

Length of proceedings as standard of due process of law in the practise of the Constitutional Court of Albania

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Abstract

ECHR, as an international treaty is part of the Albanian legal system. Among international law instruments, the ECHR enjoys a privileged status in the Albanian legal system by virtue of Article 17 paragraph 2 of the Constitution according to which restrictions to human rights and freedoms cannot infringe the substance of those rights and freedoms and in no case can exceed the restrictions provided for in the ECHR. Article 1 of the Convention requires States to secure the substance of the rights to those in their jurisdiction. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an arguable complaint under the Convention and to grant appropriate relief. The scope of this paper is to analyse the effectiveness of the complaint to the Constitutional Court with regard to length of proceedings as part of due process of law in terms of proceedings during the court trial and after the process has been finalized and the final decision should be executed.

Keywords: constitutional; complain; length; proceedings; remedy; effective; prevention

Introduction

Article 42 of the Constitution, (*the right to a due process of law*) partly corresponds to article 6 (*the right to a fair trial*) of the Convention European of Human Rights, (Convention). Article 42 of the Albanian Constitution provides that:

“The freedom, property and rights recognized by the Constitution and by law shall not be infringed without a due legal process.

In order to protect his constitutional and legal rights, freedoms and interests, or in the case of charges raised against him, everyone has the right to a fair and public trial within a reasonable time, by an independent and impartial court established by law”.

The length of proceedings is a standard of the aforesaid constitutional and conventional rights. The analyse in this paper is focused on the Albanian Constitutional Court as a remedy through the lenses of Articles 13 of the Convention, for the unreasonable length of proceedings, as one of the most problematic standards of due process of law, in the framework of Albanian judicial practise¹. On this ongoing observation, the

¹ Progress - Reports of European Commission for Albania, 2012, 2013, 2014 website: http://ec.europa.eu/enlargement/pdf/key_documents/

lack of standards towards length of proceedings has been subject of many applications against Albania in the European Court of Human Rights (ECHR). According to most of the experts of the jurisprudence of ECHR, some states are “repetitors” of the violations and obviously have some deficiencies in their judicial system².

This paper is focused only in analysing the activity of the Constitutional Court (CC) on this direction. Regarding this issue, ECHR in *Eltari vs. Albania*, states that:

“Article 13 of the Convention gives direct expression to the States’ obligation, enshrined in Article 1 of the Convention, to protect human rights first and foremost within their own legal system. It therefore requires that the States provide a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief. (...) The scope of the Contracting States’ obligations under Article 13 of the Convention varies depending on the nature of the applicant’s complaint; the “effectiveness” of a “remedy” within the meaning of this provision does not depend on the certainty of a favourable outcome for the applicant. At the same time, the remedy required by Article 13 must be “effective” in practice as well as in law in the sense either of *preventing* the alleged violation or its continuation, or of *providing* adequate redress for any violation that has already occurred”.

On the light of these considerations, this paper seeks to enlight:

- Ongoing practise of ECHR in relation with the Constitutional Court as effective remedy in terms of length of proceedings;
- Case - law of CC and the effects of its judgements;
- Effective remedies of european countries towards the length of proceedings;
- Obstacles according to albanian legislation in relation to efectivity of CC;
- Considerations on changes of law on the organization and functioning of Constitutional Court.

The practise of Echr in relation with applications against Albania concerning the unreasonable length of proceedings as part of due process of law

The length of proceedings – is a standard required from article 6 of the Convention, but in conjunction with article 13, the result is that States have the obligation to choose a national effective remedy for the reasonable length of proceedings.

ECHR has established the following criteria for assessing whether the duration of proceedings is reasonable:

- *Complexity of the case* (complex cases need longer time to be completed, but complexity as such is not always sufficient to justify the length of proceedings);

² Clare Ovey; Robin White; *The European Convention on Human Rights*; third edition, Oxford University Press; 27 June 2002, pages 167-168.

- *The applicant's conduct* (this is the only criterion that led the Court to conclude that Art. 6. was not violated even if the length of proceedings was manifestly excessive)
- *The conduct of the competent authorities* (if the authorities have taken prompt and appropriate remedial action to manage the temporary unpredictable overload of the courts, the longer processing time of some cases may be justified)
- *What is at stake for the applicant* (some cases need to be expedited; such "priority cases" include: labour disputes involving dismissals, recovery of wages and the restraint of trade; compensation for victims of accidents; cases in which applicant is serving prison sentence; police violence cases; cases where applicant's health is critical; cases of applicants of advanced age; cases related to family life and relations of children and parents; cases with applicants of limited physical state and capacity).

