

The Albanian Property Restitution and Compensation Agency among the branches of government

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ABSTRACT

Before the fall of communism, a great number of Albanian owners lost their property as the result of nationalizations, expropriations, confiscations, and other unjust actions performed by the communist state. The issue of restitution and compensation of property which was taken unjustly by the past regime, apart from being one of the most specific cases of acquisition of property rights is also one of the biggest problems the Albanian society is facing today.

In this context this thesis will focus in general on the restitution and compensation process of the immovable property in Albania, and in particular on the Property Restitution and Compensation Agency as an institution which is in place with the core mission of “regulating in a fair way according to the criteria established by article 41 of the Albanian Constitution, the issues of property rights that have arisen from expropriation, nationalization or confiscation”.

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Introduction

The right to property with all its components i.e. the right to possess, enjoy the fruits and the right to dispose of such property is one of the most ancient legal rights. The immovable property represents a special interest for every public and private economy and is an undeniable incentive for everyone's economic initiatives. As mentioned above, the immovable property represents a tangible interest which in many cases is the cause of multifaceted problems that can be dealt with, and solved, through various legal ways.

In light of this, I chose the issue of property restitution and compensation of immovable property in Albania, firstly because it is the most specific case of acquisition of property rights (*such rights deriving from specific laws*); secondly because it is a very complex process where an inter-linkage of phases and procedures exist and where both private and state parties are part of the process; thirdly because it represents a controversial process, due to conflicts created in the past and aggravated in the last years; and finally as one of the most sensible processes the Albanian society is undergoing.

The issue of concerns and the complexity of property matters in Albania are numerous, but this thesis will focus only on the mandate, structure and competencies of the Property Restitution and Compensation Agency as an institution created for “*regulating in a fair way according to the criteria established by article 41 of the Constitution, the issues of property rights that have*

arisen from expropriation, nationalization or confiscation".¹ It will explore and examine the Agency's position among the branches of government from a separation of powers perspective, also analyzing whether its operation sufficiently safeguards individual rights in the light of applicable European standards. Through a comparative analysis of the previous and the current organization of the juridical person (*Property Restitution and Compensation Agency and the State Committee for the Restitution and Compensation of Property*), and the legal framework based on which the Agency and the State Committee have been operating, this thesis will try to identify the crucial issues of concern and propose potential solutions.

We must admit that this administrative body with a peculiar nature plays a unique role in the solution of the property problem in Albania. In my opinion, a certain degree of independence from the political branches is necessary for the legitimacy of such a body, which is supposedly designed to resolve in a fair way the property problems created during the communist regime, and also to guarantee the property rights of the Albanian citizens. The independence that this body should enjoy is of fundamental importance, a privilege of those who are taking part in the examination of their property claims, and a guarantee of a fair, effective, and an impartial administrative process.

¹ Article 1.(a), Law Nr. 9235, dated 29.07.2004 "On restitution and compensation of property", published in Official Journal Nr. 61, dated 31.8.2004 as amended by Law Nr. 9388, dated 04.05.2005, published in Official Journal Nr. 44, dated 14.6.2005, Constitutional Court decision Nr.26, dated 02.11.2005, published in Official Journal Nr. 91, dated 01.12.2005, Law Nr. 9583, dated 17.7.2006, published in Official Journal Nr. 81, dated 2.8.2006, Law Nr.9684, dated 06.02.2007, published in Official Journal Nr.11, dated 14.02.2007, Constitutional Court decision Nr. 11, dated 04.04.2007, published in Official Journal Nr.46, dated 23.04.2007 and Law Nr.9898, dated 10.04.2008, published in Official Journal Nr.62, dated 07.05.2008; Ligji Nr. 9235, datë 29.07.2004 "Për kthimin dhe kompensimin e pronës", botuar në Fletoren Zyrtare Nr.61, datë 31.08.2004, ndryshuar me Ligjin Nr. 9388, datë 04.05.2005, botuar në Fletoren Zyrtare Nr.44, datë 14.06.2005, Vendimin e Gjykatës Kushtetuese Nr.26, datë 02.11.2005, botuar në Fletoren Zyrtare Nr.91, datë 01.12.2005, Ligjin Nr. 9583, datë 17.7.2006, botuar në Fletoren Zyrtare Nr. 81, datë 2.8.2006, Ligjin Nr. 9684, datë 06.02.2007, botuar në Fletoren Zyrtare Nr.11, datë 14.02.2007, Vendimin e Gjykatës Kushtetuese Nr.11, datë 04.04.2007, botuar në Fletoren Zyrtare Nr.46, datë 23.04.2007 dhe Ligjin Nr. 9898, datë 10.04.2008, botuar në Fletoren Zyrtare Nr.62, datë 07.05.2008, as available at: [http://77.242.19.116/drjuridike/Permbledhje%20ligjore/lidhja%209235 ndryshimet 2008.doc](http://77.242.19.116/drjuridike/Permbledhje%20ligjore/lidhja%209235%20ndryshimet%202008.doc), last visited 30.10.2008

As the results have shown, it is difficult to believe that this Agency could ensure a fair administrative process of restitution and compensation of property since it does not have a structure which contains some important elements and guarantees of independence, or how it could significantly make safe the property rights of the individuals without the existence of actors who are impartial from an objective view point.

Unfortunately as we will find out along this thesis, the current organization and operation of this Agency have caused a loss of the public's trust in this body, compelling people to consider this institution as an administrative hurdle to overcome, and not to view it as the venue where they can solve their property problems fairly.

In the last chapter of this thesis, I will focus on the issue of compensation of expropriated subjects and analyze if the remedies provided by the current law are effective within the framework of the European Convention on Human Rights, enabling that category of former-owners whose right to compensation is recognized to obtain sufficient redress.

I. The Agency: An independent body or not?

A. Historical background of the process of restitution and compensation of property; organization, competencies and the main objective of the Agency

During the communist regime, the right of private property did not exist. In the 1976 Constitution, private property was forbidden.² All immovable property was considered as the property of the socialist state and constituted the cornerstone of the country's economy.³ The expropriations were not done as a result of public interest but had a pure ideological basis. At the time, there were no chances of fair reward.

Immediately after the collapse of the communist regime in Albania, the new democratic state faced difficult political, economical, and social problems deriving from the injustices committed in relation to private property. During this period, as a consequence of expropriations, confiscations and other unjust actions of the communist regime that were based on a set of laws, sub-legal acts and other undue court decisions that were in total contradiction with the universal and inalienable human rights recognized and accepted by many democratic countries and human rights documents, a big number of owners lost their private property.⁴

The described phenomenon does not constitute a unique matter only in Albania, but it has also been encountered in other countries which have undergone the communist regime (*maybe not at the same extent and scale the problem was spread in Albania*).

² Articles 16, The Constitution of the people's socialist Republic of Albania, approved by the People's Assembly on December 28, 1976, as available at: <http://bjoerna.dk/dokumentation/Albanian-Constitution-1976.htm>, last visited 01.11.2008

³ Articles 16,17 and 18, id.

⁴ GJYKATA KUSHTEUERE ne bashkepunim me USAID dhe PREZENCA E OSBE-SE NE SHQIPERI, "Kthimi dhe kompensimi i pronave subjekteve te shpronesuara ne praktiken e Gjykates Kushtetuese Shqiptare", albPAPER, Tirane 2006, page 17-18, Decision Nr.4, dated 08.04.1994 of the Albanian Constitutional Court, published in the Official Journal Nr 5, dated 31.05.1994,

According to European jurisprudence, the property rights can not be identified and can not serve as a basis for the state to perform the restitution of property taken unjustly from totalitarian regimes. *“In the post communist countries and countries in transition the process of properties’ restitution and compensation is not based in the right to property, but in the principle of honesty and justice and moreover in the principle of the social state.”*⁵

In light of this, the process of reacquisition of property rights through the process of restitution and compensation of property, aims at correcting at the largest possible extent within the possibilities and social-economic conditions of the country, all the injustices committed by the past regime in relation to private property through nationalizations, expropriations and confiscations or any other form of committed injustice.⁶

Article 181 of the Albanian Constitution declares the obligation of the Albanian Parliament to issue laws on the fair regulation of different matters related to expropriations and confiscations (*lead by the criteria set out in Article 41 of the Constitution*), carried out before the approval of the Constitution.⁷ The Albanian Constitutional Court in some of its decisions has emphasized the fact that the abovementioned provision aims that the legislative power issues necessary legal acts, within reasonable time limits and all the possibilities the state has, in order to correct an injustice made to the expropriated subjects but keeping in mind not to over cross the permitted

⁵ GJYKATA KUSHTETUESE ne bashkepunim me USAID dhe PREZENCA E OSBE-SE NE SHQIPERI , “Kthimi dhe kompensimi i pronave subjekteve te shpronesuara ne praktiken e Gjykates Kushtetuese Shqiptare”, albPAPER, Tirane 2006, page 106, Decision Nr. 30, dated 01.12.2005, of the Albanian Constitutional Court published in the Official Journal Nr. 92 dated, 02.12.2005, referred to Decision of the German Constitutional Court, *Gerechtigkeit und Sozialstaatlichkeit*. BverfGE 84,91 (121, 130)

⁶ GJYKATA KUSHTETUESE ne bashkepunim me USAID dhe PREZENCA E OSBE-SE NE SHQIPERI , “Kthimi dhe kompensimi i pronave subjekteve te shpronesuara ne praktiken e Gjykates Kushtetuese Shqiptare”, albPAPER, Tirane 2006, page 84, Decision Nr.26, dated 24.04.2001 of the Albanian Constitutional Court, published in the Official Journal Nr 20, dated, 07.05.2001.

