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Whose Justice?

The Agrarian Reform in the Post Communist Albania and its Impact on the Right of Property

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Abstract

The article provides an analysis of the jurisprudence of the Albanian Constitutional Court on land reform in the post-communist Albania, which highly impacted the Constitutional right of the property of the (legal) owners. It takes a three dimensional approach. Firstly, the article provides a brief analysis of the process of nationalization of the immovable property by the Albanian Communist Regime. Secondly, it examines the efforts of the Albanian Governments after the fall of the communism to redress the past injustice of massive property confiscation/nationalisation. Such efforts had to address two conflicting interests: the interests of traditional owners and the interests of those who possessed and enjoyed the immovable property of the former, either due to formal allocation from the communist state, or by occupation after the fall of communism. Thirdly, it evaluates the jurisprudence of the Constitutional Court of Albania developed as a result of such conflicting interests. It finds that both the Governmental reform for returning private property and the Constitutional Court refer to a re-distribution of immovable property in accordance with the principle of social justice; however, the definition of social justice remains plausible. The Court refers to the justice of majority, with the majority including the *de facto* possessors of

the immovable property and not the historical owners who have the legal entitlement in accordance with the Civil Code. The latter, by and large, practically can not use and enjoy their property even in the post-communist Albania, as it was expropriated for the interests of other private parties, under a state established compensation regime with a fixed price, considerably lower than the price of the market.

This analysis is carried out under the lenses of the *concept of social justice*, as it has been formulated by the Albanian Constitution and as it has been interpreted by the Albanian Constitutional Court, in cases concerning the private property reform.

Key Words: *social justice, legal owner, land reform, compensation, public interest*

Abstrakt

Artikulli analizon jurisprudencën e Gjykatës Kushtetuese Shqiptare lidhur me reformën e pronës së paluajtshme në Shqipërinë postkomuniste, e cila ka një impakt esencial në të drejtën kushtetuese të pronës. Artikulli mban një qasje tre dimensionale. Së pari, artikulli pasqyron shkurtimisht procesin e shtetëzimit të pronës së paluajtshme nga regjimi komunist në Shqipëri. Së dyti, analizon përpjekjet e qeverive shqiptare pas rënies së komunizmit për të adresuar padrejtësitë e të shkuarës lidhur me konfiskimet/shtetëzimet masive të pronës private. Këto përpjekje duhet të pajtojnë dy interesa konfliktualë: interesat e pronarëve tradicionalë/historikë dhe interesat e atyre që e posedojnë dhe e gëzojnë pronën e paluajtshme të të parëve, ose për shkak të alokimit formal nga shteti komunist, ose për shkak të uzurpimit pas rënies së komunizmit. Së treti, artikulli analizon jurisprudencën e Gjykatës Kushtetuese të zhvilluar si rezultat i konfliktit të këtyre interesave. Artikulli gjen se reformat e Qeverisë për kthimin e pronës private dhe Gjykata Kushtetuese referohen në një rishpërndarje të pronës së paluajtshme në përputhje me parimin e *drejtësisë shoqërore*, por koncepti i drejtësisë shoqërore është problematik. Gjykata e quan si drejtësia e shumicës, ku me shumicë i referohet poseduesve *de facto* të pronës së paluajtshme dhe jo pronarëve historikë që kanë titullin ligjor të pronësisë në përputhje me Kodin Civil. Këta të fundit, nuk e gëzojnë dot pronën e tyre edhe në Shqipërinë postkomuniste pasi ajo shtetëzohet për interesa të privatëve, në një nivel kompensimi fiks, goxha më të ulët se çmimi i tregut. Analiza i referohet konceptit të *drejtësisë shoqërore* sikundër është formuluar nga Gjykata Kushtetuese Shqiptare për çështjet që kanë lidhje me reformën e pronës private.

Fjalë Kyce: *drejtësia sociale, pronar i ligjshëm, reforma agrare, kompensim, interes publik*

