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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

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

**by**

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**Factual background**

The fall of communism and the process of democratic transition and economic transformation created a series of socio-economic problems in the countries of Eastern and South Eastern Europe.

Severe economic and social problems lead to a very difficult financial and public budget situation.

Shrinking public resources made it very difficult to implement adequate housing policies : the result was insufficient investment in social housing, urban planning and infrastructure development.

During the past two decades, there has been a standstill of state-led housing construction and a decline of urbanisation. Furthermore, the emergence of a private housing market was hampered by outdated and inefficient land information or registration systems (cadastre).

A massive rural exodus and migration to urban areas taking place during the last 15 years triggered the emergence of informal and illegal settlements mainly at the fringes of urban areas. According to some estimates, the urban population in Albania is supposed to have risen from 35.75% in 1989 to 42.3% in 1995 and turns around 54 % in 2003[1]. An estimated 20 to 30 percent of Tirana's current residents are reported to live in such settlements[2].

The phenomenon of informal settlements lead to a very chaotic urban development resulting in inadequate access to basic services and facilities, vulnerability to forced eviction, informal and insecure land tenure and a neglect of housing maintenance.

Furthermore the multiplication of these informal settlements hampered the establishment of a functioning housing market and economic development in general.

Reforms granting a form of legal ownership to the settlers and establishing tenure security are therefore considered an urgent priority. They will stimulate investment in housing maintenance and production and favour an efficient housing market.

The objective of the law n° 9482 of 03.04.2006 on legalisation, urban planning and integration of unauthorised buildings is to initiate these reforms.

The national Association “Ownership with Justice” has lodged an application with the Constitutional Court of Albania for the abrogation of the above-mentioned law.

The applicant claims that the law n° 9482 does not satisfy the criteria of Article 1 of the Additional Protocol n° 1 of the European Convention of the Human Rights.

Thus the law would :

- abrogate the right of property not in the public interest but for a private benefit;
- take property from the owners without compensation;

[1] Council of Europe Development Bank, “Housing in South Eastern Europe solving a puzzle of challenges”

[2] Interim Poverty Reduction Strategy Paper, May 3, 2000, prepared for the International Monetary Fund by the Government of Albania

- ❖ establish a legal valuation method which produces a compensation not in line with market prices;

- ❖ legalise or regularise legal actions defined as criminal acts in the Criminal Code.

By virtue of the disputed law, many legal owners will definitely be deprived of land and building sites.

In effect, the new legislation will legalise illegal settlements and the legal owners will not be in a position to recover the possession of their land and evict the occupants.

According to Article 1 (P1-1) of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms ("Article 1"), the deprivation of property can only be justified by the public interest :

> *"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 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."*

Normally, a transfer of property from one private person to another takes place for a private benefit and the parties to such an operation do not act "in the public interest".

**1. The question arises whether the Albanian law n° 9482 passes the "public interest" test provided for by Article 1.**

**a) Deprivation of property for private housing needs without the community having a direct use or enjoyment of the expropriated property**

According to the applicant, the beneficiary of an expropriation cannot be another private person whose housing needs are a personal matter and not a matter of public interest.

In many legislations of the EU, only a public administration may initiate the expropriation procedure. According to the French legislation, this may only be the State, a municipality, a territorial collectivity ("collectivité territoriale"), a public organism and exceptionally, a private person but only in case this person is in charge of a public service mission or acts in view of the public interest. Normally the expropriator is also the beneficiary of the expropriation. Exceptionally, private persons may also become the beneficiaries of this procedure.

According to the Luxembourg legislation, an expropriation can only be pursued by the State, the municipalities, a public organism, or a private person in case his private interest is at the same time of public interest[3].

This wording does not require that the private person is in charge of a public service mission or subject to public service obligations.

[3] The wording in French of article 2 of the Luxembourg law of March 15,1979 is the following : « L'expropriation pour cause d'utilité publique ... peut s'opérer à la demande de particuliers mais seulement si l'intérêt privé de la partie demanderesse est en même temps d'intérêt public ».

Nowadays, many special legal provisions allow for the use of an expropriation procedure for the benefit of a private person.

In Luxembourg, a special law has authorised the possibility of the expropriation of land for the benefit of a distribution system operator in the gas or electricity sector. In case a private person is unwilling to transfer a right of way through his property, a compulsory transfer is provided for by the law.

The new law relating to the electricity market of July 24, 2000 based on the EU directive (Directive 2003/54/EC of the European Parliament and of the Council of June 26, 2003 concerning common rules for the internal market in electricity) also provides for a compulsory transfer of a right of way and of small parcels of land necessary for the construction of the grid.

