The Right of Access to Court

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Abstract

Every person has the right to address the court in order to protect his legal rights, freedom and interests. Access to justice is an important aspect of due process, the absence of which makes inexistent the discussion for respecting the principle of due legal process. Access to the court is a right guaranteed by the Constitution, international acts and is specifically interpreted by the European Court of Human Rights. The right to address the court is not an absolute right. This right 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. In this paper will analyze the right to address the court, as part of due 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.

Keywords: access to court, due legal process, court fees.

Introduction

All rights and freedoms would remain abstract, if the right to access the court and to restore the rights is not recognized. The right to access the court is recognized by the international law and domestic law. The specificity of the right to access the court consists in the fact that this right does not stand independently from the due legal process. Likewise other rights, the right to access to court can be limited when there is a legitimate reason; however this limitation should not affect the substance of law itself. The guarantee of the right to access to court has often been in the attention of a number of international organizations which often came up with report and recommendations to be implemented by the state.

Although, Albania has a full comprehensive legal framework that guarantees the access to court, there have often been limitations or lack of coordination between institutions, which as a consequence has caused the violation of the right to access the court.
The access to court according to the international law

The right to access the court is not explicitly foreseen by international acts, but one finds it incorporated in the right for a due legal process. Moreover, the right to access the court has consistently been in the focus of international organizations which from time to time have issued reports and recommendations for the implementation of this right by the state.

Article 10 of the Universal Declaration of Human Rights, which stands for the first international act where it was predicted in full assurance the guarantee and recognition of Human Rights, states the following:

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

Another important international act, the International Covenant on Civil and Political Rights, article 14, paragraph 1 states that:

“...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...”

One finds the right to a fair legal process and therefore the right to access the court provided in the Charter of Fundamental Rights of the European Union, which in article 4, paragraph 2 states that:

“Everyone has the right to a fair and public hearing within a reasonable time, by an independent court, and impartial filed before the law”

The European Convention of Human Rights, article 6, paragraph 1 states that:

“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...”

Although the right to access the court is not explicitly stated by the international law, the European Court of Human Rights by her side has already consolidated its attitude (position) in a number of decisions, when stating that the right to access the court is an integral part of the due legal process.

Article 6 of the ECHR can’t be understood as a guarantee of the procedure given to the parties in a civil action, without understanding the right that makes possible in reality the completion of these guarantees, that is to say: the right to access to court (Francois & Kombe 2007, 60). According the court one can’t talk for a due legal process, when the right to access the court is not guaranteed.
Domestic law and the right to access to court

One finds in the Charter of Fundamental Statute of Albanian Kingdom the right to protect the rights recognized through judicial means¹: “Every person has the right to protect his rights within acceptable ways of law”.

Article 127 of the same statute also states that: “None of the courts can reject the judgment of an issue that is in his power and his duty…”

In the monism' legal acts the right to access the court in order to protect the respective rights and freedom was prohibited, therefore was inexistent. In the Constitution of 1950 one finds the right of citizens to access the courts against the unjust work of public officers².

In the constitution of 1976, article 59 it is stated that³: “Citizens have the right to make requests, complaints, remarks and, proposals, to the competent authorities for personal, social and stately issues.

Likewise the previous Constitution, the Constitution of 1976 also does not state explicitly the right to access the court.

For the first time, one finds the right to access the court explicitly expressed in the Draft Constitution of the Republic of Albania, in 1994. Article 57 of the Draft -Constitution states that⁴: “To no one, to whom is violated a right stated in the Constitution, can be denied without the restoration of the right to court”

According to this draft project, the right to access the court stands independently from the right to a due legal process; the later expressed in article 58. The provision of this right explicitly, constitutes a particularity, given the fact that the right to access the court is not found explicitly provided, separated from the due legal process in any of the international or national acts of the time.

In 1998 entered into force the Constitution Republic of Albania, which stands for the fundamental act. In article 42/2 of this constitution states that: “For the protection of rights, freedoms and, other constitutional interests, everyone has the right for a due legal judgment and public hearing, within a reasonable time by an independent court and impartial tribunal established by law.”

One finds the right to address the court incorporated in the right for a due legal process. The right for a due legal process guarantees the right of every person to protect his legitimate rights, to address the court or other competent bodies. This is a right guaranteed to all citizens and there can’t be any reason to deprive any person or category of persons from this important right (Omari & Anastasi, 2008, 157).

