

**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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## 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 exhibits several distinctive features which set it apart from other countries with a communist past. It is important to note that privatization in post-communist countries has proceeded as a necessity due to the failure of the socialist system based on arguments that state/social enterprises were not productive, respectively unable to fulfill social requirements.<sup>1</sup>

With the fall of the Berlin Wall which represents the collapse of communism and the concept of socialist economy,<sup>2</sup> it was clear that the economic system of former communist countries had to move towards a free market economy, whereas the immediate privatization of state/social property<sup>3</sup> 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 economies towards free market economies was considered to be the only way to avoid an economic crisis.<sup>4</sup> In this context, privatization as a concept represents a state-organized legal process through which the state/social property is transformed, or rather transferred into private hands aimed at achieving more productivity, efficiency and competitiveness in order to fulfill social needs (necessary services, manu-

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<sup>1</sup> Pitelis, Christos/Clarke, Thomas, *The political economy of privatization*, (London, 1993), 1; Roland, Gérard/Verdier, Thierry, 'Privatization in Eastern Europe, Irreversibility and critical mass effects', [1994] 54, *Journal of Public Economics*, 161-183; Pavlinek, Peter, "Domestic Privatization and its Effects on Industrial Enterprises in East-Central Europe: The Evidence from the Czech Motor Component Industry", (2002), *Europe-Asia Studies*, Vol. 54, No. 7, 1127.

<sup>2</sup> See among others Ramamurt, Ravi A., "Multilevel model of privatization in Emerging Economies", *The Academy of Management Review*, [2000] Vol. 25, No. 3, 525, 532; 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, 2.

<sup>3</sup> See among others Roland/Verdier (op. cit. 1), 161.

<sup>4</sup> Gordon, David, 'Privatization in Eastern Europe: The Polish experience', *Law & Policy in International Business*, (1993-1994), Vol. 25, 517, 517; Yilmaz, Akyuz, *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), 3, 6; Kušić, Siniša, *Path-Dependency in the Process of Privatization, The impact of privatization*, (Frankfurt, 2005), 13.

facturing, infrastructure, increase of taxes for the state, increase of the quality and quantity of products and services etc.).

What are the difficulties and dilemmas involved in the privatization process? Post-communist countries featured many dilemmas and difficulties regarding the method as to how the privatization process should be implemented. No unique model applied, thus every country has followed different methods and models of privatization adjusted to the economic, legal and social circumstances and particularities of each country. The following models of privatization have been considered: (1) issuing shares to enterprise workers (internal privatization), (2) distributing shares to all adult citizens (the voucher system), (3) selling shares to strategic investors (domestic or foreign), as well as (4) returning property to former owners, whose property was nationalized without compensation during communism.<sup>5</sup> Among these methods, the most important and productive towards economic development is the method of sale of shares to investors for the sole reason that it adds new capital and new experiences to enterprises, and moreover the holder of the enterprise can be clearly defined which also influences to a great part the decision-making process of business operations.<sup>6</sup> This model, derived from the experience gathered in other countries, currently is implemented in Kosovo. However, while in other countries the difficulties accompanying the privatization process have been subject to various debates and eventually a social consensus was reached, such a process did not take place in Kosovo due to diverse political events regarding its future and the determination of its political status which have also covered economic matters, including privatization. Nevertheless, it must be noted that in all privatization models, the main conditions for the successful privatization are considered to be: *a clear legal basis, justice, transparency, competition and social consensus*.

The questions this article is dwelling on are the difficulties with regard to the privatization process in Kosovo. The focus will be on a number of particularities and difficulties inherent to the process in Kosovo, including the legal conflict which represents a major challenge to 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 into a number of difficulties during the process which can be subsumed to three main reasons:

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

All of the above circumstances have been reflected into challenges 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 described below.

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<sup>5</sup> Bennett, John/Estrin, Saul et. al. 'Privatization methods and economic growth', *CEPR*, Discussions Papers 4291, 2004, 3.

