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ARTICLE 13 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE LEGAL SYSTEM OF THE REPUBLIC OF KOSOVO

Abstract

Civil legal protection of individual rights is guaranteed by constitutional and legal provisions of Republic of Kosovo¹. Given the old legal principle that justice delayed is justice denied, modern constitutions guarantee to their citizens the trial of their cases by a court established by law which must adjudicate the case within a reasonable time. This right is guaranteed by the Republic of Kosovo with its constitution. Therefore, it can be concluded that Kosovo guarantees the right to trial within a reasonable time. This right cannot be materialized without the existence of an effective legal remedy which would enable the party to at least be indemnified because its case was not resolved by the court within a reasonable time. Adjudication of the case within a reasonable time in addition to the Kosovo Constitution is also provided by the European Convention on Human Rights (hereinafter: ECHR). Also, ECHR Article 13 provides for the obligation of states to enable their citizens the use of an effective remedy to protect the rights provided in the Convention. The Republic of Kosovo has no effective remedy for the protection of the right to trial within a reasonable time.

Keywords: Legal remedies; ECHR, the Constitution of Kosovo, Trial within a reasonable time.

¹. Article 31 of the Constitution of Kosovo and Article 252 of the Law on Contentious Procedure of Kosovo.

INTRODUCTION

The objective rights guarantee Kosovo citizens the rights assigned by civil law nature such as the right to property, the right to enter into contractual relations, the right of inheritance, etc., while subjective rights are used by subjects of law because they stem from the objective rights. The entire corpus of rights would lose its meaning if the state with its power of the state would not guarantee the realization of these rights. This is due to the fact that the rights of legal entities (legal and natural persons) recognized by the objective right may be affected by illegal actions of third parties. The state should create mechanisms that provide legal protection for the subjective rights which are violated or threatened. The state of Kosovo has created a solid mechanism for protecting subjective rights, by approving laws, establishing courts, defining the powers of the bodies which should protect these rights etc. One of the essential human rights enshrined in Article 31 of the Constitution is the "trial of the case within a reasonable time". This basic human right enshrined in the Constitution and ECHR is ineffective unless there is a legal mechanism that sanctions the state for non-compliance to the right to trial within a reasonable time.

The situation in Kosovo judiciary as regards the trial within a reasonable time is alarming. There are lengthy civil proceedings and therefore the realization of subjective rights is inefficient and it imposes the need to take radical measures to change this situation.

The solution to this problem depends on many factors such as: a) - the organization of the judiciary; b) - systematization of jobs; c) - profiling of judges and lawyers; d) - the financial support of the judicial system, etc.

Law on Contentions Procedure of Kosovo (hereinafter: LCP) contains basic principles which contribute directly to the effectiveness of the procedure as:

1. The principle of cost - which means using the minimum resources to achieve the goals of the civil procedure; and

2. The principle of prohibition of misuse of procedural authorizations - which means that the parties must conscientiously use procedural authorizations².

Article 31 of the Constitution of the Republic of Kosovo and Article 6 of the European Convention on Human Rights, guarantee the right to a trial in a reasonable time. This right should be of substantial, not just formal character. The realization of a subjective right after a long time of its violation loses its social effect.

ECHR text gives no response to the question of what is considered "reasonable time". It is very difficult to say what is the position of the ECHR regarding the reasonable time within which national courts should resolve the cases. A formula of a trial within a reasonable time is contained in the so-called formula 3+2+1. This means that in cases where the procedure is not considered complicated, it is considered that the court of first instance should take the decision within 3 years from the date of commencement of the proceedings, the court of second instance within 2 years, while the court of third instance 1 year from the date of submission of the case to this court³.

The European Court of Human Rights (hereinafter: ECHR), in its decisions, has set out the criteria which must be taken into account when assessing whether the principle of trial within a reasonable time was violated, such as:

1. Complexity of the case in trial;
2. Conduct of the applicant;
3. Conduct of the judicial authorities;
4. The importance of the case for the claimant.

- The case may be called complex if in its resolution, a number of facts in dispute must be verified. In addition to the number of facts that must be proven by means of probation there are other factors as well to be considered that affect the case complexity. These factors may include: voluminous material, nature of contentious legal issues, obtaining of evidence through legal aid,

². See Articles 9 and 10 of LCP.

³. Medjonarodno Pravo Ljudskih Prava (International Law on Human Rights), Dimitrijevic et al, Beograd, 2007, p. 198.

etc. If according to the above criteria, the case is considered to be complicated then the period for resolving the issue by the judiciary could be longer.

The European Court of Human Rights in the case “Beshiri and others against ALBANIA” stated as follows:

The Court reiterates that the length of the proceedings should be reasonably estimated on the basis of some specific circumstances of the case and considering the criteria set in the jurisprudence of the Court, in particular the complexity of the case and the conduct and the relevant authorities. The Court reiterated that the period to be taken into consideration began on an unspecified date in 1997, while B.N. initiated proceedings in the Tirana District Court and they ended on 24 September 2002, when the Constitutional Court's decision was filed in the registry of the European Court. Thus, the process lasted about five years and eight months in total for six levels of jurisdiction. It considered that the case in question was dealing with a complex factual situation where the courts had to determine the property rights of the applicants on the basis of complex expert reports.