Апстракт

Во рамките на оваа статија се дава анализа на јуриспруденцијата на албански Уставниот суд за земјишни реформи во посткомунистичка Албанија, која има големо влијание врз уставното право на сопственост на (правни) сопственици. Во статијава се применува тридимензионален пристап. Прво, во статијата се дава кратка анализа на процесот на национализација на недвижен имот од албанскиот комунистички режим. Второ, се испитуваат напорите на албанските владите по падот на комунизмот, со цел да се надоместат минатото, неправдата од масивна сопственост конфискација / национализација. Со таквите напори се решаваат два спротивставени интереси: интересите на традиционалните сопственици и интересите на оние кои ги поседуваат и уживаат во недвижниот имот на поранешните, или поради формални алокација од комунистичката држава, или со земање по падот на комунизмот. Трето, се анализира судската практика на Уставниот суд на Албанија, која што е развиена поради таквите противречни интереси. Се смета дека двете владини реформи за враќање на приватната сопственост и на Уставниот суд се однесуваат на редистрибуција на недвижен имот во согласност со начелото на социјална праведност, но дефиницијата на социјална праведност останува веродостојна. Судот се однесува на правдата на мнозинството, со мнозинство вклучувајќи ги и де факто сопствениците на недвижен имот, а не на историски сопственици кои имаат законско право во согласност со Граѓанскиот законик. Подоцна, практично не можат да го користат и да уживаат во својот имот, дури и во Албанија посткомунистичка земја, како што беше експроприрано за интересите на други приватни лица, во рамките на државниот режим за надомест со фиксна цена, значително помал од цената на пазарот.

Анализата се врши низ призмата на концептот на социјална правда, како што е формулирана од албанскиот Устав и како што се толкува од албанскиот Уставен суд, кога се работи за реформи на приватната сопственост.

***Клучни зборови**: социјална правда, правен сопственик, земјишни реформи, компензација, јавниот интерес*

Introduction

1. General Remarks on the terms *Justice* and *Social Justice* used in this article

The concept of justice has been traditionally subject of philosophical, political, social and in particular of legal debates. It is actually one of the essential values of the modern legal systems, given that the majority of the constitutional documents include it as the main aspiration to be achieved. Justice is considered as a conditional criterion for the legislative organ in enactment of the legal norms and as a guiding principle of the judicial power during the implementation of the legislation in the concrete cases. Thus, many documents establishing international organisations/legal regimes consider justice as one of the objectives of the international legal order, i.e. the UN Charter (UN Charter: 1945), Universal Declaration of Human Rights (1948), European Convention of Fundamental Rights and Freedoms (ECHR- 1953). Similarly, the Constitutions of many states such as i.e., USA Constitution (Preamble of US Constitution: 1787) or Albanian Constitution (1998) envisage as one of their objectives the establishment or observance of Justice.

The Albanian Constitution declares its aim for establishing justice in its preamble, where it envisages that '*We, the people of Albania…with a deep conviction that justice, peace, harmony and cooperation among nations are among the highest values of humanity, establish this Constitution' (Albanian Constitution: 1998)*.

It also sanctions the obligation to respect the principle of the ***social justice*** in its article 3 where it refers that: *The independence of the state and the integrity of its territory, dignity of the individual, human rights and freedoms, social justice, constitutional order, pluralism, national identity and inheritance, religious coexistence, as well as coexistence with, and understanding of Albanians for minorities are the bases of this state, which has the duty of respecting and protecting them (Albanian Constitution: 1998)*. With this provision, the Constitution sanctions imperatively the obligation of the state to respect the *principle of social justice*, directly (in accordance with the art.3.4 of the Constitution). Hence, we could state that in the cases were the strict implementation of the specific law does not bring social justice, the judges have the obligation to overcome the law in order to respect the demands of the justice, in accordance with article 3 of the Constitution.

Such obligation stems also from Article 145 of the Albanian Constitution, which envisages that: *Judges are independent and subject only to the Constitution and the laws. If judges find that a law comes into conflict with the Constitution, they do not apply it. In this case, they suspend the proceedings and send the case to the Constitutional Court.* Thus, if a judge considers the applicable law in a concrete case as violating the demands of the social justice, he/she should send it for evaluation at the Constitutional Court, which could declare it unconstitutional if it violates the requirements of social justice, pursuant to article 3 of the Constitution. Such approach would be in accordance with the Theory of Natural Law, which considers as a criteria for the legal validity the *justice of/by law. Lex injusta non est lex*, a declaration that has been cited continuously by the representatives of the Natural Law

Theory, which is still considered as a criteria for the validity of the norms by some regimes (Freeman: 2008). This means that when the strict implementation of the law brings injustice, the judge should overcome the law and use the basic principles of justice. Such position has been favoured also by other theories such as Legal Realism or Dworkin's Theory of Rights, who defend an active judge, liable not for the mechanical implementation of the law, but for prioritising the demands of justice over the law (Freeman: 2008; Oxford Handbook of Jurisprudence: 2005).

