

## The restriction of the right of ownership under the Italian and Albanian Constitution

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### **Abstract:**

*As we all know the constitutions of each country protect the rights and fundamental freedoms. The right and fundamental freedoms are not just a set of rules written and published, but they are guaranteed by the coercive power of the state and international instruments.*

*The paper aims to highlight the social function of property and to analyze opinions for and against.*

*According to one opinion, the social function provided by the Constitution of two countries, would transform the nature of subjective right of private property. So the social function can be seen as an objective which the owner must seek, regardless of the nature of the asset to be owned.*

*According to a different interpretation instead tends to rule out that the inclusion of the social function has led, as a result, the loss of the nature of subjective right of private property. The nature of subjective right remains and the limit of the social concern exclusively the property and not the right to property. Private property remains a subjective right but its exercise varies depending on the importance of the social good in question*

*Any restriction of the right of ownership must be borne in mind that regulation of private property is a fundamental condition for a market economy, for a secure society and in case of Albania is a condition of a country that aspires to European integration.*

**Key words:** Article 41 of Italian Constitution, Article 42 of Albanian Constitution, The right of ownership, social function of the right, restriction of the right.

## 1. INTRODUCTION

This paper analyzes the constitutional regulation of property rights in Albania and Italy. The right of ownership is considered one of the leading real rights, not only for the values of a country's economy but also because it is the main condition from which flow the other real rights. Despite the different wording of the two constitutions provisions, we see a similarity in the content of this right as in the Albanian legislation and in the Italian one where the right of ownership is considered as the right that the owner has to enjoy and dispose the items within the limits established by law<sup>1</sup>.

The right of ownership despite different definitions in different historical epochs, qualifies as an absolute right that the law recognizes the owner to enjoy the property in accordance with the destination for which it was created, and without prejudice to its active use from the third parties. All this guarantee that is offered to the owner not only by the Constitution but also by the provisions of the Civil Code, suffers a "crisis" in view of the general interest which consists in forcing the owner to enjoy and dispose the property within the limits prescribed by law.

These transformations of law and the restrictions that it suffered reflect the current situation which is not about ownership - in function of the individual interest but for the

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<sup>1</sup> Article.149 of the Albanian Civil Code, (1994), "Ownership is the right to enjoy and to possess objects freely, within the provisions of the law"; Article. 832 of the Italian Civil Code (1942), *"The owner has the right to enjoy and to possess objects in full and exclusive within the provisions and obligations of the law."*

ownership in function of general interest<sup>2</sup> The first version is the traditional one where the individual is the only one who can benefit from the property while the second brings a new perspective: if the property does not serve only to the owner, the legislator has the power to change the content of this right by orienting it to public welfare.

## **2. CONSTITUTIONAL FOUNDATIONS OF OWNERSHIP**

### **2.1 The property rights in the Albanian Constitution**

Albanian current constitution was adopted on 28 November 1998<sup>3</sup>. Before its entry into force, the right of private property was much less regulated and guaranteed in relation to public property where the latter in the period of socialism was much more privileged in her defense. We can mention the Article 16 of the Constitution of 1976, which prohibited private property and focussed country's economy to socialist property<sup>4</sup>. The socialist property belonged to the people and constitute the source of his welfare and deserving special protection. In 1991 with the adoption of the document "The Constitution", the Albanian state, now a democratic state guaranteed rights and freedoms, the country's economy was based on a variety of properties which enjoy equal legal protection, can be won by the state and any natural or legal person under the conditions provided by law.

*Currently, the constitution consists of eighteen parts. The second part of the second chapter, entitled Freedom and Individual Rights, addresses the right of property, more specifically in Article 41 according to which "The right of private*

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<sup>2</sup> Giannini, M. S., (1971) *Basi costituzionali della proprieta privata*, Pol. Dir., p.468...cit Bocalatte S., *La proprieta' e la legge, Esproprio a tutela della proprieta' nell' ordinamento giuridico italiano*, IBL, p. 34

<sup>3</sup> Law no.8417, date 21.10 of "Albanian Constitution" (1998).