⁷ Article 181, Constitution of Albania approved by the Parliament on 21 October 1998, as available at: <http://www.ipls.org/services/kusht/contents.html>, last visited 02.11.2008.

limitations and by respecting the constitutional standards.⁸ At what extent and how effectively these standards together with the constitutional obligation set out in Article 181 have been respected, we will have the chance to analyze in the following chapters.

In order to regulate some of the injustices created by the communist regime in relation to private property, the new democratic state undertook a series of measures and legal initiatives that would perform the restitution of property back to its origin and to its legal owner, and whenever the restitution of property was not possible, to perform its fair compensation. In Albania, the process of restitution and compensation of property (*only for the immovable property*) dates back to year 1993 with the approval of the law No. 7698, dated 15.04.1993 “On restitution and compensation of property to ex-owners”.⁹ In the following years, many amendments were done to this legal basis, to the point that it was abolished in 2004 by law No. 9235, dated 29.07.2004 “On the restitution and compensation of property”. Although a big number of laws, decisions of Council of Ministers, and other guidelines were approved during these years in order to regulate the issues of property rights of the Albanian owners, unfortunately the process of restitution and compensation of property is still incomplete and the issue of property rights of expropriated subjects remains a big dilemma that needs an immediate solution. As a consequence of certain wrong solutions given to the regulation of property rights issues, a big number of abuses

⁸ GJYKATA KUSHTETUESE ne bashkepunim me USAID dhe PREZENCA E OSBE-SE NE SHQIPERI , “Kthimi dhe kompensimi i pronave subjekteve te shpronesuara ne praktiken e Gjykates Kushtetuese Shqiptare”, albPAPER, Tirane 2006, pages 105-106, Decision Nr. 30, dated 01.12.2005, of the Albanian Constitutional Court published in the Official Journal Nr. 92 dated, 02.12.2005.

⁹ Law Nr.7698, dated 15.04.1993 “On restitution and compensation of property to ex-owners”, as amended published in Official Journal Nr.5, dated 18.05.1993; Ligji Nr.7698, date 15.04.1993 “Për kthimin dhe kompensimin e pronave ish-pronareve”, botuar ne Fletoren Zyrtare Nr.5, Faqe 345; datë 18.05.1993, ndryshuar me Ligjin Nr.7765, date 02.11.1993, botuar ne Fletoren Zyrtare Nr.13, Faqe 807; date 14.12.1993, Ligjin nr.7808, date 30.03.1994, botuar ne Fletoren Zyrtare Nr.5, Faqe 247; date 31.05.1994, Ligjin Nr.7879, date 01.12.1994, botuar ne Fletoren Zyrtare Nr.18, Faqe 869; date 26.12.1994, Ligjin Nr.7916, date 12.04.1995, botuar ne Fletoren Zyrtare Nr 11, Faqe 441; datë 31.05.1995 dhe shfuqizuar me Ligjin Nr. 9235, datë 29.07.2004, botuar në Fletoren Zyrtare Nr.61, Faqe 3934; date 31.08.2004

committed by different commissions established to examine the applications of expropriated subjects, abuses of offices for registration of immovable properties, abuses of land registry office, courts and other institutions which are related to the process of restitution and compensation of property, the issue of restitution and compensation of property has become one of the biggest problems the Albanian society is facing nowadays.

Nevertheless, in the paragraphs to come I will focus more and analyze the internal organization, the competencies and the nature of the issues dealt by the Property Restitution and Compensation Agency (*hereinafter PRCA*). Based on the legal framework, *PRCA* has as its main object “*the just regulation, according to the criteria established by article 41 of the Constitution, of the issues of property rights that have arisen from expropriation, nationalization or confiscation*”¹⁰ of private property from the Albanian state before the fall of communism. *PRCA* exercises its functions based on the law No. 9235, dated 29.07.2004 “On restitution and compensation of property”, as amended, decision of Council of Ministers No.566, dated 23.08.2006 “On the organization and functioning of the Property Restitution and Compensation Agency”¹¹, as well as on the other sub-legal acts deriving from the law. This legal framework regulates the functioning of the Agency in overall.

Based on the Article 15 .1, *PRCA* was established for the implementation of the abovementioned law, and it was vested with legal public personality, and put under the subordination of the Minister of Justice having its headquarters in Tirana and 12 regional offices in different

¹⁰ Article 1.(a), Law Nr. 9235, dated 29.07.2004 “On Restitution and compensation of property”, as amended, id.

¹¹ Decision of Council of Ministers Nr.566, dated 23.08.2006 “On the organization and functioning of the Property Restitution and Compensation Agency”, published in Official Journal Nr.94, dated 23.08.2006; Vendim i Keshillit te Ministrave Nr.566, datë 23.08.2006 “Për organizimin dhe funksionimin e Agjencisë së Kthimit dhe Kompensimit të Pronave”, botuar ne Fletoren Zyrtare Nr. 94, faqe 3938; date 23.08.2006 as available at: http://77.242.19.116/drjuridike/Permbledhje%20ligjore/lidhja%209235_ndryshimet_2008.doc, last visited 03.11.2008

districts.¹² According to the current internal organization, the PRCA is directed by the General Director and two deputy directors who respectively manage at the national level the Directorate of Restitution of Properties and the Directorate of Compensation of Properties¹³.

Article 2 of the present law determines every expropriated subject¹⁴ or his heirs as the initiators of the procedures for the recognition of the right of ownership, restitution, or compensation of property¹⁵, which was taken by the state through legal and sub-legal acts, criminal judicial decisions or any other unjust manner since 29.11.1944. Initially the requests for the recognition of the right of ownership, restitution or compensation of property from expropriated subjects, accompanied by the necessary legal and hart graphic documentation in order to prove the right to property in question, are submitted to PRCA regional offices where the immovable property is situated.¹⁶ Following the review of the request and the verification of proof and documentation acquired based on which the participating parties in the administrative process support their property claims, and also based on the information gathered from other institutions that are related to the property restitution and compensation process, it is the legal obligation of the Director of the PRCA regional offices to issue a reasoned decision within the period of three months, thus complying with the criteria for administrative act as set out in the Code of

¹² Article 15.1, Law Nr. 9235, dated 29.07.2004 “On restitution and compensation of property”, as amended, id ; Point 1, 2 , Decision of Council of Ministers Nr.566, dated 23.08.2006 “On the organization and functioning of the Property Restitution and Compensation Agency”, id.

¹³ Point 5 and 5/2, Decision of Council of Ministers Nr.566, dated 23.08.2006 “On the organization and functioning of the Property Restitution and Compensation Agency”, id.

¹⁴ According to the definition given by article 3.3 of Law Nr. 9235, dated 29.07.2004 “On restitution and compensation of property”, as amended , “expropriated subject” means a natural or juridical person or their heirs whose property is nationalized, expropriated, confiscated or taken in any other unjust manner by the state.

¹⁵ According to the definition given by article 3.2 of Law Nr. 9235, dated 29.07.2004 “On restitution and compensation of property”, as amended, “property”, within the meaning of this law is an immovable item as defined in the Civil Code. This law deals only with the restitution and compensation of immovable property.

¹⁶ Article 16.2, Law Nr. 9235, dated 29.07.2004 “On restitution and compensation of property”, as amended, id

Administrative Procedures.¹⁷ The decision issued by the regional offices constitutes a property title which re-recognizes or not, according to the conditions set out in the law, the lost property rights during the communist regime.

Within 30 days upon notification of the decision taken from the PRCA regional offices, the expropriated subject or the heirs, and the Office of the State Attorney have the right to appeal it before the PRCA central office.¹⁸ Also, with regard to decisions recognizing the right of ownership, restitution or compensation of property, taken from former local commissions for the restitution and compensation of property¹⁹ as well as former district or municipal commissions for the restitution and compensation of property to ex-owners²⁰ (*hereinafter the ex-commissions*), the expropriated subject or the Office of State Attorney have also the right of complain/appeal in the PRCA central office.²¹ Whilst for the decisions issued by the PRCA regional offices the deadline for possibility of appeal at the PRCA central office is 30-days, for the decisions issued by the ex-commissions there is no time limit within which the subjects that enjoy this right can exercise their right of appeal.

