

RESEARCH ARTICLE

THE JUSTIFICATIONS BEHIND THE RISE OF THE REFORM ON LEGALIZATION, URBANIZATION AND INTEGRATION OF THE INFORMAL BUILDINGS

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Abstract

With the fall of the communist dictatorship, Albania, like all other countries of South Eastern Europe, started its journey towards the materialization of the aspiration for creating a democratic society and promoting market economy. The fulfillment of this goal during the transition, was intended to be put to life through a radical constitutional and legal process, having as main objective, among other things, the reformation of the ownership system and the emergence of private property rights. Therefore, in order to accomplish this objective, based on the principles and values of the new democratic state, a set of legal reforms were undertaken in the field of land privatization, housing and state asset privatization. But since the genesis of democracy, certain people, in order to fulfill the need for housing, established in important public and private urban centers of the country and even in public and even private land parcels, construction structures without the permit of public authorities. The rise and the spread of this phenomenon, not only attacked directly the legal and institutional instruments that were predicted to give rise to and protect private property, but also severely affected the two elements at the basis of democracy, rule of law and private property. Given that a considerable amount of informal settlements were built on privately owned land, a big dilemma arose before the state authorities: *Is the state allowed to interfere on the right to private property of its rightful owners in favor of a certain category of individuals, as holders of informal settlements? Consequently, is legalization of informal settlements in privately owned land justified?* This paper aims to give them answers to these questions through a thorough analysis of the basic legal documents of international law and based on the jurisprudence of the ECtHR.

Keywords: *Right to housing, Property Right, Legalization, Informal Settlements, ECHR.*

Introduction

One of the most acute problems faced by the Albanian society and government in recent decades is the phenomenon of informal settlements. The informal settlements during this period affected not only the land which was of public ownership, but also the one in private property, thus bringing about greater social tension and becoming a barrier to the economic and social development of the country. *The paper aims to analyze whether a state intervention in protecting the rights of holders for informal housing in privately owned land, is justified.* To accomplish this goal the paper is structured under five sections. The first section examines the causes that have given rise to the phenomenon of informal settlements in Albania. The second section examines the status of the right to housing in the legal documents of the United Nations, while the third section explores this right in legal documents of the Council of Europe and in the jurisprudence of the ECtHR. The last section deals with the concept of the right to housing in the communitarian law, and the impact of community organisms in the emergence of the reform for the legalization, urbanization and integration of informal settlements.

Scientific method

The study is based on qualitative research, the review and a comparative research into the international legal framework

concerning the housing right, property right and an analytical interpretation of decisions issued by ECtHR.

1. The factors that led to the emergence and spread of illegal building in Albania.

With the fall of the communist dictatorship, Albania, like all other countries of South Eastern Europe, started its journey towards the materialization of the aspiration for creating a democratic society and promoting market economy. The fulfillment of this goal during the transition was intended to be put to life through a radical constitutional and legal process, having as main objective, among other things, the reformation of the ownership system and the emergence of private property rights. Therefore, in order to accomplish this objective, based on the principles and values of the new democratic state, a set of legal reforms were undertaken in the field of land privatization, and housing and state asset privatization¹. But since the genesis of democracy, certain people in order to fulfill the need for housing established in important public and private urban centers of the country and even in public and even private land parcels, built

¹In the article 2 of the law nr.7491/1991 “Për dispozita kryesore kushtetuese”, it is sanctioned: “... justice and social support are basic principles of the state which is entitled to ensure their respect and protection”.

structures without the permit of public authorities. The rise and the spread of this phenomenon, not only attacked directly the legal and institutional instruments that were predicted to give rise to and protect private property², but also severely affected the two elements at the basis of democracy, rule of law and private property.

To make a thorough analysis of the reasons that justify the legalization of informal settlements we should first examine the factors that have led to the emergence and spread of the phenomenon of informal settlements. *First*, in the process of the radical transformation of the economic and legal system the democratic state did not pay attention to the public policies in the field of internal migration. Before the democratic developments, strict control by the state of the population migration was an important part of the planned economy. This economy had enabled an artificial and inefficient distribution of the population. With the advent of democracy and the emergence of a new economic system the state was no longer responsible for providing individuals with jobs and housing. In the framework of the free market policy, the demand of the population for more resources, goods and services led to the movement of population towards urban areas. Failure to timely action against the dangerous phenomenon of illegal building was often justified by the right of citizens to free movement. (De Waal 2004). Free movement of people in search of work, better conditions and better chances of living was seen as a fundamental human right.³ Policies of housing privatization and special housing programs⁴ that were generated by public institutions proved to be not sufficient to meet the demands of citizens for housing. The Law nr.8030, dated 15.11.1995 "On the state contribution for homeless families" not only did not turn out to be successful in addressing the issue of housing of people who had remained homeless as a result of the implementation of the law No. 7652/1992, but at the same time this law left out of his scope many families in need. The process of replacing these putting into place appropriate more enhanced and free market oriented mechanisms that take over the support of vulnerable groups of society, was too slow.

