THE CONSTITUTIONAL COURT AS A GUARANTOR OF THE FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

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In this paper, I shall treat very briefly the issue of the new position of the Constitutional Council of France with reference to the protection of fundamental human rights and freedoms and later on, remaining on the same topic, I shall present the situation, problems and concerns that have come out during the examination process of individual complaints submitted before the Constitutional Court of my country, the Republic of Albania.

It is commonly accepted nowadays that the general protection of the citizens' fundamental rights and freedoms represents the crucial pillar of the entire organization and functioning of the constitutional courts. Eventually, this is the main reason for establishing these important mechanisms of the democratic state. Although not directly expressed, it is quite obvious that this has been the spirit that penetrates the whole doctrine of the colossus of legal thought of our century, the Austrian Hans Kelsen, for the establishment of constitutional courts. In opposition to the ideas contradicting the establishment of constitutional courts – which were introduced in the beginning of the 1930s by the distinguished constitutionalist Carl Schmidt – Kelsen underlined that such a mechanism would protect the constitution and the supremacy of its norms in the general hierarchy of legal norms, guarantee the implementation of constitutional norms by the three branches of power, as well as avoid taking arbitrary actions during the exercise of state power. In other words, according to him, it could imply that the constitutional court should play an important role in safeguarding democracy, respecting the principles of the rule of law and guaranteeing the citizens' fundamental constitutional rights and freedoms.

It was exactly this theory and philosophy which brought about the establishment of constitutional courts in a number of countries, mainly after World War II. Among these courts, it could be justly distinguished the German system guaranteed by the Constitution (das *Grundgesetz*) of 1949, as one of the most effective and successful in the accomplishment of the aforementioned duties.

In parallel with the democratic developments and bearing the same intentions and goals as above, during the past two decades, constitutional courts have been established in almost all the Eastern and Central European countries, including my country as well. In spite of imperfections and difficulties, it should be generally accepted that, just as the constitutional courts in consolidated democracies, they have played a very positive role in the process of safeguarding the individuals' fundamental rights and freedoms.

However, the way these rights and freedoms have been guaranteed through the constitutional justice, always with a view to the best and most effective protection of these rights and freedoms, differs a lot from one case to another. In the majority of cases and for a certain category of rights and freedoms, the individual has been entitled with the right to directly address the constitutional court and ask for the cessation of the alleged infringement or violation. There are also other cases where the individuals have not been granted the right to directly put the constitutional court into motion. In these cases, the safeguarding of individuals' fundamental rights and freedoms before the constitutional court is done indirectly, by recognizing the right to put the constitutional court into motion to another subject or, in general terms, through the abstract and concrete review usually exercised by the constitutional court. Nevertheless, it should be accepted that despite the ways employed for each concrete case, with the passing of time, the main goal to be

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achieved has been the continuous improvement of the mechanism of constitutional review in order to protect to the best possible degree the individuals' fundamental rights and freedoms. The French case can be considered as such.

Actually, according to the jurisdiction and the competences of the Constitutional Council of 1958, which were mainly focused on the *a priori* control of laws, it is rather difficult to consider this organ as a constitutional court in the primary meaning of the word. The adoption of this formula at that time in France was greatly influenced by the strong and deep cultural, legal and democratic traditions. But, even in such a developed country as France, this system has constantly changed. So, for example, in 1974 it has been recognized the right of 60 deputies or senators (very important for the opposition forces) to put the Constitutional Council into motion, in 1992 the right of 60 deputies to ask the Constitutional Council to check the compatibility of international treaties with the Constitution, and in 2004, the right of Constitutional Council to be engaged with issues related to the protection of the environment, etc.