The process of legislation enactment in Albania however, envisages generally formal criteria for the validity of laws. Thus regardless of its content, a law to be valid must be enacted by the Parliament, followed by a Presidential Decree and publication in the official Gazette (Albanian Constitution: 1998; EURALIUS: 2006). The legal scholars and the doctrine refer to the general principles of law, in particular of justice, as essential in the process of drafting of the legislation. It is argumented that *'Laws shall not violate the notions of reason and justice, as well as the rational legal order…. The laws with low quality, irrelevant and unjust weaken the legal order and the authority of the state' (Berberi: 2008).*

The concept of **justice** has been traditionally interpreted in the form: *ones getting ones due (Freeman: 2008).* Here it is raised another issue: what is ones' due. Is it meritocracy, desert, luck? This subjective criteria has made the concept of justice a subject of study and discussions since the ancient philosophy until nowadays. Black's Law Dictionary (2005) defines it as: *the fair and proper administration of laws.* The Black's Dictionary refers to the procedural and substantial justice. Substantial justice means *justice fairly administered according to the rules of substantive law*, regardless of any procedural errors not affecting the litigant's substantive rights (See also Armstrong and Schauer: 1996). A key element of the substantial justice is **distributive justice**, which is referred to as the *justice owned by the community to its members, including the fair allocation of common advantages and sharing of common burdens (Black's Law Dictionary: 2005).* Regardless of the differences on how the distribution should be done, it is important to notice that distribution of goods/wealth/rights is essential for a society and in principle it should be just.

Social justice on the other hand has been defined as *justice that conforms to a* ***moral principle such as that all people are equal (****Black's Law Dictionary: 2005****)***. This is closely related with the distribution of rights and wealth in a society. Social justice generally refers to the idea of creating an egalitarian society or institution that is based on the principles *of equality and solidarity, that understands and values human rights, and that recognizes the dignity of every human being (Schauer- Armstrong: 1996).*

The article does not analyse the different concepts and philosophical approaches on justice and social justice- there is an immense literature on this area (i.e. Rawls: 1971; Schauer- Armstrong: 1996; Clayton, Williams: 2011). It will focus on the *concept of justice* and of *social justice* as defined by the Albanian Constitutional Court for cases related with the re-distribution of the immovable property in the post communist Albania. Hence, the concept of justice and of social justice in this article have been used simultaneously, when related to re-distribution of immovable property. The reason for using both terms as

synonymous is because the legislation enacted for this purpose and the jurisprudence of the Constitutional Court analysed in this article refer to both terms under the same definition: *justice in re-distribution of the land/immovable property to create a balance between conflicting interest*s. The article uses the original term, for consistency purposes. However, it must be said, that the approach of the Albanian Constitutional Court is mostly related with the so-called '***transitional justice'***, which refers, *inter alia, to* the efforts of the state to address human rights violations of the past. In the property distribution in Albania, the concept of transitional justice has its specifies, and has collided with the traditional concept of 'social justice', which will be addressed in the article as below.

2. General remarks on the right of immovable property in Albania during and after the communist period

The pre-communist Albania, as elsewhere during this period, found the society divided clearly in two main classes- feudal (called as Bejlerë in Albanian) and villagers, mostly without property. There was a limited class of entrepreneurs living in the cities, but the majority of the population was a rural one. The land/immovable property in general was a private one, owned by big feudal families and the limited class of bourgeois (History of Albania: 1984). The Civil Code of the time (enacted in 1929) recognised and protected the private property.

The instalment of the Dictatorship of Proletariat after the Second World War had as its main premise the equality of persons, as proclaimed by the Albanian Constitution of 14 March 1946. The Constitution acknowledged the exclusive state ownership on the means and tools of production and envisaged the right of private property only to the extent that it did not contravene the interest of the state. The Constitution declared that the land will be given to the one who works/uses it. The state and cooperative property were considered as property of the whole society. It reaffirmed the objectives of the Agrarian Reform, laid down by the Law no.108/1945 'On the agrarian reform' which gave priority to the obligatory transfer (without any compensation) of the private land/immovable property as the state's land. The Law envisaged steady measures for establishment of cooperatives in production of goods and services.

The result of such policy was the gradual removal of the private property- leaving it without any practical role in the economy. The main forms of property entitlements were envisaged as following (Decree 2083/1955):

Nationalization, which was the obligatory transfer of the property to the state ownership without compensation. It was the primary way for creating state property. It was not considered as a penalty or criminal measure, but as a general measure of the Communist Albania for the creation, enhancement, and strengthening of the socialist economy.

Expropriation- it is the expropriation of the private immovable property for a general public interest. The compensation was either in currency or in another form of property, commensurate with the real value of the property in the time of expropriation. *Differently from nationalization, the expropriation was an extraordinary measure, regulated by an administrative act.*

Confiscation- was the obligatory expropriation without compensation of the private property by the state, following a judicial decision.

