

Right of Ownership as a Basic Right to Constitutional and European Convention on Human Rights

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Abstract

This paper presents a general framework of the property right seen in the Constitutional Review and the standard of the European Convention on Human Rights. Such harassment came to me not because such an anchor was not previously elaborated by the professors or the practice of the law, but because of the lack of a sensible, juridical remedy to this right not only by the citizens but also by the organs state and law enforcement agencies. It is for this very fact that I have been dealing with the analysis of the genesis of this right, specifically in the constitution of the republic of Albania and European Convention on Human Rights. It should be said that ownership issues, especially in Albania, constitute one of the most comprehensive and influential challenges in many sectors of a country due to the still informal ownership situation in Albania where ALUIZNI enjoys an important position and as such has pushed me to touch and illustrate the problems with prominent judicial decisions to present a framework of judicial practice in defining how clearer the material and procedural aspects of the norms related to property and property issues related to informal constructions.

At the end of this paper, conclusions and solutions to the problems arising from different legal situations regarding property rights will be reflected, trying to bring Albania together in a context and context consistent with the standards of the European Court of Human Rights.

Keywords: *Ownership; Judicial practice; Property Rights; Send Immovable; Former owners.*

Since Article 11 of the first part entitled "The economic system of the Republic of Albania" is based on private and public property, as well as on the market economy and the freedom of economic activity." In the second paragraph of this article states that private and public property is protected by law. After that in the provision of Construction of Albania is expressed that the right to private property is guaranteed.

Ways of acquiring ownership according to it are: donation, inheritance, purchase and any other classical manner provided for in the Civil Code. The fact that the ways of gaining property are summarily foreseen and in the Constitution states the importance of ways of gaining ownership of civil law. In detail, the ways of gaining ownership are provided by the Civil Code respectively from Article 164 and onwards. For the purpose of the article we will not deal in detail with the ways of gaining ownership because the subject of our analysis will be the law no. 9482, dated 03.04.2006 amended "On legalization, urbanization and integration of illegal constructions" as a special way of gaining ownership. If we analyze Article 17 of the Constitution, we will conclude that any restriction of human rights and fundamental freedoms is carried out only by law. In this context, the aforementioned law for a category of subjects is a way of gaining property, while for another category there is a restriction of human rights and fundamental freedoms.

The Constitution states that the right to private property is guaranteed, but this guarantee is not absolute (Daci, 2011: 297). Although the right to private property is listed in the catalog of freedoms and constitutional rights, the grouping of personal rights can not be absoluteized as a completely individual right and has an important social character. It directly influences the general social well-being and must therefore be restrictive. The public interest or social function of property is a constitutional concept that justifies the external limitation that has been imposed on the right to property through the law. In the rule of law, interference with private property must be set at the constitutional level that guarantees the individual's full respect for this property. Restriction of a fundamental right such as property by law is an expression of the right and the obligation that the legislator enjoys, in the name of a legitimate aim in the public interest, to respond to the dynamics of the country's development, as well as to the realization of the reforms required by time (Rama, 2010: 97). If we analyze Article 41 of the Constitution, we conclude that the criteria of the constitutionality of an expropriation policy, which at the same time constitute restrictive criteria for the right to private property, are:

- a) Expropriation should be provided by law;
- b) Be undertaken for the public interest or in defense of the rights of other persons;
- c) The existence of a fair reward.

In addition to these special criteria set out in Article 41 of the Constitution, where the recognition, protection and at the same time the limitation of the right of private property as a self-right, the sovereign in its Article

17 has provided for other criteria that must be taken into account when undertaken restrictive actions to the individual's fundamental rights and freedoms, and consequently the right to private property. This provision can be considered to call directly the international act of the European Convention on Human Rights to become an integral part of it and to apply to the same level as the Constitution of the country. Specifically, this provision of a comprehensive nature imposes on lawmakers that whenever they intervene in the sphere of human rights and freedoms, in complying with the above criteria, it is imperative to evaluate the following:

a) The principle of proportionality as well,

b) The standards that sanction the European Convention on Human Rights and *mutatis mutandis* the relevant jurisprudence regarding the imposition of restrictions on fundamental human rights.