It is quite obvious that until recently, despite the very important and useful engagement of the French Constitutional Council in the protection of the Constitution and the rights and freedoms provided for by it, the individuals have not been recognized the right of access to this important mechanism, even indirectly. It is worth mentioning here that this has been the reason why some members of the Constitutional Council were critical of this system. About 3-4 years ago, in Paris (at the Constitutional Council), in talks which I had with some members of the Constitutional Council, they thought that it was the time for the Constitutional Council to be put into motion by the individual, in an incidental way as well. According to them, this way would ensure not only a better protection of the constitutional rights and freedoms, but also the Constitutional Council would become an effective screening, an effective remedy at the national level, before the individual could address the Court of Strasbourg for the infringement of his rights and freedoms. They argued that this is one of the motives why France has so many cases in Strasbourg as compared to Germany, whose population is larger by 20 million people than France's, but it still has a considerably smaller number of cases in Strasbourg. According to them, the merit for this belongs to the work and case of law of the Constitutional Court of Germany, which were rightly appraised as being very positive.

Apparently, these have been the reasons why the very important constitutional reform of June of this year (June 23rd, 2008), inter alia, has recognized for the first time in the French system the right to have the constitutional review of already adopted laws – in incidental way – of laws which have been claimed to infringe the individuals' fundamental rights and freedoms. Article 61/1 of the French Constitution explicitly emphasizes that: "If during proceedings…before a court of law, it is claimed that a legislative provision infringed the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'Etat or by the Cour de Cassation to the Constitutional Council, which shall rule within a determined period…".

Undoubtedly, within the framework of French system this is a new positive standard, another guarantee for the protections of the citizens' rights. Further more, I think that compared to other systems of incidental control, as for example that of Albania (in article 145/2 of the Constitution of the Republic of Albania of 1998, which stipulates that: "If judges believe that a law is unconstitutional, they do not apply it. In this case, they suspend the proceedings and send the question to the Constitutional Court..."), the system adopted by the French Constitution is better and more effective. This is due to three simple reasons:

1) It is the individual himself who might raise this claim before the ordinary courts of law without waiting for the judge or the panel of judges to be reminded or convinced for this, and

2) it has been envisaged that the issue in the form of questions that should receive answers can be ultimately presented before the Constitutional Council by the Conseil d'Etat or by the Cour de Cassation, which should preliminarily examine whether the complaint is well-founded, its relation to the case under examination, whether the claims relative to the unconstitutionality of the same provision have been raised even before etc. Certainly, this

screening makes the complaint more serious and professional. Meanwhile, it serves well enough to the principle of legal certainty, which is put forward any time that the constitutional court carries out judgments of this nature, and

3) A time limit is established, within which the Constitutional Council should rule on the unconstitutionality or not of the challenged provision.

Yet, the majority of cases that normally recognize the individual's right to directly put into motion the constitutional court as an extraordinary remedy, when he/she pretends that a certain fundamental constitutional right or freedom has been violated, normally after having exhausted all the other ordinary means of appeal (as a rule the courts of ordinary jurisdiction), differ a lot from each other. In some of them, as it is for example the German, Croatian, Spanish, Czech, etc. case, the individual has the right to put the Constitutional Court into motion after having exhausted all the other regular remedies, any time he/she might pretend that a certain fundamental constitutional right or freedom has been violated.

This opportunity recognized to the individual by these systems, often combined with the so-called actio popularis, aims at bringing the constitutional court closer to the citizens, making it more concrete, transparent, credible and an absolute guarantor of their fundamental rights and freedoms.

Some of the basic criticisms made against this system, which practically allows the referral to the Constitutional Court of a considerably great number of individuals' complaints, comprise the infringement of the principle of legal certainty, the overloading of Constitutional Court with individual complaints, what in the majority of cases leads to delays in the examination of cases. On the other hand, this system compulsorily asks for the implementation of some preliminary, rigorously, screening or selective procedures, what might often result in mistakes, considering in addition that it has been commonly foreseen that in these preliminary procedures the case should not be treated by a single constitutional judge.

In other countries, the individual has been recognized the right to put into motion the constitutional court only for allegations related to the infringement or violation of some certain fundamental rights or freedoms.

