

REAL ESTATE LEGISLATION AS IMPERATIVE FOR A SOUND AND FUNCTIONAL DEMOCRATIC LEGAL SYSTEM: THE CASE OF ALBANIA

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Abstract

This paper aims to explore one of the most fundamental juridical principles of a democratic society, the soundness of its property legislation. This has been a commonly found problematic issue in countries in transition, especially in Eastern Europe and the Western Balkans. Our case study will be Albania and the way that its property registration system reflects the functionality of its legal system as a whole. As such, this paper will very much be about the state of democracy in Albania, since the Rule of Law and the State of Law is the most important pillar of a western democracy. In Albania, the Property Registration System has gone through a number of stages to reach its present form. In the past, the property registration system has been fragmentary and with a completely different model from the concept of the today's immovable property registration. We will analyze the institutions which administrated the property information, with special reference to urban areas, where the focus was the owner of the property.

In the early 90's Albania undertook a series of reforms in the land market. These reforms resulted in the fragmentation and reorganization of the boundaries of land and as a result - the creation of over 3 000 000 private properties. Transfer of rights from the state to private created at that time over 500 thousand private owners. The new system of immovable property registration has in the focus the property and not the owner. The property consists of several components such as: the act of legal acquiring the property, the Index map and the property cartel containing all the information on the property. Currently, the immovable properties are recorded and are being recorded through three specialized private companies, contracted by the Main Registry of Albania. Due to all innovations and the problematic carried the new Immoveable Property Registration System in the Republic of Albania, I appreciate the need to analyze a range of important issues related to this process as well as the interests of citizens and other subjects of the right affected by it.

Keywords: right, joy, disposition, heritage, land, forests, pastures, meadows, rivers, streams, channels, lakes, lagoons, reservoirs.

1. INTRODUCTION

Ownership, as one of the most ancient legal institutions, was established with the birth of the right itself. The Right of Property is one of the most important legal institutions of civil law in Albania. Its importance is expressed by the fact that it is an object of regulation and it is protected not only in the legal aspect, but also in the constitutional and international one. Hence, the right of ownership enjoys protection in national and international terms. The right of ownership is a constitutional category. In international level, the Right of Ownership is guaranteed with the Universal Declaration for Human Rights, year 1948, and with the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention for the Protection of Human Rights) and Fundamental Freedoms with its Protocols, acts which were ratified by the Albanian state (ratified with law no. 8137, dated 31/07/1996, published in the official bulletin no. 20, year 1996, date of publication /12/08/1996).The scope of this paper is to analyze the Albanian legal framework legislation regarding the real estate in the Albanian legislation, and regarding the

right of property and the right of private ownership in particular, topics that are treated in the arguments below.

2. THE RIGHT OF PROPERTY IN GENERAL AND THE RIGHT OF PRIVATE OWNERSHIP IN PARTICULAR IN THE REPUBLIC OF ALBANIA

The right of property in general and the right of private ownership in particular in the Republic of Albania, is one of the fundamental human rights anticipated as such in the "Second Part" Human Rights and Fundamental Freedoms anticipated in the Constitution of the Republic of Albania, which is a fundamental juridical act of the Albanian State.

