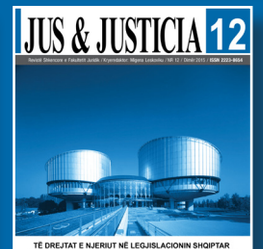

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JUS & JUSTICIA

JUS & JUSTICIA 14

International Scientific Journal / Editor-in-Chief: Prof. Dr. Xhezair Zaganjori / No. 14 / 2020 / **ISSN 2223-8654**

INTERNATIONAL PROTECTION OF HUMAN RIGHTS

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UETPRESS

JUS & JUSTICIA No. 14/2020

INTERNATIONAL SCIENTIFIC JOURNAL

ISSN 2223-8654

UETPRESS

Published under the series "**ACADEMIC JOURNALS**".

European University of Tirana
University Press "UET Press"
Address: Bulevardi "Gjergj Fishta", Nd.70, H.1, Postal Code 1023, Tirana, Albania.
polis@uet.edu.al
www.uet.edu.al/polis

Polis journal has been catalogued at the National Library of Albania and the Library
of the European University of Tirana, Albania.

UETPRESS

Published by:
EUROPEAN UNIVERSITY OF TIRANA / ALBANIA
Bulevardi "Gjergj Fishta", Nd. 70, H1, Tirana, Albania
www.uet.edu.al / polis@uet.edu.al

Tirana, 2020.

përmbajtja

Welcome note

Prof. Dr. Xhezair Zaganjori
Editor-in-Chief

Dear readers,

After a three year break, we are continuing the law review periodical "Jus & Justicia" of the European University of Tirana. This journal will now have a new format, only in English, – Justicia. The aim is to broaden the spectrum of our readers to also include more international audience. Albania has now made significant steps towards Euro-Atlantic integration, which is why there is an increasing interest in continuously following important legal and jurisprudential developments in the country's legal landscape. In addition, the latter is a key condition to evaluate the respect for the rule of law and the effective protection of fundamental rights and freedoms of Albanian citizens. To this end, it is this journal's objective to present key topical information and academic debate also on the case-law of important international courts, among which the main focus will of course be on European Court of Human Rights and the European Court of Justice. The close geographical vicinity, similar state of developments and common integration perspectives will also push us to explore the legal dynamics in other countries of the Western Balkans, in particular in Kosovo, North Macedonia and Montenegro.

With this law journal, we hope to give the right space to young lawyers and their best researches.

We hope to meet these objectives by offering academic articles which are of good use and value. On the other hand, we are committed to further improving the journal and hence open to receiving your constructive comments, thoughts and cooperation, as well as your contributions with academic articles in the area of law and justice.

The asylum and extradition or the criminal pursuit and persecution. Important concepts that create difficulties in the judicial practice

Xhezair Zaganjori[1]

1. Introduction

In this article I will briefly analyze a very important and actual theme related to reciprocal influences of two similar judicial regimes, such as the *asylum* and the *extradition*, which frequently have problems or difficulties in application in judicial practice. From a more general point of view, difficulties may arise in the English language from a vocabulary point of view, which frequently also generates problems in interpretation. For instance, such may be the case for the terms *prosecution* and *persecution*, which formally are translated respectively as criminal charge and persecution.

I would also like to emphasize on the theoretical and practical importance, domestically and internationally, on matters related to asylum and extradition. The integrating and globalizing processes, the liberalization and the opening of frontiers, the effective war against international criminality, the consolidation of the state of law, the guaranteeing of individual fundamental rights and liberties, the protection of people in necessity from persecution because of race, religion, nationality, membership in a certain social group or because of political convictions, as essential values of the community of nations, are some of the main reasons that encourage the debate for a more effective application of these institutes.

[1] *Ex-President of the High Court of the Republic of Albania. (2013-2019)* (The main part of this article was held by the author on the occasion of an *International Forum, June 2015*. However, the material is adapted to some main developments in this area in the following period. Published revised).

So, as it is understood from the chosen theme, it is very clear that one of the regimes is related essentially to the necessity to avoid impunity, while the other with the important idea of the protection from the danger of persecution. Both these very important principles have deep historical roots from a national and international perspective. Almost all authors that have scientifically analyzed the most crucial matters of the history of the state and of the law agree that the first extradition agreement is of the year 1280 BC, signed in ancient Egypt between the Pharaoh Ramses II of Egypt and Hattušili III[rd,] King of the Hittites.[2] On the other hand, the word *asylum* (derived from the Greek word *Asylia*, which may be translated 'untouchability'), is encountered for the first time in ancient Greece, referring to persons who because of profession (chiefly merchants and diplomatic representatives), enjoyed immunity in a foreign territory, or were referred to 'holy' places where people who looked for accommodation could carry out the *hikitea* rite, which is similar to the modern or contemporary process of the call for asylum.[3]

It is not surprising that the forehanded meaning of these two institutes has been very different from the meaning they have today.[4]At that time, the possibility of extradition being refused or that an asylum request would be accepted and vice-versa depended more from the level of diplomatic relations between two states or corresponding sovereigns, than from the genuine and independent judicial evaluation of every specific case.

At times this continues to be true even nowadays, although very rarely and predominantly in regions and states where there are problems with the implementation of the state of law. In these cases, extradition requests and judgments which grant or refuse asylum requests in fact are defined or encouraged more from political assessments than from judicial ones.[5]

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[2] *International Extradition*: *United States Law and Practice, M. Cherif Bassiouni*, *Oxford University Press*, *2014*, p.5. *Transnational Fugitive Offenders* in *International Law*: *Extradition* and *Other Mechanisms, Geoff Gilbert, Martinus Nijhoff Publishers*, *1998*, p.17. *Extradition in international law, Ivan Anthony Shearer, Manchester University Press* Oceana Publications [*1971*]. S. Langdon and Alan H. Gardiner, *The Treaty of Alliance between Hattušili, King of the Hittites, and the Pharaoh Ramses II of Egypt*, The Journal of Egyptian Archaeology , 179, (Jul., 1920).

[3] *Rethinking Asylum*: *History*, *Purpose*, and *Limits* [*Matthew E. Price*], *Cambridge University Press, 2009,* (*p.26*).

[4] *M. Cherif Bassiouni cited above,* in the note1: ("In fact, from antiquity up to the end of the 18th century, these persons (fugitives) were not in search for common crimes but for political reasons. Common criminals were the least required category of the authors of criminal offences because their harmful action influenced only ordinary people and not the sovereign or the public order.")

[5] Brian Gorlick, *Asylum Determination and Evidentiary Uncertainty: Perceptions and Prescriptions*, in International Association of Refugee Law Judges. *The Asylum Process and the Rule of Law*, *Manak Publications* Pvt Ltd., *2006, p.157*: ("Regardless of the opinion that many states have created independent and specialized organs composed of a staff of trained officials well trained to establish the refugee status, in some cases political indicators and policies imposed from the executive power of the government may influence on the decision-making process." *Arguing about Asylum: The Complexity of Refugee Debates in Europe, Niklaus Steiner*, *St Martin's Press,* 1st edition (*2000*): ('Asylum policies come as the result of the pulling of the rope (war) *between national interests tightening asylum* on the one hand and

2. The meaning of the notions: Asylum versus extradition

2.1 Asylum

Before analysing the meaning of persecution, as an essential element of the asylum procedure, let me clarify the difference between territorial asylum and extraterritorial asylum (diplomatic asylum). While the first notion (territorial asylum) is established plainly in international conventions and in domestic legislations of the states, the second notion may be considered mostly as a judgment of emphatic political influence, since the requiring or the granting of the ayslum in these cases (diplomatic asylum), as is going to be analysed followingly, is not related to a well and clearly established right through the general principles of the international law.

2.1.1 Territorial asylum

Recently there has been an extraordinary increase of asylum requests. The situation is dramatic especially in some of the most developed countries of Western Europe. Practically this problem is one of the main challenges with which the European Union in particular is confronted. It is sufficient to mention that in the second half of 2013,around 5,9 million people at global level asked protection in or out of the frontiers of their state,[6]that in 2014, 44 industrialized countries received around 612.700 new asylum applications,[7]that in 2016, the Federal Republic of Germany accommodated around one million asylum seekers, and so on, while in 2017, on a global spectrum, around 68,5 million persons moved towards western countries who came mostly from zones of conflict in Syria, Afghanistan, Iraq, Myanmar, as well as from some African countries. So, how may asylum be defined then? In the session held in Bath, a city in the United Kingdom some decades earlier, the Institute of International Law (*Institute de Droit International)* tried to define asylum as: "The protection that a State grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek it. *(La protection que l'etat accordè sur son territoire ou dans un autre endroit relevant de certains de ses organes à un individu qui est venu la rechercher)."*[8]

On the other hand, the well-known Professor Grahl-Madsen considers asylum as: "The right of an individual to stay in the territory of the State that grants asylum, not for a permanent period, but as long as it is necessary. This means that asylum

international norms and *morality* loosening it on the other'), p. 133.

6 *UNHCR Mid-Year Trends 2013*, p. 3.

7 UNHCR - Asylum Levels and Trends in Industrialized Countries, 2013, p. 5.

8 Institut de Droit International, Session de Bath, *L'asile en Droit International Public (*à l'exlusion de l'asile neuter), Rapporteurs MM. Arnold Raestad et Tomaso Perassi, (1950).

may be granted as long as he has the refugee status or as long as he requires the right of residence in a third state."[9]

Frequently we confuse the meaning of the terms "asylum seeker" and "refugee."In fact, the difference stands only on different phases of the procedure of the evaluation of individual or collective requests. Technically the refugee is an asylum seeker who is currently granted refugee status, while the asylum seeker is simply a person who has presented an asylum request close to the authorities of a foreign country.[10] From this comes the conclusion that to be an asylum seeker does not mean that you receive automatically the right to obtain asylum. The sentence to grant or to refuse the asylum depends on the host state or on the territorial state, so from the state that has received the request, that is free to consider if a person may be qualified or not as a refugee. However, this decision might not be arbitrary. Normally it might be based on an objective assessment of the concrete refugee, with criteria defined from domestic and international legislation. For this purpose, it is recommended that the last word should be of the court and not of the executive organ, which may have interest to minimize the area of the action of the asylum, intending to hold back other refugees (or illegal immigrants) who require asylum in a certain state.

In fact, the fundamental legal instrument that arranges the international law on refugees is the Geneva Convention relating to the Status of Refugees of 1951 as well as its additional Protocol of 1967.[11]The Article 1A of this Convention defines the term "refugee" as a person who: "Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

The first element that attracts the attention is the criterion "of the crossing of an international frontier". This means that the refugee status may be claimed only from persons who seek accommodation in another state, since asylum is an institute that essentially is related to the exercise of the territorial jurisdiction of every sovereign state,[12] which is different from the state from where the seeker comes. Unfortunately, persons that for different reasons (including even those defined from the Article 1 of the Convention of 1951 relating to the Status of Refugees)

[9] *Atle Grahl-Madsen*, *Territorial Asylum*, Swedish Institute of *International* Law, *Almqvist & Wiksell*, Stockholm, *1980*, p. 52.

[10] *Niklaus Steiner* cited above, at note 4, p. 133.

[11] *Convention relating* to the *Status* of *Refugees*, *28 July 1951*, *United Nations*, *Treaty Series*, *vol. 189*, *p. 137. Protocol relating* to the *Status* of *Refugees*,*31 January 1967*,*United Nations*, *Treaty Series*, *vol. 606*, *p.* 267.

[12] Oppenheim, L. (Lassa), *International law*: A *treatise* / *Vol. 1*, *Peace,* 2nd*edition, Longmans*, *Green*, and *co.*, pp. 391-393.

leave from a region and go to another region of the same state, are excluded from the protection that is granted to the asylum seeker.

This category of people is known by the term "Internally Displaced People."[13] Although initially the "Internally Displaced People" was not covered by the competence of the United Nations High Commissioner for Refugees (UNHCR), with the passing of years he was engaged and continued to be engaged even with the assistance of this category of persons, through concrete commitments of humanitarian nature of the United Nations Organization (UNO) for every individual case.[14]So in any case, the application of universal human rights and Fundamental principles of International humanitarian law is intended even for these people, especially when there are domestic armed conflicts. However, it is emphasised that according to the Contemporary International Law and for the intentions of the asylum, these people continue to be under the jurisdiction and the "protection" of their state. The situation is problematic when one of the parties in an armed conflict within the same state, a non-state actor, has or claims to have *effective control*[15]of a certain region of the state in discussion, and self-declares the independence of this territory. Without referring to the foundation of the international recognition of the State, in this case one may discuss the case related to the "responsibility" of people who leave from war zones seeking accommodation in the part controlled from the combatant non-state party. Is it possible to consider these people as Internally Displaced People? The "orthodox" point of view would consider it so and would consider invalid every act declared from the non-state actor, at least up to the completion of combats. Moreover, even if we would accept that a non-state actor principally could be qualified as a State on the basis of international law, yet in this phase, "the just-created state" would not be automatically subject to the Geneva Convention of 1951 or to its Protocol of 1967.

As underlined at the very beginning, the most important aspect in the definition of refugee status is related to "persecution". Although the Convention does not offer a definition of the term "persecution", this may be insinuated in general lines by referring to the serious threat of the fundamental human rights and liberties, such as the right of life, the prohibition of torture, the guaranteeing of liberty

[13] *UNHCR—Protecting Internally Displaced Persons: A Manual for Law and Policymakers*, October *2008, Brookings* Institution—University *of* Bern, p.11.

[14] To the same.

[15] On the notion of the 'effective control' in International Law see *International Court of Justice*, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Judgment of 27 June 1986, paragraphs 105-115. *International Court of Justice*, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, of 26 February 2007, paragraph 405. *Prosecutor v Dusko Tadic*, The Appeals Chamber, *Case* No. IT-*94-1*-A (*ICTY 1999*).*Cassese Antonio*, The *Nicaragua* and *Tadić Tests Revisited* in *Light* of the *ICJ Judgment* on *Genocide* in *Bosnia*, *EJIL* Vol. *18* (*2007*), pp. *649-668*.

and security,[16]and so on. According to the definition of the term "refugee" cited above in reference to Article 1A (2) of the Geneva Convention of 1951, a person is qualified to be so only if he/she does not have any chance or any desire to come back to the country of origin, because of persecution by reason of race, religion, nationality, membership of a particular social group or political opinion. On the other hand, the fear of persecution be "well-founded". It is not enough for that person to have the subjective feeling of being persecuted. There might be a causal relation between the subjective element (respectively *fear*) and the objective element (the criterion of "well-founded"), which may be promoted from concrete elements such as the country of origin, his/her social status in this country, events or developments that have happened to family members, relatives, acquaintances or to his friends, and so on. [17]

Furthermore, it is important to underline that the feature or the most important characteristic of the International Law for refugees is *the Principle of Non-refoulement (*known in international theory and practice by the French term of the principle of *non-refoulement),* which word by word means, "Absolute forbiddance of the returning of persons who may be in danger of persecution."In difference from the right to seek asylum, which is not absolute, the principle of *non-refoulement* is applied despite of the formal recognition or not of the refugee status. It is considered correct that this principle in the course of time has gained the status of international common law.[18]However, it might be underlined that this principle is not applied for people who yet have not touched the frontier, have not touched the territory of the State where they desire to seek accommodation. This was underlined by the Swiss representative in preparatory works (*travaux preparatoires)* of the Convention relating to the Status of Refugees, "The Article 33 cannot be applied to a seeker who has not entered yet in the territory of a country."The term 'refoulement' used in the English text, transmitted exactly this idea.[19]According to Madsen, this point of view was supported completely even from other delegates.[20]

In fact, it might also be underlined that the Principle of *Non-refoulement* is related essentially to the forbiddance of torture. Almost the same definition as in the Article 33 of the Convention relating to the Status of Refugees may be found

[16] Guy S. Goodwill-Gill, *Convention Relating to the Status of Refugees, Protocol Relating to the Status of Refugees, United Nations Audiovisual Library of International Law*, (2008), p.3.

[17] *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/Rev.1, reedited, Geneva, January 1992, UNHCR 1979, paragraphs 40-43.

[18] Guy S. Goodwill-Gill, *The right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, *23 INT'L* J. *REFUGEE* L. *443*, p. 444 (2011). *Atle Grahl-Madsen*, *Commentary* on the *Refugee Convention 1951 Articles 2–11*, pp. 13-37, Geneva: Division of International Protection of the United Nations High Commissioner for Refugees, (1997).

[19] To the same, Commentary of the Article 33.

[20] To the same.

even in the Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which states that: "*No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*"

Naturally, even the EU Asylum *acquis* holds similar provisions. Among others, it is mentioned specifically in Article 78[21]of the Treaty on the Functioning of the European Union (TFEU), as well as some EU Regulations and Directives.[22]However, the EU's serious intention and commitment to have a common policy on asylum might not be understood as a scope of going out of the standards of the United Nations Organization (UNO) Convention relating to the Status of Refugees of 1951. On the contrary, it remains a central point even for the EU asylum regime. The European Court of Justice (ECJ) has stated clearly this attitude through its jurisprudence. So, for example in the case of Aydin Salahadin Abdulla and Others v Germany *it states among others that*: "*It is obvious that the Geneva Convention provides the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive to establish who is qualified for the refugee* status *and the content of this recent one were approved to guide the competent organs of Member States for the application of this Convention on the basis of common concepts and criteria.*"[23]

In the European Convention on Human Rights (ECHR), there is not any direct reference to the Principle of *Non-refoulement*. However, the European Court of Human Rights (ECtHR) has treated this matter mainly in the context of the application of Article 3 of the ECHR(Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). This court already has a rich and consolidated jurisprudence in this direction, which currently cannot be treated in details. However, among others we may mention the very interesting case of *MSS v. Greece and Belgium*[24]of 2011, where the ECtHR had to assess if the asylum seekers, who were asylum seekers, because of non-proper conditions in reception places of asylum seekers as well as in the isolation rooms in Rhodes island, could be subjected to cruel and inhuman treatment if they would go back from Belgium to Greece. In the judgment of the case, the Greek party claimed among

21 The Article 78 (1) anticipates: "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties."

22 *Dublin II Regulation, Council Regulation* (*EC*) *No 343/2003* of 18 February 2003. Council *Directive 2005/85/EC* of 1 December 2005 on Asylum Procedures. *The Qualification Directive*, etc.