Secondly, the inherited legal framework for the planning, management and control of territory and the new law passed in 1993 failed to respond and meet the new economic and social requests and needs of the population for housing and socio-economic activities.⁵ The absence of city regulatory plans, the delay in having them approved and adopted and their lacked compliance to the socioeconomic reality in the urban areas gave way to informality in the field of construction. *Thirdly*, the slow progress of privatization

reforms was another cause for the birth and spread of the phenomenon of illegal buildings in Albania. The phenomenon of illegal buildings was given rise at the start of the democratic developments in a period when the state and individuals had little knowledge about the importance of having the right to public and private property over the land protected and at a time when the established institutional mechanisms designed to give rise and record these rights did not provide for the timely issuance of property titles and the reasonable and accurate identification of property boundaries. *Fourth*, another aspect that has had a negative impact on the spread of this phenomenon was the legal vacuum that existed in criminal law with regard to the illegal buildings.⁶ Until 2008, the Criminal Code sanctioned only the penal offense of land invasion and did not consider illegal building as a criminal offense. In the latest legislation, the latter was categorized only as an administrative violation.⁷ *Finally*, another factor that has had a major impact on the spread of the phenomenon of illegal building has been the actual state that has been characterizing Albania after the riots of 1997 and in the following a period, a time frame in which the state and the public institutions were unable to exercise their constitutional functions and the legal protection of life, health and in particular the protection of the individual property. Precisely in this period one can notice a greater movement of population to the important urban centers of the country, in search not only of public services such as education, health, public safety, etc., but also in search of better opportunities to make a living. As a result of these factors, Albania was characterized by the proliferation of informal settlements, which led to increased levels of social conflict, poverty, social exclusion and property insecurity.

But, given that these structures were built in violation of the right of land ownership, as well as contrary to the rules of territorial planning and development, it was unclear for the authorities which position should be held against them. Having a decision on the fate of informal settlements taken by state authorities was closely associated with the impact that this decision would have on the private and family life of the holders of the informal settlements, with the subsequent livelihood conditions, and the social tensions that would be created as a result of this decision-making. It is these elements, which are guaranteed in a number of international legal documents and ratified by the Albanian state. *Therefore, the main question that arose was whether or not the right to housing of the informal builders who have been living for several years in illegal buildings, seeks protection?* To give an answer to this question it is necessary to analyze the concept of the right of respect for the home, the ration that this right creates as compared to the other human rights, the legal status of the right to housing in the international law and the obligations attributable to the states concerning the realization of this right and foreseen in these

²A series of laws aimed at the desocialization of the state economy and the transfer of it towards the private subjects. Ligji nr.7501/1991, Ligji nr.7512/1991, Ligji nr.7652/1992, Ligji nr.7693/1993, Ligji nr.7698/1993 etj.

³Ligji nr.7491/1991 "Për dispozitat kryesore kushtetuese", and the actual constitution hold the same stand. Concretely speaking article 38, point 1 of the constitution sanctions: "Everybody has got the right to choose his place of residence as well as move freely in every part of the territory."

⁴Ligji nr.8030, datë 15.11.1995 "Për kontributin e shtetit për familjet e pastreha", botuar në Fletoren Zyrtare nr.24, faqe 1084.

⁵ Ligji nr.7693, datë 06.04.1993 "Për urbanistikën" dhe Ligji nr.8405, datë 17.09.1998 "Për urbanistikën".

⁶Article 200 of the Penal Code sanctions:"Invasion of the land constitutes a criminal offense and is punishable by fine or imprisonment up to two years."Article 5, Section 14 of the law nr.7752, dated 28.03.1993 states:" The arbitrary occupation of the construction site will be fined up to 100,000 ALL and accompanied with the demolition of the building and return of the land to its former condition at the expense of the offender".

⁷Ibid.

documents. This analysis will primarily focus on the jurisprudence of the ECtHR.

2. The status of the right to housing in the legal documents of the United Nations.

The right to adequate housing was, for the first time, foreseen as part of the international law in the Universal Charter of the United Nations. In article 25(1) this declaration sanctions the right of every person to adequate standard of living, for the health and well-being of him and of his family, including, among other things, housing. About two decades later, this right was also included in the International Covenant on Economic, Social and Cultural Rights. Article 11 (1) of the Convention imposes the obligation that Member States recognize every person the right to an adequate standard of living for himself and his family.⁸ The content of the right to housing in the ICESCR⁹ and the numerous and ongoing explanations of the UN Committee on Economic, Social and Cultural Rights on the obligations that arise to the states within Article 11 (1) has succeeded to make this Convention accepted as one of the most important legal sources of this right.¹⁰ CESCR has stated that, just as with every social and economic right, Member States, pursuant to Article 2 (1) of this Convention, have an obligation to take measures of an economic and technical character, individually or through assistance and cooperation with the international community and to the maximum resource capacity in order to progressively achieve the full realization of the rights provided by the Convention, attempting to do the latter by all possible means, including particularly the adoption of legislative measures.