Article 16.1 of the Law clarifies the fact that PRCA central office has a leading and supervisory role over the work on the implementation of the law at the regional offices in the districts. Such provision gives to the PRCA central office the status of supervisor on the decisions given by the

¹⁷ Articles 15.1 (a), (b),(c), 16.2, 16.3, 17.2, Law Nr. 9235, dated 29.07.2004 “On restitution and compensation of property”, as amended, id

¹⁸ Article 18.1, first sentence, id.

¹⁹ Commissions established for the implementation of Law Nr. 9235, dated 29.07.2004 “On restitution and compensation of property” published in Official Journal Nr. 61, dated 31.8.2004

²⁰ Commissions established for the implementation of Law Nr.7698, dated 15.04.1993 “On restitution and compensation of property to ex-owners”, as amended, id.

²¹ Article 18.1, second sentence, id.

PRCA regional offices²² and appealed by the interested subjects. Furthermore, the PRCA central office performs the initial examination of the requests for compensation.²³

The review process of complaints, which are evaluated and have as reviewing object the decisions issued by the PRCA regional offices, or decisions issued by the ex-commissions, and also claims from the parties which interests are hindered by the case review, is carried out within 30 days.²⁴ During this time period the General Director of the PRCA should issue a reasoned decision in reply to the property claims coming from the parties involved in the complaint/appeal process.²⁵ I need to stress the fact that the time limits set out in the law within which the examination of the request by the PRCA regional offices should be conducted together with the revision of appeal by the PRCA central office are respected in very few cases causing long and exhausting delays. This delay is caused by a number of factors, including failure to provide in time the necessary information for solving the cases by other institutions which are related to the process, lack of staffing in the Agency, lack of normal working conditions in the PRCA regional offices, etc. These are also some of the reasons why the deadline determined by the law within which the expropriated subjects are entitled to submit the new requests for the recognition, restitution or compensation of property before the PRCA regional offices and the final time limit for the termination of the process of restitution and compensation of immovable property is always postponed by the Albanian Parliament. Based on the latest amendments of the law, the final deadline for the submission of requests in districts is the date 31.12.2008 and the final time

²² According to articles 16.1(ç) and 18.1 of Law Nr. 9235, dated 29.07.2004 “On restitution and compensation of property”, as amended, the General Director of the PCRA has the right to review with his/her own initiative the legality of the decisions taken by the PRCA regional offices, within the time limit of 30-days.

²³ Article 16.1(b),id.

²⁴ Article 18.1, id

²⁵ Articles 16.3, 18.1, id

limit for the termination of the process of restitution and compensation of immovable property is the date 30.06.2009.²⁶

Article 18.1 of the law states in a clear way that against the decision issued by the PRCA central office upholding or repealing (*and settle its merits*) the decisions taken by the PRCA regional offices it is possible to file a complain in court by also defining which is the competent court that should deal with the complain procedures in both cases. In addition the same article sets out which body should defend the institution's interest before the Court. Nevertheless, there is a legal loophole concerning the possibility to file a complain in court and which is going to be the competent court to review the decision of the PRCA central office that in reference to Article 18 letter "c" repeals the decision taken by the PRCA regional offices in the districts and send the case for reviewing back to the PRCA regional offices. Furthermore, the law does not explicitly clarify and leaves ambiguous whether it is possible to challenge in court the decisions issued by PRCA central office that had as object of review the decisions issued by the former commissions and which is the competent court to deal with such complaints.

There is a vast variety of complaints which are processed and reviewed in the PRCA central office. I have to emphasize that the thematic of many cases that undergo the review (*in order that the case be fairly solved*) requires the reviewing of decisions taken before by former commissions in different districts. In many cases the claimed properties under revision have overlapping issues with properties previously dealt by decisions issued by former commissions, and as a consequence there will be different parties that will participate in the reviewing process. Their interests may be hindered directly or indirectly by the decisions that will be taken by the PRCA. In the majority of the cases, the property claims of expropriated subjects to a given

²⁶ Articles 17.1, 24, Law Nr. 9235, dated 29.07.2004 "On restitution and compensation of property", as amended, id.

property overlap with each other, raising the number of participating parties in the process in more than two.

Although the PRCA is an administrative body (*part of the executive branch*), the nature of its operations and the matters it deals with in relation to property issues, in many cases have to do with the comparison and verification of the legal documentation the parties bring to support their claims and with taking decisions on overlapping claims of different participating parties in the process (*both private and state parties*²⁷). This grants and vests this institution with a adjudicating character which according to my opinion is more linked to the idea of “a specialized administrative tribunal established to regulate the property rights issues in Albania, created as a consequence of injustices committed by the past regime”.

Unfortunately, as we will also have the chance to see in the detailed explanation in the following chapters, this body in its current organization does not enjoy the necessary independence to guarantee a fair, effective and impartial process and to make possible the fair regulation of the property issues deriving from expropriations, nationalizations or confiscation by the Albanian state before 1990, as explicitly defined in the Article 1(a) of the law. My view is that without some degree of independence from the political branches and especially from the executive this institution cannot properly exercise its functions.

²⁷ According to Article 18.1 of the Law Nr. 9235, dated 29.07.2004 “On restitution and compensation of property”, as amended the Office of State Attorney is one of the subjects that have standing for appeal before the PRCA central office against the decision taken respectively by the PRCA regional offices and the former commissions.

B. The Agency as a monocratic centralized body, directly subordinated to the executive

The current organization of the Property Restitution and Compensation Agency, its not build upon the basis of meaningful independence, and it is not an exaggeration to say that the Agency is under the total influence of the party in power.

Based on the decision of the Council of Ministers No. 566, dated 23.08.2006 “On the organization and functioning of the Property Restitution and Compensation Agency”, the General Director of the PRCA is appointed and dismissed from his position by the Council of Ministers based on the proposal of the Prime Minister, while the two Deputy Directors are appointed and dismissed by the Prime Minister based on the proposal of the Minister of Justice.²⁸ The Directors of the PRCA regional offices in the districts and other employees of the PRCA are appointed and dismissed by the General Director of the PRCA.²⁹ As we can clearly see the Government through the new amended law “On restitution and compensation of property” and the sub-legal acts issued for the implementation of the law and particularly the aforementioned decision of Council of Ministers, established a centralized monocratic body that although under the authority of the Minister of Justice, is directly dependent from the Head of the Executive.

As has usually happened in the last years, appointments in high positions of the Agency are mainly seen as political appointments, and the persons who were appointed have been viewed as being totally under the influence of the party in power and not as autonomous and neutral. As we

²⁸ Point 6, Decision of Council of Ministers Nr.566, dated 23.08.2006 “On the organization and functioning of the Property Restitution and Compensation Agency”, id.

²⁹ Point 7,id.

will see in the subsequent chapter, the persons that have the possibility to be chosen and appointed in these political positions do not have to fulfill a specified number of requirements or qualifications expect the fact that the persons need to guarantee that they have “*the right motivation to serve properly*”. In line with this, it is difficult to imagine or to believe that the whole process of property restitution and compensation is totally impartial, fair and far away from political interference or pressure. Also this direct vertical dependence of the highest officials of the Agency from the Prime Minister and the Minister of Justice, as well as the vertical dependence of the Regional Directors from the Director General, logically creates the fear that the persons vested with decision making powers might be reluctant to take decisions and appose what the persons that have in their hands the competence to dismiss them want, showing their devotion and loyalty.

The previous chosen structure created a more independent body. The previous law on restitution and compensation of property that was amended by the current law established the State Committee for the Restitution and Compensation of Property (*hereinafter the Committee*); a collegial body composed of 5 members that were appointed and dismissed by the Parliament.³⁰ Out of five, two members were proposed by the majority and two members from the parliamentary opposition, while the fifth member who was also the Head of the Committee was proposed by the Council of Ministers to the President of the Republic (*in the majority of cases a consensual figure due to the required majority for his election*)³¹, who afterwards had to send the

³⁰ Article 15.1 first sentence, Law Nr. 9235, dated 29.07.2004 “On restitution and compensation of property”, published in Official Journal Nr. 61, dated 31.8.2004; Ligji Nr. 9235, datë 29.07.2004 “Për kthimin dhe kompensimin e pronës”, botuar në Fletoren Zyrtare Nr.61, date 31.08.2004.

³¹ According to article 87.2 of the Albanian Constitution “The president of the Republic is elected by secret vote and without debate by the Assembly by a majority of three-fifths of all its members”.

name of the Head of the Committee for approval in Parliament.³² After, the Committee appointed five members of the local commissions based on the competition criteria set out from the “Law on civil service”.³³ The chosen election system for the members of the Committee was an additional guarantee which served to the independence of the institution, making the election processes of its members the result of a broad consensus between political parties in the Parliament.