Other forms of establishing state property during this period were:

- *Objects without an owner and buildings left behind*- became state property if the owner did not claim the property within 6 months after loosing it.
- *Antiquities*: consisted of valuable objects hidden in the land, whose owner was not known or had lost the right of property. Whoever would find them would take 20% of the value, the rest became state property. There were cases of gold found by citizens, due to the fact that many owners tried to hide their property in gold in abandoned areas.

Massive nationalization, confiscation and expropriation of the private property continued until the private property was completely abolished by 1966. The development of economy was based on the centralised planning. This regime of the property was reinforced by the following constitutions/legislation, i.e. Constitution of 28 December 1976, which sanctioned the complete abolition of the private property.

The big owners either handed 'voluntarily' their property to the state, or were declared 'Kulak/enemy of the state' and their property were nationalised. The nationalised/confiscated land was used for cooperatives and for building purposes-factories, schools, other public premises or apartment blocks.

Apartments built during the communist period were property of the state, while the houses built before the communist period could only be used in accordance with the *socialist morality.* The nationalized/confiscated houses-villas- apartments were re-inhabited by other individuals/privates following state orders, as part of the policies to provide shelter to everyone. This was the situation during the 1991.

The fall of communism in 1991 was associated with *a legal reform aiming at acknowledging and protecting private property*. The first act: Law on Fundamental Constitutional Provisions no.7491/1991 recognised the right of property, the private initiative and diversity of properties (1991). It was followed by a myriad of legal acts on this purpose.
Such recognition of property was carried out in the middle of the following practical developments:

1. The former[1] owners (persecuted or not) began gradually to seek re-possession of their property, starting from the houses/ apartments, which were occupied by other dwellers in the framework of communist policies. The latter had been living in such buildings for periods up to 30-40 years and moving out could result in ending up in the street.
2. The fall of communism was associated with massive internal migration, especially from north to central Albania, in particular in Tirana and Durres; as well as from rural areas in general to the cities. The internal migrants occupied land and state buildings, which were in fact property of the former owners, expropriated/nationalised/confiscated by the state. Thus, by and large the internal migrants occupied the private properties and not the state ones.
3. The promulgation of the free market economy was followed by overall privatization of state companies. The process aimed at facilitating privatisation by the persons who had been working on such companies, regardless of the fact that the companies had been built in the land previously owned by the private owners.

For the purpose of this section of the article, I am referring briefly to some of the most important legal acts approved by the Albanian parliament to address the post communist reality of immovable property.

Law 7501 "On the Agricultural Land', which distributed the Agricultural Land to the farmers/former members of collective farms (Law no.7501: 1990). The distribution was carried out not based on the Titles of Property before the nationalisation of the private property, but on the basis of residence in the village or registration as agricultural family. This law was followed by other legal acts and bylaws regarding privatisation of several state objects by individuals, still not on the basis of the title of property/expropriation.

Law no.7652/1992 'On the privatization of the state buildings', which gave the right to all the individuals living in the state buildings (everything was considered as a state building) to privatise them. Among the buildings privatised during this period were also several ones nationalised from private owners and given for use during the communist period.

Law no.7698/1993 'On the return and compensation of the properties to the ex owners', which aimed at returning, where possible the properties to the pre-communist owners. If that was impossible, the Law envisaged compensation.

Law no.7926/1995 'On the transformation of the state enterprises in commercial companies'. Many companies, which were established in a private land, were actually privatised by the people working on those companies and not to the owners of the land.

[1] This is the term used for the pre-communist owners in Albania.

Law no.8337/1998 'On the privatization of the agricultural land, forests, etc'. Here the principles was- distribution of the land not to the former owners but to the members of the cooperatives/villages.

Law on the Legalisation, Urbaning and Integration of Illegal Buildings no. Nr. 9482, date 3.4.2006 (as amended). This law, *inter alia*, granted the title of ownership to the illegal possessors of the land of the pre-communist owners; thus, expropriating the latter for the interest of the post-communist possessors. This law was largely discussed and criticised by the associations of legal owners.

The legal acts have been, by and large, inconsistent partly due to rapid developments of the situation in the practice and partly due to other emerging issues in a country with a very fragile democracy. The legal basis recognized the right of private property, but with various practical complications. It provided the title of ownership to persons who did not have any document of ownership: more specifically, in the villages, it distributed the land to the members of the cooperatives who were not necessarily the owners of the land before the communist nationalisation process, but only persons working in the lands of the feudal/owners. Hence, this was not a mere acknowledgement of the private property, but an *agrarian reform*, where the state, regardless of the origin of property decides how to distribute it in the society. Similarly, it declared as owners of the apartments all the persons living in the apartments built during the communist period, only because of the fact of living there. It did not take into account the landowners, where the premises were built; thus, depriving the owners from their right of property of the land. Similarly, it created a new class of owners of the State Companies and subsequently also of the land where the company was built. Such class consisted of persons who did not have any property title over the land before the nationalization. This created a dispute between the legal owner of the land and of the new owner of the building/shop/company offices etc.

