Judicial civil procedure dragging out in Kosovo

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Abstract

This article tends to deal with one of the most worrying issues in the judicial system of Kosovo-the problem of judicial civil procedure dragging out. The article analyses the reasons of these dragging outs of the judicial civil procedure focusing on the context of one of the basic procedural principles in civil procedure-the principle of economy or efficiency in the courts. Dragging out of civil procedure in Kosovo has put in question not only the basic principles of civil procedure, but it also challenges the general principles related to human rights and freedoms sanctioned not only by the highest legal act of the country, but also with international treaties.

The article tends to give a reflection to the most important reasons that effect and influence in these dragging outs of civil procedure, as well as, at the same time aims to give the necessary alternatives to pass through them by identifying dilemmas within the judicial practice.

As a result, the motives of this scientific paper are exactly focused at the same time on identifying the dilemmas, as well as presenting ideas, to overstep them, including the judicial practice of the European Court of Human Rights on Article 6 of the European Convention on Human Rights, by which it is given the possibility to offering people efficient and within a reasonable time legal protection of their rights before national courts. For these reasons, the paper elaborates this issue based on both, the legal theory and judicial practice.

Keywords: Civil procedure, principle of efficiency, reasonable time, European Convention.

Introduction

As today the modern and democratic states pay the biggest attention to respect and promotion of human rights, of which it is also the right to a fair trial, this paper is focused specifically on this topic.

The right to a fair trial in itself includes the basic principle on the functioning of the civil judicial procedure, a principle in which it is based the reasonable time a fair trial should be proceeded within.

Because of the fact that these procedures are not proceeded within this time and by respecting this elementary principle, the paper is focused precisely in the most important indicators that influence in the dragging out of the procedures, starting from the point whether the dragging out exists or not; in case of a yes answer, which factors influence on it; the opinions of the practitioners of law; differences between theory and practice; the importance of the European Convention on Human Rights and its Article 6 on fair trial including the legal practice of European Court on Human Rights, and finally recommendations on improving this situation.

The principle of efficiency in civil judicial procedure

Law as a group of legal provisions by which the different legal relationships within the society are regulated, *ultima ratio* intends to protect the subjective rights of individuals, respectively gives the opportunity to everyone to ask for a judicial protection of these rights.

As a result, it has become the division of law into two basic branches: the material law, by which there are given the subjective rights to an individual, and the procedural/ formal law, by which these individuals is given the possibility to demand for a protection of their rights. So, it is civil judicial procedure the process regulated by legal provisions in which it is made recognition, creation and realization of subjective rights of private individuals.

If we go back in time, in the history of human rights' birth, we may come to a conclusion that the main aim and meaning of peoples' freedom have been demanded and found in limitation of state's authority and protection of an arbitral act of states' apparatus. This protection of basic rights and freedoms must be efficient,…(Hasani & Ukaloviæ, 2013, 2015).

One of the basic principles of civil procedure is absolutely the principle of economy/ efficiency in judicial procedure, a name of the principle normally created by legal theory based upon legal provisions. As a result, similar to any other activity, the procedural activity also must be completed within the shortest time, using as less work as possible and small expenses (Brestovci, 2006, 37).

Because of this importance, nowadays in democratic states the intentions are directed towards creation and reforms within the judicial system in order that the citizen is given the adequate judicial protection of its rights. In this line, also it is the Law on Contentious Procedure of Kosovo (now and therefore LCP) which has given the basement of this principle in article 10. The court is bound to try that the procedure is ended without dragging out and with fewer expenses possible, and make impossible any misuse of procedural rights by the parties to the contest (Law on Contentious Procedure, 2008, art.10).

It is seemed that principle of efficiency is one of the basic principles that run a fair trial within the judicial system of any state, and the same is in Kosovo, too. Because of this highly impact, the states take care of incorporating it in their legal provisions. In this context, the same is to Kosovo's situation. Referring only to the civil judicial procedure, there are a number of legal acts in which this principle lives in.

First of all, the Constitution of Kosovo of 2008 has foreseen it in three of the most important articles, such as articles 31, 32 and 54 referring to human rights and freedoms, specifically within the article 31, pars. 1 and 2, stating that *"everyone is granted equal protection of his/her rights before courts, other official institutions and public authorities"*, and *"everyone is entitled to a fair and impartial public hearing for decisions regarding to right and obligations or for any criminal charge against her/him within a reasonable time, by an independent and impartial court as founded by law"*. By these, the Constitution has intended to put on the basement of a guarantee to each citizen, because *"a very important constitutional guarantee that protects individual freedom of individuals relates to the right to a fair trial. This right includes some guarantee and special*