<sup>6</sup> See Kornai, János, 'Ten years after "The Road to a Free Economy": The author's self-evaluation', in: *Paper for World Bank "Annual Bank Conference on Development Economics-ABCDE"*, (Washington, D. C, April 18-20, 2000), 6-8.

## 2.1 Leading the Privatization Process

The privatization process has been headed by the KTA, with representatives from local institutions being involved. However, UNMIK had the final decision-making power, because the decisive vote was the one of the deputy of SRSG, as chairman of the KTA board.<sup>7</sup> This constitutes a specific in so far as an international institution has led and determined the policies of the privatization process. On the one hand, it is a positive aspect of the privatization because the support of international experts was necessary for post-communist countries, including Kosovo, since they did not possess such expertise 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 as well as the process and decision-making in privatization. This nature of dualism of institutions in decision-making has led to poor decision-taking in the privatization process with purposes only harmonizing the approaches of different institutions. The current debate revolves around the Privatization Fund itself which is not part of the economic development of Kosovo.<sup>8</sup> However, due to property rights disputes, this model allows to provide funds as security for the compensation of the legitimate owners or creditor's claims as required under the European Convention on Human Rights (ECHR), Protocol 1, Article 1, and to continue the process of privatization as a necessity for a developing economy.<sup>9</sup>

## 2.2. Unclear Legal Bases

According to UNMIK Regulation 1999/24, the applicable laws in Kosovo are determined as follows: Laws in force until March 22<sup>nd</sup> 1989, respectively before the privation of autonomy of Kosovo by Serbian military forces, UNMIK Regulations, and Laws of the Kosovo Assembly. Whereas, the laws issued after 1989 were considered to be applicable, only if there were legal loopholes and if the laws were not of discriminatory character.<sup>10</sup> One of the main deficiencies is the lack of determining which laws in force after March 22<sup>nd</sup> 1989

<sup>7</sup> SRSG was the Special Representative of the Secretary General (SRSG) of the United Nation who has led the United Nations Interim Administration Mission in Kosovo (UNMIK).

<sup>8</sup> The money allocated in this fund is not part of the monetary circulation in the Kosovar economy, rather it is an isolated fund, which was founded and intended to serve the 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 the resolution of property conflicts and as such still remains an isolated Fund and it is not used for economic development.

<sup>9</sup> According to the European Convention on the Human Rights (ECHR), Protocol 1, Article 1, it is required to create the necessary funds for compensation of the owners or creditors if through state action their property has been taken for public purposes. Privatization is considered as a public purpose and specific form of expropriation when the privatized property may be subject to property disputes. Therefore, Kosovo is in compliance to the requirements arising from ECHR since the Fund cannot be spent until property disputes are resolved.

<sup>10</sup> See UNMIK Regulation No. 1999/24 for the applicable law in Kosovo, amended by 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 22<sup>nd</sup> 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 22<sup>nd</sup> 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.

should be excluded from application and which should continue to be applicable as well as which laws do not exhibit a discriminatory character.<sup>11</sup> The lack of such clarification unfortunately created the opportunity for a number of laws issued after 1989 to be applied in practice. With the placement of Kosovo under UNMIK administration, based on Regulation No. 1999/1 on the temporary administration of Kosovo, UNMIK was responsible for the administration of public and state/social properties of Kosovo.<sup>12</sup> Regardless of this fact, many state/social 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 property.<sup>13</sup>

### 2.3 Property Disputes

The privatization process in Kosovo is also characterized by the phenomenon of property disputes concerning privatized enterprises or those currently undergoing a privatization process. Social enterprises were subject to forced transformation process by Serbia during the 90-s. In this regard, many property claims related to this forced transformation were submitted to the Special Chamber of the Supreme Court.<sup>14</sup> Besides this category, there are similar claims from former owners, whose property was taken away by means of 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 and on KTA as well as later on the Law on PAK, property claims cannot hinder the privatization process, and there will be no returns of property, rather the proceeds from the sales will be stored in the trust fund;<sup>15</sup> these requests may nevertheless be subject to review during the liquidation process of PAK and in the end of the court itself – Special Chamber of the Supreme Court. Hence, the unclear legal basis will present serious challenges to the resolution of these conflicts.