This legal package created also a significant class of owners, who illegally had trespassed into the land of legal owners and had build their houses in those lands. The Law on Legalization considered the trespassers as the new legal owners, while the original owners were finally declared ex-owners and were given only the possibility of compensation, not under the market value but under a fixed one by the state. It was the state that would make the compensation and not the private ones.

These forms of entitlements of ownership contradict the classical ways of acquisition of property, envisaged by the Civil Code (1995). The latter being: contractual transactions, inheritance, good faith, successful prescriptions and property by merger. The latter entitles the owner of the land also with title of the ownership of the buildings constructed on his land by somebody else, unless the building has been constructed in good faith and exceeds the value of the land. However, in the latter case there is need for a decision of the court (Albanian Civil Code: 1995). Contrary to such provision, the law on legalisation gives the right of property to the illegal builder and not to the owner of the land.

As per above, during the last two decades there have been lodged many claims in the courts as a result of clashes of titles of properties and as a result of collision of the classical

property entitlements by the Civil Code with the specific legal acts mentioned above, i.e. Law on Legalization. The article will analyse below only the claims raised at the Constitutional Court of Albania, which are related with the principle of justice in distribution of the right of property.

3. The Jurisprudence of the Constitutional Court of Albania regarding the justice of the immovable property reform

The Albanian Constitutional Court has been called to declare unconstitutional several legal acts enacted by the Albanian Parliament regarding private property. The common denominator of the cases has been the claim from the historical owners that the post-communist privatisation process has been unjust and violating their constitutional right of ownership.

One of the first cases was lodged by the Organisation of Free Privates, the National Organization of Expropriated Owners 'Property with Justice' and the Social Democratic Party in 1994. The applicants, in the name of the historical owners required from the Constitutional Court to declare as anti-constitutional the articles 12 and 17 of the Law no. 15.04.1993 'On the return and compensation of the property to ex-owners'. In its Decision no. 4/1994 regarding this case, the Albanian Constitutional Court refers to the spirit of justice, as a criteria/ a standard in evaluation of the legal acts enacted and implemented during the communist regime, which sanctioned the collective property and expropriation of the owners. The Constitutional Court declared that:

"In addition to the privatisation of the state property, the new democratic state was in front of a reality with sharp political, economical and social problems, result of ***injustices*** *of the totalitarian communist regime for around 50 years towards the private owners. The latter, have been expropriated by their legal properties through arbitrary acts, without any legal basis, by means of nationalisation, expropriation, confiscation and other means, based on laws or bylaws, or judicial acts, which were in contradiction with the spirit* ***of justice and human dignity****, against the universal and fundamental rights, accepted by the entire western democratic world. Through the law no. 7698, date 15.04.1993 "For the return and compensation of the properties of ex owners", the new democratic state, regardless of the fact that was not responsible for the injustices of the past, undertook the moral and legal obligation to restore, as much as possible, some of the injustices of the former regime after 29 November 1944 (Decision no.4-1994)".*

In this paragraph, the Constitutional Court refers to the legislation and the jurisprudence of the courts in the previous regime, which have expropriated the owners from their properties, as *in contradiction with the spirit of justice*, but without undertaking further analyses to interpret the spirit of justice, treating it as a self-explanatory concept. The Constitutional Court acknowledges an essential importance to the principle of justice in its approach in this case, but only when analysing the communist legislation. It does not take a consistent stand throughout the case. It considers as unjust the legislation of the former regime, but does not continue such evaluation for the legislation in force, which is actually claimed as anti-constitutional by the plaintiffs with the argument that it is unjust. The Constitutional Court does not enter in evaluation of fairness or unfairness, justice or injustice of the post communist law, but limits

itself within the realm of the legal notions. Thus, the Albanian Constitutional Court refers to the claim '*that the law for privatisation… is unconstitutional, because it violates the right of prior purchase of the ex-owners to buy/privatise the properties that have been expropriated from them unjustly*' as legally unbiased with the argument that '*the right of prior purchase of a property is a juridical notion that exists only for the co-owner …of the co-owned objects and not for other subjects that do not fall within the co-owned relationship' (Decision no.4-1994).* In this paragraph, the Constitutional Court does not analyse whether the traditional juridical notion of the right of pre-purchase, in the concrete case, if strictly applied, brings justice or injustice, or whether it violates the concept of *social justice* according to the Albanian Fundamental Constitutional Provisions (1991).

