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SOCIAL AND CULTURAL FACTORS AS A CAUSE OF ENCROACHMENT OF THE RIGHT TO A FAIR TRIAL: CASE OF KOSOVO

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Abstract

Through this study, we will make an analysis of the legal resources of the right to a fair judgment in Kosovo by putting into place standards that are applicable in other countries as well. We can see that the right to a fair trial is not just a purely of formal right, it makes sense when the other demands of social and cultural nature are enviable to enjoy as for the right. This work will not be limited to treat the right to a fair judgment from a purely legal dimension but will treat also other social and cultural impacts that are important that this right to be accessible for all citizens indiscriminately. We will address the impact of the general living conditions, respectively the living standard and the level of cultural emancipation as a key factor in the enjoyment of the right to a fair trial. The purpose of the work focuses on treatment of these aspects, which are not of legal nature but are extremely important to have and to enjoy as for the right. Simply, we will try to emphasize that social and cultural factors cannot be abstracted when the right to a fair trial is treated.

Keywords: Right to a Fair Trial, Social and Cultural Factors

1. Introduction

On this work, we will present the specific influence such as poverty and the level of intellectual development in the enjoyment of the right to a fair trial in criminal proceedings in Kosovo. These are two of the informal factors that directly affect the enjoyment of the right to a fair trial. However, these factors are not the only ones that influence informally the enjoyment of the right to a fair trial in criminal proceedings. Certainly, there are other factors, but for the purpose of this work, we will treat these two important factors. The right to a fair trial is not simply a formal right, it goes beyond the purpose of the legal norm as a concrete regulation and relates to the dynamics of social life and other aspects that consist this right.

Social and cultural environmental factors contribute to the inability of enjoying inadequately way the right to a fair trial, a generally accepted right, which is promoted through many international instruments that guarantee civil rights and freedoms, reflecting most state legislation as an internal individual right. Investigations and changes that have been made in many countries have drawn very interesting conclusions, many citizens lacking in the necessary professional knowledge and minimum orientation to enjoy the certain rights in criminal proceedings have suffered and have failed to reach justice which belongs to them. The material condition is an important factor that prevents the access to justice and the enjoyment of other

procedural rights. Parties in the absence of optimal material conditions are reserved to receive professionally prepared and experienced lawyers in court cases and go to a handicapped trial in terms of the protection and fair representation of their interests in criminal proceedings.

Judicial corruption, lack of objectivity in trials, lack of professionalism by judges, prosecutors and other subjects involved in the criminal proceedings are the causes of the right to a fair trial not to be reached in criminal proceedings. These are just some of the factors that influence a guaranteed formal right with legal norms, not to materialize in practice and remain just an ideal to be achieved. Considering the space and concept of work, we will focus on addressing only the social and cultural factors that violate the right to a fair trial in criminal proceedings in Kosovo.

2. The influence of social conditions

All human rights are also related to the financial possibilities that are available in the state. Equality and the right to enjoy the rights without any distinction as a subject of the right of the other entity is not simply a formal act, it is required that the same rights be real and accessible for each citizen inside the state organization.

The Constitution of Kosovo, human rights, gives it a distinctive feature, specifying it inseparable, inalienable and inviolable, and as the basic foundation of the state's legal order (Kosovo Government, 2008, s.21, (1)). Constitutional and legal norms that guarantee individual rights operate erga omnes and these rights may be restricted by law only to the extent that it is necessary for an open and democratic society to fulfill the purpose for which restriction is permitted. (Kosovo Government, 2008, s.55,(1,2)) The restriction of the rights and freedoms guaranteed by the Constitution does not deny the essence of the guaranteed right. (Kosovo Government, 2008, s.55,(5)).

The constitution in its introductory part - preamble, pledges that Kosovo to be a state of economic well-being and social prosperity and expresses its commitment to the creation of an equal citizens' state, which will guarantee the rights of every citizen, civil liberties and equality of all citizens before the law. The observance of human rights and freedoms and the rule of law, principles of freedom, equality, non-discrimination and social justice, under Article 7, are part of the constitutional order of Kosovo as the fundamental value of the state.

Considering the way of building its citizenship, Kosovo has found the solution of social justice and the offer of equality and the prohibition of discrimination to emplace as its inalienable value in its highest legal act. In the state of rights, not only formal legal recognition of freedoms and rights is emphasized, but also their effective exercise. Governments should be active in ensuring the full development of the individual and their effective participation in social formations throughout and through which they realize their civil, political, economic, social or cultural rights. (Martines, 2011). A right guaranteed by applicable legal norms is not sufficient unless the same is practically guaranteed and to create the appropriate conditions to make them accessible and not to depend on other factors.

