

Access to the Court, as a basic principle of due process

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Abstract

Access to the court, is one of the basic principle of due process. This principle is provided by the international acts and also by domestic laws. Constitution of Albania provides that every person has the right to address the court in order to protect their own legal rights, freedom and interests. Access to justice is an important aspect of due process, the absence of which makes in-existent the discussion for respecting the principle of due legal process. This principle is one of the European Convention of Human Rights elements of the article 6 and it is specifically interpreted by the European Court of Human Rights.

Albania undertook some action to reform the justice system, and some of laws are amended and affected even the part of access to the court. Some changes were done to the Procedural Civil Code, with the aim that the civil procedure to be easy, the time of the proceeding to be reasonable, the access to court to be easy for every citizen, the procedures to be simplified etc.

In this paper there are analyzed the rights to address to the court, as part of appropriate process, cases when this right can be restricted, which is the practice followed by the domestic courts intertwining with the attitude that keeps the European Court of Human Rights, the changes that were made to the

laws by Albania during these years and affects that access to the court.

Key words: access to court; due legal process; court fees;

1. Introduction

Access to the court is not an absolute right, it can be restricted in cases when there is a due legal aim and the restriction is proportional between the used tools and the aim required to be achieved. Unlike other rights, the right to justice has a particular nature, requiring the relevant rules (deadlines, different procedures, court fees, etc.), which are set by the state. However, in any case, these rules shouldn't affect the essence of the law itself. In practice there have often been problems, likewise the set of high court fees, the existence of immunity for some functionaries, several criteria (likewise age, ability to act), which have violated the right to address the court. It is not enough that the right to address the court recognized, but it needs to be also effective.

The rights and freedom will remain abstract, if not recognized the right of access to the courts in the country to restore them. Access to justice is recognized by international law and domestic law. The specificity of the right to justice lies in the fact that it is not independent from the process of law. Like other rights, the right of access to court may be limited when there is a legitimate reason, but this limitation may not affect the substance of the law itself. Ensuring access to court often has been in the attention of many international organizations, which often come up with reports, recommendations that should be implemented by the state. Albania has a comprehensive legal framework that guarantees access to court, but there is often found limitations or lack of coordination between institutions, which have led to the violation of the right to address the court.

Albania approves a new law for the legal aid, for the tax on justice system that will affect even the right of citizen to access the court.

2. Access to court under international law

The international acts have incorporated a principle of access to justice, as an important element of due process.

The Universal Declaration of Human Rights, as the first international act, has predicted in full assurance and recognition of human rights, concretely on article 10 is provided:

"Everyone is entitled in full equality to a fair and open court by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him"

In another important international act, the International Covenant on Civil and Political Rights, Article 14 paragraph 1, provided:

"... In the determination of any criminal charge against him, or of his rights and obligations in a matter of judgment, everyone should have the right to a fair and open ..."

On the European Convention of Human Rights, the article 6, paragraph 1 provides:

"Every person has the right to have his case heard in a fair and public hearing within a reasonable time by an independent court and impartial ..."

The European Court of Human Rights has already consolidated its position in many decisions, stating that the right to justice is an integral part of the legal process. According to the Court, "could not understand that Article 6 of the ECHR guarantees the procedure described in detail given to the parties in a civil action and not only protects early which makes it possible in reality benefit of these guarantees, access to the court"¹. The Court can not talk about due process, when not granted the right to address the court.

3. Right of citizen to have access to the court, historical view of this principle

The right to protect the rights recognized through judicial means, we find that the statute contemplated charter Albanian Kingdom ²: *"Every person has the right to protect its rights with acceptable ways of law"*

Also, according to the art. 127 of the Statute, it stipulates that no court can refuse to examine the issues: *"No court can refuse to consider issues that are in power and his duties ..."*

¹ Francois.J, Kombe.A, *Positive obligations under the European Convention of Human Rights*, Council of Europe, 2007, pg 60

² Art. 122 of Fundamental Statute of Albanian Kingdom, 1.12.1928

In legal party system does not find the right voice to court to protect the rights and freedoms. The Constitution of 1950 envisaged the right of citizens to access justice against injustice Officers made to exercise³.