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<sup>11</sup> 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 18<sup>th</sup> 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 20<sup>th</sup> 1991).

<sup>12</sup> 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”.

<sup>13</sup> 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 the law on obligation many contracts through which property was taken during the communist regime are declared invalid and property has been returned to the former owner.

<sup>14</sup> The Special Chamber of the Supreme Court is a special court responsible to deal with privatization matters. This court is established by UNMIK Regulation, No. 2002/13.

<sup>15</sup> 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.

### 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 17<sup>th</sup> 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 15<sup>th</sup> 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 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 PAK.<sup>16</sup> 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 Chamber 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 Regulation.<sup>17</sup> As a consequence of this opinion, the Special Chamber recognizes only KTA as the responsible agency for final decisions and representation of cases before 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 power.<sup>18</sup>

Such a stance of the Special Chamber is a breach of the law in Kosovo and violates the Constitution of Kosovo as well as the Comprehensive Ahtisaari Plan.<sup>19</sup> Moreover, the Kosovo Constitutional Court concluded that the Special Chamber with its actions does not

<sup>16</sup> 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.'

<sup>17</sup> UNMIK/RREG/2008/4- Clarification, 12 November 2009.

<sup>18</sup> See Decision of the Special Chamber 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 9<sup>th</sup> 2010, page 4. Based on this decision, the court expresses the same approach by ignoring the enforcement of the Law on PAK.

<sup>19</sup> 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 4<sup>th</sup> 2010, paragraphs 53-57.

recognize the Law issued by the Kosovo Assembly, which represents a breach of the Constitution, and continues to ignore the existence of Kosovo as a state.<sup>20</sup> In the meantime, the Opinion of the International Court of Justice (ICJ) has confirmed that the declaration of Kosovo's independence has been issued in full harmony with the International Law and it is not in conflict with the UN Resolution 1244.<sup>21</sup>

Under the domestic law of Kosovo, the denial of PAK as a full legal entity and as a party to a procedure is a breach of procedural rules related to the fair representation of a party in civil law procedure,<sup>22</sup> but also a breach of constitutional rules related to a fair trial.<sup>23</sup> Moreover, such decision of the Special Chamber 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 procedure.<sup>24</sup> 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 Chamber 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 could 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 the 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 it has never been acted upon.

This problem has been emphasized regularly even in the PAK reports to the Kosovo Assembly.<sup>25</sup> In these reports, PAK has pointed out the difficulties ahead with regard to the Special Chamber concerning, representation in privatization cases. It seems that the relevant institutions have misunderstood the situation by thinking that with the Law on Courts of the year 2010, the problem of courts and the Special Chamber could be resolved, often using the justification that "we do not need a law for the Special Chamber which is a

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<sup>20</sup> 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.'

<sup>21</sup> *Ibid.*

<sup>22</sup> Law 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'.

<sup>23</sup> See Constitution of the Republic of Kosovo, Article 31.

<sup>24</sup> For more, see European Convention on Human Rights, Article 6.

<sup>25</sup> See 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 Chamber and the fact that this court does not recognize PAK as a public legal entity and neither recognizes the Law on PAK.

UNMIK body”. The competencies of the Special Chamber can be amended only through a special law exclusively for this court, respectively by amending the UNMIK Regulation No. 2002/13.

