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Tirana, October 2015

Submission pursuant to Art. 9(2), of the Rules of the Committee of Ministers of the Council of Europe

Concerning: Albania/Supervision of the execution of ECtHR judgments in "Manushaqe Puto" and "Driza" groups of cases to be examined by the Committee of Ministers on 8-10 December 2015

Our association defends the right to property of legitimate owners expropriated by the communist regime of Albania.

We support the principled decisions of the European Court of Human Rights (ECtHR) aiming at resolving structural problems of property rights mismanagement and judicial system malfunctioning in Albania.

We expose below our views on the draft law proposed by the Albanian Government in July 2015 as part of the execution of "Manushaqe Puto" and "Driza" groups of cases, to be examined by the Committee of Ministers on 8-10 December 2015.

Our position, presented below, can be summarized as follows:

- Compliance with art. 41 and 181 of the Constitution and the rule of law as the only way to establish the effective mechanism required by the pilot judgement (point I);
- We contest that the draft law presented by the Government establishes an effective mechanism to solve property related claims and present our arguments (point II);
- We propose a path towards a sustainable solution and invite the Committee of Ministers to request the Albanian Government and Parliament to show political will to respect art. 41 and 181 of the Constitution and to finally resolve the issue of return and compensation of properties confiscated by the communist regime (point III).

We are willing to contribute towards finding a sustainable solution with expertise and support from our specialists, associations and our local communities.

Yours faithfully,

Mr. Rrapo Hajredin Danushi
National Association of Expropriated Owners "Pronësi me Drejtësi"

I. GUIDING PRINCIPLES: ART. 41 § 181 CST

1. The ECtHR pilot judgement "Manushaqe Puto" and the "Driza" group of cases concern the longstanding structural problem of non-enforcement of final domestic judicial and administrative decisions ordering the restitution of immovable property nationalized during the communist regime or awarding compensation for its lost (violations of Article 6 § 1 ECHR and Article 1 of Protocol n° 1), as well as the lack of an effective remedy in that regard (violation of Article 13 ECHR). General measures are required to redress this systemic problem (art. 46 ECHR).

2. Most claims for restitution of properties unduly expropriated by the communist regime are based on legislation adopted in 1993, namely Act 7698 of 15.04.1993 on the restitution and financial compensation of former owners concerning urban properties and Act 7699 of 21.04.1993 on the monetary compensation or compensation by other land of former owners of agricultural land which granted compensation for land up to 15 ha.

3. Several other acts on privatisation were adopted without taking into consideration the fact that the State was not the rightful owner and that property that was being privatized had been unjustly confiscated to legitimate owners by the previous regime. Such laws include Law 7512 of 10.08.1991 on the regulation and protection of private property, Law 7652 of 23.12.1992 on the privatisation of state-owned flats, Law 7501 of 19.07.1991 on land.

4. The 1998 Constitution recognises the right to private property as a fundamental right. It acknowledges the problem of conflicting laws (privatisation *vs.* restitution) and, unlike any other East European country constitution, clearly indicates in article 181, referring to art. 41 (both cited below), the criteria for solving such conflicts. It sets a deadline for implementing such criteria and solving the longstanding problem of restitution and compensation (181§1).

5. Accordingly, the criteria that should guide any legislation on restitution and compensation are :
- just regulation of matters related to expropriations and confiscations;
- "just" means in conformity with art. 41 which foresees that the right of private property is guaranteed and expropriations and limitations to this right are permitted only in the public interest and against fair compensation;
- legislation introduced prior to the Constitution continues to be applied only if it does not conflict with it.

