

The legal conflict regarding the privatization of socially owned enterprises: Amendments to the Law on the Special Chamber of the Supreme Court, the Law on PAK and other relevant laws

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Executive Summary

The privatization process of SOEs in Kosovo represents one of the most complicated privatization processes in post-communist countries. Privatization in Kosovo includes a number of distinctive features which have translated to a number of difficulties in the process that can be summarized in at least three main reasons: 1) Privatization process has been headed by a duality of institutions - an international organization-UNMIK and Kosovo Institutions; 2) Unclear legal base; and 3) Property rights disputes.

With the entry into force of the Constitution of the Republic of Kosovo since 15 June 2008, all laws passed by the Kosovo Assembly which have amended the UNMIK Regulations, are the only valid laws. The same situation should apply to the Law on the Privatization Agency of Kosovo (PAK) as well, approved in 2008, which replaced the UNMIK Regulation on KTA. Despite the new legal reality, the Special Chambers of the Supreme Court still considers the KTA Regulations as the law in force and does not recognize the Law passed by the Kosovo Assembly on PAK.

In the sense of the domestic law in Kosovo, the denial of PAK as a full legal entity and as a party in the court procedure is a breach of procedural regulations related to the rightful representation of a party in a civil law procedure, as well as a breach of constitutional rules related to a fair trial. KTA was not successful in the representation of some court cases because intentionally or unintentionally they have lost many privatization cases, among which it is worth mentioning the case of the Steel Factory in Ferizaj. The Law on PAK, although approved by the Kosovo Assembly, which replaces the Regulation No. 2002/12 on KTA, has not achieved its purpose. Hence, it is necessary to have a new law on the Special Chamber, to amend the Law on PAK, to amend Regulation No. 2005/48 for the reorganization and liquidation of enterprises and their assets within the administrative authorization of KTA, and have a new law on denationalization/compensation.

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1. Introduction

The privatization process of SOEs in Kosovo represents one of the most complicated privatization processes in post-communist countries, for the sole fact that Kosovo has distinctive features which set it apart from such countries. It is important to note that privatization in post-communist countries has followed as a necessity from the failure of the socialist system based on scientific arguments that state/social enterprises were not productive, respectively efficient to fulfill the social requirements¹.

With the fall of the Berlin Wall which represents the collapse of communism and the economic concept of socialist economy², it was clear that the economic concept had to move towards a free market economy, whereas the immediate privatization of state/social property³ was considered as one of the main roads to achieve this objective. The main purpose of the economy is the fulfillment of social necessities, whereas privatization as part of the transformation of socialist economy towards free market economy was considered as the only way to avoid the economic crisis⁴. In this context, privatization as a concept represents a state organized legal process through which the state/social property is transformed, respectively it is transferred to the private hand aimed to make this property much more productive, efficient and competitive to fulfill the social needs (necessary services, manufacturing, infrastructure, increase of taxes for the state, increase of the quality and quantity of products and services etc).

Are there difficulties and dilemmas in the privatization process? Post-communist countries featured many dilemmas and difficulties regarding the method as to how the privatization process should be developed. During this road there was no unique model, but every country has followed different methods and models of privatization by adapting to economic, legal and social circumstances and specifics of each country. The following are considered as models of privatization: issuing shares to enterprise workers (internal privatization), distributing shares to all adult citizens (the voucher system), the sale of shares to strategic investors (domestic or foreign), as well as returning the property to former owners, whose property was nationalized without compensation during communism⁵. Among these methods, the most important and productive towards economic development is the method of sale of shares to investors for the sole fact that it brings new capital and new experiences to the enterprises, and moreover the enterprises has a clear owner which also influenced the decision-making in the business operations of the enterprise⁶. Such model, derived from the experience of others, currently is implemented in Kosovo as well. However, all these difficulties have been

¹*Pitelis & Clarke*, 1993, p. 1; *Roland & Verdier*, 1994, p. 1; *Pavlinek*, 2002, p. 1127

²See among others *Ramamurti*, 2000, p. 532; *Havrylyshyn*, 2007, p. 2.

³See among others *Roland & Verdier*, 1994, p. 161.

⁴*Gordon*, 1993-1994, p. 517; *Yilmaz*, 1993, p. 6; *Kušić*, 2005, p. 13.

⁵*Bennett, Estrin, Maw & Urga*, 2004, p. 3.

⁶See *Kornai*, 2000, pp. 6-8.

subject to various debates till a social consensus was reached. Kosovo did not have this opportunity due to the fact that political events regarding its future and the determination of its political status have covered the economic matters, including privatization. Nevertheless, it must be noted that in all privatization models, the main conditions for the successful privatization are considered: *a clear legal base, justice, transparency, competition and social consensus.*

The question we would like to deal with is whether there are difficulties with regard to the privatization process in Kosovo? In this analysis, the focus will be on a number of actual specifics and difficulties, especially the legal conflict which represents a challenge for the privatization in Kosovo and which requires an urgent solution.

2. Some specifics of the privatization process in Kosovo

Privatization in Kosovo includes a number of distinctive features which have translated to a number of difficulties in the process that can be summarized in at least three main reasons:

- 1) Privatization process has been headed by duality institutions - an international organization -UNMIK though KTA with representation of the Kosovo Institutions;
- 2) Unclear legal basis; and
- 3) Property rights disputes in the property being privatized.

