

Gaps Analysis of Albanian and International Legislation on Easement: Legal Prospect

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Abstract

The private property in Albania was reduced for 50 years and became mainly public. The ownership rights were insignificant for individuals or private institutions that asked for land and other uses of space. Except ex-communist states and England where the land belonged to the state (to the Crown in the case of England), the land was private since in the middle age, in all other countries. In this context, the ownership right on private property was not known in Albania until the 90'. This article aims to provide the legal framework of land use for private or public purposes in Albania and in the European Countries. The rules and the international financial corporation standards on the easement, included in the Performance Requirements, have been considered in preparing this article. The purpose of this paper is to highlight the existing differences between the Albanian and international legislation regarding the easement.

Keywords: servitude/easement, right of way, rent, land, legislation.

1. Introduction

Various construction projects (of public or private interest), require the use of land areas. The use of land requires the negotiation of an agreement between the land owner/user and the investor. The property may be private or public (state and local government unit owned). The property owner has the undeniable right to use, sell, rent/lease or to donate the property. For example, the land lease gives to the tenant a part of landowner rights according to the terms and conditions set forth in the negotiated contract. During the lease period the landowner can have a measurable interest on the land (the lease price).

According to the definition provided by Albanian Civil Code, "*Easement or Servitude consists of a burden imposed on a property, for the utilization and utility of a property of another owner*". In other words it is defined as the "right of way". This right may be limited for a certain period of time. Based on the utilization time, the servitude can be temporary or permanent. One of the most common temporary

servitudes is temporary servitude of the land used for construction needs. Temporary servitude is mainly used to facilitate the realization of a project and terminates at the end of the construction or at the end of a specific utilization period.

There are three main types of servitudes: (i) underwater/underground servitude, (ii) surface servitude, and (iii) air servitude. The underground servitude may be necessary for the construction of water and wastewater pipelines, gas tubes, communication lines or road tunnels. During the construction, the surface may be invaded partially, although the main part of the project remains underground with few requirements for property rights. The surface servitude includes the underground and surface constructions as the case of railways and highways construction. An example for the air type servitude is the electric energy transmission through the electric lines. Apart from this classification, some servitudes may include the multi-space use. The electric energy transmission lines require surface areas

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for pillar positioning and some underground areas may be necessary for the underground passage of the lines.

The first step is the assessment of the “conducted transmitted rights” related to the establishment of the easement and the right methodology to measure these rights. The applied principles and techniques on the evaluation of the property, on the partial purchase, the relevant compensation, lease and *easement* will be further analyzed in future publications.

And naturally a question is raised: where do we base to calculate the servitude value? The answer stands on the Market! During the assessment should be considered the effect, the applied elements and the reference on the ownership right principles and current legal framework. In the basis of sale and purchase is the property market.

The general effect of the servitude can be measured visualizing the current sales of the market, which are not charged with similar servitudes. Finding a charged sale can be a challenging exercise which needs too much time and a huge research team. Considering the difficulties to extract a precise situation from the market, a potential solution would be the comparison of charged sales with uncharged ones. This is often referred to as “*corresponding analysis of the sale with charged and not charged servitude*”. Due to the lack of market, indirect evaluation methods are applied. Such indirect methods are elaborated and applied in similar situations from the international institutions.

2. Materials and methods

The object of this article is the servitude in terms of legal view and its applicable elements, on the construction of roads, railways, canals and water supply tubes, energy transmission lines, optic fibres, internet lines, oil and gas pipelines and constructions of all kinds. The methodology conducted in analysing the easement regime consists on the comparison with other countries. Through the comparative method is has been possible to identify the gaps in the legislation regarding the right of way. The legislative packets in Albania and the performance requirements used by the international institutions have been consulted through a wide bibliographic study.

3. Discussion

The constitutional dispositions for the expropriation and ownership right limitation

There have been cases of evaluation of servitudes and its specific elements in Albania during the construction of roads, wastewater pipes, pavements, public spaces (public works) and oil pipelines (Bankers Company). In cases of public works, the expropriation procedures are mainly applied. As per this process, the private properties are taken due to a public interest, by compensating the relevant owners according to the applicable legislation. Taking as a reference the oil company in Fier (Bankers), other specific elements, beside those defined in case of public expropriation like easement have been applied. Trans Adriatic Pipeline Project, the gas pipeline project in Albania, constitutes a *par excellence* study case of all elements that derive from “the right of way” and the evaluation of this right from a two-sided view: the user and the owner. TAP as project of strategic importance, will use urban and agricultural land, forests, pastures and the accompanying agricultural infrastructure during two periods: the construction period and the operation period.