In none of the provisions or articles of the aforementioned law, there is any set time limit in relation to the terms of office of the Committee members, implying that the members of the Committee would keep their position until the process of restitution and compensation of immovable property was completed, which based on the previous law was the date 31 December 2006.³⁴ In light of this, another fundamental element of independence was to provide in a certain way irremovable status to the members of the committee until the finalization of the process of restitution and compensation of property.

Moreover, once the member of the Committee was appointed in his/her position, he/she could not be dismissed, except in the circumstances defined precisely by the law. In this context, the member of the Committee was removed from office by the Parliament only in the cases when: “a) *he/she had been convicted through a final court decision for a criminal offence and/or desisted or suspended to exercise the duty as a public servant; b) as a result of physical and mental loss of ability to perform his/her functions based on the decision of the competent bodies; c) when he/she did not participate for several times in a row at the Committee meetings without*

³²Article 15.1, second and third sentence, Law Nr. 9235, dated 29.07.2004 “On restitution and compensation of property”, id.

³³Article 17.2, Law Nr. 9235, dated 29.07.2004 “On restitution and compensation of property’, id.

³⁴Article 24, id.

*a rational reason, as well as when it is verified that has abused his/her office in order to profit unjustly while exercising his/her competences; and e) as well as when he/she violated the law's provisions".*³⁵

As we have already mentioned above, the decision for the dismissal of the General Director of PRCA and his/her two deputies remains completely on the discretion of the Prime Minister and of the Council of Ministers without any precise limitation with regard to circumstances and/or reasons why these persons are dismissed. In poor words there is no set of rules or guidelines which define the process of removal. Furthermore, it can be said that the dismissal process is not carried out in a transparent and neutral way, on the contrary it is essentially a closed process based on political and inter-personal relations behind the closed doors of the Council of Ministers.

This way of regulating the appointment and removal process constitutes a real problem for the effectiveness of a fair process and can strongly influence an independent way of thinking in deciding upon the property claims of different applicants, for the simple reason that these "administrative judges" think that they are totally dependent from the high officials that decide on their carrier, and as a consequence are afraid to act by opposing their wishes and preferences. In relation to arguments usually provided by the Albanian government, this way of organizing the removal process is a necessary instrument to get rid of unproductive state employees and avoid officials who are prone to corrupt practices. According to the government's point of view the goal of this system is to secure state employees who are responsible for issuing fair reasoned decisions and only on the basis of facts and law putting an end in this way to the corruptive phenomenon in the institution.

³⁵ Article 15.5, Law Nr. 9235, dated 29.07.2004, "On restitution and compensation of property", id.

This argument is not without force at all but we must keep in mind that the benefits of having professional, impartial and honest employees should be balanced against the risk of jeopardizing an independent way of thinking and reasoning while deciding cases in accordance with the provisions of the law and the articles of Constitution. In my opinion this system really affects a fair and impartial process, offering the option to misuse this power and very often to exercise it as a weapon to discipline these “administrative judges”, when they appose the interests of political actors.

The following chapter will discuss the importance of creating and establishing an independent structure, and the peculiar significance of the necessary qualifications of the candidates who seek to work for the PRCA.

C. The necessity for building up an independent structure

Article 15 of the previous law, which established the Committee for the Restitution and Compensation of Property, specified and defined in more detail than in the current legal framework which were the necessary criteria and requirements the candidates would meet to become members of the Committee, trying thus to avoid an appointment process based only upon political connections and personal relations.³⁶ In this context, the only persons eligible to become members of the Committee were those who had a university degree in the field of law, economy, agriculture or an engineering degree in an area that is closely linked to the property restitution and compensation process³⁷. Moreover, the member had to have a minimum of seven years of work experience, had to enjoy good reputation, and had to possess exceptional abilities in his/her profession.³⁸ In addition, the member of the Committee could not have been a member of the leading organs of any political party, could not have been convicted for any criminal offences or punished by the disciplinary measure of dismissal from the office.³⁹ Whilst the 5 members of the local commission on the restitution and compensation of property were appointed by the Committee in compliance with the final results of a competition organized based on the criteria defined in the law “On civil servants”.⁴⁰

The current requirements for being eligible for the post of General Director of the Agency and the two Deputy Directors, as well as the Regional Directors are quite general and ambiguous, and as a consequence prone, *(in the absence of clear and precise criteria)* to let political/personal

³⁶ Articles 15.2 Law Nr. 9235, dated 29.07.2004 “On restitution and compensation of property”, id

³⁷ Article 15.2 (a), id

³⁸ Article 15.2 (b), id.

³⁹ Articles 15.2 (ç), (d), (dh), id

⁴⁰ Article 17.2, id.

interventions impinge on the selection/appointment process. The only requirements that the candidates for these positions must satisfy are high moral integrity and high professional abilities.⁴¹ Moreover, there are no detailed requirements, or a competition for the recruitment processes of the other employees of the Agency and as a corollary the importance of personal merits come after political and personal associations. Differently from the previous organization in place which was based on final results of national competitions, now the current General Director of the PRCA has the total competence to choose any person to become an employee of the Agency, basing his/her decision simply on the personal linkage and/or suggestions from political interferences. In my opinion, a fundamental component towards enhancing professionalism in the institution, and a guarantee of an effective and impartial process is that at least the persons that have decision making rights and hold key positions in the Agency must satisfy specific and clear requirements established by law, and undergo a transparent and impartial selection/appointment procedure which is totally out of reach of political interventions.

As the history of this Agency in the last 2 years has shown, if the recruitment and removal process are not regulated by precise and detailed rules, the heads of the institution as well as other employees who contributes in the decision making process, will be always vulnerable and depending in a large scale by the preferences of the higher officials who decide on their career and term of office.

⁴¹ Point 6, Decision of Council of Ministers Nr.566, dated 23.08.2006 “On the organization and functioning of the Property Restitution and Compensation Agency”, id

According to the old law the membership in the Committee was not in compliance with any other state or political activity.⁴² In none of the provisions of the new law is there any set rule on the in compliance of the Agency's employees with any other state or political activity.

It is crucial that the person who will be involved in the decision making process at the Agency provide sufficient guarantees of his/her impartiality and unbiased judgment, as well as demonstrating moral integrity while performing his/her tasks in the quality of "an administrative judge", showing that there are no links between him/her and state or private parties participating in the process. At the same time, the abovementioned qualities and requirements (*which must be set in the law*) would enable these "administrative judges" not only to perform their tasks in an independent and professional way but also serve as a safeguard in order to avoid at the largest extend possible any conflict of interest that might occur.

Article 6.1 of the ECHR declares the right of the individual to a hearing carried out by an independent and impartial tribunal established by law.⁴³ There is a set of three conditions that should be satisfied in order to make Article 6.1 applicable in civil cases.⁴⁴

The first condition is related to the necessity of having a civil right or obligation which is acknowledged by the domestic law. The second one consists in the existence of an authentic and serious dispute in relation to the civil right and the way it is applied. Finally, the last one is connected to the capability of the body to produce a binding decision.⁴⁵

⁴² Article 15.3, Law Nr. 9235, dated 29.07.2004 "On restitution and compensation of property", id

⁴³ Philip Leach, "Taking Case to the European Court of Human Rights", Second Edition, OXFORD University Press, pages 262

⁴⁴ Philip Leach, "Taking Case to the European Court of Human Rights", Second Edition, OXFORD University Press, pages 244, 262

⁴⁵ Philip Leach, "Taking Case to the European Court of Human Rights", Second Edition, OXFORD University Press, pages 244, 262; Ramadhi and five others v. Albania, no.38222/02, 13.11.2007.

In cases decided by the Agency, it is clear that there is a dispute between the State and the private applicants, and in many cases also between private applicants, whose property claims overlap over a right recognized under the law “On the restitution and compensation of property”, over the determination of the property rights of the parties participating in the process by the PRCA.⁴⁶ Moreover, based on Article 16.3, when the decisions issued by the PRCA regional offices or even from the PRCA central office are not appealed or reviewed by the General Director of the PRCA within the set time limit and according to the procedure established by the property law, they constitute an executive title and their enforcement is obligatory. In light of this, the law assigns the Bailiff Office to execute such decisions in compliance with the rules defined in the Code of Civil Procedures.⁴⁷

After carrying out of the verification of the application of article 6.1 of the Convention in our present circumstances the so called test of independence applied by the Strasbourg Court includes consideration: on the appointment/selection process of the members of the body under examination; the length of time they serve in office; the existence of safeguards against external influence and interferences; and lastly if the body shows that it works on the basis of autonomy and presents an appearance of independence.⁴⁸ *“However even when a body with adjudicatory powers that determines disputes over civil rights does not comply with article 6.1 there will be no violation where that body itself is subject to the control of article 6 complaint judicial body with full jurisdiction”.*⁴⁹

⁴⁶ Ramadhi and five others v. Albania, no.38222/02, 13.11.2007.

