General overview of applications made to ECHR against Albania

Ravesa Nano

Abstract

Albania has ratified the European Convention of Human Rights (ECHR) on October 2, 1996 and since that time 495 applications against Albania were sent to the European Court of Human Rights. According to the ECHR statistics for Albania, although the number of applications has increased in a progressive way, very few applications were considered admissible for judgments. For example for the year 2015 the ECHR dealt with 101 applications concerning Albania, 79 of which were declared inadmissible or struck out. It delivered 7 judgments (concerning 22 applications), which found at least one violation of the European Convention on Human Rights. Generally, the subject – matter of violation judgments has been mainly about right to a fair trial (40%), length of proceedings (10%), right to an effective remedy (20%), protection of property (20%) and others (10%). Seen through these statistics, Albanian main judicial problems are 'the right of a fair trial' and 'length of proceedings'.

Keywords: ECHR, Albania, procedure, process.

Introduction

Albania has ratified the European Convention of Human Rights (ECHR) on October 2, 1996 and since that time 495 applications against Albania were sent to the European Court of Human Rights.[1] According to the ECHR statistics for Albania, although the number of applications has increased in a progressive way, very few applications were considered admissible for judgments. For example for the year 2015 the ECHR dealt with 101 applications concerning Albania, of which 79 were declared inadmissible or struck out. It delivered 7 judgments (concerning 22 applications), which found at least one violation of the European Convention on Human Rights. Generally, the subject – matter of violation judgments has been mainly about right to a fair trial (40%), length of proceedings (10%), right to an effective remedy (20%), protection of property (20%) and others (10%). Seen through these statistics, Albanian main judicial problems are 'the right of a fair trial' and 'length of proceedings'.

The issue of fair trial and length of proceedings constitutes about 50% of ECHR violations against Albania and almost always is a conjunction with other issues such as length of proceedings, non-enforcement of final court decision etc. The length of the proceeding seems to be a recent phenomenon in the applications against Albania; however, it is always accompanied by the issue of a fair trial. As Shaw points out individuals who complain at ECHR cannot raise abstract issues, but must be able to claim to be the victim of violations of one or more of the convention rights' (Shaw, 2003, 329). In most of the cases brought to the Court against Albania the applicants claim to be victim of violations of many rights when the main emphasizing is especially on

[1] European Court of Human Rights. (2016). Albania. Retrieved from the official website: http://www.echr.coe.int/Documents/CP_Albania_ENG.pdf.

issues of fair trial. Nevertheless, 'length of proceedings' as a violation is not so much dispersed in cases against Albania as it is in the violations against other states such as Italy or Greece.

Adjudication cases brought to ECHR

The most famous adjudication cases brought to ECHR from the Albanian perspective have been those complaints dealing with the principle of the 'protection of property', especially after two decisions taken by the ECHR which decided that the Albanian state was obliged to pay for the reparation of the damages. This was especially visible in the cases of 'Driza v. Albania' and 'Vrioni and others v. Albania' in 2009. Although both applications were in general for 'property issues', they complained particularly for 'a violation of the fairness aspect of Article 6 and a failure to enforce a final judgment'.[2] In the Case of Driza v. Albania' dated on 15.03.2011 for example, the Court found that 'the applicant's right to a fair hearing by an impartial tribunal within the meaning of Article 6 of the Convention has been infringed'. The case concerned, inter alia, the lack of an effective domestic remedy in relation to the applicant's right to in-kind compensation in lieu of the physical restoration of property. Thus the main violations were based in Article 13 (right to an effective remedy) and violation of Article 1 of Protocol No. 1 (protection of property).

