

The right to a fair trial according to Article 6 of the ECHR and Article 42 of the Albanian Constitution

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Abstract

This article will be focused on the right to a fair trial, as one of the basic elements for guaranteeing many other human rights and fundamental freedoms, as well as an instrument to implement important democratic principles. The article is guided by two main approaches. Firstly, it treats different aspects of the legal theory on the right to a fair trial and due process, and secondly, the connection of these theoretical and legal aspects with the practical part, the interpretation of the norms guaranteeing the right to a fair trial and due process by the European Court of Human Rights (ECHR) and the Constitutional Court of the Republic of Albania (CCRA). We will analyze the Article 6 of the ECHR and Article 42 of the Albanian Constitution, looking at the difference and how they have interpreted the right to a fair trial and due process of law. To make the analysis as complete as possible, we will bring some of the most important decisions taken from the case-law of the ECHR and the case-law of the CCRA.

Keywords: due process, fair trial, Article 6, Article 42, Convention.

Introduction

The rule of law covers a variety of policy areas and includes political, constitutional, legal, and human rights issues. Any democratic society that aims to promote human rights must recognize the supremacy of the law as a fundamental principle. It is important to understand that human rights cannot be achieved without the rule of law and without fair trial. The principle of the rule of law and fair trial guarantees that no one will be persecuted or arrested arbitrarily and that everyone has the right to a fair and public hearing by an independent and impartial tribunal established by law.

In this article we will talk about the notion of the fair trial and due process. This article describes the processes of civil and criminal proceedings, with concrete cases brought by the case law of the ECHR and Constitutional Court of Albania alleging that Article 6 of the ECHR has been violated.

The right to a fair trial is developed over thousands years ago, in the Magna Carta which dates back to 1215. The article 39 of the Magna Carta defines that "no free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land"¹.

¹ https://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_39

Then, after the World War II, the Universal Declaration of Human Rights recognised the fundamental rights of human beings, including the right to a fair trial.

Right to a fair trial and due process

Due process is a vital guarantee in any democratic society, so this article is one of the most important and most attacked provisions of the European Convention on Human Rights (the Convention). It is presented as a guarantee for the citizens against the unjust actions of the authorities on the one hand and as an obligation of the latter to not violate the rights and freedoms of the citizens without ensuring the observance of legal procedures on the other hand.² Fair trial is a fundamentally important guarantee in any democratic society, so this article is one of the most important, and most frequently invoked, provisions of the Convention. There are more cases about fair trial than about any other issue.³ Due process is not just a right. It is nowadays treated more as a constitutional principle that extends to certain fundamental human rights and freedoms. Its function and purpose is to protect the individual from illegal interference by public authorities.⁴ The basic provision of Article 6, in the first sentence of paragraph 1, is "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".⁵

Because the Convention has to apply to many States, whose legal systems differ substantially, many of the terms in the article have been given their own "autonomous" Convention meaning by the Court. This applies, for example, to "criminal", "charge" and "civil right". These terms will not always mean the same as they do in national systems,⁶ but if each State (party of the Convention), would have different interpretation of the concepts of the Convention, would lead to different and unpredictable practice, as well as different standards of protection on the rights guaranteed by the Convention.

As per above, "Charge" is an autonomous concept under the Convention which applies irrespective of the definition of a "charge" in domestic law. In the case of *Deweere v. Belgium* the ECHR stated that the word "charge" should be given a substantive rather than a formal meaning, and it felt compelled to look behind the appearances and investigate the realities of the procedure in question. The Court (ECHR) stated that "charge" could be defined as the official notification given to an individual by the competent authority of an allegation that he is suspected of having committed a criminal offence, or, where the situation of the [suspect] has been substantially affected because of that same suspicion.⁷

As the ECHR stated in the case of *Engel and others v. the Netherlands*, State Parties are free to designate matters in their domestic law as criminal, disciplinary or

² <http://www.avokatipopullit.gov.al/en/node/253>, AvokatiiPopullit (translation of the author)

³ <https://www.coe.int/en/web/echr-toolkit/droit-a-un-proces-equitable> Council of Europe