Regarding the expropriation compensation and damage substitution, the user of the servitude will face different situations due to the different use of land areas and various agricultural activities that are carried out along the pipeline project. These includes: (i) compensations for damages caused during the gas pipeline construction to the annual crop cultivations, perennial cultivations, fruit trees, pastures, forests; (ii) purchase of areas where the compressor and valve stations will be installed, including the control points, etc; (iii) rehabilitation of drainage and irrigation systems; (iv) compensation and substitution of different land categories, different production intensity (irrigation, mechanization, input use etc) and the costs of the reforestation and biological rehabilitation of land production capacities – regulated by the Law on Environmental Impact Assessment – EIA(- 2011) and the Law of Land Use (1996).

The first dispositions on the expropriation and limitation of property right can be found in the Constitution of the Republic of Albania. The property is a right guaranteed by the Constitution.

The article 41 of the Constitution affirms that:

1. The right of private property is guaranteed.

2. *Property may be acquired by donation, 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*

According to this provision, the ownership right is guaranteed, but not untouchable. If there is a **public interest** on it, the ownership can be removed or limited. The Constitutional Court of Albania, through one of its decisions, has declared that: “*the public interest is a not comprehensive constitutional notion, i.e. the list of the cases of public interest cannot be ever comprehensive, because the public interest should be understood in a relative sense, depending on the different situations that are presented*”[1]. The European Court of Human Rights accepts a wide space of evaluation of what is considered public interest from the states, in the view of their social and economical policies[2]. According to this Court the public interest should be understood in a wide sense, especially for the laws that are approved for social and economical purposes [3]. The notion *public interest* is quite wide and the Constitution does not define. The Law no. 8561, date 22.12.1999 “On the Expropriations and Taking in Temporary Use the Private Property for Public Interest” lists the justifications for which the expropriation can be conducted for public interest. However, it never tries to define the *public interest* and the causes that can lead to expropriation are quite wide.

The owners cannot oppose to the expropriation or the limitation of the exercise of ownership right. However, the affected individuals have the right to appeal to the Court for the compensation quantity.

The legal framework on the expropriations and limitations of ownership right

The constitutional provisions do not regulate in detail the expropriation and the limitations on property rights. The Constitution intentionally leaves regulatory spaces to the lawmaker, in order not to obstacle the undertaking of political, economical, social and cultural initiatives by the governments [4] Thus, the lawmaker has approved the Civil Code and

the law no. 8561, date 22.12.1999 “On the Expropriations and Taking in Temporary Use the Private Property for Public Interest”

Expropriations in Albania

The expropriation is the transfer of the ownership titles on private properties in favour of state or a private investor, i.e. the ownership on the property is totally removed from the owner for public interest [5]. According to the Albanian legislation subject to expropriation can be the immovable properties such as land, permanent constructions of any kind, and the properties of historical, archaeological, cultural or scientific value [6]. The Civil code affirms on the expropriations that “*the ownership rights cannot be removed to nobody, except when this is requested by the public interest, and always toward a right compensation*”[7].

The expropriation and the expropriation procedures are regulated in a detailed way by the Law no. 8561, date 22.12.1999 “On the Expropriations and Taking in Temporary Use the Private Property for Public Interest”. The purpose of the law is to regulate the right of the state to expropriate or to take in temporary use for public interest the properties of individuals or legal entities, and the protection of the rights and interests of the respective owners. The expropriation law has envisaged that expropriation or the taking in temporary use of the private property can be conducted only for public interests that cannot be realized in other ways, in the necessary size for the realization of expropriation objective and always toward a right compensation [8]. In cases when a public work can be realized in another way without the need of expropriation, the law does not allow the expropriation.

This disposition constitutes a guarantee for the owners, who are obliged to leave their properties in case of expropriation. The displacement of the owners from their properties is traumatic and often is associated with the loss of assets which guarantee their living [9]. The aim of the lawmaker in this disposition has been the avoidance of population displacement from their properties in cases where other ways can be followed for the realization of public works. The government has the obligation to guarantee the compliance of this provision. The Council of Ministers is the structure that approves the expropriations of private property, based on the requests presented by the state subject or the private legal entities that undertake the realization of public

works [10]. The duty of Council of Ministers should be not only the connotation of the existence of public interest, but also the examination of alternative possibilities for their realization.