Although the law of legalization passed in the constitutional review process, the Constitutional Court in its decision devoted importance only to the formal aspect of the restriction of the right to property as a fundamental right. The Constitutional Court in assessing the constitutionality of the law of legalization avoided reviewing the content of the law in relation to the elements of a significant constitutional principle such as proportionality, which should be taken into account whenever restrictive measures are taken on fundamental rights (Daci, 2011: 297). The Constitutional Court has a role more than the technical control of the compliance of laws with the Constitution. It should have the political and social sensitivity to judge whether constitutional declarations are fully implemented in legal measures. Respect for the constitutional principle of proportionality constitutes a conditional *sine quanon*, not only for the legislator, but also the Constitutional Court in the constitutional control process whenever measures of a restrictive character to human rights and fundamental freedoms are examined (Rama, 2010: 97). The assessment of the principle of proportionality and its constituent elements such as: the necessity of the decision, its suitability or reasonableness, and the burden of legal action on the affected subject, in the light of the constitutional and jurisprudence standards of the European Convention on Human Rights would have directed the Court in a completely different attitude. In the same position is achieved if we consider the special constitutional provision, article 41 point 3, which reconfirms the limitation of the right to private property through the law. The imposition of this legal reserve undoubtedly represents the fundamental aspect of this article because it is the maximum guarantee that is provided for the protection of private property. It allows us to understand that only the law is fully capable of establishing rules related to the rights and freedoms of citizens. In order to offer maximum guarantees to private property and to avoid state arbitrariness, in exercising the right to take restrictive action on private property, the legislator has regulated by law specific conditions or objective reasons when it is possible to justify and accept expropriation under the constitutional legal regime, as well as the respective expropriation procedure (Leka, 2008: 55). The need to carry out expropriations comes as a necessity of the economic and social development of the country, hence its use and exploitation in the interest of the general social interest. The right to private property is not an absolute right, it is subject to restriction when it is determined that it can be used for public interest, finding the reasonable balance between private and social interest. Balance does not appeal to the individual's action, but it is the law that sets the legal status that expresses the conditions of social life at a particular moment (Zaganjori, Vorpsi, Biba, 2012: 168).

The large size of illegal constructions in Albania had implications such as land, public property and private property. Therefore, in the category of legitimate owners, whose properties are affected by informal legal constructions that are legalized by the state, as well as the natural or legal persons who have acquired and enjoy property rights over these lands. The state, as a subject of civil law, is the owner of the land ownership right. (Biba, 2012: 168). This right is exercised over two distinct categories of immovable property, public property and non-public property. As this reform took place in the course of land privatization processes, a large number of entities are mainly persons who have benefited property rights over land through the process of the Property Restitution and Compensation as well as persons who have benefited agricultural land from the law land. If we refer to data obtained from the Property Restitution and Compensation and the Law on the Illegal Constructions, so far, it results that as a result of the legalization procedure 862 private-owned parcels were discovered, recognizing about 4816 co-owners the right to compensation on a total area of 652 415 m², in the total value of 9 910 278 240 leke (Albanian money). By verifying the origin of their property titles, it turns out that the land belonging to these entities has been acquired through ownership through the process of restitution and compensation of property. Therefore, in most cases, legitimate owners