⁴⁷ Article, 16.3 Law Nr. 9235, dated 29.07.2004 “On restitution and compensation of property”, as amended, id

⁴⁸ Philip Leach\, “Taking Case to the European Court of Human Rights”, Second Edition, OXFORD University Press, page, 262.

⁴⁹ id.

As mentioned in the first chapter, Article 18.1 of the Law clarifies that against the PRCA central office decisions, upholding or repealing (*and settle its merits*) the decisions taken by the PRCA regional offices, the aggrieved parties may file a complaint in the competent court. However, the law does not define whether the other decisions taken by the PRCA central office that repeals the decision taken by the PRCA regional offices in the districts and send the case for reviewing back to the PRCA regional offices may be subject to court review, and also does not define which is the competent court that will deal with these PRCA decisions. Furthermore, the law does not explicitly clarify whether it is possible to challenge in court the decisions issued by the PRCA central office that had as object of review the decisions issued by the former commissions and which is the competent court to deal with such actions. This unclear situation leaves to much room for different interpretations and discretion in respect of the availability and the possibility that these decisions to be subject of judicial scrutiny. In the absence of clarity from the specific law, the parties may only resort to the general rules as provided in the Code of Civil Procedure and related to complaints against administrative acts. However, in the absence of specific provisions related to their cases it is very doubtful that they will succeed in court.

Crisan vs. Romania case was about a Romanian citizen that applied for the status of politically persecuted person before a given commission which as the court argued during the proceedings was not independent *vis-à-vis* the executive branch from the point of view of its composition, and even more its decisions were not subject to challenge in the courts.⁵⁰ Therefore it didn't fulfill the requirements of Article 6.1 of the ECHR. As the court concluded, in order for the criteria of the above mentioned provision to be satisfied the claimant should be given the

⁵⁰ Crisan v. Romania, Application No.42930/98, 27.05.2003

opportunity to challenge the Commission's decisions to a judicial body with full authority which does comply with the requirements of article 6.1.⁵¹

In another Romanian case *Glod vs. Romania*, again the Court draw the attention to the fact that the Administrative Commission which had decided upon the citizens property claims for restitution of her property was chaired by the provincial governor and therefore was found not to be independent from the executive branch, and did not constitute a "tribunal" within the meaning of Article 6.1 of the ECHR.⁵² The Court found violation of the above article since the Commission decision according to the Rumanian courts was not subject to judicial control.⁵³

I would like to stress here that the peculiar nature of the cases examined by the PRCA require specific legal and technical knowledge for their solution. The confrontation, evaluation, and judgment of different overlapping claims coming from different parties into this process, and at the end, the production of a solution which is a pure combination of legal and technical opinion (*the opinion of the topographic experts of the Agency*) gives to this institution more of a character of a specialized adjudicatory body, which in my opinion, is closer to the idea of “an administrative tribunal, specialized for reviewing property related cases, that have arisen from expropriation, nationalization or confiscation, inherited by the earlier communist regime”.

Talking form a separation of powers perspective and based on the above arguments, the peculiar nature of the institution (PRCA) demands some form of independence and sufficient guarantees that will defend this institution from outside influence, and that would also provide decision-making persons working in this institution the necessary independence that will allow them to

⁵¹ *Crisan v. Romania*, Application No.42930/98, 27.05.2003

⁵² *Glod v. Romania*, Application No.41134/98, 16.09.2003

⁵³ *id.*

decide upon the property claims of the Albanian citizens relying only on the basis of facts, law and their personal inner conviction. This independence will enable the PRCA to properly exercise its functions and take decisions in a sovereign and autonomous way and bound only by the provisions of the Constitution and the law itself.

II. The consequences brought by the latest amendment of the law and the effectiveness of the compensation process.

A. Changes brought by the latest amendment to the law “On restitution and compensation of property”

The latest amendments to the law on the restitution and compensation of property made in 2007⁵⁴, in my opinion have further complicated the situation. They are fundamentally in contradiction with the constitutional provisions, and moreover, are not in conformity with the rights protected by the ECHR.

One of the changes introduced by these last amendments of the law explicitly stipulate that the Office of State Attorney is one of the subjects that have standing for appeal before the PRCA central office, against the decisions recognizing the right of ownership, restitution or compensation of property taken respectively by the PRCA regional offices, the ex-local commissions for the restitution and compensation of property and the ex-district or municipal commissions for the restitution and compensation of the property to ex-owners.⁵⁵ In other words, this last amendment of the Law recognizes as a party into this process by legitimating its right to appeal against the decisions taken by the PRCA regional offices and the ex –commissions, the Office of State Attorney which is a body under the direct subordination of the Minister of

⁵⁴ Law Nr.9684, dated 06.02.2007, On some amendments to Law Nr. 9235, dated 29.07.2004 “On restitution and compensation of property”, as amended, published in Official Journal Nr.11, dated 14.02.2007; Ligji Nr.9684, date 06.02.2007, Per disa shtesa e ndryshime ne Ligjin Nr. 9235, date 29.07.2004 “Per kthimin dhe kompensimin e prones”, te ndryshuar, botuar ne Fletoren Zyrtare Nr.11, date 14.02.2007

⁵⁵ Article 18.1, Law Nr. 9235, dated 29.07.2004 “On Restitution and compensation of property”, as amended, id

Justice.⁵⁶ Taking into account the fact that the Property Restitution and Compensation Agency (PRCA) is not an independent institution, but an institution directly under the subordination of the same state institutions as the Office of State Attorney (*the Ministry of Justice*), one cannot claim anymore for an impartial and effective process where the parties are in equal positions and the PRCA acts as an impartial arbiter. Legitimizing the Office of the State Attorney in this process is in clear contradiction with the overall accepted principle of law and natural justice according to which, no-one and even if this one is the State, should be a judge in its own cause. (*Nemo judex in causa sua*)⁵⁷

On my opinion, the prerogative and competency to review claims of a body that protects state interests against those of a private party belongs only to the courts or at least to a body that offers the same guarantees of independence in producing an impartial judgment and only based on the law and Constitution. Hence, by taking this exclusive competence from the hands of the judicial power and placing it in the hands of the executive, the constitutional principle of separation of powers is being violated. On the other hand, the inclusion of the Office of State Attorney as party in this process violates the rights of the individual to have a fair and impartial trial of his/her claims by an impartial and independent arbiter in complete equal position with the other party into the adjudicating process.

The principle of equality of arms is a fundamental element of the right to a fair process.⁵⁸ The institutional set up of PRCA positions the private party at a considerable disadvantage in relation

⁵⁶ Article 7.1, Law Nr. 8551, dated 18.11.1999 "For the state attorney", as amended, published in Official Journal Nr.33, dated 16.12.1999; Ligji Nr.8551, date 18.11.1999 "Per avokaturen e shtetit", i ndryshuar, botuar ne Fletoren Zyrtare Nr.33, date 16.12.1999

⁵⁷ *Nemo judex in causa sua* as available at: http://en.wikipedia.org/wiki/Nemo_judex_in_sua_causa, last visited 12.11.2008

⁵⁸ Philip Leach, "Taking Case to the European Court of Human Rights", Second Edition, OXFORD University Press, pages 256-257

to its opponent, in this case the Office of State Attorney. It is clear that this kind of organization puts the private party into a more inferior position, in violation of the equality-of-arms principle.

It is also worth mentioning that the law provides no limits to the discretion or to the circumstances of when the Office of State Attorney may file an appeal, which makes this competence of the Office of State Attorney to be used in an abusive fashion. This is especially true taking into account that in many practical cases the Office of State Attorney files complaints without showing where the state interest has been violated. To put it in simple words, the right of the Office of State Attorney to file appeals has been often used abusively by its staff for their personal or corrupt interests.

Another considerable anomaly created by the amended law, consists in the fact that the expropriated party or the Office of State Attorney have the right to file a complaint even against the decisions taken by the ex-commissions and for which the amended law sets no deadline. Article 18.1 as amended in February 2007 explicitly states that: *“Against the decision recognizing the right to ownership, restitution or compensation of property, as well as other real rights of ex-local commissions for the restitution and compensation of property and the ex-district or municipal commissions for the restitution and compensation of property to ex-owners, the expropriated party or the Office of State Attorney have the right to file a complaint in the PRCA central office”*.⁵⁹

In this respect, it is worth mentioning that based on Article 27(a) of the law No. 7698, dated 15.04.1993 “On restitution and compensation of properties to ex –owners”, as amended, aggrieved parties had the right to file a complaint before the courts against the decisions of former district or municipal commissions for the restitution and compensation of property to ex-

⁵⁹ Article 18.1, Law Nr. 9235, dated 29.07.2004 “On restitution and compensation of property”, as amended, id

owners. The amendments to the law provide that the expropriated subjects and the Office of State Attorney may file a complaint in front of the PRCA central office (*which is an administrative body*) against the decisions of these former commissions, in clear violation of the separation of powers principle, taking into account that a great number of the decisions of these former commissions have already been reviewed in court proceedings, and that the new provisions allow for them to be “re-reviewed” again by an administrative body (*the PRCA*).