> ***Article 41***
> *1. The right of private property is guaranteed.*
> *2. Property may be acquired by gift, inheritance, purchase, or any other classical means provided by the Civil Code.*
> *3. The law may provide for expropriations or limitations in the exercise of a property right only in the public interest.*
> *4. Expropriations or limitations of a property right that amount to expropriation are permitted only against fair compensation.*
> *5. In the case of disagreements related to the amount of compensation, a complaint may be filed in court.*
>
> ***Article 181***
> *1. Within two to three years from the effective date of this Constitution, the Assembly enacts laws for the just regulation of the various matters related to expropriations and*

> *confiscations that took place before the approval of this Constitution, guided by the criteria of article 41.*
> *2. Laws and other normative acts approved before the effective date of this Constitution that relate to expropriations and confiscations shall be applied when they do not conflict with it.*

6. Constitutional conformity is expressly required for legislation introduced before the entry into force of the Constitution (181§2). *A fortiori,* constitutional conformity (i.e. respect for art. 41 and 181) is required for legislation introduced after the 1998 Constitution.

7. Constitutional conformity of legislation on restitution and compensation means that any new legal act should, at least, refrain from worsening the situation of legitimate owners.

8. The 2004 Act on Restitution and Compensation (replacing the two 1993 Acts mentioned above) was adopted 3 years after the deadline foreseen in the Constitution had expired. It extends the restitution and compensation to agricultural land (up to 100 ha), to tourist zones and removes all limitations for restitution and compensation in urban areas.

9. But it also introduces the possibility to legalize illegal constructions and prioritizes legalisations to the detriment of the right to restitution (as the first redressing measure foreseen) of rightful historical owners (the 2004 law excluded restitution of property involved in the legalisation process until the time-limitations for legalisation had expired). No procedure is foreseen for restitution and as a matter of fact only some financial compensation has taken place.

10. 17 years after the adoption of the Constitution, articles 181 and 41 have not been implemented. The issue of restitution and compensation has not been resolved. Instead, the legal situation of rightful owners waiting for restitution or compensation has deteriorated as legalization of illegal properties was, unconstitutionally, declared a priority after 2004. The draft law intends to further deteriorate the situation of legitimate owners by omitting to provide for restitution and by focusing on financial compensation which is admittedly impossible to achieve.

11. Indeed the right to private property already recognised by the 1991 constitutional amendments and by the 1998 Constitution has not been and is not being respected. Institutions work in anarchy allowing corruption to flourish. The latest draft law looks more like an attempt to consolidate illegal transfers of property from 1991 up to now.

12. Any new regulation on restitution and compensation of legitimate owners (the term "former" owner is a bad omen for a just resolution) should obligatory aim at implementing articles 41 and 181 of the Constitution. The criteria announced in these two articles are the guiding principles for a just and sustainable solution.

13. In conformity with criteria announced in articles 181 and 41 Cst, owners unjustly expropriated by the communist regime should recover their properties (restitution). Post-1991 owners (through privatisations) should be compensated and/or adequate new rights should be provided to them by the State. Illegal owners should not take precedence over the previous. Cases in which restitution is considered impossible should be clearly and narrowly defined in conformity with art. 41 and 181. In such a case, just compensation (in kind or monetary) should be issued without delay.

II. THE DRAFT LAW OFFERS NO SUSTAINABLE SOLUTION

14. The 2015 draft law (to replace the 2004 Act) worsens the legal situation of legitimate owners for the reasons mentioned below.

15. It omits the first redressing measure foreseen by both 1993 and 2004 acts: the restitution of property. Omitting or excluding restitution - the first redressing measure - worsens the situation of legitimate owners compared to the 2004 and 1993 laws. As such, it violates art. 41 and 181 Cst.

16. It focuses on financial compensation to be paid from State budget, while it is commonly accepted that the budget will not be able to fulfil such obligation for tens or even hundreds of years. In other words the draft law does not establish the effective mechanism for a just and prompt resolution of this problem as required by the pilot judgement.

17. It focuses on the worst redressing measure not only from the legitimate owners' point of view but from the Albanian taxpayer and society point of view as well. While restitution should be neutral and at the advantage of the society (resolve historical injustice, stimulate investments by strengthening security of legal ownership), any compensatory measure creates a burden.

