A PRACTICAL AND ANALYTICAL APPROACH TO THE ALBANIAN MECHANISM FOR VIOLATION OF REASONABLE LENGTH REQUIREMENT IN JUDICIAL PROCEEDINGS

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Abstract

In Albania, a major constitutional reform took place in 2016 that aimed at strengthening the independence and accountability of the judiciary and had, as its main pillar, the vetting process for judges and prosecutors. Other major interventions were ratified following the constitutional amendments that aimed at securing speedy procedures before the courts. Therefore, amendments to the Code of Civil Procedure were envisaged and introduced a mechanism to give impetus to accelerating the judicial proceedings.

This article will mainly address the effectiveness of this instrument and the behavior of the courts towards claims based on that mechanism. This analysis will be conducted in the current setting of the Albanian judiciary which is facing a considerable backlog of cases. Through an analytical approach and examination of jurisprudence, the authors suggest that this mechanism is designed to work in a normal situation where courts are adequately equipped with human resources, both judges and aiding staff.

Keywords**:** *reform in the judiciary, protracted proceedings, effective remedy, violation of reasonable time, fair trial.*

1. Introduction

A major constitutional reform affecting mainly the judiciary took place in Albania in 2016[1] which was considered a condition for furthering EU accession talks (Hoxhaj, 2021, p. 159; Maxhuni & Cucchi, 2017, p.3). This reform aimed at strengthening the independence and accountability of the judiciary (Anastasi, 2018, p. 4) and offering guarantees for a fair trial (Albanian Parliament, 2015a, p. 15). The main pillar of this reform was the vetting process for judges and prosecutors (Albanian Parliament, 2015a). Other major interventions were enacted following the constitutional amendments that aimed at securing speedy procedures before the courts (Broka & Çinari, 2020) because protracted proceedings were identified as a problem by the progress reports of the European Commission (European Commission, 2014, p. 39) and the analytical document that preceded the reform in the judiciary (Albanian Parliament, 2015b, p.11). Lengthy proceedings as an antithetical element of a fair trial were considered a growing concern by the European Court of Human Rights as well in cases brought against Albania.

Therefore, the emphasis of this article is put on the mechanisms introduced by the Albanian legislator to deal with unreasonable length of proceedings, especially, administrative and civil disputes. Currently, the Albanian judiciary is facing a major backlog. Backlogs do occur normally in domestic court activities and are also faced by other courts operating with an international background (Craig, 2018, pp. 284-288). However, at this time in the Albanian judicial system, this backlog is also the result of the reform in the judiciary that is currently ongoing, to restore public confidence (Balliu, 2020, pp. 709-728; Garunja, 2022). Another reason why we focus on the length of proceedings is that this is related to the index of confidence in the justice system (Palumbo et al., 2013, p.9) and finally, on account of the novelty of this remedy in the Albanian legal environment.

The main question that this article will address is related to the effectiveness of the instrument introduced in the Code of Civil Procedure (CCP) and the behavior of the courts towards claims based on this mechanism. Through an analytical approach and examination of the case law, the authors suggest that this mechanism is designed to work in a normal situation where courts are sufficiently equipped with human resources, both judges and auxiliary staff.

The article follows this structure: first, an introduction of the situation before the aforementioned legal interventions will be elaborated emphasizing the standpoint of the Constitutional Court and the European Court of Human Rights (ECHR, also referred to in this article as the Court) case law against Albania

[1] Some of the laws that were introduced: Law nr.76/2016, dated 22.7.2016, amending the Constitution, Law no. 84/2016, dated 6.10.2016 “On the Transitional Re-evaluation of Judges and Prosecutors in the Republic of Albania”, law no. 98/2016, dated 6.10.2016 “On the Organization of the Judicial Power in the Republic of Albania, law no 96/2016, dated 6.10.2016 “On the Status of Judges and Prosecutors in the Republic of Albania”, Law no. 115/2016, dated 3.11.2016 “On Governance Institutions of the Justice System”.

for infringement of Article 6§1 of the Convention. Subsequently, two immediate legal interventions addressing this issue will be elaborated i.e., the amendments in the law on the organization of the Constitutional Court and the amendments of the CCP. A discussion on the effectiveness of the mechanism included in the CCP is offered, intertwined with the domestic and ECHR jurisprudence especially in the current situation of the Albanian judiciary due to the implementation of the reform in the judiciary.

The paper has both a theoretical and practical profile. Hence, reference will be often made to domestic and ECHR case law. However, one of the main constraints is related to the novelty of this mechanism and the significant lack of domestic doctrinal elaboration. Against this background, the authors aim to shed light on this mechanism through an analytical approach and elaborating on the relevant case law.