23 *CJEU Joined Cases C-175/08*, *C-176/08*, *C-178/08*, Aydin *Salahadin Abdulla* and *Others v Germany* [*2010*] *ECR* I-*01493.*

24 *Application* N° *30696/09,* [GCH], of 21 January 2011.

others that according to the Dublin II Regulation, Council Regulation (EC), every Member State of this Union was considered a "safe" country for the intentions of the application of the Principle of *Non-refoulement*. But in spite of this, the ECtHR, based on the claims of seekers as well as on the information received, came to the conclusion that with the transferring of seekers in Greece, Belgium had violated Article 3 of the ECHR, considering the fact that respective Belgium state authorities knew or might have known that seekers there would be subjected to inhuman and degrading treatment. However, within a relatively short time from the declaration of this judgment, Greece took a number of measures to improve the conditions of the asylum seekers in reception centers and in isolation rooms. In a later judgment of the ECtHR, in the case of Safaii v Austria[25]in2014, referring to the claims on the conditions of reception and accommodation spaces of the asylum seekers in Greece, it was considered that there is no violation of Article 3 of the ECHR, since the situation has changed significantly compared to the conditions and to the time of the giving of the judgment in MSS v. Greece and Belgium.[26]

In Albania, asylum matters are arranged by law no. 121/2014, *on asylum in the Republic of Albania,* (which replaced law no. 8432, of the date 14.12.1998, *on asylum in the Republic of Albania,* (changed by law no. 10060, of the date 26.01.2009). The law generally follows rules and principles on asylum that are internationally accepted, intending specifically the approximation to the standards of some Directives of the Council and of the European Parliament on this matter. (Directive no.2001/55/EC, Directive no. 2003/9/ EC, Directive no. 2003/86/EC, Directive no. 2005/85/ EC, Directive no. 2011/95/EU, and so on). Naturally the law refers largely to the Geneva Convention of 1951relating to the Status of Refugees as well as to the cooperation with the UNHCR Office of the United Nations High Commissioner for Refugees. The new law intends to arrange clearly and better the rights and the obligations of asylum seekers, of refugees, of persons in temporary protection, competences and obligations of executive responsible authorities, and so on. Also, it should be pointed out that the authority responsible for the granting, removal and exclusion from the right of asylum, although not expressed explicitly in this law, actually is the Directory of the Asylum and of Nationality, which is part of the Ministry of Home Affairs. The National Commission for the Asylum and Refugees on the other hand might coordinate every assistance offered from national and international donors might supervise the registration of persons who have received temporary protection, as well as might take proper measures for unaccompanied children who require asylum or for other people with specific necessities.

According to Article 40 of the law, the *asylum* seeker to whomthe right of application for asylum is rejected is given the right of appeal within 15 days to the National Commission for the Asylum and Refugees, that might take a decision on

[25] ECtHR - Safaii *v Austria*, *Application* N° *44689/09*, Judgment of 7 May 2014.

[26] To the same, paragraph 51.

this matter within 30 days from the date of the presentation of the request. In the case when the judgment is negative, the *asylum* seeker may file a judicial appeal to the First Instance Administrative Court, afterwardsto the Administrative Court of Appeal and at the end to the Administrative College of the High Court.

Up to now, a small number of matters related to asylum seekers are filed to the High Court.[27]This happens because of relatively low number of asylum seekers in Albania. However, this situation may change in the future. It is expected that in the future the number of asylum seekers will significantly increase. Consequently, if the number of asylum seeks is going to increase, the number of judicial appeals will also increase. This means that we judges should be well prepared to know and to apply best judicial principles and practices, which already are defined quite well from European courts in matters of asylum, as well as the jurisprudence of high and constitutional courts of western democracies.

2.1.2 Diplomatic asylum

Although matters of diplomatic asylum arequite rare compared to territorial asylum, they often attract the main mediatic attention and become a cause for problems and tensions among states. This happens for many reasons.

Firstly, these actions happen mainlyin residences of embassies and the asylum process is in itself an exclusion from the normal activity of diplomatic missions. Since the untouchability of embassy residences has always been established quite clearly byinternational law, the practice of the usage of these spaces as a kind of "protection" from the jurisdiction of the territorial statehas always posed the sensitive question of whether this is an abuse of this specific status.

Secondly, these cases usually involve people that have been somewhat known to the generalpublic,who often undertake such an action to avoid the criminal pursuit started in their country of origin, with the claim that accusations are either politically motivated or the crime in itself is of a political nature.

Thirdly, if diplomatic asylum is granted, the seeker normally stands isolated in the embassy, since the authorities of the territorial state do not permit him to have freedom of action. A typical example is the case of Julian Assange, founder of WikiLeaks, to whom political asylum was granted inside the embassy of Ecuador in London, hindering his extradition in Sweden to be confronted with the accusations for sexual abuses.

The widely accepted point of view is that there is no legal right to grant asylum inside diplomatic or consular spaces.[28]As is mentioned above, this practice contradicts the normal functioning of these diplomatic missions. This point of view is affirmed

[27] High Court, Administrative College, Judgment no. 662, of 17 December 2013.

[28] *McNair Arnold*, *Extradition* and Exterritorial *Asylum*, *28*BRIT. Y.B. *INT'L* L. *172* (*1951*).

even from the International Court of Justice (ICJ) in the widely known case of "the asylum."[29]The focal issue in this case is the accommodation that the ambassador of Colombia in Lima, Peru, granted to Mr. Víctor Raúl Haya de la Torre, head of the Peruvian Popular Revolutionary Alliance, who was under investigation from the authorities of that country for the encouragement and the leading of a violent rebellion. After granting asylum, Colombia required from the Peruvian authorities the issuing of laissez-passer so that Mr. De la Torre could leave Peru. Competent authorities did not agree to permit him leaving Peru, arguing that he had to be criminally investigated in Peru for the commitment of a criminal offence. In these circumstances, both governments agreed to present the case to the International Court of Justice for the interpretation of the Convention on Asylum (Havana, 1928) as well as of the Convention on Political Asylum (Montevideo, 1933). Initially the Court declared that Colombia had the right to grant temporary asylum for Mr. De la Torre, but later had to consider if the accusations filed in Peru had or not political character. Later on, in relation to the main issue of the case, the Court, among others, underlined that since Peru opposed all the legitimacy of the process of granting asylum, it could not be forced to provide permission to Mr. De la Torre to leave the country. Finally, based on the claims of Peru, the Court declared that in this case, the granting of asylum from Colombia was in opposition with Article 2 of the Convention on Asylum (Havana, 1928), since it missed the element of "urgency" mentioned explicitly in this Convention. More specifically, the International Court of Justice underlined in its judgment that:*"In principle, it could not be imagined that the Convention on Asylum* (*Havana*, *1928*) *intended to include in the concept of "urgency" the potential danger of the continuous persecution from law-implementing institutions to which every citizen of every state may be exposed. However, as a rule, asylum can not be used to obstruct the functioning of justice. Exclusion from this rule may exist only if "justice"is used as cover for arbitrary actions that undermine the law. This would be the case when the giving of justice would be disrupted by actions clearly motivated from certain political scopes. Asylum protects the person politically accused from every measure of a completely extra legal character that a government may undertake or may claim to undertake against political objectors".*[30]

2.2 Extradition

Extradition is defined as the practice that gives a state the opportunity to turn over to another state criminals charged with or convicted of a crime, who escaped and are in the territory of the first state.'[31]In principle, extradition is accomplished

[29] *Asylum Case*, *Colombiav. Peru, Judgment* of 20 November*1950, I.C.J. Reports 1950*, p.266.

[30] To the same, p. 284.

[31] *Malcolm* N. *Shaw - International Law* (*6th Edition*), *Cambridge University Press* (October 25, *2008*), p.689.

with the implementation of an agreement or a completed treaty between two states, although international cooperation in criminal matters essentially is a matter of will, which means that extradition may also be undertaken without a specific agreement among two states. However, it is emphasized that extradition is predominantly done with the existence of an agreement between the requesting party and the party where the enquired person or persons are located. Although every extradition agreement has its own specifics, usually every agreement of this kind has these elements:

a)Double criminality: This is a very aged norm of international criminal law, which is related to the principle of legitimacy and reciprocity. It means that the criminal offence for which extradition is required should be envisaged to be so in both states. Since the duration of the conviction for the commitment of the criminal offence cannot be the same, in principle it is required for it to be defined or for an approximate margin of appreciation to be applied. The kind of conviction should be the same. This is generally implemented in cases of convictions that comprise the deprivation of one's liberty. This is how it is defined in the Article 2 (1) of the European Convention on Extradition.[32]

b) Ne bis in idem principle: The principle of prohibiting a person's conviction twice for the same criminal fact has strong and consolidated roots both in domestic and international criminal law. There are two situations in relation to the European Convention on Extradition. The first has to do with the requests for extradition in relation to criminal offences for which the judicial organs of the requesting party have already given a final judgment, receiving the *res judicata* status. It is clear that in this case the extradition cannot be done. On the other hand, in cases when the authorities of the requesting party have decided not to start or to interrupt proceedings against the enquired person in relation to the same offence or the same criminal offences, then, depending on the circumstances, a decision *may* be taken either for the refusal of the extradition, or for its authorization.[33]

c)Lapse of time: Based on Article 10 of the European Convention on Extradition, extradition shall not be granted when the person cannot be prosecuted or convicted, according to the law of either the requesting or the requested party, by reason of lapse of time. This rule has already changed with the coming into force on 1 June 2014 of the Fourth Additional Protocol to the European Convention on Extradition. According to new anticipations in this Protocol, lapse of time will be calculated only according to the legislation of the requesting party and not according to the legislation of the requested Party.

d) Criminal offences of a political nature: As briefly mentioned above, the possible refusal of extradition in cases when the enquired person is proceeded or convicted for criminal offences of a political character is practically present almost

[32] *Council of Europe*, *Paris*, *13 December 1957*, *ETS No.024.*

[33] *Council of Europe*, Explanatory Report of the European Convention on Extradition, Article 9.

in all respective agreements between states. Almost everywhere it is envisaged that extradition cannot be done if the criminal offence for which the person is enquired has a "political character". But what is a criminal offence of a political nature? In fact, there is no definition of such a term, since it is not easy for states to agree on the establishment of such a definition. In these circumstances, the more appropriate and pragmatic way to define this term would be the usage of the interesting axiom of Justice Potter Stewart 'I know it when I see it'[34],which means that every specific case needs specific judicial evaluation of specific facts and circumstances. However, it should be underlined that the immunization of "the criminal offence of a political nature" from extradition should be treated carefully from the courts of the receiving state. The main issue in this case should be the humanitarian necessity to protect the person who is criminally in pursuit only because of his political attitudes or ideals of a completely personal character. In theory, the subject of the criminal offence of a political character, in the function of the consideration of the request for extradition, is the person who intends to transmit, develop or achieve peacefully his individual ideas, with a certain objective of political character. An example of this may be the case of Albania in the communist regime, where for almost 50 years, thousands of people along with their family members were convicted and were treated inhumanly, simply because of their desire to establish pluralism, because of the attempts to leave the country for a better life as well as because of the opinions, criticisms, simple evaluations on several deficiencies of daily life (the so-called agitation and propaganda against state authority). However, I want to underline that every specific case should be carefully considered by the court. The refusal of extradition, through a wide interpretation and without a deep investigation of the claims of a political character of the seeker, would create undesired effects and would have harmful effects in practice. It would deteriorate the normal cooperation between states in criminal matters, providing a "warm" shelter, albeit completely undeserved, for criminals who would have the opportunity to avoid the application of the law.

In fact, in judicial doctrine, the criminal offence of a political character may be classified as a 'clean' or 'relative'[35]criminal offence.

The first category is easily defined. It refers to the specific figure ofthe criminal offence for which extraditionof the accused person is required. This offencenormally is against the state. So for example, if a well-known individual of an opposition party is accused for the commitment of criminal offences such as betrayal orespionage, the relation that exists between the activity where the author is involved and the specific criminal offence for which he is accused may be easily defined.

[34] Jacobellis v. Ohio 378 U.S. 184,197 (1964).

[35] *Helton*, *Arthur C.*, *Harmonizing Political* asylum and *International Extradition*: Avoiding Analytical Cacophony, Immigration& Nationality Law Rev.347, (1988), p.351.

In the second category of political criminal offences of a "relative" nature, according to doctrine, are those offences where "an ordinary crime is so much related to a political act that the figure of the criminal offence takes a political character, becoming an important potential obstacle for the extradition request." [36]

Both categories mentioned above are defined in Article 3(1) of the European Convention on Extradition of 1957, which anticipates that: "*Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested party as a political offence or as an offence connected with a political offence.*"

e) The danger of violation of fundamental human rights and liberties: In the cases when there are no criminal offences of a political nature, for the effect of extradition, courts may and should take into consideration other claims of the seeker, such as for example those related to the danger of the violation of the individual fundamental rights and liberties, especially when the standards of Article 3 of the European Convention on Human Rights, as cited above, are involved.

Although these kinds of provisions cannot be considered in details as causes for blocking the procedures of extradition, practically they are the most discussed and the most sensitive matters in national courts. However, it has to be underlined that as a rule, just like in the application of asylum procedures as well as in the evaluation of the application or not of the Principle of *Non-refoulement*, there should be no extradition if there is reliable evidence that suggests that if the enquired person will surrender, he will be subject to torture or inhuman and degrading treatment. In relation to this matter, in the application of Article 3 of the ECHR, the ECtHR has a quite rich and interesting jurisprudence. Among others, one could mention important cases such as *Soering v United Kingdom*,[37] *Vilvarajah and Others v The United Kingdom*,[38] *Al-Saadoon and Mufdhi v. the United Kingdom*,[39] *Garabayev v. Russia*, and so on. [40]

The only case of the ECtHR related to the procedures of extradition that includes Albania is the case of *Rrapo v. Albania*.[41] In this case the seeker was extradited in the United States of America in accordance with the Bilateral Extradition Treaty between the United States of America and the Kingdom of Albania of March 1, 1933. In fact, the ECtHR took an intermediate judgment, by accepting the claim of the seeker not to be extradited until the taking of the final judgment from the High Court on this case. The Albanian authorities did not apply this judgment but made the extradition based on the judgment of the Appeal Court, without waiting

[36] To the same, citing Eain *v. Wilkes*, *641 F.2d,* n.24, p.523.
[37] Application no. 14038/88, Judgment of 07 July 1989.
[38] Application no. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, Judgment of 30 October 1991.
[39] Application no. 61498/08, Judgment of 2 March 2010.
[40] Application no. 38411/02, Judgment of 7 June 2007.
[41] Application no. 58555/10, Judgment of 25 September 2012.

for the judgment of the Criminal College of the High Court. In the judgment of 25 September 2012, the ECtHR underlined that by making the extradition of Mr. Rrapo, *Albania* had not violated Article 3 of the ECHR, since although in delay, reliable guarantees were taken through diplomatic channels from the government of the United States of America that the applicant would not be subject to the death penalty[42] and that "in practice there had not been violations on the commitments undertaken from the government of the United States of America on such issues".[43]However, the ECtHR underlined that with regard to the non-application of its intermediate judgment (temporary suspending measure), the Albanian government had violated Article 34 of the ECHR as well as the Article 39 of the Statute. [44]

3. Criminal pursuit and persecution: How to make the difference?

Asylum and extradition are two different judicial institutions quite connected to each-other. Extradition is almost always a judicial process, while asylum normally starts with an administrative process and later on, frequently concludes with a judicial process. This happens especially in cases when the asylum request is refused administratively. On the other hand, asylum has to do mostly with the protection of refugees, so it is mainly oriented towards humanitarian necessities, while extradition intends a more effective fight against criminality and facilitation of international cooperation between states in criminal offences. Both these institutions could certainly function independently from each-other. But it is quite frequent that for a person who seeks asylum, it may be required for him to be extradited to a certain state thereafter. Consequently, in these cases, proper attention should be given to the explanation of the important fact if the criminal pursuit for which extradition is required is related to a common crime, punishable in respective countries, or has to do with a persecution because of race, religion, nationality, membership in a certain social group or because of political convictions, just as is provided in the United Nations Organization (UNO) Convention relating to the Status of Refugees of 1951. Undoubtedly, this is relatively easy in theory, but quite difficult to be applied in practice. There are many cases when common criminals have unjustly gained in another state the right of asylum, just as there are so many other cases when certain persons are extradited, although criminal accusations on their charge have been fake or fabricated mainly for political purposes. Therefore, courts in particular should be more careful in the multidimensional assessment of every individual case. Almost every person who

[42] To the same, paragraph 71.
[43] To the same.
[44] To the same, paragraph 88.

seeks asylum claims that in a way or another, he has been a victim of persecution in his country of origin. That is the reason why the majority of people accused of common crimes, living in another state, would claim to competent authorities of this state that the accusation on their charge is done because of their political views or because of other circumstances covered by the refugee status, and because of this, if they are extradited to the requested state, they will be subject of torture, inhuman or degrading treatment. Despite such cases of 'abuse of the law', executive and judicial organs might take the necessary precautions for a correct evaluation of evidences for every asylum seeker. After all, national authorities have the responsibility to assure that the State that they represent might not extradite or negate the asylum to a person, if there are sufficient evidences to believe that he will be subject to deliberate violations of the rights guaranteed from national and international legislation.

