

## The right to appeal under the constitution of Albania and court jurisdiction

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### Abstract

The right to appeal is both a fundamental human right and a procedural tool, whereby parties exercise examination of the lawfulness of court rulings, etc. The constitution of the Republic of Albania,<sup>1</sup> approved in 1998, expressly provides for and guarantees the right to file an appeal. Unlike other rights, this fundamental right was not restricted, being in accordance with Article 17 of the Constitution, except for cases otherwise provided in the Constitution. In accordance with this constitutional right and guarantee, all codes of administrative procedures, civil and criminal procedure, provided for and widely guaranteed the exercise of the right to file an appeal.

This absence of restriction of the right to file an appeal brought about an overload of court cases and trial delays, thus making the completion of the adjudication within a reasonable deadline uncertain. As a result, there rose the necessity to limit this right in the Constitution of the Republic of Albania. The amendments to the Constitution by Law no. 76/2016 also limited the right to file an appeal under Article 17 of the Constitution. However, these amendments were not complete, as they did not entail the exercise of the right to file an appeal against decisions of administrative authorities. The jurisdiction of the Constitutional Court of Albania is a guarantee of the right to appeal/effective access in the civil and administrative process, although slightly controversial in the criminal process. However, positive developments regarding the guarantee of effective access to the court have recently occurred. Even in the broad jurisdiction of the European Court of Human Rights, when cases from Albania have been adjudicated, violations of the right to effective appeal have been observed in the criminal process.

**Keywords:** exercise of the right to appeal, limitation of the right, judicial appeal, administrative appeal.

### Provision for the right to appeal in the Constitution of the Republic of Albania

The Constitution of the Republic of Albania<sup>2</sup> is a positive one, which provides for and guarantees the fundamental human rights and freedoms. One of these fundamental rights is the right to file an appeal, as provided in Article 43 of the Constitution.<sup>3</sup> This Article stipulates that: “anyone shall be entitled to file an appeal against a judicial decision

<sup>1</sup> Adopted by Law no. 8417, dated 21.10.1998 of the Albanian Parliament.

<sup>2</sup> Law no. 8417, dated 21.10.1998, “Constitution of the Republic of Albania”.

<sup>3</sup> See Article 43 of the Constitution: “Anyone shall be entitled to file an appeal against a judicial decision before a higher court, except if otherwise provided in the law”.

*before a higher court, except if otherwise provided in the Constitution”.*

This Article clearly guarantees the exercise of the right to file an appeal against court decisions and the limitation is only applied to cases provided in the Constitution. The cases of not exercising the right to file an appeal provided in the Constitution were few in number, including the case of not exercising the right to file an appeal against the decision of expropriation of private property for public use.<sup>4</sup>

Nevertheless, although the Constitution of Albania used the best experience of other constitutions, this Article did not provide for the exercise of the right to appeal or effective access against decisions or activities of administrative authorities.

Guarantee of the right to appeal under the Constitution and not limiting this right, brought about an excessive exercise of the right to appeal without any limitations, and this was due to the fact that all codes widely guaranteed the exercise of this right. What does our national legislation provide for the exercise of the right to file an appeal?

### **The provision for the right to appeal in domestic legislation**

In accordance with constitutional guarantees, all codes, including the administrative procedure, civil procedure, and criminal procedure, provide for the exercise of the right to file an appeal.

#### *Guarantee of the right to appeal under the Code of Administrative Procedures of 1998*

Administrative procedure under the Code of Administrative Procedures and, like any other procedure, is grounded on a number of principles. One of these principles is the principle of internal and judicial control, set forth in Article 18 of this Code<sup>5</sup>. This Article provides for the exercise of internal and external control of the activities of administrative bodies<sup>6</sup>. This internal control of an administrative body of a higher level of hierarchy, is guaranteed by the exercise of appeal. The external control of the activities of the administrative body is also conducted at court, by means of appeal to the relevant court, in accordance with the regulations provided in the Code of Civil Procedure. At present, there is a new code of administrative procedures.