The owners that will be expropriated for public interests can not oppose to the expropriation. The decision of Council of Ministers is obligatory and not appealable (except for the compensation amount). Nevertheless, the law on expropriation allows them to oppose to the expropriation, if they commit to realize by themselves the project or the investment of public interest for which expropriation is necessary. In this case they should comply with the legal terms and conditions that should have been fulfilled by the subject that would have realized the project [11]. The realization of such projects and investments useful for public has very high logistical and financial costs which are very difficult to be afforded by privates that will be expropriated. For this reason it is very difficult for the property owners to stop the expropriation process.

The servitude – Albanian legal framework

According to Black's Law Dictionary the servitude is "*The right to use the property of another for a defined purpose. The servitudes are created for the benefits of neighbour properties, without considering who their owner is. The property, in benefit of which the servitude is created, is the dominating property, while the property which is charged with the servitude is the serving property*". According to the Civil Code of the Republic of Albania the property is "*the right to freely possess and enjoy the objects, within the limits defined by the law*". So the property includes a group of rights that the owner has over his objects. The owner can choose to practice these rights by himself or to pass these rights temporally to a third party. He is free to use and enjoy his property by himself, to rent it, sell, donate or to charge it (servitude). Based on the servitude definition, the owner of the serving property passes to the owner of dominating property a part of his rights without losing the right of the ownership.

In the Albanian legislation the term "Servitude" is defined as: Real rights over immovable properties that are owned by another person (perdial servitudes/real servitudes). The article 261 of the Civil Code explains the real servitudes, which are simply named *servitudes*. In accordance with this provision: "*The servitude is the burden with which an immovable property is charged, for the use and benefit of a*

property of another owner". The servitude is a burden with which a real estate is charged (*serving property*), which should be used for the benefits of another property (*dominating property*). The possessor of the servitude has the right to use in a limited way the object owned by another (the object of the servitude), who continues to be the owner of the property. The institution of the servitude enables the use of the property that belongs to another person, based on law predictions or an agreement through the parties, without the necessity to transfer the ownership right. In the case of servitude application there is not a physical or economical displacement of the owner. The owner continues to enjoy and use his property without disturbing the servitude owner.

The new Law no. 107/2014, "On territorial planning and development" predicts the creation of public servitudes as burdens or rights, that are charged to a real estate for public use and the utility of a special public interest. The public servitudes can be determined by a national or local planning instrument (such as specific plans and or rules) or based on a development request (application for construction permission).

The law stipulates that the public servitude is not limited in terms of time, except when it is decided or agreed to be created for a defined period of time. The rights and obligations over the public servitudes are defined in the Civil Code and in the applicable laws. The planning authority can approve further detailed rules based on the needs and circumstances. The public servitude can be established for the application of a future public purpose also when no request for development has been done.

The dispositions of the Law "On territorial planning and development" are not the only base for the establishment of the servitude for public interests. The Civil Code [12] predicts that the servitudes can be created by law or through the will of the owners (article 262 of Civil Code). The servitudes created by law are compelling servitudes. The compelling servitudes are established regardless of the will of the parties, since the circumstances for their creation are predicted by law. According to the article 265 of the Civil Code, the owner of a property, which according to the law has the right of servitude, has the right to request to the owner of another property the establishment of servitude. If an agreement cannot be achieved, he has the right to appeal to the Court. In this case the Court deliberates the servitude

establishment, the rules of servitude practice and the compensation for the respective damage.

Civil Code settles an easy and flexible way in allowing landowners to reach an agreement on the servitude establishment and the relevant compensation for the damage caused.

The easement for the placement of pipes, cables and wires predicted by the Civil Code, can be created for the realization of projects and investments in energy, telecommunications, water works of any kind, in service and public interest [13]. This easement consists in the obligation of land owners to allow the passing of technical equipment through their property, in conducting different services such as: water supply, electricity, communication etc. The owner has to allow the construction of canals, the placement of water and gas pipes, cables and telegraph or electric wires and other installations through of his property. In the event that the construction works cannot be realized differently (or without greater costs), the owner is obliged to allow the easement establishment. The owner has the right to be indemnified if the realization of these works has caused damages to his property.