Just as underlined by the International Court of Justice in the case of *asylum*, the criminal pursuit (extradition) might be in principle the rule, while persecution (asylum) might be an exclusion from the rule, functioning in this case as a filter or as a kind of "hindrance" to accomplish the normal cooperation between States on criminal cases. According to the UNHCR handbook and guidelines on procedures and criteria for determining refugee status, 'A refugee is a victim – or a potential victim – of injustice, not a fugitive from justice.'[45] Maybe in this case an important explanation should be made: In practice, while it is true that all victims of injustice are considered as persecuted in their native land that requires extradition, the same thing cannot happen in the state where they seek shelter. But on the other hand, the natural question that begs is "how deep may and should the courts of this state investigate, so that to create the conviction that the extradition request's main intention is persecution or not?" I reiterate that this is not an easy process. It depends completely from the circumstances as well as from the information that may be taken in every individual case. However, it is important to be emphasized that if these facts demonstrate that the extradition request or the arrest warrant of the state of origin is influenced from other external factors such as political opinions, race, religion or the nationality of the accused person, then courts of the requested state should refuse the extradition request.

4. Conclusions

Judicial matters of asylumand extraditionare frequently represented as very complicated and at the same time as very difficult ones. Because of their sensibility, even the responsibility of the court is enormous. On one hand is the

[45] UNHCR handbook, cited above, note 16, paragraph 56.

obligation to fight better and more effectively against criminality in the national and international plan, while on the other hand there is the human protection of people truly in need, connected even with the destiny of their family members or relatives.

Such problems are more serious and more urgent in the conditions of the tendency and of the request for the continuous opening of frontiers, that normally are accompanied with serious measures which intend the preservation and the functioning of the legal state.In these conditions,it is necessary to intensify the cooperation and the dialogue between courts of all levels, in national and international levels. Weas judges should be modest and learn not only from our best practices but even from our mistakes. We shouldwork patiently and be transparent. Globalisation has changed many things, including our legal systems, which should no longer be interpreted in a one-dimensional approach. Domestic judges will judge to a large degree cases combined with domestic and international law, while certain institutes of international law such as extradition, asylum and so on, will need specialised knowledge, which frequently lacks in the majority of our courts.

Therefore, I reemphasize on the necessity for the exchange of information among us on the best and most advanced practices. In this direction, the International Association of Judges on Refugee Law, in which I have been part for a long time now, remains a history of success. Its main scope is 'to exchange and to share information on international law and practice for cases related to refugee status'. Through its conferences, seminars and many publications, the Association intends to encourage the dialogue between judges on matters of refugees so that to provide effective protection for them just as is guaranteed from instruments on human rights, such as the Convention relating to the Status of Refugees of 1951, as well as its additional Protocol of 1967.

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UNHCR handbook, note 16, paragraph 56.

Collateral Conversion in Cross-Border Infrastructure Financing Projects

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Due to its geographical position, and also because of the potential integration of the Western Balkans economies into the European single market in the near future, in recent years, important and legally challenging cross-border infrastructure projects have taken and will continue to take place in Albania. These complex projects, such as the construction of railways, gas and oil pipelines and others, are challenging to finance, not to mention the legal challenges they face including the occupation of construction sites and easement. Above all, providing collateral is a crucial factor in increasing the chances of successfully financing, implementing, and completing these projects; particularly where in such projects the assets themselves used as collateral are purchased, created, and built during the implementation phase.

In this article I will address some Albanian legal issues to be considered in the process of legal assessment of the quality and provision of collateral in financing of cross-border infrastructure projects. Specifically, I will address some specific legal issues associated with the conversion of collateral. The need for this analysis arises from the challenges involved in implementing such projects in Albania and also from the need to recognize the compatibility of the legal provisions and their applicability in different jurisdictions. Especially when the same pool of lenders are available for the companies building and developing the relevant infrastructure networks in multiple cross-border states. Below, I have itemized the key issues to consider when seeking to secure such financing.

1. In the various jurisdictions where the cross-border construction projects are being conducted, the treatment of collateral conversion from movable property to immovable property depends on the legal definition of 'movable property' and 'immovable property' in the relevant jurisdiction. Under Albanian law (according to Article 142 of the Civil Code) land, water springs and springs, trees, buildings,

other land-based floating constructions and everything that is embodied in the land and/or building are defined as 'immovable property'. All other items, including any other natural energy, are considered 'movable(s)'.

2. Depending on the relevant definitions, in order to properly address the issues of collateral and its conversion, we should assess whether during the construction of the relevant infrastructure network there will be a transformation of the tangible movable property into immovable property. We must ask whether it is possible for a tangible movable property to be transformed into an immovable property in a specific project. Movable assets, which due to installation, assembly and/or construction work create a permanent connection to the land, may be defined as immovable property at the instant when they acquire the quality of being immovable in relation to the land, i.e. become connected to the land. Thus, for example pipe pieces, which during installation are mounted and/or installed and extend as pipelines above ground and/or underground by their nature are movable items when purchased. However, these movables acquire the quality as immovable property because of the qualities they gain after assembly/installation and inclusion in construction works, these works that permanently connect them to land (Article 142 of the Albanian Civil Code).

3. The legal challenge in the said projects remains with the different types of collateral for different types of properties (i.e. movable property or immovable property). In this respect, the next question to address during the legal due diligence should be: What is the type of available security offered for the concerned movables and for the immovable property?

Under the Albanian legislation, the means to use a movable item as security for relevant financing is achieved through a possessory or non-possessory lien. According to Article 546 of the Civil Code, "*the lien shall be placed on a movable property... A lien is created by placing the property or title in the possession of the creditor or a third party upon agreement between the parties*". In practice, in Albania, possession is almost never used in project financing, and much less in the case of large investments. It simply isn't pragmatic in such instances to render the movable property blocked and not put in use. Further, as of 1999, Albanian Law no. 8537/1999 "On Securing Charge" (as amended) provides a comprehensive, efficient and effective means for a non-possessory lien (otherwise referred to as a securing charge). Under a non-possessory lien/securing charge movable property is permitted to be used during the respective construction projects and is perfected upon registration in the Securing Charge Registry (Article 8 of the Securing Charge Law). It is important to note that the Securing Charge Registry is intended to provide lenders/creditors with the means to register a securing charge on the movable tangible and intangible property of the borrowers (Article 1 of the Securing Charge Act). The perfection/registration of collateral is also the means

through which one prioritizes claims over the enforcement of the same movable property used as collateral for several creditors, as well as between complete and incomplete securing charges (Article 11 of the Securing Charge Law).

Movable property serving as collateral for the relevant financing until it is transformed into immovable property, i.e. after it is assembled/installed and merged through construction works in permanent connection with the land and, thus, qualifies as immovable. At which point (under Articles 560 and 562 of the Albanian Civil Code) a contractual mortgage becomes the means of securing the enforcement of the obligation which represents a creditor's real right over the borrower's or a third party's immovable property for the benefit of the creditor, to ensure the fulfillment of a borrower's obligation.

4. For the purposes of these infrastructure projects the ability to obtain security on future immoveable property is imperative. While a mortgage can be created by contract (Article 562 of the Civil Code), a mortgage can then only be registered thus enforceable once the immovable property comes into existence (Article 567). In this regard, it is important to determine the instant in which the asset is legally considered to be immovable property, namely that the 'immovable asset exists'. Further detail, which I shall not enter into in this article, can be found in the Albanian legislation related to real estate development and construction for guidance on the interpretation of when that instance is.

5. Given that we have a transformation of the movable property into immovable property in these infrastructure projects and given that our legislation offers different types of security for both movable property and immovable property, the legal challenge lies in the conversion of that collateral. This conversion should seek not to affect the interest of the lenders, their priorities, but also to achieve continuity of effective collateral without any interruption. So, what is collateral conversion? Above all, it should be made clear that 'conversion' is not the 'renewal' of the collateral. In relation to collateral, the term 'conversion' is used as an analogy because of the possibility of transformation of the asset subject to collateral, but, the effect of conversion of the collateral itself is achieved by 'substituting' the type of collateral. According to Albanian legislation, we are dealing with the substitution of the 'securing charge' with a 'mortgage'. Can this substitution be done safely for the lenders? Collateral conversion through substitution without diligent attention to corresponding legal framework could potentially leave the creditor/lender with no effective collateral at the time of this conversion; the relevant legal risks will not be covered by this article. Only through proper legal due diligence can the security of lenders be maximized in these complex projects. As a relevant and proportionate legal solution, it is important to mention here that the mortgage should not follow the transformation of the movables into immovable property. Creating a contractual mortgage on the immovable property that will exist in the future seems

likely to create legal comfort. The procedure of establishing a contractual mortgage on the future asset, its registration hence perfection on the prospective immovable property must be coordinated and overlapped with the release of the securing charge created and registered/perfected when the borrower becomes the owner of the movable property. For the purpose of the secure substitution of the collateral, it should also be considered that while the registration of the securing charge is done in a single central register which is the Securing Charge Register ('RBS'), the mortgage is registered in the real estate registry offices of the place where the actual immovable property is located. Likewise, the issue of extinguishment of a securing charge and mortgage should be given special attention, as should the moment of the creation of the borrower's title to the immovable property , the validity and effectiveness of securing charge and mortgage, the extension of the mortgage on the relevant servitude (Article 564 of the Civil Code), the order of the mortgage and the application of the principle *pari passu* during the enforcement of the mortgage under Articles 574, 575 and 576 of the Civil Code.

6. The legislation of all countries where the relevant project will be implemented should be considered simultaneously to ensure compatibility and, to the extent possible, uniformity in multi-jurisdictional legal solutions to the success of the project and, in particular, the security of lenders. In such multi-jurisdictional infrastructure projects, the legislations from the relevant jurisdictions must be comparatively examined with respect to the specific legal definitions, types of collateral applicable to movable and immovable property, the legal solutions that these legislations have regarding the creation, validity, registration, and effectiveness of the mortgage on future immovable property, and with respect to all of the items covered above herein. For example, in cross-border projects with Italy and Greece, it has been comparatively assessed that there are many legal issues treated similarly in the Albanian legislation and in their respective legislation, but there are also differences which, for the purposes of securing financing lead to different legal solutions to those provided under Albanian legislation.

Having considered all the above, in conclusion, I would comfortably summarize that the Albanian legislation does indeed provide effective legal opportunities to maximize the security of lenders in the financing of the construction of cross-border infrastructure networks. Of course, the legal challenges to the practical implementation of the above legal remedies are numerous given the complexity and can be open to interpretation given such projects are relatively new in Albania and as such relevant jurisprudence and court practice is virtually non-existent.

Disclaimer: This article does not represent and should not be considered as legal advice that can only be provided if circumstances and particularities of a specific project are known.

Strasburg Dissappointments[1]

Florjan Kalaja[2]

1. The prologue of the disappointments

The European Court of Human Rights (hereinafter the Strasbourg Court) had and still has two issues of great importance for the Albanian state. The first one was the issue of fair compensation of former owners unjustly expropriated by the communist regime in relation to Law no. 133/2015 "*Law on the treatment of property*" (hereinafter Law no. 133/2015), which concluded the process of their compensation. The second is its approach to administrative and judicial practice, which respectively the Independent Qualification Commission or the Appeal Chamber have held in the process of transitional re-evaluation of judges and prosecutors, in which officials of the justice system have been dismissed during this period.

The first issue was resolved. On Thursday, 07/05/2020, the Strasbourg Court published the decision in the case "*Agim Beshiri and 11 others against Albania*"[3], where the former owners complained that their property rights and the right to due process were violated from non-execution for several decades of final decisions on the financial compensation of unjustly expropriated property by the communist regime. It took the Strasbourg Court 63 pages to conclude that the claims of the former owners were procedurally inadmissible and that it had no jurisdiction to review them. With this decision 12 Albanian court cases were repatriated, of which the earliest had since 2006 that had escaped the non - resolving judicial jurisdiction of motherland.

[1] The very first draft of this article is published in the daily newspaper "Panorama", d. 12 May 2020. See in the web: http://www.panorama.com.al/zhgenjimi-i-strasburgut/. The article was translated by Mr. Dritan Dema which the author wants to thank him very much for the help he gave with the translation and the good collaboration he is always keen to give.

[2] The autor is Judge in Vlora District Court and Advisor in the Administrative Chamber of the Supreme Court.

[3] See the case "*Agim Beshiri and 11 others against Albania*", Ap. No. 29026/06, d. 17 March 2020, Second Section, ECHR, decision on the admissibility. See in the web: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-202475%22]}.

Seven of these requests, the earliest of 2006, one of 2008, one of 2010, one of 2011, two of 2014 and one of 2015 were declared inadmissible because they had not submitted any request to the Agency of Property Treatment (hereinafter APT) or further in the competent Albanian courts, in accordance with the provisions of the new law. Four of these requests, two in 2012 and two in 2014, were declared inadmissible because, although they had submitted a request to the Strasbourg Court, they had also submitted a request to the APT and further to the court and the proceedings for their trial were ongoing in Albania under the new law. A request filed in 2014, was declared inadmissible because, according to Law no. 133/2015, the former owners were compensated by the Albanian authorities (see paragraphs 218 - 220 of the decision).

2. First disappointment

From reading the decision I cannot hide the first great disappointment I have received from a jurisprudence of the Strasbourg Court, in ten years of my professional life as a judge. I did not understand how the rule of merging claims (Article 42 point 1 of the Rules of the ECtHR[4]) could be applied to cases where the issue of law and the fact that they raise are quite different. That is, seven cases are joined, the plaintiffs of which have not filed any claim with the Albanian administrative or judicial authorities, with five cases, the plaintiffs of which are litigants and are being tried by Albanian courts or creditors against the state, after being compensated in accordance with the Law no. 133/2015.

Further, at the end of a long waiting for international justice, the seven parties are told that your requests are inadmissible because you have not exhausted domestic remedies and that only after you have done so come and complain again in Strasbourg about the Albanian State. Meanwhile, when these cases are repatriated to the motherland, ATP will not accept them for consideration, because the deadline for considering the requests has expired, and the courts will decide not to accept the lawsuit without considering the case on the substantial merits, as their time limit for filing a lawsuit has expired. Namely, with this decision, the Strasbourg Court for these seven requesting parties has created a "*neither-in-heaven-nor-on-earth*" effect, or in other words the purgatory effect of the justice.

[4] See in the web: https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf

3. Second disappointment

In this case, 12 applicants complained among other things that Albania had failed to execute final compensation decisions over decades, the earliest year being 1993, and claiming that a maximum of 27 years of waiting for it to execute an executive title are many and as a result Article 6 of the European Convention of Human Right (hereinafter ECHR) has been violated, in the element of completion of the execution process within a reasonable time. I did not understand why the decision reflects Articles 399/1 - 399/12 of the Code of Civil Procedure[5], which regulate the special trial of compliance with reasonable deadlines and I am even more unclear of the reason which the means of this internal appeal has to do with the alleged violations by 12 requesting parties in the Strasbourg Court. If the message of these respective parts of the decision is to conclude that in the domestic legal order there is an accessible means of appeal for unreasonable terms of trial or execution, it must be acknowledged that this conclusion is erroneous in the case of these 12 claims.

This special procedure, as presented by the new law in Albania, has entered into force on 05.11.2017 and the retroactive force of the amending law is not such as to financially compensate everyone who in the Albanian courts or bailiff service has not been able to enjoy fundamental rights during decades of litigation or execution process. This means that this remedy for 12 pairs of applicants is accessible, not to the lawsuits that they appealed to the Strasbourg Court, but to those that they have today or will have in the future in Albania. So, I found this part of the decision irrelevant to the judgment and as such it gave me the perception of a bit of balm for the forsaken of justice (see paragraph 212 of the decision).

With this position held, we must expect in the future jurisprudential of the Strasbourg Court, that any Albanian applicant to this court who has claimed violation of the right to due legal process, for the completed trials in all judicial levels in Albania before 05.11.2017, in the element of reasonable time, would be in vain. This is because each of them had to exhaust the request for violation of the reasonable time limit created by the civil procedural law in 2017. Exactly, the Court that the cornerstone of jurisprudence has the principle of non-transformation of material and procedural rights into theoretical and illusory, in the case of the confrontation of Albanian citizens with their state, it refuses to give justice, citing the principle of subsidiarity and repatriating them to the motherland. However, legally this repatriation, even for the claims of violation of the reasonable time limit for the processes before 05.11.2017, has created a purgatory effect and constitutes a legal repatriation to procedural means completely inaccessible, theoretical and illusory.

[5] The Albanian Civil Procedure Code is amended by the Law no. 38/2017 with this part of regulation and these articles entered in to force in 05.11.2017. There is no provision that this possibility has retrospective effect.

4. Third disappointment

I did not understand what has changed in the jurisprudence of the ECtHR from the case "*Sharrxhi and others against Albania*"[6] of January 2018 (the explosive demolition of the land-sea palace in Vlora, in south of Albania) to the case "*Agim Beshiri and others against Albania*" and in May 2020. Meanwhile, in January 2018 the Strasbourg Court, when the Supreme Court had 8 judges in its effective staff, due to the fact that the decision of the Administrative Appellate Court was suspended and that the trial of the case had not been listed in the Supreme Court for two years, it was concluded that in these conditions the recourse and the third instance trial in Albania could not be an effective mean of appeal. It was the very first case-law of ECtHR that the bankruptcy of one European supreme courts was internationally acknowledged and that was the case of the Albanian Supreme Court. This unique conclusion of ECtHR was an extraordinary invitation for immediate access to its international jurisdiction for unresolved Albanian litigants forgetting about the principle of subsidiarity.

All of a sudden, in May 2020, when the Supreme Court originally had three months with three judges, it was one year with one judge and not even two months since three judges had been newly appointed, and when for years a case in one of the appellate courts is a world-known fact that it takes years to complete the trial, the Albanian courts in the eyes of the Strasbourg Court become effective means of appeal, so much so that it seems premature to judge their effectiveness while trials in these impossible trials forums are still ongoing (see paragraph 219 of the decision).