In addition to individual criteria, ECHR also makes an overall assessment of the circumstances of the case. It may establish that 'reasonable time' is exceeded, if in such a global assessment, the Court finds that total time is excessive, or if it finds long periods of inactivity by competent authorities.

Some of cases against Albania submitted in ECHR are connected with the length of proceedings in conjunction with effective remedy; specifically with the constitutional complain as such. This practise has started in 2005, and until now there are several decisions, where can be observed very clear the approach of the ECHR on this problematic legal situation. Firstly, with the *Qufaj and Co* (2005), ECHR has stated that:

“40. The Albanian legal system affords a remedy - in the form of an application complaining of a breach of the right to a fair trial-which was available to the applicant company in theory. The company unsuccessfully attempted to avail itself of that remedy and its appeal to the Constitutional Court was dismissed.

41. In the light of the foregoing considerations, the Court holds that the fair trial rules in Albania should have been interpreted in a way that guaranteed an effective remedy for an alleged breach of the requirement under Article 6 § 1 of the Convention.

42. In the Court's opinion, therefore, the Constitutional Court was competent to deal with the applicant company's complaint relating to non-compliance with a final decision as part of its jurisdiction to secure the right to a fair trial”

In *Gjonbocari* (2007), ECHR notes that:

“...the Court observes that as the Government admitted, apart from the constitutional complaint, the Albanian legal system did not provide for a particular remedy, such as those referred to by the Court in *Kudla* (cited above), which the applicants could have used in order to obtain redress for the excessive length of the proceedings”.

In Marini (2008), ECHR assessed that:

“The Court further observes that, even assuming that the Constitutional Court could in theory offer adequate redress in respect of the excessive length complaints, the Government failed to produce any case in which the Constitutional Court had ruled on a complaint about the length of proceedings. While it is not for the Court to give a ruling on an issue of domestic law that is as yet unsettled, the absence of any case-law does indicate the uncertainty of this remedy in practice”.

In Berhani (2010), ECHR reiterates its finding:

“...the Constitutional Court is considered an effective remedy for the purposes of Article 35 of the Convention where fair-trial issues arise. In the instant case, the applicant did not avail himself of this remedy. The Court will examine whether the applicant was required to exhaust this remedy. The Court recalls that the rule of exhaustion of domestic remedies is assessed, in principle, against the date of introduction of the application with this Court. It reiterates its findings in *Gjonbocari and Others v. Albania* (no. 10508/02, §§ 73-82, 23 October 2007) and *Marini v. Albania* (no. 3738/02, §§ 147-158, ECHR 2007-XIV (extracts) that there was no effective remedy in respect of the length of civil proceedings. The fact that on 21 July 2009 the Constitutional Court examined the merits of an application about the length of delayed enforcement of a final court decision (see paragraph 37 above), does not suffice to find that it constituted an effective remedy in respect of the length of criminal proceedings at the material time”.

In Mishgjoni (2011), ECHR, notes that:

“...Moreover, the Court recalls that it is for the Contracting States to organise their legal systems in such a way that the competent authorities can meet the requirements of Article 6 of the Convention, including the obligation to hear cases within a reasonable time”.

In Delvina (2011) ECHR reiterates that:

“Article 13 of the Convention gives direct expression to the States’ obligation, enshrined in Article 1 of the Convention, to protect human rights first and foremost within their own legal system. It therefore requires that the States provide a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief”.

In all cases mentioned above, is stated strongly that effective remedy under Albanian juridical system is missing and furthermore CC does not fulfill the criteria to be “effective” as a remedy for the length of proceedings. ECHR has given arguments such as:

“...governments has not shown how many decisions of this kind have been taken...”,

“... there is not even one decision from CC related to the reasonable length of proceedings...”.

“...CC has not included the reparation concept within its jurisdiction...”.

As stated above, ECHR has analyzed case by case the position of CC as effective remedy according to article 6 and 13 of the ECHR. The conclusion of the ECHR is clear; CC is not effective in respect of article 13 and 35 of ECHR for the unreasonable length of proceedings.

