

Freedom of Information in Albania, Constitutional Regulation And Mechanisms To Protect It

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Abstract

European integration of Albania among others requests the creation and implementation of higher standards of state governing and administrating. These standards set for the first time as fundamental human right, the freedom of information and access on government documents. Setting the freedom of information asks for the just constitutional and law regulation. The article's structure aims to put that, the first step to ensure the protection to right of information is the Constitution of the Republic of Albania. It provides, through its provisions, the accent on the freedom for information as a possibility of the public to fulfill their individual requests also as a possibility that is given to the administration to realise the requests of a democratic society for a governing closer to the citizens. Also, it is an important step the constitutional provision of the restriction of the right to information and the provision of the mechanisms that enable its effective protection.

Introduction

The democratic society is closely connected with the observance of fundamental human rights. "Democracy and freedom of expression have emerged along and cannot exist separated"¹. It is increasingly clear that "freedom to communicate and the freedom of expression in any form it appears,

¹ Guido Guidi "La società dell' informazione: libertà, pluralismo, risorse"-DIRITTO PUBBLICO COMPARATO ED EUROPEO- Atti del convegno dell'Associazione di San Marino, 30 Settembre 2005, G.GIAPPICHELLI EDITORE, 2006, fq 2.

is a fundamental human rights”.² The right of information is recognized by the general formula of freedom of expression. The freedom of expression is a negative right and the state interference is a guarantee condition for the respect of this right. By the other hand, the freedom of information is presented more as a positive right, which dictates a positive action by the state to accomplish it. It is clear that “the first issue relating to the freedom of information is to determine if it is an independent right, completely detached by the right of expression or is a component of it”.³ Even the international documents have not resolved this dilemma for a long time, reinforcing the idea that “the freedom of information is so complex, because it was seen associated with studies in the field of the right of expression”⁴. I would refer to the European Convention of Human Rights⁵ which regulates indirectly “the right of information”. The right of information is provided as a right to receive and to give information, considering as components of the right of expression” (article 10)⁶. The subject that connects the democracy with the freedom of expression is the citizen who, according to Leonardo Ferrara “has a subjective legal situation in relation of information”.⁷ This situation realised that the freedom of information appear in a dual aspect- the right to be informed and the right to communicate. The freedom of communication is legitimated by the needs of people to be informed, so that can freely participate in public and political activity”⁸.

Freedom to information is the foundation to form a correct public opinion as a necessary tool of the democratic societies to transfer “the formation of political consciousness from the traditional places to the media arenas”⁹. “The

² Ibidem, pg 2.

³ Gent Ibrahimji “Gjyqësori dhe e drejta e informimit” nëKonf. Komb.”E drejta e informimit-e drejta themelore e njeriut” Tiranë 2003,fq 41.

⁴ Manganaro, A.R.Tassone “I nuovi diritti di cittadinanza: il diritto d’ informazione”, fq 103.

⁵ European Convention of Human Rights is adopted in Rome on 4 November.

⁶ The European Court of Human Rights, accomplishing its functions, which oblige it to give a specific attention the principles which are characteristic for a “democratic society”, has created an extensive jurisprudence regarding article 10 of the Convention. The Court has decided that the states should not interprise positive that inhibit the access to the information. (Cit. by “Manual of the human rights- No 2 “Freedom of expression”- Guidelines for the implementation of the article 10 of ECHR, Second edition, Tirana 2003).

⁷ F. Manganaro, A.R.Tassone “I nuovi diritti di cittadinanza: il diritto d’ informazione”, fq 105.

⁸ Ibidem, pg 3.