Ignoring the actions of this court can have enormous negative consequences. It is worth mentioning the importance of the case of Trepca<sup>26</sup> and the Privatization Fund. The entire Privatization Fund should be addressed by 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 Chamber by the KTA is an anachronism knowing the fact that with the Law on PAK, the sole responsible authority is PAK. 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, to pay 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 – became final. 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), ordered the enforcement of the decision of the Municipal Court in Ferizaj, C.no.340/2001.<sup>27</sup> However, the question here is if the decision of the Municipal Court in Ferizaj, C.no. 340/2001 is in compliance with the applicable law in Kosovo? Kosovo cannot take responsibility for the violent actions in SOEs carried out by Serbia during the 90-s, including the forceful expulsion of workers. There are a number of existing international cases as well where it has been established that a particular country does not take responsibility for the actions of another state. Germany represents one of these cases; Germany did not take responsibility for property claims regarding the expropriations that occurred between 1945 and 1949 as a consequence of the Soviet occupation, the justification being that Germany cannot be held liable for the actions of another country.<sup>28</sup> Moreover, the SOEs currently in privatization are not responsible for compensating any kind of salaries or damage caused during the 90-s. The enterprises which are considered SOEs are those which had the legal status of SOEs before March 22<sup>nd</sup> 1989, respectively before the privation of autonomy of Kosovo by Serbian military forces<sup>29</sup> Any eventual change in their legal status after 1989 is taken into consideration only if it is in compliance with the laws in

<sup>26</sup> The Trepca Enterprise is the main mine and mineral enterprise in Kosovo. The case of Trepca is submitted to the court (Special Chambers) based on the requests of some supposed owners and creditors.

<sup>27</sup> See Decision of the Kosovo Constitutional Court, Ref. No. AGJ 75/2010, December 17th 2010.

<sup>28</sup> See Allen, Tom, ‘Restitution and transitional justice in European Court of Human Rights’, [2006-2007], Vol. 13, *Columbia Journal of European Law*, 1, 3; Blacksell, Mark/Bom, 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, 178, 179; Koradjava, Mariana, ‘Property restitution in Eastern Europe: Domestic and International Human Rights Responses’, [2004] *Review of Central and East European Law*, No. 3, 325, 332; Preuß, Ulrich K., ‘Restitution and privatization of property in the former GDR- The German case and some historical precedents’, in: Bönker, Frank/ Preuß, Ulrich K. (eds.), *Efficiency and Justice of Property Restitution in East Europe*, (Center for European Law and Policy (ZERP), Bremen, 1993), 47, 50.

<sup>29</sup> See Regulation no. 2002/12 on the Kosovo Trust Agency, article 5.

power which implies the Laws of Markovic before 1989,<sup>30</sup> and which do not have a discriminatory character.<sup>31</sup> Whereas, any other legal status change of SOEs as well as any other institutional body including the courts after 1999, respectively after the setting up of the international administration, is illegal, because UNMIK, and later KTA, were the ones responsible for the administration of social and public property.<sup>32</sup> Additionally a reason for the non-credibility of KTA for the representation of cases before the courts is also the fact 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 KTA.<sup>33</sup> A report of OSCE also criticizes the work of the Special Chamber because it acts in an unclear legal environment and with non-transparent procedures, the impartiality of the judges has been questioned as well.<sup>34</sup> 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 every perspective of political and legal circumstances in Kosovo.

The last decision of the Special Chamber which requires the establishment of an International Administration for Trepca,<sup>35</sup> shows the importance of cases before the Special Chamber and the role of this court in decision-making. This situation is created as a result of negligence to the issues concerning the Law on the Special Chambers, but also a special Law on Trepca would bring Trepca to a different situation than it is currently the case through 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;<sup>36</sup> and 3) the worst possible method – the liquidation of Trepca and the sale of its assets – to a very low price- and the payment of all debts. These competencies are not under Kosovo Institutions (PAK), but lie in the hands of the administrator based on a decision of the Special Chamber which creates a new legal situation which is unfavorable for the Kosovar economy.

Based on what has been mentioned above, amending the UNMIK Regulation No. 2002/13 on the Special Chamber of the Supreme Court is an urgent matter in order to enable the court to exercise its competencies in compliance with the Law of the Kosovo Assembly and with respect to the Kosovar Judicial System.

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<sup>30</sup> 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

<sup>31</sup> Decision of the Special Chamber of the Supreme Court, SCC-04-0188, date 58/11/2006, p. 10.

<sup>32</sup> Decision of the Special Chamber of the Supreme Court, SCC-4-0087, date 15/09/2006.

<sup>33</sup> 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.

<sup>34</sup> 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.