All of the above circumstances have been reflected into difficulties and dilemmas with the privatization of socially owned enterprises. It is necessary to be noted that the privatization process also has its advantages and as a process is supported and considered as a necessity towards the economic development of Kosovo and the creation of a free market. However, this process has some difficulties and specifics which will be showed below.

2.1 Leading the Privatization Process. Privatization process has been headed by the KTA, but with representatives from local institutions as well. However, UNMIK had the final decision-making power, because the decisive vote was the one of the deputy of SRSG, as the chairman of the KTA board. This constitutes a specific, because an international institution had led and determined the policies of the privatization process. On the one hand, it is the positive aspect of the privatization because the support of international experts was necessary for post-communist countries, including Kosovo that do not have such experiences on privatization. On the other hand, even though there was consensus and consultation with domestic institutions, in many cases there was disagreement among domestic institutions and UNMIK regarding privatization, especially the privatization model, the process and decision-making in privatization. This sort of dualism of institutions in the decision-making has led to poor decision-making in the privatization with purposes only harmonizing the

approaches of different institutions. Currently debated issue for the Kosovo economy is the Privatization Fund itself which is not part of the economic development of Kosovo⁷. However, due to property right disputes, this model allows to provide funds as security for compensation of the legitimate owners or creditor's claims as required under European Convention on Human Rights (ECHR), Protocol 1, Article 1, and to continue the process of privatization as a necessity for developing economy.⁸

2.2. Unclear Legal Bases. According to UNMIK Regulation 1999/24, the applicable laws in Kosovo are determined: Laws in power until March 22nd 1989, respectively before the abolition of the Kosovo autonomy by Serbia force measures, UNMIK Regulations, and Laws of the Kosovo Assembly. Whereas the laws issued after 1989 were considered as applicable only if there were legal loopholes and if the laws were not of discriminatory character⁹. One of the main deficiencies is the lack of determining which laws after March 22nd 1989 should be excluded from being implemented and which ones should continue to be implemented but which do not have a discriminatory character¹⁰. The lack of such clarification unfortunately created the opportunity for more laws issued after 1989 to be implemented in practice. With the placement of Kosovo under UNMIK administration,

⁷ One of the debated decisions for Kosovo's economy is the Privatization Fund. The money allocated in this fund are not part of the monetary circulation in the Kosovo economy, rather it is an isolated fund, which was founded and intends to serve for resolution of property conflicts in privatized enterprises, in the first place. Contrary to other countries in transition such as Slovenia, Croatia, Hungary, Czech Republic, Poland, Eastern Germany, which had created Development Funds, in the middle of which the Privatization Fund was used as a Development Fund, in Kosovo this Fund *prima facie* serves for the resolution of property conflicts and as such still remains an isolated Fund and it was not used for economic development.

⁸ According to the European Convention on the Human Rights (ECHR), Protocol 1, Article 1, is required to create the necessary funds for compensation of the owners or creditors if through state action is taken their property for the public purposes. As a public purpose and specific form of expropriation is considered privatization when on the privatized property may be property disputes. Therefore, such an attitude in Kosovo regarding the Privatization Fund fully is in compliance to the requirements arising from ECHR. Such a Fund could not be spent until property disputes are resolved.

⁹ See UNMIK Regulation No. 1999/24 for the applicable law in Kosovo, amended with Regulation No. 2000/59, article 1.1 and 1.2: "1.1. The applicable law in Kosovo includes: a) Regulations issued by the Special Representative of the Secretary General and supporting instruments issued in compliance to them and b) The law in power in Kosovo on March 22nd 1989. In the case of conflicts, the regulations and supporting instruments will dominate. 1.2. If a court of a competent jurisdiction, a body or a person which must implement a provision of the legislation, determines that a case or a situation cannot be covered by the legislation determined in paragraph 1.1 of this regulation, but it is covered by another law in power in Kosovo after March 22nd 1989, which is not discriminatory and is in compliance with article 1.3 of this regulation, in this case – the court, body or person, as an exception, enforces that law.

¹⁰ Based on UNMIK Regulation No. 1999/10 on the nullification of legislation for housing issues and property rights, only two laws have been excluded from implementation in Kosovo – Law on Amendments and Additions in the Limitations of Transactions of Real Estate (Official Gazette of the Republic of Serbia, 22/91 of April 18th 1991); and the Law on Conditions, Methods and Procedures of Giving the Agricultural Land to Citizens who wish to Work and Live in the Territory of the Autonomous Province of Kosovo and Metohia (Official Gazette of the Republic of Serbia, 43/91 of July 20th 1991).

based on Regulation No. 1999/1 on the temporary administration of Kosovo, UNMIK was responsible for the administration of public and state properties of Kosovo¹¹. Regardless of this fact, many state and public properties were transformed, respectively privatized, based on the laws issued by Serbia during the 90-s as a result of non-exclusion from the implementation of laws related to transformation (privatization) of property¹².

