
INDIVIDUAL REQUEST IN THE CONSTITUTIONAL COURT, IN COMPARATIVE RELATION WITH THE COMPLAINT (AMPARO INSTITUTE) IN KOSOVO, ALBANIA AND MEXICO

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Abstract: The constitutional court as a centralized state body for the distribution of constitutional justice, in most cases is faced with an individual request or individual constitutional lawsuit which in all democratic constitutions is sanctioned as an authorized party and the individual. The tendency of appeal is to be opposed to state authorities if it considers that any of its rights guaranteed by the relevant constitution have been violated. In this paper we will deal with the individual request in the comparative aspect at the level of the constitutional courts of the countries of Southeast Europe and the history of the first constitutional request in Latin America and Mexico respectively called the amparo appeal. This request is taken as an example for the democratic world for the achievements of the citizens to oppose the state power if it considers that any right guaranteed by the constitution has been violated in the judicial procedure and beyond. The structure of the paper begins with the historical content and origin of the individual constitutional request recognized by the constitutionalists as an amparo appeal. The reason for processing the individual request in some constitutional courts of transition countries.

Keywords: Individual claim, amparo claim, constitutional court, guaranteed constitutional rights.

1. INTRODUCTION - HISTORY AND ORIGIN OF THE INDIVIDUAL REQUEST (AMPARO)

Individual demand has a long history, dating back to 1875 when the corpus of human rights freedoms was violated by kings who had greater power than the law or the law itself, as Louis XIV said "The state is me". In the annals of constitutional constitutionalism and judicial constitutionalism, the individual claim as such is practiced in the Mexican constitutional court known as the amparo appeal, which dates from the second half of the nineteenth century (Kulić, 1969). Thus the modern Mexican constitution of 1917 fully accepted the procedure of judicial review of constitutionality provided by the 1957 constitution, but the Mexican model of constitutional review survives the time and to this day was and remains a specific feature of constitutional justice in the World.

The word amparo itself comes from the Spanish word meaning protection or aid. Amparo was originally created as a means to protect the individual rights guaranteed by the constitution of citizens which is its basic and essential characteristic. This means that amparo guarantees the oversight of the constitution only as long as the individual rights of the individual have been violated. The basic conditions for initiating a judicial process are that: The individual whose constitutional right has been violated has previously exhausted all other legal remedies provided in the procedure. This means that the amparo procedure would not have been accepted and implemented if the procedure had not been initiated before the competent courts, ie if the regular legal way provided by the constitution and the law had not been used (Kulić, 1969, p. 267). Only in case the other legal means for the protection of a certain right do not exist or that they have been used can be the basis for initiating amparo procedures (Article 73, paragraph XII of the law on amparo). Provides as an exception the cases when the amps can be used without making a final decision or other legal remedies have not been exhausted. An amparo lawsuit can be filed against court decisions that have not become final and enforceable if there is a significant risk to life, which could lead to a deportation or possible expulsion of the citizen from the country, secondly an amparo court procedure may used also in the case of a decision to release a person from liberty, but provided that the court has used a legal remedy and that the court has taken its decision. However, amparo can also occur during a dispute between two parties. This can happen if in such a dispute the right of a third party is violated who is then given the opportunity to continue the protection in the amparo procedures. Here, too, regular legal remedies must be exhausted. The Constitutional Court is considered a court of human rights because it is an effective tool for the individual to restore his right in cases where he fails to restore this right within the ordinary judicial system. According to the constitution of Kosovo as well as the law on the constitutional court, individuals are authorized to raise violations by public authorities of their individual rights and freedoms guaranteed by the constitution, but only after they have exhausted all legal remedies provided by law⁴⁰. Every individual has the right to seek legal protection from the constitutional court in cases

⁴⁰ Procedure in the case defined in Article 113, paragraph 7 of the Constitution of Republic of Kosovo 2008, Article 46, admissibility the constitutional court accepts and processes the request raised under Article 113, paragraph 7 of the Constitution

