4]. Moreover, the law upon which deprivation is based should be in accordance with the internal law of the Contracting State, including the relevant provisions of the Constitution.[5] The power of the European Court to review compliance with domestic law is, however, limited.[6] The domestic Constitutional Court is of course in a better position to interpret the dispositions of the Constitution. For that reason the Commission of Venice will also to take a reserved position on the issue of the interpretation of the relevant articles of the Albanian Constitution.

6. The reference in the second sentence of paragraph 1 of article 1 of the First protocol to "the general principles of international law" means that those principles are incorporated into that article. According to the European Court on Human Rightqs these principles were however specifically developed for the benefit to non-nationals. So they are not applicable to a taking by a State of the property of its own nationals.[7]

March 2001, § 41; ECHR, Wittek v. Germany, judgment of 12 December 2002, § 41;ECHR, Hutten-Czapska v. Poland, judgment of 22 February 2005, § 142; ECHR, Jahn and others v. Germany (GC), judgment of 30 June 2005, § 78; ECHR, Edwards v. Malta, judgment of 24 October 2006, § 57.

[2] See on the *de facto* expropriation, among others, ECHR, Sporrong and Lönroth v. Sweden, 23 September 1982, § 63; ECHR, Papamichalopoulos and others v. Greece, 24 June 1993, §§ 41-45; ECHR, Carbonara and Ventura v. Italy, 30 May 2000, § 60; ECHR, Belvedere Alberghiera S.r.l. v. Italy, 30 August 2000,

[3] ECHR, Amuur v. France, judgment of 25 June 1996, § 50; ECHR, The Former King of Greece and others v. Greece, judgment of 25 October 2000, § 79; ECHR, Malama v. Greece, judgment of 1 March 2001, § 43; ECHR, Hutten-Czapska v. Poland, judgment of 22 February 2005, § 146; ECHR, Jahn and others v. Germany (GC), judgment of 30 June 2005, § 81.

[4] See, *mutatis mutandis*, ECHR, Broniowski v. Poland, (GC) judgment of 22 June 2004, § 147; ECHR, Malone v. U.K., judgment of 2 August 1984, § 66-68; ECHR, James and others v. U.K., judgment of 21 February 1986, § 67; ECHR, Lithgow and others v. U.K., judgment of 8 July 1986, § 110; ECHR, Hentrich v. France, judgment of 22 September 1994, § 42; ECHR, Saliba v. Malta, 8 November 2005, § 37**;** ECHR, Edwards v. Malta, judgment of 24 October 2006, § 60.

[5] ECHR, The Former King of Greece and others v. Greece, judgment of 25 October 2000, § 82

[6] ECHR, Hakansson and Sturesson v. Sweden, judgment of 21 February 1990, § 47.

[7] ECHR, James and others v. U.K., judgment of 21 February 1986, § 58-59, 61; ECHR, Lithgow and others v. U.K., judgment of 8 July 1986, § 113.

C. The "public interest-principle"

7. Any interference with the enjoyment of a right or freedom recognized by the Convention must pursue a legitimate aim. A measure depriving a person of his property has to pursue, in principle as well as on the facts, a legitimate aim "in the public interest".[8] The notion of "public interest" is necessarily extensive. In particular, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures of deprivation of property. The Court, finding it natural that the legislature should enjoy a margin of appreciation in implementing social and economic policies, will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation[9]

D. The principle of proportionality: the "fair balance"-test

8. Not only must an interference with the right of property pursue, on the facts as well as in principle, a "legitimate aim" in the "general interest", there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized by any measure depriving a person of his possessions The European Court on Human Rights considers that a measure must be both appropriate for achieving its aim and not disproportionate thereto. That requirement is expressed by the notion of a "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole. In each case involving an alleged violation of that Article the Court must therefore ascertain whether by reason of the State's interference the person concerned had to bear a disproportionate and excessive burden.[10]

---

[8] ECHR, Lithgow and others v. U.K., judgment of 8 July 1986, § 120; The principle of a "fair balance" inherent in Article 1 of Protocol No. 1 itself presupposes the existence of a general interest of the community. ECHR, Hutten-Czapska v. Poland, judgment of 22 February 2005, § 146.