In some circumstances, the total period in each jurisdiction level cannot be considered unjustifiably prolonged. Moreover, the applicants failed to demonstrate that there had been any significant period of inactivity on account of judicial authorities during the process.

- The conduct of the applicant is also considered by the ECHR when it considers whether the applicant's right to a trial within a reasonable time was violated. The party is requested to implement procedural actions on its part and to refrain from delaying tactics of the process and also to use domestic legal remedies that are in function of efficiency.⁴

It considered that the party is acting irresponsibly:

- a) If it is absent from the hearings and due to this, it comes to the cease of the procedure;
- b) If very often, without any reason, requires the postponement of hearings;
- c) If it does not tell to the court the exact address;
- d) If very frequently changes the proxies (attorneys);
- e) If it introduces new facts which must be verified and in the end, they come to be false;

⁴ . Unión Alimentaria Sanders SA v. Spain, 1989, p. 35.

f) If it fails to submit the necessary documents to proceed with the case.⁵

In all these cases, despite the excessive length of judicial proceedings beyond reasonable limits, the state cannot be held responsible for violations of the right to a trial within a reasonable time. We consider that such position of the ECHR is fair and in accordance with the principle of fairness, because the state cannot "be charged for" prolongation of the process even when the party itself is not prompt and directly affects the stalling of the judicial process.

The conduct of state bodies is a key factor which ECHR takes into account in its assessment of the duration of the trial. Although civil proceeding is traversed by a series of actions the enactment character that depend mainly on the parties to the proceedings, the court has to be active since under the provisions of the Law on Contested Procedure of Kosovo (LCP), it must ensure that the trial take place without delay, it even has the authority to sanction parties if they deliberately delay the civil procedure. In the case known as Bucholz v. the Federal Republic of Germany, 1981, p. 50, ECtHR held that the court is obliged to prevent the misuse of procedural authorizations of the parties to proceedings. Article 404.4 of the LCP provides that the preliminary session should be convened no later than within 30 days from the date on which the court has responded to the claim of the respondent. Reality shows that there are cases when judicial hearings of preparatory character are set after 5 or 6 years from the day when the court has received the response to the filed motion. There is no doubt that if Kosovo were a member of the Council of Europe, it would have to pay to its citizens a considerable sum of money for the damage suffered by the violation of the right to a trial within a reasonable time.⁶ In the case Caleffi v.s. Italy, the European Court of Human Rights recalled that everyone has the right to a final decision within a reasonable time in the determination of his/her civil rights and duties. It is the duty of Contracting States to organize their legal systems in such a manner that their courts can meet this requirement.⁷

⁵ . Ibid.

⁷ . Caleffi v.s. Italy [1991] , paragraph 17.

In the case *Ras v.s Russia*, the ECtHR found that we were dealing with a violation of the principle of trial within a reasonable time in a defamation trial because the court delayed for 11 months to make the text of the judgment accessible to the applicant.⁸

The right to a hearing within a reasonable time has to do with the time from when the proceedings are taken until the court decision becomes final and is enforced. All these ECtHR decisions cited indicate that the right to a trial within a reasonable time is not only guaranteed by the ECHR, but the ECtHR by its decisions proved that this right is not only formal but also substantial. The right to a trial within a reasonable time frame is associated with the legal security which the state must guarantee to each citizen or person situated in its territory. Without respect for this right, judiciary credibility will be lost and citizens' confidence in the judiciary will be seriously put at stake.

From the report of the OSCE Organization, presence in Kosovo is found that: "In addition to the pre-trial stage, the lack of case management is also present in other stages of the proceedings. The excessive number of hearings scheduled in the civil proceedings, the lack of proper planning of these sessions and the number of their postponements present other issues of concern. In this context, the opinion of the OSCE is that the applicable law should include a legal provision which would directly determine the general conditions for the postponements while judges should be assigned the responsibility for postponements which occur and which are not expressly permitted by LCP".⁹

These concerns of the OSCE Mission are still present in Kosovo judiciary, where is still continued with the same approach of unreasonable postponements of court hearings, the large number of ineffective sessions, no procedural actions taken for a long time, etc. All these actions violate the right of parties to a trial within a reasonable time.

Legal remedies for violations of rights guaranteed by the Constitution and the ECHR

⁸ . *Ras v.s. Russia* [2005] , paragraph 25.

⁹ . OSCE Mission, 2006 Report "First review of the civil law system" June 2006.

In order to guarantee human rights, it is not enough that they only be provided by domestic and international law, but the state should create mechanisms that make realizable human rights in practice.