⁹ Gianluca Gardini “Regole dell’ informazione”- Principi giuridici, strumenti, casi”, Pearson Paravia, Bruno Mondador, S.p.A, 2009, fq XI-XII.

formation of public opinion is a basic principle of the political processes of the representative democracies”¹⁰. Although, the freedom to information is not recognised by the doctrine for a long time (for example in England “Historically, the Government has always exercised strict control over the disclosure of information related to government activities and public authorities”¹¹), the studies demonstrated the importance of the independent existence of the two autonomous rights, although closely related. “The freedom of information does not mean only to take the information provided, but above all the opportunity to react and to act for obtaining information through the access and the distributed and heterogeneous resources, but also through the collecting of the data by direct observation of the events and situations”¹². That is the beginning of a movement that aims “to achieve a wider transparency of the public life, which finally materialized in the drafting of the necessary legislation to give to the public access to the official document of the public administration”¹³. Thus, such principles as that of publicity, transparency in the administrative activity “is specified in the duty to inform and communicate with the public, that the lawmaker imposes to the administration”¹⁴. This obligation is closely related with the right of a person to access to the official documents of the public administration and the right to participate in decision-making process. “Existence of the principle of the publicity of the activity of the public authorities, imposes to them the obligation for an effective information”¹⁵.

¹⁰ Ibidem, pg XII.

¹¹ Charles de Fleurieu “Freedom of information”- “Law and the Media”, Fourth Edition, Focal Press, Oxford 2002, pg 212.

¹² Enrico Pattaro “Il diritto dell’informazione e comunicazione, Padova 1998, pg 108.

¹³ Ibidem, pg 110.

¹⁴ Guido Corsa “Manuale di diritto amministrativo” “Manuale di diritto amministrativo” , Torino, 2004.

¹⁵ Elisabetta Zuanelli “Manuale di comunicazione istituzionale”, Editore Colombo, pg 5.

Constitutional regulation of freedom of information, as a fundamental human right.

“The constitution is a general system of the politico-social relations, which developed within the state, and a system of fundamental principles that give the identity to it”¹⁶. It is very important for a democratic state to codify the fundamental human rights within its Constitution in accordance with the international documents.

The Constitution of the Republic of Albania¹⁷ has defined that “respect for dignity of people, his rights and freedoms is one of the basic principles of the state, who has the obligation to implement them”¹⁸. The Constitution reserves the second part to fundamental human rights and freedoms, including the right to information. It provides and guarantees that right even in other parts and other provisions, that realise constitutional regulation of the government bodies (organs of state power). Other provisions of the Constitution provide the right to information as an indispensable tool to ensure the enforcement of other fundamental human rights.

Constitution of Republic of Albania (article 23):

1. Has expressly provided the freedom of information guaranteeing (ensuring) to everyone the general right to be informed; (§ 1)
2. Has specified as an independent right the access to the official documents by the public authorities or their officials; (§2)
3. Has considered the freedom to information as an important element for an open and transparent governance; (§3)
4. Has considered the freedom of information as a necessary tool to respect other fundamental rights.

Constitutional regulation of freedom of information is wider than international acts (f.e. European Convention of Human Rights), because it guarantees the right to information as an independent human right.

¹⁶ Gianluca Gardini “Le regole dell’informazione-Principi giuridici, strumenti, casi”, Pearson Paravia, Bruno Mondador, S.p.A, 2009, pg 4.

¹⁷ The Constitution is adopted by the Assembly with the law No. 8417, on 22.10.1998, and entry into force through the Decree of the President of the Republic No.2260, on 28.11.1998.

¹⁸ “The constitution and its explanatory materials”, Tirana, December 1998, pg. 3.

While the Constitution guarantees the right to information, through the paragraph 2, it provides the legal reserve to regulate subsequently, in detail the access to the official documents for the state organs and of persons who exercise that functions.

Article 23 § e, of the Constitution accompanied by a series of provisions, that aim to a transparent activity of the state power not only for the executive authorities. The constitution considers the right of information as an important element for the activity of the Assembly. Exactly the article 79 provides that “Meetings of the Assembly are open”. That article is a regulation of the principle of transparency, because it is particularly important for citizens to know the activity of the elected collegial bodies, to know who has won the vote, how they are represented by the elected, how they achieve political choices that decide on their future. It need to say that the Constitution establish a balance between the enjoyment of this right and the exclusion of it. That is realized by the constitutional provision according to which “ At the request of the President of the Republic, the Prime Minister or one-fifth of the deputies, meetings of the Assembly may be closed when a majority of all its members has voted in favor of it” (article 79, § 2)¹⁹.