2.3 Property Disputes. The privatization process in Kosovo is also characterized by the phenomenon of property disputes in the privatized enterprises or those currently in privatization. Social enterprises were a subject to a forced transformation process by Serbia during the 90-s. In this direction, many property claims related to this transformation were submitted to the Special Chambers of the Supreme Court. Besides this category, there are similar claims from former owners, whose property was taken through different ways (nationalized, expropriated or confiscated) during the communism era. The third category of potential property claims are those of supposed investors who have invested or credited SOEs during the 90-s. Even though based on UNMIK Regulation on KTA and later on the Law on PAK, property claims cannot stop the privatization process, and there will be no returns of property, rather the money from the sale will be stored in the trust fund¹³; nevertheless, these requests may be subject to review during the liquidation process from the PAK and at the end from the court itself – Special Chamber of the Supreme Court. Hence, the unclear legal basis will present serious challenges to the resolution of these conflicts.

3. Legal confusion and the problem of implementing the law on privatization process: A conflict between PAK and the Special Chamber of the Supreme Court

The Independence of Kosovo was declared on February 17th 2008, which has created a new political and legal situation. With the entry into force of the Constitution of the Republic of Kosovo on June 15th 2008, all laws issued by the Kosovo Assembly which were passed to replace the UNMIK Regulations are the only applicable laws. A similar approach should be

¹¹ See UNMIK Regulation No. 1999/1 on authorizations of the temporary administration in Kosovo, article 6 which says: “UNMIK administers the movable and immovable property, including finances, bank accounts and other forms of property registered in the name of the Federal Republic of Yugoslavia, Republic of Serbia or any of its bodies, which are located in the territory of Kosovo”.

¹² In the practice before and after 1999, there are many decisions of domestic courts (municipal courts) related to the return of agriculture property and privatization of apartments in social ownership based on the Laws of Serbia issued after 1990; Law on Privatization (1991) and the Law on privatization of apartments in social ownership (1992). Restitution of property is carried out also using the Law on obligation of 1978. Based on that many contracts through which property was taken during the communist regime are declared invalid and property has been returned to the former owner.

¹³ See Regulation No. 2002/12, amended by Regulation No. 2005/18, article 5 and 6; Law no. 03/L-067 on the Kosovo Privatization Agency, article 2.

applicable with the Law No. 03/L-067 on the Privatization Agency of Kosovo, approved in 2008 which replaced UNMIK Regulation No. 2002/12 on KTA. As a result of this law, PAK was established as a successor of KTA, whereas all responsibilities of KTA have been transferred to PAK¹⁴. This is of utmost importance because the entire privatization process including the representation of cases in the Special Chamber of the Supreme Court should be led by Kosovo Institutions, respectively PAK and not KTA.

Having in mind this new legislative reality, the Special Chambers of the Supreme Court still considers UNMIK Regulation 2002/12 on KTA as the law in power and does not recognize the Law of the Kosovo Assembly on PAK. According to the Special Chamber approach, only KTA is responsible to represent cases in the court, regardless of the fact that legal and economic consequences affect Kosovo. Such approach is justified by the Special Chamber of the Supreme Court based on a Legal Opinion issued by the UNMIK office in 2009 which explains which Law is considered to be applicable regarding privatization. Among others, UNMIK explained that only the Regulation on KTA 2002/12 is the applicable law and not the Law on PAK, with the justification that a Law passed by the Kosovo Assembly cannot abrogate a UNMIK Regulation¹⁵. As a consequence of this opinion, the Special Chamber recognizes only KTA as the responsible agency for the final decisions and representation of cases in the court. This court does not recognize the Law on PAK as an enforceable law but only as an internal regulation of the Privatization Agency without any legal power¹⁶.

Such a stance of the Special Chambers is a breach of the law in Kosovo, the Constitution of Kosovo, and the Comprehensive Ahtisaari Plan¹⁷. Moreover, the Kosovo Constitutional Court concluded that the Special Chambers with its actions does not recognize the Law issued by the Kosovo Assembly, which represents a breach of the Constitution and continues to

¹⁴ Law No. 03/L-067 on Kosovo Privatization Agency, article 1 and 31. Article 1 says: “The Privatization Agency of Kosovo (hereafter the “Agency”) is established as an independent public body that shall carry out its functions and responsibilities with full autonomy. The Agency shall possess full juridical personality ... The Agency is established as the successor of the Kosovo Trust Agency regulated by UNMIK Regulation 2002/12 “On the establishment of the Kosovo Trust Agency”, as amended, and all assets and liabilities of the latter shall be assets and liabilities of the Agency.. This law nullifies the Regulation 2002/12. Article 31 says: “The present law shall supersede any provisions in the Applicable Law which are inconsistent therewith. UNMIK Regulation 2002/12, as amended, will cease to have legal effect on the date the present law enters into force.”

¹⁵ UNMIK/RREG/2008/4- Clarification, 12 November 2009.

¹⁶ See Decision of the Special Chambers of the Supreme Court, ASC-09-0089, page 3, where it is stated: “This does not and cannot mean, that the Special Chamber accepts the PAK- Law as applicable law in Kosovo, but to ensure a secure and rightful privatization process, this PAK “Law” has to be treated as valid and bring internal rules of organization within the privatization process”. Likewise, see the Decision of the Special Chamber of the Supreme Court, ASC-09-0067, dated March 9th 2010, page 4. Based on this decision, the court expresses the same approach by ignoring the enforcement of the Law on PAK.

