

The Evolution of the Constitutional System in Albania

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Abstract

This paper aims to introduce the readers with the standards of the Albanian constitutional provisions, as the keystone of the whole legal system of the country. As the basic document of the functioning of the state, the constitution is a reflection of the national aspirations of the respective society as expressed in the political, social and the legal system. This is especially true for the system of protection of human rights, since the guarantees against the violation of the basic rights of the individuals are usually an integral part of the constitution of a country. Upon the establishment of the new democratic regime in 1991, the entire Albanian legal system underwent substantial changes, which were the *sine qua non* of the reconstruction of the new social and political order.¹ The constitutional provisions, as the supreme laws of the country and the basis of the political, legal and social structure, were the firsts to go through the process of reformation.² In 1991 Albania adopted a constitutional regulation that was different to the previous one. This constitutional regulation, although not sufficient and adequate, guided the country for several years until the adoption of a proper Constitution in 1998.

The paper focuses on the characteristics of the constitutional regulation in terms of human rights guarantees, status given to the international law in the domestic level, and particularly the range of local recourses available to the individuals in cases of violations of their rights. It also describes the main features of the judicial and executive system, as the principal authorities whose activity is directly related to the enforcement of the rights of individuals.

The evolution of the constitutional regulation

Since the establishment of the socialist regime in Albania, two socialist constitutions have been adopted, sanctioning more or less the same rules of governance. The first communist Constitution was adopted in 1946. It was abrogated by the Constitution of 1976 that remained in force until 1991.³ Both Constitutions were structured in several parts dealing with the main principles of the communist regime and the activity of the state structures. After 1990, a new type of constitutional regulation was introduced.

¹ Carlson S., *A Study of the Judicial System in the Republic of Albania*, Soros Foundation, Legal Resource Center, 1997, p. 5.

² The first Constitutional Law was adopted only one month after the establishment of a multiparty political system: Law No. 7491, dated 21.05.1991, "On the Main Constitutional Provisions." Official Journal 1991, Vol. 4. Hereafter referred in the text as the Constitutional Law.

³ International Constitutional Law, *Country Index: Albania*, available from http://www.uni-uerzburg.de/law/al__indx.html;

Instead of a unique Constitution, a package of constitutional laws guided the country for almost 8 years. The first constitutional law adopted in 1991, namely the Law "On the Main Constitutional Provisions," at the time of enactment, contained only four chapters.⁴ The first chapter defined the form of the regime (a Parliamentary Republic), and the main principles upon which was based the state structure. The second chapter provided the supreme organs of the state power, (the Parliamentary Assembly, and the President of the Republic). The third chapter contained provisions dealing with the supreme bodies of the public administration, (the Council of Ministers and the Judicial System), while the fourth chapter provided the procedures for amending the constitutional provisions, as well as some transitory provisions on the abolishment of the old Constitution of the Socialist Republic of Albania adopted in 1976.⁵

Later on, the provisions of the Constitutional Law have been amended by three other constitutional laws, which brought the total of the constitutional laws to four. The initial idea was that this package of constitutional laws would function temporarily till the enactment of the new Constitution, which was supposed to be adopted within 1 year from the entry into force of the Constitutional Law. Between 1991 and 1998, several efforts to adopt a proper Constitution failed. Several constitutional drafts of the government and opposition, dated January 1993, October 1994, and February 1995 failed to pass. The constitutional draft of October 1994 was rejected by a nationwide referendum held in 6 November 1994, while the other two drafts did not find the political consensus for being discussed in Parliament.⁶

A proper Constitution was adopted only in 1998. Similarly with the old regulation, the new Constitution is structured in several chapters dealing with the functioning of the main institutions of the state, such as the President of the Republic, the Parliament, the Council of Ministers, the Local Government, the People's Advocate, the Judiciary System, etc. The most important values and principles of the democratic governance, such as the protection of human rights and fundamental freedoms and the application of international treaties are also regulated. In general, the new constitutional regulation is much more advanced and comprehensive than the old package of the constitutional laws, as far as structure, systematization and subject regulation are concerned. As it will be shown in the next part, the time factor helped for a better perception of the concept of human rights and role of state with regard to their protection.⁷

⁴ Constitutional Law No. 7491, dated 21.05.1991, *see* note 2.