The CESCR has identified four levels of escalating obligations attributable to the Member States with regards to the right for adequate housing, which specifically includes: respect, protection, promotion and fulfillment of this right. *First*, minimally, the state and its organs have the negative duty not to apply legal measures, policies or practices that exacerbate the existing housing situation in their countries. States should refrain from policies or practices of arbitrary or forced eviction of people from their homes. *Secondly*, the state should play an active role in preventing violations of the right to housing by the private entities. To achieve this goal the state has an obligation to provide legal remedies for redress in case of violation of this right by the owners, property developers or other social actors. *Thirdly*, the state has the obligation to promote the issue of housing and the right to housing through policy making, legislation and practice, which will gradually lead to the elimination of homelessness. In fulfillment of the obligations arising from the promotion of the right to housing authorities must have a strategic document, which should include discussions and

consultations with all stakeholders. *Finally*, the obligation to fulfill the right to housing includes a number of measures in terms of economic redistribution policies relating to the provision of public housing, the provision of subsidies for housing and monitoring of the levels of rent.¹¹

On the other hand the ICESCR has elaborated the concept of what comprises an adequate housing. *First*, adequate housing includes elements such as: legal security of tenure and the availability of services, facilities and infrastructure. These elements include access to natural and common resources, safe drinking water, electricity, health services, food storage tools, as well as waste disposal facilities. *Secondly*, adequate housing also includes components such as: economic sustainability and the idea of being inhabitable. Affordability of housing requires that costs be kept at such a level that does not affect the basic needs of families and individuals in need, while the idea of being inhabitable refers to the safety requirements of housing and to the protection of the residents from threats to their health caused by weather or structural risks. The ICESCR states that special attention should be paid to the needs of vulnerable social groups, such as the elderly, children, disabled persons, victims of natural disasters and other groups. Finally, particular care should be given to the cultural relevance in the field of housing, because it relates to the expression of cultural identity and diversity of housing.¹²

3. The right to housing in the judicial documents of the Council of Europe.

By promoting a wide range of basic rights in many areas, the ECHR has included under Article 8 (1) the right to respect for home. This article recognizes every person's right to respect for his private and family life, residence and correspondence. By focusing on the analysis of the provisions of the Convention we can notice that Article 8 of it aims to protect four areas of personal autonomy, which have a close relation and mutually interact with each other. In fact, the ECHR does not represent the right to respect for home as a right in itself. However, it includes provisions of the civil and political rights interpreted by the ECHR as a basis for the development of the housing rights. In its jurisprudence, ECHR has held that the right to respect for home, finds protection in Article 8 and Art. 1 of Prot. 1. The main goal of this disposition is to respect the existing right to housing, while those who formally do not possess houses, enjoy no protection from this article.¹³ However, to determine the nature of the right to respect for home, it is essential to clarify what is meant by the notion of "home" in the jurisprudence of ECtHR.

3.1 The concept of “home” according to the jurisprudence of ECHR and its connection to property.

ECtHR, in its jurisprudence, has held that the concept of "home" is autonomous and does not depend on the classification made by the domestic law. "Home" is a broad term given that the word "domicile" has a broader

⁸This convention has been ratified by the Albania through the law nr.7511, datë 08.08.1991.

⁹As the monitoring mechanism to the implementation of these rights by the member states.

¹⁰ UN Committee on Economic, Social and Cultural Rights: General Comment 4. The right to adequate housing (Article 11 (1), of 1991 (United Nations: Document E/ E/1992/23). General Comment 7. The right to adequate housing forced evictions (Article 11.1 of the Covenant), of 1997 (United Nations: Document E/1998/22, annex IV).

¹¹ UN Committee on Economic and Cultural Rights: General Comments.

¹² UN Committee on Economic, Social and Cultural Rights: General Comment 4. The right to adequate housing (Article 11 (1)), of 1991 (United Nations: Document E/ E/1992/23), para.8.

¹³ Koh, E., Human Rights As Indivisible Rights: The Protection of Socio-economic Demands.

connotation. Since the first decision *Gillo vs. United Kingdom*, in determining the right of the defendant to respect for his home, the ECHR has made a thorough analysis of the notion of "home". The court stopped verifying if there was a "sufficient and continuous connection" of the applicant to his residence or his alleged house. Court has held that the sufficiency of this bond can be reduced (through the long period of absence from the home or the creation of another house) or strengthened (through long periods of residence, ownership of the property, the presence of personal items, aim to get permanent residence, emotional ties),¹⁴ while the continuity of connection has no effect if the inability to enjoy the right to housing has been caused by the state. The same approach was also used by the court in the case *Oneryeldiz v. Turkey* and *Yordanova and Others v Bulgaria*, in which it was held that since the applicant and their families living in makeshift homes for many years, had created a sufficient stable connection, turning those settlements into their homes, whether they were caught in a legal or illegal way, were to be evicted from their homes and community; their home and private and family life, would be adversely affected.¹⁵ In the case *Moreno Gomez v. Spain*, ECHR analyzed the concept of home regarding privacy. The court announced that "home is the place or physically defined space, where the private and family life is made". Based on this definition in determining whether or not a country is considered home, it is not the form, but the function that that place performs instead. The court, in its jurisprudence, has held that the concept of home includes existing homes¹⁶, land¹⁷, but not the area where the person and his family lived and had its roots under the condition when they no longer live in that country.¹⁸ The concept of home, according to the ECHR means not only traditional dwellings, but also, among others, caravans and mobile settlements, second homes, vacation homes, commercial premises in the absence of a clear distinction in between someone's office and private apartment or in between the private activities and business activities, the premises of a registered company, the branches or the other business buildings. Other examples include invasion of a house, if it has lasted for significant periods of time and on an annual basis, a room occupied by the applicant in a building owned by the tenants, and a garage or garden as part of the property or the right to lease. The Court's jurisprudence has shown that the legality of residence in the shelter is not crucial to the definition of the notion of "home". On the court's grounds, the applicant's factual situation is more important than the legal status of the home.¹⁹ In conclusion, ECtHR has in some cases recognized that illegal building in an occupied land serving to the

applicant for housing purposes are qualified as holdings and therefore as "home".