In the 1976 Constitution, Article 59 stipulates that ⁴: "Citizens have the right to make requests, complaints, remarks and proposals to the competent authorities for personal issues, social and state ". Like the previous Constitution, the 1976 Constitution does not provide explicitly the right to address the court.

The right to address the court, for the first time found the projected clearly and fully in Draft Constitution of the Republic of Albania, 1994 Article 57 of the Draft Constitution provided⁵:

"Anyone who is violating a right recognized in the Constitution, can not be denied restoration of the right to court"

Under this project the right to address the court stands independently of the right to a fair trial, a right provided for in Article 58 of this right Forecast separately, constitute a particular, as the right to court does not find the foretasted explicitly separated from due legal process in any national or international law.

In 1998 came into force the Constitution of the Republic of Albania, which constitutes the basic act. In its article 42/2 provided that:

"Whatever, for the protection of rights, freedom and interests of his constitutional and legal, or in the case of charges brought against him, has the right to a fair and public hearing within a reasonable time by an independent court and impartial tribunal established by law. "

The right to address the court finds incorporates the right to a fair legal process. The right to a fair process guarantees the right of every person to protect his legitimate interests, to address the court or competent bodies. This right is granted to all citizens and there can be no reason to deprive any person or category of persons from this right is important⁶.

Constitutional Court stated that many decisions ⁷:

³ Art. 33 of Albanian Constitution, 4.07.1950

⁴ Art. 59 of Albanian Constitution, 28.12.1976

⁵ Art. 57 of Draft Constitution of Albania, 1994

⁶ See Omari.L, Anastasi.A, *Constitutional law*, Tirana, 2008, pg 157

⁷ See Decision no.5, date 2.03.2011 of Constitutional Court, decision no.5, date 06.03.2009

"Denying the right to go to Court and get an answer from her final allegations raised constitutes a violation of the fundamental right to a fair hearing.

The Constitutional Court has gone further by stating that access to justice can neither be affected by deficiencies or errors nor the activity of state bodies themselves⁸. The Court explained that the rule of law presupposes that any interference by the executive authorities on the rights of the individual or legal persons shall be subject to the effective control of a body that provides guarantee of independence and impartiality during the review process of conflict⁹.

4. Limits and restrictions to access the court

As we mentioned above, the access to justice is not an absolute right. The European Court of Human Rights said the decision *Golder v United Kingdom*, the very nature of the right to address the court calls for regulation (which may vary in time and place, according to community needs and resources and individuals) issued by the state, although such regulation should not affect the essence of the right at all¹⁰. The Constitutional Court holds the same opinion, stating that¹¹:

"The Court reiterates its position that the denial of the right of access, ie. the right to address the court and get a final answer from that associated with the claims raised, constitutes a violation of the fundamental right to a fair hearing as provided by Article 42 of the Constitution and Article 1.6 of European Convention on Human Rights (ECHR)

... It may have limitations, but they should not limit the scope of access to the individual in such a way as to touch right at its core"

4.1. Legal restrictions

Article 17 of the Constitution provides for the limitation of rights, but in any case these rights may not infringe the essence of law. Even the right to justice is not absolute, it may be limited, but these restrictions should follow a lawful order and the restriction must be proportionate between the means employed and the aim sought to be achieved. It is often determined

⁸ See Decision no.22, date 26.07.2006 of Constitutional Court

⁹ See Decision no. 10, date 04.04.2007 of Constitutional Court

¹⁰ See Mole.N, Harby.C, *Right for the due process*, Council of Europe, 2006, pg.36

¹¹ See Decision no.28, date 16.12.2008 of Constitutional Court

by state laws, either directly or indirectly infringing the right to address the court.

4.2. Who has the right to address the court?

Article 42 of the Constitution provides that "whoever, to protect the rights, freedoms and interests of his constitutional and legal, or in the case of charges brought against him, has the right to a fair and public trial within a reasonable by a court independent and impartial tribunal established by law."