#### *New Code of Administrative Procedures<sup>7</sup>*

The Code of Administrative Procedures was adopted in 2015 and entered into force in May 2016. An Article of this Code, like the previous one, provides for internal

<sup>4</sup> See Article 41 of the Constitution, which provides for expropriation of property for public use.

<sup>5</sup> Law no. 8485, dated 12.05.1999 “Code of Administrative Procedures of the Republic of Albania”, Article 18.

<sup>6</sup> Article 18 provides:

The principle of internal and judicial control.

To defend the constitutional and legal rights of natural persons, the administrative procedure is subject to:

a)-Internal administrative control regarding the provisions of this Code about administrative appeal.

b)-Control by the court in accordance with the provisions of the Code of Civil Procedure.

<sup>7</sup> Law no. 44/2015, “Code of Administrative Procedures of the Republic of Albania”, Article 21.

and external control of the activities of administrative bodies.<sup>8</sup> Under this principle Article, the exercise of appeal to the administrative body and/or the judicial one is guaranteed. This Code does not provide for the limitation of the right to appeal against decisions or activities of administrative bodies.

External judicial control is conducted in accordance with the provisions of the Code of Civil Procedure.

#### *Guarantee of the right to appeal under the Code of Civil Procedure<sup>9</sup>*

The adjudication of disputes concerning administrative procedure, but not limited to, is regulated by the provisions of the Code of Civil Procedure. Article 21 of this Code, as a principle Article, provides for the exercise of the right to appeal against a court decision, when first instance adjudication is complete. This Code also provides for the means of appeal and deadlines, in Article 442,<sup>10</sup> thus entailing appeal, recourse, and request for revision, as means of appeal against first instance decisions or final decisions. This Code contains no limitation as to the right of appeal against decisions at higher instances.

Below we discuss the provisions of the Code of Criminal Procedure.

#### *Code of Criminal Procedure<sup>11</sup>*

Criminal proceedings are directed at persons who are suspected of having committed a criminal offense. In these proceedings, like all other proceedings, the exercise of the right to file an appeal is provided for against the first instance decision and the final decision. There is no provision for this in the principle Articles, but the chapter after adjudication, Article 407<sup>12</sup> and onwards of the Code of Criminal Procedure, provides for the exercise of the right to appeal, the subject that exert it and the means of appeal. The means of appeal in these proceedings are the appeal, recourse and request for revision. This and the other codes do not provide for the limitation of the right to file appeal.

As it was elaborated above, the Code of Administrative Procedures, the Code of Civil Procedure and the Code of Criminal Procedure guarantee the right to effective appeal in compliance with the constitution. However, this guarantee and lack of limitation of the right to appeal under the constitution caused problems with regard to its implementation. Higher instance courts, such as the Appeal and High Court, faced an influx of trials. This great number of cases caused problems with the application of another principle, the completion of the adjudication within a reasonable time limit,

<sup>8</sup> Article 21.-Principle of Control. Administrative activities are subject to:

a-Administrative control under the provisions of this Code on administrative legal means and the existing legislation.

b-Control by the court under the existing legislation.

<sup>9</sup> Adopted by Law no. 8116, dated 29.03.1996 "Code of Civil Procedures, as amended"

<sup>10</sup>The means of appeal against court decisions are:-Appeal to the Court of Appeal;-recourse to the High Court and Request for Revision;

<sup>11</sup>Law no. 7905, dated.21.03.1995, Code of Criminal Procedure, as amended.

<sup>12</sup>Cases and means of appeal.

-The law specifies the cases when court decisions and orders are subject to appeal, and the means of appeal.

3-The means of appeal are appeal, recourse to the High Court and review for revision.

thus resulting in trials completed in a decade.

This overload of examining the means of appeal led to the necessity of constitutional changes first, to be later followed by changes to the codes of administrative, civil and criminal procedures.

The situation is different with regard to the new law on administrative disputes regarding the exercise of the right to appeal.