18. Compensation in kind is the lighter burden as the State uses land in its own property to compensate. Financial compensation presents the heaviest burden especially, as in this case, when the burden is transferred to taxpayers and to society in general instead of being put on the shoulders of those who illegally occupy the properties of legitimate owners.

19. Logically, financial compensation was the last measure foreseen by both 2004 and 1993 Acts, restitution being the first, followed by compensation in kind with property in State ownership (of same kind or in areas with tourism development as a priority or of any other type of equal value) and compensation by shares in companies with State capital (see art.11 of the 2004 Act). The draft law omits or leaves other solutions yet to be decided by lower-level legislation and focuses on financial compensation. By changing the order of precedence of redressing measures it violates art. 41 and 181 Cst.

20. The intention of excluding restitution is reflected in the language, namely in the terms used in the draft law. "Compensation in nature in the recognized property" is used as a synonym of "restitution" (e.g. art. 7§1a, 19§1, 20§1). The previous Acts (2004 and 1993) clearly differentiated between the two, compensation in nature (or in kind) being the first type of compensation to be considered when restitution is impossible. So, compensation in kind and restitution were considered and indeed are two different things. We notice that provisions that are more detailed systematically use "compensation" instead of "restitution". This seems to us to be an attempt to definitely bury the first redress: restitution. No explanation or justification is provided. Using "compensation in nature in the recognized property" instead of "restitution" is misleading, abusive and violates the Constitution.

21. Confusion in terminology is combined with lack of clear criteria that should guide the choice of one of the redressing measures instead of another. Lack of clear definitions and lack of clear criteria is a well-known receipt for the (continuation of) abuses.

22. The draft law is to be read in the context of a very open system for legalisations of illegal appropriations of property. The draft law, like the 2004 Act, continues to give a preference to legalisations at the expense of restitution to rightful owners. Article 20§5 is a

perfect illustration of such preference for illegality, without justification and without limits. It foresees that land located within *touristic territories* is restituted to the rightful owner only if it is not occupied. "Occupation" is not defined. Neither are the criteria and limitations which should apply for an occupation to take precedence over restitution of property to the rightful owner. This means that the solutions offered by the draft law are not conditioned by articles 41 and 181 of the Constitution or by the requirements of the ECtHR pilot judgement for a just and prompt solution. Instead the draft law serves the interest of those who did and continue to abusively occupy others' properties.

23. In comparison, it is worthy to note that when it comes to properties occupied by the State, the same draft law foresees a number of conditions and limitations (public interest being the main one) under which the right to restitution to the rightful owner can be restricted. This shows that the problem reflected in art. 20§5 is not one of bad drafting but clearly one of political will which currently favours illegality.

24. Needless to say, the draft law does not take into account final decisions of national courts of last resort on this issue, including Unifying Decision of the United Colleges of the Supreme Court, no. 24, dated 13 March 2002[1] which says that Law on Restitution and Compensation of Property of 1993 adjusts injustices which occurred and abolishes *ipso lege* all previous legal acts based on which property was wrongfully taken away from the legitimate owners. Or the more recent decision 43 of 6 October 2011 of the Constitutional Court which says that the right to property as recognized by the Constitution can only be restricted if due process of law as defined in art. 42 of the Constitution is respected[2].

25. Last but certainly not least no true consultation or serious involvement of the legitimate historical owners was undertaken during the legal drafting process. No attempt to ensure that amendments be accepted by a majority of them was made.

26. The draft law discriminates against legitimate owners by putting a disproportionate burden on them. In addition to having waited for years, they are being denied restitution. While the legalisation of illegality continues unbounded, legitimate owners see compensation measures systematically reduced and delayed with the passing of time and the adoption of new strategies, action plans and laws. No explanation or justification for such a disproportionate burden and for the continuous degradation of the rights of legitimate owners is provided. The draft law violates articles 41 and 181 of the Constitution.

III. WAY FORWARD

27. Any new legal instrument on restitution and compensation of property unjustly confiscated by the communist regime should clearly indicate as its main objective the implementation of art. 41 and 181 of the Constitution.

