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ANA DHAMO

\, Albania

BRIKENA DHULI

\, Albania

RECOURSE TO THE CONSTITUTIONAL COURT BASED ON THE CONSTITUTION OF THE REPUBLIC OF ALBANIA

Abstract:

In this paper we will discuss the recourse to the Constitutional Court of the Republic of Albania. In Albania, the Constitutional Court operates in several different ways: with the request of the President of the Republic, the Prime Minister, not less than one-fifth of the MPs, ombudsman, Chairman of the High State Control, any district courts, each commissioner established by law for the protection of fundamental rights and freedom, guaranteed by the Constitution, High Council of Judges and High Council of Prosecution, Local state bodies, Religious institutions, political parties, NGOs, individuals. The attention in this paper focuses on the new constitutional changes regarding the recourse to the Constitutional Court and individual recourse at the request of the individuals. So far, the Constitutional Court has reduced constitutional control on the basis of individuals' requests only in the control of a due legal process. This is quite different from the experience created by the implementation of the law on the main constitutional provisions, on the basis of which the Constitutional Court finally resolved the appeals of individuals concerning the essence of fundamental rights and freedoms. In its jurisprudence, the Constitutional Court has closely related the guarantee of the right to a fair trial and its constituent elements to the concept of the rule of law, considering it the first element of the rule of law. The recommendation in this case refers to the revision of this article of Law 99/2016 to extend the access of recourse to individuals to the Constitutional Court, not limiting it only to breaches of the rules regarding due process. The meaning of this research paper is precisely that of the constitutional review in order to extend the title on the constitutional guarantees in the protection of fundamental rights. The comparison with Latin American countries will be fruitful for our constitutional lawmaker, both in terms of history and constitutional development.

Key words: constitution, recourse, individual recourse, Albania, constitutional revision.

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Recourse to the Albanian Constitutional Court

In Albania, the Constitutional Court operates in several different ways: with the request of the President of the Republic, the Prime Minister, not less than one-fifth of the MPs, ombudsman, Chairman of the High State Control, any district courts, each commissioner established by law for the protection of fundamental rights and freedom, guaranteed by the Constitution, High Council of Judges and High Council of Prosecution, Local state bodies, Religious institutions, political parties, NGOs, individuals.

In the case when the Constitutional Court acts prompted by ordinary courts, it is done with the decision of the judge in the context of a judicial litigation, being either civil or criminal. During an ordinary trial, the judge decides that the law applicable to the concrete case is in contradiction with the constitution, it does not apply it. He suspends the trial and addresses the case for review to the Constitutional Court. In this regard, the question is whether the initiative for the constitutional process constitutes an obligation for the judge, or is it simply left to his own discretion. From the interpretation of the constitutional provision it turns out that the provision itself constitutes an obligation for the ordinary judge, as the latter can not enforce a law which he deems to be in contravention of the constitution. Nor can he decide himself for its incompatibility with the Constitution. This is a system that applies across Europe and is called the European model. At this point, our constitutional justice system is fundamentally different from that of the Latin America. In almost all Latin American countries, every ordinary judge can not only file a request for the Constitutional Court to act (focused/centralized control), but he may also decide on his own in case of incompatibility with the constitutional norms (extended control).

In our country, the ordinary judge respects the procedural rules provided by the organic law of the Constitutional Court for its application, as well as the constitutional jurisprudence. In this case, the ordinary judge must act by suspending the trial only if he finds that the control of the constitutionality of the relevant law is necessary for the resolution of the case in question. This kind of constitutional trial necessarily requires the existence of a direct link between the law, the unconstitutionality of which is judged as such by the courts, and the resolution of the case in question. This is a close relationship, which has a direct and imperative character. For what was specified above, the Albanian Constitutional Court has well taken into account the existence of the necessary link

required for trials of this nature. The Constitutional Court has often dismissed the request of ordinary judges in cases when the case in question has presented significant shortcomings of the importance of resolving the specific case.

Article 134 / i of the Constitution of the Republic of Albania deals with the individual recourse against the violation of fundamental rights, thus imitating the German-Spanish model. International organizations such as the OSCE and the Venice Commission participated in the drafting of the Constitution. It is necessary to remember the characteristics of the Albanian constitutional process, which had the technical support of foreign institutions in the autonomous exercise of the constitutional power, of the full freedom of expression of the sovereignty of the state. This has preserved the political discretion of national bodies in the final decisions on the constitutional text.