### **Limitation of the right to appeal under Law no. 42/2012**

Law no. 49/2012<sup>13</sup> is a special law whose intention and scope is the adjudication of administrative disputes. This law emerged as a necessity of the time to guarantee the conduct and completion of the adjudication of administrative disputes within a reasonable time limit, by a special court established for this purpose. As a special law, it, first of all, applied its provisions and the provisions of the Code of Civil Procedure, as long as they were not in contravention of this law.<sup>14</sup> This law was a novelty regarding the exercise or limitation of the right to appeal due to the nature of this adjudication, which must be efficient and terminate early, so that administrative decisions are executed. Taking into consideration the problems that have previously occurred in practice, this law provided, for the first time, the limitation of the right to appeal against the decisions taken by these courts.

Thus, according to this law, the following decisions cannot be appealed<sup>15</sup>:

*“no appeal is allowed against final decisions of the administrative court, whose subject of the suit is:*

*-Objection to the punishment for administrative misdemeanor of a value of less 20 times the minimal salary at national level.*

*- Objection to the administrative act that has refused the provision of obligation in money, of a value less than 20 times the minimal salary at national level;*

*-Disputes regarding the protection of constitutional and legal rights, freedoms, and interests, deriving from social and health insurance, social aid and disabled people’s benefit, of a value 20 times the minimal salary at national level”.*

This law also provides for not exercising appeal to the High Court<sup>16</sup>, *for all cases mentioned above but for a value less than 40 times the minimal salary at national level.*

This first time limitation, although in contravention of Article 43 of the Constitution, was in compliance with the general concept and the limitation of rights specified in Article 17 of the Constitution. This limitation was in compliance with the criteria set by this Article:

- it was necessary in a democratic society;
- this limitation is made for public interest;
- it does not violate the essence of the right;

<sup>13</sup>On the organization and conduct of administrative courts and adjudication of administrative disputes.

<sup>14</sup> See Article 44-Means and deadlines of appeal.

The means and deadlines of appeal against administrative court decisions are the same with those provided in the Code of Civil Procedure, except when otherwise provided in this law.

<sup>15</sup> See Article 45 of Law no. 42/2012.

<sup>16</sup>See Article 56 of Law 42/2012.

These provisions were not subject to constitutional examination, as this could have caused a dilemma of decision-taking by the Constitutional Court, whether this limitation was in compliance with Article 43 of the Constitution. This provision preceded the political apathy to amend Article 43 of the Constitution but it led to the necessity to amend this Article of the Constitution. However, as we all know, the amendment of the constitution is a complex process requiring a qualified majority. Amendments to the constitution under the justice reform also included the amendment of Article 43 in July 2016.

### **Existing regulation of the right to appeal under Article 43 of the Constitution of the Republic of Albania<sup>17</sup>**

Article 43 of the amended Constitution specifies that:

*“Anyone shall be entitled to file an appeal against a judicial decision before a higher court, except if otherwise provided in the law, for light criminal offences, administrative or civil cases of small importance or value, in accordance with the requirements set forth by Article 17 of the Constitution.”*

Thus, Article 43, as amended, recognizes the limitation of the right to appeal under Article 17 of the Constitution and has also specified the cases of limitation, including: light criminal offenses, administrative or civil cases of small importance or value.

The constitutional provision is general regarding the cases of not filing an appeal, but this is expected to be completed by provisions of the Code of Administrative Procedures, Code of Civil Procedure and Code of Criminal Procedure. Until now, there has been no approval of the necessary amendments to the Code of Civil Procedure, where the limitations of the right to file an appeal are provided.

However, this constitutional provision made the constitutional regulation of the provision of cases of the limitation of the right to appeal in the law on administrative disputes no. 42/2012.

Nevertheless, Article 43 does not provide for the exercise of the right to appeal against decisions of administrative bodies, thus remaining an incomplete and not comprehensive Article.

What about the role of our Constitutional Court with regard to Article 43 of the Constitution?

### **Role of the Constitutional Court of Albania in guaranteeing the right to appeal**

The Constitutional Court guarantees the right to appeal and the right to a fair and legal process provided for in the Constitution. This role is in compliance with Article 131 of the Constitution and the Law on Constitutional Court. As regards Article 43 of the Constitution, the Constitutional Court has a broad guaranteeing jurisdiction, at times controversial, and recently characterized by positive developments.