where he claims that his individual rights and freedoms guaranteed by the constitution have been violated by a public authority. The individual may file the request in question only after having exhausted all legal remedies provided by law. Article 48 clarification of the referral the applicant has the duty to clarify in his referral exactly which rights and freedoms he claims have been violated and which is the concrete act of the public authority which the applicant wishes to challenge⁴¹. The request is submitted within 4 months. The time limit starts to run from the day when the applicant is served with the court decision. In all other cases the time limit begins to run on the day the decision or act is publicly announced. If the request is directed against a law then the deadline starts to run from the day the law entered into force. Article 50 return to the previous situation if the applicant through no fault of his own has not been able to submit the referral within the set deadline. The Constitutional Court has the duty to return it to its previous state upon the applicant's request. The Applicant has the duty to submit the request for return to the previous situation within fifteen (15) days from the removal of the obstacle and to justify the request in question. Return to the previous situation is not allowed if a year or more has passed from the day when the deadline set by this law expires (Assembly of the Republic of Kosovo, Constitution of the Republic of Kosovo with amendments XXVI, 2008), (Assembly of the Republic of Kosovo, Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo, 2009).

2. MATERIALS AND METHODS

The paper has been treated mainly with the comparative method, respectively with the comparative constitutional method, about the idea of individual request directed to the countries of Southeast Europe and the Western Balkans, specifically in Kosovo and Albania. The materials are absorbed from the university textbooks of the character of European constitutional justice and that of Latin America. The literature of Kosovar and Albanian constitutionalists has also been used. My experience as Vice President of the Constitutional Court of the Republic of Kosovo was a modest contribution to address this topic with a high academic level. Also we have used other methods like historical method and method of analysis of legislation.

In principle, the processing of individual claims before the constitutional courts is relatively the same. Given that the initiator of this request is the American state, Latin, Mexico, as a result we are forced to analyze the individual request already called amparo claim or amparo constitutional lawsuit which has the meaning of protection of the individual and assistance of the individual from the constitutional court in the report with state authorities. The model of constitutional review in Mexico was and remains one of the most specific and interesting models in constitutional justice, (Kulić, 1969, p. 267). The main or basic reason for initiating the amparo procedure on the basis of the Mexican constitution under Article 103 was (Kulić, 1969):

- a) For violating the law or any acts of high state bodies, the citizen's right, guaranteed by the constitution, when has been violated;
- b) Because a federal law violates the sovereignty of a federal unit;
- c) For the violation of the powers of a body of Mexican federal unit by federal law or act (p. 270). The amparo lawsuit can be initiated, among other things, against the decision that is not final if the decision is a risk to the life of the individual, or if the decision is given for the penetration of the citizen, from the country and the other specific case is when the court has made the decision with death, but the legal remedies available must be exhausted (Kulić, 1969, p. 272).

Constitutional appeals to the German constitutional court include (Kulić, 1969, p. 272):

- a) All constitutional lawsuits against acts of public authorities
- b) The constitutional lawsuit is filed by the municipalities, if Article 28 of the federal constitution is violated, the constitutional lawsuit can be filed by anyone in the constitutional court.

Among German citizens the federal constitutional court enjoys high respect and appreciation. This is to a large extent explained by the existence of an appeal to the individual constitution which with some differences makes or even to the scope of competence of the Constitutional Courts of the Western Balkan countries. This individual appeal which gives anyone the opportunity to address the Federal Constitutional Court began its operation on September 28, 1951 with a ceremonial act (Bundesverfassungsgericht-The Federal Constitutional). More than 6,000 individual petitions are filed with the Federal Constitutional Court each year, through them, the Federal Constitutional Court regularly faces issues which concern citizens in daily life, the decisions summarized in this publication which relate to fundamental rights (Schwabe, 2010). In addition to being considered a specific protection

if it finds that all legal requirements are met. Also Article 47 of the law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo provides individual request.

⁴¹ Article 49

of constitutional rights, the amparo lawsuit is also considered a general judicial action to protect the supremacy of the constitution (Brewer-Carías, 2009).