⁵ *Id.*

⁶ *See* note 3.

⁷ A special Commission, composed of representatives of the main political forces, was established for the exclusive purpose of drafting the articles of the Constitution. Experts of the Council of Europe and other international organizations assisted in the drafting of the chapter dealing with the human rights and freedoms of the individuals. <http://www.geocities.com/Eureka/Enterprises/5434/newsletter.htm>.

Human rights guarantees within the framework of the provisions of the Constitutional Law and the Constitution of 1998

The first set of human rights provided in the constitutional amendment of 1993⁸ was very similar to the articles of the Convention. It included the basic civil and political rights of the individuals such as, the right to life, the right not to be submitted to torture, the freedom of expression, conscience and religion, the right to organization, the right to peaceful assembly, the freedom of movement, the right to strike, the right to a fair trial, the right to vote and to be elected, etc.⁹ There were also some economic and social rights included in this chapter, such as the right to employment, insurance and social assistance, the right to health care by the state, the right to marriage and to family, etc. However, the mere translation of some of the articles of the Convention and their incorporation in the constitutional laws without a further harmonization with the rest of the provisions caused conflicts between some of the articles.

So happened with the right to free expression, which, according to article 41 of the Constitutional Law, could not be limited even in a state of national emergency or war. At the same time article 2 of the same law provided that it could be restricted in special circumstances.¹⁰ The conflict between the two provisions was brought before the Constitutional Court for a final decision on their compatibility, only in 1997. The Constitutional Court resolved the case in favor of the limitations imposed on the right to free expression by article 2.¹¹

As regard remedial recourses, article 43 of the chapter of Human Rights and Fundamental Freedoms, entitled "The Right to Appeal", stated the right of everyone to appeal against a court judgment to a higher court level established by law.¹² From the way it is formulated, article 13 seems to imply that the right to appeal could be exerted only for judicial decisions. However, article 14 stated that the individuals who had suffered a *wrongful administrative* or judicial decision, had the right of rehabilitation and compensation, in accordance with the rules of law. This implies that administrative decisions could also be found in violation of the individuals' rights protected by law. Naturally, these administrative decisions could be found to be "wrongful" only by higher respective authorities, what suggests that they as well could be complained against by the individuals. So, the provision of article 14 was a sort of remedial guaranty at the constitutional level for the individuals' complaints.

⁸ Constitutional Amendment No. 7692, dated 31.03.1993, "On the Basic Rights and Fundamental Freedoms of the Individuals." Official Journal 1993, Vol. 3, p. 161.

⁹ *Id.* at arts. 1-40.

¹⁰ *Id.* at art. 2.

¹¹ Decision No. 14, dated 29.05.1997, Official Journal 1997, Vol. 7, p. 174.

¹² Constitutional Law No. 7491, dated 21.05.1991, see note 2.

On the other hand, as it may be easily deduced from the wording of article 14, the right of individuals to get remedies was related to the violations committed either by the judicial or by the administrative authorities. This is related to the fact that at the time this regulation was in force, only these two groups of state bodies could take binding decisions, which could eventually affect the rights of the individuals.

As regard the relationship between the national and international law, the provisions of the old constitutional laws did not contain very clear rules regarding the status of the international law in the domestic law. There was only one article mentioning that the Constitutional Court had the power to decide on the compatibility of the international treaties that had been signed by the Republic of Albania with the Constitution, before their ratification.¹³ According to the doctrinal interpretation, this regulation provides for a dualistic status of the international law in the domestic law.¹⁴ This basically means that in case of a conflict between the domestic and international law, the domestic law would prevail over the international laws. Thus, in order to become part of the domestic system, it was necessary that the Parliament promulgated the provisions of the international treaties.