It is evident that these provisions are not only in the interest of the private electricity company but also in the interest of the community because the construction of an electricity grid necessary for the supply of electricity to the households is also in the public interest.

This public interest results explicitly from legal provisions imposing public service obligations to the electricity transportation company. According to article 3 of the Directive-2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal electricity market :

> *"…. Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency and climate protection."*

The European Court of Human Rights ("The Court") has recognized the public interest of "zonal expropriations" for the purposes of town planning "to carry out a complete redevelopment of a densely-populated district". The Court granted the Contracting States a wide margin of appreciation in the area of development of large cites (Sporrong and Lönnroth, 69.) and regards it as established that the implementation of a town-planning policy satisfies the requirements of general interest (Elia S.r.l.,77).

Recently the Court confirmed this view that expropriation in view of the development of social housing is not an infringement of Article 1 of the Protocol n°1 (Motais de Narbonne, 21.) even if later on private persons and not the community at large will make use of the expropriated property.

I would like to give an example taken from the Luxembourg legislation of a private person not entrusted with a public service nor subject to public service obligations, but who nevertheless is entitled to make use of the expropriation procedure for his own benefit.

An agreement between the Grand-Duchy of Luxembourg and Sotel, société coopérative, concluded in 11 April 1927 legally ratified by Parliament in which the Government has committed itself to declare of public interest and to authorise the construction of electric lines built in order to insure the energy supply of the industrial steel production sites of Arbed. Sotel is the electricity supplier and transmission grid operator of the steel company. As steel production was by far the largest industry sector and employer in Luxembourg (up to 25.000 workers in a country of 350.000 inhabitants) the energy supply of the private steel company was considered of public interest as the closure of a production unit because of difficulties in the supply of energy would have caused severe social hardships.

The declaration of public interest to which the Government committed itself to proceed through an "arrêté grand-ducal" made it possible for Sotel to resort to the expropriation procedure in

case a private owner refuses to sell a parcel of land for the construction of the pylons of an electric line or to grant a right of way.

Another example of a compulsory transfer of property to a private person is the legislation relating to land consolidation or regrouping ("Remembrement" in French).

It is an administrative operation with the aim of improving land cultivation by replacing scattered parcels of land by larger surfaces allowing for a more efficient exploitation. This land consolidation is a way of improving the working conditions of farmers. Thus a farmer may lose ownership of a parcel in exchange of another piece of land. Some farmers may finally have to give up a parcel of land against their will, or get in exchange a smaller surface or land of lesser quality.

Although the transfer of ownership is from one private person to another, land consolidation and reallocation is undertaken in the interest of the whole community of farmers in favour of a more efficient exploitation of the land. Therefore the whole operation is described as being in the public interest.

This example is very instructive as it allows for a compulsory transfer of ownership from one private person to another for purely economic considerations related to a limited number of cultivators.

We may conclude that an expropriation of land in the exclusive interest of private persons not entrusted with a public service mission or with the implementation of public service obligations does not necessarily exclude the public interest of the expropriation.

The following principle emerges from the Court's case-law, notably its James decision : "So the compulsory transfer of property form one individual to another may, depending on the circumstances, constitute a legitimate means for promoting the public interest." … "No common principle can be identified in the constitutions, legislation and case law of the Contracting States that would warrant understanding that the notion of public interest as outlawing compulsory transfer between private parties." (James,40.)

According to the case law of the Court, the expression "pour cause d'utilité publique" is not to be interpreted in a narrow sense. The Court gives to this concept an "autonomous" meaning covering a wider scope that also includes "expropriation measures taken in implementation of policies calculated to enhance social justice".

"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." (James, 45.)

The deprivation of property from one person in order to transfer it to another is not necessarily a violation of Article 1 of the Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

**b) Whether the aim of the disputed legislation is a legitimate one**

The law under review addresses severe socio-economic problems related to the development of housing and the promotion of a free housing market.

The Court's attitude is to respect the legislature's judgement as to what is in the public interest, unless that judgement be "manifestly without reasonable foundation".

The settled case law of the Court (James, 47) considered leasehold reform legislation or any "legislation aimed at securing greater social justice in the sphere of peoples homes" as

pursuing a legitimate aim and noted that modern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces.

Many international legal instruments stress the importance of housing rights and of policies striving for the improvement of living conditions.

The Council of Europe's Revised Social Charter recognizes housing as a fundamental social right. According to Article 31 of the Revised Charter :

> **"***Article 31 – The right to housing*
>
> *With a view to ensuring the effective exercise of the right to housing, the parties undertake to take the measures designed.*
>
> *1. to promote access to housing of an adequate standard;*
> *to prevet and reduce homelessness with a view to its gradual eliminations;*
>
> *3. to make the price of the housing accessible to those without adequate resources."*

The EU's Charter of Fundamental Rights referred to housing in the following terms : " *In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance".* (article 17.1 et 34.3)

The pursuance of a social policy in favour of the housing of the population is unanimously considered a legitimate aim.

