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**The Right of Participation and Information
in the Framework of Legal Process**

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Abstract: The right of the parties to be present at the hearings and to be informed, even though there have been ongoing complaints before the European Court of Human Rights, for violations of Article 6 of the Convention, recent years continue to refer to court cases whose decisions are found to be irregular according to the procedure and states are fined with high financial costs. There is therefore a need to remind the obligation that the national authorities have to comply with these decisions and not to be repeated in the future. In support of this purpose, several issues of the Constitutional Court in Albania and ECHR decisions are addressed. The number of cases is growing year after year. As a result, we understand that remains the main duty and responsibility of the judicial authorities in the de facto implementation of the right to participate in trial and information of court proceedings. While a person should recognize this right and make use of the means made available by the right to exercise it. It is interesting to show the current situation in which Albania confronts the Convention and the ECtHR. We have we have over 50 cases so far adjudicated at the European Court of Human Rights, with the Albanian State party, subject to the violation of Article 6 of the Convention.

Keywords: Convention; Constitutional Court; violation

1. Introduction

The right of the parties to be present and the right to be informed about the judicial process are important aspects of the due legal process, both constitutional and European.² This right entrusts the authorities with the task of notifying, in sufficient time, their parties and their defenders of the date and place of the court proceedings to request their presence and not to unjustly exclude them from the trial. This is already a well-known and consolidated practice of the Constitutional Court of Albania and of the European Court of Human Rights, which would have negated the detailed description of the procedural

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² European Convention on Human Rights, Article 6/3 / a: 1. Everyone has the right to be heard fairly, publicly and within a reasonable time by an independent and impartial tribunal established by law, which will decide on disputes regarding his civil rights and obligations, as well as on the merits of any criminal charge under his custody. A decision should be made publicly, but the presence in the courtroom may be prohibited to the press and to the public throughout the process or during a part of it, in the interest of morality, public order or national security in a democratic society when this is required by the interests of juveniles or the protection of the private life of the parties in the process or to the extent deemed necessary by the court, when in special circumstances publicity would undermine the interests of justice. 2. Any person charged with a criminal offense shall be presumed innocent until his guilt is legally proven. 3. Everyone charged with a criminal offense has the following minimum rights: a. to be informed within a short deadline, in a language that he understands and in detail, of the nature and cause of the charge being raised against him; b. Provide appropriate time and facilities for the preparation of the defense; c. to defend himself or to be assisted by a defense counsel chosen by him, or if he does not have sufficient means to reward the defense counsel, be granted free legal aid when the interests of justice so require; d. to ask or ask to question the witnesses of the charge and to have the right to call and question the witnesses in his favor under the same conditions as the witnesses to the charge; e. be provided free of charge by an interpreter if he does not understand or speak the language used in court.”

guarantees of the parties in the process if they do not, it was ensured that it actually enables them to respect these rights and that is information and participation in the trial.¹

What is observed in Article 42 of the Constitution of the Republic of Albania and Article 6 of the European Convention on Human Rights is that the due legal process should be used in procedural and substantive terms, including rights such as access to the right to be heard and to participate in the proceedings, the right to be heard and to call witnesses, the right to a court hearing with an opposing party, a reasonable trial, etc.

The Constitutional Court of Albania and the European Court of Human Rights in their judicial practice have maintained that informing someone of all the proceedings against him is indispensable. The information and notification of all the procedures must be made in accordance with the procedural and substantive requirements, which should guarantee the effective exercise of the rights of the person. Getting incomplete and informally can't be enough. Known or known facts may constitute indisputable indications for the court that the accused is aware of the existence of criminal proceedings against him, the nature and cause of the charge, such as when the accused declares publicly or in writing that he does not will respond to court appeals for which it has been informed through various sources and not from the authorities, or when it saves an arrest warrant. The rules applied for notification and effectiveness of the applicant's notification by the authorities are evaluated by the court in function of the realization of the right to defense.²

2. Article 42 of Albanian Constitution and article 6 of ECHR

The requirements of Article 42 of the Constitution and Article 6 of the Convention taken in its entirety are intended to guarantee to anyone who claims that his rights recognized in the Constitution have been violated, in particular the prosecution of the case in court and participation in trial. This right is seen as reinforcement in the application of all the secured procedures. This includes the right to appeal to a higher court.³ An important finding has been found in *Deweer v. Belgium*, where in paragraph 44 of the judgment, ECtHR states: "However, in a society known as democratic, the right to a fair trial prefers a fair trial rather than the court is obliged to look beyond the filing of the case and to investigate the reality of the proceedings in question. If we are to argue that the ordinary courts have violated the right to be heard in the courts, In the Decision No. 34, dated 03.10.2007, the Constitutional Court of Albania estimates that from the set of claims and causes raised in the request, the constitutional control should be focused on: violations that violate the due process standards. In the present case, the non-communication of the recourse has denied the request present the right of participation in trial and defense, which made the process irregular in the constitutional sense.