The Albanian Constitution has resolved this problem in a different manner and, as far as I know, we represent a unique case in this regard. Concretely, article 131/f of the Constitution has foreseen that the Constitutional Court decides even on "…the final adjudication of individuals' complaints for the violation of their constitutional right to due process of law, after having exhausted all the other legal remedies for the protection of these rights." So, according to our Constitution, it is quite obvious that individual may turn to the Constitutional Court only in cases when it has been pretended that the court trial conducted against him has not been fair. In all the other cases, when the infringement of fundamental constitutional rights and freedoms may be invoked, the individual may turn to the courts of ordinary jurisdiction, but not to the Constitutional Court.

In this aspect, the actual Constitution differs to a great extent not only from the constitutions of countries that guarantee the constitutional justice, but also from the law no. 6561, dated 29.04.1992 "On some amendments and additions to the law on the main constitutional provisions," through which it has been established the Constitutional Court of our country. Article 24/9 of this constitutional law had also foreseen that Constitutional Court has the authority to ultimately resolve the individuals' complaints presented in the way of constitutional review for the infringement of their fundamental rights from the unlawful acts." So, it is clear enough that in this case it has been generally adopted the so-called German system, which gives to any individual the possibility to approach the constitutional court any time he/she pretends that a fundamental right or freedom guaranteed by the Constitution has been violated.

The reasons inducing the drafters of our Constitution to make such a significant restriction of the Constitutional Court jurisdiction in view of the examination of individuals' complaints might have been different. However, I would like to repeat once more the fact that the

Constitutional Court of my country cannot be invested by the individual in order to guarantee the substance of a fundamental constitutional right that might have been violated or denied to him/her, but only on the basis of allegations for the protection of a certain constitutional right, as it might be the right to due process of law, a right which is often not treated as a fundamental one, regardless of the special importance it bears as to the guaranteeing of fundamental constitutional rights and freedoms.

From this viewpoint, I think that there is a shortcoming in our Constitution. In addition to that, the paradox may be such that the court trial may be legal and fair, what can be easily ascertained by the Constitutional Court bringing about in this way the refusal of the individual complaint, perhaps since the first phase of its examination – in the panel of judges – at a time when the same case may contain a flagrant violation of a fundamental constitutional right or freedom. But, in that case the Constitutional Court would not be allowed to express itself or to interfere in order to guarantee this fundamental right.

It might appear that "this defect" could be rather compensated through the incidental control or the right that the Constitution has recognized to the People's Advocate for putting the Constitutional Court into motion for issues related to his interests (article 134/dh). As such, the Constitution has also stated "the protection of the individual's rights, freedoms and legal interest from the unlawful actions or inactions of the organs of public administration."

Certainly, the two above-mentioned possibilities envisaged by our Constitution are complementary forms of protection, which play an important and positive role in guaranteeing the individual's fundamental rights and freedoms, as it is eventually the whole activity of the Constitutional Court. Also, it should be taken into consideration that the complaint presented to the People's Advocate cannot be regarded as an effective remedy. Nonetheless, in my opinion, it would be more reasonable if, at least for some of the most significant fundamental rights and freedoms, the individual could be directly addressed to the Constitutional Court, without having the case initially treated by another screening body or constitutional mechanism.

In order to make more effective the protection of fundamental human rights by the Constitutional Court of our country, but always within the actual legal status, there are actually some opinions for two possibilities or two interpretative approaches:

Firstly, that the Constitutional Court considers the due process of law not simply from the procedural viewpoint, but also from the substantial one, having in this way the possibility to ascertain in the concrete case whether the material law has infringed or not a fundamental human right guaranteed by the Constitution;

Secondly, dealing with the due process of law from a more comprehensive standpoint, taking into account here even article 6 of the European Convention on the Human Rights and the valuable case law of the European Court of Human Rights in this regard.