In regard to a different decision, taken for the same violation, the Court held that 'it is the State's responsibility to organize the legal system in such a way as to identify related proceedings and where necessary to join them' thus it was in the State competencies to pay the compensations. Blackwell and Ong point out the 'question of State responsibility, which arises whenever the State is alleged to be in breach of an international legal obligation that applies to that State' (Blackwell. & Ong, 1998, 205). and Albania has ratified the European Convention on Human Rights. Also where 'the Court has found a violation, the matter is placed on the agenda of the Committee of Ministers and will stay there until the respondents government has confirmed that any sum awarded in just satisfaction under article 41 has been paid and/or any required individual measure has been taken and/or any general measure has been adopted preventing new similar violations or putting an end to continuing violation (Shaw, 2010, 359). These cases brought to the Court influenced the initiative of the Albanian government later on to issue a law on former owners' compensation. Although the state compensation for the former owners was minimal, the existence of this law diminished the flux of complaints in ECHR and many applications were rejected by the Court. ECHR has developed a pilot-judgment procedure since 2004 and in response to the large number of cases deriving from systemic or structural problems in certain countries. This consists in identifying in a single judgment systemic problems underlying a violation of the European Convention on Human Rights and indicating that judgment and remedial measures are required to solve such situations. The pilot-judgment procedure is not only intended to facilitate effective implementation by respondent states of individual and general measures necessary to comply with the Court's judgments, but also induces the respondent State to

[2] European Court of Human Rights. Application no. 33771/02. Case of Driza v. Albania. 02/06/2008.

resolve large numbers of individual cases arising from the same structural problem at domestic level, thus reinforcing the principle of subsidiarity which underpins the Convention system. These pilot judgements were given also in other cases related to 'property compensation of former owners'. As such was the case of 'Manushaqe Puto and others v. Albania' on 31.07.2012. This case concerned the complaints of 20 Albanian citizens that, despite the recognition of inherited title of land property by the authorities, final administrative decisions awarding them compensation in one of the ways provided for by law in lieu of restitution had never been enforced. ECHR found violations of Article 13 (right to an effective remedy), Article 1 (protection of property). Also the Court noted that these kinds of complaints reflected a widespread problem in Albania affecting a large number of people. It held that Albania had to take general measures in order to effectively secure the right to compensation within 18 months from the date on which the judgment became final.

In contrary of cases for ownership problems, very few criminal proceedings cases can get material compensation based on Article 6. Hence in the 'Case of Berhani v. Albania' the applicant complained about the unfairness of the criminal proceedings against him but the Court found that is 'inappropriate to award the applicant compensation for the alleged pecuniary damage' but just 'the most appropriate form of redress would, in principle, be trial *de novo* or the reopening of the proceedings, in due course and in accordance with the requirements of Article 6 of the Convention'.[3]

Regarding the lustration cases brought to ECHR it is important to assess that perhaps the most frequent debates on lustration legislation have taken place within the Council of Europe. According to Vladimir Balas 'lustrations are quite well covered by the case-law of the European Court of Human Rights in Strasbourg (ECHR), and receive some attention within the European Union (Balas, 2010, 172). One of the fundamental political documents adopted by the Council of Europe is Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems. However the Resolution does not constitute a formal legally binding act and is considered a political document, since it does not constitute a formal legally binding act. By its nature, it is a soft-law instrument intended simply as a recommendation. However, it is certain that in case a complaint concerning lustration comes up before the ECHR, this resolution would not escape the attention of the Court. In this particular respect, the Albanian lustration legislation, though far from perfect, does not conflict with the Council of Europe resolution; quite on the contrary, it seeks to fully meet its requirements (Balas, 2010, 174). Lustration cases brought before the ECHR concern mostly violations of the rights enshrined in the European Convention on Human Rights (mainly Articles 6,10 8 11 and 14 12) and its Protocol No. I, mainly Article 313. The reasons given and the rights invoked by applicants differ widely, reflecting the diversity of lustration laws in post-totalitarian countries (Balas, 2010, 175). It is almost impossible to find any judgment of the Constitutional Court where the case law of the European Court of Human Rights (ECHR) has not been cited at least once. Indeed, all Albanian courts, and the Constitutional Court in particular, have given considerable attention in the past decade to the ECHR's case law. An attentive observer would note that even the structure of some of the Constitutional

[3] European Court of Human Rights. Application no. 847/05. Case of Berhani v. Albania. 04/10/2010.