The court has held that there is a significant overlap between the concept of "home" under Article 8 of the ECHR and "property" under Art. 1 of the Prot.1. House can be found to exist even if the applicant is not entitled to any right or interest in real property law.²⁰ This is the reason why the notion of property includes the range of rights that specify the legal relationship of people to their possessions wealth, despite whether they are physically bound or not. The scope of Art. 1 of Prot. 1 has been steadily expanding to include relationships that arise not only based on assets but also based on intangible benefits and contractual relations. Consequently, a broad interpretation of the right to property also applicable to the residence of the person, and the most frequent case in the jurisprudence of the ECHR is not only the protection of the safety of the tenants, but also of the people living for a long time in an illegal building.²¹ This interpretation shows that there is an overlap in between the concept of the right to housing and the right to property in relation to immovable property. Regardless of the connection between these two rights, one can not speak of a unification in between them because they are not used cumulatively. Their specific nature is dedicated to their classification, ie as a civil right and as a social right (Adams, 2009). Just as it will be analyzed below, the ECHR jurisprudence confirms that the right to housing is not only a right of social character, but it also includes important civil aspects at its foundation. The Court's jurisprudence has shown that housing policies have a "quasi-civilian" character, being closely related to Art. 1 of the Prot.1. Therefore, in most cases the interference with the right to housing has led to the violation of the right to property.

3.2 Positive obligations under the article 8 and art.1 of the Additional Protocol of the ECHR.

The ECtHR has held that Article 8 of the ECHR, in no way covers the desires of the individuals or their collective requirements to have adequate housing guaranteed by the state in all circumstances. In the case *Chapman v. Great Britain*, the Court has stated that: "Article 8 of the Convention does not recognize the right of every person to be offered a home by the state. Even the jurisprudence of ECtHR has recognized that there is no such right. While there is an undeniable desire that every human being should have a place where he or she might live with dignity and in which they can be contacted, there are unfortunately many persons in member states who have no home. If the state provides funds to enable each person to have a home is a decision of a political nature and not of a legal nature."²² Regarding this issue the Court held that despite the huge evolution taking place in the international law in relation to Article 8 (2) of the Convention, this provision cannot be interpreted as it poses to member states a positive broad obligation in the field of general social policy.²³

¹⁴ Buyse, A., Strings Attached: The Concept of "Home" in the Case Law of the European Court of Human Rights, European Human Rights Law Review No. 3 (2006), page 298.

¹⁵ The case *Yordanova and Others v Bulgaria*, parag. 105.

¹⁶ The case *Loizidou v. Turkey*, 18 December 1996, para. 66, Reports 1996-VI.

¹⁷ The case *Buckley v Grand Britain*.

¹⁸ The case *Loizidou v Turkey*, verd. 18 December 1996, parag. 66.

¹⁹ Buyse, A.C., Strings Attached: The Concept of "Home" in the Case Law of the European Court of Human Rights", European Human Rights Law Review (2006), page 300.

²⁰ The case *Prokopovich v. Russia* apl. no 58255/00, par. 35-39, verd i 18 Nov. 2004, and the case *Khamidov v Russia* apl. no. 72118/01, par. 128, verd. 15 Nov. 2007.

²¹ See the case *Oneryeldiz v Turkey* and the case *Yordanova and Others v Bulgaria*.

²² The case *Chapman v. United Kingdom*, apl. no. 27238/95, verdict 18 January 2001, parag. 99.

²³ Ibid, parag. 98.

However, the Court has held that Article 8, together with Article 1 of the Prot. 1 impose to the member states positive obligations, both in terms of the protection of individuals from arbitrary intrusion to their homes, as well as in terms of the housing policies that the public authorities should undertake, in exceptional cases. Consequently, ECtHR has limited its powers only in reviewing the cases or the technical aspects such as interfering with the right to housing and the acquisition of the right to housing.²⁴ In the case *Marzari v. Italy*, a disabled applicant complained that local authorities had failed to provide adequate housing. He had been in fact offered an apartment for rent, but he claimed that the previous apartment, from which he had been evicted, was no longer suitable for his living and his special conditions as a disabled person. The court, in this case, stated that regardless of the fact that Article 8 does not guarantee the right of the claimants to be provided with a solution by the state authorities, the refusal of the authorities to provide support for such a person who suffers from a difficult disease can bring about the rise of such an obligation for the state.²⁵ The Court emphasized that the main purpose of Article 8 is to protect the individual against arbitrary intrusion by public authority. According to the Court, this provision simply does not obligate the state to refrain from such an intervention, but besides this negative obligation, the state can give rise to positive obligations regarding the respect of the right to privacy and shelter. For the Court, a state develops obligations of this kind, if there is a link between the direct and immediate measures requested by the applicant and the private life of the latter.²⁶ However, in this case the Court found out that the authorities had not only been granting to the applicant a flat for rent, but had undertaken to reconstruct it in accordance with the needs of the applicant. Therefore, the Court rejected the request, arguing that Article 8 does not impose any positive obligation on the authorities like providing the applicant with a specific flat.