Meanwhile, it remained inexplicable for me from reading the decision, why in 63 pages of reasoning, where detailed information were given about normative bylaws, inter-ministerial measures taken given by government statistics about facts that have and have not relevance to the issue is not clearly and accurately reflected in the fact that, according to Law no. 133/2015, the final and enforceable decision in all cases of property compensation issues, is not the decision of the appellate court, according to article 451, letter "ç" of the Code of Civil Procedure, but it is the decision of the Supreme Court. I need to add here the fact that, recently, this interpretive attitude and approach of the law has been maintained by the Civil Chamber[7] and the Administrative Chamber[8] of the Supreme Court. I consider that this fact was of fundamental importance to the Strasbourg Court for

[6] See the case "*Sharrxhi and Others v. Albania*", Ap. No. 10613/16, d. 11 January 2018, First Section, ECtHR. See in the web: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-179867%22]}.

[7] See the Decision no. 75/396, d. 13.05.2020; the Decision no. 112/489, d. 13.05.2020 and the Decision no. 128, d. 06.05.2020 of the Civil Chamber of the Supreme Court.

[8] See the Decision no. 45/327, d. 08.06.2020 and the Decision no. 56/348, d. 08.06.2020 of the Administrative Chamber of the Supreme Court.

the conclusion that it was not able to reach it in a way, prematurely, as it admits in the decision.

5. Fourth disappointment

I did not understand what has changed in the jurisprudence of the Strasbourg Court on the issue of the seven claims identified above, which have not filed any claim or lawsuit in Albania under Law no. 133/2015, with the case "*Siliqi and Others v. Albania*"[9] of 2015; with the case "*Metalla and Others v. Albania*"[10] of 2015; with the case "*Luli v. Albania*"[11] of 2014; with the case "*Sharra and Others v. Albania*"[12] of 2015; "*Rista and Others v. Albania*"[13] of 2016; with the case "*Halimi and Others v. Albania*"[14] of 2016; with the case "*Karagjozi and Others v. Albania*"[15] of 2016, decisions of the Strasbourg Court which were issued after the pilot decision "*Manushaqe Puto and others v. Albania*"[16] and after the entry into force of Law no. 133/2015. All these jurisprudential decisions of the Strasbourg Court are identical in the circumstances of the fact and the issues of law that arise for resolution as the circumstances of the fact are presented and the issues of law in the seven claims identified in paragraph 218 of the decision. However, their legal fate is diametrically different. For all decisions of 2015 and 2016, the Strasbourg Court did not take into account the new law to determine its jurisdiction and

[9] See the case "*Siliqi and Others v. Albania*", Ap. Nos. 37295/05 and 42228/05, d. 10 March 2015, Fourth Section, ECtHR. See in the web: file:///C:/Users/Florjan%20Kalaja/Downloads/001-152778.pdf.

[10] See the case "*Metalla and Others v. Albania*", Ap. Nos. nos. 30264/08, 42120/08, 54403/08 *and* 54411/08, d. 16 July 2015, Fourth Section of the ECtHR. See in the web: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22metalla%20and%20others%22],%22itemid%22:[%22001-156069%22]}.

[11] See the case "*Luli v. Abania*", ap. no. 30601/08, d. 15 September 2015, Fourth Section of the ECtHR. See in the web: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22luli%22],%22itemid%22:[%22001-157342%22]}.

[12] See the case "*Sharra and Others v. Albania*", Applications nos. 25038/08, 64376/09, 64399/09, 347/10, 1376/10, 4036/10, 12889/10, 20240/10, 29442/10, 29617/10, 33154/11 and 2032/12, d. 10.11.2015, Fourth Section of the ECtHR. See in the web: https://www.reporter.al/wp-content/uploads/CASE-OF-SHARRA-AND-OTHERS-v.-ALBANIA.pdf

[13] See the case "*Rista and Others v. Albania*", ap. Nos.
nos. 5207/10, 24468/10, 36228/10, 39492/10, 39495/10, 40751/10 *and* 48522/10, d. 17 March 2016, Fourth Section of ECtHR. See in the web: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22rista%22],%22itemid%22:[%22001-161410%22]}.

[14] See the case "*Halimi and Others v. Albania*", ap. No. 33839/11, d. 7 April 2016, Fourth Section of the ECtHR. See in the web: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22halimi%22],%22itemid%22:[%22001-161809%22]}.

[15] See the case "*Karagjozi and Others v. Albania*", ap. No. 32382/11, d. 7 April 2016, First Section of the ECtHR. See in the web: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22karagjozi%22],%22itemid%22:[%22001-161806%22]}.

[16] See the case "*Manushaqe Puto and others v. Albania*", ap. nos. 604/07, 43628/07, 46684/07 *and* 34770/09, d. 4 November 2014, Fourth Section of the ECtHR. See in the web: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22puto%22],%22itemid%22:[%22001-147862%22]}.

jurisprudence, although it had entered into force and the ATP had become fully operational during this time, while in 2020 it does the opposite.

6. Fifth disappointment

I did not understand how it differs the legal case that was filed for settlement before the Strasbourg Court in four decisions of May 22, for these seven requests identified in paragraph 218 of the decision, 2018, specifically in the cases of "*Topi v Albania*"[17], "*Hysi vs. Albania*"[18], "*Malo v. Albania*"[19], "*Muça v. Albania*"[20]. In the latter, the observance of Article 6 of the ECtHR for convicts *in absentia* was presented for a solution in the criminal process with presumption of knowledge about the criminal proceeding. The Albanian Government asked the Strasbourg Court to declare these claims inadmissible and consequently to cede these issues to its international jurisdiction, under the Article 450 of the Criminal Procedure Code as amended in 2017.[21]

The new amendments, trying to apply the ECtHR's standards on this matter[22], provided that convicts *in absentia* could request a review of the final criminal court decision, although the requests were submitted years ago on 01.08.2017, the moment when the legal changes of 2017 came into force. The ECtHR assessed in these four cases on the same date that the legal changes could not resolve the issue of retroactive applicants and therefore did not deviate from international jurisdiction, finding Albania in violation of Article 6 of the ECtHR in these cases. All of a sudden, the Strasbourg Court, two years later, decided to repatriate seven claims - exactly identical substance of the procedural issues - to the parent justice system, in which the legal deadlines have expired for months. Again, returning to a justice of inaccessible material and procedural means, theoretical and illusory.

[17] See the case "*Topi v Albania*", Ap. No. 14816/08, d. 22 May 2018, Second Section of the ECtHR. See in the web: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22topi%22],%22item id%22:[%22001-183117%22]}.

[18] See the case "*Hysi vs. Albania*", ap. No. 72361/11, d. 22 May 2018, Second Section of the ECtHR. See in the web: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22hysi%22],%22item id%22:[%22001-183121%22]}.

[19] See the case "*Malo v. Albania*", ap. No. 72359/11, d. 22 May 2018, Second Section of the ECtHR. See in the web: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22malo%22],%22item id%22:[%22001-183120%22]}.

[20] See the case "*Muça v. Albania*", ap. No. 57456, d. 22 May 2018, Second Section of the ECtHR. See in the web: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22muca%22],%22item id%22:[%22001-183119%22]}.

[21] See the Law no. 35/2017, the amendments of which entered in to force on 01.08.2017.

[22] See for example the case "*Sejdovic v. Italy*", ap. No. 56581/00, d. 1 March 2006, decision of the Grand Chamber of the ECtHR.

7. Sixth disappointment

I did not understand what has changed in the way the Strasbourg Court drafts its decisions, where universally after the factual part of the case and the positive law, it puts in the decision the claims of the applicant first, who is the initiating subject of the trial and then further, that of government, one that is supposed to be judged as a violator of fundamental human rights and freedoms. In this decision of May 2020, the Strasbourg Court even formally had first established the defence arguments of the government and then further, presented the arguments of the requesting individuals.

For the first time I noticed that maybe even in this formal and unimportant element on the substance of the matter, perhaps it is done upon the negligence of the draftsman in the way the decision was drafted, there may be room to perceive something reasonable. For the first time I noticed in a jurisprudence of the Strasbourg Court that the arguments claimed by the government were taken for granted and that they were then used to declare inadmissible the claims of 12 applicants.

8. Seventh disappointment

I did not understand why the Strasbourg Court, in a completely procedural decision of the inadmissibility of the request for trial, or in other words in a decision to remove the case from its jurisdiction, undertakes to resolve the merits of the case of compliance with Article 6 and Article 1. of Protocol no. 1 of the ECtHR of Law no. 133/2015. Furthermore, I did not understand the connection between the non-negotiable condition of the Strasbourg Court, set at 10% of the real value of the property, as an acceptable standard of compensation for the former owners, with the content of a procedural decision of the inadmissibility of the request and the removal of the case from international jurisdiction.

I also did not understand why the Strasbourg Court in this decision ceded the principle of self-restraint beyond the limits of resolving the case in relation to the type of disposition it has made available, by taking an abstract judgment on the quality of its internal regulation, as if it had been invested in this trial according to Protocol no. 16 of the ECHR. This decision of inadmissibility, although not formally self-proclaimed, materially is the second pilot decision on the issue of former owners, after the decision in the case "*Manushaqe Puto and others against Albania*". Not only the second but also the last in terms of jurisprudential innovations in this special Albanian issue in the Strasbourg Court. With this decision, the three-decade-old cause of the former owners died.

9. Final remarks

I estimate that with this procedural and in the same time material decision, the Strasbourg Court generally removed also *pro - future* concerns and the backlog of all similar Albanian cases. I do not understand whether there is room - after all that has been said and concluded in 221 paragraphs of the decision - for the considerations given in paragraph 222 thereof, where, in other words, former owners excluded from its tutoring jurisdiction are told that:

"*Do not worry and keep in mind that if the Albanian state authorities do not reimburse you the property again after and according to this decision, we are here to protect the rights that the ECtHR provides since 1957!*".

I have the civic and professional conviction that this issue is a poor international and especially European jurisprudential development. Through which an european court precedent was set, unlike what the centuries-old legal traditions of Council of Europe member states have done, that jurisdiction and competence are determined in the moment when the court is invested and that subsequent changes to the law and fact have no relevance to them. With this *sui generis* standard for Albania in the Strasbourg Court, every member state of the Council of Europe understands that it is enough to change a law, as you have systematically violated fundamental rights or freedoms, to disable even the only hope of justice, the international one to avenge you. In this sense, I consider that from 7 May 2020 the Court of Strasbourg protects less the citizens who live and are violated in the territorial space of the Council of Europe.

Through this decision, the ECtHR showed that it is not above the member states when the issue arises to resolve general issues of the legal system. Consequently, it is concluded that the individual in the jurisdiction of the Council of Europe has no effective means of appealing to challenge the general legal problems of a Member State. With this recently promoted standard, the ECtHR showed that it remains as a European hope only for individual and episodic national legal or judicial issues.

From 7 May 2020 the first major Albanian problem in the Strasbourg Court was solved. This court already has on its agenda another similar or even bigger problem, not caused by the communist regime, but by the democratic, modern state and a member of the Council of Europe.

I do not know whether the resolution of the first case will affect the resolution of the second case. At first glance they have nothing to do with each other. But still I come to understand and feel that the philosophy of giving justice, which first aims only to be effective and to be discharged from the backlog, is not a good sign.

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The Justice Reform And Some Implications On The Constitutional Court

Magistrate Engert Pëllumbi[1]

"There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid." – Alexander Hamilton[2]

1. Abstract

The Justice Reform consists in one of the main steps necessary for the consolidation of the independence and accountability of the judicial branch of power. It has also been asked for a long time as the only tool for the return of the trust of people in the judiciary, in particular, and in the whole state organs in general. Finally, it's the most important homework towards the European integration. It has always been emphasized that, without a professional and independent justice system, Albania cannot stand shoulder to shoulder with other western developed democracies.

The Constitutional Court is one of the most important institutions in a democratic state governed by the rule of law. It's the guardian of the Constitution and has the mission of making its final interpretation through adjudication of constitutional disputes. In this regard, its role is very crucial in safeguarding the

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[2] Hamilton, Alexander, Madison, James, Jay, John, "*The Federalist Papers*", no. 78.

human rights and fundamental freedoms. As such, preserving its impartiality and independence is one of the most important goals for the implementation of the rule of law. From the beginning of the democratic regime in Albania, the Constitutional Court has shown itself as one of the strongest defenders of the democratic institutions, the human rights and fundamental freedoms, separation of powers and the rule of law. Even though, it has always suffered political attacks and accusations of bias in its activity.

Having a professional and independent justice system is the half way in the consolidation of the rule of law and the realization of the greatest dream of this century for Albania, the European integration. Without a strong Constitutional Court the democratic process and the implementation of all necessary reforms is in danger. So, the reassessment of the focal procedural and substantial points on the organization and functioning of the Constitutional Court was made important in order to have a successful and effective justice reform. The past experience and the best models that can be found throughout the most consolidated democracies have given a significant backup in this area.

Key words: *Justice Reform; Constitutional Court; rule of law; human rights and fundamental freedoms; judicial branch; separation of powers;*

2. The unconstitutionality of the constitutional amendments

As is well known, almost all constitutions have a similar structural construction. They consist of the preamble and the normative part. The latter further consists of the basic principles and fundamental human rights and freedoms as well as the institutional part. The first is considered as a super constitution, or as the part that represents the natural law in the constitution, while the second, as an expression of positive law, exists in function of the first. So, the organization and functioning of state institutions is always done in the service of realization of fundamental state-building principles and with the aim of protecting and promoting fundamental human rights and freedoms.

Consequently, the constitution is not an equivalent system of values. Some of these values enshrined in the constitution have a universal echo and are common values of civilized nations. It is these that constitute the essence of the constitution, or what is known from the doctrine as the super constitution. Principles such as the rule of law, the welfare state, democracy, parliamentarism, the separation of powers, and the protection of life, dignity, personality, and the entire corpus of fundamental rights and freedoms, constitute an invariable part of the constitution, sculpted in its preamble. This extraordinary importance is also given to them by

the fact that they are not merely national but have an international character, based on the values of humanity.

Adherence to fundamental principles and the protection of fundamental human rights and freedoms would remain an illusion if the constitution were sufficient to proclaim them and did not provide the means to guarantee them. For this purpose, constitutional justice has been established. Through the mechanism of reviewing the constitutionality of acts issued by state bodies, it is possible to guarantee the values of the constitution.

Constitutional justice can, according to the chosen model, be entrusted to the highest body of the judiciary (the Supreme Court) or a specialized body such as the Constitutional Court. The Constitutional Court is the reflection of the principle of constitutionality, expressed in the hierarchy of acts. The hierarchy of acts or sources of law means that a norm or source of law derives its validity from a higher source than it and the constitution which is the fundamental source, from the will of the people, which is the source of sovereignty.

However, there are some values that stand above any will, be it the will of the sovereign. Some values are considered universal and those that are born together with man, being an integral part of his existence. They cannot be violated but only defined, protected and promoted by positive law, including the constitution.

The real purpose of the Bill of Rights in the constitution is to exclude certain issues from the conflict of political debate, to place them beyond the will of the majority and officials, and to sanction them as legal principles applicable by the courts. The right to life, liberty and property, the right to speech, the press, the right to trust and organization, and other fundamental rights may not be subject to voting, they may not depend on the results of elections.[3]

At the same time*, a system of government cannot survive on law alone. A political system must also possess legitimacy and, in our political culture, this requires an interaction between the principle of the rule of law and that of democracy. The system must be able to reflect the aspirations of the people. But there is more to it than that. The requirement of our legal order for legitimacy also relies on an appeal to moral values, many of which are sanctioned in the content of the constitution. It would be a great mistake if legitimacy were to be equated only with "sovereign will" or "majority principle", excluding other constitutional values*.[4]

In this context, constitutional justice in general and the constitutional court in particular, should not be conceived as defenders of constitutionality only in the formal sense. It has been a relatively easy task for the constitutional courts throughout their history to identify and repeal laws and other acts of an unconstitutional nature. This is because such a task fully complies with the

[3] Judgment of the Supreme Court of the United States of America W. Va. Bd. of Educ. v. Barnette, 319 U.S.A. 624, 638, 1943.

[4] Judgment of the Supreme Court of Canada Non-charter case of the secession of Quebec, 1998.

prima facie mission for which the constitutional court was established. However, constitutionality is more than just protecting the constitution from the norms that violate it.

The Constitution is the supreme law in the scheme of the sources of law. This statement is clearly affirmed in the Article 4(2) of the Albanian Constitution. As the reflection of the will of the people, it has the scope to limit the state power and to promote the human rights and fundamental freedoms of this people. In this aspect, the Constitution serves as the act by which the validity of the other acts is checked.

The legal order, in particular the legal order whose personification is the state, is not a system of norms which are coordinated with each other, which stand, say, next to each other, at the same level, but is the hierarchy of norms in different degrees. The relationship between the norm that regulates the creation of the other norm and that other norm can be assumed as a relationship between the giver and the receiver, which represents a linguistic figure in space.[5]

Naturally, after this affirmation, a question may be raised: can the validity of the Constitution, of its articles or of its amendments be evaluated? And who has the power to do so? Is that the Constitutional Court? These questions may have several answers, depending on the constitutional philosophy of one country or another.