I think that the exemption of the land owners from the right of prior-purchase of the state objects built in their property is unjust and further more, it creates another social conflict between the owners of the land and the persons who are given the right to buy the state building, the so called – the new owners-, a conflict which the Constitutional Court actually aimed to eliminate through not recognising the right of prior-purchase of the (ex) owners. If the Constitutional Court would have taken the same stand as it did when referring to the communist legislation, (declaring it unjust) it could also consider unjust a law that does not provide for the landowner, unjustly expropriated during the communism, the right to buy the (state) objects built in his/her land. The Constitutional Court refused to deal with the impact of the strict implementation of the juridical notion of *–prior-purchase-* in this case, arguing that definition of the juridical notion is a competence of the Parliament and requires a political solution. I think that even though the right of prior-purchase of the land by the owners is a juridical notion, in the concrete case, it should have been applied in full compliance with the principle of *(social) justice*; the latter being a Constitutional one. The Decision in this case perpetuated the expropriation of the traditional owners, without a clear public interest.

The Constitutional Court was called again to decide on property conflicts related with traditional owners in another case: no.7 date 14.09.1994. The Organisations of the Expropriated Owners 'Property with Justice" required the Constitutional Court to abrogate as anti-constitutional the law no. 7501/1991 "For the land", Law no.7699/1993 "For the compensation in monetary value of the ex- owners of the agricultural land" and partly the Law no. 7698/1993 "On the return and compensation of the property of the ex-owners', The requesting party claimed that "*the legal regime of the agricultural land envisaged through the anti-constitutional laws cited above is unprecedented in the law making practice of the democratic countries and is more communist than the "Law on Land Reform' approved by the dictatorship of Enver Hoxha'.* Thus, the requesting party evaluated the post communist legislation using as benchmark of **injustice** the communist legal regime of property, which the Constitutional Court itself declared unjust in its previous decision nr. 4/1994. The Constitutional Court declared in this case that: "… *Law no.7501/1991 "On the land" ..., as well as the law no..7699/1993 "On the monetary compensation of the ex-owners', have the features of an agrarian reform based on the principle of* ***Social Justice****, as envisaged by article 2, paragraph 2 of Law no.7491/1991 "On the Fundamental Constitutional Provisions'. This serves for fulfilment of the programme of our*

state for self-expropriation and privatisation of the economy... in harmony with the historical and actual conditions in Albania'.

Treating the legal acts as in *compliance with the social justice*, the Constitutional Court (pre) judged the requests of the claimant as unfounded. Even though the Court did not attempt at all to define the concept of '*social justice'*, it is very interesting the fact that it considered the *'agrarian reform of the years '90'* as complying with the constitutional principle of the *social justice,* while the agrarian reform of the Dictatorship of Proletariat (mentioned in the previous decision no.4/1994) as completely unjust. If we would use the same evaluating standard-*the fact that the state expropriates and takes decisions on a property, which is not a state property,* but a private one- expropriating the owner without a clear and proportionate public interest, wouldn't that be unjust also in the post communist reform? Even the communist regime pretended that the nationalisation/expropriation was carried out in compliance with the Marxist social justice, a justice of *sharp equality* sanctioned by the Constitution in compliance with the entire spirit of the Communist Regime (Albanian Constitution: 1946 and Albanian Constitution: 1976).

In the case no.7/1994 referred above, the Constitutional Court has emphasised that: *the agrarian reform is not a mere juridical civil act, but a legal measure with obligatory character... which,… aims at establishing a juridical system of property over the agricultural land, on the basis of the principle of* ***social justice*** *and the objectives of the free market economy....A considerable part of agricultural families are enjoying since two years the land granted by law. As a result, there would be a violation of the constitutional principle of social justice if we would agree with the claim that the farmers can only use but not own the land granted by the above-mentioned laws, and to pay rent to the ex- owners'.*

The Constitutional Court does not treat the above legal acts as individual norms, but has raised them in the level of a reform-of a general policy of the state. This is in line with the Dworkin's idea on Policies as an essential part of the Law, which aiming at regulating a particular sphere for the improvement of the community as a whole, may also be contrary to the legal norms or general principles of law. Due to their objective, as Dworkin says, the Policies take precedence over laws or general principles, for specific cases and for a limited time, as required by the needs of the community (Dworkin: 1977).

Citing the fact that a good part of the agrarian families had already settled/started their life, based on a law that declared them since two years as owners of the land due to general privatisation, the Constitutional Court uses the term of **social justice** as a *utilitarian justice, justice of the largest number of people*, as opposed to the individual rights. It also refers to a legality that stems from the *practice* and not *vice versa*. Thus, the practice determines the law; and not the law, determining the practice. Why should the constitutional right of the ownership of the legal owners be overlapped by the right of the farmers (new owners) to use and own the land? The Law 7051/1991, ignoring completely the right of the owners to their property, was unjust and contrary to the classical ways of property acquisition envisaged by the Civil Code and contravened the Constitutional Right of Property.

