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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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I) Background of the case

The Constitutional Court of Albania has to decide on the constitutionality of the Law No. 9482 "On Legalization, Urban Planning and Integration of Unauthorized Buildings." It has asked the Venice Commission for an Amicus Curiae Opinion on the legal problems arising in the context of this constitutional dispute.

The object of the Law No. 9482 is the legalization of objects built illegally in certain urban areas and the transfer of property of the parcel of construction where the unauthorized buildings have been built (cf. Article 1 of the Law No. 9482) from those registered in the immovable property registers to the owners of the illegal buildings (Art. 15 of the Law No. 9482). An "owner of an illegal building" is considered to be a "natural or legal person who has carried out himself or has been investor of the unauthorized building and who proves that he/she freely possesses or uses it and the construction parcel, regardless of whether s/he has ownership over them registered with the Immoveable Property Registration Office" (cf. Art. 3 g of the Law No. 9482). The private subject formerly registered in the immovable property registers is entitled to remuneration in kind or cash (Art. 15.2 of the Law No. 9482). The compensation is calculated in accordance with the law "On Property Restitution and Compensation" (Art 15.5 of the Law No. 9482)

A list of "natural or juridical subjects entitled to remuneration" is submitted to the Council of Ministers by the Immoveable Property Registration Office. A decision on the remuneration of the owners has to be made within 30 days. They have to be compensated within three months (Art. 15.3 and 15.4 of the Law No. 9482).

The Law No. 9482 is applicable to all "objects build without authorization before the date of entry into force of this law, regardless of whether their function is housing, economic activity, or other social or cultural purposes, if these have been built by and are possessed by individuals or by legal persons" (Art. 2.1 of the Law No. 9482).

The constitutionality of this regulation is challenged on the basis of Art. 4, 17, 18 and 41 of the Constitution of Albania.

II) Relevant Articles of the Constitution of Albania

The relevant articles read as follows:

Article 4

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.

Article 17

1. Limitations of the rights and freedoms provided for in this Constitution may be established only by law, in the public interest or for the protection of the rights of others. A limitation shall be in proportion to the situation that has dictated it.
2. These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights.

Article 18

1. All are equal before the law.

2. No one may be unjustly discriminated against for reasons such as gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic condition, education, social status, or parentage.
3. No one may be discriminated against for the reasons mentioned in paragraph 2 without a reasonable and objective justification.

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 wording of Article 17.2 of the Albanian Constitution makes it necessary to consider the relevant legal questions on the basis of the limitations to Article 1 of the First Protocol to the European Convention of Human Rights. Other legal regulations (especially the jurisprudence of the German Constitutional Court) will also be taken into account in the amicus curiae opinion.

III) Basic legal questions

The basic legal questions arising out of the case are the following:

1. Can the transfer of property of one person to another one for the latter's private benefit be "in the public interest"?
2. Which conditions have to be met in the case of expropriations for the benefit of private persons?
3. What requirements does the compensation payment have to meet in this case?
4. Which sort of legal protection has to be guaranteed in this case?

IV) Analysis of the legal questions

1) Preliminary observation

The word "expropriation" is not used in the Law No. 9482. But it can be inferred from the regulation contained in Article 15 of the Law No. 9482 that those formerly registered in the Register of Immovable Property and compensated because of the registration of the owners of the illegal buildings are de facto and de iure expropriated.¹

2) Admissibility of the compulsory transfer of property of one private party to another one

It can be said that, as a rule, expropriation of private property is deemed to be a human rights violation unless it is "in the public interest" and subject to special conditions. The term "in the public interest" or for the "public benefit" or similar terms are used in many national constitutions² as well as in international human rights documents.³ But neither the expression

¹ Cf. Jahn and others v. Germany, para. 63 et seq.

² „Public purpose“ (Art. 16 Constitution of Belgium, Art. 62 II Constitution of Portugal), „public weal“ (Art. 73 I Constitution of Denmark), „common good“ (Art. 43 II Constitution of Ireland), „public needs“

“in the public interest” nor “for the common good” has to be interpreted in a very narrow sense outlawing expropriations for the benefit of private persons.

Thus, the European Court of Human Rights clearly states in its judgement *James and others v. The United Kingdom*:

“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.”⁴

The same approach is taken by the German Constitutional Court in its judgment “Boxberg”.

“If the expropriation for the purpose defined by the Basic Law and sufficiently concretized by the legislator is necessary, it is ... not decisive, if it is for the benefit of a private person or a public administration.”⁵

The U.S. Supreme Court also states that “one person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid. ... But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”⁶

Furthermore, there is consensus that the expression “in the public interest” does not restrict expropriations to those cases in which the public has a direct benefit.