The deprivation of a party in the process from the opportunity, through representation to defend its interests in the trial, is considered a violation of the standard of the due process in many decisions of the Constitutional Court of Albania.⁴ The Applicant VL, at the beginning of the first instance trial, on the claim of the plaintiffs, joined the case as a third person and as such was treated and participated in both stages of the trial, having all the rights parties to the trial under Article 195 of the Code of Civil

¹ Decision of the Constitutional Court of Albania, no.16, dated 19.04.2013, point 38 of the decision.

² Decision of the Municipal Court, no. 5, dated 25.02.2013, point 12 and 14 of the decision.

³ Publication of the Council of Europe "The right to a fair trial" Collection Science and Technology of Democracy, no. 28, p. 64.

⁴ Decisions of the Constitutional Court of the Republic of Albania no. 6, dated 16.02.2007; no. 13, dated 13.04.2007; no. 8, dated 02.06.2006, p. 76; no. 16, dated 08.06.2006, p. 153. Review of the decisions, year 2006; no. 11, dated 18.05.2005. Review of Decisions, 2005, p. 167; etc.

Procedure. With the decision of the Court of Appeals, given in his favor, was created a stability in the resolution of the conflict and at the same time a legal guarantee, which can be violated only under the conditions provided by law. The Constitutional Court of Albania found that the applicant V.L did not communicate the copy of the recourse exercised by the other party to the decision of Court of Appeals of Tirana. The recourse to the Court of Appeals decision must be notified to the interested party to give it the opportunity to participate in the trial of the case in the High Court of Albania and to defend itself. The Constitutional Court of Albania stated in another decision¹ that continuing the investigation for a period of 6 months, without a decision to extend the deadline by the prosecutor, brought violations of the rights of the defendant, guaranteed by the Constitution and the law. So the Constitutional Court found violation of the right to be informed and to receive notice of all court proceedings. According to this Court, pursuant to Article 323 of the Code of Criminal Procedure, within three months from the date on which the name of the person attributed to the criminal offense is recorded in the Notification Register, the Prosecutor must decide to send the case to court, or suspend it. Pursuant to Article 325/1 of the Code of Criminal Procedure, the defendant has the right to appeal to the court against the prosecutor's decision to extend the term of the investigation.

2.1. The Right to Choose the Defense

However, not always the presence of the parties in the process makes the court process irregular. The Constitutional Court of Albania deems that in a case, subject to a review of the decision, the appearance of the applicants to participate in the trial does not render the trial unreasonable in the constitutional sense. Pursuant to Article 494 et seq. Of the Code of Civil Procedure, the right to file a claim in the High Court of Albania for the revision of a final decision independently belongs to any person who has been a party to the trial of the case for which the decision is rendered and has a legitimate interest in its revision. This means that it is in the will of the person above to submit or not the request for revision, or to present it together with other persons who are parties to the same matter.² Also, Constitutional Court of Albania³ has accepted in its decisions that “the lack of communication of the request for review of the matter in the counseling room without the participation of the parties” and “the ignorance of the facts and arguments of the opposing party are justified reasons to the right to a fair legal process”.⁴

In one of the Unifying Decisions of the Supreme Court of Albania,⁵ it is emphasized that the right of defense, in its essential meaning, is a fundamental right of constitutional character which belongs exclusively to the defendant and can't be transferred to relatives.⁶ Another situation may result in the case of absentee judgments. In this sense, the High Court of Albania asks whether the sentence of imprisonment may be rendered in absentia and the execution of his or her suffering has not yet been committed. Is the relative legitimate to choose a defense counsel for a convicted person even if the

¹ Decision of the Constitutional Court of the Republic of Albania, no. 20, dated 10.07.2005.

² Decision of the Constitutional Court of the Republic of Albania, no. 2, dated 05. 02.2008.

³ Decision of the Constitutional Court of the Republic of Albania, No. 17, dated 18.07.2005.

⁴ “The grounds put forward by the applicant for an irregular process relate to the lack of communication of the request for review of the case to the counseling room without the parties’ participation. These two alleged violations are inherent and interdependent and concern with the standards set for a fair trial in terms of the right to protection of participation in the trial and the principle of contradictory. Under the normal conditions of consideration of the case at a court hearing, according to the content of Article 447 of the Code of Criminal Procedure, it is mandatory the request for revision is a remedy and must be notified to the other party according to the general rules. The right to a fair trial also includes the notion that both parties in the process have the right to have information on the facts and arguments of the party on the other hand, taking into account the nature of the case review in case of review which relates not only to the finding of the facts or to their assessment (letters a, b, and Article 494 of the Code of Criminal Procedure), then this assessment must be made by the court after having applied the principle of contradictoryity. This case is important, as decisions in the counseling room can not be broken by touching standards of due process.”