The Court has interpreted the right to respect for home in the framework of the right to a peaceful enjoyment of the property in the case *James and others v. UK*.²⁷ The court held that modern societies consider housing of the population as a primary social need, whose regulation can not be entirely left up to the free market. The margin of appreciation enjoyed by a Member State to generate legislation aiming at the establishment of a greater social justice in the area of housing is quite extensive, even when such legislation interferes with the contractual relations existing in between private parties, though it does not bring any direct benefit to the state or to the community in general.²⁸ The most important element of this verdict was having the Court announce that creating housing policy constitutes a positive obligation with the issue of property

protection. In subsequent cases, the ECtHR has held that a state with inefficient housing policies ought to reconsider them within a certain time limit.²⁹ In the case *Scollo v. Italy*, the ECtHR asserted that homelessness was a global concern. Interpreting the right to respect for home, ECtHR expressed the positive obligation attributed on member states to undertake effective housing policies, under Article 1 of the Prot. 1.³⁰ The Court concluded that the lack of a housing policy constituted a violation to the property rights. Given this fact, the court did not allow changes in the rent contractual relationship and stopped the forced eviction of the tenants.³¹

3.3 Protection of the right to housing through the means of intervention on civil rights.

In the jurisprudence of the ECtHR there have been some cases where the need for the protection of the housing rights has exceeded legal guarantees for the property protection, as defined in Art. 1 of the Prot. 1. In these cases, the Court has demonstrated a social sensitivity by voicing its support to the solutions that foresee the protection of the right to housing of the vulnerable groups, the tenants or illegal builders, usually at the expense of the state or the private owners. Art. 1 of the Prot.1 allows member states to design such laws as they deem necessary to protect the public interest in general or the interest of specific social categories in particular, not only with the aim to regulate the use of property, but also to deprive, if necessary, the rightful owners of the right to property in cases in which there is a public interest, in the conditions provided by the law and by the general principles of international law. The Court in its jurisprudence has held that states may interfere with the right to private property in order to improve their housing policies with the aim to have society in general or specific social groups benefit from it. For the Court, the elimination of social injustice is the basic function of a democratic legislature. Moreover, modern societies consider the housing issues of the population as primary social needs, whose regulation can not be left entirely in the hands of the free market. The margin of appreciation enjoyed by the state is so broad that it includes undertaking legal measures aimed at achieving a greater social justice in the sector of housing for the population, no matter the fact that this legislation interferes with the contractual rights in between private parties and despite the fact that the state or society in general do not have any broad interest.³²

The main question that arises in this context is *to what extent Member States may interfere with the right to private property in order to improve housing policy with the aim to have society in general or specific social groups benefit from it*. In the Court's assessment, states have considerable space for the evaluation of policies in the field of housing. In a number of cases the Court has expressed that in areas such as housing, which plays an important role in the economic and social policy in modern societies, the Court respects the stand held by the legislator, to the extent the latter is consistent with the public interest for as long as this

²⁴ Sarigiannidis, M., Pervou, J., 2013, Adequate Housing: Seeking Justifiability Through the Right to Property, International Human Rights and Constitutional Studies, Vol 1, Nr.1, page 31.

²⁵ The case *Marzari v Italy*, verd. 4 may 1999, parag. 175.

²⁶ Ibid, paragraph 179.

²⁷ The case *James and Other v United Kingdom*, 1986.

²⁸ In this case because of the above mentioned reasons the court declared that the purpose of the legislation to reform elements of the lease was legitimate.

²⁹ The case *Olaru and Others v. Moldova*, 2009.

³⁰ The case *Scollo v. Italy*, 1995.

³¹ Ibid, paragraph 47.

³² The case *James and Others v. United Kingdom*, parag. 47.

approach is not considered manifestly unfounded.³³ In its jurisprudence the court has held this stand not only in the relationship or conflict between owners and tenants,³⁴ but also in between owners and illegal builders. Despite the main goal of the court has been and remains the protection of property as a fundamental human right, the court has been under special circumstances forced to resolve the conflict in favor of the tenants or the land squatters. The need for the protection of the right to housing, through keeping renting prices on reasonable levels by preventing eviction of tenants from the house covers a significant number of cases in the jurisprudence of the Court. Convention in the second paragraph of Art. 1 of the Prot.1 allows Member States to design and enforce laws that control the regime of property use either by interfering with contractual relations for the protection of the general interest of society or of particular social groups. The main argument used in court to support the category of the tenants was that "the establishment of control over rents aimed the fair distribution of housing resources in a country where the land available for construction did not meet the needs of the population, did not provide for the social protection of tenants, could not prevent turning to homeless of a wide category of people, and could not ensure protection of the dignity of the poor tenants."³⁵ In the case *Velosa Barreto v. Portugal* ECtHR denied to the applicant the right to use his inherited house, given that the tenants who had been living in the house had been in a great need.³⁶ Another case in which the Court articulates its decision about the priority of the right to housing in relation to the right to property was the case *Spadea and Scalobrinio v. Italy*.³⁷ This is the first case in a series of cases considered by the Court as related to the long Italian tradition of having the legislation interfere with the right to lease the houses as a way of controlling them. The methods used by the Italian legislation in this regard were the increase of the lease, the postponement by law of the lease contractual relationship namely the postponement of the payment deadlines, as well as the prohibition of the act of the eviction of the tenants.