Thus the European Court of Human Rights states:

“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.”⁷

It is deemed to be sufficient that the public indirectly profits from the expropriation:

(§ 15 Constitution of Finland), „public interest“ (Art. 14 I Constitution of the Netherlands, Art. 16 Constitution of Luxembourg), „pressing public interest“ (§ 18 I Constitution of Sweden), „public necessity“ (Art. 17 Declaration of the Human Rights of 1789, France), „public benefit“ (Art. 17 II Constitution of Greece), „common interest“ (Art. 42 III Constitution of Italy), „public utility or social interest“ (Art. 33 III Constitution of Spain); „in cases and in the manner described by the law“ (Art. 5 Basic law on the general rights of nationals in the kingdoms and States represented in the Reich’s Congress of 1867, Austria); Otto *Deppenheuer*, in: Tettinger/Stern, *Europäische Grundrechte-Charta*, München 2006, p. 447.

³ „Public interests“ (Art. 1 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms), „ public need“ (Art. 14 African Charter on Human and Peoples’ Rights), „public utility or social interest“ (Art. 21 II American Convention on Human Rights).

⁴ Cf. *James and other v. The United Kingdom*, para. 40.

⁵ Decision of the Constitutional Court of Germany (24.3.1987), NJW 1987, p. 1251.

⁶ U.S. Supreme Court, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

⁷ *James and others v. The United Kingdom*, para. 41.

“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.”⁸

In the case of the indirect benefit of the public good the German Constitutional Court sees an “enhanced danger of misuse to the detriment of the weaker ones”.⁹ Therefore it expects the legislator to clearly define by law “for which projects under which conditions and for which purposes an expropriation can be admissible.”¹⁰

The approach taken by the Albanian Law in question compulsorily transferring property from one private owner to another private owner can therefore not be seen to be incompatible with generally accepted standards as such.

3) Preconditions for expropriations for the benefit of private persons

The most important and controversial aspect is, however, which conditions have to be met in order to consider an expropriation for the benefit of private persons to be “in the public interest”.

The European Court of Human Rights sees it as a necessary precondition that the expropriation legislation pursues a legitimate aim and that the means chosen to achieve the aim are proportional.

a) Legitimate aim

It is important to note that the European Court of Human Rights is reluctant to define concretely what might be a legitimate aim justifying an expropriation as being “in the public interest”. In the context the Court considers the national legislator to understand the society’s needs better and refers to the doctrine of the “margin of appreciation”. Still, it explains that the policy aim of the national legislator must not be “manifestly without reasonable foundation”.¹¹

The Court considers measures to even out social injustices to be generally justified by a “legitimate aim”.

“Eliminating what are judged to be social injustices is an example of the functions of a democratic legislature. More especially, 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. The margin of appreciation is wide enough to cover legislation aimed at securing greater social justice in the sphere of people’s homes, even where such legislation interferes with existing contractual relations between private parties and confers no direct benefit on the State or the community at large.”¹²

But it is clearly emphasised that “social justice” has to be the ultimate aim. Therefore the Court bases its judgment in the case James and others v. The United Kingdom on the “moral

⁸ James and others v. The United Kingdom, para. 41.

⁹ Decision of the Constitutional Court of Germany (24.3.1987), NJW 1987, p. 1253.

¹⁰ Decision of the Constitutional Court of Germany (24.3.1987), NJW 1987, p. 1253.

¹¹ James and others v. The United Kingdom, para. 46.

¹² James and others v. The United Kingdom, para. 47.

entitlement” of the beneficiaries. It accepts that the legislator’s “belief in the existence of social injustice” is not manifestly unreasonable.

The same can be said for the U.S. Supreme Court in the decision *Hawaii Housing Authority v. Midkiff*, as the expropriation legislation was meant to reduce the perceived social and economic evils of a land oligopoly.

The German Constitutional Court is still more demanding. It does not accept general aims of social redistribution policy, but allows expropriations for the benefit of private persons only under two narrow conditions: First, the private beneficiary must be assigned tasks for the public good on the basis of a law. Second, it must be secured that these tasks will be fulfilled in practice.¹³ This view is also shared in the scientific literature both in relation to the interpretation of the German Grundgesetz¹⁴ and in relation to the Charter of Fundamental Rights of the European Union¹⁵. But this view seems to be especially restrictive.