¹⁷ See, Decision of Constitutional Court, ref. AGJ 109/2011, in the case KI 25/10, Privatization Agency of Kosovo versus the Decision of the Special Chamber of the Kosovo Supreme Court, ASC-09-089, dated February 4th 2010, paragraphs 53-57.

ignore the existence of Kosovo as a state¹⁸. In the meantime, the Opinion of ICJ has confirmed that the declaration of Kosovo's independence was done in full harmony with the International Law and it is not in conflict with the UN Resolution 1244¹⁹.

Under the domestic law of Kosovo, the denial of KPA as a full legal entity and as a party in procedure is a breach of procedural rules related to the fair representation of a party in the civil law procedure²⁰, but also a breach of constitutional rules related to a fair trial²¹. Moreover, such decision of the Special Chambers also represents a breach of article 6 of ECHR (European Convention on Human Rights), which guarantees a fair and a properly trial in a court procedure²². All the arguments mentioned above show that the approach of the Special Chamber does not respect the judicial system in Kosovo and the hierarchy of laws, which creates un-repairable consequences for Kosovo.

4. Changing UNMIK Regulation No. 2002/13 on the Special Chamber as an urgent matter

Amending the Regulation No. 2002/13 on the Establishment of the Special Chambers of the Supreme Court must be considered as an urgent matter in order to avoid a legal conflict regarding the privatization of SOEs in Kosovo. With the amendment of this regulation, the competencies of this court would be clearly defined in order to recognize the laws of the Kosovo Assembly as the only applicable laws. Specifically, the issue of the Law on PAK must be addressed, as well as the representation of cases before this court. These facts were known to the Kosovo Institutions, which were advised as of 2008 to amend this regulation and to issue a new law regarding the Special Chambers, however this was never realized.

Such a problem has been constantly emphasized even in the PAK reports to the Kosovo Assembly²³. With these reports, PAK has emphasized the

¹⁸ See Decision of the Constitution Court cited above, paragraph 53, which says: "In these circumstances, the Court can only draw the conclusion that the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo does not recognize and apply the laws lawfully adopted by the Assembly. In fact, the Special Chamber simply continues to ignore the existence of Kosovo as an independent State and its legislation emanating from its Assembly."

¹⁹Ibid.

²⁰Law on the contested (dispute) procedure, no. 03/L-006, article 5, paragraph 1, says: "The Court will give an opportunity to each party to be declared regarding the requirements and claims of the opposition party", and article 7, paragraph 3, which says: "The Court may not base its decision on facts and evidence regarding which the parties have not had an opportunity to be declared" related to article 182, paragraph 2, point 2 which says: "Essential breach of provisions of the contested procedure always exists...(i) if any of the parties through illegal activity, especially by not offering the opportunity for a hearing in the court".

²¹See Constitution of the Republic of Kosovo, article 31.

²²For more, see European Convention on Human Rights, article 6.

²³See PAK Annual Report 2008-2009, page 5. In this report, PAK in an explicit manner, has expressed their concerns regarding the decisions of the Special Chambers and the fact that

difficulties with the Special Chamber regarding the representation of privatization cases. It seems that the Institutions have misunderstood the situation by thinking that with the Law on Courts of the year 2010, the problem of courts and the Special Chambers has been resolved, often using the justification that “we do not need a law for the Special Chamber which is a UNMIK body”. The responsibility of the Special Chamber can be amended only through a special law for this court, respectively by amending the UNMIK Regulation No. 2002/13.

Ignoring the actions of this court, could result in enormous consequences. It is worth mentioning the case of Trepca but also for the Privatization Fund itself. The entire Privatization Fund should be addressed from this court based on the requirements of the creditors and potential or simulated investors. On the other hand, the representation of cases in the Special Chambers by the KTA is an anachronism knowing the fact that now with the Law on PAK, only PAK is the responsible authority. Moreover, KTA was not successful in the representation of some court cases because intentionally or unintentionally, they have lost many cases regarding privatization, among which it is important to highlight the case of the Steel Factory in Ferizaj. In this case, the Municipal Court of Ferizaj obliges the Kosovo Government, respectively the PAK with 25,649,250 euro with an annual interest rate of 3% starting from 2002, which reaches the amount of approximately 30 million euro, compensation for salaries of workers who were forced to leave their jobs due to violent measures of Serbia taken in socially owned enterprises during the 90-s.

This action came as a consequence of not appealing against the decision of the Municipal Court of Ferizaj. C.no. 340/2001. Thus, the decision – although it breached the law – it became the final decision. Consequently, *based on the principle of justice that a final decision must be enforced*, the Constitutional Court, by considering the decision C.no. 340/2001 as *res judicata* (judged case), takes a decision which orders the enforcement of the decision of the Municipal Court in Ferizaj, C.no.340/2001²⁴. But, the question here is is the decision of the Municipal Court in Ferizaj, C.no. 340/2001 in compliance with the applicable law in Kosovo? Kosovo cannot take responsibility for the violent actions on SOEs undertaken by Serbia during the 90-s, including the forceful expulsion of workers. There are a number of existing international cases as well where a particular country does not take responsibility for the actions of another state. Germany represents one of those cases, which did not take responsibility for property claims regarding the expropriations that occurred from 1945 to 1949 as a consequence of Soviet occupation, with the justification that Germany cannot be held liable for the actions of another country²⁵. Moreover, the SOEs currently in privatization are not responsible for any kind of salaries

this court does not recognize PAK as a public legal entity and neither recognizes the Law on PAK.