Article 41 of the Constitution of the Republic of Albania (approved with law no. 8417, dated 21.10.1998, published in the official bulletin no. 28, year 1998, date of publication 07/12/1998), anticipates that "The right of private property is guaranteed". This article of the Constitution of the Republic of Albania anticipates the ways of the acquisition of ownership, which are: by donation, inheritance, purchase and by any other classical means provided in the Civil Code of the Republic of Albania (approved with law no. 7850, dated 29/07/1994, which became effective on the date of 01/11/1994, published in the official bulletin no. 11, 12, 13, 14 of the year 1994). Notwithstanding the fact that this article of the Constitution provides with law that expropriations or limitation in exercising the property can be made only for public interests, it also anticipates that such expropriations are allowed only for a fair reward and that for each claim of the expropriated against the amount of such reward the parties are entitled to appeal at court. Article 42 of the Constitution provides, inter alia, that "The property cannot be violated without a fair legal hearing process and that everyone is entitled to a fair public hearing within a reasonable time and by an independent and impartial court determined by law". Article 11, paragraph 2 of the Constitution of the Republic of Albania provides that "Private and public property are equally protected by law". Article 16 of the Constitution provides that the rights and fundamental freedoms provided for Albanian citizens, one of which is the ownership, are also valid for foreigners and stateless persons in the Republic of Albania, except when the constitution of the country associates the exercise of certain rights and freedoms specifically with the Albanian citizenship. Article 17 of the Constitution of Albania provides that restrictions of rights and freedoms anticipated by the constitution can only be imposed by law for the public interest or for the protection of the rights of others. The Civil Code of the Republic of Albania, in its Article 190, also provides that items may be expropriated only for public interest recognized by law and only against a remuneration recognized by law. Regarding real estate, the Civil Code of the Republic of Albania, in Articles 192-197 provides as well the registration of real estate in public registers, the real estate registry. Regarding the real estate in the Albanian legislation and in practice, no treatment differences are anticipated between Albanian citizens and foreign citizens, with the exception of restrictions provided in law no. 9048, dated 07.04.2003 "On cultural heritage" (Law no. 9048, dated 07.04.2003 "On cultural heritage"). Law no. 9048, dated 07/04/2003 "On cultural heritage" (published in the official bulletin no. 33, of the year 2003 date of publication 16/05/2003), stipulates, inter alia, the protection of cultural heritage in the territory of the Republic of Albania. Cultural heritage constitutes of movable and immovable material values, in state or private ownership". As for the objects of cultural and historic heritage in private ownership, physical or juridical persons or their users are obliged to preserve the integrity of the values of these objects. The objects of cultural heritage with special and unique national values, which are not state-owned, may be collected, sold, purchased, inherited or donated between the Albanian citizens living within the country. The Albanian State enjoys the right of pre-purchase of these assets. The objects of cultural heritage in private property with special and unique national values, when required for public interest, may be expropriated pursuant to the legal provisions on expropriation. The existing Albanian legislation, in addition to the rights of ownership, also provides the restrictions regarding such rights and its exercise for certain categories of persons (I.E. Foreigners, Citizen of the EC) or certain categories of properties (I.e. Agricultural land). The restrictions of the right of property are general and particular. Law no. 8561, dated 22/12/1999 "On expropriation and obtaining in temporary use private property for public interest", stipulates the rights of private physical and juridical persons in relation to the compliance of properties in their ownership. Moreover, according to law no. 8561, dated 22/12/199, "Expropriation of private properties is made only for public interest, in conditions when public interest prevails against the private interests of their owners, in conformity with the conditions anticipated by law and general principles of the international law". In addition, the right of expropriation and obtaining in temporary use private property is exercised for public interest which cannot be realized or protected in any other ways, except for reasons and in compliance with procedures determined expressly in this law, to the extent that is indispensable for the realization of the expropriation purpose and in any case against a fair remuneration. Regarding immovable property, it exists a certain category of them, called "state's immovable property", determined in law no. 8743, dated 22/02/2001 "On state's immovable properties" (published in the official bulletin no.9, year 2001 date of publication 23/03/2001), amended by law no. 9558, dated 08.06.2006 "On an amendment in the law no. 8743, dated

22/02/2001 "On state's immovable properties" (published in the Official Bulletin no. 69, of the year 2006 date of publication 06/07/2006), for which alienation or giving for use is made pursuant to the ways and boundaries set by special laws and not through the classical way of civil circulation of real estate in private ownership. These properties belonging to the state and part of the public immovable properties are defined in Article 3 of the law in question, including:

1. "a) Coastline in order to have access to land, territorial waters, beds and banks of rivers, streams or other water streams, lakes, lagoons and natural or artificial reservoirs, islands and sand accumulations, stones and silt on river, lake and reservoir beds, as defined under applicable laws. b) Historic, archaeological and cultural areas, as well as national parks of national or local importance. c) Areas, installations and other objects intended for purposes of national defense, public order and security. ç) Natural resources and mineral reserves and aggregates, as defined in the applicable legislation.