28. The superposition of property rights and claims over the same property should be resolved based on the principles of art. 41 and 181 following the chronological order of the right to property. This means, first, redress of historical injustice, i.e. restitution to legitimate owners; second, compensation and/or allocation by the State of new adequate rights to post-1991 owners (through privatisation of properties which did not belong to the State but to legitimate owners unjustly expropriated by the communist regime). Illegal/legalised

[1] Published on http://www.gjykataelarte.gov.al/ , Albanian version. See under "Vendimet e Gjykatës", "Vendime unifikuese"
[2] See http://www.gjk.gov.al/web/Gjykata_Kushtetuese_1_1.php

owners cannot take precedence over legitimate owners. The situation of already legalized illegal owners is resolved making use of compensation.

29. The State assumes responsibility for the contradictory legislation it has introduced over time as well as for abuses by the administration or judiciary. These created competing and conflicting rights over the same property. The only way to resolve this problem is prioritization. Prioritization should strictly comply with art. 41 and 181 Constitution and not depend on politics.

30. Prioritization concretely means that in solving conflicting rights the State authority maps the most favoured redressing measure with the priority owner. In practical terms this means a maximum of restitution to legitimate owners unjustly expropriated by the communist regime, followed by compensation in kind, compensation with shares and financial compensation. In a second step, the same principles are applied with respect to post-1991 owners and so on. Prioritizing legitimate owners over post-1991 and over illegal/legalised owners does not mean that the situation of some owners is going to be resolved while that of others is not. The State has the responsibility to resolve all legally backed claims. However this should be done following a certain order which, according to the Constitution is: first, owners unjustly expropriated by the communist regime; second, post-1991 owners; third, owners through legalisation of illegal property.

31. Romania was in a similar situation to Albania as the same kind of systemic problem was identified by the ECtHR. The latest project law aimed at resolving this issue in Romania[3] contains several elements that could inspire Albania. The law identifies restitution of nationalised property as the first guiding principle (art. 2a) followed by fairness, transparency, just balance between interests of historical owners and society in general. The law foresees sanctions in case authorities do not apply the law (chapter V) and the necessity to monitor compliance.

32. Our associations proposed a legal solution to the Government in the form of a draft law in 2013. While it may need some improvements of language and style, this draft law contains all substantive elements that need to be taken into account[4].

33. More than 8'000 killings on property grounds are reported by the Albanian Police, the State Advocate and NGOs since 1991. This is a war toll although Albania is officially in peace. However, the Albanian Parliament has so far not dedicated a single sitting to this issue. Showing political will to resolve the issue, the Parliament should seriously take it into consideration. Regrets and excuses in the press of former and current Prime Ministers (Berisha, Majko, Rama) saying that law 7501 was an error and that many other errors were committed with restitution and compensation, should be investigated and corrected with legal amendments.

34. Associations should be involved in the elaboration of legislation, their arguments heard and addressed. They should be involved in monitoring the implementation of articles 41 and 181 of the Constitution.

35. Any new legislation should introduce an effective system for monitoring compliance and sanctioning violations. The necessary resources should be made available.

[3] Published on < http://www.coe.int/t/dghl/monitoring/execution/News/Strain_projet_loi_fr.pdf >, October 2015

[4] The EN version of the law needs language improvements. Both versions are to be found on our website defendingproperty.com on the right hand bar, under "Projektligj" and "Draft Law"

36. Finding a sustainable solution to restitution and compensation of property unjustly confiscated by the communist regime requires political will to resolve the issue, respect for constitutional principles, inclusiveness and transparency during the elaboration and the implementation of a strategy and of legislation, an efficient system for monitoring compliance and sanctioning violations and the necessary human and financial resources.

37. We do trust the Committee of Ministers will make sure that the principled decisions of the ECtHR are fully implemented and not watered down by the Albanian successive "socialist" or "democratic" Governments.