The Constitutional remedy in practice: the Constitutional Court case - law and the effect of its judgements in terms of length of proceedings

The Constitutional Court is the highest authority, which protects and guarantees the implementation of the Constitution. It carries out the constitutional review of the acts of the legislative, executive and juridical powers, violating the fundamental rights. However the sphere of competence of this Court dealing with individual complains is limited. Article 134/f of the Constitution provides that the Constitutional Court initiates a proceeding *inter alia* on the request of the individuals. Article 131/f of the Constitution stipulates that the Constitutional Court decides on the final adjudication of the complaints of the individuals for the violation of their constitutional rights concerning the due process of law, after all legal remedies for the protection of these rights have been exhausted.

The CC has reiterated that in accordance with Article 131/f of the Constitution the constitutional protection has a definitive function in the meaning that it could be applied only in relation to those decisions for which the judicial proceedings have been exhausted. Article 131/f is related to the fact that the constitutional review, including the right to a due legal process, is subsidiary in nature. It means that individuals should have exhausted all other available remedies³. The exhaustion of remedies is interpreted in order to mean that the applicant should avail himself/herself all permissible procedural remedies in the various instances of judicial adjudication. The legal remedies will be considered as exhausted when, depending on the circumstances of the case, the procedural rules do not provide any other and procedural remedies. Therefore, the violation of the constitutional right to a due legal process can be claimed at this court only after the complete exhaustion of all the remedies which are offered by the complaints and appeals⁴ system. There is an exception to this rule, in case when the Constitutional Court finds reasonable grounds in terms of unreasonable length of proceedings, to accept the complain without the exhaustion of all the remedies.

³ See Decision no.17, dated 18.07.2005

⁴ See Decision no.10, dated 02.04.2003; Decision no.9, dated 09.05.2005

As previously highlighted, the ECHR has accepted that in order for a remedy to satisfy the criteria of Articles 13 and 35/1 of the Convention, the remedy should be effective, sufficient and accessible, and that the remedy should be effective not only in theory but also in practice. As will be indicated below, the Constitutional Court has recognised that the respect of a reasonable length of proceedings is a guarantee of the due process of law and as such it shall be interpreted in accordance with the criteria developed by ECHR. The reasonableness of the length of proceedings will be carried out, on a case by case basis, as it constitutes an assessment *in concreto*.

The CC from 2011 has decided and issued declarative decisions for some cases with object the nonreasonable length of proceedings. In fact, CC earlier in 2005, with decision no.18/2005, has decided that no breach of reasonable time of proceedings has been occurred; however the practice clearly has started in 2011 with the case Shyti, where the Court has assessed that:

“...complexity of the case, the behavior of the state organ, and the behavior of the applicant, are the reasons for the length of proceedings beyond limits. Nevertheless, the delays addressed to the proceeding organ, have happened for objective reasons and the legislative space has allowed the reopening of the case, in the assessment of the court, the delays from the state authorities are not justifiable. Even though in the conditions of a lack of specific effective remedy for the reparation of the damage, the court notes that it is the duty of the competent authorities, including the ordinary courts, the General Prosecution, Ministry of Justice and High Council of Justice, to take the necessary measures for the good administration of justice and the implementation of reasonable time limits for the length of proceedings”.

Meanwhile in the case A. Koliqi (2012), CC has assessed that cases which have not been finalized with a decision should be taken to examination when the individuals complain about the length of proceedings. In this direction CC has noted that:

“.. Individuals should submit a request in the Constitutional Court, because there is not any effective remedy for them to apply, besides the said court”.

In the case Nordstrom, (2013) CC reiterates its statement that:

“....the applications concerning the violation of reasonable judgement may be examined, independently from the judgement that has not been concluded with a final decision from the ordinary court”.

All the abovementioned decisions designate the approach of the CC toward the consideration of conventional violations as constitutional violations and the reparation inside the national legal system. However, these decisions are declarative, which means that the ordinary courts are not obliged, in these cases, to accelerate the process or to pay just satisfaction to the injured individuals. In the Law no. 8577, dated 10.02.2000 “On the organization and functioning of Constitutional Court” there is no provision

about just satisfaction. The CC facing a violation of the aforesaid right, cannot address any particular measures, nor in terms of financial compensation, neither in terms of setting time limits for the court to finish the process. In other words, if the CC finds that there has been a violation of the Constitution in terms of length of proceedings sheltered by due legal process, the court shall not afford just satisfaction to the injured individuals. As long as individuals will not obtain redress, there is no doubt that this kind of decisions will not be considered as “effective” in the meaning of Articles 13 and 35/1 of the Convention.

