IMPLEMENTATION OF JUDGEMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS REGARDING THE REOPENING OF CRIMINAL PROCEEDINGS BY THE ALBANIAN CONSTITUTIONAL COURT

Elsa Toska (PhD)
Judge
Constitutional Court of Albania

1. Introductory remarks

From the time when cases against Albania started to be considered as admissible, the European Court of Human Rights, (ECtHR) has delivered several decisions that have found violations of Article 6/1 of the European Convention of Human Rights, (ECHR), recommending the re-opening of judicial proceedings as the most appropriate remedy, depending on the relevant civil or criminal cases. Against the historical background, legislation and model of the case reopening have changed several times over the years in the Albanian procedural legal system. This system did not provide for the automatic reopening of cases due to a ECtHR judgement that had found violations done by Albanian courts. The re-opening of processes in the Albanian legal system has had a legal framework and judicial practice, not necessarily in line with the required constitutional and conventional standards.

However, the legal framework underwent noticeable improvements, in 2016, when interventions were made in the criminal and civil procedural legislation, but also in the organic law of the Constitutional Court. The reopening procedure is not centralized. It has been vested to ordinary courts as well as to the constitutional court, depending on the process to be open and the courts which has committed the violation according to ECtHR judgement[1].

My presentation will aim to address the reopening of criminal processes, through the role of Constitutional Court of Albania, (CC). In view of this, I have chosen the case *Xheraj v. Albania* (2008). In spite of being a little old in time, it represents an important jurisprudence in the Albanian legal system, and the first test at the ECtHR in this regard. This is due to two reasons:

[1] Article 450 of Criminal Procedure Code; Article 494 of Civil Procedure Code.

firstly, because through this decision, Constitutional Court emphasized the importance of the direct implementation of ECtHR decisions at the national level by the local courts and, *secondly*, because the process re-opening was done even though the criminal legislation of that time did not provide for this procedural right of the applicant.

2. Reopening of criminal cases following a judgement of the European Court of Human Rights (Xheraj v. Albania)

Briefly, the circumstances in the Xheraj case were as follows: The applicant Xheraj filed an application with the ECtHR, which found that the decision of innocence, given by the court of first instance was final. The request of the prosecutor to appeal the decision of innocence outside the legal time limit and the approval of this request, giving the prosecutor the right of reinstatement within the appeal time limit, has led to the violation by the Supreme Court of the principle of legal certainty, according to Article 6/1 of ECHR.

After the ECtHR decision, the applicant addressed the Constitutional Court, claiming the invalidity of the decision of the Criminal Chamber of the Supreme Court and the execution of the ECtHR decision, dated 29.07.2008. According to the applicant, the decision of the Criminal Chamber of the Supreme Court was invalid because, due to the legal deficiencies that exist in the Albanian criminal legislation, the ECtHR decisions were not yet recognized as final and part of the internal legal system by the Albanian institutions. In this context, he requested from the Constitutional Court the recognition of his innocence for the criminal offense of murder and the execution of ECtHR judgement.

The Meeting of Judges of the Constitutional Court decided to reject the application, determining that the competent state body responsible to fulfill the obligations arising from the aforementioned ECtHR decision was the Supreme Court[2]. The Criminal Chamber of the Supreme Court, after re-examination of the criminal case against Xheraj, decided not to accept the request for the review of the Supreme Court's decision. The applicant appealed again to the Constitutional Court asking for annulment of the Supreme Court’s decision that decided not to accept the request for reviewing of his case.

[2] Decision no.22/2010 of the CC.

This time, the Constitutional Court repealed the Supreme Court's decision by reasoning that although the Albanian criminal legal system does not allow the review of final criminal decisions through the process reopening, after ascertainment by the ECtHR of serious violations regarding the fair court trial, the Supreme Court must directly apply the Constitution and the ECHR, by reopening the criminal trials concluded with a final decision, following the decision rendered by the ECtHR.[3] The lack of procedural provisions in the CPC regarding the reopening of trial after the judgement of ECtHR did not stop the Constitutional Court to bind (by its practice) the Supreme Court to re-examine the case. In addition, the Court expressed the obligation of the lawmaker to fill in the legal gap related to the reopening of criminal processes, arising as an obligation of ECtHR decisions. After this decision of the Constitutional Court, the Supreme Court took the case under examination, annulled the sentence, and decided to dismiss the case against the applicant, releasing him from prison.