International requirements for servitudes

In EU countries ownership of land (*dominium*) is the all inclusive real right (property right). In the Europeans continental Systems, ownership cannot be divided in different ownership rights though there are “precursor rights” such as possession. However under common law, there may be estates, being ownership limited in time. In England and Wales and in Ireland (not in Scotland), the lease is considered an estate – that is time limited ownership in the civil law terms. Another important difference between common law and civil law is the existence and the extensive use of the trust in the common law jurisdictions [14]. Under common law, the trust is also characterized as involving divided ownership. A formal *numerous clausus* rule - meaning that real rights are defined by law, and parties are not free to create new ones by contract - exists in the majority of European countries. However, even in the remaining countries it is either observed in practice (Spain), or its ratio to render the scope of those rights which are enforceable *erga omnes* foreseeable is equal ensured by other devices. The numerous clauses of real rights in land applies in most European countries. In a rigid version, particularly in France, Greece, Italy, Portugal and Germany real rights are exhaustively defined by law,

and parties are not free to create any new ones. Rights to use may be divided into extensive rights of use giving possession (in particular right of superficies, usufruct, uses, right of habitation, emphyteusis, building lease and timesharing rights) and limited rights of use, the most important ones being easements or, synonymously, servitudes. With regards to their holder, easements may be divided into two types: First, easements in appurtenance, i.e. to the benefit of the owner or possessor of neighbouring land; in this sense, one may refer to a dominant tenement (piece of land) and a servant tenement and the second consists on, easements in gross, i.e. to the personal benefit of another person.

The right of way and the servitude, the applicable rules and procedures, guides and national ordinances are explained in details in the Civil Code of each country. The rules regarding the servitudes related to the investments in Albania are summarized in the so called “Performance Requirements” of the important financial international institutions which are presented below.

IFC Land Acquisition Reference Framework

As a result of development projects that need large spaces and affect ownership, different communities face displacement, damage of crops, occupation and limited use of land. Displacements result to loss of homes and livelihoods in the name of the common good [15]. In these cases providing compensation to those who are displaced is insufficient. Policies guided by the principle of Resettlement and Development provided in the World Bank guidelines should be applied for the displaced communities [16].

The International Finance Corporation (IFC), the private sector group of the World Bank Group, has established a Sustainability Policy and 8 Performance Standards. In addition, Guidance Notes have been published to assist clients in implementing key provisions of the Performance Standards against the land owners, the right of way and the valuation of the easements/servitude rights.

The objectives and the requirements of the Performance are:

- a. to avoid or, at least minimize, involuntary resettlement wherever feasible by exploring alternative project designs;
- b. to mitigate adverse social and economic impacts from land acquisition or restrictions on affected persons’ use of and access to land by: (i)

providing compensation for loss of assets at replacement cost; and (ii) ensuring that resettlement activities are implemented with appropriate disclosure of information, consultation, and the informed participation of those affected;

- c. to improve or, at a minimum, restore the livelihoods and standards of living of displaced persons to pre-project levels. In this cases the rule that, the social and economic status of displaced communities should be higher than before the implementation of the project is applied.

Equator Principles

The Equator Principles (EPs) are a credit risk management framework for determining, assessing and managing environmental and social risk in project finance transactions. The Equator Principles are based on the International Finance Corporation (IFC) performance standards on social and environmental sustainability, and on the World Bank Group's Environmental, Health and Safety general guidelines. The Equator Principles promote socially responsible conduct and sound environmental practices in relation to project finance initiatives. Much of private sector project finance in emerging markets is currently provided by Equator Principles signatory institutions. As far as land acquisition and resettlement are concerned, the standard referred to by the Equator Principles is the IFC's PS5.

European Bank for Reconstruction and Development - EBRD

To ensure its Environmental and Social Policy results in successful practical outcomes, EBRD has adopted a set of 10 specific Performance Requirements (PRs) which are expected to meet by its clients, covering key areas of environmental and social impacts. PRs reflect the EBRD's commitment to promote European Union (EU) environmental standards as well as the European Principles for the Environment. EBRD expects its clients to assess and manage the environmental and social issues associated with their projects so that projects meet the PRs. Performance Requirements should be read in conjunction with EBRD's Environmental and Social Policy and Procedures, which have been put in force in 2008. Performance Requirement 5 addresses land acquisition and is generally similar to the IFC's PS 5. The EBRD seeks to ensure, through its environmental

and social appraisal and monitoring processes, that the Project:

- a. is socially and environmentally sustainable,
- b. respects the rights of affected workers and communities, and
- c. designed and operated in compliance with applicable regulatory requirements and good international practice.