²⁴See Decision of the Kosovo Constitution Court, Ref. No. AGJ 75/2010, December 17th 2010.

²⁵ See Allen, 2006-2007, p. 3; Blacksell & Bom, 2002, p. 179; Koradjava, 2004, p. 332; Preuß, 1993, p. 50

or damage compensation caused during the 90-s. The enterprises which are considered SOEs are those which had the legal status of SOEs before March 22nd 1989, respectively before the forceful abolition of the Kosovo autonomy by Serbia²⁶. Any eventual change in their legal status after 1989 is taken into consideration only if it is in compliance with the laws in power which implies the Laws of Markovic before 1989²⁷, and which do not have a discriminatory character²⁸. Whereas, any other legal status change of SOEs after 1999, respectively after the deployment of the international administration, is illegal from any institutional body, including the courts, because UNMIK, and later KTA, were the ones responsible for the administration of social and public property²⁹. Additional facts for the non-credibility of KTA for the representation of cases before the courts is also the situation that many documents were destroyed during the time of handing over the KTA functions to the PAK which puts doubts regarding the transparency of the functioning of KTA³⁰. A report of OSCE also criticizes the work of the Special Chambers because it acts in an unclear legal environment and with non-transparent procedures, and the non-bias of the judges has been questioned³¹. Hence, the approach of the Special Chamber that only KTA may represent cases before the court and the non-acceptance of the existence of Law on PAK and the PAK itself as a legal entity and a legitimate representative, is illegal in the every perspective for the political and legal circumstances in Kosovo.

The last decision of the Special Chamber which requires the establishment of an International Administration over Trepca³², shows the importance of cases before the Special Chamber and the role of this court itself in decision-making. This situation is created as a result of negligence to issue a Law on the Special Chamber, but also a special Law on Trepca, brings Trepca to a different situation than the Trepca's Moratorium. The Administrator will have the following responsibilities: 1) the reorganization of Trepca and the creation of a new enterprise, in order to create the opportunity to pay all possible debts. This would be the best method because legally the old enterprise would be closed and a new enterprise of Trepca would be created, but without any debt; 2) the privatization of Trepca with the method of privatization of public enterprises; and 3) the worst possible method – the liquidation of Trepca and the sale of its assets – with very low prices and the payment of all debts. These competencies are not under Kosovo Institutions (PAK), but on the hands of the administrator based on a

²⁶ See Regulation no. 2002/12 on the Kosovo Trust Agency, article 5.

²⁷ Law on Enterprises 1988, Official Gazette of SFRY, no. 77/1988; Law on state capital 1989 (known as the law on transformation of social enterprises), Official Gazette of SFRY, no. 84/1989

²⁸ Decision of the Special Chamber of the Supreme Court, SCC-04-0188, date 58/11/2006, p. 10.

²⁹ Decision of the Special Chambers of the Supreme Court, SCC-4-0087, DATE 15/09/2006.

³⁰ 2008-2009 PAK Report, p. 8, 15, and 16. This report features a number of evidence that privatization reports were burned and exterminated by KTA.

³¹ OSCE Report, Privatization in Kosovo: Juristically Review of Cases of the Kosovo Trust Agency by the Special Chamber of the Supreme Court, May 2008, p. 42.

³² See Special Chambers of the Supreme Court, Decision no. SCR-05-001, January 26th 2011.

decision of the Special Chamber which creates a new legal situation which is unfavorable for Kosovo.

Based on what is mentioned above, the amendment of UNMIK Regulation No. 2002/13 on the Special Chamber of the Supreme Court is an urgent matter, to bring this court functioning in compliance to the Law of the Kosovo Assembly and to respects the Kosovo Judicial System.

5. Amending the Law on PAK

Law No. 03/L-067 on the Privatization Agency of Kosovo (PAK), even though approved by the Kosovo Assembly which replaced the Regulation no. 2002/12 on KTA, did not achieve its purpose. In the Law on PAK it must be explicitly stated that the representation of privatization cases by KTA is prohibited, whereas only PAK is responsible to do so. The Law on PAK does not provide any resolution for former owners claim, besides that it is said that property ownership claims do not stop the privatization process, whereas these requests can be compensated from the privatization fund. Hence, this law, must also state that any law issued by Serbia after 1989 regarding transformation or restitution of property, is nullified until the issuance of a respective law for treating property claims for the former owners. In the PAK Law, the issue of the Privatization Fund must be clarified and create an opportunity to invest these funds in the Kosovo economy in order to generate incomes for Kosovo Budget.

6. Amending Regulation No. 2005/48 on the reorganization and liquidation of enterprises and their assets with the administrative authorization of the Kosovo Trust Agency

This regulation which presents the main legal base upon which the property and creditor's claims has to be resolved during the liquidation procedure of SOEs must be amended and converted into a Law of the Republic of Kosovo. This regulation has enough references which entitled only KTA as an authority for taking actions regarding privatization and liquidation of socially owned enterprises. Therefore, such legal basis should not be allowed where courts have the power to make important decisions on property disputes. Regulation No. 2005/48 does not provide the possibility for some enterprises to be reorganized and transformed to the public enterprises in order to clarify the status of such enterprises - property. This would be of great interest for some enterprises which are vital to the Kosovo economy, to obtain the status of a public enterprise. Therefore, privatization of these enterprises for the purposes of economic development may be carried out using the method of privatization for public enterprises, respectively by offering them through concession or public-private partnership.