On the other hand, the right of information in relation with the activity of the Assembly, should be seen in two aspects:

- The right of the public to be informed for the activity of the Assembly (article 79).
- The right of the Assembly to be informed for the activity of the executive authorities, which is realised through the interpellation sessions.

Article 80, paragraph 3, expands the circle of the organs of public administration on who have the obligation to inform the Assembly, including the directors of central institutions. The Constitution recognises the right to information in relation with the activity of other constitutional institutions or others created by law, which have the obligation to report periodically before the

¹⁹ <http://www.president.al/english/pub/kushtetuta.asp>

Assembly and its committees. We can mention the People's Advocate²⁰, the High State Control²¹, the Commissioner for Data Protection²².

It is important to mention that the Constitution does not regulate the right of the public to be informed for the activity if the Conceil of Ministers in the same mode as for the Assembly. There is an exception from the general regulation that comes from article 23 § 3. Article 100 § 3, which defines the legal status of the Conceil of Minister, provides that "Meetings of the Council of Ministers are held behind closed doors". In fact, The Conceil of Ministers is a collegial organ that during it activity is characterized by the confidentiality.

The financial aspects of the activity of the state authorities have to be transparent and open for the public. That is the reason that the Constitutional has provided expressly this principle. It is clear if we refer to two of its articles. Article 157§ 4, that regulate the financial public, provides the obligation of central and local government to be public their revenues and expenses public. Indirectly, the Constitution allows for disclosure the public finance through the provisions that regulate the legal status of High State Control. Article 164 § 1, provide the obligation of this independent organ to report before the Assembly on the implementation of the state budget; to inform on the results of the periodic control. Iven the absence of a constitutional provision, is the Rule of Procedures of the Assembly that provides " plenary sessions of the discussing of the budget are necessarily open for the public" 23:

The transparency should be present to the process legislative. The Constitution provides that "A law enters into force with the passage of not less than 15 days after its publication in the Official Journal"(art.84§3)²⁴. According the Constitution even it provides the cases of extraordinary measures as well as in cases of necessity and emergency (when the Assembly decides with a

²⁰ Albanian Constitution Neni 63.

²¹ Ibidem, Art. 164.

²² Ligji " Për mbrojtjen e të dhënave personale", Nr.9887, datë 10.03.2008, Kreu VIII.

²³ Rregullorja e Kuvendit të Republikës së Shqipërisë", Kreu VII, neni 43.

<http://www.parlament.al/>.

²⁴ <http://www.president.al/english/pub/kushtetuta.asp>

majority of all its members and the President of the Republic gives his consent) a law enters into force immediately, it have to made known publicly²⁵.

While, for the obligation of the local government to transparency of their meeting, it is not a specific constitutional provisions. In this case, we can refer to the art. 23 §3.

The Constitutional has not overlooked the transparency in the judiciary organs activity. I would like to be present that through to articles of it. Art. 42, provides “the right of everyone to protect her constitutional liberties and interests through a fair and public trial, within a reasonable time, by an independent and impartial court specified by law”²⁶, including the right to information. The Constitutional specifies the obligation for transparency of the judicial system through the art. 146 §2 when provides that “In every case, judicial decisions are announced publicly”.

In relation with other fundamental rights, the right to be informed for the environment and its protection is guaranteed by the art. 56. The right to protect the environment is part of third generation of human rights, which was given a special attention from the different international organizations. 27

The Constituatio through the art. 28 provides the right of information as an important tool to guarantee an effective protection in a penal process. It provides that “everyone whose liberty has been taken away has the right to be notified immediately, in a language that he understands, of the reasons for this measure, as well as the accusation made against him. The person whose liberty has been taken away shall be informed that he has no obligation to make a declaration and has the right to communicate immediately with his lawyer, and he shall also be given the possibility to exercise his rights”²⁸. This regulation continues by art.31/a, which emphasizes that, in a criminal proceeding, everyone has the right “ to be notified immediately and in detail of the charges against him, of his rights,

²⁵ The law shall be published in the first number of the Official Journal.