2. ECHR standards on lengthy proceedings

According to the well-established case law of the ECHR, excessive length of proceedings constitutes a breach of Article 6§1 of the European Convention on Human Rights (hereinafter referred to as the Convention). The Court has ample case law regarding the protracted proceedings before domestic courts that are considered “by far the most common issue raised in applications to the Court and that it thereby represents an immediate threat to the effectiveness of the Court and hence the human rights protection system based upon the Convention” (Council of Europe, 2010(3)). Furthermore, the Court has stressed that “excessive delays in the administration of justice constitute an important danger, in particular for the respect of the rule of law” (Botazzi v Italy [GC], 1999, para. 22).

The significant jurisprudence delivered by the ECHR has elaborated several standards in assessing the length of proceedings before domestic courts. First, it has determined the starting point of calculating the length for civil proceedings to be the date the action is filed with the court (Bock v. Germany, 1989, para. 35-36). As to when the period ends, the Court case law refers to all stages of the legal proceedings aimed at settling the dispute not excluding stages after judgment on the merits. (Robins v. the United Kingdom, 1997, para. 28-29).

Certainly, there are no strict time limits for any court to resolve a dispute, and “reasonable time” is considered a “roguish thing” (Schabas, 2016, p. 292), but the jurisprudence of the ECHR has developed criteria to assess the reasonable length of proceedings before domestic courts. The ECHR has repeatedly emphasized that trial length is to be assessed in the light of “the circumstances of the case, having regard in particular to the complexity of the case and the conduct of the parties to the dispute and the relevant authorities” (Robins v. the United Kingdom, 1997, para. 33) and “the importance of what is at stake for

the applicant in the litigation" (Duclos v. France, 1996, para. 55)[2]. Given the growing frequency of violation of article 6§1 of the Convention, the Court case law imposed the obligation on the Contracting States to establish domestic procedures enabling litigants to complain of the excessive length of proceedings (CEPEJ, 2018(26), p.14). This was reflected in the Member States through the introduction of legal measures that provide effective redress in case of proceedings that extended beyond the reasonable time limits (CEPEJ, 2018(26), pp. 66-73).

Protracted proceedings in domestic courts have been an issue that has often been brought against Albania before the ECHR (Qufaj Co sh. p.k. v. Albania, 2004, Driza v. Albania, 2007, Ramadhi and Others v. Albania, 2007). The Court, in several cases, has found a breach of Article 6§1 and has emphasized the lack of an effective remedy to tackle the excessive length of proceedings domestically. A special note of this issue was brought in Marini v. Albania, "that apart from the constitutional complaint, the Albanian legal system did not provide for any particular remedy … which the applicant could have had at his disposal to find redress for the excessive length of proceedings." (Marini v. Albania, 2007, para.154)

Previous to the intervention in compliance with the directions of the ECHR, the only mechanism available was a complaint filed with the Constitutional Court in which the latter only declared the breach of a reasonable length of the proceedings, without granting any redress or relief, an obviously ineffective approach.[3] (Gjyli v. Albania, 2009, para. 58).

Later, the Court, in Luli and Others v. Albania, noted that "…excessive length is becoming "a serious deficiency in domestic legal proceedings". There are already dozens of similar applications before the Court. The growing number of applications is not only an aggravating factor as regards the State's responsibility under the Convention but also represents a threat to the future effectiveness of the system put in place by the Convention, given that in the Court's view, the legal deficiency identified in the applicants' particular cases may subsequently give rise to other numerous well-founded applications" (Luli and Others v. Albania, 2014, para. 115). Subsequently, to comply with this obligation, two major legal interventions took place: one in the law on the organization of the Constitutional Court and the other in the CCP.

[2] Similar criteria are also taken into consideration by the General Court of the European Union in its judgment Case T-577/14, Gascogne Sack Deutschland GmbH, and Gascogne, v. European Union, ECLI:EU:T:2017:1, para. 64. "The length of that period depends, in particular, on the complexity of the dispute, the conduct of the parties and the occurrence of any procedural incidents."

[3] See for example decision no. 81 dated 28.12.2015 and decision no. 61 dated 23.09.2015 of the Constitutional Court of Albania.

3. The compensatory mechanism for proceedings before the Albanian Constitutional Court

The obligation to deliver timely decisions applies to the Constitutional Court as well. However, as noted by the jurisprudence of the ECHR, proceedings before this court are peculiar because the Constitutional Court should consider other circumstances such as the nature of the case and its importance in political and social terms (Oršuš and Others v. Croatia [GC], 2010, para. 109). Nevertheless, despite these peculiarities, the Constitutional Court should comply with the standard of reasonable time. As a result of this consideration, when the reform in the judiciary was being drafted, a mechanism for lengthy proceedings before the Constitutional Court was introduced.