<sup>4</sup> Article.17, point 2 of the Albanian Constitution (1976), "*The socialist property consists of state property and cooperative property in agriculture*", p.16.

*property is guaranteed. Property is acquired by gift, inheritance, purchase, or any other classical way provided in the Civil Code. The law may provide expropriations or limitations in the exercise of the right of property only for public interest. Expropriations or limitations of property rights that are equivalent to expropriation are permitted only against a fair compensation. For disputes over the amount of compensation we can appeal in court "*

The entire content of the provision is directed towards private property without providing a definition of this right. This implies that Constitution in its predictions has defined criteria to enable adjustment of this right rather than its identification. In this perspective, any definition of private property would be acceptable, provided that the realization of this right in practice may not be inconsistent with the predictions of this provision.

Although foreseen in various articles, the Constitution provides the same protection for public property<sup>5</sup> putting them on the same plan as well as orienting the economic system towards two types of properties and excluding the fact that the goods may be subject only to private property<sup>6</sup>. The meaning of the guarantee that the constitution has given to the right of private property, is the meaning of a fundamental right that is closely related to individual freedom, thus preserving, its private function<sup>7</sup>. *To extract the meaning of the private property right, we refer to Article 149 of albanian Civil Code, according to which " Ownership is the right to enjoy and to possess objects freely, within the provisions of the law ". If the first part of this provision refers to the exclusive and absolute power that every owner has on his item excluding third parties, the second part*

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<sup>5</sup> Article.11, point 2 of the Albanian Constitution, (1998), *"Private and public property are equally protected by law"*.

<sup>6</sup>Article. 11, point 1 of the Albanian Constitution, (1998), *"The economic system of the Republic of Albania is based on private and public property and the market economy and the freedom of economic activity"*.

<sup>7</sup> Omari L., & Anastasi A., (2010). *E drejta kushtetuese*, Tiranë, ABC, p.152

is a limitation of exclusive power of the proprietary in the implementation of general interest. Regarding the items, these are goods that have an economic value, satisfy consumer needs of each entity and used for productive activity, and on which people can build relationships of belonging<sup>8</sup>.

In relation to the creation of the property, the Albanian constitution makes an overall adjustment of private property rights. It explicitly stipulates what are the ways of gaining ownership citing those classics as gift, inheritance and purchase and any other means specified by the Civil Code<sup>9</sup>. Civil Code defines the main ways of gaining ownership even though the wording of Article 163 special laws can create other ways of gaining ownership<sup>10</sup>.

Constitutional guarantee provided to the preceding paragraph has to do with the power given to the Civil Code to intervene in owner-item report. Although the right of ownership is the right that gives more power over the property owner, the power of direct and immediate is not absolute because in this report lawmaker always interferes determining ways of profit, exploitation and property boundaries.

Paragraph 3 and 4 of Article 41 refers to the expropriation and constraints experienced by private property rights in favor of general interest and against fair compensation. Any private legal or physical entity has the right of disposition of property that it owns. Dues or powers that the owner owns form the content of the legal relationship of ownership. On the one hand, these dues are numerous, on the other hand, in some cases these are reduced so much that the power of the owner's property remains purely formal<sup>11</sup>.

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<sup>8</sup> Kondili V., (2010), *E drejta Civile II*, Pjesa e posaçme-Pronësia, të drejtat reale të përkohshme dhe trashëgimia, Tiranë, GEER, p.14-15

<sup>9</sup> Omari L., & Anastasi A., (2010). *E drejta kushtetuese*, Tiranë, ABC, p.152

<sup>10</sup> Article. 163 of Albanian Civil Code, "*Property acquired through methods defined in this Code and other means specified by special law*".

<sup>11</sup> Shehu A.,(2006), *Pronësia*, Tiranë, albin, p. 9

The law recognizes to the state the right to expropriate or limit assets to public interest of individuals or private entities, as well as protecting the rights and interests of their respective owners. Expropriation is decided by the Council of Ministers and regulated in detail by law No. 8561, dated 22.11.1999, "On expropriation and making temporary use of private property".