[9] See ECHR, James and others v. U.K., judgment of 21 February 1986, § 46; ECHR, The Former King of Greece and others v. Greece, judgment of 25 October 2000, § 87; ECHR, Malama v. Greece, judgment of 1 March 2001, § 46; ECHR, Zvolský and Zvolská v. the Czech Republic, 12 November 2002, § 67 in fine; ECHR, Edwards v. Malta, judgment of 24 October 2006, § 64. The same applies necessarily, if not *a fortiori*, to such radical changes as those occurring at the time of German reunification, when the system changed to a market economy. ECHR, Jahn and others, judgment of 22 January 2004, § 80; ECHR, Jahn and others v. Germany (GC), judgment of 30 June 2005, § 91.

[10] ECHR, Sporrong and Lönnroth, judgment of 23 September 1982, § 69 and § 73; ECHR, James and others v. U.K., judgment of 21 February 1986, § 50; ECHR, Lithgow and others v. U.K., judgment of 8 July 1986, § 120; ECHR, Mellacher and others v. Austria, judgment of 19 December 1989, § 48; ECHR, The Holy Monasteries v. Greece, judgment of 9 December 1994, § 70; ECHR, Spadea and Scalabrino v. Italy, judgment of 28 September 1995, § 33; ECHR, Pressos Compania Naviera S.A. and Others v. Belgium, judgment of 20 November 1995, § 38; ECHR, The Former King of Greece and others v. Greece, judgment of 25 October 2000, § 89; ECHR, Malama v. Greece, judgment of 1 March 2001, § 48; ECHR, Wittek v. Germany, judgment of 12 December 2002, § 53-54; ECHR, Jahn and others v. Germany, judgment of 22 January 2004, § 82; ECHR, Schirmer v. Poland, judgment of 21 September 2004, § 35; ECHR, Hutten-Czapska v. Poland, judgment of 22 February 2005, § 150; ECHR, Strain and others v. Romania, judgment of 21 July 2005, § 51; ECHR, Edwards v. Malta, judgment of 24 October 2006, § 69.

9. In determining whether the requirement of proportionality is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.[11] Nevertheless, the Court cannot abdicate its power of review and must determine whether the requisite balance was maintained in a manner consonant with the applicants' right to "the peaceful enjoyment of [their] possessions", within the meaning of the first sentence of Article 1 of Protocol No. 1.[12]

E. The principle of compensation

10. Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants.[13] In this connection, the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference, and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances.[14]

11. Applicants must have the possibility of proving their alleged damage and, if successful, of receiving the relevant compensation.[15] They may not be prevented from asserting before the domestic courts their right to compensation in full for the loss of their property.[16] Compensation for the loss sustained by the applicant can only constitute adequate reparation where it also takes into account the damage arising from the length of the deprivation. It must moreover be paid within a reasonable time.[17]

12. Article 1 (P1-1) does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.[18] A radical reform of a country's political and economic system, or the state of the country's finances, may justify stringent limitations on compensation.[19].

13. Furthermore, the European Court's power of review is limited to ascertaining whether the choice of compensation terms falls outside the State's wide margin of appreciation in this

---

[11] ECHR, Chassagnou and Others v. France [GC], 29 April 1994.

[12]See ECHR, Zvolský and Zvolská v**.** the Czech Republic 12 November 2002, **§ 69;** ECHR, Jahn and others v. Germany (GC), judgment of 30 June 2005, § 93.

[13] See the the above-mentioned ECHR, Sporrong and Lönnroth, judgment of 23 September 1982, §§ 69 and 73.

[14] See ECHR, The Holy Monasteries v. Greece, judgment of 9 December 1994, §§ 70-71; ECHR, Papachelas v. Greece, judgment of 25 March 1999, § 49.

[15] See ECHR, Tsomtsos and others v. Greece, judgment of 24 October 1996, § 42;

[16] ECHR, Papachelas v. Greece, judgment of 25 March 1999, § 54.

[17] ECHR, Guillemin v. France, judgment of 22 January 1997, § 54.

[18] ECHR, James and others v. U.K., judgment of 21 February 1986, § 54; ECHR, Lithgow and others v. U.K., judgment of 8 July 1986, § 121; See ECHR, The Holy Monasteries v. Greece, judgment of 9 December 1994, §§ 70-71; ECHR, Papachelas v. Greece, judgment of 25 March 1999, § 49; ECHR, Börekçiogullari and others v. Turkey, judgment of 19 October 2006, § 36.