The Constitutional Court reaffirmed its approach in the Decision no. 30/2005, called again by the Organisation of the Expropriated owners 'Property with Justice' for declaring

unconstitutional several articles of the Law on the Compensation and Return of the Property. The Court expressed that: *Analyses and interpretation of some of constitutional concepts that are related with the 'public interest' and with the 'just compensation' as well as the* ***principle of justice, of proportionality and of the social state, make up the constitutional boundaries of the margin of evaluation, which should orient the parliament for respecting the property right****...* (Pursuant to the European the jurisprudence, the Albanian Constitutional Court finds that) {…the *process of return and compensation of the properties in the countries of transition is not based on the right of property, but on the* ***principle of fairness and of justice and moreover, on the principle of the social state (welfare state*****)** **(**reference has been omitted**)....** *The principle of justice requires that the Court takes in consideration not only the interests of the owners and of their heirs, but also of the other persons in the society as well as the public interest in general. Thus, the principle of justice and of proportionality do not require…, return of the property rights for all ex- owners or of their heirs, or to fully compensate them with the full value. The objective of the property laws is not cancelation of all injustices but their reduction. Return of the property rights should not create other injustice ..., in respect of the* ***principle of justice and of social state,*** it can not be *established an obligation for full compensation for the expropriated or nationalised property by the regimes that have not respected the minimal standards of the human rights and that 'full restoration of the previous property rights would be contrary to the principle of equality itself (Reference made to the Report of Venice Commission on the Law on Return and Compensation of the Property: 2004)}.*

... the above arguments make up already ***agreed standards,*** *which guide the Constitutional Court in its analyses of the constitutionality or unconstitutionality of the provisions subject of analyses, with the Constitution (Decision no30: 2005)."*.

The Constitutional Court expressly emphasises that in the evaluation of the constitutionality of the legal norms it is based on the **principle of justice, proportionality and social state,** as standards it has recognised and accepted. It conceives the principle of justice as a principle strictly related with the public interest, dealing with a very much argued issue both from the philosophical and constitutional perspective- that of the report between individual justice and collective/social justice. The Albanian Constitutional Court gave priority to the latter.

The Constitutional Court with the above decision refers to the *public interest as* conditioning the removal of *the private property titles on the basis of a* ***policy*** *calculated to achieve social justice within the community (Decision no.30-2005)'.* The public interest is closely connected and is dependant on the social justice. Some concerns must be raised here: Firstly, can we say that the policies undertaken by Albania since the fall of communism in '90s have been deliberately calculated policies for achieving the social justice? The fact that the issue of private property continues to be the main problem in Albania even after 20 years from the communist period makes it doubtful whether such policy has indeed been well projected, towards the social justice. Secondly, does the Albanian Constitutional Court have the discretion to evaluate the state policy so as to ascertain whether it is in line with the social justice? The Constitutional Court expressed that the evaluation of the policies is more a duty

of the State rather than of other organs because 'the *State... recognises the conditions and social relations more than every other individual and that the state only has in its disposal the legal means for their improvement*. This approach of Constitutional Court reminds us the analyses of the Lord Browne Wilkinson in the case Airedale National Health Service Trust k. Bland, in relation with assisted euthanasia referring that:

"Where a case raises wholly new moral and social issues, in my judgement it is not for the judges to seek to develop new, all-embracing principles of law in a way which reflects the individual judges' moral stance when society as a whole is substantially divided on the relevant moral issues... For these reasons it seems to me imperative that the moral, social and legal issues raised by this case should be considered by Parliament (La Bland Case: 1995)"

Similarly, the property issues in Albania have divided the public opinion in two parts: one part of the society which claims that the property belongs to the historical owners (referred as ex-owners); and another group which thinks that due to the *de facto situation* of the last 20 years the state should decide not on the basis of the entitlements but on the basis of the public interest; where the balance (the concept of public interest) should fall at the occupators (new owners) who have possessed the land of the owners and claim the title of property not on the basis of legal forms envisaged by the Civil Code, but due to the *factual occupation* (Decision no.35/2007).