Expropriation and other limitations are equal to the most severe form of restriction of private property. Thank to expropriation we have a forcibly transfer property to another owner who must be accompanied by some basic conditions, to be consistent with the Constitution<sup>12</sup>, as "a general interest" and "fair compensation".

The expropriation of private properties is done only for public interest, as the public interest prevails over the private interests of their owners, in accordance with the conditions prescribed by law and general principles of international rights: It is used for a public interest that can not be realized or protected in any other way, except for reasons and with respect to the procedures defined in the laws, to the necessary extent to accomplish the purpose of the expropriation and in any case against a fair compensation. The criterion of "fair compensation" in favor of the former owner, recognized by the Constitution, can not be complete, but "fair". From concept of property rights that has received Constitution in Article 41, is also enshrined in Article 1 of the Additional Protocol, does not derive any absolute right to full recompense.

The amounts of compensation and its boundaries are determined by the circumstances of the specific case. In relation to acts which result in a restriction on the right of private property, mention those situations that restrict the content of enjoyment or possession of debt which must be justified also by

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<sup>12</sup> Omari L., & Anastasi A., (2010), *E drejta kushtetuese*, Tiranë, ABC, p.153-154

the general interest and never touch its core. An obligation that we find also reinforced in Article 17 of the Constitution<sup>13</sup>.

It is the Constitutional Court and ordinary courts to decide how far they should extend the restriction, in order not to impair the essence of the right of the property owner. In any case, the interference with the right of property to be justified, there must be a proportionate relationship between the means used and the aim sought to be achieved<sup>14</sup>. Limitations of property rights can not touch its essence, and also the expropriation and restriction of private property should guarantee transparency, equality of citizens and protection of their interests and their property rights.

## **2.2 The property rights in the Italian Constitution**

The right of ownership of textes of the XVIII century, as well as the liberal State Constitutions, was part of the rights of the man he earned since his birth and enjoying an unconditional protection. After World War II, the fall of the dictatorship, in Italy created a situation of socio-political variety. It was elected Constitutional Assembly and it had to write the basic constitutional act which would replace the guarantees provided in the Albertin Statute<sup>15</sup>. The new constitution should definitely take into consideration the regulation of market economic relations adapted to the needs and requirements of a new reality now and directing them towards the common good; for this purpose, the entire Chapter III of the first part of the Constitution which came into power in 1948 was dedicated to economic relations.

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<sup>13</sup>Article. 17 of the Albanian Constitution, (1998), *“Limitations of the rights and freedoms provided for in this Constitution may be imposed by law in the public interest or for the protection of the rights of others. The restriction must be proportionate to the situation that has dictated it. These limitations may not infringe the essence of freedoms and rights and in no case may exceed the limitations provided for in the European Convention on Human Rightst”*.

<sup>14</sup> Constitutional Court Decision, No.30, dt.01.12.2005

<sup>15</sup> Boccalatte S., *La proprieta' e la legge, Esproprio a tutela della proprieta' nell' ordinamento giuridico italiano*, IBL, p. 33

If the liberal State considered economic rights as an expression of personal freedom and the independence of the individual, with the coming into power of the Constitution of 1948 which is still in power today, economic rights are not an individual attribute. This change in approach led to the inclusion of property rights in the field of economic relations as evidence of the purpose of the Constitution makers to address the right of ownership in a plan different from that of absolute and inviolable rights of the individual. Treatment of the right of property in a different light reflected in many legal writings that speak out for a dispersion of ownership and power without property<sup>16</sup>

*Referring to Article 42 of the Italian Constitution: "Property is public or private. Economic assets belonging to the State, private or institutions. Private property is recognized and guaranteed by law, which defines ways of its acquisition, enjoyment and its limits in order to ensure its social function and that it can be made accessible to all. Private property may be expropriated for reasons of general interest, in cases stipulated by law and against compensation. The law establishes the regulations and limits of legitimate testamentary and the State's rights on legacies".*