⁵ United Colleges, unified criminal case no. 1, dated 10.03.2014.

⁶ United Colleges, Decision no. 1, dated 20.01.2011, p. 7; Constitutional Court, decision no. 30, dated 17.06.2010, pp. 15-16.

decision for the latter is given in absentia? Can a relative choose a defender for a person who is tried in absentia but has not received effective notice of charges against him? To answer the above questions, the Court analyzed Article 48 (3) of the Code of Criminal Procedure.

The opportunity provided by the lawmaker in the Criminal Procedure Code to allow relatives of a detained person, arrested or sentenced to serve as a defense counsel, has come as a result of the need to provide legal assistance to the defendant in the first moments of the criminal proceedings. In the “*ratione temporis*” aspect, the relative is allowed to choose the protector “until this person [the right holder] has made the choice himself”. So the provision implies that this choice by relatives should be limited in time, and of temporary character. Although the lawmaker has not set a fixed deadline beyond which the defendant’s relatives lose the opportunity to choose a defense counsel, what emerges from the purpose of the provision but also from the use of the term “until” is the prediction that the defendant’s choice by himself the defendant will occur at a certain time of the criminal proceeding in which the latter will decide to elect another defender or to accept the continuation of the defense by the same defender previously elected by his relatives. Admission, on the contrary, of the possibility of extending the defense counsel’s choice of relatives of the defendant for the entire duration of the criminal proceedings, without the defendant himself having the opportunity to make his choice, would undoubtedly translate into a violation of the right to defense and due process of law.

Moreover, the ability of relatives to choose depends on avoiding the “suggestion” of the names of the defenders within the detention and/or detention facilities. On the other hand, the relatives of the defendant, being “out”, find it easier to do a thorough and complete search for the purpose of choosing the defenders they believe will give the right relatives assistance of them. On the contrary, as regards the defendants in the free, the fleeing, or who are not found, this need to “seek” and choose the protector can be accomplished personally, without the need of relatives. The United Colleges of the High Court conclude that the determination of the law that the relative of the defendant has the right to choose a defense counsel, in the sense of point 3 of Article 48 of the Code of Criminal Procedure, only in cases where the defendant is isolated, in the conditions of the limitation of personal freedom is clear and there is no need for unifying interpretation. In this case, the defense counsel chosen by the relative of the person in the conditions of the limitation of personal liberty shall be considered, for the purpose of law, as an elected defender.

Finally, we say that the choice of defense counsel from the defendant's family members, in the sense of Article 48(3) of the Code of Criminal Procedure, occurs in cases where the defendant is in a position to limit his personal freedom, that is to the availability of the justice and has sufficient knowledge of the conduct of a criminal proceeding under his custody.

2.2. The Right to be Present at a Trial

Concerning concealment from the trial, the European Court of Human Rights states that the mere fact that the defendant is not found does not serve to burden on state authorities to enable effective notification of the defendant’s indictment. So, especially for the defendant not found, it can’t be presumed that he has waived his right to participate in the trial.¹

¹ The ECtHR has stated that “When a person charged with a criminal offense has not been personally notified, it can not be presumed simply by his status as an” escape, “which is based on a presumption in itself, insufficiently grounded in the facts the defendant has waived the right to participate in the trial and to defend himself (...). The ECHR has also had the opportunity to point out that, before it is acknowledged that the defendant, through its conduct, implicitly renounced an important right of Article 6 of the Convention, it must first be justified to prove that he had predicting the consequences of his choice (...)” Sejdovic k. Italy, parag. 87.

However, the Constitution, the European Convention of Human Rights but also the International Covenant on Civil and Political Rights (the “Pact”)¹ do not in principle prohibit trials in absentia.² Regarding the waiver of the right to be present at trial, the European Court of Human Rights has held that the spirit of Article 6 of the Convention does not prevent a person from renouncing, voluntarily, directly or indirectly, by guarantees of a fair trial. However, in order to be effective in the sense of the Convention, the waiver of the right to participate in the trial must be proved in an explicit manner and accompanied by a minimum standard proportional to its importance. Moreover, it should not come up against any significant public interest.³

In any case, the burden of proof always belongs to the state authorities and not the defendants, who should not prove that he/she was not seeking to hide the trial, or that his/her absence was due to force majeure.⁴ There should also be a possibility that, at the time of imprisonment by the law enforcement authorities, in order to execute the sentence in absentia, the latter should be allowed to resettle in time for the purpose of exercising his right to be protected, including the right to defend the defense.