The law "On the organization and functioning of the Constitutional Court of the Republic of Albania" was amended in 2016, providing *inter alia*, for compensation in case of protracted proceedings before the Constitutional Court (Chubric, & Bogdani, 2017, p.11). Hence, the amendments set forth that parties in proceedings before the Constitutional Court can ask for compensation in case of protracted proceedings before this court had affected their constitutional rights. The law provides that the time for reviewing the case brought before the Constitutional Court should not exceed three months, except for cases when the law stipulates otherwise (Law no. 8577, 2000, Art 47(1)). However, the parties cannot ask for compensation until a year after the commencement of the proceedings. The Constitutional Court deals with these complaints, taking into consideration the nature of the proceedings, and the circumstances that have delayed decision-making (Law no. 8577, 2000, Art 71/ç (3)). Finally, if excessively long proceedings are found, compensation is granted, taking into consideration the consequences caused by the delay. The amount of compensation is provided by the law to be 100,000 Albanian Lek (ALL) (approximately 800 Euros) for each year of delay (Law no. 8577, 2000, Art 71/ç (4)). The amount is somehow harmonized with the compensatory mechanism offered by the CCP. This mechanism lacks the acceleratory tool as the optimal remedy (CEPEJ, 2018(26), p.14; Scordino v.Italy, 2006, para 183).[4] However, it serves as a first attempt to offer redress to individuals who suffered prolonged proceedings before this court which was missing before these amendments.

[4] This has been the Court stance in Scordino v. Italy where it has stated that "*Where the judicial system is deficient in this respect, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach a posteriori, as does a compensatory remedy…*", ECtHR Scordino v. Italy, ECtHR Judgement (29 March 2006), para. 183

4. The acceleratory and compensatory mechanism of the CCP

Before the introduction of the instrument to tackle protracted proceedings before the court, the Constitutional Court only delivered declaratory decisions, deprived of any effective power to restore the violated right as it neither offered any compensation nor accelerated the proceedings. The grounds for these decisions was the constitutional provision (The Constitution of the Republic of Albania, 1998, Art. 42(2)) that granted anyone the right to a fair, public trial within a reasonable time. However, this mechanism has been found ineffective by the ECHR in Gjyli v. Albania where the Court notes that: "… the Constitutional Court judgments (see paragraphs 21–27 above) recognized that there had been a violation of the appellants' right of access to court on account of the non-enforcement of domestic courts' judgments. However, their findings were declaratory so the Constitutional Court did not offer any adequate redress. In particular, it did not make any awards of pecuniary and/or non-pecuniary damage, nor could it offer a clear perspective to prevent the alleged violation or its continuation." (Gjyli v. Albania, 2009, para. 58)
To comply with the obligation set forth by the aforementioned case, Luli and Others v. Albania, additional legal interventions were executed to introduce an effective redress for breach of a reasonable length of proceedings. Thus, in 2017, the CCP underwent major amendments to align with the new standards of reform in the judiciary and comply with the obligation imposed by the jurisprudence of the Court (Law no. 38, 2017). For the first time, incorporated in a set of provisions, specifically articles 399/1-399/12 of the CCP, an instrument was introduced to handle excessively long proceedings. These provisions were a novelty for the judicial proceedings, given the lack of existing remedies, as was found by the ECHR.

4.1. Reasonable time-limits

The calculation of reasonable time for the investigation, proceedings, or enforcement of a final decision is a variable matrix depending on the circumstances of each case. Article 399/2 (1) of the CCP provides a general timeline for the maximum reasonable time that domestic courts must comply with. The law regulates five specific areas in which reasonable time limits must be taken into account: civil and administrative proceedings, enforcement proceedings of civil and administrative decisions, investigation of criminal offenses, and criminal trial according to the pertinent jurisdiction. Clearly, the provisions do not apply to protracted procedures for other bodies or authorities beyond courts.
The CCP has set forth that a reasonable time for administrative proceedings is considered one year from the commencement at each level of the jurisdiction (first instance and appellate courts). Whereas for civil proceedings a reasonable time limit to settle the dispute (due to the complexity that these cases represent) is considered the two-year time limit as of commencement (for all three levels of jurisdictions: first instance, appellate courts, and the High Court) (Code of Civil Procedure, 1996, Art. 399/2; CEPEJ, 2018(26), p. 73).