<sup>35</sup> See Special Chamber of the Supreme Court, Decision no. SCR-05-001, January 26th 2011.

<sup>36</sup> Privatization of the Public Owned Enterprises POE (such as Electricity, Post-Telekom, Airport etc) is responsibility of the Government and not of the Privatization Agency. The privatization model is based on the sale of shares to the investors.

## **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 eligible to represent such cases. The Law on PAK does not provide any provision for claims introduced by former owners, besides it states that property ownership claims do not hinder the privatization process, however, allowing for compensation out of the privatization fund in such cases. 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 considering property claims of former owners. In the PAK Law, the issue of the Privatization Fund must be clarified and must create an opportunity to invest these funds in Kosovar economy in order to generate incomes for the 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 represents the main legal basis upon which property and creditor claims have to be resolved during the liquidation procedure of SOEs must be amended and converted into a Law of the Republic of Kosovo in order to create a unique legal framework. This regulation has enough references which entitled only KTA as an authority to take action regarding privatization and liquidation of SOEs which is contrary to the PAK law. Therefore, such legal basis should not be allowed where courts have the power to make important decisions on property disputes using different legal bases. Regulation No. 2005/48 does not provide the possibility for some enterprises to be reorganized and transformed to public enterprises in order to clarify the status of such enterprises and relevant property even though obtaining the status of public enterprise would be of great interest to some enterprises which are vital to the Kosovar economy. Therefore, privatization of these enterprises for the purposes of economic development may be carried out using the method of privatization for public enterprises, by process of 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 era.<sup>37</sup> In the liquidation process, these types of claims must be addressed as well. Hence, the lack of a clear legal basis may allow for a

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<sup>37</sup> 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.

different implementation of laws in similar cases. Moreover, the fact that the Laws of Serbia issued after 1990 related to the restitution of properties are not yet nullified, there is a risk of implementing such laws by courts, given that such an event has already happened in practice. Thus, 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 the European Convention on Human Rights, respectively Protocol 1, Article 1, does not have a retroactive force to the time when the nationalization of properties happened, because these countries were not signatories to the Convention.<sup>38</sup> Even though the resolution of property conflicts related to the properties of the former owners has been one of the challenges of privatization and disregarding the fear that the privatization process could be hindered by these processes,<sup>39</sup> 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 restitution 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 after 1999) by using these laws, have managed to receive back the properties taken away from them during the communist era. Moreover, these properties are now being sold on the marketplace. This category includes the return of agricultural properties and apartments. However, there is also the other category of citizens who have not managed to use these laws as a basis for restitution of their properties. If within one country there are legal provisions upon which some citizens exercise the right for the restitution of properties, whereas the other part of citizens is not able to exercise 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 of all citizens before the law.<sup>40</sup> On 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-

<sup>38</sup> See 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.

<sup>39</sup> See Brus, Włodzimierz, *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), 47-60, 47f.; Gelpem, Anna, 'The laws and politics of reprivatization in East-Central Europe: A comparison', [1993-1994], Vol. 14, *U. Pa. J. Int'l Bus. L.*, No. 3, 315, 322.

<sup>40</sup> 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'.

ity of citizens before the law, the issue of restitution treatment is an obligation which derives from the Comprehensive Ahtisaari Plan.<sup>41</sup>

Kosovo should not allow the restitution of properties to be resolved in a fast way, thus facilitating the use of legal loopholes and allowing for 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 for **spontaneous restitution** which other post-communist countries have avoided by creating a centralized system through a Strategic Plan for the restitution of properties, namely compensation and by issuing relevant laws.<sup>42</sup> Why is it important to mention this in the case of Kosovo? Because Kosovo needs to draft a Plan for the method to be used with regard to the restitution of properties thereby treating all citizens equally. Kosovo needs to take a political and legal stance as to how these properties should be returned, up to which amount they may be compensated, on what legal basis of the ex-communist system may the owners be called upon for the restitution of properties, etc.