[19] ECHR, Broniowski v. Poland, judgment of 22 June 2004, §§ 175, 183 and 184; ECHR, Strain and others v. Romania, judgment of 21 July 2005, § 51.

domain.[20] Because of their direct knowledge of their society and its needs and resources, the national authorities are in principle better placed than the international judge to appreciate what measures are appropriate in this area and consequently the margin of appreciation available to them should be a wide one. It would, in the Court's view, be artificial in this respect to divorce the decision as to the compensation terms from the actual decision to deprive private persons of their possessions, since the factors influencing the latter will of necessity also influence the former. Accordingly, the Court's power of review is limited to ascertaining whether the decisions regarding compensation fall outside the State's wide margin of appreciation; it will respect the legislature's judgment in this connection unless that judgment was manifestly without reasonable foundation.[21]

II. The Albanian Law "on legalizing, urban planning and integration of unauthorized buildings"

14. The Albanian law "on legalizing, urban planning and integration of unauthorized buildings" implies that private owners will be "deprived of [their] possessions", within the meaning of the second sentence of Article 1 (P1-1). It must, therefore be examined whether the interference complained of can be justified under that provision.

A. The principle of legality

15. The interference by the Albanian authorities in the peaceful enjoyment of the possessions is based on the law on "legalizing, urban planning and integration of unauthorized buildings". It thus can be considered as being « lawful ». The applicants do not seem to dispute that the applicable provisions of this law are sufficiently accessible, precise and foreseeable in their application

16. However, according to the applicants, this Albanian law does not comply with the Albanian Constitution, more specifically with article 41 of the Constitution. This article reads as follows:

Article 41:
1. The right of private property is guaranteed.
2. Property may be acquired by gift, inheritance, purchase, or any other classical means provided by the Civil Code.
3. The law may provide for expropriations or limitations in the exercise of a property right only in the public interest.
4. Expropriations or limitations of a property right that amount to expropriation are permitted only against fair compensation.
5. In the case of disagreements related to the amount of compensation, a complaint may be filed in court.

The question raises whether the transfer op property provided for in the law "on legalizing, urban planning and integration of unauthorized buildings", can be considered as an "expropriation" in the meaning of article 41 of the Constitution, although it is not the result of a formal expropriation procedure. It belongs to the Albanian Constitutional Court to review the

[20] ECHR, James and others v. U.K., judgment of 21 February 1986, §. 54; ECHR, Lithgow and others v. U.K., judgment of 8 July 1986, § 121.

[21] ECHR, Lithgow and others v. U.K., judgment of 8 July 1986, § 122; ECHR, Papachelas v. Greece, judgment of 25 March 1999, § 49; ECHR, Hutten-Czapska v. Poland, judgment of 22 February 2005, § 148.

compliance of the domestic law with article 41 of the Albanian Constitution and more specifically to interpret the concept “expropriation” in this article.

17. In this context reference can be made to a judgment rendered by the Turkish Constitutional Court on 10 April 2003[22] in a, be it only partly, analogous case. In this judgment the Court unanimously declared section 38 of Law no. 2942 unconstitutional and a nullity. It gave the following grounds in particular:

> “... Expropriation, as provided for in Article 46 of the Constitution ... is a restriction of the right of property in exchange for fair prior compensation...
>
> Expropriation ... is a constitutional restriction of the right of property within the meaning of Article 35 of the Constitution. The administrative authorities may not restrict that right unlawfully in breach of the relevant legislation and the principles of expropriation. According to the provision complained of, when twenty years have passed since a *de facto* occupation, effected without going through a formal expropriation procedure ..., that unlawful act produces all the effects of a lawful expropriation and may give rise to registration of the property in the land registers in the name of the administrative authorities. However, *de facto* occupation is not provided for in the Constitution. To accept that an owner's right to bring an action lapses and that the property must be transferred to the administrative authorities twenty years after the occupation, without any consideration being given, would be contrary to the right of property and would impair the very substance of that right.
>
> For those reasons, that rule is contrary to Articles 13, 35 and 46 of the Constitution.
>
> ... Authorising the State or public legal entities to deprive private individuals arbitrarily of their right of property and their right to compensation is contrary to the principle of the rule of law.
>
> Moreover, a State governed by the rule of law must respect the universal principles of law in its acts. One of the general principles of law is the 'timeless' nature of the right of property, in other words it is not limited in time. The fact that over a period of twenty years the owners of an immovable property, their successors in title or their heirs have not enjoyed the rights in respect of that property that the Civil Code and the Code of Obligations confer on them, may be regarded as the lack of a *de facto* link with that right; it does not mean, however, that the *de jure* link has disappeared. A State governed by the rule of law must respect acquired rights in its acts...
>
> Furthermore, the European Court of Human Rights has held in numerous cases that deprivation of possessions without expropriation infringes the right of property, as guaranteed by Article 1 of Protocol No. 1. In the cases of *Papamichalopoulos v. Greece* (no. 14556/89), *Carbonara and Ventura v. Italy* (no. 24638/94) and *Belvedere Alberghiera S.R.L. v. Italy* (no. 31524/96), *de facto* occupation by the Greek navy and Italian local authorities was held to be contrary to the right of property.
>
> In the light of the above considerations, the provision complained of must be declared null and void, being contrary to Articles 2, 13, 35 and 46 of the Constitution.”

The Albanian Constitutional Court is in principle better placed to appreciate whether the notion of “expropriation” in article 41 of the Albanian Constitution implies that an expropriation can only be effected going through a formal expropriation procedure.

C. The “public interest-principle”

[22] Published in the Official Gazette on 4 November 2003, See also the reference to this judgment in ECHR, Börekçiogullari (Cokmez) and others v. Turkey, judgment of 19 Oktober 2006, § 28-29.

18. The question raises whether the Albanian law permitting the deprivation of private persons of their property, pursues a legitimate aim "in the public interest". The applicants before the Constitutional Court dispute that the deprivation of property, provided for in the Albanian Law, meets with this condition, as it aims at the transfer of the property to other private persons.

19. Both article 1, paragraph 1, second sentence, of the First Additional Protocol to the ECHR and article 41 of the Albanian Constitution submit the expropriation to the condition that it pursues a “public interest”. As far as the notion “public interest” is used in article 41 of the Albanian Constitution, it will be up to the Albanian Constitutional to interpret this notion. As far as the notion is used in article 1, of the First Additional protocol, the European Court on Human Rights took a very clear stance on the above mentioned question in its judgment in the case of James and others v. the United Kingdom.[23] The relevant passages of this judgment read as follows:

> “40. The Court agrees with the applicants that a deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be "in the public interest". Nonetheless, the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest. In this connection, even where the texts in force employ expressions like "for the public use", no common principle can be identified in the constitutions, legislation and case-law of the Contracting States that would warrant understanding the notion of public interest as outlawing compulsory transfer between private parties. The same may be said of certain other democratic countries; thus, the applicants and the Government cited in argument a judgment of the Supreme Court of the United States of America, which concerned State legislation in Hawaii compulsorily transferring title in real property from lessors to lessees in order to reduce the concentration of land ownership (Hawaii Housing Authority v. Midkiff 104 S.Ct.2321 [1984]).
> 41. Neither can it be read into the English expression "in the public interest" that the transferred property should be put into use for the general public or that the community generally, or even a substantial proportion of it, should directly benefit from the taking. The taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being "in the public interest". In particular, the fairness of a system of law governing the contractual or property rights of private parties is a matter of public concern and therefore legislative measures intended to bring about such fairness are capable of being "in the public interest", even if they involve the compulsory transfer of property from one individual to another.
> 42. The expression "pour cause d’utilité publique" used in the French text of Article 1 (P1-1) may indeed be read as having the narrow sense argued by the applicants, as is shown by the domestic law of some, but not all, of the Contracting States where the expression or its equivalent is found in the context of expropriation of property. That, however, is not decisive, as many Convention concepts have been recognised in the Court’s case-law as having an "autonomous" meaning. Moreover, the words "utilité publique" are also capable of bearing a wider meaning, covering expropriation measures taken in implementation of policies calculated to enhance social justice.
> 45. For these reasons, the Court comes to the same conclusion as the Commission: a taking of property effected in pursuance of legitimate social, economic or other policies may be "in the public interest", even if the community at large has no direct use or enjoyment of the property taken. The leasehold reform legislation is not therefore ipso facto an infringement of Article 1 (P1-1) on this ground. Accordingly, it is necessary to inquire whether in other respects the legislation satisfied the "public interest" test and the remaining requirements laid down in the second sentence of Article 1 (P1-1).”