¹Art. 122 of Fundamental Statute of Albanian Kingdom , 1.12.1928.
²Art. 33 of Albanian Constitution, 4.07.1950.
The Constitutional Court in a number of decisions stated that:

"Denying the right to address the court and to get a verdict from the court for the claims raised, constitutes a violation of the fundamental right to a due legal process"

The Constitutional Court has gone further stating that the access to court can't be affected by deficiencies or errors of the activity of state bodies themselves. The Court explains 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 conflict.

**Restrictions on the right to access the court**

The rights and freedom remain theoretical and illusory until the moment that the one person requires them to court, thus this court gives the verdict for the given issue and the verdict is implemented. Therefore, the access to court is necessary to guarantee the rule of law.

The right to access the court is not an absolute right. The European Court of Human Rights stated in the verdict of Golder vs. United Kingdom' case, that the nature of the right to address the court requires the relevant regulations (the said regulations may vary in time and place, according to the needs and sources of the community and individuals). These regulations are drafted by the state. However, it is worth stressing that such regulations should not affect the essence of the right (Mole & Harby, 2006, 36).

The Constitutional Court has the same attitude, stating that:

"The court reiterates its position that the denial of the right of access, the right to address the court and get a final verdict from the said court in relation to the claims raised, constitutes a violation of the fundamental right to a fair hearing as provided by Article 42 of the Constitution and Article 6 paragraph 1 of the European Convention of the Human Rights. (ECHR)... it may have limitations but they should not affect the essence of law at all."

**Legal restrictions**

Article 17 of the Constitution provides the limitations of rights, but in any case these rights can not affect the essence of the law itself. However, the right to address the court is not absolute. This right can be limited but these limitations should follow a legal aim. Moreover, the limitation should be in proportion between the tools utilized and the main aim sought to be achieved. It has often occurred that legal acts, either directly or indirectly, has affected the right to access the court.

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5 Decision no.5, date 2.03.2011 of Constitutional Court, decision no.5, date 06.03.2009.
6 Decision no.22, date 26.07.2006 of Constitutional Court.
7 Decision no. 10, date 04.04.2007 of Constitutional Court.
9 Decision no.28, date 16.12.2008 of Constitutional Court.
Who has the right to address the court?

Article 42 of the Constitution provides that: “For the protection of rights, freedoms and, other constitutional interests, everyone has the right for a due legal judgment and public hearing, within a reasonable time by an independent court and impartial tribunal established by law”.

According to the above constitutional disposition one can conclude that every physical and juridical person of Albanian nationality, foreigners or stateless, all have the right to access the court. One of the elements that must be fulfilled by the physical and judicial persons to address the court is the capacity to act. Under civil law the capacity to act for physical persons is reached at the age of 18 and the capacity to act for the judicial persons can be reached in the moment when they are registered next to competent institutions. According to the legislation, the persons that do not have the capacity to act, can exercise their right to access the court through their representatives.

It is concluded that the set of some possible restrictions for these persons to access the court, affects the essence of law itself. During the civil process, the person to whom the capacity to act is limited or removed, the said person will be represented by a temporary guardian. The procedural position of this person is very disadvantaged. Although he is subject to the questions, however he does not have the status of a party in the litigation, given the fact that the litigation is treated as litigation without an opposing party. Therefore, if a person looses the right to to expression as a consequence he loose also the right to protect himself in court.

The Criminal Procedural Code provides the right of persons to address the court for offenses provided in article 59. Juveniles can address the court through their representatives. This creates a problem as the proceedings of the accused person in these cases should be signed and followed during all trial proceedings and judgment from the legal representative of the child, from the parent or from the guardian. If the legal representative does not agree and does not perform these actions, then the juvenile is unable to protect his interest. Failure of legal proceedings which are supposed to regulate this legal vacuum, for example, by giving the prosecutor the power to send the request, brings again the infringement of the right to access the court.

The European Court of Human Rights has supported the idea that the limitation of the access to court for juveniles, for persons with mental disabilities or bankrupted does not follow a legitimate aim (Mole, Harby, 2006, 36).

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10 Article 91, Civil Procedure Code.
The access to court and the legal aid

The right to be protected by a lawyer is predicted in the Constitution, in legal codes such as The Procedural Penal Code, The Procedural Civil Code and, in specific laws. Can the obstruction of a person to be represented by the lawyer in a civil or criminal matter bring as a consequence the violation of the right to access the court?