3. RESULTS AND DISCUSSIONS

In the linguistic sense, the term "individual" means a person with himself, every member of society: male (female) individual, based on the above, the first meaning we can give to this term is necessarily related to the natural person. Consequently, every citizen has the right to file an individual constitutional complaint in order to protect his / her constitutional rights. Since according to the European conventions on human rights and freedoms are incorporated in the constitution of Kosovo, fundamental rights and freedoms for Kosovar citizens are equally valid for foreigners and stateless persons, it turns out that foreign citizens or stateless persons have the right to individual appeal, if they are violated any individual right guaranteed by the constitution of the Republic of Kosovo (Assembly of the Republic of Kosovo, Constitution of the Republic of Kosovo with amendments XXVI, 2008). *With the term "individuals" in the constitutional sense are first natural persons, but referring to Article 113, point 7 of the Constitution, it turns out that legal persons are also included.* It seems that individuals also have the right to challenge the legal norms in the Constitutional Court, if they manage to justify their interest. In fact, based on the principles of systematic interpretation, that is interpreting this constitutional norm related to other norms, it results that the interest of the individual is determined by the Constitution itself and more specifically by Article 113, point 7 thereof. It therefore turns out that the individual can only complain about the violation of his right to a fair legal process by the administrative and judicial bodies and only after he/she has exhausted all legal remedies. The jurisdiction of the Constitutional Court in this regard has always been consistent by not legitimizing, as a rule, the individual to oppose the laws. The only possibility for the individual in my view is that in addition to the request for a due process of law to seek the development of an incidental trial by the Constitutional Court itself, based on the arguments we have addressed above. In the first place with: individuals we will understand natural persons who enjoy full legal personality. Since the constitutional provision does not contain any reservations regarding foreign nationals or those without citizenship, the Constitutional Court has legitimized the latter as well. A constitutional complaint can't be filed on behalf of others, only the person whose constitutional right has been violated can act as a claimant. The claim can be filed alone or through a lawyer. This act should contain expressly for the representatives to appeal to the Constitutional Court and not references of a general nature. This power of attorney must have been issued by the person concerned and not by other persons who do not have the tag to act in his name and on his behalf, be they the relatives of the person concerned. Thus, fundamental rights and freedoms also apply to legal persons. As it results from this provision, legal persons are entities which enjoy and benefit from the fundamental rights and freedoms provided in the Constitution, insofar as they coincide with the purpose of the activity of Thus, legal persons enjoy, among other things, economic freedom, freedom of organization, the right to property. For criminal liability of legal persons, it turns out that these entities can also be criminally punished. For these reasons, given that legal persons have an important position in economic life, social rights of a country and operate with their property, then it is understandable that according to the Constitution they also enjoy the right to a fair legal process in order to protect their property and non-property rights. Despite the fact that the right to a due process of law consists in protecting the rights of individuals from the decision-making of state bodies, this does not mean that legal public persons are excluded from the right to appeal a due process of law (Qendra e Botimeve Zyrtare, 1998). In fact, article 16 point 2 of the Constitution of Albania defines only legal entities without making a distinction between public or private legal entities (Assembly of the Republic of Albania , 1998), as two different entities provided in this way by the Civil Code in Albania. In constitutional jurisprudence it is noted that in some cases the constitutional court has legitimized public legal entities (such as the General Directorate of Customs, the state bar, etc.). To be heard about their claims to due process. The right to appeal to the court, as a right of procedural nature must be respected and used by every entity that is considered a party in a process and that is affected in a way "Regular legal process in the practice of the Constitutional Court of Albania (Hrvoje, 2011).

4. THE ANALOGY OF THE INDIVIDUAL REQUEST OF THE NATURAL PERSON IN THE RELATION IN THE CONSTITUTION OF MEXICO, KOSOVO AND ALBANIA

The similarity is essential that the appeal is opposed to state bodies, the second is that individual rights are protected even though they are different from seniority, they basically have a mission to restore a constitutional right violated by courts or state institutions, hence the complaint to the constitutional court for violation of the right to a fair trial can not be restricted to any entity, including public legal entities. This conclusion is based on the argument that "the initiative for a constitutional trial is not conditioned by the character of the person. Also from the case law are accepted as subjects within the notion of individuals and various functionalities of the state, as prosecutors, judges (Jerzy, 2000, p. 146). Many constitutional courts have therefore adapted the organization of work through