2. There are also public immovable properties, if belonging to the State, the forests, pastures and meadows, as well as any other immovable properties built on them, which directly serves their protection and development.

3. There are also public immovable properties, *if belonging to the State, and the fixed assets (or tangible)*, which serve to provide public services, such as: roads and bridges, railways and auxiliary systems related to them, airport infrastructure, systems of electricity production and distribution, telecommunications and mail service systems, potable water supply systems, and sewage spills of residential areas, buildings of well-known historic, archaeological and cultural interest, parks, green areas, public squares in cities and residential areas, buildings along with courtyards that are used for services provided by the state for education, science, culture and sports, health and social service, central and local institutions, as well as governmental residences along with the lands where these properties are situated". In the register of immovable properties, for public properties of the state, this law in its Article 7 provides the registration of their conditions and limitations or their removal or limitation. These conditions and limitation for immovable properties of Local Government (Commune/Municipality) may be removed or changed only with the Decision of the Council of Ministers. The right of ownership of the state on certain categories of properties is also anticipated in Law no. 8093, dated 21/03/1996 "On water reserves" (published in the official bulletin no. no. 12, year 1996). Article 3 of this law stipulates that the right of state ownership is unchangeable and irrevocable on: a) All water resources of the Republic of Albania, determined in Article 2, paragraph 1, of this law. b) All the beds and banks of rivers, streams or other water flows, permanent or temporary, channels, lakes, basins, lagoons and reservoirs, natural or artificial, island and sand accumulations, stones and soil in the river beds, lakes and reservoirs, as well as geological formations of underground waters. c) All the hydrotechnical object and works built by the state, such as: dams, irrigation, drainage, navigational systems, water supply and canalizations and their respective works. ç) Land created from the revulsion of water or land advancement to the detriment of water is state property". The right of ownership of the state on certain categories of properties is also anticipated in Law no. 8906, dated 06/02/2002 "On protected areas"(published in the official bulletin no. 29, of the year 2002, date of publication 26.06.2002), Article 18 provides that "Protected areas are proclaimed those territories that are public, municipal, communal properties and in special cases private property. For special interests of protecting nature and biodiversity, protected areas also include lands, forests, pastures, etc. Territories and private objects, included in protected areas, remain the property of the private owner. They are administered and used by him or by the legitimate user, only according to the requirements of the area's management plan, approved by the Ministry of Environment. The private owners, whose property is included within the territory of the protected area, with the entry into force of this law, are recognized the right of administration and its use, according to the management plan. In case the owners do not agree, they have the right to seek compensation in value or with another surface, or sell it to the state, according to the applicable legislation. Natural monuments, public property, are inalienable". Article 7 of this Law provides that the "Natural monument is proclaimed the natural Formation (including special wood), with an area of up to 50 hectares, unique geological and geomorphologic formation, a mineral deposit or a habitat of a rare and threatened type or of special scientific and aesthetic importance." The right of gaining ownership for Albanian and foreign citizens is also determined in the Albanian legislation and, in specific terms, in law no. 7980, dated 27/07/1995 "On the sale-purchase of lands" (published in the official bulletin no. 18 of the year 1995, date of publication 18/08/1995), and, in concrete terms, its Article 5 anticipates the conditions to be fulfilled in order to enable to foreign physical or juridical persons the right of purchase of immovable property and, in concrete terms: "*Foreign physical or legal persons have the right to buy land after achieving investments in accordance with the construction permit, up to a value of not less than three times the value of land according to the stipulation of the Council of Ministers. From the time of obtaining the construction permit until the time of ownership transfer of the land, the foreign physical or legal person pays the rent for use of land. This lease is defined in*