From the above constitutional provisions conclude that any natural or legal person, with Albanian citizenship to foreigners or stateless has the right to address the court. One of the elements that must be fulfilled by the court to address is the ability to act¹². Under civil law capacity to act for individuals at the age of 18 years and for legal persons when registered at competent institutions, persons who do not have the capacity to act, can exercise their right to address the court through their representatives.

It was found that placing certain restrictions on persons to justice, violates the essence of law itself. In civil process for limiting or removing the ability to act, the person will be deprived of the ability to act is represented by a temporary guardian. Procedural position of the person's ability to act which is under discussion, it seems very disadvantaged, it is subject to questions, but do not have the status of a party to litigation, given that the claim is adjudicated as a matter without the opposing party. The missing person's right to expression and as a consequence, the right to be protected before the court¹³.

4.3. Access to courts and legal aid

The right to defend with counsel is provided for in the Constitution and in a more concrete codes (Code of Criminal Procedure, Civil Procedure Code) or in special laws. Obstruction of a person to represent the attorney in civil or criminal matters, can bring violations of the right to address the court?

An answer to this question has provided protection agencies of the human rights, which have found various obstacles that impair the right of access to justice. The ECHR found that obstruction of a prisoner to contact a

¹² See Article 91, Civil Procedure Code

¹³ See OSCE report, Towards Justice, Civil Process Analysis in the district courts, in 2013, pg.105,

lawyer, not allowing it to virtually launch a civil case violates his right of access to court¹⁴.

However, even passively allowing a person to contact a lawyer may not always be sufficient to ensure that access to justice. Claimants to provide efficient access to the court, the State are required in some cases to provide legal assistance¹⁵.

Another important element is the legal aid scheme. The right to be represented by an attorney, in cases where the defendant is in financial difficulties to choose themselves, is provided in the Code of Criminal Procedure. The problem that existed was to provide legal assistance in civil litigation cases. Albania passed the law in 2008¹⁶ for providing free legal aid, and set up a committee to implement this law and determining the categories of persons who benefit from free legal aid. One of the types of assistance that is offered is representation by an attorney.

The existence of a free legal scheme is also protected by the ECHR, despite the fact that this is not an obligation for States to provide it. ECHR says.¹⁷:

"Article 6 (1) may sometimes compel the State to provide assistance to a lawyer when such assistance proves to be necessary for effective access to court either because legal representation is being made mandatory so that the national legislation applies Contracting States for several different types or by reason of the complexity of the procedure or of the case "

Despite that we have a legal framework, which enables the representation in court, as in criminal cases as well as civil matters for persons who are in financial difficulties, problems encountered in practice to aid effectiveness that provide attorneys assigned. We think that should be taken by supervisory authorities in order to control mandatory continuing work assigned lawyers.

On December 2017, it was approved the new law on legal aid guarantee by state (entered in force on 1 July 2018), which provide some basic provisions with the aim to facilitate the right of the vulnerable groups to access the court. The law provides in principle that everybody that don't

¹⁴ See OSCE report, *Towards Justice, Civil Process Analysis in the district courts*, in 2013, pg.100 www.osce.org

¹⁵ Ibid

¹⁶ See Law no.10 039, date 22.12.2008 "Legal Aid"

¹⁷ See Decision of ECHR, *Aiery vs. Irlandës*, 9.10.1979

have enough many to pay a lawyer, to pay the courts fees and the other expensive can benefit by the legal aid scheme. Taking in consideration that this law is still not applicable, because it is not approved, we have to wait to see how this law may help the citizens to access the court.

4.4. The court fees can bring some limitation to access the court

One of the criteria that must be met when submitting a claim in court-request is the fee\ court fee¹⁸. Court fees are often subject to change, given the tendency of growth. For a very short period of court fees increased 8 times the base level while the percentage that must be paid by plaintiffs seeking to sue the object of a lot more than 4 million lek increased by three times from 1% to 3%. Tax Increase \ court fees brought many problems in practice, as the amount to be paid by the plaintiff was too big and bring her grace begin the trial. So I violated the right to address the court, despite the fact that civil procedural law gave judges the right to exclude from the fee and court costs. But the exemption can only be done in cases where people fall into the categories provided in the provisions for taxes on acts¹⁹.