Court's judgments follows that of the ECHR, with long citations of applicable law first, followed by the parties' submissions, and finally with the Court's assessment. Most of the time, the proceedings before the Constitutional Court have served as an effective filter before lodging an application with the ECHR (Zyberi & Sali, 2015, 88).

EU law and future prospect for Albania

'Europeanization' here is important to be studied in all its complexities because it explains the impact of the EU upon the individual states, on domestic institutions, structures, policies and practices. It refers to the extent to which EU requirements have affected the states' policy agendas and to what degree the EU practices, procedures and values have been embedded in administrative practices of member states. It is a process leading towards closer integration, policy convergence and homogenization. The impact of 'Europeanization' has been most notable through three aspects: the Single European Market (SEM), EU legislation, and EU policies. The SEM has been a source of great pressure towards deregulation and liberalization in domestic markets, privatization of national monopolies, and restrictions on public ownership and state aid. Market liberalization, in promoting productivity and competitiveness, requires a limited intervention of the state in the economy, primacy of market principles and forces, and limited national policy autonomy. A whole range of policy areas and competences has shifted to the EU. The policy areas which have become most Europeanized are those related to the operation of the single market, such as competition policy, trade, the common agriculture policy (CAP), and monetary policy. EU legislation and its conversion into domestic law include transposition, implementation and reinforcement of EU regulations, directives and recommendations (Loughlin & Bogdani, 2007, 221).

In June 2014, the European Council granted Albania the candidate status[4], but the opening of accession negotiations have not yet started. Every year the European Commission has published its progress report for Albania which makes a summary of the main reforms in the country and how they are approaching them to the EU legislation. The accession of Albania into EU is seen as part of a larger Enlargement Strategy and is related also to the progress made in five key priorities areas identified by EU. These five priorities areas, that are important not only for the internal reformation of Albania but are a condition for EU accession are: 'public administration reform; strengthening of independence, efficiency, and accountability of judicial system; fight against corruption; protection of human rights, including Roma and anti-discrimination policies, as well as the implementation of property rights'.[5] All these areas are connected more or less with the role of the legal system, and will have an effect also in the work of the Albanian Constitutional Court. In the last progress report published by the European Commission, Albania's judicial system is described

[4] European Commission. Albania 2015 report. p.4. Retrieved from: http://ec.europa.eu/enlargement/pdf/ke ydocume nts/2015/20151110_report_albania.pdf

[5] Ministry of Foreign Affairs of Albania. Official website: http://www.punetejashtme.gov.al/en/mission/eu-integration/relations-between-albania-and-the-eu.

as slow and with problems regarding the independence and accountability of judges and prosecutors, enforcement of decisions, inter-institutional cooperation.[6] The main recommendation was the adoption of the judicial reform strategy. Other problems described in the last report of European Commission are the fight against organized crime. Also, it is stated as positive that the legal framework for the protection of human rights is broadly in line with European standards. But that however, effective implementation of relevant legislation and strategies is limited and the enforcement of human rights protection mechanisms remains insufficient.[7] It is important to mention that Albania has continued to align its legislation to the requirements of the EU in a number of areas, enhancing its ability to take on the obligations of membership.