the contract where it has been also stipulated the eventual purchase price of land, as well as the term when such price is valid. Even the foreign physical or legal persons, who have bought or built objects worth over three times the price of their land, are given the right to buy the land of these objects. Meanwhile, relating the states or international organizations in this article, it is anticipated that *the latter, in the same conditions as the Albanian physical and juridical persons, are entitled to purchase land, private or state property in order to build the head offices for their missions, in order to purchase land, on which they have constructed or continue to construct them. The benefit from such right is made on the basis of reciprocity, by benefitting the state which recognizes the same right to the Albanian state.* Furthermore, the Article 7 of this law no. 7980, dated 27/07/1995 "On the sale-purchase of lands" anticipates that "The lands which contain museum, archaeological, historic values, national parks, reserves of flora and fauna, land with special environmental values and those of military character are excluded from sale for foreign physical or juridical persons". Law no. 8337, dated 30/04/1998 "On the transfer in ownership of agricultural land, forests, meadows and pastures", Article 3 provides the impossibility of alienation of the agricultural land, forests, meadows and pastures, state property, until the compensation of former owners, except when otherwise anticipated by law, with the exception of the case of ownership transfer for effects of execution of law no.7698, dated 15/04/1993 "On the return and compensation of properties to former owners". In addition, Article 4 of Law no. 8337, dated 30/04/1998 "On the transfer in ownership of agricultural land, forests, meadows and pastures", anticipates the exclusion of foreign physical or legal persons from the right of benefitting ownership on agricultural land, forests, meadows and pastures, who, referring to this provision, enjoy the right of renting it up to 99 years, such right is exercised according to the provisions of the Article 801 and following of the Civil Code. Law no. 8337, dated 30/04/1998 "On the transfer in ownership of agricultural land, forests, meadows and pastures", makes exceptions in relation to foreign citizens. However it is possible that the foreigners, who establish a trade company (Albanian legal person), according to law "On trade companies", are entitled by means of these companies to purchase such kind of properties. A considerable part of Albanian society consider the Law no. 7501 dated 19/07/1991 "On land", (as amended by law no. 7715, dated 02/06/1993, as amended by law no. 7855, dated 29/07/1994 and amended by law no. 7763, dated 25/10/1993 by law no. 7983 dated 27.07.1995), as an anti-human law, because it is in obvious contradiction with the natural human right. The reasons are strong and numerous. Problems with the dismissal of private property from owners started by the end of 1944, immediately after the Second World War, with the arrival in power of the left extremists and installation of the communist regimen in Albania. Such small areas of land were recognized to the legal owners of the land, which were also recognized to several small non-farmer owners with law no.108, dated 29/8/1945, they were actually obtained through the decisions of the commission for the implementation of agrarian reform at executive committees under the relevant prefectures since the year 1945, while with law dated 27/5/1946, was entirely denied "de jure" the ownership of the above-mentioned persons on each agricultural land area. Agricultural land was taken from latifondists and other great and middle owners, in order to be given to the villagers without land or with a small area of land. There were completely expropriated 8714 land owners, out of whom 54.499 ha of land was taken. There were partially expropriated 10.641 families, out of whom 64.497 ha of land was taken. From the partially or completely expropriated families, there were taken 118.996 ha of land, or, on average, less than 10 ha of land per family. Expropriation was made without compensation, contrary to the newly-adopted Constitution of the country. The villagers who received land on which they did not have real rights for working, as they did not have any rights neither to sell or to buy land, land for which the farmer had to pay heavy duties, who in fact turned into a bondsman, in such a way that had never been observed nor in the darkest days of the Ottoman Empire. In 1946, in Albania it started the campaign for the private land consolidation in cooperatives and state farms, as well as the expropriation of other private properties for state purposes. These campaigns culminated with the Constitution of the People's Socialist Republic of Albania in 1976, approved by law no. 5506, dated 28/12/1976, which in Article 18 declared all properties as state properties". State property belongs to all people and it is the highest form of socialist property. It is the property of the state only: land and subsoil assets, mines, forests, pastures, waters, natural resources of energy, plants, factories, stations of machineries and tractors, banks, means of communication and means of railway, sea and air transport, posts, wire, phone, radio and television, films. State property is also any other property that is created in the state sector or that the state gains according to law". According to the Law of the Agrarian Reform (Article 12) the villagers who received land, were registered in special registers in the Offices of Agrarian Reform, but these persons, were never provided with titles of ownership for the land. The right of ownership possession on the land gradually faded and "de facto" in 1967, there was not private property on the land, while "de jure" with the constitution of the year 1976, it was ultimately sanctioned that land was in the ownership of the state. Nationalizations, expropriations and collectivization of agriculture which were enforced by the totalitarian state, hit exactly this vital nerve, this fundamental right. By means of law no. 7501 dated