specialized chambers for constitutional appeals. Some countries have developed different procedural rules on the basis of which the court makes a preliminary assessment of the claims. Thus in Germany, the constitutional appeal passes for consideration only if (Adea, 2009, p. 121): a) The appeal is important in terms of the constitution, so it is a new issue of without first deciding by that court, or b) The appeal is important for the implementation of the fundamental right to which this appeal is made, which is affirmed even if a positive decision is not taken regarding the request and the applicant may face serious negative consequences from this fact and c) The appeal is filed within the deadline. In principle, a regular normative presentation requires that the essential aspects of the constitutional complaint be defined in as much detail as possible in the constitution. From the constitution, law on the constitutional court and jurisprudence of this Court result in general terms these procedural conditions, necessary in order for an individual's request to be successful and accepted for review by the Panel or the meeting of Judges of the Constitutional Court. The first criterion mentioned by the Constitutional Article has given the individual the right to initiate the Constitutional Court only for the violation of his constitutional rights for a due process of law and not for allegations of violation of the rights of other persons. From the above, the Constitutional Court has not considered the requests submitted to it by entities that have challenged the court decisions, even though these decisions have been in their favor, with the reasoning that in this case these entities lack the interest to initiate a such constitutional judgment (Vorpsi, 2011, p. 31). Letter "f" of the Constitution of the Republic of Albania, which tactically provides that a subject be legitimized to address the constitutional court, it is necessary to have exhausted in advance all legal remedies for the protection of his rights (Sadushi, 2012). This is a precondition, which can not be bypassed. Exhaustion of these tools is necessary only if they are effective. The appellate instance under Article 13 of the European Convention on Human Rights "ECHR", must examine not only the substantive violations of the rights guaranteed by the Convention but also guarantee adequate legal protection. Consumption of this route does not only require that the parties formally exhaust the appeals to the relevant bodies, judicial or administrative, but necessarily requires that the claims be raised at any stage of the trial. The party who thinks that his / her right has been violated should draw the attention of the ordinary court and on the alleged violation and to request the restoration of the right from her (Sadushi, 2012, p. 316). In these cases, the right of disposition belongs to the parties in the process who have full freedom in submitting claims. If the parties do not submit these allegations then the court cannot review them. This is especially true at the time of filing appeal or claim as ordinary procedural means of appeal recognized by procedural legislation. In these cases, as the function of the Constitutional Court is subsidiary, it is not possible for this court to replace the ordinary organs of the judiciary and to hear the parties regarding allegations which had not been raised before, thus putting them in a position to unfavorable even the winning party which would be faced with some arguments for which it had not had the opportunity to oppose the precedents (Kascajo, 1998, p. 17). If a trial at first instance took place in his absence, then the individual should use the procedural means of reinstatement in time and not of appealing directly to the Constitutional Court. With regard to the manner of taking evidence or objecting to its taking, as well as to the act of expertise, these allegations must also be raised at all levels of appeal, in order to be considered by the Constitutional Court. Likewise, for any violation found in the appellate court, such as the impartiality of the trial panel, the principle of legal certainty, the change of the cause and object of the lawsuit in the appellate trial, etc., the parties must first raise them in the recourse they present before Supreme Court. The only claim that can be raised in this case is related to the violation of the right to if they are prevented then their claims will be considered and if it turns out that they have not been prevented, then the claim will be rejected due to non-exhaustion of legal remedies. Consequently, the non-submission of claims, makes the request considered inadmissible due to non-exhaustion of legal remedies, despite the fact that formally all levels can be exhausted through the means of appeal provided by applicable law. This requirement is necessary because raising various claims in another court instance constitutes a violation of the right to a fair trial as it denies the parties the possibility of adversarial proceedings and equality of arms. In relation to this point, the Constitutional Court has held that: In the jurisprudence of the Court it is accepted that the constitutional trial aims to assess whether the process as a whole has been orderly, focusing on those substantial violations, the establishment of which would affect the fundamental rights and freedoms of the parties to the proceedings. In its decisions, the Court has not acknowledged the violation of the principle of due process in cases where the higher instance court, based on the powers conferred by the Code of Procedure, has supplemented or corrected the shortcomings and errors of the courts, lower levels in meeting the standards and elements of a due process of law (Decision no. 21, 2008). However, in the present case, it does not appear that the courts of the judicial system have met the standards of adjudication, especially in providing opportunities for the State Advocacy to ensure the protection of public interests. The latter was not notified and the acts for the trial in the first instance were not sent to him and thus he was denied a trial scale to present evidence, to hear the claims of the other party and to make the necessary objections to the act of expertise. According to the representative of the State Advocacy, the latter was not even aware of the trial on appeal and the participation of her employee in this trial was accidental. But, even if