constitutional rights aiming to give the individual a fair trial, correct and impartial".
Except this constitutional guarantee, the citizens are given the legal guarantees for such a right, naming here specific laws such as, the Law on Contentious Procedure and Law on Courts within article 7, pars. 2 and 5, we cite *"everyone is entitled to an equal approach within courts and anyone is not neglected the right to a fair trial in conformity with regular legal procedure or the right to equal protection as given by law. Each physical or legal person has the right to a fair trial and within a reasonable time"*, and *"all courts must function fast and efficient when deciding cases".*
Ending this, it is not only the national legal protection ensured to people in Kosovo, but also there are lots of international legal acts that are in force in Kosovo and individuals may refer to them when dealing with this principle. In fact, none of these legal acts are ratified by the usual procedure of ratifying international acts, but Kosovo intended to make enforced within its territory by article 22 of the Constitution, according to which, these acts are directly applicable in Kosovo. As a result, in this list we may refer to The Universal Declaration on Human Rights of 1948, and The European Convention on Human Rights of 1950 (now and therefore ECHR). Making a comparison to the abovementioned constitutional provisions and article 6 of the ECHR, it is seemed quite easy that, in fact, the Constitution, at a maximum, has incorporated the formulation and meaning of this article when referring to the standard of a *"fair trial within a reasonable time".*

The trial within a reasonable time and article 6 of European Convention on Human Rights

As already mentioned and elaborated as above, it is seemed that when referring to the principle of economy/efficiency in the civil judicial procedure, the focus at all is given to trails ending within *"a reasonable time".* In fact, the aim of this principle is precisely this, that a procedure is ended as quickly as possible without making unnecessary expenses within a reasonable time.
But, even though this notion of "a reasonable time" is so important for a fair trial, until now there is no legal act, not national, nor international, that has specified what time is included within this standard. However, it is the judicial practice of the European Court of Human Rights that has created it, but on the other hand it has also not specified what period does it include. Even this Court, has not been able to specify that for example, the reasonable time means a trial's maximum lasting for 2, 3 or x years, however, according to this Court's practice, when deciding, whether this standard, is breached or not by national courts, bases on some criteria. The standard of "reasonable time" as foreseen in article 6(1) is a subjective standard that may change in civil and criminal cases (Gomien, 1998, 41). The trial within a reasonable time is not a fixed category strictly foreseen, but it is a standard that the Court appreciates in a special way in each individual case (Zendeli, 2009, 3).
As a result, those famous criteria that the Court uses when deciding if there is a breach or not of the standard, include the followings: the complexity of the case; the behavior of the party itself and the behavior of the state's authorities for that case (Interights Manual for Lawyers, "Right to a fair trial under the European Convention

on Human Rights (Article 6), 2009, 52).

Even though, it is well understood that legislation has sanctioned very well this principle, the practice is unfortunately very differing. In Kosovo, there is a general principle that a civil procedure may last at a maximum of 90 days from the day of the submission of the claim. So, the law has made efforts to point some basic procedural deadlines, which in fact if there were to be respected, there would be no breach of the standard in article 6 and other constitutional and legal provisions. Taking some specific examples, the LCP in article 400 par. 4 has foreseen that the preparatory hearing should be held within 30 days from the day that the court has received the respondent's answer; article 421 par. 2 has stated that the main hearing should be held at least 30 days after the preparatory hearing, or exceptionally as foreseen in article 441, pars. 1 and 2, in cases of any necessity to postpone the hearings by court's or parties' request, the hearing may be postponed for a maximum of 30 days, but never in an unspecified date.

Law has intended to make these regulations by appointing such deadlines because it is a fact that in Kosovo, especially civil procedures last for many years, as a result of which parties get exhausted of them, while the courts are full of work, and it is usual that they cannot finish them by the end of the year, but old cases transfer for many times from a year to another.

At this stage, the question raised, is that of which are the indicators that influence these exhausting procedures! By a simple research it seems to be obvious, that the main factors to indicate on this situation are: not enough judges; absence of enough civil administrative staff, and a great number of cases in courts, which are difficult to be dealt by the small number of judges.

That this is a fact, it is seemed by the periodical reports of the Kosovo Judicial Council, which, every six month publishes statistics on courts' efficiency. In the Council's Report of the first 2015 six-month period (Kosovo Judicial Council, Statistical Report of courts-first 2015 six-month, 1), it is presented the number of cases, as well as, the judges' efficiency during this period in completing the cases that were transferred from past years, and their ability to manage with new cases during the first six-month period of 2015.

Based on this Report, in all the regular judicial system of Kosovo, including the Supreme Court of Kosovo, the Special Chamber of the Supreme Court, the Appeal Court, and Basic Courts, there were only 321 judges who worked on cases' decisions, and 1437 civil servants to assist them. As seemed from this Report, the judges in Basic Courts were the ones to be the most exhausted workers on solving the issues before them, on a number of 561,139 cases, of which at the end of the first 2015 six-month 165,253 cases were solved, while for the next second term there were 395,886 other waiting to be solved.

Even though, basic courts lead with the highest number of unsolved cases, the other courts, such as the Appeal, the Special Chamber and the Supreme Court are not in any better position rather them, because unfortunately, they are also full of unsolved cases, too.

As it seems, our courts are facing off with a drastic number of cases dealing with, which when put in comparison with the number of judges working on them, is

disproportionate. It is impossible for such a small staff of judges to solve these great numbers of issues.