19/07/1991 "On land" the people were denied the right of ownership on land, which was washed through with the sweat and blood of many generations in order to purchase it, preserve it, maintain it, work in it for living and it is given to a third party who has no connection with it. For a part of the Albanian society, Law no. 7501 dated 19/07/1991 "On land" is considered completely anti-democratic, because democracy implies the protection of human rights and fundamental freedoms and not their breach and denial. One of these fundamental rights is the right of land ownership, juridical protection of private property by the state. The above law does not comply with the Article 41 of the Albanian Constitution, which states that:

1."The right of private property is guaranteed.

2. A property is gained through donation, inheritance, purchase and any other classical means anticipated in the Civil Code.

3. The law may anticipate expropriations or limitations in the exercise of the right of property only for public interests.

4. Expropriations or those limitations of the right of property which are equalized with expropriation, are allowed only against a fair remuneration".

By means of Law no. 7501 dated 19/07/1991 "On land", the land was rejected to legitimate owners and it was given to others by making use of none of the ways stipulated in the Constitution. The purpose of Law no.7491, dated 29/04/1991, "On the main constitutional provisions", whose provisions are effective until the approval of the Constitution of the Republic of Albania, and then the Constitution of the Republic of Albania approved by law no. 8417, dated 21/10/1998, aimed at the correction of the breach of private property right. In reality, in Albania, there have been performed actions completely against such constitutional principle even after it became effective (1998) by leaving in force Law no. 7501 dated 19/07/1991 "On land", which was issued and became effective before the Constitution, exactly when the agricultural cooperatives were destroyed. The problem of land in that time may have been solved quite easily, where each owner could have taken what he had set into the cooperative (which were taken from him after 1944). Notwithstanding the fact that Law no. 7501 dated 19/07/1991 "On Land" has effective power across the whole territory of the Republic of Albania, the law, in the mountains of Northern Albania was never applied by the people living in that region, where each of them has taken the inherited land, the land that was taken by the state after 1944. Thousands of owners who had moved to other cities or residential areas lost the right of ownership before the 90s, because they were employed in state entities, and according to the above-mentioned law, they were dismissed of the right of land ownership, because it was divided by special commissions established by law, to the persons who were living in the village, members of the agricultural cooperative before the demolition of such agricultural cooperatives (01/08/1991). The above law was entirely based in the Leninist principle that "land belongs to the one who works it" and not to its legal owner. In the same way it was also distributed the agricultural land, which was administered by Agricultural Enterprises. The execution of Law no. 7501 dated 19/07/1991 "On land", in Albania has brought considerable social consequences, fightings, injuries, murders and other property conflicts, which constitute approximately 40-50 percent of all the conflicts occurring in present-day Albanian society. Law no. 7501 dated 19/07/1991 "On land" as amended, aimed that, those agricultural families which lived in villages or cities, whose economic income for keeping their families was the income provided by work in agricultural cooperatives or in Agricultural Enterprises, and as such it was deemed appropriate that the agricultural land that was left under the administration of Agricultural Cooperatives or Agricultural Enterprises be shared proportionally with the number of people, representatives of agricultural families, according to the family composition dated 01/08/1991, so that such families, by making use of the agricultural land area divided per capita, generate economic income. This was also the reason that a considerable part of agricultural land was given for use to physical and legal persons. By means of Law no.8053, dated 21.12.1995 "On the transfer into ownership of agricultural land without remuneration", the agricultural land acquired through the law no. 7501 dated 19/07/1991 "On land", from land given for use turned into land given in ownership. The Article 1 of the above law states: "This law aims at the legal adjustment of the transfer into ownership of agricultural land without remuneration to agricultural families or individuals who make use of it". Law No. 7501 dated 19/07/1991 "On land" states that "Physical or juridical persons who have or take agricultural land in ownership or in use are obliged to make use of it only for agricultural purposes, to preserve and increase its production capacity, as well as perform systematization and build works to protect it".