The first paragraph of Article 42 of the Constitution provides two forms of property, public and private. This paragraph sets the same defense plan of two properties, excludes the fact that items may be subject to a regime property. Also in this section it is emphasized the affiliation of items which may belong to the State, entities or individuals. In this new system of values that represents the current Italian Constitution, ownership is no longer regarded as an attribute of an individual but as a means by which it is carried his

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<sup>16</sup> Berle, A. A. (1959). *Power without property*, Harcourt Brace & Co., New York; Berle, A.A, Means, C.G. (1932). *The modern Corporation and Private Property*, Macmillan, New York. Retrived from Boccalatte S., *La proprieta' e la legge, Esproprio a tutela della proprieta' nell' ordinamento giuridico italiano*, IBL, p. 34



personality, and where the individual is considered not for what he "owns" but for what he "represents"<sup>17</sup>.

Part of the concept of public property are a group of things which by their nature can not belong to public entities, such as state or public legal persons. These items are provided by law<sup>18</sup>

The second paragraph of Article 42 refers to ensurance that the Constitution has given to private property and limiting the power of the legislature to meet constitutional objectives; legislator determines the ways of profiting, enjoying and limitations of the right to private property, should also ensure social function and profit of this right by all.

Regarding the acquisition of property by all, the legislator may not legal or sub-legal acts to exclude specific categories of subjects from the profit of this right by creating the discriminatory situation in society. This obligation of legislators, in my opinion corresponds to the principle of equality which characterizes the Italian constitutional system.

Other obligation that the Constitution imposes to legislators is related to guaranteeing the social function of private property, rather than finding a balance between individual interests and the interests of the general owner. In this regard there are expressed different opinions.

According to a point of view, the social function that constitution recognizes to property, has transformed the subjective nature of this right; this change is noticed in the provision of Article 42, paragraph 2, where the constitution does not refer to the right of ownership but property. In this regard, the Institute of ownership as power-obligation should be implemented in accordance with the general interests<sup>19</sup>.

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<sup>17</sup> Castorina E. & Chiara G., (2008), *Beni pubblici, Codice Civile Commentario*, Giuffrè, p. 43

<sup>18</sup> Pellecchia E., (2012), *Valori costituzionali e nuova tassonomia dei beni: dal bene pubblico al bene comune*, in *Il Foro italiano*, p. 573-576.

<sup>19</sup> The social function of property expressed in the Italian Constitution originated the Weimar Constitution of 1999 which in the last paragraph of Article 153 provided the

Social function can be viewed as an objective that the owner must realize regardless of the nature of the item subject of property. This brings yet another proprietary power limitation in order to achieve general interest where the latter does not always coincide with the individual interests of the owner<sup>20</sup>.

Another point of view tends to exclude the fact that the social function of property is the cause of the loss of subjective nature of the right of ownership. This is not related to the subjective nature as limiting the fulfillment of general interest belongs to the property and not the right.

The right of private property remains a subjective right and exercising its importance varies depending on the item subject of property.

Limiting with social character that the constitution maker has set to the property does not absolutely belong to property but in that category which, according to lawmakers, has social importance. Social function is a criterion that justifies every differentiation and choice of legislators. In this way the legislator initiated by the characteristics of the item subject of property, will have to balance the conflicting interests, the individual and overall. In the moment when will prevail general interest, owner will incur a "shrinkage" in the exercise of the rights that he has<sup>21</sup>.

As a conclusion, in this paragraph, absolute and exclusive power of the owner over the property can be subject to restrictions not in the interest of another owner (neighbor), as happened in the past but now in the realization of general interest; so that the right of ownership of a private owner may

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phrase "property of forcing". Provision that we find a slight difference in Article Article 14 of the Constitution of Bonn, "Property imposes obligations" its use unless private also belongs to society "; this provision resisted almost unchanged in Article 14 of the Constitution of Bonn.

<sup>20</sup> Rodota S., (1990) *Il terribile diritto*, Bologna, p. 420 ...

<sup>21</sup> Milneri L., (2007), *La proprietà privata*, in *Il diritto*, Milano, Enciclopedia giuridica del sole 24 ore, p. 336-337.

be limited due to the fulfillment of solidarity as provided in Article 2 of the Constitution<sup>22</sup>.