7. The absence of a Law on Denationalization (restitution or compensation) of nationalized properties during communism

Having a Law on Denationalization should be considered as one of the laws to be included in the package of laws on privatization. Even though it might not be the right time for Kosovo to solve this complicated problem, it is necessary to have this law because a number of property claims have been submitted to the courts regarding the return of nationalized or expropriated properties during the communist era³³. In the liquidation process, these types of claims must be addressed as well. Hence, the lack of a clear legal basis may allow for the implementation of law in different ways for the same cases. Moreover, the fact that the Laws of Serbia issued after 1990 related to return of properties are not yet nullified, there is a risk of implementing such laws by courts, when such an event has already happened in practice. In this way, the law on denationalization is necessary for transparency in the liquidation procedure of SOEs and the resolution of property conflicts of this nature, in the same way for all citizens.

There is no international act in power which forces countries to return the properties nationalized during the communist era. Moreover, not even the practice of the European Court on Human Rights could force countries to return nationalized properties due to the fact that European Convention on Human Rights, respectively Protocol 1, article 1, does not have a retroactive force in the time when the nationalization of properties happened, because these countries were not signatories of this Convention³⁴. Even though the resolution of property conflicts related to the properties of the former owners has been one of the challenges of privatization and a fear that the privatization process could be stopped³⁵, all the post-communist countries have dealt with the resolution of this problem as a necessity to clarify all property rights as a precondition for a free market but also for the creation of a social justice. In Kosovo, the situation is different than in other countries when it comes to this problem. As mentioned above Serbian laws for the return of properties (denationalization) are not yet nullified. As a result of this legal deficiency, in Kosovo, there are plenty of cases where one category of citizens (the majority of Serb nationality before 1999 but not excluding the others) by using these laws, have managed to return the properties taken from them during the communism era. Moreover, these properties are now being sold in the marketplace. This category includes the return of agricultural properties and apartments. Hence, there is also the other category of citizens who have not managed to use these laws as a basis for returning their properties. If within one country there are legal basis upon which some citizens exercise the right for return of properties,

³³. See among others Proceeding of the Special Chambers, no. SCC-04-0112, date 11/10/2007. In this case, the party has requested the return of the expropriated property in the year 1959.

³⁴See among other cases, *Gratzinger v. Czech Republic*, App. No. 39794/98, *Szechenyj v. Hungary*, App. No. 21344/93; *Gelusek v. Hungary*, App. 23318/94; *Polacek v. Czech Republic*, App. No. 38645/97; *Prezoldova v. Czech Republic*, App. No. 28390/95.

³⁵See, Brus, 1993, p. 47-48; Gelpem, 1993-1994, p. 322.

whereas the other part of citizens does not cherish this right, this represents a breach of article 14, article 1 of Protocol 1, and article 1 of Protocol 12 of ECHR which ensure the protection of property and an equal treatment for all citizens before the law³⁶. In the other hand, in the absence of a clear legal basis it can be assumed that regular domestic courts (municipal courts), including the Special Chamber will continue to use these laws as a basis for the resolution of conflicts of this nature. Besides the fact that the treatment of restitution is a request for respecting the equal right of citizens before the law, the issue of restitution treatment is an obligation which derives from the Comprehensive Ahtisaari Plan³⁷.

Kosovo should not allow that the return of properties to be resolved in a fast way, so that by using legal loopholes to allow the use of laws which are in conflict with the laws on privatization, respectively the Regulation on KTA and later the Law on PAK. This legal situation allows kind of **spontaneous restitution** which other post-communist countries have avoided by creating a centralized system through a Strategic Plan for return of properties, respectively compensation and issuing respective laws³⁸. Why do we say this? Kosovo needs to draft a Plan for the method of treating the return of properties in the same way for all citizens. Kosovo needs to take a political and legal stance as to how should these properties be returned, in what amount may they be compensated, on what legal basis of the ex-communist system may the owners be called upon for the return of properties, etc.

One argument of fear for treating the cases dealing with return of properties without clear legal basis are cases before the PAK and the Special Chamber. The questions is, what kind of approach will the court take if one owner claims that they posses property documents (ownership document or patent) for an SOE or a part of it but that was nationalized during the communism era. How will this case be resolved? All the post-communist countries did not allow the return of properties to former owners if the property was in use for the public interest or it was sold to a third party in confidence (bona fide transactions), but which have created an opportunity

³⁶ European Convention on the Protection of Human Rights, article 14 says: “Cherishing of the rights and freedoms known in this Convention must be ensured, without any difference based on reasons such as sex, race, color, language, religion, political or any other opinions, national or social origin, ethnic minority status, wealth, birth or any other situation”. Whereas Protocol 12, article 1, says: “Cherishing of the rights and freedoms known in this Convention must be ensured, without any difference based on reasons such as sex, race, color, language, religion, political or any other opinions, national or social origin, ethnic minority status, wealth, birth or any other situation”.

³⁷ See Comprehensive Plan for the Resolution of the Kosovo Status, March 26th 2007, Annex 7, article 6.