²⁶ <http://www.president.al/english/pub/kushtetuta.asp>

²⁷ Albania has signed the Aarhus Convention, the first pillar of which provides the right to information

about the environment, information held by the public bodies. According to this Convention, the public authorities has the obligation to actively disseminate the information relating the protection of

the environment.

²⁸ <http://www.president.al/english/pub/kushtetuta.asp>

and to have the possibility created to notify his family or relatives”²⁹. The protection of the right of information in a civil or penal process has taken a regulation in detail by the law.

The constitutional restrictions of the right to information

The right to information is not an absolute right. The Constitutional contents a specific provision³⁰, which provides the general restrictions for all the fundamental rights, including the right to information. This provision defining the condition in which we can restrict the constitutional human rights, in fact reinforces the guarantee of these rights avoiding their arbitrary deprivation. According this article the European Convention of Human Rights, already part of albanian legislation, it is the threshold of the protection of the constitutional human rights, but it is the maximum of the restrictions. Also, this article provides that the principle of proportionality is in the base of the restriction, so a limitation shall be in proportion to the situation that has dictated it. That requests that the restrictions should be in accordance with a lawful purpose, making a balance between the absolute necessity of a democratic society make the restriction and the individual interest enjoy his right.

I appreciate the protection from the constitutional provisions³¹ of the right to protection of personal data. In fact, this is a restriction of the right of information. The Constitutional provides expressly³² that no one may be compelled, to make public data related to his person; the collection, use and making public of data about a person can be done only with his consent; everyone has the right to be informed for data collected by authorities about him and everyone has the right to request the correction or deletion of untrue or incomplete data or data collected in violation of law. This right to protect the personal data can be restrict only by the cases provided by law.

²⁹ <http://www.president.al/english/pub/kushtetuta.asp>

³⁰ Article 17 provides that:

1. Limitations of the rights and freedoms provided for in this Constitution may be established only by law, in the public interest or for the protection of the rights of others. A limitation shall be in proportion to the situation that has dictated it.

2. These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights.

³¹ Article 35

³² <http://www.president.al/english/pub/kushtetuta.asp>

This article is the constitutional guarantee to protect the privacy and the right of everyone to be informed with information regarding to him. It is provided the legal reserve to define the conditions of the terms of exclusion. The basic legal of this restriction is provided in detail by the law “On protection of personal data”³³.

The constitutional mechanisms for the protection of the right of information

The provision of the necessary mechanisms for the protection of fundamental human rights is another value of Albanian Constitution.

For the first time, is provided by the Constitution People’s Advocate as an independent institution. According the art.60 its function and purpose is to defend “ the rights, freedoms and legitimate interests of individuals from unlawful or improper action or failure to act of the organs of public administration”³⁴. Referring to the position which has the public administration in a society, we can say “that can regard the manner of the formation of various areas of power, which change according the historical context and the dominant social code. Administrative area has been made more distinguished than other social structures”³⁵. The goal of administration is to achieve good governance, which means governance closer to the public and an active participation of the public in the decision- making. That is possible if the public is informed about the issues of common interest. The art.63 defines competencies of People’s Advocate, emphasizing his right “to make recommendations and to propose measures when he finds violations of human rights and freedoms by the public”. People’s Advocate has the right to request information by the public administration for the cases that are subject of her review and the public organ are obligated to provide that information to him (art.63/4). By the other hand, People’s Advocate has the obligation to present an annual report before the Assembly(art 63/1), when so requested, and he may request the Assembly to hear him on matters he

³³ Ligji “Për mbrojtjen e te dhenave personale”, Nr.9887, datë 10.03.2008.