The destruction of the "houses" or settlements by the state authorities, who have been tolerated for a long time, constitutes another violation that falls within the purview of Article 8 (2) of the Convention. In the case *Akdivar and others v. Turkey*, the court found out that the security forces were responsible for burning down the homes of the applicants and the act of setting to fire these homes forced the applicants leave the village and move elsewhere. In this case, the Court articulated that there was no doubt that the burning down of homes was deliberate applicants and constituted a serious interference with the right to respect for their family life and their home under Article 8 of the Convention, as well as simultaneously comprising an interference on private property rights under Art. 1 of Prot.

1.³⁸ The Court has noticed a violation of these rights in a number of other cases against Turkey.³⁹ In the case *Allard v. Sweden*, public authorities ruined the applicant's house that was not only built without permission, but also without the consent of the other joint owners of the land.⁴⁰ In this case, the Court acknowledged that the state may require that a house built illegally be brought down, although this action provides no apparent benefit to the community. The Court found that the main benefit of the community was to maintain functioning the system of co-ownership.⁴¹ However, the Court held that in those particular circumstances, the state can and should choose less repressive measures, which may interfere less directly on the housing rights of the individuals.⁴² Therefore, it was concluded that the applicant homeless, the authorities failed to strike a fair balance in between the interests of the applicant and those of other co-owners.

In its jurisprudence the Court has declared that the construction of informal buildings in violation of the internal urban regulations, when tolerated by state authorities, may lead to the birth of property interests that are sufficient in nature and which are sufficiently considered to constitute a substantial interest within the notion of "property" within the meaning of the rule set forth in the first sentence of Article 1 of Prot.1.⁴³ On a number of cases the court has defended the right to housing of the vulnerable categories, especially of ethnic Roma population. In the case *Moldovan and others v. Romania*,⁴⁴ the court noticed serious ongoing violations of Article 8 of the Convention. The Court concluded that "... it was clear from the evidence presented by the complainants and by the decision of the civil court that police authorities were involved in burning down the houses of the Roma community. Having been forced to leave the village and their homes, the applicants were forced to live and still today some continue to live in appalling and inadequate conditions, moving constantly towards different extremely overcrowded locations. Given the direct consequences of the actions of the police authorities on the rights of the applicants, the Court found that the authorities were responsible about the subsequent living conditions of the applicants. There was no doubt that the issue of the living conditions of the applicants fell within the scope of their right to respect for private and family life, as well as the right to respect for their homes. Therefore, Article 8 was clearly applicable in these circumstances."⁴⁵ In the case *Yordanova and Others against Bulgaria*, the Court took a stand against the actions of the municipality of Sofia to remove the informal Roma settlements known as "Batalova

³³ Ibid, parag.41.

³⁴ See the case *Radanovic v. Croatia*.

³⁵ The case *Hutten-Czapska v Poland*, apl. no.35014/97, verd. 19 June 2006, parag. 178, and the case *Ghigo vs Malta*, apl. 31122/05, verd. 17 July 2008, parag. 58.

³⁶ The case *Velosa Barreto vs. Portugal*, parag 64.

³⁷ The case *Spadeo and Scalobrinio vs. Italy*, verd 28 september 1995.

³⁸ The case *Akdivar and Others vs. Turkey*, verd. 16 september 1996, paragraph 88.

³⁹ The case *Mentes dhe të tjerë kundër Turqisë*, verd. 28 November 1997, the case *Selcuk vs. Turkey*, verd. 24 April 1998, the case *Dulas versus Turkey*, verd. 30 January 2001, the case *Orhan vs. Turkey*, verd 18 June 2002.

⁴⁰ The case *Allard vs. Sweden*, apl. no. 35179/97, verd. 24 June 2003.

⁴¹ Ibid, paragraph 52.

⁴² Ibid, paragraph 59.

⁴³ The case *Oneryeldiz vs Turkey*, case *Yordanova and Others vs Bulgaria*.

⁴⁴ The case *Moldovan and Others vs Romania*, verd. 12 July 2005.

⁴⁵ Website [http://press.coe.int/cp/2005/397a\(2005\).htm](http://press.coe.int/cp/2005/397a(2005).htm).

Vodenitsa". The court articulated that since the applicants had been living with their families for many years in the makeshift homes, those houses turned into their homes, regardless of the fact whether they had been occupied in a legal or illegal way. If applicants would be evicted from their homes and the community, their home and private and family life, would be adversely affected. The Court considered that it was legitimate for the authorities to act to evict the applicants who had occupied municipal land illegally. However, for several decades in a row, authorities had tolerated the establishment of the illegal Roma settlements in "Batalova Vodenitsa". This action had allowed applicants to establish a strong link with their own country and create a community life there. Notwithstanding the above mentioned acts, the state had no obligation under the Convention to provide housing to the applicants. However, the obligation to provide housing for individuals who are part of the vulnerable groups and are living under difficult conditions can be derived from Article 8 of the Convention in specific cases.

