



Human Rights in the Constitution and Jurisprudence of the Constitutional Court of the Republic of Albania

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Abstract

This paper discusses how Albania's fundamental human rights are guaranteed by the Constitution and how the Constitutional Court's jurisprudence has contributed to this effort. It includes two aspects of their treatment: the constitutional background and some of the most important decisions made by the Constitutional Court concerning the protection of fundamental human rights. Its goal is to provide the reader with a brief overview of the Constitutional Court's role in this regard while also acting as a jurisprudential guide for the protection of fundamental rights. Although this topic has been covered by some legal experts in previous works, it is particularly relevant now that the Republic of Albania is celebrating the 25th anniversary of the adoption of its Constitution because it highlights the Constitutional Court's contribution even after the Law Reform of the year 2016 and the innovations it brought about. The methodology employed to produce this paper involves processing and analysing secondary data obtained through various means, both qualitatively and quantitatively. The primary focus is on the decisions made by the Constitutional Court between the end of 1998 and the present, viewed through the lens of human rights. The methodological part that is based on interviews or other primary data is not included in the study because of its nature and the time constraints. The article concludes that in order to prevent inconsistencies within the current jurisprudence and to provide more substantive rights for individuals, including those that will be expanded after 2016, it is necessary to add qualitative aspects to its consolidation and to expand it quantitatively.

Keywords: Fundamental rights, Constitution, Constitutional Court, Jurisprudence

1. Human Rights and their Importance in the Constitution

Human rights are sanctioned in the second part of the 1998 Constitution, from article 18 to article 59, inspired by the European Convention of Human Rights ratified in 1996, being divided into three important sections; "Basic principles", "Personal freedoms and rights", Political Freedoms and Rights, Economic, Social and Cultural Freedoms and Rights.

The basic principles and the sanctioning of the fundamental rights and freedoms of the individual, which led the democratic changes after 1990, originally date from law no. 7491 dt. 29.04.1991 "On the main constitutional provisions" and its amendments in 1991 and 1992.

Their guarantee through constitutional control has its origin in 1992 with the establishment of the Constitutional Court for the first time, but their re-dimensioning in the post-Constitutionalism period (after 1998) has established a considerable jurisprudence.

This quarter of a century has naturally been little referred to the challenge of creating jurisprudence as a guarantor

of respect for the Constitution in terms of human rights and freedoms.

Throughout this time, the state's fundamental laws have undergone numerous revisions. Notably, the Justice Reform of 2016 included changes to the Constitution that constituted a turning point for the court's functions, structure, and authority. These changes were reflected in both the law governing the Constitutional Court's functions and in the provisions of the constitution.

One of the key innovations of these reforms is the development of the individual constitutional appeal, which aims to safeguard the individual against acts of public power and allows control over the constitutionality of all normative actions of power that infringe against the fundamental rights guaranteed by the Constitution.

The Constitution now recognizes an individual's right to appeal to the Constitutional Court for any fundamental right or substantial freedom guaranteed by the Constitution, as well as for the right to a regular legal process, which has to do with the procedural guarantees it provides to the individual during the judicial and administrative process.

This method of appeal acknowledges the right to contest not only laws or other public acts but even court rulings, should they have infringed upon one's rights.

The jurisdiction of this court to decide on the final judgment of individual complaints against any act of public power or judicial decision that infringes upon the fundamental rights and freedoms guaranteed by the Constitution was established in the letter "f", point 1 of article 131 of the Constitution.

This legal option has not been exhausted so far by individuals, despite their efforts to refer to the Constitutional Court, due to the procedural shortcomings of following the process, especially the obligation to exhaust the lowest levels of judgment.

Although people have used individual constitutional appeals to challenge laws and other acts of public authority in the Constitutional Court, the Court has not yet decided on the merits of these requests; instead, they have ended at the preliminary review stage because the applicants were unable to comply with the preliminary requirements set forth by the organic law and the constitutional provision, which are primarily related to the exhaustion of legal remedies.¹

Article 134, on the other hand, states that, in addition to the subjects that were originally intended to establish the Constitutional Court, other subjects have been added whose primary function is the protection of fundamental human rights and freedoms. These subjects include the commissioners appointed by legislation to protect the fundamental rights and freedoms guaranteed by the Constitution, KLGJ- High Judicial Council and KLP- High Prosecutorial Council, which are constitutional bodies responsible for the governance of the justice system.