[23] ECHR, James and others v. U.K., judgment of 21 February 1986, §§ 40-42.

20. More in general, the European Court has frequently underlined that the notion of "public" or "general" interest is necessarily extensive. In the judgment of 24 October 2006, in the case of Edwards v. Malta[24], the Court stated:

> "In particular, spheres such as housing of the population, which modern societies consider a prime social need and which plays a central role in the welfare and economic policies of Contracting States, may often call for some form of regulation by the State. In that sphere decisions as to whether, and if so when, it may fully be left to the play of free market forces or whether it should be subject to State control, as well as the choice of measures for securing the housing needs of the community and of the timing for their implementation, necessarily involve consideration of complex social, economic and political issues (*Hutten-Czapska*, cited above, §§ 165-166, and *Ghigo v. Malta*, no. 31122/05, § 56, 26 September 2006).
> 66. Finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, the Court has on many occasions declared that it will respect the legislature's judgment as to what is in the "public" or "general" interest unless that judgment is manifestly without reasonable foundation (see *Immobiliare Saffi v. Italy*, [GC], no. 22774/93, § 49, ECHR 1999-V, *mutatis mutandis*, *Broniowski*, cited above, § 149, and *Fleri Soler and Camilleri v.Malta*, no. 35349/05, § 65, 26 September 2006).
> 67. In the present case, the Court can accept the Government's argument that the requisition and the rent control were aimed at ensuring the just distribution and use of housing resources in a country where land available for construction could not meet the demand. These measures, implemented with a view to securing the social protection of tenants (see, *mutatis mutandis*, *Hutten-Czapska*, cited above, § 178, and *Ghigo*, cited above, § 58), were also aimed at preventing homelessness, as well as at protecting the dignity of poorly off tenants (see paragraphs 43 and 47 above). "

21. In this context, it has to beard in mind that the building of illegal constructions in breach of the domestic town-planning regulations, when tolerated by the State authorities, could give rise, under certain circumstances, to proprietary interests that are of a sufficient nature and that are sufficiently recognized to constitute a substantive interest and hence a "possession" within the meaning of the rule laid down in the first sentence of Article 1 of Protocol No 1.[25] In seeking a solution to the conflict of interests between the original owners and the new occupiers, whose illegal constructions have sometimes been tolerated for many years by the authorities, the Albanian State has a large margin of appreciation. In a, be it only partly, analogous case, the European Court stated[26]:

> "2. The Court recognizes that the Croatian authorities faced an exceptionally difficult task in having to balance the rights of owners against those of temporary occupants in the context of the return of refugees and displaced persons, as this involved dealing with socially sensitive issues. Those authorities had, on the one hand, to secure the protection of the property rights of the former and, on the other, to respect the social rights of the latter, both of them often being socially vulnerable individuals. The Court therefore accepts that a wide margin of appreciation should be accorded to the respondent State. However, the exercise of the State's discretion cannot entail consequences which are at variance with Convention standards (see *Broniowski v. Poland* [GC], no. 31443/96, § 182, ECHR 2004-V).

---

[24] ECHR, Edwards v. Malta, judgment of 24 October 2006, § 65-67; See also ECHR, Mellacher and others v. Austria, judgment of 19 December 1989, § 45; ECHR, Spadea and Scalabrino v. Italy, judgment of 28 September 1995, § 28; ECHR, Immobilare Saffi v. Italy (GC), judgment of 28 July 1999, [GC], § 46; ECHR, Schirmer v. Poland, judgment of 21 September 2004, § 34.

[25] ECHR, Öneryildiz v. Turkey, judgment of 30 November 2004, §§ 29 to 34.

[26] ECHR, Radanovic v. Croatia, judgment of 21 December 2006, § 49.