As we can see, through the new amended law its possible that the decision issued by the ex-commissions, which according to the previous law were legally examined in court, to be re-examined and be reviewed again from the executive. In other words the law offers the possibility to the executive to control the legality of the acts produced from the executive itself, acts which according to the previous law were object of judicial control.

In certain cases, this situation has created a total chaos. In these cases, decisions of the former commissions after being scrutinized by the courts which have reached a final decision that uphold or changed them, have been again taken under scrutiny and even repealed by the PRCA central office, based on the above-mentioned provision. As a result, the PRCA (*part of the executive*) has indirectly reviewed and repealed a final court decision. Such action and practice is a serious violation of the separation of powers principle, as well as a violation of the exclusive right of the judicial branch i.e. not to have its decisions be reviewed by the executive branch, but only by a higher court. It also amounts to a violation of the overall accepted principle of *res adjudicata*.⁶⁰ As mentioned above, these provisions create a very problematic situation. For instance, the same decision of a former commission which has been scrutinized and later upheld with a final decision by the court is now being reviewed again and repealed by the PRCA. The

⁶⁰ Res judicata, as available at: http://en.wikipedia.org/wiki/Res_judicata, last visited 12.11.2008

question rises: how will we deal with the legal consequences stemming from this situation? In other words, which decision will be enforced; the first one taken by the former commissions and upheld in the court, or the one issued by the PRCA which repeals the decision taken by the former commission?

To add more to the confusions, it is worth mentioning that the great majority of the pieces of property returned by the former commissions have been already sold to new owners and have also been affected by changes as a result of investments on such property (*property development*). This uncertainty, where the old decisions are being repealed by PRCA, is a very fertile ground for social conflicts. In my opinion the prerogative to repeal and regulate the consequences stemming from the old decisions of the former commissions should remain an exclusive attribute of the judiciary.

According to Article 11 of the Constitution of Albania, “*The economic system of the Republic of Albania is based on private and public property, as well as on a market economy and on freedom of economic activity. Private and public property are equally protected by law.*”⁶¹ In its Article 41 the Constitution stipulates that: “*The right of private property is protected by law....the law may provide for expropriations or limitations in the exercise of a property right only in the public interest*”⁶²

In its entirety among other things these provision guaranties the right to private property. Any individual in the Republic of Albania has the right to private property and the state is constitutionally bound to guarantee its protection.

⁶¹ Constitution of Albania approved by the Parliament on 21 October 1998, as available at: <http://www.ipls.org/services/kusht/contents.html>, last visited 17.11.2008

⁶² id

One of the main changes introduced by the amendments to the Law in 2007, consist in the right of the General Director of PRCA to review with his/her own initiative the legality of the decisions taken by the former local commissions for the restitution and compensation of property and the former district or municipal commissions for the restitution and compensation of property to ex-owners.⁶³

This prerogative of the General Director of the PRCA to review with his/her own initiative the legality of the decisions taken by the former commissions, completely on its own discretion and without having any boundaries in terms of legal deadlines as foreseen by the law, is in full contradiction with the principle of legal certainty of the individuals and the constitutional right of the individuals to enjoy freely and peacefully the fruits of their property. Further more, this seemingly anti-constitutional provision is also not in conformity with the Article 1 of the first Protocol to the Convention, according to which: *“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law...”*.⁶⁴ This article of the European Convention guarantees the right of everyone to enjoy peacefully his/her own possessions. The decisions of the former commissions have returned (*recognized*) the properties with a final administrative decision and in most of the cases these decisions have also gone through judicial review. With the years passing, the legitimate owners have effectively exploited the fruits of their possessions by obtaining full legitimacy on their property rights and as a consequence they constitute existing possessions

⁶³ Articles 16.1 (ç), 18.1 , Law Nr. 9235, dated 29.07.2004 “On restitution and compensation of property”, as amended, id

⁶⁴ The European Convention of Human Rights as available at: <http://www.hri.org/docs/ECHR50.html>, last visited 17.11.2008

which are directly under the protection of Article 1 of the first Protocol to the Convention⁶⁵. Any breach of this article may lead to claims based on this provision.

According to Article 16 of the Albanian Law “On Restitution and Compensation of property”, as amended, the General Director of the PRCA has the right to review (*and if suitable to him/her, repeal*) with his/her own initiative even decisions of the former commissions taken as long as 15 years ago and on which the interested parties have not filed any appeal. Thus, these decisions have been implemented and produced real legal consequences and rights. It would again like to reiterate here that most of these properties returned and recognized by the former commissions have been already sold to new owners and have also been affected by changes as result of investments. This kind of review of these decisions might cause inevitable detrimental effects to third parties and not only to the former -owners.

It is not an overstatement to say that this provision gives to one single person (*the General Director of PRCA, which as elaborated in previous chapters does not fulfill minimum standards of independence*) the right to review with his/her own initiative all the decision taken by the former commissions since the beginning of the process of restitution and compensation of property without having any limitations in time and completely on his/her own discretion. Needless to say that such an arrangement violates Article 1 of the Protocol No.1 of ECHR and the constitutional right of the individuals to enjoy in peace their property.

⁶⁵ Prince Hans-Adam II of Liechtenstein v. Germany [GC], no. 42527/98, Beshiri and others v. Albania, No 7352/03, 22.08.2006

The principle of legal certainty is a fundamental ingredient of the rule of law, which is referred to the preamble of the ECHR as the common heritage of the contracting states.⁶⁶ Among others, this legal certainty presupposes the citizens' confidence into their state and into the stability of the laws governing their lives.⁶⁷ The citizen confidence is primarily related to the fact that the citizens should not be constantly worried about the change in the laws and on the negative impact of the normative acts that damage and worsen their legal position already determined by other previous acts.⁶⁸ On the other hand the historical and today's meaning of property rights is that it constitutes an important part of the individual freedom.⁶⁹

Under such provisions, we may say that the property rights are never guaranteed. This creates a state of total uncertainty for the Albanian property owners and foreign investors who may want to buy property or invest in Albania. Practically, any Albanian property owner, whose property has been recognized and returned by the former commissions or that has purchased it from such owner has to leave in fear that one day the General Director of PRCA may, for no substantive legal reason, review with his/her own initiative any decision of the commissions that have recognized the rights to a given property. Such a review may include even cases where decisions were taken and implemented 20 years ago. Under this legal regime, no owner will feel secure

⁶⁶ Philip Leach, "Taking Case to the European Court of Human Rights", Second Edition, OXFORD University Press, page 242

⁶⁷ GJYKATA KUSHTEUERE ne bashkepunim me USAID dhe PREZENCA E OSBE-SE NE SHQIPERI, "Kthimi dhe kompensimi i pronave subjekteve te shpronesuara ne praktiken e Gjykates Kushtetuese Shqiptare", albPAPER, Tirane 2006, page 101, Decision Nr.26, dated 02.11.2005 of the Albanian Constitutional Court, published in the Official Journal Nr.91, dated, 01.12.2005

⁶⁸ id

⁶⁹ GJYKATA KUSHTEUERE ne bashkepunim me USAID dhe PREZENCA E OSBE-SE NE SHQIPERI, "Kthimi dhe kompensimi i pronave subjekteve te shpronesuara ne praktiken e Gjykates Kushtetuese Shqiptare", albPAPER, Tirane 2006, page 110, Decision Nr. 30, dated 01.12.2005, of the Albanian Constitutional Court published in the Official Journal Nr. 92 dated, 02.12.2005, referred to Decision of the German Constitutional Court, BverfGE 58, 225 (300).

and in the same time is deprived from his/her freedom to exploit the real fruits stemming from his/her right to a given property.