2. Human Rights in the Jurisprudence of the Constitutional Court

From 1992 up to the present, the Constitutional Court has issued a total of 1216 Decisions, while since the entry into force of the Constitution on 28.11.1998, it has issued a total of 1059 decisions²

In the analysis of the content of these decisions, which constitute the jurisprudence of the Constitutional Court so far, it is found that most of them, especially before the amendments of 2016, dealt with complaints related to "due process" in its procedural sense.

In most of them, it is observed that the Constitutional Court has played the role of the "positive" legislator by consolidating the procedural aspect of the development of a regular legal process in its multidimensionality.

Apart from this general characteristic of the Jurisprudence of the Constitutional Court in these 25 years, there have been significant cases when this Court has examined a series of substantial fundamental human rights. Some of the most significant cases of this category are presented as follows:

2.1 The right to life and respect for human dignity.

The Capital punishment in peacetime allowed by the provisions of the old Criminal Code was ruled by the Constitutional Court to be unconstitutional in Decision No. 65, dated 10.12.1999. In its ruling, the Constitutional Court states that the capital punishment "shall be deemed incompatible with the essence of these rights and freedoms when analysed according to the spirit of the Constitution and the ECHR."

It is a denial of the right to life and constitutes in itself an inhumane and cruel punishment, which the state carries out through its judicial power. Capital punishment is not about restriction, but about finally eliminating the subject from

¹Tusha, Vitore, 5 years from the Justice Reform, the consolidation of the system through the new Cross-Sector Strategy of Justice 2021-2025".page 2

² Final decisions (gjk.gov.al)

society."³

Pursuant to Article 17, point 2 of the Constitution, which prohibits restrictions on freedoms and human rights that go beyond those allowed by the European Convention on Human Rights, the Constitutional Court determined that the capital punishment embodies the spirit of both the Constitution and the ECHR.

2.2 *The right to appeal against decisions*

The jurisprudence established for the aforesaid right turns out to be one of the richest of the Constitutional Court.

1. Therefore, in Decision No. 25 dated 13.02.2002, the Constitutional Court has declared unconstitutional point 2 of Article 34 of Law No. 8737 dated 12.02.2001 "On the organization and functioning of the Prosecution Office in the republic of Albania", according to which, "the decree of to the President of the Republic for dismissal from office is unappealable". The Constitutional Court reasons that "... the right to appeal is accepted as a fundamental right by the ECHR and that the exercise of this right is unlimited". The Constitutional Court states that the limitation provided by law exceeded the limitations provided for by the ECHR and Article 17 of the Constitution, following:... the due process of law is applied to all conflicts that are decisive for the legal position of a person, even when this is a public functionary that a person's right to a normal legal procedure extends to administrative disciplinary proceedings as well as judicial proceedings.⁴
2. In the constitutional examination that it has made of some provisions of the law no. 7928 dated 27.04.1995 "On the value added tax", the Constitutional Court specified that "... the right to appeal presupposes the right of the citizen to address to a higher state body, the review of the appeal, the existence of the body for the review of the appeal, the optimal terms of the review, the objective review, the judicial review as the final review of the appeal and guarantee for possible rehabilitation as a result of the acceptance of the appeal."⁵
3. In Decision No. 15 dated 17.04.2003, the Constitutional Court declares that the addition made to the Criminal Procedure Code regarding the act of representing the defendant only by him, is contrary to Article 17 of the Constitution, concluding that the right to appeal of the defendant is violated in this case. Respect for the right to defense is an important criterion for assessing whether or not the procedural law is compatible with the Constitution and the standards of the ECHR.

2.3 *Freedom of private economic activity, freedom of profession*

In decision No. 30, dated 11.07.2006. After analysing the content of Article 49 of the Constitution, the Constitutional Court states that the constitutional right to work contains "...a positive obligation that requires a state commitment to create suitable conditions for the realization of this right...and an obligation negative that requires the non-intervention of the state to violate this right"⁶

In this decision, the Constitutional Court has established an efficient and useful jurisprudence also related to one of the very few articulated principles of the functioning of the Public Administration, that of proportionality, declaring the unconstitutionality of the decisions of the Council of ministers subject to appeal "also due to non-respect of the principle of proportionality ...". In this case, the Constitutional Court has analysed the constituent elements of this principle that must be taken into consideration by state bodies. Rejecting the applicant's claim regarding the extended interpretation that IT gave to the phrase "only by law" for the limitations that can be made to the rights and freedoms provided for in the Constitution (Article 17), the Constitutional Court observed that "an interpretation of such constitutional norms can only be allowed in the positive aspect, when this interpretation goes in favour of the protection of rights and not the opposite, as happened in the case under examination."⁷

2.4 *Independence of the court and the judge, disciplinary measures against the judge*

In considering some cases, the Constitutional Court has made evaluations about the position of the judge based on the

³Decision No. 65 dated 10.12.1999 Constitutional Court

⁴Decisions of the Constitutional Court of the Republic of Albania, 2002, Tirana, page 111.