Usually in the reports of EU the judicial criteria's are included in the political criteria's and particularly to the rule of law analyzes. For many years the rule of law has been considered a problem due to the political and economic transition process. The main idea of EU regarding the functioning of the judiciary system of Albania is that its judicial system is at an early stage of preparation. Some progress has been made in the past year, notably through the establishment, in November, of an ad hoc Parliamentary Committee on Justice Reform to carry out a comprehensive and inclusive reform process. Administration of justice is slow and judicial decisions are not always enforced. The professional training of judges is inadequate and their independence is not fully ensured. There is insufficient accountability of judges and prosecutors and corruption within the justice system is widespread. Inter-institutional cooperation is poor and resources are insufficient. In order to fulfil the key priority on the reform of the judicial system, the main recommendation of EU were to: a) adopt a new judicial reform strategy and accompanying action plan, and proceed, through an inclusive consultation process, with drafting and adopting the institutional, legislative and procedural measures necessary, taking into account European standards and best practices; b) fill the vacancies at the High Court and the administrative courts; c) extend the courts' unified electronic case management system and ensure it is effective, including an appropriate maintenance budget; d) publish all court decisions with their respective reasoning within a reasonable deadline.[8]

In the report it is stated that the main management body of the judicial system in Albania was the High Council of Justice (HCJ). Although legally its role is limited to the appeal and first-instance courts, for EU it was urgent its reformation in many aspects. As a legal management body composed by the President of the Republic (chair), the Minister of Justice, the President of the High Court, nine judges of all levels elected by the National Judicial Conference and three lawyers elected by parliament by a simple majority, this institution has no ensuring mechanisms for the opposition party. The HCJ is in charge of the evaluation, appointment, promotion, and transfer of judges and handles disciplinary proceedings initiated by the Minister of Justice.

[6] European Commission. Albania 2015 report. p.4. Retrieved from: http://ec.europa.eu/enlargement/pdf/ke ydocume nts/2015/20151110_report_albania.pdf

[7] European Commission. Albania 2015 report. p.4. Retrieved from: http://ec.europa.eu/enlargement/pdf/ke ydocume nts/2015/20151110_report_albania.pdf

[8] European Commission. Albania 2015 report. p.12. Retrieved from: http://ec.europa.eu/enlargement/pdf/ke ydocume nts/2015/20151110_report_albania.pdf

In 2014, new rules on suspension from office and dismissal of HCJ members, and on issues relating to conflicts of interest, were introduced. According to EU Progress Report for 2015 the HCJ has big problems with the ethics which remain incomplete.
Also, in the report analysis of the judicial system in Albania, the European Commission included five main problems: 1) Independence and impartiality; 2) Accountability; 3) Professionalism and competence; 4) Quality of justice; 5) Efficiency. Regarding the first aspect in the report it is stated that 'the independence of the judiciary is enshrined in the Constitution […]. However, in practice it is jeopardized by the highly politicized way in which High Court and Constitutional Court judges are appointed, and the wide margin of discretion enjoyed by the HCJ in appointing, promoting and transferring judges. In principle, judges and prosecutors decide independently on individual cases. In practice, their independence is limited and there are regular reports of selective justice and political interference in court cases.
Not all courts use the unified case management system to allocate cases. Non-transparent practices such as assigning cases by drawing lots — occasionally even in the office of the head of court — have not been phased out in some courts. Rules on the exclusion of judges from cases are set out in the Civil, Criminal and Administrative Procedure Codes. Courts do not keep a register of cases from which judges have been excluded or have asked to be excluded. Individual requests to exclude judges from cases are addressed directly to the courts. The prosecution service established recently a case-handling system, which is not yet fully operational throughout the country, except for case registration purposes.[9] Balas (2010) describes 'the Albanian Constitution of 21 October 1998 as a modern document obviously inspired by modern European democratic constitutional tradition' but he notes that some provisions are at first sight purely declaratory that may be interpreted in accordance to an instruction to all state authorities, legislative, executive as well as judicial, and to local government bodies, to respect international legal commitments and take them into account in the exercise of power'.
Regarding the accountability of judges in the European Commission report it is stated that although judges have a Code of Ethics since 2000 it had no real impact on their accountability. At the same time 'there is not enough monitoring of compliance with ethical standards and integrity when appointing judges and prosecutors. There is no counselling or mandatory in-service training on ethics. Lawyers have their own code of ethics and professional ethics, which is one of the subjects covered by the initial training program of the School of Magistrates. Judges are held accountable through inspection by both the Ministry of Justice and the HCJ. Although there is a memorandum of understanding between these two bodies, there is a risk of overlapping inspections. The legal framework for disciplinary proceedings lacks clarity and such proceedings can be used to improperly influence judges. The Minister of Justice has sole power — and discretion — to bring disciplinary proceedings against judges, which is contrary to EU standards. The Minister submits disciplinary cases to the HCJ for review and a decision on sanctions. Judges and prosecutors are obliged to declare their assets on an annual basis. However, despite numerous reported cases