In spite of the theoretical interest it may present, the first recommendation is really debatable since it would place the Constitutional Court in a very difficult position, especially in relation to the Supreme Court. As to the second recommendation, I think that Constitutional Court has made efforts to always bear it in mind during the examination of the individual complaints, taking into consideration at the same time the space given by the Constitution and Albanian legislation in relation to complaints for due process of law, as well as the already known fact that the European Convention on Human Rights, in pursuance of article 122 of the Constitution, forms part of the internal legal system of the Republic of Albania. However, I think that it remains much work to be done in this direction.

Actually, our Constitution has mentioned the due process of law, but it has neither given a clear definition of it nor settled the basic criteria that would serve to define the due process of law from the constitutional context. Article 42/1 has only stipulated that "freedom, property and the rights recognized by the Constitution or law cannot be infringed without due process of law (fair court trial)," implying that such a complaint should be firstly presented before the courts of ordinary jurisdiction, but not only before them.

However, the Constitutional Court, through its jurisprudence case law and being very careful and matured, has managed to consolidate a relatively stable practice concerning the interpretation and implementation of requirements for the due process of law in the constitutional context. With regard to this, for analogue cases, in general terms it has managed to harmonize quite well the requirements of our Constitution, the most essential of which are some of the constitutional guarantees provided for in the Chapter "Personal rights and freedoms" (especially articles 28, 31, 32, 33 (guaranties in criminal proceedings – Art. 5 ECHR), article 29 (nulla poena sine lege), article 34 (ne bis in idem) etc.), as well as the respective provisions mainly envisaged by the Codes of Procedure, with the requirements of article 6 of the European Convention on the Human Rights, the case law of the European Court of Human Rights and equivalent constitutional courts. It is important to re-emphasize that in this direction we have always intended to consider and treat the due process of law as a constitutional right and guarantee, without trying to take the place of ordinary courts, whose main function is to give justice. On the other hand, Constitutional Court has underlined several times that the individual's right to due process of law in the constitutional context cannot be restricted only to the classical court trial, but should include even those of administrative disciplinary character.

Being this the reality, through the numerous judgments of the individual complaints pretending for the infringement of the right to due process of law in the constitutional context, Constitutional Court has been able to determine the key elements of this process, among which it could be detached: the right of access to courts; the right to a fair and lawful trial; the regular composition of the panel of judges; the right to personally attend the court trial; the right to be defended, personally or through a lawyer; guaranteeing and adequate implementation of the principles of equality of arms and contradictoriness; the adjudication by an independent and impartial court; the fair reasoning of court decisions; the right of appeal against a court decision etc.

In brief, as to the examination of individual complaints by the Constitutional Court of the Republic of Albania, it could be differentiated or highlighted the following elements:

1. Constitutional Court of the Republic of Albania accepts and rules on the individual complaints only when an infringement of the constitutional right to due process of law has been alleged. The Albanian system does not recognize the so-called actio popularis.
2. The right to be addressed to the Constitutional Court for the infringement of the right to due process of law is enjoyed by any individual, physical or legal person, Albanian or foreign citizen, or person without citizenship, should the allegation be raised against a court decision or an act issued by an organ or mechanism of the Albanian state public power (three branches of power).
3. As a rule, the state legal persons do not enjoy such a right, since they are part of the public power.
4. As a rule, the appellant should pretend that this right has been infringed to him personally and not to a third person. The exception here might be for the appellant in the civil lawsuit in the criminal process.
5. The individual complaint presented to the Constitutional Court has subsidiary character. Before being addressed to the Constitutional Court, it should be exhausted all the regular remedies of judicial or administrative appeal. The individual complaint before the Constitutional Court is an extraordinary means of appeal.
6. The allegation for the infringement of the right to due process of law should be real and not hypothetical.
7. The complaint should be presented in a written form in Albanian language. The allegation should be apparent and understandable. These elements are clarified even through the documentation attached to the complaint.

8. The complaint should be presented not later than two years from the time when the infringement has been ascertained or from the notification date of the decision taken by the respective state body etc.

REFERENCES

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