⁴ Arta Vorpsi, *Procesiirregulltligjornëpraktikën e Gjykatës Kushtetuesetë Shqipërisë*, page 13 (translated by the author) <http://www.aksesdrejtesi.al/dokumenta/1592561423procesi-i-rregullt-perfundimtar-19.11.pdf>

⁵ https://www.echr.coe.int/documents/convention_eng.pdf

⁶ <https://www.coe.int/en/web/echr-toolkit/droit-a-un-proces-equitable>

⁷ <https://rm.coe.int/168007ff49>; Human rights handbooks, No. 3; A guide to the implementation of Article 6 of the European Convention on Human Rights; Nuala Mole and Catharina Harby, page 19-20

administrative, as long as this distinction does not in itself contravene the Convention. In that case, the Court established criteria for deciding whether a charge is “criminal” in the sense of Article 6 or not. These principles have been confirmed in later case-law.⁸

In this context, the standard of due process should be considered, mainly guaranteed by Article 6 of the Convention. The bodies established by the ECHR have made considerable efforts to provide a uniform or European definition of the protection area of Article 6, which conforms (partially) the content of Article 42 of Albanian Constitution.

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.⁹

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.¹⁰

3. Everyone charged with a criminal offence has the following minimum rights¹¹:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The first paragraph of Article 6 applies to both civil and criminal proceedings, but the second and third paragraphs apply only to criminal proceedings.

In principle, Article 6 applies broadly to all civil disputes, with some longstanding exceptions. In practice it is simplest to list some of the cases to which the Court has said Article 6 will apply and others to which it will not, but, the lists are not exhaustive and practice is always developing.¹²

⁸ <https://rm.coe.int/168007ff49>; Human rights handbooks, No. 3; A guide to the implementation of Article 6 of the European Convention on Human Rights; Nuala Mole and Catharina Harby, page 16

⁹ https://www.echr.coe.int/documents/convention_eng.pdf Article 6/1 of the European Convention on Human Rights

¹⁰ https://www.echr.coe.int/documents/convention_eng.pdf Article 6/2 of the European Convention on Human Rights

¹¹ https://www.echr.coe.int/documents/convention_eng.pdf Article 6/3 of the European Convention on Human Rights

¹² <https://www.coe.int/en/web/echr-toolkit/droit-a-un-proces-equitable> Council of Europe.

Although states have a wide margin of appreciation in deciding what conduct will constitute a criminal offence, the normal exercise of Convention rights, for example freedom of speech or freedom of expression, cannot be a criminal offence. However some conduct, such as serious sexual assault, must carry a criminal sanction if the victim's rights are to be protected.¹³

For trials that determine a criminal charge, the procedural safeguards are stricter than for other judicial proceedings. The notion of "criminal" has a specific meaning under the Convention and may extend to disciplinary, administrative or fiscal proceedings if they may lead to punishment of the person concerned.¹⁴

The constituent elements of the right to a basic process developed by the Constitutional Court of Albania (CCRA) have been different, although it cannot be said that they have been exhaustive. These elements have been developed on a case-by-case basis, reflecting the requests made by individuals, and include such as access to trial, trial by a court established by law, independent, impartial, reasonable length of trial, right of appeal, the right to defend oneself, the right to participate in the trial, equality of arms, execution of the decision, reasoning of the decision, etc.¹⁵

The difference between Article 42 of the Albanian Constitution and Article 6 of the Convention

Why is it important to respect the right for a fair trial and the due process of law? The Article 42 of the Albanian Constitution defines that:

1. Freedom, property and rights recognized by the Constitution and by law may not be violated without the due process of law.
2. Everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial court established by law, in order to protect his rights, freedoms and constitutional and legal interests, or in the case of charges brought against him.