[9] European Commission. Albania 2015 report. p.12. Retrieved from: http://ec.europa.eu/enlargement/pdf/ke ydocume nts/2015/20151110_report_albania.pdf

of failure to comply with this requirement, no final decisions on sanctions have been issued to date. The judiciary is generally perceived as being highly corrupt.'[10]
Concerning judge's professionalism and competence in its progress report for 2015 the European Commission states that 'the requirement of professionalism and integrity is not sufficiently reflected in the existing criteria for judges. Criteria for evaluating prosecutors are in place but clear and transparent criteria for evaluating and promoting judges have yet to be adopted. Decisions related to judges' careers are not fully transparent and are not always based on merits and other objective criteria. An appeal against appointments, evaluations, transfers, promotion decisions and disciplinary measures is possible. High Court and Constitutional Court judges are appointed by the President of the Republic, with the backing of a simple majority of parliament. In recent years, the process of appointing Constitutional and High Court judges has been marred by controversial hearings in parliament's Legal Affairs Committee and frequent rejection by parliament of presidential nominees. In an attempt to remedy this situation, the Law on the High Court was amended in 2013 and again in 2015, when more specific criteria and procedures for the selection of judges were introduced. Prosecutors are appointed, promoted, transferred and dismissed by the President of the Republic upon a proposal from the General Prosecutor. The independence and accountability of the prosecutorial system is further weakened by the fact that the General Prosecutor is appointed with the consent of a simple majority of parliament. Procedures for the appointment, promotion and dismissal of key staff in the General Prosecutor's Office lack transparency.[11]
Thus, in its final analysis regarding the overall quality of justice in Albania, the progress report of European Commission is noting that investments in trainings and in courts infrastructure have been done lately. But however 'the budget for the overall justice sector in 2015 is 3 % lower than in 2014 at EUR 80.1 million, which represents 0.8 % of GDP and 2.4 % of the state budget. It covers the Ministry of Justice, the prosecution, the courts, the School of Magistrates, the High Council of Justice and the Constitutional Court'.12 It also notes that the 'overall length of proceedings from initiation to final judgment remains a major concern. There is no effective monitoring mechanism and there is an overall lack of capacity to produce reliable statistical data. Compared with selected European states and the 'reasonable time' standard under Article 6 of the European Convention on Human Rights (ECHR), Albania has some of the lengthiest civil and criminal procedures in Europe. The excessive length of proceedings is due to long delays before appeal courts. Unclear provisions in the Codes of Civil and Criminal Procedure also reduce the efficiency of the courts.
The European Court of Justice (ECJ) has a very important role inside EU and is going to have its impact also in the future decisions of the Albanian Constitutional Court. As Stone Sweet (2000) points out 'its unique achievement is to have fashioned a judicially enforceable constitution out of international treaty law, transforming the

[10] European Commission. Albania 2015 report. p.13. Retrieved from: http://ec.europa.eu/enlargement/pdf/ke ydocume nts/2015/20151110_report_albania.pdf
[11] European Commission. Albania 2015 report. p.14. Retrieved from: http://ec.europa.eu/enlargement/pdf/ke ydocume nts/2015/20151110_report_albania.pdf
[12] European Commission. Albania 2015 report. p.14. Retrieved from: http://ec.europa.eu/enlargement/pdf/ke ydocume nts/2015/20151110_report_albania.pdf