The problems the Albanian legislature addresses through the law under review are severe.

The United Nations Economic Commission for Europe has established reports on Country profiles relating to the housing sector and has published a report on Albania.

> This report points out that *"Albania is currently facing a high level of informal and illegal housing development due to he large flow of rural inhabitants to urban areas. Local authorities and several NGOs are currently trying to regularize a chaotic urbanization process and legalize selected informal settlements" . …*

The report mentioned that the Albanian Parliament enacted a law on Urban Planning in order to deal with the problem of illegal settlements. Article 75 of this law states that arbitrary land occupation for every type of building has to be solved by the immediate demolition of the building at the expense of the violator.

The authorities were afraid that the strict application of this law and the implementation of enforcement measures against the illegal occupants would trigger a social revolt of the inhabitants of illegal settlements.

The housing situation in Albania is certainly one of the most complex and challenging problems facing the country. The assessment of the Albanian legislature according to which this situation is of public concern cannot be seriously disputed.

The Court recognized that legislative provisions dealing with chronic housing shortage and designed to avoid social tension and troubles to public order have a legitimate aim in the general interest (Immobiliare Saffi, 48.)

In conclusion, there are strong arguments in favour of assuming that law n°9482 has been enacted for purposes of public benefit and its objective is undoubtedly a legitimate one.

**c) The means chosen by the authorities to achieve the aim must be appropriate and not disproportionate**

In the James case, the Court has stated that a measure depriving a person of his property must be appropriate for achieving its aim (James,50).

The Court did interpret the Article 1 (P1-1) as not establishing a test of strict necessity and considered that even if an alternative means were available, this would not render the reform legislation unjustified.

The principle is that the measure adopted by the legislature must be appropriate for achieving its aim and not be disproportionate thereto. It has therefore to be examined if the severity and urgency of the socio-economic problems that the measure should address justifies the deprivation of property of the concerned private persons.

The recommendations of the above-mentioned report on Albania published by the United Nations Economic Commission For Europe invite the Albanian authorities to look for ways allowing for legalisation of the illegal settlements:

> *"New ways to legalize informal and illegal settlements need to be found to solve this acute housing problem. The current Law on Urban Planning is too strong to be applied in practice and a new amendment to this Law should provide new solutions, considering the de facto situation prevailing in various parts of the country".*

The Vienna Declaration on informal settlements in South Eastern Europe signed in Vienna on 28th September 2004[4] emphasised regularisation efforts :

> *"A sustainable urban management requires that informal settlements be integrated in the social or economic, spatial/physical and legal framework, particularly at the local level. Successful regularisation efforts contribute to long-term economic growth as well as to social equity, cohesion and stability.*

It is also mentioned in this declaration, that the legalisation of informal settlements is considered a key factor in the preparation for accession to the EU.

There exists in the countries of South-Eastern Europe a general consensus that a policy striving towards regularisation of informal and illegal settlements and integration in a legally well organized urban structure is adequate and necessary.

In conclusion, there are strong arguments in favour of assuming that the legalisation programme adopted by the Albanian legislature is appropriate for achieving its aim and not disproportionate thereto.

[4] The Vienna Declaration was signed by the Governments of Albania, the former Yugoslav Republic of Macedonia, Serbia and Montenegro at a high level conference organized by the Stability Pact for South Eastern Europe/Housing and Urban Initiative.

## 2. Questions relating to the valuation methodology of the expropriated land

### 2.1. Grand principle

Compensation terms are material to the assessment whether a fair balance has been struck between the demands of the general interest and the requirements of the protection of the individuals' fundamental rights and notably whether or not a disproportionate burden has been imposed on the persons who have been deprived of his possessions.

As a matter of principle, the availability and amount of compensation are material considerations. Compensation must be reasonably related to the value of taken property when it was taken: compensation must be fair and just, real, effective and prompt.

The deprivation in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances (Lithgow, 120).

In the James case, the Court has concluded that the taking of property without payment of an amount reasonably related to its value would normally constitute such a disproportion (James,54.)

The Court grants to the legislature a wide margin of appreciation in this domain. It will normally respect the legislature's judgement regarding compensation unless that judgement is manifestly without reasonable foundation.

### 2.2. The contested legal provisions

In Article 15 of the Law n° 9482 under review there is a reference to Article 11 (Forms of Compensation) of the law n°9235

The expropriated subject has the choice between various forms of compensation. If the request is objectively not possible, the Local Commission for Restitution and Compensation of Property may reject the request through a reasoned decision and offers another form of compensation.