Due process is one of the rights of the individual related to the regularity of an ordinary trial or an administrative process. Article 42/1 of the Albanian Constitution mentions the due process of law, without giving it any detailed meaning. What this Constitution does not explain in detail, the practice of the Constitutional Court of the Republic of Albania (CCRA) has tried to develop, which is mainly oriented towards the jurisprudence of the ECHR and the European constitutional courts. Although, the jurisprudence of the CCRA has begun to take on a physiognomy of its own, in terms of the meaning presented by Article 42 and 131 / f of the Albanian Constitution, there is still no consolidated and single position on due process of law regarding its exhaustive definition.¹⁶

¹³ <https://rm.coe.int/168007ff49>; Human rights handbooks, No. 3; A guide to the implementation of Article 6 of the European Convention on Human Rights; Nuala Mole and Catharina Harby, page 16

¹⁴ <https://www.coe.int/en/web/echr-toolkit/droit-a-un-proces-equitable> Council of Europe.

¹⁵ Prof. Dr. Xhezair Zaganjori, Prof. Dr. Aurela Anastasi, Dr. Eralda (Methasani) Çani, Shteti i Drejtësnë Kushtetutën e Republikës së Shqipërisë, page 90 (translated by the author) https://www.kas.de/c/document_library/get_file?uuid=726ef2ee-7a25-2477-3d07-a97bfeb4a8a7&groupId=252038

¹⁶ Arta Vorpsi, Procesi i rregullt ligjor në praktikën e Gjykatës Kushtetuese të Shqipërisë, page 73 (translated by the author) <http://www.aksedrejtjesi.al/dokumenta/1592561423procesi-i-rregullt-perfundimtar-19.11.pdf>

In its decisions, the CCRA has tried to distinguish the difference between Article 6 of the Convention and Article 42/1 of the Albanian Constitution. According to this Court, while the Convention denies the right of the individual to a fair trial both to criminal and civil cases, in the Article 42/1 of the Albanian Constitution and its jurisprudence, the right of the individual to a due process is not limited to the judicial process, but includes also the administrative disciplinary character. This has been one of those issues that mark an evolution of the practice of the CCRA, which has been shown to be creative but without crossing the boundaries of the Constitution. In this case, the CCRA consolidated its position in its jurisprudence by not restricting the right to a fair trial to court cases only.¹⁷

Article 42/2 of the Albanian Constitution includes in itself the impartiality of the court in adjudicating the case, which is normally implied until proven otherwise. But determining a court's impartiality is not always easy. In general, impartiality has its subjective element which refers to the creation of the judge's internal conviction for the concrete case as well as the objective element which means the provision by the court of sufficient guarantees for the judgment of the case in an impartial way.

The Albania Constitutional Court has considered the lack of impartiality of the court (first instance and appeal) the exceeding of the limits of the case, expressing for those that were not requested by the plaintiff,¹⁸ as well as the unilateral acceptance of requests of only one party and failure to analyze the arguments submitted by the other party¹⁹. The impartiality of the court is also violated by the subjective attitudes held by the court during the course of the process "allowing the performance or non-performance of those necessary procedural actions related to the drafting of the claim, notifications or knowledge of the parties to the trial"²⁰, which create reasonable doubts to the respondent that the court would not appear impartial in resolving the case.

In the decision no. 93, dated on 13.05.2002, the Constitutional Court of Albania emphasized that the violation of the right to a fair trial is not related to the manner of evaluation of evidence by the ordinary court. The manner of evaluating the evidence is an attribute of the ordinary courts resolving the concrete case and is not subject to its constitutional review.²¹ This is a principle generally accepted by European jurisprudence, but with exceptions. These exceptions can be made in cases of irregularities and arbitrariness. Thus e.g. the illegal provision of evidence and its admission by the trial panel, directly affects the judicial process. However, the consideration of this evidence, which also means its evaluation, directly affects the progress of the judicial process and in this case it can be implied that the process is irregular. In addition, we can mention the case-law of Qufaj CO. LLC v. Albania, where

17 Arta Vorpsi, *Procesi i rregullt ligjor në praktikën e Gjykatës Kushtetuese të Shqipërisë*, page 74 (translated by the author). <http://www.aksedrejtisi.al/dokumenta/1592561423procesi-i-rregullt-perfundimtar-19.11.pdf>