affected by the process of legalization of informal constructions are also expropriated subjects in terms of the law on restitution and compensation of property. In facing the interests of the lawful owner and informal builders, the old law had given great importance to the will of the parties. According to the law: "When the occupied area is privately owned, the legalization of the apartment is done after the transfer of ownership over the occupied area by the owner to the apartment builder, in accordance with the provisions of the Civil Code. In cases when this transition is not realized, the owner of the area occupied by the constructions is compensated in accordance with Law No. 9235, dated 29.07.2004 "On the Restitution and Compensation of Property". In this case, the transfer of ownership of the construction parcel to the apartment builder is done according to the definition of point 1 of this article. As it is seen, for the attainment of its purpose, the lawmaker had built up a legal relationship that was basically an escalation of the masses and instruments in reports of created situations. Above all, the bill stimulated the achievement of a civil agreement for the transfer of ownership rights over the area occupied by the lawful owner to informal builders. The transfer of ownership over a construction plot in favor of an illegal builder would only be achieved if the latter would pay the money owed for the land occupied by the illegal owner (Maho, 2009: 125). As such, the law did not immediately abolish the right of ownership overwhelmed by the lawful owner. As such, the law did not immediately abolish the property right overwhelmed by the lawful owner. This law sanctioned the mandatory loss of ability to own the land from the illegal owner only if the latter and the informal builder were unable to reach a dispute civil law. The law did not foresee any deadlines that could be needed by its subjects to enter into an agreement. In cases where the parties fail to reach an agreement, then the law sanctions the rightful owner to strip the land over the surface of the land, recognizing him the right to compensation, in accordance with the standards set in the Law on Return and Compensation property (Zaganjori; Vorpsi; Biba, 2012: 168). Expropriation, in the old law, as an appropriate measure of binding character is placed on the rightful owners without clearly establishing with certainty and security how to proceed to fulfill the right of compensation, what would be the concrete expropriation procedure, which would it was the state body that would realize the compensation process. The law, by a reference provision, provided that, in the absence of a dispute, the transfer of ownership of the building parcel to the apartment builder is done in accordance with the established procedure for immovable property of the state, without addressing any concrete measures for the protection of constitutional and legal interests The owners, in the old law, as an appropriate measure of binding character is placed against the rightful owners without clearly establishing and sufficient certainty as to how to act for the fulfillment of the right to compensation, what would be the concrete expropriation procedure , which would be the state body that will realize the compensation process. This condition created by the law, in function of the realization of its purpose, indicated that for lawmakers, it is only the loss of the right of ownership of the land by the rightful owners and the disadvantages or effects that this loss for these subjects (Leka, S., 2008: 55. This legal status favorably promotes informal builders at the expense of the rightful owners. Moreover, the lawmaker envisioned a number of alternatives to action given to informal builders to fulfill the obligation to pay off. The law provided for the possibility of immediate payment of the value of the property, as well as its repayment by delegating to the Council of Ministers the right to determine the ways in which the installments, installments, terms and conditions for informal builders are set. However, an important aspect of the law is the establishment of a unique criterion for guaranteeing the economic interests of the state and the rightful owners. For the lawmaker, the payment of the land to the informal lodge and the compensation of the rightful owners will be done according to the market value of the forecaster of performing the legalization, following the criteria that determine the method of valuation of the real estate. The law did not explicitly state whether the legitimate owner would be known from the moment of expropriation until the remuneration was received. In the context of avoiding these problems, the Law "On the Legalization, Urbanization and Integration of Informal Constructions" adopted in 2006, which, for the sake of what we are discussing, decided to change the ownership transfer procedures on the private land on which constructions were built informal, imposing only the expropriation option (Zaganjori; Vorpsi; Biba, 2012: 168). For the lawmaker, reaching a free-will agreement as the first step underlying the process of transferring ownership from the lawful owner to informal builders was not the right solution. In the lawmaker's assessment, in such an abnormal situation of property violation, it was impossible to find full implementation of the general principles of civil law, so such a conflict situation imposed a more active intervention of the state in regulating the situation of the lawlessness, the expropriation of the rightful owners. Given that the main

purpose of the law, legalization of illegal constructions in favor of informal building holders can not be fully realized without expropriating private property, the legislator has the constitutional obligation, be careful in adopting appropriate legal measures that impose a fair balance between the opposite interests of the two social categories, the holders of informal constructions and the lawful owners. The Constitutional Court in its jurisprudence has stated that respect for the principles of "justice, the social state and proportionality constitutes the constitutional boundaries of the lawmaker's assessment space in interfering with private property" and consequently in finding a reasonable solution protecting the interests of informal building holders, and so on to review the right of property of the rightful owners. If the intervention in the right to private property of legitimate owners is justified to pursue a legitimate aim of respecting justice and the social state, then it is imperative that persons affected by a fair compensation and the corresponding procedural guarantees are afforded. This requirement stems from the article 1 of the Additional Protocol to the Convention and Articles 17 and 41 of the Constitution of the Republic of Albania, which sanction the respect of the principle of legality and security in the deprivation of subjects from private property. Therefore, compliance with these principles requires that not only the activity of administrative bodies in the fulfillment of their mission is set at certain stages and times, but also legitimate owners whose property interests are affected by the effects of the law must have clearly in advance the consequences that the law introduces in connection with the loss of property, the terms and procedures of realizing the right to compensation of property and to have the effective means of protection against the arbitrariness of the public administration bodies.

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