There is an omission for the administrative disputes examined by the High Court. Certainly, reference cannot be made to article 60(2) Law no. 49/2012 “On Administrative Courts and Adjudication of Administrative Disputes”, as amended, when it sets the obligation of the High Court to examine administrative cassation appeals within ninety days of receipt (Law no. 49, 2012, Art 60/2). Furthermore, the same law in article 48(2), when referring to administrative proceedings before the Administrative Court of Appeal, sets a time limit of 30 days for their adjudication, while in relation to the proceedings in the first instance, the law sets special deadlines, the observance of which suggests that proceedings should terminate approximately within two months.
Given this background, when assessing whether the proceedings are within reasonable time limits the specific provisions (serving as *lex specialis*) should be considered the regulation provided by the CCP through the instrument that addresses protracted proceedings. In these circumstances, the jurisprudence should determine either to recognize the one-year time limit for administrative disputes examined by the High Court (as provided for lower jurisdictions) or apply the two-year time limit for the High Court applicable for civil proceedings.[5]
However, it is noteworthy that these time limits provide an orientation, because the CCP, in line with the jurisprudence of the ECHR, has set forth that “parties in the proceedings may ask for finding protracted proceedings, according to article 399/6 point 1, before the termination of the aforementioned time-limits, taking into consideration the complexity of the case, the nature of the dispute, proceedings or trial, the behavior of the authority that is carrying the procedures and any other person related with the case, when they claim for protracted investigation, trial or enforcement.” (Albanian Code of Civil Procedure, 1996, Art. 399/2(2)).

4.1.1. Cases before the entrance into force of the amendments of the CCP

For cases that were awaiting adjudication before the entrance into force of the amendments of the CCP, the lawmakers adopted the following solution.
“For the proceedings that are being tried on the date of entry into force of Articles 399/1 - 399/12, the time limits according to Article 399/2 are extended:
a) in administrative proceedings in the first instance and on appeal, 6 months;
b) at all levels of jurisdiction for civil proceedings, one year and 6 months;
c) in the procedures of enforcement of a civil or administrative proceeding, 6 months;

[5] The Constitutional Court in its decision no. 26, 27 March 2017 has made specific reference to the 90 day time-limit provided by Article 60/2 of the Law 49/2012 “On Administrative Courts and Adjudication of Administrative Disputes published, but this reference was made prior to the entry into force of the amendments of the Code of civil Procedure. Here the Constitutional Court found a breach of the reasonable time by the High Court.

ç) in the first instance criminal trials one year for crimes, 6 months for misdemeanors, and in the second instance and the High Court, 6 months for crimes and 3 months for misdemeanors." (Law no. 38, 2017, Art. 109(4)).
The above-mentioned provision provided for the extension of reasonable deadlines set out in Article 399/2 (1) of the CCP. The wording of this provision is somewhat ambiguous, as it can be either interpreted as giving an extension beyond the limits set by article 399/2 (1) or it can be understood as setting a maximum time limit to terminate those proceedings that were ongoing at the time of the entry into force of the amendments regardless their commencement. This second stance disregards the time elapsed before the entrance into force of the new mechanism and sets the new deadline that began to run as of 5.11.2017 (the date on which the amendments of the Code of Civil Procedure entered into force). Given the vagueness of this wording, the courts should determine its meaning while dealing with requests for finding a breach of the reasonable time required for cases that were pending before the introduction of this mechanism.

4.1.2. Additional measures to implement the mechanism

To aid this mechanism, the High Judicial Council issued a decision for the calendar of examination of cases in the Court of Appeal, acknowledging the right of the parties to ask for the acceleration of proceedings before the Court of Appeal, if complying with the time limits set by article 399/2, would give rise to serious consequences for the parties. There is a long list of cases that, due to their specificities, may be accelerated, upon request of the interested party, to be terminated before the general time limits set by article 399/2. Such cases include those involving children's rights or affecting a minor, cases of divorce or annulment of marriage, and cases having as an object child custody or adoption (High Judicial Council, 2019, para 3.1). Through this regulation, the mechanism would normally work through prioritizing those cases that are urgent and examining the others in order of seniority. Other cases, as the spirit of the CCP provisions suggests, may in certain circumstances be finished beyond the aforementioned time limits and this may not be considered by the domestic court a violation of the reasonable time requirement if the nature of the dispute does not allow observance of those time limits due to its complexity.

4.2. How does the mechanism work?

The procedure for examination of claims for violation of reasonable length of proceedings and taking measures for expediting these proceedings begins when the requesting party files the request with the court that is deemed in breach or the competent court that supervises the enforcement of the final decision (Code of Civil Procedure, 1996, art. 399/5(1)). The submission and examination of this request do not suspend the proceedings of the case or the enforcement procedures, but on the contrary, the "court in delay" should take the necessary measures to accelerate such proceedings (Code of Civil Procedure, 1996, art. 399/5(3)).
The request for finding a breach of the reasonable time requirement and acceleration of the proceedings shall be lodged with the competent court (Code