Clearly, a "clash of jurisdictions" was created between the Constitutional Court and the Supreme Court, followed by a debate through respective decisions on the way how decisions of ECtHR should be understood and implemented at national level.

The above analyzed case proved that the Albanian system at that time could not offer as a solution the reopening of final criminal decisions, following the individual constitutional complain. However, although with tensions and the late restoration of the applicant's right, in terms of international standards, it was managed to clarify the approach between the two courts and their jurisdiction in this regard, due to the active role played by Constitutional Court while implementing the ECtHR decisions and international obligations based on Article 46 of the ECHR.

3. *The legal framework in force regarding the reopening of cases*

As I mentioned above, with the amendments of legal framework of 2016, the reopening of cases has been vested to ordinary courts, as well as to the Constitutional Court.

Following the amendments of the Criminal Procedure Code in 2016, the revision of the final court decisions actually is made in two stages: *In the first stage*, the court of first instance is

[3] Decision no. 20/2011 of the CC.

competent for reviewing the request for the revision of the final criminal decision and assessing the conditions of admissibility in the consultation chamber without the presence of the parties. At this stage, the court examines the existence of grounds for revision. *In the second stage*, the court responsible for the revision of the case may be the court of first instance or the court of appeal, depending on the decision that is requested to be revised. This court, during the revision trial, takes the decision on merits. According to the Civil Procedure Code, the revision of the final decision is also made in two stages.

This legal model, particularly the provisions of Criminal Procedure Code related to the reopening of processes, has been challenged before the Constitutional Court by addressing issues related to the human rights and the rule of law, the principle *ne bis in idem,* the adjudication by a higher court and the hierarchy of acts. Constitutional Court has been put into motion by the ordinary courts (incidental control), but the applications have been rejected as unfounded. Therefore, these provisions have passed the test of abstract review from the constitutional point of view[4]. From the viewpoint of control initiated by individuals, through the individual constitutional complaint, Constitutional Court admits the applications *ratione materiae* and now controls them not only for procedural rights, (as before constitutional amendments), but also for substantive rights, with the expansion of its jurisdiction by the constitutional amendments of 2016.

Meanwhile, referring to the organic law of the Constitutional Court, if the Constitutional Court *has previously ruled on a matter*, which has been tried by an international court[5], and the latter has concluded that fundamental rights and freedoms of the individual *have been violated because of the decision of the Constitutional Court*, the subject infringed upon, in whose favor the international court has ruled, shall be entitled to address the Constitutional Court with a *request to reopen the judicial process*. The request for reopening of the process shall be filed with the Constitutional Court within 4 months of the entry into force of the decision of the international court. It must contain a summary of the international court's decision, highlights of findings made by that court and concrete requests. The applicant must expressly request the reopening of the process and the repeal of the act.

[4] Decision no.1/2021 of the CC.

[5] Article 71/c, point "1" of the Law provides: "For purposes of this law, international courts are the courts whose jurisdiction extends to the Albanian State, because of obligations arising from ratified international agreements". (….)

When the Constitutional Court accepts the request, it shall decide on: *a)* The repeal of its previous decision and admissibility of the application. *b)* The repeal of its previous decision and simultaneously the repeal of the act that has violated fundamental rights and freedoms of the applicant and the obligation of the competent authority to issue a new act or the obligation of the authority not to act, as appropriate[6].

So far there are a few cases communicated to Albania, in which the process and decision of the Constitutional Court was claimed by the applicants as against conventional standards[7]. *Hopefully*, the ECtHR is not going to find any violations, but if it happens it will be the first time for the Court to apply the new provisions on reopening of a case after the ECtHR judgement. In this context, we shall see in the future if the reopening of cases will be solved easily and in accordance with ECtHR judgement.

4. Preliminary conclusions

In conclusion, the re-opening of criminal and civil judicial process, or constitutional ones as a measure of individual character to ensure the *restitutio in integrum* of the applicants, has resulted to be a very controversial issue, both from the doctrinal and jurisprudential points of view at the national level. With the legal amendments of 2016, the legislation on the process reopening was improved in accordance with conventional standards too. For the time being, judicial practice does not offer much, while the reopening of proceedings after a decision of an international court has not yet been tested at a constitutional trial.

However, the Constitutional Court is fully aware of the importance of the case reopening at domestic level and its role to guarantee the international standards.

Dated: 25 November 2022

[6] Article 71/c, point "3", "4" and "6" of the Organic Law.
[7] See communicated cases against Albania at HUDOC page.