⁵Decisions of the Constitutional Court of the Republic of Albania, 2003, Tirana, page 40

⁶Decision No. 30, dated 11.07.2006 of the Constitutional Court

⁷Decision No. 30, dated 11.07.2006 of the Constitutional Court

definition of Article 6.1 of the ECHR, which sanctions the right of the individual to have his/her case examined "... by an independent and impartial court, recognized by law".

In Decision No. 11 dated 27.05.2004, dismissing the request to declare unconstitutional some provisions of Law No. 8678 dated 14.05.2001 "On the organization of the Ministry of Justice" and Law No. 8811 dated 17.05.2001 "On the organization and functioning of the High Council of Justice", the Constitutional Court clarifies the comprehensive meaning of the regulation made in Article 145 of the Constitution, which states, "that judges are independent and subject only to the Constitution and laws". Based on the above-mentioned documents, the constitutional court notes that "... no other power can function as a court or exercise the duty of a judge, ... no one can interfere in the administration of justice and that ... no one is allowed question the recognition and value of court decisions or refuse their execution after they have become final.⁸

The Constitutional Court has determined that in relation to the ECHR and the jurisprudence of the ECHR, the Constitution offers higher standards of protection against the measure of dismissal from office of a judge because this measure is also accompanied by the means of appeal to the Supreme Court⁹

In Decision No. 18 dated 14.05.2003, "On investigative commissions", the Constitutional Court considers that the final report of the investigative commission should avoid the risk of influence that it may exert on the delivery of justice by the courts. The latter may be influenced by the conclusions drawn in the final report of the parliamentary investigation¹⁰.

Regarding the dismissal of a judge for a disciplinary violation, the Constitutional Court states: "the provision of the law on "On the organization of judicial power in the Republic of Albania" that provides for the measure of dismissal of a judge for a disciplinary violation is incompatible with Article 147, point 6, of the Constitution... ... the dismissal of the judge, the right to appeal against this decision as well as the body that should consider this are directly regulated by the Constitution..." and this is an expression of a supplementary guarantee that is given to him/her to exercise the assigned mission in complete independence and impartiality¹¹

2.5 *The right to respect private and family life and the right to information*

Finding the balance between these two conflicting rights has been one of the challenges of the jurisprudence of the Constitutional Court. In Decision No. 16 dated 11.11.2004, the Constitutional Court reasons that "restriction of the right to respect private life in the form of declaring assets and not obtaining prior consent for the publication of personal data of this type constitutes a measure provided for by law and that the legislator has rightly valued it as a necessary measure to protect major public interests such as national security, the economic well-being of the country, the protection of the constitutional order, the prevention and punishment of criminal offenses, the protection of the freedom of others¹²etc.

In this decision, the Constitutional Court accepts that personal data of a financial nature are included in the sphere of private life protected by Article 35 of the Constitution and Article 8 of the ECHR, but assesses that they are not data "... of a sensitive nature..." so "... they do not constitute the essence of private and family life". Thereafter it is added that "... the assessment margin in this case is and should be much wider and tolerant, since it is about important public figures, vested with considerable state power", citing the Decision of ECHR *Frezzes & Roire vs France* according to which "publication of details of income or personal wealth does not constitute interference with private life, especially if the person exercises public or quasi-public functions"¹³

According to the Constitutional Court, the legislator has shown care to respect the principle of proportionality by balancing the fundamental right to information with the obligation of state bodies to respect private life.

⁸Decision No. 11 dated 27.05.2004 of the Constitutional Court.

⁹ Kristo, V. (2007) 'Constitutional control of the compliance of Albanian legislation with the standards of the ECHR', Conference, "Improving the quality of the implementation of the ECHR through the expansion of cooperation between local institutions", Ministry of Foreign Affairs & Council of Europe, September 26-27, 2007, Tirana, page 6.