It is doubtful if the Albanian Law No. 9482 meets the requirement of “pursuing a legitimate aim” as it is understood by the European Court of Human Rights. The beneficiaries of the Law “On Legalization, Urban Planning and Integration of Unauthorized Buildings” are those having illegally acquired the possession of construction sites. Contrary to the beneficiaries in the case “*James and other v. The United Kingdom*” they cannot claim to have any “moral entitlement”. It is also very doubtful if the law enhances “social justice” as it takes away property from the legal owners and transfers it those having acquired the possession of the relevant pieces of land illegally. The basic aim achieved might be legal certainty. But the Law No. 9482 seems to achieve this aim without having regard to social justice or moral entitlements. But this aspect might also be judged differently on the basis of the factual situation in Albania.

b) Proportionality

Furthermore according to the jurisprudence of the European Court of Human Rights as well as to the jurisprudence in the majority of the European legal systems the means chosen have to be proportional to the aim sought. There must be a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. The persons concerned must not have to bear “an individual and excessive burden.”¹⁶

It is also doubtful if this criterion is met in the case of the Albanian Law No. 9482 as those having violated the law are rewarded, whereas the interests of the legal owners are sacrificed. Even if the property rights of the former owners were seen to be “windfall profits” as a consequence of the reprivatisation law, they are based on a legal act passed by the democratically elected body (The Law on Restitution and Compensation of Property No. 9235. dated 29.7.2004), whereas there was never any legal basis to justify the investments of the illegal owners.

4) Compensation payments

¹³ Decision of the Constitutional Court of Germany (24.3.1987), NJW 1987, p. 1253.

¹⁴ Otto *Depenheuer*, in: v. Mangoldt/Klein (Hrsg.), Kommentar zum Grundgesetz Bd. I Art. 1-19, München 2005, Art. 14 Rdn. 428-430; Hans-Jürgen *Papier*, in Maunz-Dürig Grundgesetz Kommentar, Bd. II Art. 6-16a, 48. Lfg. 2006, Art. 14 Rdn. 577-588; Joachim *Wieland*, in: Horst Dreier (Hrsg.), Grundgesetz Kommentar, Bd. I Art. 1-19, Tübingen 1996 Rdn. 95; Rudolf *Wendt*, in: Michael Sachs (Hrsg.), Grundgesetz Kommentar, München 1996 Art. 14 Rdn. 161, 162

¹⁵ Cf. *Depenheuer*, in: Peter J. Tettinger/Klaus Stern (Hrsg.), Europäische Grundrechte-Charta, München 2006, Art. 17 Rdn. 65-57.

¹⁶ *James and others v. The United Kingdom*, para. 50.

The Albanian Law No. 9482 provides for compensation payments. In this context it refers to the Law "On Property Restitution and Compensation."

According to the case law of the European Court of Human Rights, a right to full compensation does not have to be guaranteed under 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."¹⁷

Here, once again, it is doubtful if the Albanian Law No. 9482 meets the required standards. As it is not obvious that it is designed to achieve greater social justice, it does not seem to be acceptable to compensate the expropriations in the same way as in the case of reprivatisations after expropriations during the communist regimes.

5) Legal Protection

Article 26 of the Law No. 9482 provides for the settlement of disputes on the "rights of the subject", but explicitly enumerates only disputes "concerning the property ratio on the object and/or on the inclusion of other people who claim rights on the construction parcel to be legalized". It is not clear if other disputes, e.g. regarding the justification or the proportionality of the expropriation in the concrete case or the amount and payment of the compensation in the concrete case are thus excluded from judicial review.

In the cases of expropriations the European Court of Human Rights does not require judicial review going into the details and reasonableness of each concrete transfer of property if a standardized approach can avoid uncertainty, litigation, expenses and delays.¹⁸ Furthermore, according to the Court Article 6.1 ECHR "does not require that there be a national court with competence to invalidate or override national law".¹⁹ But as far as a "civil right" in the meaning of Article 6 ECHR is concerned, access to court must be guaranteed. That is especially true for the amount of compensation.

On the basis of the text of Law No. 9482 it is not clear if these requirements are met.

V) Summary

The results of the legal analysis can be summarized as follows:

1. The compulsory transfer of property of one person to another person can be in the "public interest" and thus justified under certain conditions.
2. Expropriations of private individuals for the benefit of other private individuals are only justified if a legitimate aim is pursued and the measure taken is proportional. The elimination of social injustices can be a legitimate aim. It is doubtful if the Albanian Law No. 9482 on "Legalization, Urban Planning and Integration of Unauthorized Buildings" helps to mitigate social injustices insofar as it promotes a redistribution of property from legal to illegal owners. It is also doubtful if it is proportional. But this has to be judged on the basis of the social background in Albania that is not clear enough from the material available for the amicus curiae opinion.

¹⁷ James and others v. The United Kingdom, para. 54.

¹⁸ James and others v. The United Kingdom, para. 68.

¹⁹ James and others v. The United Kingdom, para. 81.

3. In the case of measures designed to achieve greater social justice, it is not necessary to guarantee a right to full compensation under all circumstances. But it is hardly perceivable that a standardized compensation payment below the market value is compatible with legal standards in Europe, if expropriation measures favour illegal owners.
4. It can be justifiable not to allow for judicial review going into the details of every single case of expropriation if there are a large number of clone cases; it is sufficient to check if the conditions set by the legislation are met. But as far as a “civil right” in the meaning of Article 6 ECHR is concerned, access to court must be guaranteed.