copies of the trial acts had been sent regularly and the trial on appeal had been duly notified, the participation of the State Advocacy would not have been able to provide an effective defense, to repair the basic procedural shortcomings related to non-disclosure, the participation of the parties, non-compliance with the jurisdiction and jurisdiction, etc., which the court of appeal, according to Article 467 of the Code of Civil Procedure, can not correct itself, and is therefore obliged to overturn the decision of the court of first instance first and send the case for retrial. The Constitutional Court has refused to accept allegations of violation of the constitutional principle of due process of law, in cases where the higher court has supplemented or corrected the shortcomings of the lower court in meeting the standards and elements of a process. regular legal (Merkuri, E & Anastasi, A.). Thus, the right to a fair trial covers all stages of a process, from initiation to final decision. This further applies to all levels of judgment. 508. Remedies are considered not to have been exhausted even in those cases where the higher court overturned the decision of the lower court and remanded the case for retrial. In this case, there is still no final decision on the resolution of the dispute and consequently the case. In this regard, any violation of the right to a fair legal process can be repaired by the ordinary court. In the jurisprudence of the Constitutional Court, it initially happened that the parties often turned to the Constitutional Court after exhausting other avenues, but the last instance of the judiciary, the Supreme Court, decided not to consider the case because according to it we were not facing provided by the relevant provisions of the codes of civil and criminal procedures. This moment was initially considered by the Constitutional Court as a failure of internal channels and if it found a violation, then it overturned the decision of the colleagues of the High Court and forced it to be first this court to rule on the allegations of the requesting party, and then this party could appeal to the Constitutional Court. The Constitutional Court has stated that in these circumstances, the Constitutional Court considers that the allegations made in both the High Court and this Court are important for the verification of constitutionality of the process conducted in ordinary courts. The High Court should have invested in their examination and maintained a strong position on them, because the control of compliance with constitutional standards for a due process of law is also a function of the ordinary courts, and even more so of the Supreme Court. Such a line regarding the relationship between the constitutional jurisdiction and the jurisdiction of the ordinary courts, when it is the case of review by the Constitutional Court of individual claims, pursuant to Article 131 / f of the Constitution, is guided by the principle of subsidiarity (complementarity). A different stance would turn the Constitutional Court into an ordinary instance, which is not its function. This kind of practice seems to have turned the Constitutional Court into a kind of selection panel for the type of cases that the Supreme Court had to adjudicate. This practice was later changed again, and despite the Supreme Court's decision not to consider a case, it was again considered that the requesting party had exhausted its legal remedies and could now turn to the Constitutional Court (Merkuri, E & Anastasi, A.). However, again this practice can not be considered consolidated. After a period of several years, the Constitutional Court returned to the old practice by not resolving the case itself but by returning it to the High Court as the recourse contained reasons for which it had to express itself. This position seems to be reinforced by another standard set by the Constitutional Court, vis-vis the High Court for its observance of due process. Thus according to the Constitutional Court, it has stated that, based on Article 480 of the Civil Procedure Code, it is within the competence of the Civil College of the High Court (deliberation room) to analyze and assess whether the grounds raised in the recourse are in accordance with requirements of the law (Merkuri, E & Anastasi, A.). If the Panel, in the deliberation room, creates the conviction that the reasons raised in the recourse objectively do not exist in the court file, then it is in its function to decide, in accordance with the legal requirements, the non-acceptance of the case for review in the court session. According to comparative research, the most comprehensive protection of the constitutional rights of citizens is provided by the constitutional claim in Germany, and this happens when the constitutional claim is made against the legal acts of the authorities of the states (Pobric, 2004, str. 470). So the individual who sets in motion the constitutional court are natural and legal persons, excluding the public legal person. The legitimacy of the individual is conditioned by his interest, as a bearer of fundamental rights and freedoms. The Constitution provides that legal persons may also be holders of fundamental rights and freedoms, insofar as these rights correspond to the general purposes of these persons. This right is also enjoyed by political parties that aim to protect the freedoms and rights of individuals, such as the right to vote and freedom of religion etc (Zagonjari, XH., & Anastasi, A., & Çani, E., (2011), pp. 86-87).

5. CONCLUSION

As we pointed out above, the amparo complaint was the beginning of the guarantee of constitutional rights and freedoms, respectively the amparo procedure appears as an achievement, an effort and a long human struggle since the constitution proclaimed the basic political rights of citizens and when it was established. The issue of protection of these rights by the arbitrariness of state authorities. Therefore, it seems that the past and the present are a significant right, above all a political right and an effective means of man to protect his fundamental rights from holders of public office and political power. Thus, the amparo procedure in the control and protection of

constitutionality first presupposed the existence of the violation of the constitutionally guaranteed rights of individuals as its basic and only precondition for the conduct of the procedure. However, the new jurisdiction in the amparo procedure was not limited to individual constitutional rights. The amparo request evolving spread to Europe, expanding the grounds for individual appeal to the Constitutional Courts. The extension of the grounds for appeal to the Constitutional Court of individuals was an important development in European law.

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