³⁸ See for example: Law on denationalization of the Republic of Macedonia, Official Gazzette, no. 20/89 and no. 43/2000; Croatian Law on the compensation of properties taken during the communist Yugoslavia, Official Gazzette, no. 92/1996; Slovenian Law on Denationalization, Official Gazzette, no. 27/1991; Germany Law on the resolution of property conflicts, approved on April 18th 1991; Czech laws, the so called Law on small restitution (Law on Mitigation of the Consequences of Certain Property Losses, No. 403/1990, dated October 2nd 1990 amended by Law No. 458/1990 dated October 30th 1990 and entered into force on November 1st 1990) and Law on Extrajudicial Rehabilitation No. 87/1991, February 22nd 1991, the so called Law on Wide Restitution, etc.

to provide compensation with another property or compensation in monetary value³⁹. This is allowed within the European Convention on Human Rights, Protocol 1, article 1, because when the public interests are in question, the countries have the right to interfere in private property. The evaluation of public needs in the circumstances of economic reforms is pretty wide within the so-called *margin of appreciation*.⁴⁰ Moreover, the compensation model as well differs in post-communist countries and does not have a unique approach. Every country has determined a compensation scale by having in mind the needs and public interest. For example, Hungary did not allow the return of the same property, but only limit compensation. A question may arise as to how the court could decide regarding the claimers in the property of Trepca or other SOEs if eventually an owner shows property rights documents on Trepca or other SOEs. According to the Law on PAK if it was determined that there is no return of property but only compensation, the question arises as to how much the compensation will be, does it include the full market value or a limited value considering the budgetary possibilities of Kosovo? Hence, Kosovo requires a new legal infrastructure upon the basis of which such conflicts can be resolved. This would prevent the issuing of decisions which do not take into consideration the public purpose and national interest of a country.

³⁹See Tucker-Mohl, 2005, p. 18-17; Sinn, 1992, p. 2, Law on denationalization of the Republic of Macedonia, Official Gazette, no. 20/98 and no. 43/2000, article 10-11; Croatian Law on the compensation of properties taken during the communist Yugoslavia, Official Gazette, no. 92/1996, article 1 paragraphs 3 and 4 and article 52-56; Slovenian Law on Denationalization, Official Gazette, no. 27/1991, articles 19 and 20.

⁴⁰ See ECtHR, *James v. United Kingdom*, App. No. 8793/79, judgment of 21 February 1986, par. 46.

Summary

1. In the privatization process in Kosovo there is a legal conflict as a consequence of which, the courts can rely on different legal basis when taking a decision. In this direction, the Special Chamber of the Supreme Court does not respect the judicial system in Kosovo.
2. The rejection of PAK to represent cases before the Special Chamber, denies the right of the Kosovo Institutions to defend the economic-property interest in court cases related to privatization.
3. For some enterprises of vital interest to Kosovo, the Kosovo Institutions-PAK does not possess any power of decision-making anymore because such cases are in court procedure in the Special Chamber. The right of Kosovo is protected only through the fair representation before the court, a right which currently is too narrowed or denied due to the fact that PAK is deprecated from representation.
4. In Kosovo, there is lack of a legal base that some SOEs with a vital interest for Kosovo to be transformed and converted into public enterprises, whereas their privatization may be done through a model of privatization of publicly owned enterprises, respectively by public-private partnership.
5. The unclear legal base and the non-abrogation of the Serbia Laws issued after 1989 related to the transformation of property (privatization), has created a legal loophole for these laws to be used for the return of properties (agricultural properties and apartments) to a considerable number of former owners, the properties of which had been nationalized during the communist era. For the treatment of these cases there is no legal basis issued by the Assembly of the Republic of Kosovo.

Recommendations:

1. UNMIK Regulation No. 2002/13 for the establishment of the Special Chamber of the Supreme Court needs to be amended and converted into a Law of the Kosovo Assembly. The Special Chamber is formally considered a part of the Supreme Court, even though it never reports to it. With the issuing of the new law this court must be obligated to report for its work to the Kosovo Supreme Court, in order to create a uniform judicial practice in Kosovo.
2. Amending the Law No. 03/L-067 on the Privatization Agency of Kosovo, and its harmonization with the New Law on the Special Chamber. Likewise, with the amendment of this Law it must be clarified that any legal basis for the return of properties nationalized during the communist era is nullified until the issuance of a Law on denationalization (return or

compensation) of properties to former owners. With the amendment of this law the status of the Privatization Fund and the possibility of investing it in the Kosovo economy must also be clarified.

3. Amending the Regulation No. 2005/48 on the reorganization and liquidation of enterprises and their assets with the administrative authorization of the Kosovo Trust Agency. By this law only PAK should be responsible for reorganization or liquidation of SOEs avoiding the possibility that KTA to be considered responsible. Likewise, this law must also foresee the reorganization of some SOEs with a vital interest to Kosovo (especially Trepca); first to be transformed into public enterprises to clarify enterprises property, whereas privatization may be through the privatization method for public enterprises, respectively through concession or public-private partnership.

4. The issuance of Law on denationalization (return or compensation) of properties to former owners. With this law, a stance must be taken as to how it should be dealt with property claims of this nature which are currently in procedure in PAK and in the Special Chamber. The best solution for these cases is compensation by using the Privatization Fund. Whereas, the compensation amount must be reasonable by having in mind the budgetary possibilities of Kosovo.