2.1. Overview of Living Standards in Kosovo

Kosovo has a population of 1.8 million, GDP per capita of \$ 3,579, poverty rate of 29.7%, the unemployment rate of 32.9%, while the human development index is 0.714. On the United Nations Program for Human Development Report for 2015, Kosovo has not been separated from Serbia with which it has been in a common state until 1999 and is rated in the list of highly developed human development countries (United Nation Development Program, 2015). The poor economic standard of the population in Kosovo is not the only cause of violating the right to a fair trial in criminal proceedings. It is geographically located in a territory where the pressure from the European Union and the USA is at a high level for achieving the criteria for democratizing the country as quickly as possible and strengthening the state of law and of the rights. The above data orientally have a negative influence on the enjoyment of rights guaranteed by international acts and the legal order in the country, and consequently, also the right to a fair trial is no exception to this situation.

2.2. The Living Standards and Institutional Independence and the Impartiality

Institutional independence is one of the fundamental elements that ensure the right to a fair trial. Independence of the judicial system is not enough just to be guaranteed in the formal aspect, it should seem persuasive in the public eye. ECHR in the case of *Campell and Fell against The United Kingdom* has considered these elements to determine when a court is independent: the method of appointing of its members; duration of their assignment; the existence of guarantees against external pressures and issue the body represents a semblance of objective independence (*Campell and Fell v. the United Kingdom [1984]*).

The financial independence of the judicial system guarantees a judiciary less dependent on other jurisdiction and external influences in relation to the judiciary. Financial independence gives greater immunity to the management of the judicial system to be more professional and closer to attainment the goals of giving justice.

For the past decade, Kosovo's judiciary salaries have been insufficient to attract and to retain qualified judges or to enable the judges to keep their families without having to look for external sources of income. Continuous insufficiency has reflected a drastic and lengthy situation that is widely perceived as the source of most of the serious problems of the judiciary (National Council for European Integration, 2013). From January 1, 2011, the salaries of the judiciary have been raised and equalized with the positions and with equivalent salaries in the executive branch of the Government. This step has been accepted as something that should be done long time ago and as critical to supporting other reform efforts in the justice system.

It gives an important weight to the financial independence of judges, recommending the related issues from the independence, efficiency, and accountability of the judicial system, that the compensation of judges should be in accordance with their profession and responsibilities, and to be sufficient to protect them from the incitement that intend to influence their decisions.

Until 2014, the motivation of the judge to deal with complicated criminal cases was not consistent with the nature of the work. After the salaries of judges were determined and comparatively levelled according to the Law of Courts, they did not have the encouragement to stay in the Department for Serious Crimes and increased the interest in moving to other departments that could objectively provide them the smaller pressure during the performance of their duties on the judicial system. Such concerns were the basis for reflection of the Government of Kosovo, raising 25% wages for 84 national level judges that are part of the Department of Serious Crimes. Moving from this situation to the better level for a category of judges certainly increases the dissatisfaction to other judges that are in the same judicial positions but being accommodated in other departments.

The total budget of the Kosovo Judicial Council (KJC) as a budget organization and its programs for 2016 according to the Budget Law of 2017 is € 20,465,768 for a total of 2,159 positions, of which 453 are judges and 1,706 administrative positions (Kosovo Judicial Council, 2016). Salaries for the held positions in the judicial system are determined by law, while the transfer of funds proceed according to the respective budget procedures on the foreseen deadlines in the KJC account as an institution that has a constitutional mandate for the managing with the judicial system.

2.3. Standard of Living and Timely Judgment

The living standard does not affect only in impartial and independent judicial decisions but is also related to time trials. An issue raised by the judicial authorities requires solutions in an optimal time. In addition to the side above, and this section has a significant influence that violates the right to a fair trial. There are several reasons that make judgments to not end the cases in optimal terms.

2.4. Standard of Living and Equality of Arms

Equality of arms in criminal proceedings between the prosecutor and the accused is one of the fundamental criteria that consist the right to a fair trial. Equality of arms is a fundamental right in

criminal proceedings and relates to the full equality of parties under litigants in criminal proceedings related to the possibility of representation for the defense about the charges charged by the prosecutor. This means that anyone who is a pair to the process must have an equal opportunity to present their case and that no one of the pairs should not enjoy any significant advantage over the opponent. A fair balance between the parties must be established. (Mole & Harby, 2003)

Formally, the parties on the criminal proceedings are equal, as this is guaranteed by the international instruments, constitution, and legislation. The utilization of the possibility for the equality of arms in criminal proceedings is also related to the material possibilities that are available for the accused or his defense counsel, to present his case as the planned. The prosecutor, on the other hand, represents the public interest and at the same time is a state body, taking advantage of all the power it has to prove that certain individuals are responsible for violating the criminal norms, while the accused as an individual is a natural person facing these charges and if he/she wants, can also respond to the same with arguments which he/she thinks are the best for his interests in the procedure.

In the absence of sufficient professional knowledge, but also of the lack of experience and psychological state in which it is the same person in the judicial process he could engage the judicial defense in criminal proceedings to represent his interests. The commitment of qualitative protection attracts and costs that can be large and the accused can or cannot be able to cover them, where he will remain without a judicial defender in whom he wants to defend his legal interests.