Undoubtedly, the need to protect the right to housing, in special cases, may require the expropriation of the private owners. The Court has repeatedly emphasized that the notion of public interest is necessarily extensive. In the case *Edwards against Malta* the Court stated that: "Areas such as housing, which modern societies consider a primary social need and which play a central role in the economic policies of the Contracting States, can often require intervention from the state. As a result, the choice of the measures to ensure the fulfillment of the housing needs of the community and the time of their application, necessarily involves consideration of complex social, economic and political issues."⁴⁶ Considering the fact that the inherent discretion that the legislator enjoys in implementing the social and economic policies, the Court on numerous occasions has stated that it will respect the decision of the legislator about what is of public interest, unless it is openly without a reasonable basis.⁴⁷ Therefore, in search of a solution to the conflict of interest between rightful owners and the holders of the informal and illegal buildings, the existence of the illegal buildings of whom have been tolerated for many years by the authorities, the Albanian state has a large space for assessment.⁴⁸ In a similar situation were posed even the Croatian authorities while they were trying to strike a balance in between the rights of legitimate owners and those of the temporary land invaders, who were refugees or displaced persons.⁴⁹ To the Court's assessment, treatment of this issue in the social aspect was a very sensitive one, because Croatian authorities on the one hand had the obligation to guarantee private property to the rightful owners and on the other hand they had to respect the right to housing as a social right of the refugees, both of which

considered as vulnerable categories. The Court adopted a stand that the Croatian state enjoyed a wide margin of appreciation to regulate this relationship. However, the state in its exercise of its discretion cannot impose different standards from the ones prescribed by the Convention.⁵⁰ In balancing the rights of the landowners with the interests of the land squatters, the state should take into consideration the social problems, the social tensions and concerns for the public order that the deportation of vulnerable groups or persons with social needs would bring about.

4. The right to home in the judicial documents of the European Union.

On the issue of housing, the European region has been strongly influenced from the political, economical and social viewpoint by the European Union. This influence has increased since globalization, which encouraged the free movement of capital and enterprise, causing changes in many urban structures as a result of the massive migration from within and outside Europe. Up to 2010, the issue of housing was not included within the scope of EU competence, being considered merely a national competence. But, gradually it was found out that the housing issue had complex links to such EU policies as building rates, energy conservation, competition, consumer policies, financial policies, social inclusion, social and economic rights, statistics, structural funds etc. The issue of housing occupied an important place, and therefore was posed as a condition even in the common memoranda for membership to EU of the aspirant European countries.⁵¹ With the increasing immigration towards the EU countries, the increase of the internal migration and the increased need for housing because of the large number of homeless families in Europe, strengthening of the housing rights remained of paramount importance. The Treaty of Lisbon and concretely The Charter of Fundamental Human Rights, constitutes the most important legal document, which commits member states of the EU *to combat social exclusion and poverty, recognizing and respecting the right to social and housing assistance for all those who do not have sufficient resources to ensure their existence*.⁵² To attain this goal, states have an obligation not only to address through specific legislation the housing issues for the vulnerable social groups, but also to take effective measures to ensure that legislation is implemented.

4.1 The Vienna Declaration, a promoter of the reform for the legalization of the informal buildings.

The Vienna Declaration on Informal Settlements in South Eastern Europe, in October 2004 marked the corner stone for the

emergence of the reform on the legalization and integration of informal settlements.⁵³ This Declaration was the product of the sensitivity of the European Union⁵⁴ and the United

⁴⁶ The case *Hutten Czapska v Poland*, parag. 165-166, case *Ghigo vs Malta*, apl. nr. 31122/05, verd. 26 sept. 2006, parag. 56.

⁴⁷ The case *Immobiliare Saffi vs. Italy*, apl. nr. 22774/93, par. 49, 1999-V, mutatis mutandis, *Broniowski vs. Poland*, par. 149.

⁴⁸ Velaers, J. Comments on the Law of the Republic of Albania "On Legalization, Urban Planning and Integration of Unauthorised Buildings", (2007) page 9, paragraph 21.

⁴⁹ The case *Radanovic vs Croatia*, verd. 21 December 2006, parag.49.

⁵⁰ The case *Broniowski vs Poland*, apl. nr.31443/96, paragraph 182.

⁵¹ Final Communication, Meeting of European Housing Ministers, Padua, 2003 at website:

www.eu2004.ie/templates/document_file.asp?id=4785.

⁵² Article 4, point 3 European Charter of Human Rights and Fundamental Freedoms.

⁵³ The objective of the declaration is expressed in point 1, page 2.

⁵⁴ In the framework of the Stabilization Pact.