Another limit set by the Constitution to limit the right to fully enjoy the property by the legitimate holder is defined in the third paragraph of Article 42 under which "Private property may be expropriated for reasons of general interest, in cases of prescribed by law and against compensation ". The right of private property may incur a restriction that may reach to the ends of sacrifice, or rather of its loss provided the existence of the general interest and against compensation<sup>23</sup>.

*Prior to the enactment of the Constitution of 1948, the expropriation treated in Article 29 of the Albertin Statute, who after declaring the inviolability of all properties, except when the law provided a general interest, provided for a compensation in the form of "fair compensation ". Even the civil code of 1865 in Article 438 provided that "no one can be forced to sell his property or to allow others to use, unless there is a public need recognized by law and against fair compensation ".*

These provisions on one hand emphasize the exceptional character of the institution of expropriation and in turn highlight the need to compensate the owner's right to a "right" reward.

*Even the civil code of 1942 has reaffirmed the article 834 that "No one can be totally or partially deprived of his possessions except due to a" public interest "and towards a" fair compensation ".*

From reading the third paragraph of Article 42 of the Constitution noted that despite some connection with the preceding paragraph, the words used by the constitution maker

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<sup>22</sup> Article. 2 of the Italian Constitution, (1942, The Republic recognizes and guarantees the inviolable rights of man, as an individual and in social formations where his personality, and requires performing tasks necessary political solidarity, economic and social development".

<sup>23</sup> Even in this case as in the preceding paragraph of Article 42, the Constitution has placed a restriction in favor of the legislators in determining cases of expropriation of private property.

are different, as "general interest" (the only one interest against which the law allows expropriation) and "fair compensation".

The term "expropriation" means all those situations that deliver in total or partial a contraction of the right to enjoy property by the owner, in favor of general interest. Through expropriation, the owner who is already expropriated, is subject of an order of a public authority to transfer his ownership rights in favor of the society or the State.

Even though some acts do not directly perpetuate the total or partial transfer of the proprietary rights they should be considered with a expropriation character, they impose restrictions which affect deep in the use of property that make it unusable in relation to destination to which it was created and affect its exchange value<sup>24</sup>.

All this is justified by the performance of general interest defined by the legislator<sup>25</sup>.

Choosing lawmakers to realize "general interest" with the mean of expropriation presupposes that sacrifice of the expropriated owner, offset with "the right compensation" is justified by an interest realized according to a proportional report identifiable with the ability of the mean in relation to the purpose<sup>26</sup>.

General interest referred to in the third paragraph of Article 42 of the Constitution must be actual and concrete; an expropriation deprived of general interest and that targets only the transfer of property is termed as illegal.

By focusing on constitutional provision, expropriation must be followed by an award in favor of the owner.

Before the entry into force of this Constitution legislation, relating to determination of the compensation had

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<sup>24</sup>At any time, the expropriated subject may exercise remedies in defense of the right of property, when the expropriation conducted by a public authority is illegal. This rights is also provided on Article 113 of the Constitution under which "acts against the public authority always allowed the judicial protection of the rights and legitimate interests, before an ordinary court or administrative".

<sup>25</sup> Rolla G., (2014), *La tutela costituzionale dei diritti*, Milano, Carocci, p. 215...

<sup>26</sup> Sangiorgio F. V., (2002), *Proprietà e costituzione, i principi giurisprudenziali*, Milano.

set different criteria and perhaps clearer than those currently provided. Regarding to this, it is worth remembering the Albertin Statute Article 29, who in recognition of expropriation as an institute, provided the compensated owner's right for being expropriated. This article shall be segregated in parallel with law no. 2359/1865, article 39 of which it was determined that the compensation belonging to the expropriated should consist in a "fair price" which in the judgment of experts was to be the equivalent of the selling price of real property under market conditions.