The OECD Common Approaches on Export Credit

The OECD Council issued in 2007 a "Recommendation on common approaches on the environment and officially supported export credits" ("the OECD Common Approaches"). This applies to export credit guarantees delivered to private exporters by Export Credit Agencies (ECAs) of OECD member countries.

In practice this means that depending on the project context (and particularly on which other international finance institutions may be involved), and in addition to local legislation, the OECD ECAs are expected to apply the standards of the World Bank, the IFC, or regional development banks such as the ADB or the EBRD.

Gap analysis

A general gap analysis of Albanian legislation in comparison with IFC/EBRD requirements consist as follow:

The only applicable law that assures the transfer of required and affected properties for public and private projects is the expropriation law. There is not another law that provides passage alternatives in case of such projects. This is due to space limitations and lack of money for compensation in case of high cost alternatives. According to EBRD policies consideration of alternative ways for the transfer of ownership rights is a requirement despite of construction cost and compensation.

In the event of occupation of state and local government units properties with structures, crops and other activities developed in them (informal occupants on State, municipal or others' land), the Albanian legislation does not recognise any compensation or natural replacement whereas as per EBRD standards they are considered as: "*Potentially eligible to compensation of structures, crops and developments if they own these, regardless of land ownership*".

The Albanian legislation does not provide nor the procedure that should be followed for Livelihood Restoration, neither the compensation values or other

financial supports. The EBRD policies specifically require that the welfare standards of affected community at the end of the project should be higher than in the beginning of the project or, at least, at the same level as before.

In-kind compensation (replacement of land or structures by equivalent properties) in the Albanian legislation is provided as *compensation based on equal price or agronomic potential* whereas in European legislation is provided as “Land for land” based compensation to be preferred, particularly where land is critical to livelihoods.

In the Requirement Performances and in the European legislation for the limited use of land for a long term due to the problems caused to the surface of land (mostly agricultural), soil fertility and therefore the land market value, the reduced value is compensated as easement. This kind of compensation is not applied in Albania and it is not included specifically in the legal terms.

Applicable Albanian laws do not provide additional compensations in case of land use for a limited period of time, such as measures of land rehabilitation. In USA legislation the rehabilitation measures and their costs are a legal obligation and are included in the contract signed between the owner and the user. According to Schmick (2006) [17] the compensation value should also include the rehabilitation costs of physical impacts (soil compaction, damaged drain tile).

4. Conclusions

The relations between the land owners and investors, in case land transferring is needed, are regulated by law « On the expropriations and taking in temporary use of private property for public interests ». The law on expropriations envisages that the expropriation or temporary use of private properties can be conducted only for public interests purposes, which cannot be realized in other and always toward a fair compensation. This law is applied for all investments that have “public interest” as a crucial element, being of national or strategic importance. The servitude elements are partially regulated by the Civil Code. In the majority of the European countries the right of use on the property and the servitude are defined by specific laws, which regulate the relationships between the owner and the investors. Furthermore, the agreements (contracts) format is a template approved by the property

registration institutions under the supervision of territory planning authorities.

Gaps between Albanian and international legislation consist on: (i) in the physical compensation for affected properties, the Albanian legislation avoids the requirement described in international documents, i.e.: "The welfare standard of affected community at the end of the project should be higher than before the beginning of the project or, at least, at the level that has been"; (ii) compensation of private property value in case of limited use does not involve the so-called easement (decrease of market price of land charged with servitude), while in Performance Requirements (PR) this requirement is mandatory; and (iii) the Albanian legislation imposes no compensation for small and fragmented surfaces, that as a consequence of the project have no agricultural importance, while in European legislation their compensation is defined as compensation for physical and biological rehabilitation or purchase of «Orphan» land.

Despite of modern legislation aligned with European legislation, Albania has not comprised a full legal package for servitude. In this context, the Albanian legislation needs to be further improved and approximated with EU legislation, in order to ensure the adequate compensation for properties taken in use for public or private purposes.

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