of Civil Procedure, 1996, arts. 399/4(1) and 399/6(1)), according to the nature of the dispute.[6] A claimant alleging a violation of his right to a trial within a reasonable time must file his claim with the court where the claimed violation of the reasonable length of proceedings is occurring (court in delay) and not directly to the court that has jurisdiction to hear it (Code of Civil Procedure, 1996, art. 399/5(1)). This does not apply to the High Court (Code of Civil Procedure, 1996, art 399/6(1)). The submission of a request to the court that is allegedly in delay gives rise to the obligation to perform certain procedural steps by this court (Code of Civil Procedure, 1996, art. 399/7(2)), such as sending, within 15 days, to the competent court for reviewing the case (Code of Civil Procedure, 1996, art. 399/6(1)) a copy of the file and the written opinion of the judge rapporteur on the progress of the case, the reasons of the delay and the proposed actions for resolving the situation. Through the observance of this procedure, the court in delay may apply the provision of article 399/7 (3), according to which "if the authority examining the main proceedings takes the action requested by the complaining party within thirty days of the request being lodged, the examination of the request shall be discontinued." In this context, the "authority examining the proceedings" is the "court in delay". After being informed of the filed request for breach of reasonable length, the judge may take the necessary measures and apply the aforementioned article and eventually may correct the violation by planning a date for reviewing the case, thus leaving the request without an object. In this fashion the judge, in his written opinion for the court, examining the request for finding a violation of the reasonable time limit will have the opportunity to explain that he performed the healing actions for the delayed trial.

To ensure that these procedures terminate quickly the CCP has provided that the examination of the request for finding a violation of the reasonable time limit, shall take place in private (*in camera*) and the court shall take a decision within forty-five days of the request being submitted (Code of Civil Procedure, 1996, art. 399/7(2)). The court hearing the case may either accept the request, find a breach, and order that within a time limit certain procedural actions be taken in the trial or enforcement proceedings or that the case be dismissed (Code of Civil Procedure, 1996, art. 399/8(1)). The decision is final and binding which means it is *res judicata*, hence it cannot be repeated for the same facts (Code of Civil Procedure, 1996, art. 399/7(4)). However, although the decision

[6] According to article 399/6(1) of the CCP the competent court is as follows:

a) where the case in which the breach is alleged is pending before the court of first instance, the request shall be examined by the comptent apppellate courts;

b) where the case in which the breach is alleged is pending before the appellate courts, the requst shall be examined by the competent bench of the High Court;

c) where the case in which the breach is alleged is pending before the High Court, the request shall be examined by a different bench in the High Court;

d) where the case in which the breach is alleged, is in the enforcement stage, the request shall be examined by the competent court of first instance for the enforcement, according to the rules in power.

to dismiss the claim constitutes *res judicata* for those facts that were taken into consideration by the court, this does not prevent the interested party to request a finding of a violation of reasonable length and ask for measures to expedite the proceedings, later, when the objective circumstances have changed. The court shall accept a request when it observes a breach of the reasonable time requirement under article 6§1 of the European Convention on Human Rights (Code of Civil Procedure, 1996, art. 399/9(1)). In determining whether there has been a breach, the court shall assess the complexity of the case, the subject matter of the dispute, proceedings, or trial, the conduct of the parties and the trial bench during the proceedings, or the conduct of the bailiffs and anyone else involved in the case (Code of Civil Procedure, 1996, art. 399/9(2)).

4.3. Is the remedy provided by the CCP effective?

The concept of just satisfaction according to articles 399/1-399/12 of the CCP is broad and not equal to the pecuniary compensation. The remedy introduced in the CCP provides for two procedural steps that are applied in seriatim. As the ECHR case law has offered a degree of discretion to member states, Albania opted for a combination of remedies. In the first stage, the parties may ask for expediting the proceedings before the court, and if granted relief, which is not enforced by the court in delay, then a compensatory redress may be asked for. While adopting this approach the Albanian legislature had in mind the optimal solution that, as noted by the ECHR, is prevention (Michelioudakis v. Greece, 2012). With regard to this mechanism, the Albanian High Court has held (Zhurka v. Administrative Court of Appeal 2022, para. 23) that the current unblocking mechanism according to articles 399/1-399/12 of the CCP provides, as a last resort, the pecuniary compensation for damages resulting from protracted proceedings, which is the final part of the concept of just satisfaction embodied in Article 399/3 (1) of the CCP. For this reason, article 399/4(2) has set forth that “the request, according to article 399/6, point 3, is filed with the competent civil court of the first instance, in compliance with the general rules, only after the procedure for ascertaining the violation and accelerating the procedure has been exhausted according to point 1 of this article, and the court decision has not been enforced by the authority that committed the violation, according to point 1 of this article. [...]”. In interpreting these provisions, the Albanian High Court (Zhurka v. Administrative Court of Appeal, 2022, para. 23) has stressed that the concept of just satisfaction for violation of reasonable length of proceedings has two steps that are followed consecutively. The first step is finding a violation and ordering the competent court to accelerate the proceedings. If the decision of the competent court for finding a violation and ordering acceleration is not enforced, the party may ask for pecuniary damage, with the amount of compensation varying from 50,000 ALL (400 Euros) to 100,000 ALL (800 Euros) for each year or month of the year exceeding the reasonable period (Code of Civil Procedure, 1996, art. 399/10(1)),[7] though the

[7] As regards the amount of compensation provided by the Code there may be allegation that these values are relatively low and not harmonized with the Strasbourg

compensation cannot exceed the value of the lawsuit (Code of Civil Procedure, 1996, Art. 399/10(3)). The compensation claim shall be filed with the first instance court of general jurisdiction where the body found in breach is seated (Code of Civil Procedure, 1996, art. 399/6(3)).