An overall look on European practises related with efective remedies in terms of length of proceedings

In line with the CEPEJ Framework Programme (2004): “A new objective for judicial systems: the processing of each case within an optimum and foreseeable timeframes”, the member states of the Council of Europe should adjust the reform of the normative frameworks and the administrative and judicial practices towards optimum and foreseeable timeframes of judicial proceedings. At its 114-th session in May 2004, the Council of Europe adopted a Declaration on “Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels”. The Comitee of Ministers of Council of Europe, asked national authorities to improve domestic remedies in order to stop the violations of the Convention.

With regard to the reasonable lapse of time condition, the subsidiary nature of the system for protecting human rights was strengthened by the *Kudla v. Poland* judgment of 26 October 2000. In this case ECHR states that:

“Article 13, giving direct expression to the States’ obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13, as emerges from the travaux préparatoires (see the Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights, vol. II, pp. 485 and 490, and vol. III, p. 651), is to provide a means whereby individuals can obtain *relief* at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court”. (prg.152).

Following the *Kudla* judgment, several states have introduced arrangements to enable citizens who have suffered excessive lengthy proceedings or who are still awaiting completion of a particular stage to have their case expedited. By allowing countries to choose between compensation for damage suffered from over-lengthy proceedings or the possibility of expediting proceedings, the Court has created the possibility of new remedies. A number of interesting domestic remedies are currently available. For example, in Italy, the so-called *Pinto Act*, No. 89 of 24 March 2001, allows persons who have suffered detriment as a result of excessively lengthy proceedings to obtain

just satisfaction. This remedy was considered to be effective in the *Brusco* case, a pilot decision in which the European Court of Human Rights invited the applicants who had referred the case on the grounds of reasonable time to withdraw it or otherwise face the risk of an inadmissibility decision by a committee of judges.

In the subsequent *Scordino* case, the Court found that excessive lengthy proceedings did not necessarily entitle those concerned to be granted adequate compensation by the Italian courts in accordance with the Court's criteria. Appeals to the Court of Cassation were not an effective remedy. The case was referred to the Grand Chamber of the Court, which took its decision on 29 March 2006. The judges of Strasbourg note that "by adopting the Pinto law, Italy brought a remedy purely focussing on financial compensation in the event of a violation of the principle of reasonable time". The Court takes good note of the reversal of decisions of the Italian Court of cassation intervened on 27 November 2003 and greets the efforts authorized by this jurisdiction to conform to European jurisprudence by indicating to the Italian courts that the compensation for the damage related to the excessive duration of a procedure should not move away from the amounts fixed by the European Court. From 26 July 2004, it considered that the Pinto law constituted an effective remedy for purposes of Article 35 § 1 of Convention.

The Czech Republic has instituted reforms following the *Hartman* judgment of 10 July 2003, in which the European Court found that appeals to the Constitutional Court, which enabled individuals to challenge any final decision of another body, administrative or judicial, were not effective. Act No. 192/2003 has added a provision to Act No. 6/2002 on courts and judges, under which, from 1 July 2004, it is possible to seek a remedy for excessive delays in judicial proceedings by applying for a deadline to be set for completion of a particular procedural stage or formality.

In Croatia, following the judgment of the European Court in the *Horvat* case, the constitutional law on the constitutional Court of 1999 was amended. New article 63, into force since 15 March 2002, is read as follows:

"1. The constitutional Court must examine a constitutional remedy even as all the legal remedies were not exhausted whenever a court of competent jurisdiction did not rule within a reasonable time on the rights and obligations of a person or on the cogency of penal a matter charge directed against it (...)

2. If the constitutional Court retains the constitutional remedy (...) envisaged by paragraph 1 of this article, it fixes the time in which a competent court of jurisdiction must rule on the bottom of the case (...)

3. In the decision returned under the terms of paragraph 2 of this article, the constitutional Court fixes the adequate amount of repair to be granted for the violation of the constitutional laws noted (...) the amount of repair must be paid on the budget

of the State within three month from the date on which the part presented a request for payment.”