One of the court cases with the object of the parties to be present and the right to be informed about the judicial process is the Degree against Albania.⁵

The complainant complained under Article 6/1 of the Convention that the decision of the Constitutional Court had deprived him of his right of access to the court. He further claimed that the criminal proceedings in absentia had no warranties of law as required by Article 6/1 and Article 3 of the Convention. The right to approach the court, from which the right to access is one aspect, is not absolute; it is subject to the limitations that arise silently, particularly with regard to the admissibility of an appeal, since it itself requires regulation by the state, which enjoys a certain limit of assessment in this regard. However, such restrictions should not restrict or diminish the access of a person to such a way or extent that undermines the very essence of the right; Finally, such restrictions are not in conformity with Article 6/1 if they do not pursue the legitimate purpose or if there is no reasonable relationship of proportionality between the means used and the purpose pursued.

The court noted that the Constitutional Court Act provides for a two-year term for filing a constitutional complaint. The deadline starts from the date of notification of the decision of the last instance court. She further noted that the Constitutional Court Act does not contain any procedural decision for the calculation of the 2-year term, and especially, in cases where the expiration of the term falls on holiday days or holidays. However, it provides that, when faced with procedural issues, the Constitutional Court must refer to other procedural decisions having regard to the legal nature of the case. Furthermore, the Court notes that the applicant’s proceedings and the sentence were rendered in absentia. From the information in the case file it turns out that the complainant was acquainted with his sentence in absentia only on 14 June 2003, the date on which he was handed over to the authorities. The Court considers that

¹ United Nations, Treaty Series, vol. 999, p. 171, Approved by Law no. 7580, dated 08.08.1991.

² The ECtHR has often had the opportunity to state that: Although trials conducted without the presence of the defendant are not in themselves incompatible with Article 6 of the Convention, it would undoubtedly be considered a denial of justice if a person deprived of his/was able to demand from the court a reassessment of the allegations of the allegations, in cases where it is not proven that he has waived the right to participate in the trial and to defend or has been hiding the trial (...) *Sejdovic k. Italy*, Ap. no. 56581/00, ECtHR, [DHM], 01.03.2006, para. 82 (citing *Colozza v. Italy*, Ap. no. 9024/80, ECtHR, 12.02.1985, para 29, *Einhorn v. France*, Ap. no. 71555/01, ECtHR, 16.10.2001, para 33; *Krombach v. France*, Ap. No. 29731/96, ECtHR, 13.02.2001, supra 85, *Somogyi v. Italy*, Ap. no. 67972/01, ECtHR, 18.05.2004, para 66, and *Medecina k Switzerland*, Ap.no. 20491/92, ECtHR, 14.06.2001, para 55).

³ *Sejdovic k. Italy*, para. 86. See also, Constitutional Court, Decision No. 30, dated 17.06.2010, para. 30; Constitutional Court, Decision no. 45, dated 10.10.2011, para. 18.

⁴ *Ibid*, parag. 88.

⁵ ECtHR, Decision on May 10, 2011.

the contested decision means unjustified denial of the complainant's right of access to the Constitutional Court. Consequently there has been a violation of Article 6/1 of the Convention.

The Court will further consider whether, in the absence of formal notice, the complainant may be deemed to have been aware of the criminal proceeding and his judgment so far as it may be considered that he has waived his right to appear in court. In previous issues relating to inadmissible penalties, the Court has argued that informing a person about a criminal proceeding commenced against him is a legal act of such importance that must be applied in accordance with procedural and substantive requirements capable of ensuring the effective exercise of the rights of the accused; Unclear and irregular knowledge is not enough. However, the Court can't rule out the possibility that certain facts may provide a clear indication that the accused is aware of the existence of criminal proceedings against him and of the nature and cause of the charge and does not intend to take part in the trial or wants to avoid criminal proceedings. This may be the case, for example, when the accused declares publicly or in writing that he does not intend to respond to requests for disclosure for which he has been informed by sources other than the authorities or follows he avoids attempting to arrest him,¹ or when the authorities come forward with material that clearly indicates he is aware of the pending proceedings against him and the charges he faces. The foregoing remains the main task and responsibility of the judicial authorities in de facto implementation of the right to participate in the trial and information of court proceedings. While the person should recognize this right and make use of the means made available by the right to exercise it.

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¹ *Ivarazzo v. Italy* (dec.), no. 50489/99, 4 December 2001.