The combination of these two measures is found by the ECHR in Bara and Kola v. Albania as effective, "as it can both prevent continuation of the alleged violation of the individual's right to have his or her case heard without any excessive delay and provide appropriate redress for a violation which has already occurred. The Court goes on by noting that the remedy in principles fulfills the obligation of the respondent State to provide effective remedies in respect of alleged violations of an individual's rights under the Convention" (Bara and Kola v. Albania, 2021, para. 119).

However, the Court, also in this case, notes that its effectiveness should be assessed in practice, given the domestic court's capacity to develop and maintain consistent case law under the new remedy (Bara and Kola v. Albania, 2021, para. 120).

The Constitutional Court of Albania had the same perspective where it stated that the effectiveness of the remedy should be assessed, not merely by the fact that it is provided by the law, but also by its applicability ("Zyra e Përmbarimit Privat" sh.p.k v. "Banka Kombëtare Tregtare" Sh.a. and "Korporata Elektroenergjitike Shqiptare" sh.a, 2021, para. 23). Furthermore, the Constitutional Court has found that for this mechanism to be considered an effective remedy, requests on this ground should be adjudicated promptly. In the same aforementioned decision, the Court emphasized: "… that the remedy adopted in articles 399/1 et seq. of the CCP, is in principle effective, but to be deemed as such even in practice, the request for finding a breach and acceleration of the proceedings, according to article 399/6, point 1 of the CCP, should be promptly adjudicated by the court." ("Zyra e Përmbarimit Privat" sh.p.k v. "Banka Kombëtare Tregtare" Sh.a. and "Korporata Elektroenergjitike Shqiptare" sh.a, 2021, para. 30). Similarly, the Albanian High Court (Zhurka v. Administrative Court of Appeal, 2022, para. 25) has noted that the CCP has embodied an effective mechanism for the normal course of judicial activity, where the primary goal is not "pecuniary compensation" for parties suffering from protracted proceedings, but preventing this through mechanisms to expedite the proceedings, in order to deliver justice in a timely manner. Furthermore, the High Court holds that the mechanism is thought to work properly through harmonizing both phases (Zhurka v. Administrative Court of Appeal, 2022, para. 25). However, one of the main concerns currently is the capacity of domestic courts to handle these requests on time. One may argue that the court may just find that there has been a violation of the reasonable time requirement, without ordering acceleration given their inability to act due to the case overload. Yet, only finding a violation of the reasonableness time

standards, nevertheless they should be considered taking into consideration the economic development of Albania. However, they may be subject to change, after review from the Constitutional Court or the ECHR.

requirement by the competent courts without the possibility to order acceleration of proceedings would be ineffective as it neither accelerates the proceedings nor offers any redress for the affected party.

4.4. Is the reform in the judiciary a justification to absolve state responsibility?

As noted in the abovementioned decision of the High Court, this mechanism is meant to work properly in an ordinary/normal court activity, whereas in the present situation of the Albanian judiciary compliance with the reasonable time limits may seem almost impossible. In this fashion, the High Court has dismissed almost all requests filed for violation of reasonable time with the reasoning that the circumstances have made it objectively impossible for the court to proceed despite their best efforts (Arapi v. Administrative Court of Appeal, 2021, para. 25)[8]. This view is based on the provision of the CCP that sets forth that “Periods during which the proceedings have been suspended for lawful reasons or postponed at the request of the complaining party … or during which there were circumstances that made it objectively impossible to proceed, shall not be taken into account in the determination of the length of proceedings.” (Code of Civil Procedure, 1996, art. 399/2(3)). This mechanism is designed to address irregularities in isolated cases. This reasoning is also backed by the fact that article 399/12 sets forth the obligation to notify the competent court decision that finds a violation of the reasonable time requirement to the High Inspector of Justice (HIJ), implying that the object of this instrument is to correct delays stemming from careless behavior or irregularities in obeying the procedural requirements. Hence, this viewpoint casts doubts on the ability of this instrument to work properly when meeting the reasonable time requirement goes beyond the courts’ power when functioning with a significantly reduced number of judges (High Judicial