The expropriated subject is entitled to submit an appeal to the State Committee for Restitution and Compensation of Property and thereafter he may still refer the matter to court.

The Local Commission for Restitution and Compensation of Property establishes an expert group for the valuation of property. The value of the property is assessed on the basis of the market value according to a methodology proposed by the State Committee of Restitution and Compensation of Property and approved by a decision of the assembly. The different elements of this methodology are not examined in this paper as no presentation thereof has been included in the file.

The applicant criticises the law for determining sale prices unilaterally imposed by the State without regard to supply and demand mechanisms of the free market.

In various cases, the Court has stated general principles governing the valuation of expropriated property in the context of socio-economic reforms.

These principles are the following:

#### a) A common compensation formula

In the Lithgrow case (Lithgrow, 143) the Court ruled that a nationalisation is a measure of general economic nature in regard to which the State must be allowed a wide margin of appreciation.

It cannot be denied that the regularisation of informal settlements is a large-scale measure with considerable socio-economic effects and that it has undoubtedly the same importance as the nationalisation plan implemented in the United Kingdom in the seventies. Thus we may conclude that the margin of appreciation available to Albania should also be a wide one.

The methodology of valuation of the assets may be subject to many criticisms. The deprived owners may argue that the methodology does not take account of all relevant factors having an influence on the valuation and that the compensation granted to the deprived owners does not reflect fair market value.

In examining this issue, account has to be taken that the valuation method has to be of general application (Lithgow,139 and 143.). In the context of expropriation legislation of large sweep, the implementation of a valuation methodology generally applicable to all the persons concerned has been approved by the Court.

The compensation terms have to be fixed in advance. The Court observed in the Lithgow case that this is in the interest of legal certainty. Furthermore the Court held that a subsequent assessment of the compensation on an ad hoc basis would be impracticable and give rise to very long delays, which may finally lead to a serious breach of Article 1 according to the recent case-law of the Court (Akkus, Aslangiray, Motais de Narbonne).

In implementing a large-scale programme of economic and social reform concerning a very large number of deprived persons, the State is not in a position to take account of all the various circumstances of each and every land owner (James, 68).

The Court concluded in the James case that equal treatment of all the owners is not an unreasonable valuation method and that it may lead to a fair allocation of compensation (Lithgow,149.).

Nevertheless, in another case (Lallement, 24), the Court has held that each individual situation has to be examined in concreto, and in particular, specific elements of the expropriated property has to be taken into consideration especially so in case of land used for agricultural production. The Court ruled that compensation has also to taken account of the special loss suffered by the deprived cultivator making use of the land as a means of agricultural production.

A fair balance has to be struck between the interests of the deprived owners and the efforts the State has to undertake in order to establish fair compensation terms.

Thus it may be possible for the State to refine the general categories of expropriated land and to establish a more detailed price scale taking into account the most common factors influencing valuation of the expropriated land.

**b) Reference to market value**

The Court accepts that “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” (James, 54.).

According to a classic definition of fair market value, it is the price at which property is transferred between a willing buyer and a willing seller considering all the relevant facts and not acting under undue pressure to sell or buy. It is important to point out to the relativity of fair market value : any valuation is subject to a number of circumstances. Only part of these elements may be easily checked, others are subject to different interpretations and some of them may be considered as irrelevant by other interested buyers.

A comparison with the sale prices of neighbouring properties may not necessarily determine a fair market value.

It cannot be disputed that the present socio-economic problems in Albania and the difficult housing situation that has prompted the legislation under review has a significant impact on the present level of land prices. The multiple difficulties Albania encountered in establishing a normally functioning housing market have a distorting effect on the land prices.

The measures the Government is due to take in order to address this difficult situation will also have an effect on the sale prices.

In conclusion, it seems to be nearly impossible for the Albanian State to set a fair market value on real estate in the absence of such a functioning free market. The reference to a market value is very problematical.

**c) Reference to analogous private sales**

In the Lithgow case, the applicants argued that the valuation of the nationalised companies did not reflect the price that would have been fetched in a takeover bid by another company. The Court took the view that there is no warrant for holding that the applicants' compensation should have been aligned on the price that might have been offered in such a takeover bid.

Thus the Court considers that a fair and just compensation does not necessarily have to be aligned on the price in sale by private treaty between a willing seller and a willing buyer.

**d) Most favourable valuation method**

According to the Court, the fact that the most favourable valuation method has not be chosen, cannot be considered a breach of Article 1 (James, 172.).

The applicant may also argue that the chosen method does not sufficiently take account of future developments leading to an increase in the value.

In this context, account has to be taken, that appraising future increases is always guesswork.