Notwithstanding that the 2013 guidance²⁰ court fees were reduced, access to court harmed because of financial incapability. Financial difficulties as a case not provided for exemption from court fees, bringing the denial of the right to justice for people who are in financial difficulties. In Tirana District Court in several matters were submitted requests for exemption from taxes due to financial inability, but in no case the court ruled the plaintiff from paying tax²¹. In connection with the issue said the Constitutional Court²²:

"Every individual lawsuit addresses the court is obliged to prepay the tax on acts (or" fee for legal services, "according to Instruction no. 13/2009), which is determined on the basis of the claim value. However, the Court considers that in view of the above mentioned articles of CPC's, the ordinary judge is not precluded investigate and exclude plaintiff from paying this fee, where is before his financial inability to make this payment. Ordinary judge has room to assess the fulfillment of the procedural requirement for an action and to make

¹⁸ See Art. 158 of Civil Procedure Code

¹⁹ See Art. 105 of Civil Procedure Code

²⁰ See Instruction no.5668, dated 20.11.2013 "On amending No. 13, dated 12.02.2009, for the determination of the fee for services provided to the judicial administration

²¹ See Decision no. 627, date 21.02.2011 of First instance court of Tirana

²² See Decision no.7, date 27.02.2013 of Constitutional Court

exceptions on a case by case basis, in order not to hinder the realization of the right of access to court " .

Constitutional Court decision is in line with international recommendations and the ECtHR interpretations. In case *Kreuz v Poland*²³, ECHR stated:

"The court considered that the judicial authorities had failed to provide a proper balance between, on the one hand, the State's interest in collecting court fees and interest on the other side of the applicant in vindikimin of his claim through the courts. Payment required the applicant with his action was excessive and resulted in the termination of the trial on his claim was not heard by a court, which in the opinion of the Court, has damaged the core of his right of access to court " .

Based on the decision of the CC and the interpretation of the ECHR, the law on free legal aid changes was made anticipating relief from court fees, as one of the types of assisting²⁴. Although these changes have come into force, has not yet started its implementation in practice and case law continues to reject the claim exemption from taxes.

This problem has also been confirmed by international bodies, where in 2014 progress report²⁵, The European Commission has expressed:

"In terms of access to justice, the functioning of the State Committee for Legal Aid to be improved and the latest provisions on legal aid should begin to apply, setting up regional offices to provide legal aid legal fees have prevented many citizens and procedures application are very difficult. Free legal assistance is still provided mainly by non-governmental organizations with donor funds."

Referring to international recommendations and has issued practice problems, believe that the law should become effective free legal aid and judges be trained to implement the spirit of repektimit laws of human rights, international interpretations and decisions of the ECHR.

As we mentioned above, Albania have the new law for legal aid, which will create the posibilités for the vulnerable groups to have access to the

²³ See decision of the ECHR, *Kreuz vs. Poland*, application no.28249\ 95, dated 19.06.2001

²⁴See Law no. 143/2013, dated 02.05.2013 "On some amendments to Law no. 10039, dated 22.12.2008 "On legal aid"

²⁵ See Albania 2014 Progress Report of European Commission, Brussels, date 8.10.2014, pg. 11

court. Also we have the new law for courts fees²⁶, which have raised the tax to address the case before the court. Even this law is not applicable for the moment, because it has to be approved by the by-laws of the Ministry of Justice.

5. Conclusions

The right to access the court, as a basic principle of due process, obligates the state to adopt mechanisms for its implementation and at the same time should not intervene to violate this right. Access to court may be limited, but in any case it can not affect the essence of law itself. Access to justice can not be formal, but it should be effective. It is now consolidating its position, not only the European Court of Human Rights, but also the Albanian Constitutional Court on principles that includes access to the court.

Under the conditions when Albania has reformed the justice system and new laws on legal aid and court fees have been passed, we hope that citizens, and especially vulnerable groups, will have access to the court without any obstacles.

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