One argument explaining the fear of treating cases of property restitution are the current 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 possess 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 have created an opportunity to provide compensation with another property or compensation in monetary value.<sup>43</sup> This is allowed within the European Convention on Human Rights, Protocol 1, Article 1, because when public interests are endangered, countries have the right to interfere in private property. The evaluation of public needs in the circumstances of economic reforms is very broad within the so-called *margin of appreciation*.<sup>44</sup> Moreover, the compensation model differs in post-communist countries and does not have a unique approach. Every country has determined a compensation scale by having in mind public needs and public interest. For example, Hungary did not allow the return of the same property, but only limited compensation. A question may arise as to how the court could decide regarding the claimants in the case of Trepca or other SOEs if eventually an owner demonstrates property rights documents on Trepca or other SOEs. According to the Law on PAK, if it is

<sup>41</sup> See Comprehensive Plan for the Resolution of the Kosovo Status, March 26<sup>th</sup> 2007, Annex 7, article 6.

<sup>42</sup> See for example: Law on denationalization of the Republic of Macedonia, Official Gazette, no. 20/89 and no. 43/2000; Croatian Law on the compensation of properties taken during the communist Yugoslavia, Official Gazette, no. 92/1996; Slovenian Law on Denationalization, Official Gazette, no. 27/1991; Germany Law on the resolution of property conflicts, approved on April 18<sup>th</sup> 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 2<sup>nd</sup> 1990 amended by Law No. 458/1990 dated October 30<sup>th</sup> 1990 and entered into force on November 1<sup>st</sup> 1990) and Law on Extrajudicial Rehabilitation No. 87/1991, February 22<sup>nd</sup> 1991, the so called Law on Wide Restitution, etc.

<sup>43</sup> See *Tucker-Mohl Jessica*, Property rights and transitional justice: Restitution in Hungary and East Germany, in: Annette Kim (ed.), *Property Rights Under Transition*, (2005), 1-21, available at <http://ocw.mit.edu/courses/urban-studies-and-planning/11-467j-property-rights-in-transition-spring-2005/projects/jtucker-mohlfinal.pdf>; Sinn, Hans-Werner, 'Privatization in East Germany', Working Paper No. 3998, in: *National Bureau of Economic Research – NBER*, (Cambridge, February 1992), 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.

<sup>44</sup> See ECtHR, *James v. United Kingdom*, App. No. 8793/79, judgment of 21 February 1986, par. 46.

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. Furthermore, clear legal bases will prevent discrimination and avoid issuing different decision for similar cases.

### **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 bases when taking a decision. In this regard, the Special Chamber of the Supreme Court does not respect the judicial system of Kosovo.
2. The rejection of PAK to represent cases before the Special Chambers, denies the right of the Kosovar Institutions to defend the economic-property interests in court cases related to privatization.
3. For some enterprises of vital interest to Kosovo, PAK does not possess any power of decision-making anymore because cases are currently 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 deprived from its right of representation.
4. In Kosovo, a legal basis allowing some SOEs with a vital interest for Kosovo to be transformed and converted into public enterprises is missing, whereas their privatization may be carried out through a model of privatization of publicly owned enterprises, through method of sale of shares to investors.
5. The unclear legal basis and the non-abrogation of the Serbian Laws issued after 1989 regarding the transformation of property (privatization), has created a legal loophole allowing for these laws to be used for restitution of property (agricultural properties and apartments) to a considerable number of former owners, whose properties have 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 obliged to report on its work to the Kosovo Supreme Court and the Kosovo Judicial Council, 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 (restitution 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 Kosovar 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 the reorganization or liquidation of SOEs avoiding the possibility of KTA to be considered responsible. Likewise, this law must also foresee the reorganization of some SOEs of vital interest to Kosovo (especially Trepca); first with the possibility to be transformed into public enterprises in order to clarify the property of the enterprise, whereas privatization may be carried out through the privatization method for public enterprises.

4. The issuance of a law on denationalization (restitution 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 in a different manner particularly laws issued after 1990 related to the restitution of properties even though the only legal basis for privatization was the Law on KTA and later on the Law on PAK.