According to Article 41 of the Albanian Constitution and Article 1 of the Protocol No.1 of ECHR, any interference in the right to property may be justified only if it is done on public interest. Further more, for such an interference to be justified the principle of proportionality shall be respected and shall not infringe the essence of freedoms and rights.⁷⁰ This means that such interference shall be such as to demand the achievement of lawful public interests and always use appropriate and less burdensome means in proportion with the goal they intend to achieve.⁷¹ As a conclusion, the legal system should contain such procedural and material guarantees that shall secure that the interference into the right to property be not arbitrary and unforeseeable.⁷² The process of restitution shall be constructed in such a way that should avoid causing other injustices.⁷³

⁷⁰ GJYKATA KUSHTEUESE ne bashkepunim me USAID dhe PREZENCA E OSBE-SE NE SHQIPERI , “Kthimi dhe kompensimi i pronave subjekteve te shpronesuara ne praktiken e Gjykates Kushtetuese Shqiptare”, albPAPER, Tirane 2006, page 113, Decision Nr. 30, dated 01.12.2005, of the Albanian Constitutional Court published in the Official Journal Nr. 92 dated, 02.12.2005

⁷¹ id

⁷² id

⁷³ id, page 107.

B. The effectiveness of the compensation process

In this chapter I will elaborate on the issue of compensation of the expropriated subjects and I will analyze if the remedies provided by the current Law are effective, enabling the expropriated subjects to obtain sufficient redress in those cases when the right for compensation has been recognized, because for different legal reasons defined by the Law the physical restitution of their property is impossible.

As mentioned above the first law on the restitution and compensation of property dates in the year 1993. Since that time the number of expropriated subjects whose right to compensation of their property was recognized (*through final decisions of different ex-commissions for the restitution and compensation of property and in some cases even through final court decision*) has increased significantly, while the number of expropriated subjects that have received any compensation remains very small. As we will notice further down, the Albanian State has failed in re-instituting the lost property rights for those owners whose right for compensation has been recognized, but have never received any compensation. As a response to numerous complains coming from the former owners, the Albanian Government has justified itself with the argument of its lack of funds necessary for their compensation, claiming that this is an enough convincing argument to avoid responsibility. In simple words, what has happened in reality is that the Albanian State through the law on restitution and compensation of property has recognized a right to the expropriated subjects, that it has not fully realized.

As we will notice from the examples presented below, such lack of realization of the recognized right for compensation has compelled the Strasbourg Court to find a series of violations by the

Albanian government, as a result of non compliance with the provisions of the Convention, especially Articles 6, 13 and Article 1 of its Protocol No. 1.

Beshiri and others v. Albania was a case, which was given final judgment by the European Court of Human Rights only five days after the amendments of the law on restitution and compensation of property which established the Property Restitution and Compensation Agency entered into force. This case was about Albanian owners whose property was unjustly taken by the state. After exhausting all administrative remedies (*filing an application in the Commission for the Restitution and Compensation of the Property*) the applicants referred their case to the courts. After going through the courts at all levels in Albania, a final court decision was reached in which the right to compensation was recognized to Beshiri family for 2 plots of land measuring 48.55 sq. m and 46.70 sq. m.⁷⁴

Relying on Articles 6.1 and 13, and Article 1 of Protocol No.1 to the European Convention on Human Rights, the Beshiri family filed a complaint stating the failure of the Albanian authorities to enforce the Tirana Court of Appeal's judgment of 11 April 2001 which decided on the compensation for 2 plots of land measuring 48.55 sq. m and 46.70 sq. m.⁷⁵ During the case review, the Court argued that after the issuance of the Tirana Court of Appeal's decision in the year 2001 the Albanian government did not offer the applicants the possibility of obtaining suitable compensation, in order to enforce the final court decision.⁷⁶ As a result of this, the provisions of Article 6.1 of the Convention were found to be violated by the Albanian State.⁷⁷

⁷⁴ Beshiri and others v. Albania, No 7352/03, 22.08.2006

⁷⁵ *id.*

⁷⁶ *id.*

⁷⁷ *id.*

The European Court of Human Rights found also an interference with the right of the individuals for the peaceful enjoyment of their possessions as directly protected by Article 1 of Protocol No. 1 to the Convention, caused by the continuing failure of the Albanian authorities to comply with the final court decision which recognized the right of compensation to Beshiri family for 2 plots of land.⁷⁸ The Albanian authorities did not execute the judgment of the Tirana Court of Appeal and as a consequence left the applicants in a state of uncertainty in respect to the possibilities of acquisition of their property rights back to its origin.⁷⁹ In addition, for a very lengthy period of time, the Albanian authorities failed to provide them with the compensation awarded through the final decisions of the Tirana Court of Appeal and as a consequence prevented them from enjoying the possession of their money.⁸⁰

One of the arguments presented by the Albanian Government in front of the Court was the lack of funds to provide compensation, in reply of which the Court argued that this argument does not justify the failure to execute a final and binding judicial decision.⁸¹

Another case, *Ramadhi and five others vs. Albania* had also to do, among other things, with the non enforcement of the decision of a former commission for the restitution and compensation of the property to ex-owners, which granted to Ramadhi family the right to compensation for shops 150 sq. m and the plot of land measuring 5,500 sq. m.⁸² In this case also the right to compensation awarded through the commission decisions to Ramadhi family had not been realized for a considerable period of time.⁸³

⁷⁸ *Beshiri and others v. Albania*, No 7352/03, 22.08.2006

⁷⁹ *id*

⁸⁰ *id*

⁸¹ *id*

⁸² *Ramadhi and five others v. Albania*, No.38222/02, 13.11.2007.

⁸³ *id*

On grounds of the Governments' failure to abide with parts of the Commission's decisions of 7 June 1995 and 20 September 1996 regarding the possibility of receiving appropriate compensation in respect of the shops 150 sq. m and the plot of land measuring 5,500 sq. m. the Ramadhi family claimed a violation of Article 6 § 1 and Article 1 of Protocol No. 1 to the Convention.⁸⁴ In addition, the applicants alleged a violation of Article 13 of the Convention concerning the non-existence of remedies to enforce the Commission's decisions which recognized them the right to compensation.⁸⁵

As the Court mentioned many times *“the authority referred to in Article 13 need not be a judicial authority but, if it is not, the powers and the guarantees which it affords are relevant in determining whether the remedy its effective”*.⁸⁶

The Court noticed that the Law at the time did not offer any particular remedy for the realization of the recognized right for compensation by the commission's decisions.⁸⁷ Further more, the Court highlighted that under the Law, the Council of Ministers was the responsible body for designing specific rules and methods for the compensation of expropriated subjects and delineating the appropriate type and mode of compensation.⁸⁸ Thus far, the Council of Minister has not elaborated and adopted any of such rules and methods and the Albanian Government gave no clarification for such omission.⁸⁹

The above mentioned reflections were considered sufficient by the Court to conclude that, by failing to take the necessary actions i.e. designing specific rules and methods for the

⁸⁴ Ramadhi and five others v. Albania, No.38222/02, 13.11.2007.

⁸⁵ id

⁸⁶ P van Dijk & G J H van Hoof, “ Theory and Practice of the European Convention on Human rights”, (third edition), page 707.

⁸⁷ Ramadhi and five others v. Albania, No.38222/02, 13.11.2007

⁸⁸ id

⁸⁹ id

compensation of former owners whose right to compensation was granted by the decisions of the commissions and determine adequate funds for such compensation, “*the applicants were deprived of their right to an effective remedy enabling them to secure the enforcement of their civil right to compensation*”.⁹⁰ Therefore the court found a violation of Article 13 in conjunction with Article 6.⁹¹

Another defense line presented by the Government during the proceedings in both of the above cases was that the applicants failed to make use of the remedies provided by the new Law (*Law No. 9235, dated 29.07.2004 “On Restitution and compensation of property”, which provided for 5 forms of compensation*) in respect to compensation.⁹² In other words, the Government argued that that the applicants’ complain should be declared inadmissible for failure to exhaust domestic remedies.⁹³ Among others things the Strasbourg Court concluded that the Government did not provide proof to argue in favor of the existence of real effective remedies at the disposal of the claimants that could effectively have offered redress to them.⁹⁴

As in other cases the Court reiterated “*that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness*”.⁹⁵

⁹⁰ Ramadhi and five others v. Albania, No.38222/02, 13.11.2007.

⁹¹ id

⁹² Ramadhi and five others v. Albania, No.38222/02, 13.11.2007, Beshiri and others v. Albania, No 7352/03, 22.08.2006

⁹³ id

⁹⁴ id

⁹⁵ id

The actual Law “On the restitution and compensation of property” stipulates that in cases when the physical restitution of property is not possible, then the expropriated subject shall get compensation.⁹⁶ Article 11 of the law offers 6 types of compensation for the expropriated subject whose right for compensation has been recognized because, due to different legal reasons determined in the law, the physical restitution of their property is not possible. These persons might be compensated: “ a) *with another state owned immovable property of the same kind and with equal value; a/1) with public immovable property in the areas which are given priority in the development of tourism; b) with another state owned immovable property of any kind with equal value; c) with shares in state owned companies or where the state is a co-owner, that have the same value with the immovable property; ç)with the value of the objects that are subject to process of privatization; and d) with money*”⁹⁷

Further more, the law identifies the PRCA central office as the institution which is competent to perform the initial examination of the requests for compensation coming from expropriated individuals whose immovable property is recognized for compensation.⁹⁸ According to the law after receiving the request from individuals, the PRCA central office is under the obligation to examine the request for compensation within 3 months from the day of the registration of the request.⁹⁹ Within this period of time, the General Director of PRCA has to come up with a final decision or if he/she is not able to do so, may postpone this deadline with a reasoned decision but not longer than 30 days.¹⁰⁰

⁹⁶ Article 1(b), Law Nr. 9235, dated 29.07.2004 “On restitution and compensation of property”, as amended ,id

⁹⁷ Article 11, id

⁹⁸ Article 15.1 (a), 16.1 (b), id

⁹⁹ Article 17.2, id

¹⁰⁰ id.