The answer to this question is provided by the agencies of human rights, which have found various obstacles that affect the right to access to justice. The ECHR concluded that the obstruction of a prisoner to contact an advocate, therefore not allowing him to practically launch a civil case, basically violates his right to access to court\textsuperscript{13}.

However, even passively allowing a person to contact a lawyer may not always be sufficient to ensure the access to justice. In same cases, in order to provide efficient access to court by the claimants, the state itself is required to provide legal assistance\textsuperscript{14}. The role of the defensive is irreplaceable; he represents a qualified assistance, without which the equality between pairs remains simply formal. Meanwhile the debate is developed in favor of the prosecutor (Islami, Hoxha & Panda, 2010, 53), which once again brings to a violation of the access to justice.

Another important element is the legal aid scheme. In cases when the defendant, due to financial difficulties is unable to choose himself an attorney, the right to be represented by an attorney is provided in the Procedural Penal Code. The problem was to provide a legal aid in the cases of civil legal processes.

Albania, in 2008\textsuperscript{15} passed the law for providing free legal aid and, set up a committee to implement this law and to determine the categories of persons who benefit from this free legal aid. One of the types of assistance that is offered is the representation of an attorney. The existence of a free legal scheme is also protected by ECHR, despite the fact that this is not an obligation for the states to provide it. The ECHR states that\textsuperscript{16} “Article 6 (1) may sometimes compel the state to provide assistance for a lawyer, when such assistance proves to be necessary for an effective access to court, either because legal representation becomes mandatory so that the national legislation applies Contracting States for several different types or by reason of complexity of the procedure or of the case.”

Despite that, we have a legal framework, which enables the representation in courts, for criminal cases as well as for civil cases. This is used for persons that are unable to support the expenses by financial means. Though in the practice, a number of problems have been encountered according the effectiveness of the aid that the attorneys offer.

Some provisions should be undertaken from the supervisory authorities in order to control the mandatory continuous work of the assigned lawyers.

\textsuperscript{13}OSCE report, \textit{Towards Justice, Civil Process Analysis in the district courts}, in 2013, pg.100.
\textsuperscript{14}OSCE report, \textit{Towards Justice, Civil Process Analysis in the district courts}, in 2013, pg.100.
\textsuperscript{15}Law no.10 039, date 22.12.2008 “Legal Aid”.
\textsuperscript{16}Decision of ECHR, \textit{Aiery vs Ireland}, 9.10.1979.
One of the criteria that must be fulfilled when submitting a claim in court-request is the fee\textsuperscript{17}. Court fees are often subject of changes, with a tendency to grow. For a very short period the court fees increased 8 times upon the basic level, while the percentage that was required to be paid by the plaintiff seeking to sue an object with a value more than 4 million (lekë) changed 3 times, raising from 1\% to 3\%.

The increase of the court fees brought many problems in practice, as the amount to be paid by the plaintiff was quite big and the lack of payment would bring the consequence of not starting the court procedure. Therefore, the right to address the court was consequently violated, despite the fact that the civil procedural law gave to courts the right to exclude from the fee and court expenses. This exclusion however is only applied in cases when the persons belong to the categories stated in the provisions of the acts for taxes\textsuperscript{18}.

Despite the fact that in the instruction made in 2014\textsuperscript{19} that court fees were reduced, the access to court was again violated due to financial problems. The financial problems is not provided as a case for exclusion from court fees, which brings in this way the negation of the right to access to court by persons who have financial difficulties. In Tirana District Court, for several cases there were submitted requests for exclusion from fees due to financial problems, but the any of the cases did the court exclude the plaintiffs from the court fees\textsuperscript{20}.

The Constitutional Court states the following for this issue\textsuperscript{21}: “Every person that addresses the court through a lawsuit, is obliged to pay the fee on acts (the so called “fee for judicial services”, according to the instruction no. 13/2009), which is set based on the claim value. Nevertheless, the court considers that in accordance with the above mentioned articles of CPC’, the ordinary judge is not precluded to investigate and to exclude the plaintiff from the fee payment, when he is confronted with the inability of the plaintiff to make this payment. The ordinary judge has authority to value the accomplishment of this procedural criteria when the claim is been made, as well as he has the authority to make the exclusions on a case to case bases, in order not to hinder the realization of the right to access to court”