The provisions of the Constitution adopted in 1998 repaired most of the inadequacies of the old regulation. Article 122 of the Constitution recognizes a domestic status to the ratified international treaties and qualifies them as directly executable before domestic courts. Ratified treaties become part of the domestic law upon publication in the Official Journals. Consequently, the provisions of these treaties have the same effect as the domestic law, and may be invoked by the individuals in the same way. This regulation should certainly be considered as a step in advance for the protection of human rights in general.¹⁵ In this way Albanian individuals would have additional ways of remedying violations of their rights guaranteed in the international treaties, compared to the ones provided in the domestic level for the.

Nevertheless, even the new regulation raises some questions. Thus, there are no provisions in the Constitution that could specify the fate of the final decisions of the highest domestic instances in case of an adverse ruling in the international level. According to the Constitution, the decisions of the Constitutional Court are final and irreversible.¹⁶ The same is valid for final decisions of ordinary courts.¹⁷ As already said above, the Constitution stands on the top of the hierarchy of legal norms

¹³ *Id.* at art. 24.

¹⁴ Puto A., "Public International Law," Vol. 1, 1993, Shtepia Botuese Albin, p. 28.

¹⁵ It is worth noting here that in addition to the main documents adopted by the Council of Europe in the field of human rights, Albania has ratified other important treaties of the United Nations, such as the two Covenants of Civil and Political Rights, and Economic, Social and Cultural Rights, the Convention against Racial Discrimination, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, etc.

¹⁶ Albanian Constitution 1998, Art. 132.

¹⁷ Code of Civil Procedure 1996, Code of Criminal Procedure 1995, at respectively art. 510/a and art. 462.

applicable over the Albanian territory, therefore it prevails over any other domestic law, including the international law. The final and irreversible status of the decisions of the Constitutional Court, as stated by the Constitution, could be a problem for the implementation of the decisions taken in the international level, as provided in the ratified international treaties.

On the other hand, there are also opinions sustaining the idea that the final status of the decisions of the Constitutional Court relates only to the fact that there is no possibility to appeal the final decisions of the Constitutional Court in the local level. The acceptance of the jurisdiction of international bodies is not affected by the provision on the final status of the decisions of the Constitutional Court, due to the ratification of the respective international document and the straight recognition by the constitutional provisions of the obligation to comply with it.¹⁸ Consequently, there is no need of more explicit constitutional provisions on the status of the final decisions made in the international level.

As regard specific provisions of human rights included in the Constitution, in general the set of human rights provided is more substantial than the old one. The fact that they are provided in Part II, immediately after the preamble and the basic principles of the functioning of Albanian State, shows the importance that is given to their protection. Here are also included the right of individuals to challenge a court decision to courts of higher instances, and the right of rehabilitation and compensation in compliance with the law, in cases of damages caused by an unlawful act, action or failure to act of the state organs.¹⁹ As it is clear, this definition does not specify the state authorities that could commit violations of the rights of the individual, as it was previously the case with the old provisions.²⁰ The drafters of the Constitution did not find opportune the reference to the judicial and administrative authorities as the only state bodies whose activity could affect the rights of the individuals.

Obviously, the intention is to guarantee the responsibility of any state bodies in case of conflict with the individuals' rights. On the other hand, the terms "*failure to act*" could be interpreted as accepting the horizontal application of the obligation of the state, implying that state authorities are obliged to take the necessary measures for protecting their individuals from any kind of violation, public or private. Based on this provision, the failure of the state to provide such guarantees will amount to a violation of the Constitution.

The provision of the "Social Objectives" of Albanian State in the field of economic and social welfare of the individuals is another new feature of the new constitutional

¹⁸ Loloçi K., Expert member of the drafting group of the Constitution, "Powers of the Constitutional Court," Set of Lectures, Faculty of Law, Tirana University, Tirana, 17.06.2000.