There is disagreement in comparative constitutional law, primarily in the United States, regarding the justification for judicial review of the constitutionality of a statute. For the purpose of this paper, I assume that, in a given legal system, the constitution (expressly or impliedly) recognizes judicial review of statutes that violate the provisions of the constitution. The question I wish to deal with is whether that judicial review also covers an amendment to the constitution that has been made pursuant to the provisions of the constitution regarding amendment of the constitution. It seems that there is no need for great persuasion in order to show that even those who support judicial review of the constitutionality of a (regular) statute do not necessarily have to recognize the existence of judicial review of the constitutionality of a constitutional amendment. This problem arises both in legal systems whose constitutions include provisions that have been expressly determined to be unamendable (eternal clauses) and in legal systems in which there are no express "eternal clauses".[6]

One of the external restrictions that can be placed on the Constitutional Court is the revision of the constitution that is made to invalidate its decision. But in some constitutions there are clauses of inviolability, i.e. the provision that the constitution itself has excluded from any kind of review. For example, in France

[5] Kelsen, Hans, "*General theory of law and state*", University of Prishtina, Prishtina, 2017, page 165.

[6] Barak, Aharon, "*Unconstitutional constitutional amendments*", Israel Law Review, Vol. 44/321, page 321 – 322.

and Italy the provision that the republican form of government cannot be revised or the provisions of some other constitutions that do not allow the revision of the provisions providing for basic human rights are precisely such clauses.[7]

The issue becomes even more delicate if we keep in mind that inviolable principles are not only what the constitution explicitly provides, but also some others that the court considers to be such because of the capital importance they have. This position has been clearly expressed by the Italian Constitutional Court in a decision of its own, with the following words: *"It cannot be denied that this court is competent to express itself on the compatibility of the laws of constitutional review even from the point of view of the highest principles of the constitutional order. In addition, if it were not so, we would fall into the absurdity of considering the system of judicial guarantees of the Constitution as deficient and ineffective, precisely in relation to those norms, which have the highest value*".[8]

With law no. 7561, dated 29.04.1992, some changes and additions were made in law no. 7491, dated 29.04.1991, "*On the main constitutional provisions*", a law which aimed to regulate, inter alia, the organization and functioning of the Constitutional Court of Albania. This law provided for the jurisdiction of the Constitutional Court, a constitutional body whose existence was determined for the first time in the Albanian legal order, inspired by the best models of Western democracies, the subjects that set it in motion, etc. Article 24 of this law determined exactly the circle of cases that this court was considering.

From the content of this provision as well as from the content of this law in general, it results that the Constitutional Court was not recognized the right to review the constitutionality of constitutional amendments. However, inspired by the doctrine as well as the jurisprudence of some constitutional courts of Western countries, the Constitutional Court of the Republic of Albania turns out to have exercised this power only once during its existence. With its judgment no. 57, dated 05.12.1997, the Constitutional Court decided to ascertain the constitutional invalidity of Article 2 of Law no. 8257, dated 19.11.1997, "*On a supplement to the Law no. 7561, dated 29.04.1992*". In this decision, among other things, it says: "*... the decisions of the Constitutional Court are not subject to any control and that they are binding on all state bodies, not excluding the legislature. Even when acting as a constituent body, the legislator has no right to revise a constitutional provision (in the form of improving or supplementing this provision) to repeal the interpretative decisions of the Constitutional Court taken in support (in their interpretation) of the previous norms in power. This would run counter to our own constitutional law*".[9]

With law no. 8417, dated 21.10.1998, was approved the Constitution of the Republic of Albania. In its eighth part, it defines the main principles of the

[7] Traja, Kristaq, "*Constitutional justice*", Publishing House "Luarasi", Tirana, 2000, page 140.

[8] Judgment no. 1146/1998, of the Constitutional Court of Italy.

[9] Judgment no. 57, dated 05.12.1997, of the Constitutional Court of the Republic of Albania.

organization and functioning of the Constitutional Court, its jurisdiction, the subjects that set it in motion, etc. Similar to law no. 7561, dated 29.04.1992, the Constitution does not explicitly define the fact whether or not the Constitutional Court has the right to examine the constitutionality of constitutional amendments, leaving the debate immediately open.

The jurisdiction of the Constitutional Court is mainly limited to controlling the compliance of laws, international agreements before ratification and normative acts of central and local bodies with the Constitution, not directly specifying the position to be taken against constitutional laws or laws amending the Constitution. The special place of constitutional laws in the legal system and their supreme power, compared to ordinary laws, must be determined by the Constitution. Constitutional laws cannot and should not be contrary to the spirit of the Constitution, just as ordinary laws should not themselves be contrary to the Constitution and the constitutional laws.[10]

Such a debate ended with the amendments made to the Constitution of the Republic of Albania by law no. 76/2016, dated 22.7.2016, part of the justice reform package. In the Article 131, point 2, according to the amendment made to it by the aforementioned law, the Constitution provides that: "*The Constitutional Court, in the case when it is set in motion to review a law on the revision of the Constitution, approved by the Assembly under Article 177, controls only the observance of the procedure provided by the Constitution*". The only exception to this is the Article 152 of the Constitution, which provides for the Constitutional Court the power to review also the substance of the constitutionality of the issues raised for referendum. Such issues cannot be those mentioned by Article 151/2 of the Constitution.

The exercise of the power of constitutional justice by the constitutional court, in a full and comprehensive sense, includes the protection of the constitution in both its formal and substantive sense. In the substantive sense, as noted, the constitution includes the aspirations of the people and its values, fundamental principles and objectives of the future. It is these elements that constitute the natural right of every nation, which it sanctions in this document.

The fundamental law is a system of values that recognizes the protection of freedom and human dignity as the highest goal of the entire system of law, but still, the figure of its man is not that of the arbitrary individual, but that of the personality that lies in community and owes him in many ways.[11] As a result, and as noted, the constitution recognizes the hierarchy of values within itself. This leads to the logical conclusion that the constitutional court, through the provision of constitutional justice, aims, first and foremost, to protect these values even against constitutional changes.

[10] Sadushi, Sokol, "*Developing Constitutional Justice*", Toena Publications, Tirana, 2012, page 219.

[11] Judgment of the Constitutional Court of the Federal Republic of Germany, BVerfGE 12, 45 [51]; 28, 175 [189].

It is possible that the violation of these basic constitutional values is done precisely by amending the constitution. This cannot leave the constitutional court in a passive role, as its mission lies beyond the formal protection of the constitution, but aims at its real protection, guaranteeing above all the spirit of the constitution. In such a case, the constitutional court cannot be prevented from reviewing the constitutionality of a constitutional amendment. Such a process is known as super constitutionality.

The constitutional courts of countries with a more developed constitutional justice than our country have already recognized and elaborated such a doctrine. Suffice it to mention the Constitutional Court of the Federal Republic of Germany and the Constitutional Court of the Republic of Italy. In a decision, the Constitutional Court of the Federal Republic of Germany stated: "*The Basic Law has set up a system of values, which limits state power. This system ensures the independence, accountability and dignity of man towards the integrity of state bodies. The highest principles of this value system are protected by the amendments to the Constitution. Violations of the Constitution are unacceptable, as the constitutional review exercised by the Federal Constitutional Court oversees compliance with the obligation of the legislature to comply with the provisions of the Constitution. Laws are not only "constitutional" when they are formally enacted. From a material point of view, they must be in harmony with the highest fundamental values of the liberal democratic order, as an order of constitutional values, and must also comply with the unwritten basic constitutional principles and basic ideas of the Constitution, and specifically with the principle of the rule of law and the welfare state. First of all, it is not allowed for laws to violate human dignity, which is considered the highest value in the Basic Law, but also, laws are not allowed to restrict the freedom of thought, the political and economic one to that extent as to touch its essence. It follows that every citizen is protected by a sphere of organization of his private life by the Constitution. So there is one last space where the freedom of the individual is inviolable and detached from the influence of all state power. A law that would violate this sphere can never be an integral part of the "constitutional order." He must be declared invalid by the Constitutional Court*".[12]

3. Question for a preliminary ruling from the courts

The jurisdiction of the Constitutional Court has been amended from the Law on Constitutional Provisions to the present Constitution. What remains always interesting about the Constitutional Court is its relationship with the courts. Courts are one of the subjects that have characteristics in relation to other subjects. They,

[12] Judgment of the Constitutional Court of the Federal Republic of Germany BVerfGE 2, 1 [12 p.]; 5, 85 [204 p.].

on the one hand, are included in the group of subjects which make a request without being related to their interests, but on the other hand this request must be motivated by resolving the case before that court, i.e. in the sense that the trial before such court cannot continue without the prior judgment of the Constitutional Court. This form of initiating constitutional judgment is known as incidental adjudication.

In addition to the abstract control of laws, which is often recognized as a direct review in the legal literature, in the texts of constitutions, and in the practice of constitutional justice recently as a trend of the time, concrete judgment is also known, or otherwise called indirect judgment, or incidental adjudication.[13]

This control, at its core, has the concept that combines the principle of control of the constitutionality of the law, according to the American system, where this right is exercised by every judge of the ordinary justice system, that of the European system, where as we have said above, this "monopoly" is exercised by a specialized body for this purpose, i.e. only the Constitutional Court.[14]

It is called incidental because it depends on the fact that the issue of constitutionality is raised as an incidental or side issue within the main process or trial, because it happens in an unusual way, but exceptionally due to its nature and purpose intended to control its compliance of a law with the Constitution, for which the Constitutional Court must rule.[15]

With law no. 7561, dated 29.4.1992, "*On some changes and additions to the law no. 7491, dated 29.4.1991*", in addition to the creation for the first time of the Constitutional Court, as a body charged with the protection of constitutionality and legality, was also sanctioned its jurisdiction and the subjects that set it in motion. Article 8/2 of this constitutional law provided that when during the examination of the case, the ordinary courts conclude that the normative act did not comply with the law "On the main constitutional provisions" and with the laws, they suspended the trial and sent the case materials to the Constitutional Court. Under these conditions, incidental adjudication was envisaged as a means of communication between the ordinary courts and the Constitutional Court, which aimed not only to guarantee the constitutionality of laws but also the constitutionality and legality of other normative acts (normative acts issued by the Council of Ministers and Ministers).

With law no. 8417, dated 21.10.1998, the Constitution of the Republic of Albania was approved, which repealed law no. 7491, dated 29.4.1991, "*On the main constitutional provisions*", as amended. Of course, constitutional justice would be one of the most important aspects of the new constitution and would be the main focus of the parliamentary debate at the stage of preparatory work (travois préparatoires).

[13] Abdiu, Fehmi, "*About the incidental adjudication*", The Advocacy Magazine, no. 18.

[14] Traja, Kristaq, "*Constitutional justice*", Publishing House "Luarasi", Tirana, 2000, page 58.

[15] Sadushi, Sokol, "*Constitutional control*", Publishing House "Botimpex", Tirana, March 2004, page 108.

With the approval of the Constitution of the Republic of Albania in 1998 the institute of incidental adjudication was preserved but with a change. Judges can now invest the constitutional jurisdiction only for the compliance of the law with the Constitution. Regarding the control of the constitutionality and legality of normative bylaws, the new Constitution has transferred this power to the judges themselves. Not only the different linguistic formulation of the second paragraph of Article 145 of the Constitution in relation to Article 8/2 of Law no. 7561, dated 29.4.1992, leads to such a conclusion, but also the content of the first paragraph of this provision of the Constitution (Article 145) installs the power of judges to control the constitutionality and legality of normative bylaws. According to Article 145/1 of the Constitution, judges are subject only to the Constitution and laws and, consequently, have the authority to reject any other act of public power that does not conform to these higher acts.

The Constitutional Court for the first time in its jurisprudence, in the judgment no. 2, dated 3.2.2010, held that when "*the judge during a trial, concludes that the law and sub-legal act, which are directly related to the resolution of the case, contradict each other, he is obliged to is based on law*". This is the meaning of Article 145 of the Constitution, according to which "*judges are subject to the Constitution and laws, respecting the hierarchy of sources of law, as an obligation deriving from the principle of the rule of law*".[16]

With the adoption and entry into force of the Law 49/2912 "*On the administrative courts and the adjudication of administrative disputes*", the institute of incidental adjudication, which as a natural power of any judge of the republic derives from Article 145/1 of the Constitution, was expressly sanctioned in Article 38 of this law. Already every administrative judge, but not only, during the main trial of an administrative action, mainly or at the request of the parties, decides not to apply a normative bylaw, on the basis of which the administrative action under review is performed, when he considers that the normative bylaw is illegal.

In the same way, by analogy, it will be acted when the normative bylaw is unconstitutional, always if the law itself, based on the implementation of which this act was issued, is not unconstitutional. In this second situation, that is, when the law itself is unconstitutional, the court must suspend the trial and apply to the Constitutional Court with a request to repeal the law in question. If the law, in these circumstances, were to be repealed, then even the normative bylaws, based on and for its implementation, would be repealed, as they cannot have an independent existence.

This situation very clear for judges of all levels, looks like has been disturbed by the provision of Article 49/3, letter "dh", of the organic law of the Constitutional Court (law no. 8577, dated 10.2.2000), according to the change that this provision has suffered by law no. 99/2016, dated 6.10.2016. This provision, in contrast to the clarity

[16] Judgment no. 2, dated 3.2.2010, of the Constitutional Court of the Republic of Albania.

of Article 145/2 of the Constitution, the way in which the incidental adjudication has been understood since 1998 (when the Constitution was adopted) and the content of Article 68 of the very organic law of the Constitutional Court, provides that incidental adjudication will to be exercised by the ordinary courts not only when the law is in conflict with the constitution but also when such an unconstitutionality is ascertained in a normative bylaw which finds application in the case at trial.

I think that such a solution not only contradicts the provision that Article 145/2 of the Constitution has always been, but it is not in line with other legal provisions. The power conferred on judges by Article 145/1 of the Constitution and subsequently affirmed by Article 38 of the Law on Administrative Courts cannot be overturned by a provision which resembles an alien object in the body of our legislative corps. The unconstitutionality of the normative bylaw, being inseparable from illegality, will be cured through an incidental adjudication by the ordinary judge, i.e. by directly applying the law, if the latter meets the standards of constitutionality. In these circumstances, this provision will have to be left unenforceable by the judges.[17]

4. Legislative omission

In European constitutional doctrine and jurisprudence, a distinction is made between the term legislative omission (*lacuna legis*) and the term legal vacuum.[18] Avoiding the gap created by the lack of a legal norm, both through the legislative process and through the implementation of the law by analogy, is considered a matter of legislative omission. The legal vacuum is an even more extreme situation, when the gap created in a certain area of relations can only be avoided by enacting laws. In both cases, however, the court is not prohibited from filling the legal gap by interpreting the law, resolving the case on the basis of the general principles of law and the application of analogy. Fulfilment of this function by the Constitutional Court does not avoid its confusion with the power of the "positive legislator". The analysis of the concept of legislative omission by the doctrine and constitutional jurisprudence is related both to the obligation of the legislative institutions, to issue those legal norms, which are ordered by the Constitution, as well as to the evidence of non-implementation of these obligations. Legislative omission is identified both in cases where the law has not regulated a certain relationship, which in fact had to be regulated (absolute omission), and when the law has failed to meet the full and proper manner of this obligation (relative omission).[19]

[17] Pëllumbi, Engert, "*Judicial control over the normative bylaw*", The Advocacy Magazine, no. 32.

[18] "*Problems of legislative omission in constitutional jurisprudence*", General Report of the XIV Congress of the Conference of European Constitutional Courts, Vilnius 2008.

[19] Sadushi, Sokol, "*Developing Constitutional Justice*", Toena Publications, Tirana, 2012, page 235 – 236.

One of the issues that fall within the jurisdiction of the Constitutional Court is the review of the unconstitutionality of the norm as a result of legislative omission. The jurisdiction of the constitutional courts includes the declaration of the unconstitutionality of the partial (relative) omission, as well as the ascertainment of the unconstitutionality of the inaction of the legislative subjects (absolute omission).[20]

The Constitutional Court of the Republic of Albania in its practice has recognized cases of repeal of certain provisions as a result of evasion of their meaning, due to legislative omission. One of these cases was the abrogation as unconstitutional of article 1 of law no. 9260, dated 15.07.2004 "*On some additions and changes to the law no. 7748, dated 29.07.1993*", as amended.

In this judgment it states that: "*it is not clarified whether Article 1 of the new law guarantees a new type of compensation, is part or complementary of the previous compensation, or if it is essentially a kind of supplementary assistance on realized income by prisoners and political persecuted ... Article 1 does not stipulate for how long the first heirs of former political prisoners included in category "A" will benefit from the right to financial compensation ... For political prisoners who have died in prisons, it is not specified whether they will be compensated for the entire sentence, or only for the actual time of serving the sentence until the moment of death ... It is not clear the ratio legis, i.e. the purpose of drafting this article and his relationship with the previous Article 9 of the same law, which it changes. It is not clear whether Article 9 of the previous law was considered insufficient, unenforceable, fully or partially enforced. ... in its content there are a number of inaccuracies and ambiguities, the clarification of which is more than necessary for its proper understanding and application in practice*".[21]

However, in its practice, the Constitutional Court of the Republic of Albania has recognized only the mechanical abrogation of the norm, i.e. the removal of the legal force of a certain law or its provisions as a consequence of the fact that it contradicts the Constitution, as the law with the highest legal power in the country. But again, our Constitutional Court has never explicitly ruled out the possibility of intellectual repeal of the norm, which means declaring the unconstitutionality of the part of the norm that the legislature should have foreseen but failed to do.

The Constitutional Court, in its judgment no. 4, dated 23.02.2016, with the claimant the District Court of Vlora, with object: *Repeal as incompatible with the Constitution of the Republic of Albania of Article 169 of the Civil Code in the part that does not recognize the subjective right of the former owner to be compensated for loss of property with the equivalence of its value*, as well as in its judgment no. 43, dated 12.07.2016, the claimant the District Court of Vlora, with object: *Repeal*

[20] Sadushi, Sokol, "*Developing Constitutional Justice*", Toena Publications, Tirana, 2012, page 239.
[21] Judgment no. 34, dated 20.12.2005, of the Constitutional Court of the Republic of Albania.

as incompatible with the Constitution of Article 209 of the Code of Civil Procedure, in the part that does not recognize the right of special appeal against the interim court decision, which rejects the request for imposing a security measure on the lawsuit, turns out to have been expressed in principle in relation to the claim of the referring court for the unconstitutionality of the respective norms, as a consequence of the legislative omission. Thus, it has not a priori ruled out the control of the constitutionality of the legislative omission of a provision of law and has not rejected the claims based on this argument.