The Constitutional Court Decision complies with the international recommendations and with the ECHR interpretations. In the case of Kreuz vs. Poland\textsuperscript{22} the ECHR states that: “The court considered that the judicial authorities had failed to provide a proper balance between the interest of the state in collecting the fees on the one side, and the interest of the applicant for his claim in court on the other side. The payment requested from the applicant was excessive, and resulted with the termination of the trial. Therefore, his claim was not heard by a court and, according to the Courts opinion; this action actually damaged the

\textsuperscript{17}Art. 158 of Civil Procedure Code.
\textsuperscript{18}Art. 105 of Civil Procedure Code.
\textsuperscript{19}Instruction nr.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.
\textsuperscript{20}Decision no. 627, date 21.02.2011 of First instance court of Tirana.
\textsuperscript{21}Decision no.7, date 27.02.2013 of Constitutional Court.
\textsuperscript{22}Decision of ECHR Kreuz vs Poland, application no.28249/95, date 19.06.2001.
Based on the decision of the Constitutional Court and on the interpretations of the ECHR, some changes occurred in the law for free legal aid, providing the exclusion of the court’s fee, as one of the ways through which the aid is given\textsuperscript{23}. Although these changes have come into force, still the implementation in practice has not yet started and the judicial practice continues rejecting the claim of exclusion from fees. This problem has also been confirmed by international bodies, where in the annual report progress of 2014\textsuperscript{24}, the European Commission states the following: “\textit{In terms of access to justice, the functioning of the State Commission for Judicial Aid needs to be improved and the last dispositions for judicial aid need to begin to be implemented, setting up regional offices to provide legal aid. Court fees have prevented many citizens and the application procedures are very complicated. Nowadays, free legal assistance is still being provided mainly by non-governmental organizations with donor funds}.”

Referring to international recommendations and the problems identified through practice, we think that the law for free judicial aid needs to be effectively applied and practiced and lawyers need to be trained to respect the law, international interpretations and decisions of the ECHR while implementing the spirit of respecting human rights.

**Physical limitations**

In practice, legal barriers that have violated the right to access to court are found alongside the physical barriers. From an observation that has been made to the courts by OSCE\textsuperscript{25}, it turns out that 62% of the hearing sessions are held in the judge’s offices. The same has been concluded in a report by USAID, according to which only 2% of the hearing sessions are held in the courtrooms\textsuperscript{26}.

The occurrence of the sessions in the judges offices, indirectly brings the violation of the principle of public hearing and as a consequence the violation of the public right to access to court. Offices are often very small and in cases when the pairs are numerous, some of them are obliged to stay outside the office where the issue is being judged. Also, if one is not a pair in the process, the possibility and opportunity to participate in the judgment as public is actually quite low. The right to participate in the judicial proceedings is an important part of the right access to court.

Another problem that appears is the possibility of the persons with disabilities to access to court. All court buildings have stairs in their entrance, thus complicating the access to the

\textsuperscript{23}Law no. 12. 143/2013, dated 02.05.2013 “On some amendments to Law no. 10039, dated 22.12.2008 “On legal aid”.

\textsuperscript{24}Albania 2014 Progress Report of European Commission, Brussles, 8.10.2014, pg 11.


public reception area and consequently to the access and participation\(^{27}\) in court.

**Conclusions and Recommendations**

The right to access to court is a positive and negative right, which means that the state should adopt mechanisms for its implementation and at the same time the state should not intervene to violate this right. Access to court may be limited, but in any case it can't affect the essence of law itself. The right to access to justice can't be formal, but it should be effective. Now, it is also consolidated not only the position of the European Court of Human Rights, but also the position of the Constitutional Albanian Court on the principles that concern the right to access to court. The problem remains the implementation of these principles from the courts as well as the coordination between institutions in order not to violate the right to access to court.

Following the above analyzes and arguments done for the right to access the court, we concluded that the following steps should be undertaken:

- Continuous training of the judges to be familiar with international and especially with the decisions of ECHR on the principles of right;
- Monitoring and training of lawyers, which once appointed should perform the task with professionalism, enabling clients effective representation and not superficial;
- Implementation and adoption of bylaw acts to enable the application of the free judicial aid, based on the legal changes;
- Creating conditions to held hearing judicial sessions in halls and not in the offices of judges; as well as the modification of the court infrastructure, to give an equal opportunity to access to court to disabled persons.

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