As regards the right to effective access and appeal in civil and administrative cases, this court has guaranteed this right in many of its decisions. In some other

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<sup>17</sup> Law no. 76/2016, dated 22.07.2016 “On some additions and changes to Law no. 8417, dated.21.10.1998 “Constitution of the Republic of Albania”, as amended.

decisions,<sup>18</sup> the Constitutional Court has underlined that the right to effective appeal is a fundamental human right set forth in Article 43 of the Constitution. This right is not partial and, moreover, this Article provides for the non-limitation of the right to appeal. Accordingly, not providing in the Law on Prosecution for the right to file an appeal against the President's decree for the dismissal of the prosecutor is unconstitutional.

As regards criminal cases and the exercise of appeal or effective access at a court, there is a somewhat controversial attitude. There is a consolidated attitude of this court, with many of its decisions stating that the right to appeal, in the criminal process in particular, is part of the right to a fair and lawful process, but it has limited this right after 2010, by considering it related to the person and that he alone exercises this right. The Constitutional Court has underlined that the right to file an appeal shall be guaranteed and that this right shall be effective, rather than only formal.<sup>19</sup> Meanwhile, in some other decisions, with regard to the violation of the right to a fair and lawful process, with these persons not having been heard before adjudication, with the possibility of re-initiating the process by the means of appeal such as the review, this court, after examining the request for the case F. M.,<sup>20</sup> upheld the request for the re-initiation of the judicial process, thus obliging the High Court to uphold the request for revision of a criminal final decision under effective access to a court. Nevertheless, in some other cases, this Court has decided not to uphold the examination of the request for the unconstitutionality of a criminal decision.<sup>21</sup>

### **The provision for the right to appeal/effective access under ECHR and the jurisdiction of this court**

The European Convention on Human Rights (hereinafter Convention) has provided for the right to access to the court in Article 13,<sup>22</sup> which specifies that:

*"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*

*This is a comprehensive Article that enables anyone to file an effective appeal against the activities of administrative authorities.*

Meanwhile, as regards the criminal process, this Convention expressly provides for the right to effective appeal in the criminal process, Article 2, protocol 7,<sup>23</sup> providing for the possibility of re-adjudication or hearing the person who has been tried in absentia, thus providing him with effective means of appeal that guarantee the re-initiation of the process.

The Convention makes a clear definition of the right to appeal/access before a court, including the administrative, civil, and criminal process.

<sup>18</sup> Decision no. 25 of 2002 of the Albanian Constitutional Court.

<sup>19</sup> See decision no. 30, 2010, of the Constitutional Court of the Republic of Albania.

<sup>20</sup> Decision of the Constitutional Court no. 21, dated 29.04.2010.

<sup>21</sup> See decision of ECHR in the case Shkalla against Albania, decision of 10 May 2011.

<sup>22</sup> Article 13, The right to effective remedy.

<sup>23</sup> The right to appeal in criminal cases.

Meanwhile, the European Court on Human Rights considers the right to effective access part of the right to a fair and lawful process in general, and the criminal process in particular. In its broad jurisdiction, it obliges member states of the Council of Europe to implement, minimally, the 9 basic rules set forth by the Committee of Ministers of the Council of Europe concerning the legal obligation of states to notify the person of the initiation of criminal proceedings and, to be later granted the possibility to be heard or re-adjudicated.<sup>24</sup> In the case *Shkalla against Albania*, ECHR stated that the person's right to effective appeal/access to the Constitutional Court of Albania had been violated. It has always underlined that party states shall, in their domestic legislation, provide for effective means to guarantee revision or re-hearing for persons who have been adjudicated in absentia, and at the same time, to adjust this legislation with this standard set by this court. In the cases adjudicated by this court against Albania, violations have been observed in cases when the person has not been guaranteed the right to re-adjudication in cases of adjudications in absentia.

### Conclusions and recommendations

The right to effective appeal has been provided in Article 43 of the Constitution. This Article provides that: *"anyone shall be entitled to file an appeal against a judicial decision before a higher court, except if otherwise provided in the Constitution"*.