Nations⁵⁵, and especially of the Eastern European countries themselves to give positive legal solutions to the phenomenon of illegal constructions. Initially, the Declaration emphasizes the great danger that the phenomenon of illegal constructions poses to the economic and social development of the country. This document stipulates that: "Illegal buildings are human settlements, which for various reasons do not meet the legal requirements related to their construction without respecting the rights of ownership over land, the rights of transfer, or have violated the construction and urban planning rules. These constructions exist in these countries and are a serious threat to the economic development, despite the peculiarities that arise in each country".⁵⁶

Commitments embodied in the Vienna Declaration were the concrete expressions of the principles and values that characterize the common European family, values that are enshrined in the European Charter of Fundamental Human Rights and Freedoms. *Firstly*, these commitments were expressions of the respect of Article 34, paragraph 1, of the Treaty on the European Union, which promotes the fight against social exclusion and poverty, recognizing and respecting the right to social and housing assistance for all those who do not have sufficient resources to ensure their existence. The Treaty requires of Member States that the realization of the above mentioned objectives be carried out in accordance with the rules established by the Community law, and respecting national laws and practices. The states of Eastern Europe considered that the social inequality that exists in the field of housing and unequal opportunities in terms of the living conditions of a specific social group who have built illegal buildings should be seen as an obstacle to the economic, social and urban development. Therefore, the right to housing and the housing policies should be seen under a broader perspective than their legal and constitutional meaning,⁵⁷ for the mere fact that there exists a complex relationship in between housing and other aspects of human life. As a result the signatory states to the Vienna Declaration decided that the legitimization of the informal settlements should be considered a *sui generis* housing policy, which should necessarily be undertaken to establish social equality and to improve the living standards for the vulnerable groups.⁵⁸

Secondly, respect of the right to housing should be seen as closely connected not only to Article 34 of the EChFHRF, but also with its Article 17 which sanctions the property protection.⁵⁹ *Thirdly*, the commitments undertaken by the signatory states to the Vienna Declaration were a concrete expression of the principle of good governance as one of the basic principles of the rule of law, which makes sense when implementing obligations that are enshrined in many international legal documents become maximally effective,

particularly in providing opportunities for citizens to have adequate housing and to ensure that the living conditions of the residents keep improving.⁶⁰ *Finally*, a very important element identified by the signatory states of the Vienna Declaration was the fact that the inclusion of informal builders in the social life of the country, as well as the economic and urban integration of the informal settlements in the structure of cities was a key step not only for the development of the country, but also for their integration into the EU.⁶¹ By taking this step, the states express full willingness to respect the European value of inclusion and the fight against social poverty, and wanted to put to an end to the territorial arbitrariness and to reclaim rule of law.

The Vienna Declaration besides addressing the issue of the undertaking of a complete legalization reform on behalf of providing opportunities for citizens to have adequate housing, this declaration invites Southeastern European countries to respect the right to property guaranteed by Article 17 of the EChFHRF. This problem requires a careful solution by the legislators of the countries where informal settlements have been set on private properties. Protecting the interests of informal builders should be put in balance with the protection of private property of the rightful owners through the adoption of appropriate legal measures which comply with internationally accepted standards, the national laws and practices.

Conclusions

The economic, social and political developments characterizing Albania during the transitional period favored a large movement of the population to the urban areas of the country and consequently the building of residential structures in violation to the right of land ownership and without respecting any urban criteria. The spread of the phenomenon of informal settlements was the direct responsibility of state institutions. This phenomenon severely affected not only public property, but also private property. Faced with such a situation, which had been tolerated for many years, the Albanian authorities had to face the dilemma of what decision should be taken regarding informal settlements and whether legalizing informal settlements was justified based on international law.⁶²

International law, and especially European law and jurisprudence sensitized Albanian authorities regarding the fact that for modern and democratic societies issues related to the housing of the population are considered as primary social needs and must be taken under protection. Meeting these needs is done in the name of the principle of support or offering social support aiming to ensure prosperity for the people in need.⁶³ Therefore, the legalization reform should be undertaken to:

- a) to integrate into society a great community of residents who have been building without permits, so that these people be provided the opportunity to an adequate housing,

⁵⁵ In the framework of the habitat program.

⁵⁶ Ibid.

⁵⁷ The right to housing is included in the chapter of the state social objectives (almost in most European countries), where the state has the obligation through housing programs as detailed in the law (in Albania housing policy explicitly regulated in Law no. 9232/2004) to support the vulnerable categories and the poor.

⁵⁸ Vienna Declaration on Informal Buildings, point III, page 1.

⁵⁹ Annex to Vienna Declaration, over the legal international where signatory states are based upon page 3.

⁶⁰ Vienna Declaration on Informal Buildings, point V, page 1.

⁶¹ Vienna Declaration on Informal Buildings, point 6, page 2.

⁶² Vienna Declaration on Informal Buildings, point 5, page 2.

⁶³ Ligji nr.9232, datë 13.05.2004 "Për programet sociale për strehimin e banorëve të zonave urbane".

- b) to stop illegal buildings in the future,
- c) to stabilize the legal regime of property rights over land and set the stability of the socio-economic relations, avoiding the social conflict in between private persons,
- d) to protect or legalize and put into civilian circulation the capital invested in the construction field

All these factors are included within the scope of public interest for which the state is responsible for handling with legislation and consequently justify the issue of the legislation on the legalization, urbanization and integration of illegal constructions. Therefore, the purpose of the legalization law under Article 41 of the Constitution of the Republic of Albania and Art. 1 of Prot.1 of the ECHR, justifies the interference of the right of ownership over the land of its rightful owners.

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