In fact, this disproportion between the number of judges and the number of cases is the principal reason on which the judicial system bases on to pretend its innocence of long lasting procedures, but this argument seems to be not so acceptable before the European Court in Strasbourg. This Court states that it is the state the one that is bound to take care of offering an efficient administrative organization, by which it will not be possible to face with these dragging outs of the procedures. The Court has repeated that "*it is the duty of contractual states (analogia iuris in Kosovo upon article 22 of the Constitution) to create an efficient judicial system in such a way that it guarantees to its citizens the right to a final court decision within a reasonable time*" (Edel, 2007, 14).

It is uncontested fact that the number of judges is very small in proportion with the number of cases, as it can be proved by the example of the Basic Court in Prishtina and its branches, which at the period for which the report was published was working with a capacity of 75 judges, while there were 135,801 unsolved cases. Making a simple calculation, all these 75 judges had to solve 301.78 cases per month each judge, which is absolutely impossible, not only as this is a huge number, but we do not put in the calculation new cases to come during this period.

It is an important fact to be mentioned that this is not a new problem our courts are facing with. In 2006, the Organization for Security and Cooperation in Europe (now and therefore OSCE) had published a report with its conclusions specifically on the issue of dragging out of civil procedures. This report pointed out that it was the huge number of unsolved cases that influenced on the dragging out of civil judicial procedures (OSCE, First Evaluation of civil justice, 2006, 7). And the fact is, unfortunately, even after 10 years Kosovo judicial system is facing of the same problem. From many of its supervision, the Report mentions also practical cases in which civil procedures had lasted for many years, whereas some of them were still waiting to be proceeded. So, in the ex-Municipal Court in Gjilan, the plaintiff has submitted its action in 2003, without specifying the respondent's address, while the Court did not notice this absence of the and after 2 years when it appointed the preparatory hearing in which the respondent did not present, the Court noticed of its mistake. Thus, it decided to give to the plaintiff a time limit of 15 days to correct its action, but the other legal breach consisted on postponing the hearing for an unspecified date (OSCE, First Evaluation of civil justice, 2006, 9).

Similar to this, were the findings of the Institution of the Ombudsperson of Kosovo, who recently, in November 2015 published its two newest reports on breaching the principal of efficiency as incorporated in national legislation and article 6 of ECHR by national system. The first dealt with a long lasting procedure before the Basic Court in Prishtina/Branch in Graçanica, where the plaintiff submitted its action in 2009, but the preparatory hearing was held only after 4 years in 2013, and after that year no other action was taken by the court (The website of the Ombudsperson of the Republic of Kosovo offers specifically cases in which were found out such breaches, http://www.ombudspersonkosovo.org).

If making a simple calculation in this branch, it is seen that there is only one judge working in the Branch in Graçanica, while according to the Report of the Council,

this court deals with 738 unsolved cases at the end of the reported period, which means that it would be impossible only one judge to have finished all these cases during the other six-month period of 2015.
The other case dealt with an executive decision E.nr.193/2008 issued by the Municipal Court in Prishtina in 2008, but had not been executed even after approximately 8 years (http://www.ombudspersonkosovo.org).
Not so different from the conclusions of the OSCE Report, the Ombudsperson found that in both cases was breached the principal of efficiency as well as, the right of the parties as foreseen under articles 31 and 32 of the Constitution and article 6 of ECHR.
What is important is the fact that, not only the people of Kosovo are faced off with this problem. It is the judicial practice of the European Court in Strasbourg that dealt with a huge number of cases raised because of the breach of this principle foreseen in article 6 of the Convention. In the Bekerman vs. Lichtenstein Case (2015), the Court held that article 6 par. 1 of the Convention was breached, because the standard of "reasonable time" by the national court was not respected. The whole procedure had started in 2001, by a request of the plaintiff to prove its right to property, but the procedure rotated inside the judicial system for more than 10 years, which was enough to the Court to decide that there was breached article 6 of the Convention (European Court of Human Rights, Judgment, Bekerman v. Lichtenstein, 2015). Similar to this, the Court held on "Dery vs. Hungary" (2015), "H.K. vs. United Kingdom" (1987), and "X. vs. France" (1992). In all of them, the Court found that the states failed to act in conformity with their obligation taken by the ratification of the Convention on offering to their citizens the opportunity to realize the right to a fair trial within a reasonable time without any unnecessary delays.

Conclusions

It is a fact that the national judicial system is faced with permanent delays of regular judicial civil procedures, that the number of cases and the judicial staff, including judges and administrative servants are highly disproportionate and that people are faced with an absence of legal security of receiving the right protection of their constitutional right to a fair trial. For these reasons, it is obvious that we must take important steps in order to evict continuously this repeating problem over years. Starting from the professional institutions, where new generations of judges are educated, applying stricter criteria's on their evaluation; increasing the number of new generation judges in each court; familiarizing the people on using other forms of solving their disputes such as arbitration or mediation would make a great effect on minimizing the problem of civil procedure dragging outs, and by this the reliability on the national judicial system would increase gradually.

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