This Article set no limitation to the right to appeal, except for the few cases when the Constitution itself limited this right. Under this Constitutional remedy, all codes of administrative, civil and criminal procedures have provided for the right to file an appeal and the available procedural means.

These codes did not provide for the limitation of the right to file an appeal, resulting in the transformation of the High Court into a kind of first instance court, with all appealed decisions taken to this court for adjudication.

In 2012, Law no. 49 on the adjudication of administration disputes was approved. This was the first law to recognize the limitation of the right to file an appeal against first instance decisions or the Court of Appeal. Although, in practice, this resulted to be a positive development, it was somewhat controversial and in violation of the constitution, which did not limit the right to file an appeal. However, these provisions were not subject to constitutional examination.

The practice of our Constitutional Court is also controversial, but it provided more remedies than the practice of the High Court.

As regards the exercise of the right to file an appeal in the civil or administrative process, in its decisions, it has always stated that appeal is a means of control of the decisions of administrative authorities, and this right shall not be selected or limited, but it is granted to each individual.

As regards the right to effective appeal in the criminal process, the Constitutional Court has recently ruled that this is a fundamental human right, part of a fair and lawful process, and closely related to the person.

As regards the exercise of the right of one of appeal means, that of revision, in a fair

<sup>24</sup> See case *Shkalla against Albania*, decision of 10 May 2011.

and lawful process, in criminal cases, this Court, has accepted the re-adjudication of some cases, such the F.M case.

Upon re-adjudication by the Constitutional Court, it ruled that there had been infringement of the right to a fair and lawful process in cases when the High Court has not upheld the request for revision. This enabled parties to guarantee, through the request for revision, the re-adjudication and eventually, effective access to the court.

It should be underlined that the broad jurisdiction of the European Court on Human Rights and the standards set by this Court, have served as guidelines and have provided this Court with the possibility to improve its standard.

The amendments to Albania's Constitution in July 2016 also affected Article 43 by recognizing the limitation of the right to file an appeal under Article 17 of the Constitution.

The following conclusions can be drawn:

-The right to appeal is provided in the Constitution as a fundamental human right and its limitation was an exception. -The right to appeal was limited following amendments to the Constitution in July 2016. The definition of the right to appeal/effective access in the Constitution is not complete and comprehensive as it does not specify the right to appeal or effective access against decisions of administration authorities or their activities. This should have been taken into consideration, referring to the definition set forth in the Convention and the ruling of the European Court on Human Rights, which considers the exercise of appeal against the activities of administrative authorities, guaranteed by Article 6 of ECHR, and it should be therefore provided in the national law.

In practice, not limiting the right to appeal caused problems, resulting in overloaded courts and the High Court being transformed into an instance court.

In practice, a positive development was the limitation of the right to appeal in the law on the adjudication of administrative disputes. These provisions were not subject to constitutional examination as their future would be questioned.

There was no political flexibility that would have amended Article 43 of the Constitution time ago, which would have resulted in the resolution of the problems occurring in practice.

The High Court has not offered a lot guarantees with regard to appeal or effective access when it examined such means of appeal as the request for revision.

The Constitutional Court, in its slightly controversial jurisdiction but with recent positive developments, has specified that:

-The right to effective appeal is part of the right to a fair and lawful process and it can be exercised only by the person it belongs to.

-The request for re-adjudication should be upheld even in formal cases under internal regulation, thus providing parties with the possibility to be heard again and enjoy effective access to the court, which is in accordance with the jurisdiction of ECHR.

Nevertheless, under Article 43 of the Constitution, definitions of limitations of the right to appeal should also be made in the Code of Civil Procedure and the Code of Criminal Procedure. These codes should be amended and also completed in view of the broad jurisdiction of the European Court on Human Rights, with regard to



effective access to a court concerning criminal cases in particular. Therefore, the Code of Criminal Procedure should also provide for the possibility of re-examination of decisions taken by Albanian courts in cases when ECHR has observed violations of the right to effective appeal before a court, and the possibility to amend Article 450.

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