¹⁰Decision No. 18 dated 14.05.2003 of the Constitutional Court.

¹¹ Kristo, V. (2007) 'Constitutional control of the compliance of Albanian legislation with the standards of the ECHR', Conference, "Improving the quality of the implementation of the ECHR through the expansion of cooperation between local institutions", Ministry of Foreign Affairs & Council of Europe, September 26-27, 2007, Tirana, page 7.

¹²Decision No. 16 dated 11.11.2004, Constitutional Court.

¹³Judgment of the French Court of Cassation, cited by the ECtHR, in the case of *Frezzes&Roire v. France*, Application 29183/1995

2.6 The right to rehabilitation and compensation for unfair decisions

In Decision No. 34 dated 20.12.2005, the Constitutional Court has assessed as unconstitutional Article 1 of Law No. 9260 dated 15.07.2004 "On the status of ex-convicts and the politically persecuted". In the reasoning part of the decision, the Constitutional Court admits that "The democratic state compensates and compensates these people according to the conditions of economic and financial opportunities, based mainly on the important principles of justice and equality".¹⁴

2.7 The right to be heard, to have enough time to prepare the defence and not to be deported from the territory of the state

In its decision No. 48 dated 11.10.2023 Constitutional Court by repealing as contrary to the Constitution a decision of Supreme Court, synthetically in its point 33, establishes an interesting jurisprudence with three-dimensional protection of the constitutional rights of the individual, as follows:

In the specific case, the Supreme Court has tended to speed up the trial of the case, considering it with priority in relation to other registered cases, as well as shortening the legal notice period by 20 days, without giving reasons for this reduction and in the circumstances that neither the parties have given their consent in terms of shortening it. In this sense, the Court considers that non-compliance with the deadlines for publishing the date of the hearing on the official website of the Supreme Court, as well as the failure of the secretariat of this court to notify the date of the hearing to the electronic address filed by the applicant's lawyer, in the case concretely constitute violations of an essential nature, the proof of which caused the impossibility of the applicant to participate in the trial. In other words, these established procedural violations are of such a nature that they lead to the limitation of the right to be heard, to be defended and the principle of equality of arms in the trial for the applicant, a trial which was in the best interest of the applicant, as it was directly related to the limitation of the constitutional right not to be expelled from the territory, except by extradition¹⁵

2.8 Due process of law

Irregularity of the legal process accounts for the largest volume of complaints of unconstitutionality and the decision of the Constitutional Court regarding this aspect is very broad.

This competence of the Constitutional Court in the way it has been exercised for most of the time, has thus focused only on the procedural control of the process and not on the substantive aspect, while the definition of Article 42 of the Constitution according to which, freedom, property and constitutional and legal rights cannot be violated without due process of law, speaks of substantial constitutional rights, "therefore, individuals are entitled to seek the protection of their constitutional rights through a due process of law and not just the rights afforded by procedural due process".¹⁶

In Decision No. 2 dated 31.03.2006, the Constitutional Court judged that "the appellant's constitutional right to due process of law was violated, due to the non-execution of the final court decision given in his/her favour".¹⁷

Due process is not a universal right that covers all other substantial rights of the individual. It is only the judicial procedure, in which the other rights claimed by the individual must be confronted. The jurisprudence of recent years has filled this deficiency by treating this element also from the point of view of the substantial rights of the individual.

The re-defining of the competences of the Constitutional Court in terms of the constitutional control of substantial rights has also come as an effect of the overturning of the decisions of the Constitutional Court by the ECtHR.

Cases from Albania are sent to the European Court of Human Rights (ECHR), where they are examined for significant constitutional rights violations that the Constitutional Court does not explicitly state. It happens that the Albanian state is penalized for infractions that may be rectified within the Albanian system through this Court because it disregarded a crucial filter, such as the Constitutional Court, because of the interpretation it has made of its powers.¹⁸

Thus, the Constitutional Court in its Decision No. 7 dated 21.02.2023 cites: "The court appreciates reviewing the case in light of Article 42 of the Constitution, which states that everyone shall be entitled to a fair trial by a court for their

¹⁴Decision No. 34 dated 20.12.2005 of the Constitutional Court.

¹⁵Decision No. 48 dated 11.10.2023, point 33 of the Constitutional Court.