The ECHR noted on many occasions that this new provision constituted an effective remedy with regard to the excessive duration of legal procedures (see the *Radoš* case and others against Croatia (07/11/2002) and the decisions on the admissibility in the *Slaviček* case (decision of the 04/07/2002), *Nogolica* case (decision of the 05/09/2002), *Plaftak* and others (decision of the 03/10/2002), *Jeftić* case (decision of the 03/10/2002) and *Sahini* case (decision of the 11/10/2002)). The effectiveness of this new remedy was confirmed thereafter by the decisions of the Constitutional Court and in particular through the direct effect granted to the judgments of the European Court in interpretation of the Croatian right. Following the abovementioned legislative reform of 2002, the judgments of the European Court were seen as recognizing a direct effect in the event of excessive duration of the legal procedures, including procedures of execution. The constitutional Court, thus, noted several violations of the right of the plaintiffs under the terms of Article 29, paragraph 1, of the Constitution because of the excessive duration of the legal procedures. Consequently, it ordered to the concerned courts, to return a decision within certain times and granted damages for the delays which had already taken place.

In Germany following the case of *Sürmeli v. Germany*, 8 June 2006, and *Rumpf v. Germany*, reforms were made to improve internal legislation. With changes in law of 14 Novembre 2011, on protection of rights of individuals in case of unreasonable length of proceedings, the person who pretends to be a victim of inefficient procedures, may submit a request in the same court where the case is stuck. If the said court does not proceed, than the complainer may submit a request to the apel court. The process has two stages: one is of *preventive* nature, where the party claims for the acceleration of the process; and the other one is the *compensation* stage, where the proces is out of reasonable limits and the victim claims for compensation. This law includes legal redress for excessive length of court proceedings and as well for criminal investigation, as well as legal adress in the federal constitutional court and also in other legislation with a chance for proceedings to be excessive, such as: notary, advocacy, and on financial courts⁵.

Conclusion

The principle of subsidiarity lies at the heart of the international jurisdiction of the European Court of Human Rights. It requires that there is an effective remedy to enforce the substance of the Convention rights in the national legal order.

⁵ Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights, CEPEJ - 8th plenary meeting, Strasbourg, 6-8 December 2006,

The Constitutional Court decides for the final judgment of an individual complaint on violations of the constitutional rights of a “*due process*” after the other judicial means for the protection of such rights have been exhausted, but with the one exception related with the unreasonable length of proceedings, where it is not necessary for the victim to completely exhaust all remedies before submitting the request to CC.

De facto, the CC is not an effective remedy for the unreasonable length of proceedings. A declarative decision establishing a violation without tasking any state organ to make a due redressment in terms of finishing the process in a specific deadline, or allowing a financial compensation, is not effective in practice. According to article 81 of the Law no.8577, dated 10.02.2000 “On the organization and functioning of Constitutional Court”:

- The execution of the decisions of the Constitutional Court is obligatory.
- *The execution of the decisions of the Constitutional Court is secured by the Council of Ministers of the Republic of Albania through the respective state administration.*
- *The Constitutional Court may assign another organ to execute its decision and the means of execution, if thus necessary.*

However this provision has not been applicable in practice, because there are lacks of specific terms referring to executive organs, to time-limits, to methods in which the decisions of Constitutional Court must be executed. Therefore, amendments in law are necessary in compliance with Albanian Constitution and ECHR jurisprudence, for the purpose that victims of the aforesaid violations can obtain proper redress from the CC.

Albania has obligations with regard to the length of proceedings stemming not only from Article 6 § 1 but also from Article 13 of the ECHR. The international guarantee of an effective legal remedy, including the length of proceedings remedy, implies that a State has the primary duty to protect a right to a trial within a reasonable time, at first within its own legal system. As a consequence, the legislator has the duty to make arrangements in terms of the methods which might be used to accelerate the proceedings, to ensure the effectiveness of domestic remedies. As it was shown also in this paper, there are some models of legal remedy for the protection of the right to a trial within a reasonable time, but which of them shall and will be considered and/or accepted, it will depend from the actors of the legislative reform. In any case, the model of remedy that shall be established, should combine the mechanism of *preventing* delays or *accelerating* proceedings and the mechanism of *compensation*.

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