Most constitutions of European states do not explicitly provide for the right of the constitutional court to observe the constitutionality of legislative omissions or the procedure for their consideration. The only constitution that provides for the omission as part of the constitutional court's jurisdiction, in order to identify the constitutionality of legal acts due to inaction, is that of Portugal.[22]

The jurisprudence of the Italian Constitutional Court distinguishes between absolute legal emptiness as a result of inaction and relative legal emptiness known as "partial inaction of the legislature". This Court may not only repeal a norm that is inconsistent with the Constitution, but may interpret this norm in such a way that it appears to be in conformity with the Constitution. When the Italian Constitutional Court finds that the scope of a legal norm is contrary to the Constitution, because the relevant legal regulation has not been drafted (the so-called "partial inaction of the legislature"), it does not focus on the missing legal norm, but the general principles that should be reflected in the content of the norm.[23]

The position of the Constitutional Council of France is different, due to the special function related to the preliminary control of laws. This body of constitutional justice implements the mechanism of preventing legal loopholes, establishing the "negative incompetence" of the legislator, which is related to his inability to exercise full competence.[24]

In this regard, the experience of the Constitutional Courts of European countries, which have accepted this form of constitutional control, which has elaborated the technique of controlling the constitutionality of the norm as a result of legislative omission, is quite valuable. The issue of legislative omission in the practice of these Constitutional Courts has been resolved in various forms, for example, by imposing obligations on the legislature to fill the legal gap that creates unconstitutionality, leaving a deadline for this purpose, and pushing for the entry into force of its decision; forcing or permitting ordinary courts to make a conciliatory interpretation of the norm, in order to avoid the unconstitutionality it

[22] Sadushi, Sokol, "*Developing Constitutional Justice*", Toena Publications, Tirana, 2012, page 237.
[23] Sadushi, Sokol, "*Developing Constitutional Justice*", Toena Publications, Tirana, 2012, page 237.
[24] "*Problems of legislative omission in constitutional jurisprudence*", General Report of the XIV Congress of the Conference of European Constitutional Courts, Vilnius 2008.

brings, by making a conciliatory interpretation with the constitution of the norm, without declaring its unconstitutionality or declaring the unconstitutionality of the omitted part of the norm.[25]

What is important to note, even from the recent jurisprudential developments of the Constitutional Courts in Europe, is that the latter have departed from the classical framework of the negative legislature and through the technique of constitutional control of legislative omission have become fillers of legislative gaps which have unconstitutional consequences.

Such a check of the constitutionality of the norm has been done, for example, even in cases of unequal treatment of citizens. "*If the legislature privileges certain groups by violating Article 3 of the Constitution, then the Federal Constitutional Court may either declare the privileged norm invalid, or find that non-consideration of particular groups is unconstitutional. But support or privilege should not be given to exclude groups unless it is known with certainty that the legislature would have taken such a measure*.[26]

With the changes that have been made to law no. 8577, dated 10.02.2000, "*On the organization and functioning of the Constitutional Court of the Republic of Albania*", through law no. 99/2016, dated , for the first time, the manner of handling the legal gap (legislative omission) is foreseen. Article 76, point 5, of this law provides that: "*5. When the Constitutional Court, while examining a case, finds that there is a legal gap, as a result of which there have been negative consequences for the fundamental rights and freedoms of the individual, it, among other things, imposes the obligation of the legislator to complete the legal framework within a fixed term*".

Although this constitutes the genesis of legal treatment of problems that arise as a result of legislative omission, such a provision is considered incomplete and insufficient to resolve all situations that may arise in practice as a result of this flaw in the law. It should be the jurisprudence of the Constitutional Court which, this first step taken towards the treatment of the phenomenon of legislative omission, has to elaborate and develop to the same standards as that of the constitutional courts of other European countries that accept it and provide appropriate solutions.

5. Conclusions

For the preservation of democracy in general by actors and negative phenomena, it is very important to guarantee and ensure the democratic content of the country's constitution. In this case, in theory, the question arises: is it right, and if so, to

[25] "*Problems of legislative omission in constitutional jurisprudence*", General Report of the XIV Congress of the Conference of European Constitutional Courts, Vilnius 2008.

[26] Judgment of the First Senate of the Constitutional Court of the Federal Republic of Germany, dated 11 June 1958.

what extent can constitutional changes be initiated and made by a majority that is practically in power for a given term.[27]

For this purpose, there exist the Constitutional Court, i.e. to prevent the excess of the limits of power by institutions of a political nature as well as to prevent the endangering of the very foundations of democracy and the rule of law. This danger may come not only from a simple majority, through the adoption of unconstitutional laws but, above all, from super majority which may change the Constitution itself.

Consequently, in this European framework of jurisprudential development as well as in this political climate in which Albania floats, would be quite necessary not the denial but the affirmation of the right of the Constitutional Court to examine the constitutionality of constitutional amendments. Removal of such a prerogative by law no. 76/2016, dated 22.7.2016, which amended the Constitution of the Republic of Albania, constitutes a denaturation of its role as a guarantor of the Constitution and is a step backwards in the history of Albanian constitutional justice. On the other hand, such an action goes in the opposite direction to the developments of European constitutional justice.

It is concluded that in the recent decisions, the Constitutional Court has rejected and almost inclined not to legitimize the courts. It should be noted that judges are considered legal experts. As such, it is them, more than any other entity, which must identify the constitutional issues that exist in legislation. Given that the Constitutional Court has not shown a positive will towards being open with the courts, thus paving the way for a thorough review of incidental adjudications even in cases where only suspicions are raised about the unconstitutionality of a norm or even when the referring court does not has given sufficient arguments for this unconstitutionality, then it remains for such a thing to be done by law, being reflected in its organic law.

The mission of the Constitutional Court differs from that of ordinary courts. The latter resolve the case only on the basis of claims and objections of the parties as well as the evidence served by them, while the Constitutional Court has the duty to guarantee the constitution and such a mission cannot be related to the adequacy of the arguments brought by the referring court. Guaranteeing the Constitution takes on a primary and independent importance from the conviction or suspicion of a referring court or the level of arguments brought by it. The repeal of laws that violate the Constitution remains an obligation for the implementation of the rule of law, as one of the tasks that the Albanian people have set for themselves beginning from the preamble of the Constitution.

Legislative omission is a concept elaborated by both the doctrine and foreign jurisprudence. At the heart of this concept is the failure of the legislature to regulate

[27] Zaganjori, Xhezair, "*Democracy and the rule of law*", Publishing House "Luarasi", Tirana, 2002, page 63.

those legal relations defined by the Constitution, which is the law with the highest legal force in the country. This failure can appear in two forms: total failure, which occurs in those cases when the legislator has not fulfilled at all his obligation to regulate the legal relationship imposed by the Constitution (absolute omission) or in non-full implementation and due obligation of the legislature through the law (relative omission).

The consequence of legislative omission is the abolition of the norm. This abrogation can be complete, which consists in a mechanical abrogation of it, in those cases when the omission is such that it makes the norm in question incurable, but it can also appear in the context of an intellectual abrogation, being declared by the Constitutional Court the unconstitutionality of the part that should have been provided by the provision but which failed to do so. Intellectual abolition of the norm is a well-known practice and well accepted by the constitutional courts of European countries.[28] The problems of the new millennium, the challenges of constitutional justice and the need to revitalize the "*living law*" in our legal order, as well as the European perspective of the Republic of Albania, require the Constitutional Court to accept in its jurisprudence the theory of intellectual abrogation of the law.

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[28] Judgment no. 250, dated 28.11.1986; Judgment no. 317, dated 06.07.1989; Judgment no. 207, dated 18.07.2009, of the Constitutional Court of Italy.

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Regulation 2016/679 (Practical aspects of implementation in a comparative approach with previous data protection provisions in Europe)

Dea Nini

San Francisco Bay Area technologist Gary Kovacs stated that privacy is not optional and should never be the price we pay for getting the services. The European legal framework has historically paid attention to personal data. The Directive 95/46/EC "On the protection of personal data" defines as such any information that could be used to identify a person and stated the obligation of every controller to obtain consent before collecting, processing, and/or using any personal data[1]. With the innovations brought by globalization, technology, and digital evolution, many controllers moved their servers "offshore", which coincides with a smaller control space for legal entities regarding the treatment of personal data at their disposal.

After a transition period of almost 2 years, May 25, 2018, brought *in vigorem* in the European community the Regulation 2016/679, which represents one of the most significant changes within the European legal corpus of personal data protection over the last 20 years. The GDPR[2] works as a unique regulatory framework for all member states of the European Union[3], despite all previous national legal predictions that took place before it entered into force, paying more attention to individual guarantees for personal data subjects and adjusting in more detail the framework of obligations for the controllers.

One of the innovations brought by Regulation 2016/679 in comparison to the precursor legal corpus of personal data protection is specifically related to its

[1] *Handbook on European data protection law*; FRA; 2018.
[2] *The General Data Protection Regulation- Regulation* (EU) *2016/679.*
[3] *The GDPR: new opportunities, new obligations*; Publications Office of the European Union, 2018.

territorial scope of applicability on any entity that processes personal data within the European Union, regardless of where the actual data processing takes place as well as on entities established outside of the EU offering goods or services to, or monitoring the behavior of individuals within the EU[4]. The extension of the territorial scope of the GDPR is specifically related to its extraterritorial applicability even on non-European processors or those established outside the territorial confines of the European Union, giving special attention to what is processed and not where the processing takes place or who performs it.

Following our modest research endeavor, we will try to address the concept of the controllers and their responsibilities, but also the important principles of accountability, reliability, documentation of processing activities, cooperation, data security, and legal sanctions in the field of personal data protection, through a comparative approach amidst the previous provisions of the European legal corpus and those brought by the GDPR to clarify the impact of each change.

Regarding the concept of controlling party and its definition, through an extended comparative interpretation between Article 2/d of the Directive 95/46/EC and Article 4/7 of the Regulation, it appears that there is no essential change in what the controlling party represents within the European legal corpus. In this line, any entity that was a controller under the Directive likely continues to be a controller also under the GDPR.

Concerning the important principles of responsibility and accountability, it appears that the GDPR in comparison with the provisions set out in Article 6/2 of the Directive strengthens the obligation of the controlling party, as it sets as a prerequisite the obligation to demonstrate that the processing activities will be on par with the Principles of Data Protection, moving the focus precisely on the need for factual demonstration[5].

With regards to the responsibility of the controller at first sight the principle basis remains unchanged, as each controlling entity will be directly responsible and will have the burden of proof to prove that the processing activities are lawful. Despite following the same principle, the GDPR provides additional details on how entities, through the application of direct technical and/or organizational measures, can demonstrate that their processing activities are lawful[6].

The concept of personal data security as a precondition for their lawful processing is one of the aspects that in a comparative view with the predictions of the predecessor legal corpus in the field has changed. The difference consists of the fact that compliance with the GDPR should be treated as a crucial aspect from the planning to the implementation and/or production stage of any new product

[4] Ibid.
[5] GDPR; **Rec.85; Art.5(2).**
[6] GDPR; **Rec.74; Art.24.**

or service that includes the procession of personal data[7]. Although the preceding Directive required controllers to ensure compliance with its requirements, this obligation did not provide any specific measures in the planning, production, or implementation stages of the product or service. The GDPR obliges controllers to ensure that compliance with data protection principles is an integrated aspect of every stage of the control activity, which in any case must follow the principle of collecting the minimum amount of personal data necessary for the specific case.

Joint controllers represent another concept underlined within the GDPR, while the previous Directive did not use it as a term although it recognized the case where two or more controllers could jointly define the purposes and means of personal data processing. On the other hand, GDPR in Rec.79; Art.4 (7), 26 of it deals specifically with the cases of joint controllers and obligations arising in this situation. In some circumstances, the entities involved in the control and processing activities may not realize that a joint controllership has come into existence, but the GDPR obliges controllers to keep watch for potential instances of joint controllership, emphasizing the importance to treat them differently through specific "agreements" which reflect and separate the responsibilities between two or more co-controlling entities.

The previous Directive in its Rec.55; Art.23 (2) provided for the full or partial exemption from the responsibility of the joint perpetrator in case it could prove that it was not directly responsible for the event or act that caused the violation. The GDPR, on the other hand, treats the joint controller as individually responsible to the same extent, at least in the first stage of handling the case[8]. Only after the full *restitutio in integrum* of the subject of personal data the joint controllers may recover damages from one another, which means that some of them may face much higher liability due to the claims made under the GDPR despite the potential existence of force majeure.

Another innovation of the GDPR is related to the obligation of entities performing control activities outside the territory of the European Union to appoint a representative in the EU[9], as a contact point for data subjects. Contrary to the provisions of the preceding Directive, under the GDPR, a representative may be liable for the controller's failure to comply with the GDPR.

Regarding the appointment of external processors by the original data collection and control entities, the GDPR provides for increased requirements[10] in comparison to previous provisions. These requirements should necessarily be addressed by all data processing agreements and contracts with third parties, making outsourcing agreements more complex to enter into and implement.

[7] GDPR; **Rec.78; Art.25.**
[8] GDPR; **Rec.79; Art.4(7), 26.**
[9] GDPR; **Rec.80; Art.4(17), 27.**
[10] GDPR; **Rec.81; Art.28(1)-(3).**

Another important aspect introduced is the record of processing activities in registers accessible by stakeholders and personal data protection entities, an obligation that has not materially changed under the GDPR, although at first glance it seems that controllers are more favored than before as this information is made available only upon request and the legal entities with less than 250 employees are exempted (unless the processing they perform is of special importance).

The security of personal represents a crucial aspect within the legal corpus of personal data protection, where the right of the data subject to security corresponds to the obligation of the controller to pay special attention to this security during every stage of the processing activity[11]. The previous Directive in comparison to the GDPR was less detailed[12] on how to achieve the necessary level of security, however, we do not single out substantial changes or innovations in this regard.

Immediate reporting of data breaches is one of the most important obligations of controllers set out by data protection legislation. The preceding Directive did not specifically require controllers to report breaches to data protection agencies, although such efforts were noted in the national legislation of some Member States. The GDPR is quite strict in this frame where in case of violation it imposes the obligation of the controller to immediately **report the breach without undue delay, and in any event within 72 hours** of becoming aware of it[13], except for the cases where the data breach has no potential to harm data subjects.

The obligation for immediate and rigorous reporting by controllers, as an innovation of GDPR, stands not only concerning data protection agencies but also to direct data subjects. This obligation coincides with an increased burden for the controlling entities, which can often irreversibly affect their reputation.

In addition to the aforementioned changes and innovations brought by the GDPR, its financial impact is currently the most discussed aspect, which is why we decided to bring it to the attention of our research, focusing on the structure of administrative fines imposed by the GDPR, in response to potential breaches. Through a literal interpretation of Article 83 under the GDPR, it is clear that potential infringements can incur penalties, and are classified within two categories based on their severity.

Less severe infringements under the GDPR are considered those related to:

- Obligations controllers and processors[14], which must act quite rigorously in following the main principles that make controlling and processing activities legal and fair, focusing on the direct interest of the personal data subject.

[11] GDPR; **Rec.83; Art.32.**
[12] Directive 95/46/EC; **Rec.46; Art.17(1).**
[13] GDPR; **Rec.73, 85-88; Art.33.**
[14] GDPR; Art. 8, 11, 25-39, 42, 43.

- Obligations of certification bodies[15], which must carry out their assessments without prejudice and through a transparent process.
- Obligations of the monitoring bodies[16], which must demonstrate their independence and strictly follow the procedure for handling complaints, addressing them with impartiality and transparency.

The less severe infringements could result in a fine of up to €10 million, or 2% of the firm's worldwide annual revenue from the preceding financial year, whichever amount is higher.

Regarding the more severe infringements, they are related to the cases where the violation is related to:

- Basic principles of processing17, which consist of the collection and processing of personal data only for a specific purpose, taking care of their accuracy and up-to-dateness in accordance with a high level of their security. In relation to sensitive personal data, which includes information on racial origin, political views, religious beliefs, trade union membership, sexual orientation, medical records, or biometric data, the GDPR allows their collection and processing only in very specific circumstances, as the general principle is that this category of data should not be collected nor processed.
- The conditions for consent18, which consists of the fact that the processing of data must be based on the consent of the person, regarding which there must be factual evidence.
- The rights of data subjects19, regarding being aware of the data that are being processed, their correction, deletion under "the right to be forgotten" principle, or transfer of the right for their processing to another subject.
- Transfer of data to an international organization or a subject in a third country20, where before an entity transfers any personal data to a third country or international processor, the European Commission must have expressed its suitability in the context of adequate protection.

All violations related to the above-mentioned cases can result in fines of up to €20 million, or 4% of the firm's worldwide annual revenue from the preceding financial year, whichever amount is higher.

[15] GDPR; Art. 42, 43.
[16] GDPR; Art. 41.
[17] GDPR; Art. 5, 6, 9.
[18] GDPR; Art. 7.
[19] GDPR; Art. 12-22.
[20] GDPR; Art. 44-49.

According to the GDPR, penalties are administered by National Personal Data Protection Entities in each EU member states, which will assess whether there is a breach and impose the respective fine in this case. The assessment of breaches under the GDPR should be based on the cumulative assessment of 10 criteria, which include:

i. The severity and nature of the violation in a general view, the damage it caused, and the time of its recovery;
ii. The fact that the violation represents an act committed intentionally or by negligence;
iii. The fact if the subject of the violation took any action to mitigate the damage suffered;
iv. Existing precautionary measures, regarding the level of technical and organizational preparation that the entity had undertaken to comply with the GDPR;
v. History of breaches, including those related to Directive 95/46/EC as well as corrective actions are taken;
vi. Cooperation with the supervising entity to detect and correct the violation;
vii. Categories of data affected by the violation;
viii. Correct notification of the violation to the supervisory authority;
ix. Existence of subject certification relating to approved codes of conduct;
x. The existence of aggravating or mitigating factors, including financial benefits or losses avoided as a result of the breach.