¹⁶Traja Kristaq "Due process", taken from: Dedja, Bashkim, (2011) "Some elements of constitutional control according to Albanian jurisprudence", Moscow - Russia, October 28-30, 2011.

¹⁷Decision No. 2 dated 31.03.2006, Constitutional Court.

¹⁸Traja Kristaq, "Incompatibility of Albanian judicial practice with the minimum standards of the Convention", taken from: Dedja, Bashkim, (2011) "Some elements of constitutional control according to Albanian jurisprudence", Moscow - Russia, October 28-30, 2011.

protection and that a right recognized by law cannot be violated without due process of law. The court takes into consideration that the arguments are related to how the judicial process will be concluded against the applicant".

In evaluating the applicant's claims, the Court notes that the constitutional standards that guarantee due process and a fair trial, including the right to access, are closely related from an organic and functional point of view to each other, in such a way that the infringement also only one standard inevitably affects the violation of others"

The court has pointed out the constitutional importance of the implementation and interpretation of legal provisions by courts of ordinary jurisdiction, including the Supreme Court, in order to guarantee the individual due process in terms of access to court and effective protection. ... Although the interpretation and application of the law, as well as the assessment of facts and circumstances, are matters that separate the jurisdiction of ordinary courts from constitutional jurisdiction, the Court intervenes in those cases where the courts of ordinary jurisdiction, through the interpretation and application of the law in a concrete issue, have violated the constitutional rights of the parties..."

3. Conclusion

The main findings of this paper refer to two dimensions of the constitutional treatment of the fundamental rights of the individual.

From a formal point of view, these rights are guaranteed in the Constitution of Albania in full compliance with international obligations, especially with the ECHR.

However, this dimension still needs to be completed both quantitatively and substantively, particularly in terms of guaranteeing the individual's substantial rights and creating and solidifying the practice of individual constitutional appeal in order to challenge acts of public power, including laws, in the Constitutional Court. This is true even though the Court has made a significant contribution to the establishment of a jurisprudence that practically guarantees them.

Of course, the last element is not a direct competence of the Constitutional Court, but its role remains to guide the individual towards this possibility.

The article expresses its misgivings by simply covering a substantial portion of the Constitutional Court's 25-year jurisprudence, leaving open numerous topics for further study and questions for discussion in the present and the future.

References

- Decision No. 1, 1995 of the Constitutional Court of Hungary
Decision No. 11 dated 27.05.2004 of the Constitutional Court
Decision No. 15 dated 17.04.2003 of the Constitutional Court
Decision No. 16 dated 11.11.2004 of the Constitutional Court
Decision No. 29545/95, dated 31.10.2001 of the ECtHR - Devlin v. the United Kingdom.
Decision No. 30, dated 11.07.2006 of the Constitutional Court
Decision No. 34 dated 20.12.2005 of the Constitutional Court
Decision No. 48 dated 11.10.2023 of the Constitutional Court
Decision No. 65 dated 10.12.1999 of the Constitutional Court
Decisions of the Constitutional Court of the Republic of Albania, 2002, Tirana.
Decisions of the Constitutional Court of the Republic of Albania, 2003, Tirana
Decisions of the Constitutional Court of the Republic of Albania, 2004, Tirana
Decisions of the Constitutional Court of the Republic of Albania, 2005, Tirana
Decisions of the Constitutional Court of the Republic of Albania, 2006, Tirana.
Dedja, Bashkim, (2011) "Some elements of constitutional control according to Albanian jurisprudence", Moscow - Russia, October 28-30, 2011.
Final decisions (gjk.gov.al)
Judgment of the French Court of Cassation, cited by the ECtHR, in the case of Frezzes&Roire v. France, Application 29183/1995
Kristo, V. (2007) 'Constitutional control of the compliance of Albanian legislation with the standards of the ECHR', Conference, "Improving the quality of the implementation of the ECHR through the expansion of cooperation between local institutions", Ministry of Foreign Affairs & Council of Europe, September 26-27, 2007, Tirana.
Marek Antoni Novicki: About the European Convention, page 344, referred to the decision "Prince Franz-Adam II of Liechtenstein v. Germany, dated 12.7.2001, Grand Chamber, appeal no. 42527/98, par. 83
Traja, Kristaq, "Incompatibility of Albanian judicial practice with the minimum standards of the Convention"
Tusha, Vitore, 5 years from the Justice Reform, the consolidation of the system through the new Cross-Sector Strategy of Justice 2021-2025".