[8]Decision no. 6/12/4, dated 17.6.2021 of the High Court, pg. 25 “*As per the above, it results that the inaction of the court until the moment of filing of this request did not occur for subjective reasons related to assessments and abusive attitudes of the judge rapporteur. It results that the examination of cases in the High Court is done by take into account the earliest registered case as well as other legal criteria that justify priority in reviewing the case. The bench, taking into account the cases that the ECHR has determined what constitutes conduct of the court which affects the violation of the principle of trial within a reasonable time, considers that the cases when the court is in objective impossibility and against its will, to judge within a reasonable time, due to the workload of large, accumulation over the years of criminal files in court, reduction of the number of judges in the system, do not constitute an a priori violation of this standard. The judge rapporteur has taken the necessary measures by defining transparent criteria for issuing cases for trial according to the order of their seniority.”*

Council, 2020, para. 71) and handling a considerable amount of backlog.[9] On the other hand, some measures are being implemented to manage the situation. These include legislative and institutional measures, such as amendments to the CCP aimed at simplification and acceleration of procedures through increasing the pool of cases examined in private (*in camera*) in the High Court (Law no. 44, 2021) and courts of appeal, increase in human resources to the High Court, inventory of cases (High Judicial Council, 2020, p. 55), the introduction of the new the judiciary map (High Judicial Council, 2022), prioritizing cases based on their urgency, and application of the filtering mechanism (High Court, 2021). However, despite envisaging these measures, it seems that they do need some time to produce the desired effects.

Concerning the current situation of the Albanian judiciary, the jurisprudence of the Constitutional Court has not followed a consistent approach. Certainly, before the effects of the reform in the judiciary were even felt by the domestic ordinary courts, the Constitutional Court has found in several cases a violation of the reasonable time requirement, not justified by the backlog of cases. It has noted that "...the justifications that the cause for the delay in examination of cases is the high number of cases in the courts are not grounded. The backlog of the courts is not a constitutional argument that can justify the non-adjudication within the time limits set by the lawmaker. On the contrary, the latter must take measures and find the necessary means to change the factual situation (delay in the examination of cases in the High Court), for the laws to be implemented and the courts of all levels to function normally. (see decision no. 59, dated 16.09.2016 of the Constitutional Court)." (Marku v. General Directory of Prisons, 2017, para. 29).

While in its subsequent deliberations, as the effects of the reform in the judiciary were unfolding, the Constitutional Court dismissed most of the claims for finding a violation of reasonable time requirements (Gazidedja v. Regional Directory of Social Insurance, 2021). Nevertheless, its stance has been rather eclectic[10] as it neither has accepted the responsibility for the court's inability to

[9]Currently there are approximately 28.000 cases awaiting adjudication in the High Court.

[10] Decision no. 35 dated 01.11.2021 of the Constitutional Court, where it has accepted the claim and has ordered the High Court to terminate these proceedings within 6 months. In paragraph 60, the Constitutional Court has held that: "*The backlog is not a constitutional argument that can justify the lack of adjudication of cases within the time limits set by the lawmaker. On the contrary, it is the duty of the latter to take measures and find the necessary means to change the factual situation (delay in the consideration of cases by the High Court), in order for the laws to be implemented and the courts of all levels to function properly*". Here the Constitutional Court disregards the fact that neither the High Court nor courts of other levels can fix this situation in short term as it goes beyond their resources. There may be other cases of the same importance still pending in the High Court, but it takes time to prioritize them, meanwhile that there are simultaneously other cases that have stricter time limits (such as those that need to be examined within 30 or 45 days).

handle the backlog nor has it dismissed grounded individual claims. It has recognized the efforts taken by the courts to manage the backlog but stressed that these measures were not sufficient when asserting that "… the High Court has taken concrete steps, envisaging a series of measures in order to reduce the number of backlog cases as soon as possible, such as increase of human capacity, inventory of cases, processing until their review, preparation of action plans, to review issues according to the chronology of time and the nature of the dispute. However, even in this case, the Court reiterates that the measures taken by the Albanian authorities are not sufficient, as long as the proceedings in the High Court are lasting beyond reasonable time limits." (Bianku and Kumbaro v State Cadaster Agency, 2021, para. 61). Moreover, in another decision the Constitutional Court when dismissing the claim ascertained the impossibility of the High Court to handle the case within a reasonable time by stating that "…given the circumstances of the case, its complexity, the risk to an insignificant degree of the applicant's interest, as well as the high number of cases pending before the High Court, with a reduced number of judges" ("Zyra e Përmbarimit Privat" sh. p.k v. "Banka Kombëtare Tregtare" Sh.a. and "Korporata Elektroenergjitike Shqiptare" sh. a, 2021, para. 67).