The GDPR indicates that if from the cumulative assessment of the above criteria it is shown that an entity is liable for more than one violation, it will be penalized only for the most severe one, provided all the infringements are part of the same processing operation.

At the end of our analysis regarding the main changes brought by the GDPR within the European context, in the framework of its extraterritorial applicability, and its potential financial impact we find it appropriate to come up with a recommendation for all controlling entities, to comply with the provisions and obligations arising from the implementation of the GDPR.

It would be worthwhile to appoint a specific person responsible within each controlling entity for investigating, reviewing, reporting, and documenting potential cases of violations, in line with the obligation to addressing violations within 72 hours, which is one of the most stringent obligations set forth by Regulation 2016/679. Given the importance of this Regulation and the sanctions and fines it imposes on perpetrators, it is of great importance to building sustainable human resources, amid clear policies of identifying and reporting violations through different trainings and rigorous reporting protocols.

The Importance Of Expertise As An Evidence And Its Triangulation With Other Evidences

MSc. Helena Fetahu

Abstract

The right to initiate court action and conduct legal proceedings aims to resolve a dispute and put the parties on equal terms in regards to proving their claims. If we refer to the phrase "due legal process", provided by Article 6 of the ECHR, it is the prosecuting body that has the responsibility to prove different facts or versions in support of the injured party or the suspected perpetrator of a criminal offense, and the prosecuting body shall also prove, in each case, the sustainability of the versions raised during the investigation or not.

One of the evidences obtained during the investigation or trial is the expertise, which holds a special role and importance in the process. It is an indicator of the full investment of the judiciary body to conduct a fair and impartial adjudication in the context when the trial panel or the prosecuting body can not take a stand based only on their professional background or internal conviction, and therefore, they summon subjects with special knowledge in a certain field, to clarify such circumstances of special nature.

1. Introduction

The summoning of the expert in the process, both during the investigation and the trial, aims to provide an opinion, or, otherwise, it can be referred to as "p*rediction*", on the matter under investigation or object to the trial. It is referred as a prediction because it constitutes an important evidence, almost crucial, in the trial process.

Its importance comes from the authenticity that this evidence holds, considering its special technical, scientific or cultural nature, as well as the legal liability of the expert in case of false expertise. Thus, established within this framework of a special nature and characterized by legal liability, the expertise constitutes an important piece of evidence in the investigation or trial.

The specific types of expertise make us understand the variety of situations that the judiciary may face and the legal nature that each situation of everyday life bears in itself. Each expertise is different from the other because the nature of the expertise dictates the procedure to be followed and the general norms upon which it should be developed.

Adherence to the proper procedure in its performance and the observance of legal provisions and other norms, avoids the possibilities for invalidity or incapacity of the expertise as evidence.

Compliance with the provisions is also important for the expert who performs the examination, because, in order to have a usable and valid evidence in the trial process, the expert should not be in conditions of non-compliance or exclusion. Such cases are foreseen in Criminal Procedure Code of the Republic of Albania for the position of the j*udge*, as well. This means that an expertise performed by an expert in the conditions of non-compliance, makes this expertise invalid because there are doubts on its impartiality in giving the opinion, and its incapacity to be used, because during the establishment of this evidence, an important procedural provision has not been observed concerning the subject who has performed the expertise.

"44. Admittedly, the fact that Mr Bandion was a member of the staff of the Agricultural Institute which had set in motion the prosecution may have given rise to apprehensions on the part of Mr Brandstetter. Such apprehensions may have a certain importance, but are not decisive. What is decisive is whether the doubts raised by appearances can be held objectively justified … Such an objective justification is lacking here: in the Court's opinion, the fact that an expert is employed by the same institute or laboratory as the expert on whose opinion the indictment is based, does not in itself justify fears that he will be unable to act with proper neutrality. To hold otherwise would in many cases place unacceptable limits on the possibility for courts to obtain expert advice. The Court notes, moreover, that it does not appear from the file that the defence raised any objection, either at the first hearing of 4 October 1983 when the District Court appointed Mr Bandion, or at the second hearing of 22 November 1983 when Mr Bandion made an oral statement and was asked to draw up a report; it was not until 14 February 1984, after Mr Bandion had filed his report, which was unfavourable to Mr Brandstetter, that the latter's lawyer criticised the expert for his close links with the Agricultural Institute …"[1]

[1] Case Brandstetter v. Austria, 11170/84, 12876/87 and 13468/ 87, 28 August 1991

The evidences collected during an investigation or trial may be unrelated, completely independent of other evidence, or closely related to each other. The expertise is one of those evidences that in most of its types, is closely related to other evidences, and this is stipulated in provision 183 of the Criminal Procedure Code and Article 227, points 4 and 6 of the Civil Procedure Code, where the expert is given the possibility and the right to get acquainted with the acts and circumstances and also, to ask the subjects involved in the process on more details compared to what is provided in the available acts, and that is not all. In special cases, when:

- The object of the expertise is an item which can be destroyed or lost, this does not stop the expertise from being performed. Expertise is given priority over the conservation of the item.
- In order to carry out the expert examination, an inspection must be made. Third parties are *ordered* to allow the expert to perform the assigned task.
- When, according to the court decision for performing the expertise, it is necessary for the expert to be acquainted with items, evidence, accounts and other documents, the parties may be present and may submit to the expert, in writing, the opinions and remarks of their specialists, who may be interrogated in the capacity of witnesses, or requests related to the execution of the task. Therefore, in a sense, the expert gets the necessary assistance or readiness to perform the expertise.

2. The importance of expertise in investigation or trial

As the Albanian legislation stipulates, expertise as evidence is required at key moments in the process, when the investigation and trial encounter a situation which cannot be clarified or dealt with by the trial panel or the parties in the trial process cannot express an opinion on this situation, nor can it be left uninvestigated by the prosecuting body during the investigation, as this would be an incomplete investigation, where circumstances are left ambiguous. This is why the expert is summoned and through an expertise, he reaches a conclusion and it is exactly this conclusion, in its findings and all its content that constitutes evidence. Therefore, when we use the term "Expertise" as evidence, we refer to the "Act of Expertise".

Regarding the criminal process, there have existed and exist various criminal procedural systems at different times and in different places, in harmony with the society where they have been applied (mainly, the inquisitorial, accusatory and the mixed systems are more well-known), in which the ideology of "proving" and "the truth" is not the same. [2]

[2] Tonini, P. "Manuale di Procedura Penale" Milan 2018, Edition 19, p. 4

In medieval times the procedural system which gave the judge the power to initiate *ex officio* the criminal prosecution for criminal offenses committed, as well as the power to collect evidence, was called "inquisitorial" system. Whilst, the procedural system in which the initiation, conduct of the trial process and collection of evidence was in the hands of the accusing party, while the accused party enjoyed the respective rights in compliance with the principle of adversarial proceedings, was called "the accusatory" system. Thus, the judge had the right to decide only based on what had been brought by the parties as evidence.

Today, in substance, the same concepts exist, even though, in different justice systems, mixed types are applied and each country, according to its legislation, can "chose" the best features or characteristics of each of the systems, without having to strictly follow only one type or another. The latter constitutes the mixed procedural system or type. Just as procedural rules changed, so did "*proving*".

In the inquisitorial system all procedural functions were grouped in one single subject, i.e. the inquisitorial judge, be it a single judge or a collegial trial panel[3], who enjoyed entirely the right / duty to find and obtain evidence, not to mention their evaluation[4], thus, the lack of procedural activity of other subjects was noticed from the initiation of the process. The inquisitorial judge can start the proceedings even without a charge filed from someone, unlike in the accusatory system, where the accusing party conducts preliminary investigations, establishes a base of evidences relating to the filed charge and afterwards, the case is referred to the court. Thus, the power of the inquisitorial judge included the investigation phase and establishment of evidence in trial[5].

In this system, there is no preliminary investigation phase, so the characteristics of this procedural method apply only during the trial phase and the criminal proceeding consists of one phase. Having such power, it is hard to believe that procedural guarantees existed, or that the rights of the defendant have been exercised in the proceedings and, consequently, neither has benen the right to a due process.

There was a risk in conducting the expertise in the inquisitorial system: The expert did not have to justify the outcome reached by him. This is because of the "science" behind the expertise. Hence, we can state that the term "scientific evidence" was misused.

There was no limit to the admissibility of the evidence[6]. This means that in this process, neither party can doubt or question the regularity of obtaining the evidence, its validity or usability. What the inquisitorial judge intends through the trial is to reach a decision, but the method that is applied does not matter. This

[3] Tonini, P. "Manuale di Procedura Penale" Milan 2018, Edition 19, p. 6
[4] Donato,F. "CRIMINALISTICA FORENSE" Milan 2013, p. 12
[5] Ibidem
[6] Tonini, P. "Manuale di ProceduraPenale" Milan 2018, Edition 19, p. 7

includes the expert examination, in cases when the judge decides to admit it as evidence.

Only the court had the right to order an expertise and the parties did not enjoy the right to raise questions. Not to forget that the expertise is one of those evidences for which the oath of truth is made, and under the guise of the oath of truth, the expertise in the inquisitorial system was performed "secretly".

There is no doubt that the result will be in line with the predetermination of the decision to be taken and that it constitutes the so-called "voice of reason"[7] (here, we recall the political will behind the inquisitorial judge stand, as it was mainly applied as a procedural paradigm in totalitarian political systems) and also, the way of performing the expertise does not adhere to the norms of a due process, neither does it respect human rights. What proves this is the fact that the court could not take the expertise into account without providing any reasoning, and thus, it overturned an evidence which might have been in the interest of the parties in trial.

Hence, if we consider the "Expert examination" as evidence during this inquisitorial system, we realize that it did not enjoy this special and authentic nature that it should have enjoyed, but it was an evidence equal to other evidence, that could easily be tried and overturned.

In the accusatory system, the expertise shall respect a set of rules for the execution and presentation of the conclusion reached, in order to constitute valid and admissible evidence in the trial. In this system, the power to search, collect and evaluate evidence is not concentrated on a single subject, but the parties have the right to request it in certain procedural moments and under certain conditions.

It is not uncommon in this procedural system that the expertise constitutes an evidence and its conclusions have a huge weight on the process of decision-making and evaluation by the judiciary bodies. It constitutes the missing element of evidence in determining the guilt, in determining the pertinence of right, or in clarifying other key circumstances that serve to one or the other party intrial.

This also happens in the civil process. When special circumstances are explained by the expert and the Court is served a scientific, technical or cultural opinion relevant to the occurrence, the Court, after assessing its veracity, adds it to the other evidence under consideration and continues the trial on the basis of clear circumstances.

"*By using the expertise as evidence, the truth is revealed and based on it, a fair decision is given, which observes and applies the rights of the parties. Therefore, we can say that, seen in a broad sense, the expertise contributes to the detection of perpetrators of criminal offenses by punishing them or even by preventing other criminal offenses in criminal matters, by protecting life, health*[8] and any another

[7] Ibidem

[8] "Tribunë Juridike" Magazine, No.49 (4) Year 2004, V.,Luan, "Ekspertimi kriminalistik në mbrojtje të lirive dhe të drejtave të njeriut", p.57

right or freedom at the conter of the criminal proceeding, or the termination of conflicts and disputes in a civil process, if we adhere to the principle of "Truth is the same for all".

Nevertheless, it is also important to conduct an effective and timely investigation, which is part of the right "For a due legal process ". According to the Jurisprudence of the European Court of Human Rights, regarding the right to life, provided by Article 2 of the ECHR, "*The court noted that the defendant State had violated its obligation to protect the lives of children under its care and had failed to conduct an effective investigation. Therefore, the Court held that there had been a violation of Article 2 of the Convention*"[9].

In this case, the expertise affects *the effective investigation* that should be carried out by the prosecuting body, in the sense that the investigation shall not be formal, but the aim of the prosecuting body shall be focused on discovering the truth through any possible evidence. By *Effective investigation* it is understood the fact that, if the procedure is observed, the material law in substance is always achieved. Therefore, the proceeding body should not be sufficient only with the fact that it has taken the decision to execute the expert examination, but should appoint the expert, assign him clear and concrete tasks, be aware of its development within the deadlines and evaluate it.

3. Triangulation of the expertise with other evidence. Practical aspects

The Criminal Code of the Republic of Albania, in Article 309, provides for the criminal offense of false expertise, which explicitly states "*Intentionally presenting false findings in a written or oral examination report, before the criminal prosecution bodies or the court, is punishable by a fine or imprisonment of up to three years. When the false expertise is done for profit or any other interest granted or promised, it is punishable by a fine or up to five years of imprisonment*".

Furthermore, Civil Procedure Code stipulates that: *The opinion of the expert is not binding on the court and, in cases when it has a dissenting opinion with the expert, it must justify this opinion in detail in the final decision or in a decision rendered during the trial*[10].

The expertise has a greater credibility in itself as evidence compared to other evidences, as its credibility is guaranteed by several known scientific, technical or cultural basis, if not by the masses, it is known by the specialists of the field. Even so, these provisions shed light on the fact that the expertise is evaluable, in terms of the *veracity* and *validity* of the finding.

[9] B., Ledi, K., Odeta, "Jurispudenca e Gjykatës së Strasburgut", IV Edition, Tirana 2017, p. 127

[10] Article 224/b of Civil Procedure Code

This means that the Court, to some extent, is above the expert in terms of ascertainments, although this area continues to have a certain specificity.

By evaluation of the veracity of the act of expertise, it is implied the evaluation of the existence and legality that describes the expertise process, from the evidence taken in consideration, to the tactics and methods used for the expertise, reasoning and logical relevance of the findings, to the conclusions drawn. When these evidence or processes are non-existent or illegal, we can state that we are dealing with false expertise. Based on the interpretation of the provision, it is clear that the subject who commits this criminal offense is the expert himself.

While the Civil Procedure Code provides for the fact that the Expertise may not be considered as evidence by the Court, however, this must be justified in the final decision or in another decision during the trial.

This seems to contradict what was said above on the importance of the expertise, but, in fact, it is exactly the special evaluation made to the expertise compared to the other evidence, as it is one of the evidence, whose rejection must be reasoned by the Court, since the provision determines the "peculiarity" i.e. the details with which the Court shall express their stand, in the decision.

What is actually implied by the Albanian legislation on these provisions is the fact that the Expertise as evidence, even though executed by a special subject who has special knowledge, must be evaluated. But, how can this be done when the Court has summoned the expert or experts in the process precisely because of their lack of such knowledge? A practical aspect of how expert evaluation can be done, is through *triangulation* of evidence.

The triangulation of evidence refers to the evaluation of evidence against each other in a triangular paradigm, by creating a closed cycle, where the truth and conclusion are evaluated in each of the evidence, including the performed expertise, and when this consistency is not achieved, then we can state that we are dealing with deviation or the creation of a new circumstance which leads to disconnection in this process. Thus, this disconnection means that the evidences are not well connected with each other and they are not adhering to the contexts.

More specifically, if we refer to the auto-technical act of expertise, the expert, in the drafted act, describes the evidence on upon which he was based to perform this expertise, which usually include: minutes of the crime scene inspection, witness statements, photographic materials, other physical evidence found at the crime scene.

This way, the expert has revealed the story based on these evidences. However, it is necessary that he furnishes additional technical details. In a broader context, the mechanism in which the occurrence took place is generally known, but the expert provides a more precise description of the circumstances that occurred, seeing elements that the average mind and eye would not see. The auto-technical

expert estimates the speed by accurate calculations, relying on the traces of brakes, which is something that not everyone can do. An average mind and an average estimation would only state whether it was fast or not, but only the expert can estimate how fast it actually was.

Therefore, it is understood in general terms what has happened, but certain details, which affect the establishment of responsibility or the determining cause, can only be affirmed by the expert and the act of expertise in criminal proceedings where there is damage and this act of expertise is always taken into consideration because it concerns the objective aspect of the commission of the criminal offense and the responsibility of the perpetrator, and the cause-and-effect relationship between the actions of the driver of the vehicle and the caused consequence.

Hence, we can say that the expertise is about converting simple evidence into concrete and hard evidence, and it is based on these types of evidences that the expertise is built upon, and it is on the basis of the same evidence, as well, that the expertise can be overturned and often, the defense lawyers of the parties in trial work this way, in order to protect the interests of their party.

What should be noted is that "When the expertise presents affirmations which do not have a logical flow or when the combination of evidence established by the expert does not match the evidence taken as a basis, we can say that the expertise is not clear, accurate or true."

This discrepancy leads to three possible scenarios: a new re-examination; the Court does not take the expertise into account; or, in addition to holding the above stand, a criminal report for "False expertise" may be filed against the expert.

The evaluation of the evidence in trial by the parties and by the Court shows that all parties involved in the Process interact in order to follow a due legal process and to avoid impartiality and the creation of circumstances that could potentially favor of one party or the other. Thus, there is no ground for abuse of rights.

"66. Having analysed all the material submitted to it, the Court considers that neither at the pre-trial stage nor during the trial was the applicant given the opportunity to question the experts, whose opinions contained certain discrepancies, in order to subject their credibility to scrutiny or cast any doubt on their conclusions. Relying on its case-law on the subject, the Court concludes that in the instant case the refusal to entertain the applicant's request to have the experts examined in open court failed to meet the requirements of Article 6 §1 of the Convention"[11]

Thus, the evaluation that the parties themselves make to the act of expertise, according to the system of evidence triangulation, constitutes in itself an element of the right for a due legal process and the non-observance of this procedural right constitutes a violation of the right provided by Article 6 of the ECHR.