A fact to be noted is that the owner, whose right to compensation has been recognized, may opt to list his/her preferred type of compensation from 1 to 6. However, it remains in the full discretion of the Agency to decide with which type of compensation described by the law, will be used to compensate the expropriated subject. Attention should be drawn to the fact that there is no rule which defines any criteria or standards to be used by the PRCA while determining the type of compensation for the former owners.

Finally the expropriated subject has the right that within 30 days from the notification of the PRCA decision for compensation to file an appeal against it at the Tirana Court of First Instance¹⁰¹

Article 23 of the Law provides for the approval by the Parliament, with the proposal of the Council of Ministers, of the financial compensation fund to be used for the financial compensation of the expropriated subjects starting from the year 2005, and that goes on for 10 years to come. This fund will be managed by the PRCA. From the moment the right to compensation has been recognized until the compensation occurs, the expropriated subject will also benefit the bank interest rate according to the annual average rate established by the Bank of Albania.¹⁰²

The fund approved during these previous years has been extremely small to cover a great number of expropriated subjects whose right to compensation has been recognized. In reality, the monetary compensation has been done partially only for 200 sq. m. according to the rules set up

¹⁰¹ Article 18.2, Law Nr. 9235, dated 29.07.2004 "On restitution and compensation of property", as amended ,id

¹⁰² Article 23, id.

by the decisions of the Council of Ministers.¹⁰³ Starting from year 1993 until November 2008, this partial monetary compensation up to 200 sq. m. is done only for a limited number of expropriated subjects with an average of 70 – 80 per year starting from the year 2006.

In addition, article 28 of the Law provides that apart from the monetary compensation fund, within 60 days from the entry into force of the law¹⁰⁴, the Council of Ministers will define the state owned immovable properties which will be used for physical compensation.

The reality is that the Albanian Government is moving with a very slow pace. The 60 days deadline established by the law has not been respected and even now after 2 years of the entry in force of the above motioned provision, the Albanian Government is still making an inventory and verification of these state owned immovable properties which will be used for physical compensation. Thus, the physical compensation of the ex-owners has not started yet. As a result of this situation the PRCA, in reply to legal requests for compensation from those subjects whose right to compensation has been recognized, responds by declaring its inability to offer compensation as provided by law. There is no doubt that this way of proceeding indirectly denies the subject's right of access to court as an important element of Article 6 of the ECHR because in absence of a decision taken by the PRCA according to the procedures provided by law, it is difficult for the aggrieved subject to seek redress in the Court.

The right of the expropriated subjects to be compensated in an effective and full manner in one of the options provided in Article 11 of the Law has never been realized in practice but remains a

¹⁰³ Decision of Council of Ministers Nr. 758, dated 16.11.2006 “ For the approval of the procedures on the distribution of the monetary compensation fund, for year 2006”, published in Official Journal Nr. 121, dated, 24.11.2006; Decision of Council of Ministers Nr. 1343, date 04.06.2008 “ For the approval of the procedures on the distribution of the monetary compensation fund, for year 2008”, published in Official Journal Nr. 158, dated, 18.10.2008.

¹⁰⁴ Law Nr. 9583, dated 17.7.2006, On some amendments in the Law Nr.9235, dated 29.07.2004 , On restitution and compensation of property”, published in Official Journal Nr. 81, dated 2.8.2006, entered in force 17.08.2006.

very theoretical right. I would like to reiterate that the compensation fund approved for the last three years has been extremely small and only covered the needs of a very limited number of expropriated subjects and only for the value of plot no bigger than 200 sq. m (*for the rest of the property an owner must await for all owners to be compensated for their respective 200 sq. m*). On the other hand, with the lack of sufficient physical compensation fund, the only realistic way for compensation of ex-owners remains the option of monetary compensation. Thus, the other 5 types of compensation offered by the Law remain imaginary. It is logical to ask the question on whether the existence of remedies provided for in the current Law enable the expropriated subjects to obtain sufficient redress, and whether these remedies can be considered effective within the legal framework of the European Convention on Human Rights. Without any hesitation the answer to these questions is no.

In many cases when dealing with the authorities' compliance with the general obligation under Article 13 of the Convention the European Court of Human Rights emphasizes the following principle: *“The remedy required by Article 13 must be “effective” in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.”*¹⁰⁵

In *Ramadhi v Albania*, the Court stated that the violation of the applicants' rights (*provided for by Article 6 § 1, article 13 of the ECHR and Article 1 of Protocol No. 1*) by the Albanian state caused a serious problem, which affected a significantly large number of people.¹⁰⁶ This violation is exactly the unjustified obstruction of their right to the peaceful enjoyment of their property, caused by the non – realization of Commission decisions that recognized to the

¹⁰⁵ *Iatridis v. Greece*, No 31107/96, 25.03.1999; *Ramadhi and five others v. Albania*, No.38222/02, 13.11.2007

¹⁰⁶ *Ramadhi and five others v. Albania*, No.38222/02, 13.11.2007.

expropriated subject the right to compensation under different laws on the restitution and compensation of property adopted by Albania.¹⁰⁷ As a matter of fact there are a big number of identical claims in front of the Court and if the Albanian State does not take urgently the necessary measures (*while taking in consideration the recommendations given by the court*) in order to put an end to the nature and cause of the violations found in the cases analyzed above, the situation may trigger other numerous well-founded applications before the Court and put in question the State's responsibility under the Convention.¹⁰⁸

¹⁰⁷ Ramadhi and five others v. Albania, No.38222/02, 13.11.2007.

¹⁰⁸ *id*

CONCLUSIONS

As a conclusion, the solution adopted by the Albanian government to change the structure of the institution which is in place with the core mission of regulating in a fair way the issues of property rights, from a collegial body which enjoyed certain guarantees of independence into a monocratic and centralized body (*in which the concept of independence is totally non existent*), totally dependent from the Head of the Executive, as well as the latest amendments initiated by the Ministry of Justice, analyzed in the aforementioned chapter, arise questions that bear and should comprise direct political responsibility.

Was it a necessary change or was it just the hidden desire to concentrate more power in the hands of the executive and effectively control an institution which deals with big interests, or said in poor words with big money? What was the impact of these changes on the effectiveness of the process and whether the operation of the Agency under the current law sufficiently safeguards the individual rights?

In overall, based on my judgment, given the peculiar nature of the institution, it is crucial for the well functioning of this quasi judicial body to maintain and ensure the independence and impartiality of the decision makers especially from any kind of external intrusion or imposition that will seriously hinder the process and encroach on their autonomy. In this context, and taking into consideration the direct subordination the Agency has in relation to the government, a legal framework on property restitution and compensation which foresees and sets out the basis for the independence of the main body which deals with the process, should be one of the near future aims to be initiated.

On the other hand, the issue of compensation of Albanian owners, taking here into consideration the socio-economical circumstances the country is in, will remain for quite a long time one of the most problematic issues the Albanian society will face. However, it is the legal duty of the Albanian government to undertake urgent measures, and to take into account the indications provided by the European Court of Human Rights, in order to reduce to the largest extent possible the violations found in the cases analyzed above, and enable the expropriated subjects to get sufficient redress. The options offered for compensation and the procedure determined by the law, should be feasible in practice and the matter should not be considered resolved just in theory.

As I have mentioned above, the process of restitution and compensation of properties is based on the principle of honesty and the social state, and aims at correcting at the largest possible extent “within the socio-economic possibilities of the country” all the injustices committed during the communist regime in relation to private property.¹⁰⁹

The European Court of Human Rights emphasized in many cases that there is “*no general obligation under the Convention to establish legal procedures in which restitution of property may be sought. However, once a Contracting State decides to establish legal procedures of such a kind, it cannot be exempted from the obligation to honour all relevant guarantees provided for by the Convention*”.¹¹⁰

¹⁰⁹ Decision Nr. 30, dated 01.12.2005, Decision Nr.26, dated 24.04.2001, of the Albanian Constitutional Court id.

¹¹⁰ Ramadhi and five others v. Albania, No.38222/02, 13.11.2007, Beshiri and others v. Albania, No 7352/03, 22.08.2006

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