However, contrary to the High Court perspective, the Constitutional Court has not considered the impact of the reform in the judiciary as an event that makes it objectively impossible to comply with the reasonable length of proceedings when noting that "… the Court considers a more cautious approach, given the changes brought by the reform of the justice system in our country and its effects, especially about the completion of the vacancies of judges in the courts and a large number of cases pending. However, the Court has emphasized that the provision of a reform of this nature cannot justify delays, as the state has been forced to organize the entry into force and implementation of such measures in a way that avoids excessive length in the examination of pending cases. In this regard, the temporary accumulation of cases does not invoke the state with responsibility, provided that the latter has taken immediate action aimed at improving the situation, to resolve an emergency of this kind. Although there are some methods that can be applied by the courts to temporarily speed up the adjudication of cases if even such a solution results in protracted proceedings and turns into a problem of structural organization, then the state should ensure the adoption of more effective measures and organize the judicial system, to guarantee the right to a final decision within a reasonable period" (Bianku and Kumbaro v State Cadaster Agency, 2021, para. 60). Apparently, under the perspective of the Constitutional Court additional measure should be envisaged by the state to avoid the effects of the reform in the judiciary. This was confirmed in two recent decisions (Zaro v. Municipality of Gjirokastër, 2022, and Kola v. State Cadaster Agency et al., 2022) that quashed the decisions of the High Court dismissing a request for finding a violation of reasonable time requirement by the Administrative Court of Appeal. In its reasoning, the Constitutional Court stressed that the inability of the state to implement measures to alleviate the effects of the reform in the

judiciary should not justify the violation of constitutional rights. (Kola v. State Cadaster Agency et al., 2022, para. 57).

4.4.1. The stance of the ECHR

In Bara and Kola v. Albania, the ECHR dealt with a complaint of the unreasonable length of proceedings in administrative and criminal proceedings. The Court found a violation of Article 6 §1 of the Convention and held that there may be understandable delays stemming from the far-reaching justice reform in the judiciary, however, there is a general obligation of the State to organize its judicial system in such a way as to ensure compliance with the rights embodied in the Convention (Bara and Kola v. Albania, 2021, para. 70). However, the Court here disregards the effect of a far-reaching reform and the difficulties of small countries to fill the vacancies with qualified judges within a short period.[11]

The Court has reiterated in numerous decisions that it is the State's responsibility to organize the judicial system in a way that domestic courts meet the reasonable time requirement (Michelioudakis v. Greece, 2012, para. 43). However, this reform has affected all the levels of the judiciary in Albania and there has been nothing like this before in the Contracting States of the Convention. Therefore, the Court should take into consideration the difficulties of carrying out this reform, the continuous efforts to minimize its side effects, and the fact that cultivating decent judges meeting the requirements of the vetting process requires time and human resources. Hence, given these conditions, a more cautious approach is required when assessing the violation of reasonable time requirement under Article 6 §1 of the Convention.

5. Concluding remarks

The reform in the judiciary was designed to strengthen the independence and accountability of the judiciary; increase public confidence and guarantee a fair trial in line with the European standards. However, a large number of judges have been dismissed, which has negatively contributed to the length of proceedings, and the exponential growth of the preexisting backlog of cases. Nevertheless, to reduce these externalities, several measures have been adopted either legally or institutionally. One of these measures, in line with an obligation imposed by the case law of the ECHR, was the adoption of the remedy to handle the protracted proceedings before the courts. Timely decisions and proper administration of justice by judges the credentials of which have been checked are both very important. But, if they do compete with each other, proper administration of justice shall prevail. Maybe, in a short time, there may be delays in delivering justice, but the positive impact that this reform

[11] See also the Joint Concurring Opinion of Judges Dedov and Ravarani in ECtHR Bara and Kola v. Albania, ECtHR Judgement (12 October 2021), App. nos. 43391/18 and 17766/19, para. 6.

will have in the proper administration of justice should outgrow these externalities. The remedy to deal with protracted proceedings may face some difficulties in this stage because it is intended to be operational in the normal course of courts activity backed by adequate human resources or otherwise will fail (Lanau, Esposito, & Pompe, (2014; CEPEJ 2018(26), p.15).[12] Therefore, a proper understanding of the mechanism is required as well as some time to allow the judiciary to get back on track while filling out the vacancies.

Currently, where domestic courts are overburdened by the excessive number of pending cases, it may be impossible for them to properly handle requests for violation of reasonable time requirements. One may hold that courts should prioritize these requests which are rising[13]; nonetheless doing so will result in subsequent delays in the adjudication of other cases in their merits, and raise the number of cases that are in breach of the reasonableness of proceedings before the court.

Given this background, the most feasible option is not to take into account the time during which the court is understaffed due to the vetting process. This should be considered a period where it is objectively impossible for courts to act promptly. This stance is in line with the provision of the CCP that the time during which the circumstances have made it objectively impossible to proceed is not calculated in the determination of the length of proceedings.

[12] The Pinto law in Italy had this fate.

[13] The lists of requests for finding a violation of the reasonable time requirement before the High Court. http://www.gjykataelarte.gov.al/web/Lista_e_kerkesave_per_konstatimin_e_shkeljes_se_afatit_GJL_4769_1.php

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