¹⁹ Albanian Constitution 1998, Articles 33 and 44.

²⁰ Constitutional Amendment No. 7692, see note 8, at art. 14.

regulation. Basically, these provisions foresee engagements of the state with regard to certain economic and social conditions of the individuals, such as the employment especially for those who have limited abilities, education and qualification of the young generation in accordance with the abilities, protection of environment, etc. Here is included that category of “rights” that may not be guaranteed to everyone, for it depends on the concrete potential resources of the state. However, they remain as objectives for the state to fulfil them at the maximum extent possible. As a consequence, these objectives do not generate rights for the Albanian individuals in terms of obligations for the state to comply with. Non-fulfillment of such goals by the state cannot be complained against in courts.

Another original characteristic of the new constitutional regulation is the provision of a specific form of participation of individuals in the law making process, where their rights are involved. According to the provisions of Part XI of the Constitution, Albanian citizens have the right to vote a law through a referendum or to ask the President to organize referendums for different issues of a special importance.²¹ However, a referendum may be organized this way only if at least 50.000 voters have requested it. The possibility to vote a law through a referendum was provided in the old constitutional provisions as well, but it was not stated as a right of the citizens, what makes the new regulation more progressive than the old one.²² Thus, individuals are given the possibility to make decisions regarding issues that are of a special concern, such as the Constitution, or other laws that are directly related to their rights.

Finally, the most important development of the new constitutional provisions in the field of human rights protection is the regulation for the first time of the institution of the Ombudsman, as an officer in defense of the legitimate rights and interests of the individuals by the unlawful actions of state bodies. The official name of the Albanian Ombudsman is the People’s Advocate. This institution’s goal is to play a crucial role in the process of protection of individuals’ rights by the state. Thus, Albanian individuals are given the possibility to use other recourses than the judicial ones to resolve their cases. This institution represents a possibility for those individuals that cannot afford a judicial process due to their limited financial sources, to be assisted for free in their conflicts with the state bodies.

According to the Constitution, any person can file a complaint with the People’s Advocate. After reviewing the facts and merits of the complaints, the People’s Advocate may recommend the responsible authorities to take measures for remedying the harm occurred to the individuals. The People’s Advocate can also institute proceedings

²¹ Albanian Constitution 1998, Art. 150/1.

²² Article 3 of the Constitutional Law stated only that Albanian people exercise their power through their representative organs and the referendum. *See* note 2.

before the Constitutional Court for issues that relate to the mandate of the office.²³ Although the powers of the People's Advocate are limited to recommendations and reports, his institution serves to enhance the responsibility of the state with regard to the protection of the basic human rights and freedoms that may be put in stake by actions of the state bodies.

The evolution of the judicial system regulation

After the change of the political system, Albanian judiciary was totally reorganized on the basis of the principles of impartiality and independence from the other two branches of the power. Law No. 7561, dated 29 April 1992, "For the Organization of the Judiciary and Constitutional Court" that was part of the package of the constitutional laws, established a three instances judicial system whose competence was to deal with the conflicts raised in practice during the implementation of laws.²⁴ So, in case of an alleged violation, the citizens had the possibility to complain in three instances of the judiciary. Although there was a division of the subject matters between the civil and criminal jurisdiction, the system operated in the same way for both jurisdictions. Besides the ordinary courts, military courts were part of the judicial system, with a jurisdiction over all cases where military officials were involved. The final decision in both ordinary and military jurisdiction was made by the High Court, whose decision was irreversible.²⁵ The prosecution office functioned as a part of the judicial system, but also as an independent and centralized body, under the authority of the General Prosecutor.²⁶ Its main duty, according to the constitutional provisions was the protection of the public interest, the juridical order, and the rights and liberties of citizens.²⁷ It conducted the investigations and represented the accusation in court.

