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.