³⁴ <http://www.president.al/english/pub/kushtetuta.asp>

³⁵ Gjergj Sinani ”Burokracia, publiku, koha” në Konferencën Kombëtare “E drejta për informim-e drejtë themelore e njeriut” fq 56.

considers importantly (art 63/2). This is important because, except the transparency of People's Advocate activity, the constitution provides the possibility to have a clear idea for the level of the protection of fundamental human rights and to take the necessary steps to improve the situation. Referring to the annual report of People's Advocate, we can conclude that, despite the periodical recommendations made by this institution for the organs of public administration, only in the reports of 2009 and 2010, we find a clear position and an analysis of the level of the enjoyment of the right of information for the official documents. According to these reports "the legislation on the right of information on official documents, is partially recognised in an unsatisfactory level by the public administration and it is implemented in the same level, avoiding the responsibility to give the requested documentation"³⁶. It is indispensable to evident that even the public does not know his right of information about the official documents. Even the complaints at the People's Advocate express the problems of enjoyment of this right. The Report of 2010 emphasize that the main complaints "are towards the activity of the central government, local government units, public entities and legal persons that provide the public services" ³⁷.

Although the law "On the right of information on official documents" is adopted since in 1999, it is a low level of its implementation. People's Advocate considers that "this situation derived because of infrastructural reason, influenced by a lack of satisfactory politic will and expressed in the weakness of administrative capacity, autocratic tendencies inherited from the previous administration, but conditioned even by lacks of the legal framework of the right to information"³⁸. People's Advocate as the guarantee of the right of information emphasizes that we should interfere within the provisions of the law specifically about the legal terms and forms in which we should give the information or to determine sanctions and to give reparations.

³⁶ Avokati i Popullit "Raporti Vjetor 2010", fq 8.

³⁷ Po aty, fq 29.

³⁸ Avokati i Popullit "Raporti Vjetor 2010", fq 32.

People's Advocate considered very important the creation and consolidation of the offices of information in every central and local governments. It is that the reason for which this institution in 2007 has given the recommendation of a Draft TIP Regulation.

According the art.42³⁹ and art 135⁴⁰ we can conclude that the right to information can protect even by three levels of the judiciary.

Another important mechanism to protect the right to information is the constitutional provision of the art 131/f, according to it the Constitutional Court decides on the final adjudication of the complaints of individuals for the violation of their constitutional rights to due process of law after all legal remedies for the protection of those rights have been exhausted. Regarding the subjects that can initiates a proceeding to the Constitutional Court, the Constitution provides that individuals "may make a request only for issues related to their interests". If the administrative or judicial organ violates the right to information of the parties, then it has violated the right for a fair trial indirectly, giving the individuals the opportunity to make a complaint to the Constitutional Court, accomplishing the other requirements of this provision.

Albanian Constitution, trying to acquire the european standards for the protection of fundamental human rights has signed and ratified the European Convention of Human Rights, recognizing to everyone or group of individuals the right to protect the right of information in the European Court of Human Rights, certainly after they have exhausted the internal appeal.

³⁹ Article 42 provides:

1. The liberty, property, and rights recognized in the Constitution and by law may not be infringed without due process.
2. Everyone, to protect his constitutional and legal rights, freedoms, and interests, or in the case of charges against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law.

⁴⁰ Article 135/1 provides: The judicial power is exercised by the High Court, as well as by the courts of

appeal and courts of first instance, which are established by law.

Conclusion

- The right to information in Albania enjoys a constitutional and legal protection as individual right, as a tool for the enjoyment of other fundamental human rights, as a right which ensures transparency in the public administration activity.
- The Constitution provides the general restrictions available for all human rights and specific restrictions as the protection of personal data.
- The Constitution provides the mechanisms to protect the right to information through the administrative appeal, judicial appeal and to the People Advocate.
- The right of information is protected even by law. Law No. 8503, on 30.06.1999 “On the right of information to official documents”, which generally satisfies the criteria of international documents, but it will be a qualitative step for the approximation of albanian law with the European legislation, the ratification of the Council of Europe “The right of access of official documents” adopted on 27.11.2008.
- Undertaking public awareness activities for the knowledge and the implementation of the law.
- Inclusion of a module on the right of information within the training curricula of public administration.
- The adoption and adaption of the functioning of the information offices with the Type Regulation recommended by the People Advocate in order to unify the practices of these offices.

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