As regard the administrative jurisdiction of courts, it did not find regulation in the constitutional provisions. Neither the provisions of the constitutional amendment No. 7561, nor the provisions of the Constitutional Law stated anything at all with regard to the administrative activity of courts. Only in 1995, upon the adoption of the Code of Civil Procedure, administrative powers of courts found regulation in the provisions of this Code. The provisions of this Code authorize civil courts to review administrative decisions allegedly in violation of the laws. Namely, within the structure of civil courts, there function sections of administrative jurisdiction dealing with the conflicts raised between the individuals and administrative bodies. The administrative section

²³ Albanian Constitution 1998, Art. 134/dh.

²⁴ Constitutional Amendment No. 7561, dated 29.04.1992, "For the Organization of the Judiciary and Constitutional Court," Official Journal 1992, Vol. 2, p. 81, at art. 5.

²⁵ *Id.* at art. 6.

²⁶ *Id.* at arts. 14-15.

²⁷ *Id.* at art. 13.

consists in a special panel of judges that adjudicate the cases related to administrative conflicts.²⁸

The same constitutional amendment No. 7561 provided the establishment of a new judicial institution, the Constitutional Court, as the highest authority to protect and guarantee respect for the Constitution.²⁹ According to Part II of this amendment, the Constitutional Court was the only authority that could take decisions on the incompatibility of laws and normative decisions of the central or local government with the constitutional provisions. In addition to this power, the Constitutional Court could also abrogate those laws or decisions that were found incompatible with the constitutional provisions.³⁰ The Constitutional Court could start action on a complaint or on its own initiative.³¹ Individuals, as well as other subjects defined in the Constitution, could ask the abrogation of any laws or normative decisions on the grounds of incompatibility with their constitutional rights. However, not all the normative decisions of the central and local government could be challenged by individuals in the Constitutional Court. Only those executive decisions that had a direct influence on the constitutional protected rights of individuals could be brought to the Constitutional Court for a constitutional assessment.³² Thus, in order for the Court to accept a request from individuals, they had to argue before the court that the attacked decision had a direct influence on their constitutional rights.

As regard the current regulation of the judicial system, the new Constitution did not bring any significant changes with regard to the jurisdiction of courts. It states only the basic principles of the organization of the judicial system, while the details of the functioning of different instances of the judicial system are provided in the Law No. 9877, dated 18.2.2008, "For the Organization of the Judicial Power in the Republic of Albania," adopted for the purpose of implementation of the Constitution in the field of the judicial system.³³ So, the Constitution states that the judicial power is exercised by the High Court, as well as by the courts of appeal and courts of first instance, which are established by law.³⁴ The procedures of adjudication of cases in courts of all levels are provided in the Codes of Civil and Criminal Procedure Codes.

²⁸ Civil Procedure Code 1996, Art. 320. Besides the administrative sections, within the structure of the civil courts, there exist also sections that deal with conflicts related to commerce, and family and minors. *Id.* See also note 33.

²⁹ Constitutional Amendment No. 7561, dated 29.04.1992, see note 24, at art. 17.

³⁰ *Id.* at art. 24.

³¹ *Id.* at art. 25.

³² *Id.* at art 24, at paras. 2 and 3.

³³ Law No. 9877, dated 18.2.2008, "For the Organization of the Judicial Power in the Republic of Albania," Official Journal 1998, Vol. 33, p. 1265. The law also provides in article 7 that administrative courts may be established through a specific law. There have been several efforts to pass a draft law on the establishment of administrative courts, but the draft has not been approved yet.

³⁴ Albanian Constitution 1998, Art. 135/1.

As regard the prosecution office, according to the Constitution it exercises the criminal prosecution and represents the accusation in court on behalf of the state.³⁵ It is attached to the judicial system but is an independent body. The prosecution office operates as a centralized organ under the authority of the General Prosecutor. However, during the hearings of the case in courts, the prosecutors exercise their functions in complete independence. In the exercise of their powers, prosecutors are subject to the Constitution and the laws.³⁶

The Constitutional Court still remains on the top of the judicial structure, but does not represent a judicial instance for receiving complaints regarding the decisions of the other courts, except in one case. According to article 131/f of the Constitution, the Constitutional Court has the status of the highest appealing instance for individuals' claims of violation of the right to due process, after the exhaustion of all available national recourses.³⁷ The Constitutional Court has still the powers to control the compatibility of the laws enacted by the Parliament and normative decisions of the central and local administration authorities with the Constitution, but also with the ratified international treaties, in difference to the previous constitutional regulation.