The Constitutional Court has analysed in its decision no.30/2005 the inter-dependance of the social justice and the public interest and has highlighted the difficulty in finding a universal definition for each of them (Decision no.30 /2005). While, in the decision no.18/2003 it envisages that the: *"the public interest is a consitutional notion non-exhaustive, in the sense that the list of the issues with public interest should be understood in a relative sense, depending on the different situation'.* This approach has been reiterated in the Decision no.35/2007, where it treated the expropriation carried out in accordance with the Law on Legalisation as in compliance with the public interest, even though it was the result of a *de facto occupation* from privates/individuals for their own interests against the interest of the legal owners.

Of a high interest is the line of argument by the minority in this case, regarding the concept of justice. Emphasising as an essential element of the expropriation for public interest the fact that it should be legal, the minority has as its initial point of argument the fact that *Law for Legalisation legitimises the expropriation- deprivation from the right of the property the legal owners in the favor of the possessors of ilegal buildings (Minority opinion of Decision 30/2005).* This element is essential in the analyses of the laws and evaluation of the just acts. The international jurisprudence and international theory of law refers often to the principle that: *no one can profit from its illegal act (Dworkin:1977 referring to Riggs vs. Palmer Case).* But, the Albanian Law for Legalisation, in the name of public interest and of *social justice* violates such a principle: it tells to the citizens that they may profit from the violation of the law, because the state does not punish but legitimises the profits.

I think that rightly the minority in this decision analyses the objective of the law, whether such objective is based on law, whether it is related with a policy that promotes the social justice, whether legalisation can be considered as a public inerest. Here, for the first time, in its dissenting opinion, the minority re-examines the fairness and in the same time the relativity of the public interest in clear utilitarian terms: where does the balance go, towards

the illegal possesor or towards the legal possessor: should the balance necessarily take in consideration the number of persons? Are indeed the illegal possesors more in number than the legal owners (if we include also the heirs etc)? What is the long term impact of such a policy in the psycology of the citiznes regarding the legal order? The minority shares the opinion that the number is not decisive in the establishment of a public interest, but the objective which is aimed and the means used to achieve the objective. It declares that: '*It is understandable that we are in front of an abnormal situation of violation of the right of property, where there can not be fully implementation of the general principle of the civil law. However, in such a conflicutal situation, interference of the state as regulator of ilegality should not be in such measures as to harm one party for legitimising the other party. The interference of the state must aim at finding a middle approach among one or more interests that correlate/ interwine with each other. ... The law-maker has not placed in a fair balane the interests of legal owners, who have not violated the law, with the interests of those who have violated the law, and have built in an illegal way....* and *cites* the Venice Commission's approach in its *amicus curiae,* where it emphasises that: "... *the solution in the concrete case provided by law does not put a just balance, as long as the interests of the legal owners who have not violated any law, are overcomed/surpassed by the interests of those who have constructed illegal buildings" (Amicus Curiae- Venice Commission).*

The above mentioned paragraph expressely considers the justice and just balance as a fundamental criteria for evaluation of the legal act. The Venice Commission emphasises the just balance between the interests-the legitimate interests of those who respect the law and possess the legal entitlement, with the interests of those who have violated both the law and the interests of the former. The priorty should be given to legality. Such approach is in compliance with the concept of social justice and the principle of rule of law. The contrary, the legitimisation of the violation of law risks to become a negative precedent in the internalisation of the concept that the violation of the law, if carried out by a considerable number of the society for personal interests is followed by profits and not by sanctions (Lubonja: 2010).

Conclusions

The recognition of the private property in the Post Communist Albania was associated with condradictory legal acts and complications in practice regarding property titles. This was followed by several decisions of the Constitutional Court, which was called to declare anti-constitutional the specific legislation on the private property on the basis of its being unjust. The analyses of the decisions referred to this article indicates a double standard used by the Constitutional Court when it evaluates the justice of the legislation. It conducts the evaluation using the criteria of 'justice', if the legislation has been approved before 1991, but does not use the same standard regarding the post-communist legislation. It gives priority to the majority and to the '*de facto situation'* as compared to the legal entitlement and desert. This situation has resulted in 20 years of litigation for property rights by the traditional owners and in continuation of the sharp conflicting interests.

By the time the Article was written, the Albanian Council of Ministers issued a normative act, which required the possessors- non owners to release of the houses of former owners. The Constitutional Court, which was called to declare unconstitutional this normative act by the People's Advocate, once more decided to reinforce the state's policies, which fortunately in this case, were in line with the interests and justice of the legal owners. It seemed that also the People's Advocate considered justice as related with the *de facto* situation, rather than the one related with the legal owners. That is why, under its capacity as protecting the people's rights, it chose to protect the interests of the dwellers as opposed to the interest of the legal owners. However, in this last case, the Consitutional Court treated justice as linked with the traditional owners, a different approach from its previous caselaw. It is to be seen, whether such approach will continue.

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