In fact, this principle was not applied by successive legislation as compensation value of property according to the market price, constitute a burden on public finances<sup>27</sup>

Differently from the previous legislation, the Constitution maker did not bring a reference criterion for calculating the value of the reward. During its work, the constitutional assembly discussed widely on the need or not of a less general formula to calculate the remuneration of the original draft of the project Constitution stipulates that the award should be straight. The sacrifice suffered from the owner for the deprivation of property must be followed by a compensation in the form of repayment<sup>28</sup>

As a conclusion, given the above submissions, we can say that the expropriation institute consists of three elements.

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<sup>27</sup>Article.13, Law no. 2892/1885, "For the restoration of the city of Naples"; Article. 5 and 13 Law no. 369/1992; article. 32 d.p.r. 327/2001, "*Unique Text on expropriation for public purposes*".

<sup>28</sup> Article. 42, point 3 should be read in accordance with international and European obligations who Italian State is bound to respect. In order of this it is worth recalling the Charter of Fundamental Rights of the European Union, ([http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)) neni 17 "*Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. Intellectual property shall be protected*".

1. Limitations of property should be decided by particular title; eliminating general character limitations on any property against any citizen.
2. Limitations imposed on property should be indefinite, although the "time" element here is not an independent element but complements other elements.
3. Limitations should bring as a direct result effective limitations of the owner's power over the object expropriation property.

The constitutional provision of property as provided in Article 42, because it defines the ways of gaining ownership, in the last paragraph deals with the heritage institute forwarding lawmakers the power to set rates and limitations of the Institute; "The law establishes the regulations and limits of legitimate and testamentary inheritance and the State's rights on inheritance legacies".

From reading this paragraph the most striking is the fact of not mentioning by the Constitution makers of the term "ownership". However deployment of this paragraph within Article 42 where the three preceding paragraphs address the right of property, let implication that reference belongs to the heritage of property. Even in this paragraph, as in other paragraphs we see a restriction in favor of the legislators who must define the rules and restrictions of the institute.

In any case, what is worth mentioning is the bond that exists between property and heritage institute because judicial order guarantees to the legal official the right to dispose the property even after his death.

#### **4. THE COMMONALITIES AND THE DIFFERENCE BETWEEN TWO ARTICLES**

By treating the two constitutional provisions we cannot notice profound changes. Perhaps for the fact that during the works

for the design of the Albanian Constitution which is very new in comparison with the other, were taken into account the experiences of neighboring countries, especially Western ones, part of which is Italy, too. In both cases the right of property occupies a special place in the content of constitutions despite my treatment in this work of the two main provisions. We see that the constitutional guarantee reserves the two forms of ownership, public and private, even though in Article 41 of the Albanian Constitution it is discussed about the public property only indirectly. In the case of the Italian provision unless it recognizes two forms of ownership, also it gives details regarding its relevance. In determining the means of obtaining this right, the Albanian Constitution provides for some of the classic ways of gaining ownership and other ways of referring to the Civil Code. This is a distinctive element in relation to the Italian provision as in the case of the latter, the Constitution refers to the law. This change in Albanian provision comes as a result of the experience of previous communist regime which had massive nationalization of land to citizens. Dual function of property, private and social, is a common feature found in both provisions. Private function gives absolute and exclusive power to owner on property, limited to public welfare benefits. These restrictions as we saw above are set by the legislator to property as big as its social function. However, as this intervention by him to be justified there should be a proportional relationship between the means used and the aim sought to be achieved.

## **5. CONCLUSION**

Constitutions of both countries recognize and guarantee the right of private property as an owner's right to enjoy and dispose quietly and completely his property within the limits prescribed by law.

Limitations of this right are imposed by law and in the presence of general interest and against fair compensation.

In both countries there are Constitutional Courts, whose in a legal-constitutional level have to control the observance of the principle of constitutionality in a national level based on the international standards already accepted in functioning constitutional democracies.

In the context of protecting human rights and fundamental freedoms, Constitutional Courts are oriented to standards set by the GJEDNJ. Protection of human rights is a common cause of these courts, and therefore references in the decision of the GJEDNJ have been indispensable and irreplaceable in the activity of these Courts.

Regulation of private property is a fundamental condition for a market economy, for a secure society and a country like Albania, which aspires to European integration.

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