The new constitutional provisions of 1998 afford to the Constitutional Court a slightly more restricted jurisdiction compared to the former Constitutional Court, since they do not provide the power to consider cases on its own motion, as it was previously the case with the old constitutional laws.³⁸ Consequently, all its powers may be exerted only upon the request of any of the following subjects: a. the President of the Republic; b. the Prime Minister; c. not less than one-fifth of the deputies; ç. the head of High State Control; d. any court, under article 145, paragraph 2 of the Constitution; ³⁹ dh. the People's Advocate; e. the organs of local government; ë. the organs of religious communities; f. political parties and other organizations; g. individuals.⁴⁰

³⁵ Id. at art. 148.

³⁶ *Id.*

³⁷ According to article 131 of the Constitution, the Constitutional Court decides on:

- a. the compatibility of a law with the Constitution or with international agreements as provided in article 122;
- b. the compatibility of international agreements with the Constitution, prior to their ratification;
- c. the compatibility of normative acts of the central and local organs with the Constitution and international agreements;
- ç. conflicts of competencies among the powers as well as between central government and local government;
- d. the constitutionality of parties and other political organizations, as well as their activity, according to article 9 of this Constitution;
- dh. removal from office of the President of the Republic and verification of his inability to exercise his functions;
- e. issues related to the eligibility and incompatibilities in exercising the functions of the President of the Republic and of the deputies, as well as the verification of their election;
- ë. the constitutionality of a referendum and the verification of its results;
- f. the final adjudication of the complaints of individuals for the violation of their constitutional rights to due process of law, after all legal remedies for the protection of those rights have been exhausted.

³⁸ Constitutional Amendment No. 7561, dated 29.04.1992, *see* note 24.

³⁹ According to article 145/2 of the Constitution, when a judge of an ordinary court determines that a law is in violation to the constitutional provisions, he shall not apply it; in this case the judge is obliged to suspend the case and sent it to the Constitutional Court.

⁴⁰ Albanian Constitution 1998, art. 134.

Upon its establishment, the Albanian Constitutional Court has abrogated a considerable amount of laws on the grounds of being incompatible with the constitutional provisions. Most of its decisions regard the abrogation of laws as contrary to the Constitution, but decisions of the Council of Ministers have also been very often assessed as conflicting with the Constitution and therefore abrogated.

Conclusion

The provisions of the new Constitution are much more progressive than the old provisions of the constitutional laws in terms of human rights protection, international laws and remedies. The new Constitution affords protection to greater amounts of rights and freedom, as well as to another status of the international human rights law, what consequently provides more guarantees for Albanian individuals with regard to the protection of their human rights. The general principles stated in the Constitution with regard of human rights are substantiated in details in the Codes of Criminal, Civil and Administrative Procedures. In case of civil, criminal or administrative conflicts, Albanian individuals may access three instances of the judicial system, as well as, the Constitutional Court for certain claims related to the rights to due process. Theoretically, constitutional provisions entitle the Albanian individuals to receive remedies from ordinary courts for any violations committed by the official authorities. There is also a possibility for the individuals to challenge national laws and normative decisions of the central and local government to the Constitutional Court, on the grounds of incompatibility with the Convention. Although not necessary under the requirements of article 13, such provision is a positive feature of the Albanian legal regulation in terms of human rights protection. However, although very progressive, the new constitutional provisions do not take a clear position with regard to the status of rulings of international bodies versus final rulings of the highest authorities in the national level. A clear constitutional provision in this regard may be necessary.

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