18 Decision no. 20, dated on 2.07.2003 (V – 20/03) page 2 http://www.gjk.gov.al/web/Vendime_perfundimtare_100_1.php (translated by the author)

19 Decision no. 20, dated on 2.07.2003 (V – 20/03) page 3 http://www.gjk.gov.al/web/Vendime_perfundimtare_100_1.php (translated by the author)

20 Decision no. 37, dated on 22.12.2003, page 3, http://www.gjk.gov.al/web/Vendime_perfundimtare_100_1.php (translated by the author)

21 Decision no. 93, dated on 13.05.2002 (V – 93/02) http://www.gjk.gov.al/web/Vendime_perfundimtare_100_1.php (translated by the author)

after the decision was taken, the judgment was not executed, the applicant company brought proceedings in the Constitutional Court, claiming that local governmental institutions were obliged to guarantee the enforcement of final judicial decisions, not to impede them, but the Constitutional Court rejected the applicant company's complaint, stating that the "complaint [could] not be taken into consideration because the enforcement of court decisions is outside the jurisdiction of the Constitutional Court". Meanwhile, the European Court of Human Rights notes that the fair trial rules in Albania should have been interpreted in a way that guaranteed an effective remedy for an alleged breach of the requirement under Article 6/1 of the Convention. *In the Court's opinion, therefore, the Constitutional Court was competent to deal with the applicant company's complaint relating to noncompliance with a final decision as part of its jurisdiction to secure the right to a fair trial.*²²

The right to a fair legal process is a cornerstone in the system of human fundamental rights, therefore it is the duty of all state bodies and not only the Constitutional Court, to pay more attention to the observance of this right. Observance of this right by all levels of the judicial system would be a very important guarantee for all and would increase the credibility of the judicial system.

Conclusions

Usually when we talk about due process we think about the right that a person enjoys to a fair and impartial public hearing regarding decisions on rights and obligations or any criminal charges brought against him within a reasonable time by an independent and impartial court, established by law. But if we decide to follow a line of linguistic interpretation, with a regular legal process, it would also mean the activity of other public bodies, which follow out-of-court procedures (administrative, parliamentary, arbitration, mediation, etc.)²³. However, the due process remains at the core of this concept.

The Constitution of the Republic of Albania is guided by an approach that is based on the treatment of European human rights standards. In this sense it defends these rights in the spirit of the European Convention on Human Rights. The Constitutional Court of Albania made its interpretation based on the practice established by the ECHR. The practice of the ECHR follows the logic of the broad interpretation of the provisions that guarantee the due process of law, because only by making such an interpretation can the goals of this concept of law be fully realized.

The ECHR in its practice has repeatedly underlined that the states party of the Convention are obliged to provide and organize an efficient legal system, where the courts should be able to guarantee citizens the right to a fair legal process. Thus, States parties are obliged to modify their legal systems in order to allow the courts to adapt their practice to the requirements of the Convention.

In its activity, the ECHR has seen the implementation of Article 6 of the Convention in order to implement important democratic principles and therefore its interpretation should be made as broad as possible. In its judgment in *Delcourt v. Belgium*, the

²² Case of Qufaj co. Sh.p.k. V. Albania (application no. 54268/00) judgment Strasbourg 18 november 2004 final 30/03/2005

²³ Luan Omari Aurela Anastasi, "E drejta Kushtetuese", page.157, Tirana, 2010 (translated by the author)

Court stated that: "In a democratic society within the meaning of the Convention, the right to a fair trial is so important that any narrow interpretation of Article 6/1 would correspond neither to the purpose nor to the character of this article"²⁴.

Thus, the right to a due process of law guarantees the right of every person to apply to the court or the competent state body for the protection of his / her legitimate interests and to use all legal remedies and rights in the procedure which is guaranteed by law and the Constitution and at its core has the right to a fair and impartial trial.

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²⁴ ECHR, *Delcourt v. Belgium*, 17 February 1970. According to, Arta Vorpsi "Procesii Rregullt Ligjore në Praktikën e Gjykatës Kushtetuese të Republikës së Shqipërisë", Tirana, 2011 (translated by the author)