22. In balancing the rights of the owners and the social interest of the occupiers, the State can take in consideration the social problems, the tensions and the disturbance of public order that would be the result of the eviction of large groups of socially vulnerable persons. In an, again only partially analogous case, the European Court on Human Rights stated[27]:

> "3. Like the Commission, the Court recognizes that the simultaneous eviction of a large number of tenants would undoubtedly have led to considerable social tension and jeopardized public order. It follows that the impugned legislation had a legitimate aim in the general interest, as required by the second paragraph of Article 1."

D. The principle of proportionality (the "fair-balance"-test) and the principle of compensation

23. In order to be in compliance with article 1 of the First additional protocol, not only must the measure depriving a person of his property pursue a legitimate aim "in the public interest", a "fair balance" must also be struck between the demands of this public interest and the requirements of the protection of the individual's fundamental rights. The situation calls for a fair distribution of the social and financial burden involved. This burden cannot be placed on a particular social group or a private individual alone, irrespective of how important the interests of the other group or the community as a whole may be.[28] As it was stated above, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants.

24. As to the right of compensation of the private persons whose properties will be "legalized according to this law and registered in the register of immovable property", Article 15, paragraphs 2 tot 5 of the Law No 9482 on "Legalization, urban planning and integration of unauthorized buildings" state:

> "2. In case the legalized construction parcel is already registered in the immovable property registers in the name of private subject, upon registration of the legalization permit the private subject becomes entitled to remuneration in kind or cash.
> 3. For all the cases referred to in section 2 of this article, the Immovable Property Registration Office submits to the Council of Ministers every three months a list of natural of juridical subjects entitled to remuneration according to this law, including the data on every owner and respecting surfaces. The first timeline of submitting such list to the Council of Ministers is 1 December 2006.
> 4. Within 30 days from the date of submission of the list by the Central Office of Immovable Property Registration makes a decision on the remuneration of owners and respective surfaces. The commissions of property restitution in districts shall compensate the subjects within 3 months in compliance with the decision of the Council of Ministers.
> 5. For the effect of calculating the surface subject to compensation, the commission of property restitution and compensation treats the property as a building site in compliance with the methodology on valuation of the immovable property to be compensated and the property to be used for compensation, according to Law 9235, dated 29.7.2004 "On Property Restitution and Compensation," amended.

25. As to the valuation of property, Article 13 of the Law No 9235 "on restitution and compensation of property", determines:

---

[27] ECHR, Immobilare Saffi v. Italy (GC), judgment of 28 July 1999.

[28] ECHR, Radanovic v. Croatia, judgment of 21 December 2006, § 49. See *mutatis mutandis*, ECHR, Stran Greek Refineries and Stratis Andreadis v. Greece, judgment of 9 December 1994, § 69; ECHR, Hutten-Czapska v. Poland, judgment of 22 February 2005; See also ECHR, Sporrong and Lönnroth, judgment of 23 September 1982, § 69.

"1. For the valuation of property that will be compensated, the Local Commission for Restitution and Compensation of Property establishes an expert group. The commission appoints as experts experienced and specially qualified persons in the fields of law, economics and engineering that is related to the process of restitution and compensation of property.

2. The value of the property that is compensated according to this law is calculated based on the market value in accordance with the methodology proposed by the State Committee for Restitution and Compensation of Property and approved by a decision of the Assembly.

3. In carrying out its activities, no member of the state bodies for the process of restitution and compensation of property or of the expert group shall be subject to any conflict of interest defined in the Code of Administrative Procedure."

26. By allowing a compensation for the loss of their property, the Law aims to strike fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. It is not clear to the Venice Commission if on the basis of article 15, is a full compensation. If not, the Albanian Constitutional Court will have to examin whether legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.[29]

27. The applicants challenge the law before the Albanian Constitutional Court, "as it denies the right of access to the court in cases of conflicts." Article 42.1. of the Albanian Constitution provides:

"1. The liberty, property, and rights recognized in the Constitution and by law may not be infringed without due process.

2. Everyone, to protect his constitutional and legal rights, freedoms, and interests, or in the case of charges against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law."