5. The Kosovo Judicial Council must exercise control and take measures in accordance with the law, related to decisions of domestic courts which have implemented the laws of Serbia issued after 1990 related to the return of properties even though the only legal base for privatization was the Law on KTA and later on the Law on PAK.

References

- Allen, Tom Restitution and transitional justice in European Court of Human Rights, *Columbia Journal of European Law*, Vol. 13, 2006-2007, pp. 1- 46
- Bennett, John, Estrin, Saul, Maw, James & Urga, Giovanni Privatization methods and economic growth, CEPR, Discussions Papers 4291, 2004
- Blacksell, Mark & Born, Karl Martin Private property restitution: the geographical consequences of official government policies in Central and Eastern Europe, *The Geographic Journal*, Vol. 168, No. 2, June, 2002, pp. 178-190
- Brus, Wlodzimierz Privatization in the transition process-recent experiences in Eastern Europe: General problems of privatization in the process of transformation of the post-communist economies, United Nation Publication, UNCTAD/GID/7, Geneva, November 1993, pp. 47-60
- Gelpern, Anna The laws and politics of reprivatization in East-Central Europe: A comparison, *U. Pa. J. Int'l Bus. L.*, Vol. 14. No. 3, 1993-1994, pp. 315-372
- Gordon, David Privatization in Eastern Europe: The Polish experience, *Law & Policy in International Business*, Vol. 25, 1993-1994, pp. 517-564
- Hanley, Eric & Treiman, Donald J. Did the transformation to post-communism in Eastern Europe restore pre-communist property relations? *European Sociological Review*, Vol. 20, No. 3, July 2004, pp. 237-252
- Havrylyshyn, Oleh Fifteen Years of Transformation in the Post-Communist World: Rapid Reformers Outperformed Gradualists, in: *Center For Global Liberty & Prosperity-Development Policy Analysis*, No. 4, 2007
- Heller, Michael & Serkin, Christopher Review: Revaluating Restitution: From Talmud to Post-Socialism, *Michigan Law Review*, Vol. 97, No. 6, 1999, pp. 1385-1412

- Jessel-Holst, Christa The revival of human rights and the reform of private law in post-communist Eastern European States, *Tel Aviv U. Stud. L.*, Vol. 12, 1994, pp. 127-144
- Karadjova, Mariana Property restitution in Eastern Europe: Domestic and International Human Rights Responses, *Review of Central and East European Law* 2004, No. 3, pp. 325-363
- Kornai, János Ten years after “The Road to a Free Economy”: The author's self-evaluation, Paper for World Bank “Annual Bank Conference on Development Economics-ABCDE”, Washington, D. C, April 18-20, 2000
- Kušić, Siniša Path-Dependency in the Process of Privatization, *The impact of privatization*, Frankfurt 2005
- Megginson, William L. & Netter, Jeffrey M. History and methods of privatization, in: David Parker & David Saal (eds.), *International Handbook on Privatization*, Cheltenham 2003, pp. 25-40
- Neff, Michael L. Eastern Europe’s Policy of Restitution of Property in the 1990s, *Dickinson Journal of the International Law*, Winter 1992, pp. 357-381
- Pitelis, Christos & Clarke, Thomas The political economy of privatization, London 1993
- Preuß, Ulrich K. Restitution and privatization of property in the former GDR- The German case and some historical precedents, in: Frank Bönker & Ulrich K. Preuß (eds.), *Efficiency and Justice of Property Restitution in East Europe*, 1993, Bremen: Center for European Law and Policy (ZERP), pp. 47-72
- Ramamurti, Ravi A. Multilevel model of privatization in Emerging Economies, *The Academy of Management Review*, Vol. 25, No. 3, 2000, pp. 525-550
- Roland, Gérard & Verdier, Thierry Privatization in Eastern Europe, Irreversibility and critical mass effects, *Journal of Public Economics* 54 (1994), pp. 161-183
- Sinn, Hans-Werner Privatization in East Germany, Working Paper No. 3998, in: National Bureau of Economic Research - NBER, Cambridge, February 1992

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Privatization in the transition process-recent experiences in Eastern Europe: Reforms and Crisis in the transition Economies, United Nation Publication, UNCTAD/GID/7, Geneva, November 1993, pp. 3-24

Legal Acts

- European Convention on the Protection of Rights and Fundamental Freedoms of Humans, open for signing on November 4th 1950, Europe. T.S. No. 5, 213 U.N.T.S. 221.
- The Kosovo Declaration of Independence, February 17th 2008
- The Constitution of the Republic of Kosovo, approved on April 9th 2008, entered into force on June 15th 2008
- Law No. 03/1 - 067 on the Kosovo Privatization Agency, approved on 21.05.2008
- Law on conflict procedure, No. 03/L-006
- Regulation No. 1999/1 on the authorizations of the temporary administration in Kosovo
- UNMIK Regulation No. 1999/24 on the law in power in Kosovo
- UNMIK Regulation No. 2002/12 on the Establishment of the Kosovo Trust Agency, amended with UNMIK Regulation No. 2005/18
- UNMIK Regulation No. 2002/13 on the Establishment of the Special Chambers of the Supreme Court
- UNMIK Regulation No. 2005/48 on the reorganization and liquidation of enterprises and their assets with the administrative authorization of the Kosovo Trust Agency

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