[11] Case Balsyte-Lideikiene v. Lithuania, 72596/01, 4 November 2008

Conclusions

The expertise constitutes an important evidence in investigation or trial, as it is developed based on knowledge of a special nature and legal liabilities which guarantee the veracity of its finding.

In different procedural systems, the expertise has not had the same value and specificity. In the inquisitorial system, it was almost equal to the other evidence, except for the oath of the expert, which distinguished it from the rest.

The expertise, even though it is different from other evidence, remains a valuable evidence by the court.

The court and the defense lawyer in trial, evaluate the expertise by comparing the findings from each of the evidence, or otherwise, by performing the "triangulation of evidence".

The whole process of conducting the expertise, from the decision to appoint the expert until the issuance of the finding and its evaluation by the Court and the parties, shall be in accordance with the standards of Article 6 of the ECHR.

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The Challenging Relationship between Contemporary Art and Intellectual Property

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Abstract

Nowadays, the contemporarily concept of intellectual property rights is a challenging problem, because it includes many ideas like innovation, invention, copyright, trademark and creativity and/or others of these kind. The legislation of intellectual property right is one of the most challenging ones not only in Albania but also in the most developed countries. A successful entrepreneur (Craig Venter) thinks that it is the key for the economic development and prosperity.

The intellectual property plays a crucial role while being applied in the business, biotechnology and artificial intelligence. Its legislation is very recent and needs to be updated or modified so that countries should be able to anticipate any gaps of the legal framework that may be generated in future due to innovation and invention.

Soon, Albania is going to join the European Union, so additional to the efforts to ratify the domestic legislation with the Acquis Communautaire, the government is facing with another huge challenge. According to international reports "Mapping the Real Routes of Trade in Fake Goods", the country has become a main path for the international transit regarding counterfeit goods. The vigilance of domestic intuitions is underperforming that are incapable to stop this phenomenon.

Key Words: *Intellectual Property, Trademark, Copy Right, Innovation, Legislations/Regulations, Business, Biotechnology and Artificial Intelligence*

Importance of Intellectual Property

The importance of the Intellectual Property is that it is one of the newest sources of law, it carries a very great legal importance to guarantee the rights of the inventor and copyright. Specifically, the law allows inventors, owners of patents, trademarks or copyrighted works to benefit from their job or to invest in scientific inventions. These rights are described in the Article 27 of the Universal Declaration of Human Rights, which provides for the right to benefit from the protection of moral and material interests resulting from the authorship of scientific, literary or artistic works.

The importance of intellectual property was first recognized in the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). Intellectual property has a very large influence on liberal democracies. First, the progress and well-being of humanity rests on its ability to create, invent and generate new works in the fields of technology and culture. Second, the legal protection of new creations further encourages the commitment of human resources by translating this into economic and cultural growth for the respective states. Third, the promotion and protection of intellectual property promotes economic growth and development as well as creates new jobs, while the development of industry sectors guarantees higher quality and satisfactory production for the society.

Intellectual property helps to create a balance between the interests of both innovators and the public, providing an environment in which creativity and invention can flourish, for the benefit of all. But this is only achieved by creating the right legal basis and the functioning of law enforcement institutions to guarantee the proper legal guarantees to inventions and creations. One of the most important international structures is the World Intellectual Property Organization "WIPO" which has the approach to study and to identify current challenges related to intellectual property, policies, information and international cooperation. This structure is funded by the United Nations, and currently has 193 member states including Albania.

Global Index of Intellectual Property Alliance 2019		
Country	Score	Global Ranking
Albania	4.546	106
Bosnia	4.419	110
Kosovo	n/a	n/a
Montenegro	4817	92
Nord Macedonia	4.703	100
Serbia	4.785	95

Source: https://www.internationalpropertyrightsindex.org/countries

To ensure a proper legal system and full harmonization between states, WIPO currently administers 26 treaties, including the WIPO Convention. Actually, under the context of the evolution of intellectual property, here are some of the most important conventions:

- Paris Convention for the Protection of Industrial Property (1967);
- Berne Convention for the Protection of Literary and Artistic Works (1971);
- International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention) (1961);
- Treaty on Intellectual Property in Respect of Integrated Circuits (1989)

The role of intellectual property in business development

Innovative and creative ideas stand at the heart of the most successful businesses. Ideas, however, have little value. They need to be developed, transformed into innovative outputs or services and successfully commercialized in order to enable businesses to harvest the benefits of their innovation and creativity. Every invention or creation has a very important role in business, because its performance and role translates into asset value. The higher the value of the assets the more demanding it becomes for investors or financial institutions.[1]

In order to ensure a proper business development in addition to financial access, it is important to carry out the internal, but also external audit. Each audit should be carried out by professional intellectual property auditors by identifying, monitoring, and evaluating the asset, in order to have a proper strategic business development. Therefore, the business should take it into consideration in order to avoid any anomalies related to the development of the business, but also in relation to unfair competition.[2] Moreover, it is also important to identify and highlight the signs and elements that a product has, thus making the intellectual property relationship very much related to the field of marketing. Using of marketing in a professional way in relation to the product will allow consumers to distinguish the products or services, which the business has, against those of competitors and to associate the products or services with the desired qualities.

In Albania, businesses can protect their intellectual property through legal guarantees as provided for by Law No. 35/2016, "On copyright and other related rights", which applies to works of science, art and literature. Albania has ratified international conventions in the field of copyright and related rights as

[1] WIPO, Making Intellectual Property Work for Business, 2011:2
[2] WIPO, Intellectual Property for Business, Small and Medium-Sized Enterprises Division, 2011:7

administered by WIPO, such as the Berne Convention. Albania is also a member of the World Trade Organization and has implemented the TRIPS Agreement. Therefore, businesses that publish their work for the first time in Albania benefit from the automatic protection of copyright for all other countries that are members of these conventions. Meanwhile, Law 17/2017 "On industrial property" regulates the system of issuance and protection of patents and service models (for protection of inventions), industrial designs, trademarks and services, as well as geographical indications.

It's an obligation for customs authorities to prevent, detect, investigate, verify and combat smuggling, infringements, illegal trafficking of prohibited or restricted goods, infringement of intellectual property rights, etc., in order to guarantee a safe trade.[3] While having a very good legal infrastructure in place, the paradox lies in the fact that Albania is part of the chain of import and export of fake products to the European Union. The study "Mapping the Real Routes of Trade in Fake Goods", referred to the general trade-related counterfeiting index by presenting the relative intensity, with which a given economy exports fake and pirate products. This study has identified that the countries of origin, which are among the largest producers (China, Tunisia, Philippines, Turkey, etc), use Albania as one of the transit countries to enter the market of the European Union. Imports to Albania are usually made by air, while exports to the European Union are made by sea.[4] The problem is that Albania, being one of the transit countries, circulates very large quantities of fake goods and products such as, textile products, shoes, cosmetics and perfumes, medical supplies and pharmaceutical products. Therefore, this phenomenon is against the laws that protect intellectual property rights and shows anomalies in fair competition in the market.

Additionally, the European Commission 2018 report has concluded in terms of implementation, during the reporting period that General Directorate of Intellectuals Property participated in 27 court proceedings. While in 2018, 105 administrative sanctions were imposed during the inspections, thus consisting of 98 fines and seven warnings for copying. In the same period, the General Directorate of Intellectuals Property conducted a total of 336 inspections. These inspections resulted in 76 administrative sanctions (71 were warnings and five were fines). Furthermore, during the reporting period, the customs administration suspended the release of 8,334 products suspected of infringing an intellectual property right.[5] However, the European Commission report maintains that there are still concerns about the high number of fake products in the country. Therefore, law enforcement institutions need to be more vigilant and prevent the trafficking and sale of fake products at home and abroad.

[3] Law No. 102/2014, dated 31.7.2014. "The Customs Code of the Republic of Albania", Article 10/2

[4] "Mapping the Real Routes of Trade in Fake Goods", 2017:56

[5] Communication on EU Enlargement Policy, 2019:62

Currently, businesses in Albania have the right to go to the court and have access to it in cases of disputes concerning copyright or invention. Nevertheless, there is no specialized section in the court to adjudicate disputes over copyright or industrial property. The establishment of a separate section would therefore guarantee a proper and professional adjudication of intellectual property issues.

Application of biotechnology through intellectual property

Biotechnology is a sector marked by an extremely swift technological advancement. Nonetheless, return on investment in this market can be remarkably slow. It is therefore important that research organizations and enterprises safeguard the innovation they generate by resorting to an intelligent use of intellectual property rights, which provide a basis for return on investment in research and development, by endowing exclusive rights for a certain time to their owners. Biotechnology is usually divided into three sectors, namely[6]:

- Health care biotechnology, which plays an important role in the discovery of new medicines (eg insulin);
- Agricultural biotechnology used to develop new crops and increase their tolerance to diseases or climatic factors;
- Industrial biotechnology is the sector that includes the application of biotechnology-based tools in traditional industrial processes ("bioprocessing") and the production of bio-based products (biofuels, bio-plastics and bio-based chemicals).

In the domain of biotechnology, patents are the single the most important forms of legal guarantee. Patents are widely used to protect manufacturing and technical innovation, including the way it is made, operated and used[7]. This instrument gives the owner exclusive rights to prevent unfair competition that may take place, to use, sell or unfairly produce a work that has come to life through someone else's creativity. Patents in the technology sector contain additional specific elements, which are: - A description of the invention with specific details and the advantages this invention brings compared to the known state of the art, completed with relevant examples; a set of claims, which determine the issue for which protection is sought. The claims in the field of biotechnology mostly take into account following aspects[8]: claims of products, justification of the importance of use, innovation of the way of technological use.

[6] (European IPR Helpdesk), 2014:2
[7] (European IPR Helpdesk), 2014:4
[8] (European IPR Helpdesk), 2014:5

The European Union pays great attention to intellectual property. It has put in place a very large fund to invest in research and biotechnology innovations. Still the paradox lies in the fact that these investments, which can be given for scientific research, strictly prohibit their direct application. To understand what is patentable and non-patentable in the field of biotechnology, we can refer to the division made by the "European Patent Office"[9] in the European Union:

What is patentable?	**What is not patentable?**
Nucleic acid genes and molecules.	Sequences from an unknown device.
Proteins, eg: - insulin.	Genetically modified animals without a research interest in the field of medicine.
Enzymes, e.g .: for the production of bio fuels.	Variety of genetically modified plants.
Antibodies, e.g .: to fight cancer.	Variety of genetically modified animals.
Viruses, e.g .: to fight Hepatitis C.	The human embryo
Cells, e.g .: hematopoietic stem cells for the treatment of leukemia.	Processes that necessarily involve use and destruction of human embryos.
Microorganisms, e.g .: yeast for food production.	Sexual reproductive cells
Variety of genetically modified plants.	Chemical experiments between humans and animals
Variety of genetically modified animals.	

In Albania the Law no. 17/2017 "On industrial property" provides for the definition of biotechnology and for the cases when an invention can be patented and when not; it does so by always approximating domestic law with that of the European Union. Nonetheless, the situation in Albania is chaotic due to the widespread smuggling of prohibited stimulants used on livestock and agriculture products. The inaction of customs to prevent the entry of products that cause cancer cells and genetic mutations, has led to an instability in the food safety market for livestock and agricultural products. Currently, the national institutions in charge for the inspection in the field of health safety (NFA) are not in a position to take appropriate preventive measures against agricultural pharmacies that sell biotechnologically modified stimulants. In this sector we encounter a great paradox between the law in force that prevents the patenting of products with high social and health risks, and on the other hand the existence of products (stimulants) which do not possess any regular national or international legal patents whilst loosely circulating in our country. Referring to the European Commission report on the regulation of the market of food, feed and animal by-products, a rule on the labelling of food and consumer information has been adopted. Annual waste monitoring programs covering unwanted substances including veterinary medicines, stimulants, biotoxins and heavy metals have been updated and adjusted in accordance with the available techniques and financial resources. Regarding the monitoring of pesticide residues in food on the market, there

[9] (European law and practice for patenting biotechnological inventions), 2009:17

is still no certainty about the origin of their injections.[10] The report also states that deficiencies in waste and contaminant controls in live animals and animal products have been noted due to hazardous preparations / stimulants.

Progress is still lacking with regard to the urgently needed adoption legislation on genetically modified organisms. To date no structure has been designated to cover this portfolio. Therefore, the establishment of appropriate institutions to carry out monitoring, expertise and strategies to ensure a secure market for consumers, remains one of the most important challenges in the approximation of domestic legislation with that of the European Union. The human resources for these structures need to include expert biotechnologist to ensure the implementation of policies in a professional manner. As above, based on the report of the European Commission, agricultural pharmacies should receive heavy sanctions if they are engaged in trading products modified in biotechnological ways (not enjoying industrial patent rights under applicable law), because in other words this is considered a criminal offense. Engaging in it violates human health and in the most fatal case causes death.

Artificial Intelligence (Robotics) challenging the right of intellectual property

Artificial intelligence is an increasing significant development in the field of business and technology. There is no universal definition of the artificial intelligence yet, it is considered as a discipline of the computer science that aims at development of the devices and systems that can perform assignments that require human intelligence. The right of the intellectual property has developed a big challenge of discussion with artificial intelligence with regards to the rights of the author and patents.

For the first time in 1988, United Kingdom became the first country to grant protection of property rights on artificial intelligence. The position was that when a work is created and protected by copyright but there is no physical person qualified as the author, "the producer" of the work is considered to be the author. While in America "The Office for the Protection of the Common Rights" has undertaken a diverse approach. Since at least 1973 it has applied a "policy of human authorship" that bans the protection of the author rights that are not written by the human authors.

The contemporary debate states that if artificial intelligence generates or creates a new product to whom will the right of the author belong?! Certainly no computer network would replace a patent. The contemporary debate does suggest

[10] Communication on EU Enlargement Policy, 2019:68

this and yet there exist no arguments convincing enough to admit this fact. The systems generated by artificial intelligence lack the legal and moral rights as well as the capability to own the property.[11] Furthermore, it would have considerable cost and would not have obvious benefits for the changing of laws to allow the ownership of the artificial intelligence.

Guarantees of fair trial for Intellectual Property proceedings of ECHR

In addition to the material guarantees, the ECHR foresees several protection procedural measures which focus on the right for a fair judgment. The right to have access at the court plays an important role with regards to the right of intellectual property determined by the European Court of Human Rights relevant to provisions, complaint procedures, issues of jurisdiction, legal cost and unjustly extended procedures.

Thus, the procedure in the ECHR works in the frame of these principles:

- Res judicata;
- ndependence and Impartiality;
- Equality of arms and adversarial procedures
- Administration of evidence;
- Reasonable Deadline;
- Enforcement of the judicial final decisions.

As well the execution of the judicial decisions within legal determined deadlines, would guarantee a regular legal process. All parties in the process will face their rights and obligations as a result of the process. In this way the plaintiff party would guarantee the claim of rights and the conflict would be avoided in any case and abusive process with regards to the intellectual ownership.

Conclusions

There is imbalance and no fair relationship between law and practice, as a result of the application of contemporary art of innovation and technology;

Taking into account the application of intellectual property boosts growth, prosperity and R&D of business by increasing its turnover and by improving its services as well as ameliorating quality of production;

[11] (Maria Iglesias) 2019:6

Albania has another additional challenge, except the approximation of the domestic legislation with that of the European Union, to improve and to update the IP Regulations;

The customs control is inadequate in making the necessary verifications against the counterfeit goods or the smuggled products;

The role of institutions in Albania is very passive regarding the business sanctions that trade and/or produce unauthorized products while violating fair competition in the market;

International laws give huge advantages in case of applying IP rights to conduct research (R&D) and/or to invent something new at any fields including biotechnology. Meantime, international laws apply restriction and sanctions in case of violations. Albanian government should increase fines and restrictions for such cases (violation of trademarks, copy rights, IPs, etc…) ;

Currently in Albania, there are circulating biotechnological products not associated with a legal patent;

Artificial intelligence goods/products suffer the most since its legal gap in Albania is larger due to its specific challenges.

Recommendations

Albanian Institutions should guarantee the prevention of trafficking of artefacts, copyright theft, unauthorized usage of counterfeit items or reproduction by third parties, so its consequence is that the state budget and financial institutions allocate less taxes. It is another explanation why there is a low economic growth and progress in Albania;

Government must be vigilant to adapt quickly the IP laws regarding innovation and invention in order to anticipate any possible legal handicap that can affect mostly businesses in Albania;

It is important to increase investments associated with intellectual property and innovation that ensure a large and sustainable economic development for the domestic market. In particular, the Albanian government should undertake policies to facilitate and to subsidize investments and investors who are involved in the intellectual property. For example, for all the companies that have patents, trademarks, IPs, etc…, the government should provide subsidies, lower the taxes for Start-Ups, offer credits at low interest rates, etc…;

Applying sanctions to all entities that produce and/or sell counterfeit goods or illegal products and ensure fair competition is the key of success in Albania. It is the only way for attracting serious inventors and for encouraging authors, businesses and academic institutions to conduct more innovation, research and development;

Banning of counterfeit goods, which are produced (and/or sold) by local businesses in Albania, is very important. Its continuation would cultivate among staffs and entrepreneurs laziness, spoils fair competition within domestic and/or between regional/international markets, so consequently it will lower desire of R&D and Innovation as a main drive of prosperity;

Non-applying of the international IPs standards decreases the fair competition in Albania compared to the rest of the Western Balkans. Automatically, it would impact in the reputation of Albanian businesses to be seen as non-serious and incapable to face with innovation.

Improving the IP Index (Global and/or Regional ranking) of Albania is crucial, since it is placed the second last compared to our neighboring non-EU countries in the Western Balkans (Best Montenegro).

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