In accordance with to this Article it should be possible to challenge the decision of the legalization, implying the transfer of the property, and the decision on the remuneration, before an independent and impartial court specified by law. In the more specific paragraph 5 of article 41 of the Constitution however, this possibility to challenge the decision seems to be limited to "disagreements related to the amount of compensation". The relationship between these two constitutional provisions shall have to be elucidated by the Albanian Constitutional Court.

28. Although Article 1 of the First additional protocol to the European Convention on Human Rights does not explicitly hold an analogous provision, the rule of law being one of the paramount principles of the Convention, the European Court on Human Rights has on different occasions[30] emphasized that in principle, a measure interfering with the peaceful enjoyment of property cannot be legitimate in the absence of adversarial proceedings that comply with the principle of equality of arms enabling challenging of the measure taken and presenting arguments on the issue of the underestimation of the compensation offered. These procedural guarantees are, in principle, necessary to ensure that the operation of the system and its impact on the individual's property rights are neither arbitrary nor unforeseeable, but strike a fair balance, in each individual case, between the demands of the "public interest" and the requirements of the protection of the individual's rights.

[29] See supra nr. 12.

[30] ECHR, Hentrich v. France, judgment of 22 September 1994, § 42, 45 and 49; ECHR, Immobilare Saffi v. Italy (GC), judgment of 28 July 1999, § 54 ECHR, Edwards v. Malta, judgment of 24 October 2006, § 71.

29. Nevertheless, it appears from the jurisprudence of the European Court on Human Rights, that the condition to provide for a system whereby the individual can seek an independent consideration, in any particular case, of either the justification for enfranchisement or the principles on which the compensation is calculated, in certain circumstances does not have to be fulfilled. In its judgment in the case of James and others v. the United Kingdom, the European Court on Human Rights, stated:

"Such a system may have been possible, and indeed a proposal to this effect was made during the debates on the draft legislation. However, Parliament chose instead to lay down broad and general categories within which the right of enfranchisement was to arise. The reason for this choice, according to the Government, was to avoid the uncertainty, litigation, expense and delay that would inevitably be caused for both tenants and landlords under a scheme of individual examination of each of many thousands of cases. Expropriation legislation of wide sweep, in particular if it implements a programme of social and economic reform, is hardly capable of doing entire justice in the diverse circumstances of the very large number of different individuals concerned. It is in the first place for Parliament to assess the advantages and disadvantages involved in the various legislative alternatives available. In view of the fact that the legislation was estimated to be likely to affect 98 to 99 per cent of the one and a quarter million dwelling houses held on long leases in England and Wales the system chosen by Parliament cannot in itself be dismissed as irrational or inappropriate."[31]

30. Even if similar exceptional circumstances would exist in Albania, they would not be able to justify the absence of procedural guarantees, as the articles 41.5 and 42.2. of the Albanian Constitution do not seem to admit exceptions on the right to a fair and public trial. In this context Article 53 of the European Convention has to be remembered, which states: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."

31 The allegations of the applicants before the Constitutional Court also relate to Article 4 of the Constitution, which states:

« 1. The law constitutes the basis and the boundaries of the activity of the state.
2. The Constitution is the highest law in the Republic of Albania.
3. The provisions of the Constitution are directly applicable, except when the Constitution provides otherwise."

It is not clear to the Venice Commission on which grounds and to what extent the Law nr. 9482, "On legalization, urban planning and integration of constructions without authorization" could be considered violating this Article. The applicants underline that the Law "considers as legal those actions which have been foreseen as criminal acts by articles 199 and 2000 of the Criminal Code and are criminally convictable."

The legislature which has the prerogative to penalize certain actions, also has the prerogative to depenalise these actions and to legalize actions taken at a time when they were forbidden. The law legalising illegal actions of the past, will of course have to be in compliance with the prohibition of discrimination. This implies that there has to be an objective and reasonable justification for the differential treatment, having regard to its aim and effects and that there also has to be a reasonable proportionality between the means employed and the aim sought to be realized.[32] As to this justification, and more specifically, as to the legitimate aim and the principle of proportionality, reference can be made to the considerations developed above on the justification of the measure under consideration, in the light of Article 1, of the First Additional Protocol.

[31] ECHR, James and others v. U.K., judgment of 21 February 1986, § 68.

[32] ECHR, Belgian Linguistic case, 23 July 1968, p. 34