Legitimization to act belongs to any natural or legal person, but not in the form of an *actio popularis*, but as a person who has been violated by the public authority of a fundamental right. Specifically, the individual can make a request only after his case has been examined in the three ordinary trial levels. It is assumed that for all constitutional rights of the individual, the latter may seek protection from ordinary courts, which must ensure a fair trial. In this context, we can say that the right to a due legal process does not represent any change from the right to a fair trial, since all citizens have the opportunity to address the court in case of a violation of a right prescribed by the Constitution or the law. So far, the Constitutional Court has reduced constitutional control regarding the individuals' requests, being only in the control of a due legal process. This is different from the experience created in the implementation of the law on the main constitutional provisions, on the basis of which the Constitutional Court finally resolved the appeals of persons concerning the essence of fundamental rights and freedoms. Part VIII of the Constitution of the Republic of Albania 1998 deals with a concentrated constitutional justice system overloaded with competencies.¹ Individual recourse to the Albanian Constitutional Court does not have an action equivalent to the recourse to other systems, and it only partially fulfills the same function, because the guaranteed right is that of a "due process of law".

¹ Overload of functions beyond the control of the constitutionality of laws, which is a typical feature of the Eastern European Constitutional Courts, see L. Pegoraro. (2004), "La Justicia Constitucional, A Comparative Perspective", Madrid, Dykinson, p. 150.

Another consequence of the fact that the object of the defense is a procedural right, it is excluded for the complainant the possibility of recourse to the Constitutional Court for violations of fundamental rights caused by the law, unless the norm violates constitutional rights for a regular legal process.

This provision of the current constitution is different from the constitutions of the countries guaranteeing constitutional justice, and from Law 6561, dt. 29.04.1992 "On some Amendments and Annexes to the Law on the principal Constitutional Provisions" on which the Constitutional Court was established in the Republic of Albania. Law 6561 gave the Constitutional Court the power to finally resolve the complaints of persons presented on the course of constitutional control for violation of their fundamental rights due to unlawful acts. Thus, the Constitution of 1998 narrowed the powers of the Constitutional Court with regard to the possibility of making the Constitutional Court act with request of the individual. During the discussions on the drafting of the Constitution of 1998, the question was whether this meant limiting the individual and justifying that the proposed regulation was a "sieve" to the issues that could be brought by the individual to the Constitutional Court and a matter of division. In fact, based on a comparison between our present constitution and that of Latin America, we note that in our country the possibility of individual recourse to the Constitutional Court is reduced, limiting this right only in case of violation of the rules for a due legal process.

In essence, the Constitutional Court does not try of a case, but examines whether the trial was fairly conducted.

The individual request thus has subsidiary character. It is submitted to the Constitutional Court after all other ways of judicial and administrative appeal have been already consumed.

Violation of the right to a fair trial must be concrete and not presumed and the claim should also meet the other elements required to file a claim with the Constitutional Court, eg. it should be submitted no later than two years from the finding of the violation or the date of notification of the decision of the relevant body, it needs to be in Albanian, clear and understandable. Statistics point to an increase in the number of Constitutional Court decisions as a result of individual appeals.

The due legal process is one of the fundamental principles of the law and one of the fundamental human rights and freedoms under the Constitution. For the first time in our country this right is prescribed by Law no. 7692, dated 31.3.1993 "On Human and Fundamental Rights and Freedom". In the Constitution of the Republic of Albania the right to a fair legal process is expressly provided for in Article 42 as a fundamental right and freedom of individuals, which provides: 1. Freedom, property and the rights recognized by the Constitution and by law can not be violated without a due legal process. 2. Anyone has the right to a fair and public hearing within a reasonable time by an independent and impartial court, for the protection of his constitutional and legal rights, freedoms and interests, or in the case of charges brought against him. The Constitution, as mentioned above, also refers to this right in article 134, letter "i", also providing individuals with an important legal mechanism for the protection of this fundamental right, such as the submission of the claim to the Constitutional Court.

The right to a fair trial is one of the broader rights provided for in international human rights instruments. This right is guaranteed by Article 6 and Protocol No. 7 to the ECHR, Article 14 of the ICCPR, Article 8 of the Inter-American Convention on Human Rights and Article 7 of the KADNJP. The European Court and the Inter-American Court have also stated that the right to a fair trial applies in any case when a rightholder is guaranteed a right, whether material or procedural, by the applicable legal norms and implies the conduction of a trial of the dispute regarding this right under a fair procedure.

Thus, under its jurisprudence, the Constitutional Court has closely linked to the guarantee of the right to a fair trial and its constituent elements to the concept of the rule of law, considering it the first element of the rule of law.

The meaning of this research paper is precisely that of the constitutional review of the extension of the title on the constitutional guarantees in the protection of fundamental rights. Comparison with Latin American countries will be fruitful for our constitutional lawmakers, both in terms of history and the constitutional development.

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