One of the fundamental rights guaranteed by the Constitution and the Convention is the right to use the legal remedies that would be in function of the protection of these rights. Kosovo legal system guarantees to any of its citizens or any person who is in its territory the right to have his/her case heard by a higher court instance. So, in other words, the right to use regular legal remedies is guaranteed.

In justice in general, the use of the legal remedy should result in a return to the situation before the violation of a legal right or interest, or if such a thing is not possible, the damage be compensated. Therefore, we can say that the purpose of the use of a legal remedy is either restitution or reparation.

Some human rights provided in the Constitution of Kosovo could be protected by legal means, while some of them cannot be protected in court. Thus, for example social and economic rights such as the right to work, right to social welfare, etc., cannot be protected by filing the lawsuit in a court. Otherwise, a Kosovo citizen who is unemployed would be able to sue the state for his unemployment. However, the majority of human rights can be protected by filing individual legal remedies before the courts in Kosovo. The legal system of Kosovo guarantees legal protection of civil nature rights, privacy, human dignity, etc. In case of their violations, citizens can address the justice institutions to restore violated rights, or if such a thing would not be possible, to compensate the damage.

However, there is a fundamental right guaranteed by Article 31 of the Constitution and Article 6 of ECHR such as the right to a trial within a reasonable time for implementation of which the Kosovo judicial system does not provide any legal remedy to protect it. In fact, the greatest violation of human rights in Kosovo most notably has to do with the violation of the right to a trial within reasonable time periods. Therefore, the provision of such legal means is of significant importance.

The need for issuance of the special law for the realization of protection of the right to trial within a reasonable time

The right to a trial within a reasonable time cannot be realized only with a simple provision of this right in Article 31 of the Constitution of Kosovo. The right to a trial within a reasonable time is a derivative of the general law for the protection of subjective rights. Organic laws, especially procedural ones, promote efficiency of civil procedure, stipulating that the contentious procedure must take place quickly and without procedural delays, as well as provide for sanctions for misuse of procedural authorizations. Article 10.1, the court has a duty to try to have proceedings without delay and minimize costs, and make impossible any misuse of the procedural rights of the parties according to this law. However, this law and other laws of procedural nature do not provide for the responsibility of the state for inefficient work of courts.

Republic of Kosovo, being not yet a member of the Council of Europe, is "benefiting" from the objective impossibility part of the citizens of Kosovo to address the ECtHR for violations of the right to trial within a reasonable time. On the contrary, Republic of Kosovo with an average of 5 years for the resolution of civil cases in the first instance, should pay billions of euros in damages to its citizens because of violations of this right, as is the case with the Republic of Albania.

In Judgment V.A.M. against Serbia, the ECtHR found that in the legal system of Serbia citizens do not have available "effective legal remedy" for the protection of the right "to trial within a reasonable time" guaranteed by Article 13 of the ECHR. This article guarantees the use of effective legal remedies for the realization of the rights arising from the Convention.

In another case, the ECtHR has taken a very interesting position:

Regarding the applicants' submission that they had no effective legal remedy available in respect of the above complaint, the Court notes that Article 13 applies only where an individual has an "arguable claim" to be the victim of a violation of a right, according to the Convention.¹⁰

¹⁰ . Beshiri and others against Albania 22 August 2006.

In this case, the ECtHR has held that Article 13 of the ECHR can be applied and this court may conclude that the applicant lacks an effective legal remedy to challenge the judgment in a reasonable time, unless this court finds that the state is responsible for stalling the civil procedure.

It can easily happen that in family disputes in which legal component is manifested in addition to the social component, disputes drag on for years and for that period of time do not allow contact of a child with his/her parents. Inability to use a legal mechanism to expedite proceedings or to compensate for damage due to the unreasonable extension of the judicial process undoubtedly constitutes a violation of fundamental human rights.

CONCLUSIONS

1. In the Republic of Kosovo, its citizens have no effective legal remedy by which to protect their right to a trial within a reasonable time;

2. In cases, which are not considered complex, the ECtHR has determined the formula 3+2+1, in which civil cases, including the enforcement of judgments, should be completed in 3 years in the first instance, 2 years in the second instance and 1 year in the supreme court;

3. Lack of effective legal remedies for the protection of the right to a trial within a reasonable time, makes Kosovo citizens apply directly to the Constitutional Court of Kosovo for violation of this right;

4. The Republic of Kosovo should issue a "lex specialis" to protect the right to trial within a reasonable time, which should regulate the legal remedies that will be a function of expediting the procedure; legal remedies that would enable compensation for material and immaterial damage due to violations of this right; sanctions for all judges who contribute to stalling proceedings, etc

Reference

- Article 31 of the Constitution of Kosovo and Article 252 of the Law on Contentious Procedure of Kosovo.
- Beshiri and others against Albania 22 August 2006.
- Caleffi v.s. Italy [1991] , paragraph 17.
- Medjonarodno Pravo Ljudskih Prava (International Law on Human Rights), Dimitrijevic et al, Beograd, 2007, p. 198.
- OSCE Mission, 2006 Report "First review of the civil law system" June 2006.
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