3. CONCLUSIONS

It is a fact that, presently in Albania a great area of land which cover more than 40 % of lands divided as per Law no. 7501 dated 19/07/1991 "On land", are not used at all because more than 50 % of the population benefitting from this law, have left the country where they have benefitted such agricultural land and they have moved to cities or emigrated. In a certain way, leaving into force the above-mentioned law is in obvious

contradiction with the national interests in entirety, because it directly stops foreign investments in Albania. In the Republic of Albania, there are currently very good laws approved by the Assembly of Albania, laws that have been approximated to European Union legislation, with the assistance of the specialists of the European Union, but it remains much to be done in connection with the implementation of these laws in everyday practice. Property, in practice, remains the most outstanding issue in the Albanian society. It is the source of many conflicts in the country. Every day we receive information through the media for acts of violence, injuries or deaths resulting from disputes on property. The above facts are often reflected in the statements and reports of "Transparency International". After the general elections dated 23/06/2013, where the leftist won in Albania, the government that is governing the country is bringing back the communist practice of nationalization of property, when it set the acquisition without conditions and law of the private property in its favor. In a democracy, destruction of private property by the state structure is made only for public interest and always against remuneration of its full market value. However, the facts show that the law of democracy does not apply to the leftist Government of Albania, a government that has also decided to replace the court as an independent institution with separate power when declaring that the nationalization took place because the owner acquired the property in a wrong way. Even if it were so, again, a democratic government is not legitimized to seize the property of the other without going through a fair and independent judicial process. The most recent events of buildings' destructions in the Udenisht village, Pogradec, the case of destruction of a 9+2 building in the city of Vlora, or numerous cases of private property destructions all over the country in 2014 and in the beginnings of 2015, properties which have been acquired based on the rules and laws set by the Albanian state, are registered in the registers of immovable properties at the Local Offices for the Registration of Immovable Properties, show that the state itself makes very good laws, but the laws it approves and gives legal effect to, are applied into practice. The provision of ownership title by the state as a driving factor for the economic development of the country should be a basic factor to comply with the fundamental right of property. The regulation of the land market as an important factor in promoting economic development constitutes another obligation in order to improve the existing legislation in force. It arises as necessary the improvement of the legal framework so as to guarantee the protection of the ownership right as a guarantee for the enjoyment of rights and strengthening of the legal state.

REFERENCE LIST

Konventën Evropiane për Mbrojtjen e të Drejtave dhe Lirive Themelore të Njeriut", (*"European Convention for the Protection of Human Rights and Fundamental Freedoms"*)

Kushtetuta e Republikës së Shqipërisë" (*"Constitution of the Republic of Albania"*)

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Law no. 9048, dated 07.04.2003 *"On Cultural Heritage"*,

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Law no. 7501 dated 19/07/1991 *"On land"* as amended.

The Constitution of the People's Socialist Republic of Albania, year 1976.