European polity in the process. In a series of innovative decisions initiated in the 1960s, the ECJ effectively 'constitutionalized' the European treaty system, thereby constructing the conditions that enable and sustain judicialization. As judicialization has proceeded in the EC, a quasi-federal, rule-of-law polity has emerged in Europe (Stone Sweet, 2000, 153). The Albanian experience with the EU institutions has been mostly with the European Commission and with the European Parliament and less with the other two institutions: the Council of Ministers and the European Court of Justice. This because the role of the ECJ is like a constitutional court roughly based on the European model and that resolves legal disputes that arise between the various EC organs, between EC institutions and the member states, and between the member states themselves. It also provides authoritative interpretations of European law to national judges, by way of a preliminary reference procedure that closely resembles German, Italian, and Spanish concrete review (Stone Sweet, 2000, 156).
The application of international law in the Albanian legal system has been complex and has not given a precedent to be applied in every situation. Both courts, the Albanian Constitutional Court and the High Court, the highest courts in Albania, have dealt with cases involving the application of international law in Albanian domestic law. Although the Albanian Constitutional Court is not formally part of the Albanian judiciary, under the Constitution it has been invested with a leading role in determining the compatibility of Albanian laws with international legal agreements to which Albania is a party (Zyberi & Sali, 2015, 85). Thus, according to Article 131, the Constitutional Court has jurisdiction to decide, among other matters, on questions relating to: (1) the compatibility of laws with the Constitution or with ratified international agreements; (2) the compatibility of international agreements with the Constitution, prior to their ratification; and (3) complaints from individuals regarding the violation of their constitutional rights to due process of law, after all legal means for the protection of those rights have been exhausted. However, no cases have been filed thus far seizing the Constitutional Court with questions relating to (potential) conflicts between national laws and ratified international agreements (Zyberi & Sali, 2015, 85).

Conclusions

With the upcoming accession to EU Albania needs to make further reforms and constitutional amendments. For example, the accession of the Republic of Croatia to the European Union brought changes throughout the Croatian legal system. The 2010 Constitutional changes introduced a separate chapter on the EU into the Constitution, which formed the legal basis for Croatia's membership in the Union (Bozac &Carevic, 2015, 148). These kind of changes can include different aspects of the constitution and are a necessity especially to apply the acquis communautaire and the incorporation of the EU institutions inside the local ones. It is expected that the compentences of the Court of Justice of the EU are comparable to the competences of the Albanian Constitutional Court and thus it is impact to have an impact also there. The last reforms in the legal system which included also changes in the selection of judges of the Constitutional Court undertaken from the Albanian Parliament can be imagined

as the first steps towards EU membership.

References

Balas, V. (2010). Albanian lustration act, its constitutional and international law pros and cons. Czech Yearbook of International Law (Vol.1) p.172.

Bozac, I. & Carevic, M. (2015). Judicial application of international and EU Law in Croatia. In Rodin, Sinisa & Perisin, Tamara. (2015). Judicial application of international law in Southeast Europe. Berlin: Springer

Loughlin, J. & Bogdani, M. (2007). Albania and the European Union. London: I.B Taurus.

Shaw, M. (2010). International Public Law. New York: Cambrigde University Press. p.359.

Stone Sweet, A. (2000). Governing with judges. Oxford: Oxford University Press p.153.

Zyberi, G. & Sali, S. (2015). The place of application of international law in the Albanian legal system. In Rodin, Sinisa & Perisin, Tamara. (2015). Judicial application of international law in Southeast Europe. Berlin: Springer p.88.

European Commission. Albania 2015 report. p.14. Retrieved from: http://ec.europa.eu/enlargement/pdf/ke ydocume nts/2015/20151110_report_albania.pdf

Ministry of Foreign Affairs of Albania. Official website: http://www.punetejashtme.gov.al/en/mission/eu-integration/relations-between-albania-and-the-eu