In the absence of financial fund to engage the judicial defense, the court has an obligation to assign a judicial defense when for the defendant is required to apply the provisions of the mandatory defense that are provided in Article 57 of the Criminal Procedure Code of Kosovo (e (hereinafter "CPCK"). While the provision of Article 58 of the CPCK is provided the case when the judicial defense that defends the interests of the defendant, who did not appoint a lawyer at public expense, even the defense is not obliged.

To have an opportunity for a defense lawyer at public expense under this section, the defendant must complete a statement representing his assets and declare that he cannot afford the expenses of the legal defense (Code of Criminal Procedure, s.58 (4)). Depending on the criminal offense provided for the penal act, when s/he demands the justice interests, the judge in accordance with the provisions of the CPCK, can appoint a defense lawyer with the public expenses. The solutions are given with the legislation that regulates the area of legal aid are inclusive and non-discriminatory. According to the January 2009 Report on the Legal System published by the OSCE Mission in Kosovo, it is stressed that defense lawyer assigned according to the official duty, in many cases offer to the legal representation under standard and ineffective for their clients during the criminal proceedings. This can tread on the local and international law as well as their professional obligation to work with proper commitment. Also, this can have serious consequences during the criminal proceedings and directly affect the results of the judgments (Monthly Report, 2009).

The weak performance of duties by judicial defense assigned in accordance with official duty affects the rights of the defendant during the judgment and violates the lawyer's duty to give the right commitment. Monitoring of court proceedings has revealed that defense lawyers assigned often fail to offer their clients effective legal representation. The OSCE monitoring over the years has found that defense lawyer's assigned with official duty, in general, are passive, seemingly uninterested, often offer only formal representation and generally they fail to use the procedural guarantees designed to protect the rights of their customers (Organization for Security and Cooperation in Europe, 2009). Even though there is no dilemma that professional ethics should be decisive for a defense lawyer to have in one case, here happens the opposite, in cases when the case compensated by the defendant, the defense lawyer commits with all his professional capacity to offer the protection of his interests in the procedure, but in cases where he is engaged as ex-officio with public funds the same will have performance that fall in contradict with The Code for Lawyer, since this document obliges that the customer, regardless the deal nature, from the moment that has accepted to represent the defendant's interest, should have the ethic and the professional level as lawyer.

3. Cultural Factors and the Right Trial

Cultural factors have an impact on fair trial. Certainly, this does not directly affect the way in which we have discussed above the influence of social factors, but this indirectly affects this right to be violated and not sufficiently acceptable. The cultural factor, in this case, the intellectual development, has the greatest influence on the equality of arms in criminal proceedings. Many times, it may be an obstacle to the appropriateness for the development of the judicial process, since the accused party may not understand anything from the development of the criminal proceedings against him, and indirectly affects the enjoyment of the right to a fair trial. Also, it can directly affect the enjoyment of this right.

4. Illiteracy in Kosovo

The level of illiteracy is much higher at older ages. According to the AEF, while the level of illiteracy is about 0.5 percent of the population younger than 26, it increases to about 49 percent, with the population of ages 65 and older. Even the results are not fully comparable from several studies, it seems that illiteracy is decreased in rate of 6.5 percent in 2000 (UNDP), 5.9 percent in 2002 (based on AEF), and 5.8 percent in 2003 (World Bank, 2005).

Evidence shows that in comparison to urban areas, adult literacy in rural areas is higher, and for children seem considerably lower rate of finished secondary education. However, the rate for primary attendance is not different from rural and urban areas. Later, a rural disadvantage in secondary education is reflected in a large idle between urban and rural areas in proportion to adults with secondary or higher education.

Considering these statistics above, it may happen that the same persons who are on the list of persons without elementary and secondary school directly influence not to understand the nature of the charge against them or the judicial process that developed for their case. Normally in these cases, the defense is preferable and necessary, because the principle of a fair trial in the criminal proceedings will be directly violated. Also, although the trial in Kosovo proceeds in two languages, e.g. in Albanian and Serbian, as a guaranteed languages by the Constitution, in many cases, the trial applies in English when the judicial panels are from other states in Kosovo, such as UNMIK and EULEX, but always with a translation in the language that the defendants understand. Even in these cases, the translation may be inappropriate and create bad moments for all participants in the criminal procedure and not to convey the right message to what the participants in the criminal procedure meant and to create an unrealistic perception in the original understanding of them.

These situations create and delay the development of the judicial process because the parties and other participants in the criminal procedure create an atmosphere that the judicial process lasts beyond the normal legal deadlines and the trial will be a weak point that can be qualified a fast and fair legal process.

5. Conclusion

A fair trial, as a principle and as a fundamental right, is not simply a formal dimension defined by legal norms. It is more than a constitutionally guaranteed rule with international acts and with national laws. It is alive and touched, it should be a dimension that is seen to be happening. There are several circumstances and the most influential will be the social and cultural aspects of a society.

The social and cultural dimensions and their influence on a fair judgment in criminal proceedings are a reality that is present in criminal proceedings in Kosovo. These factors directly affect the enjoyment or the opposite for this kind of right guaranteed by formal legal norms. The progress that Kosovo is going through as a new country is in the increase and strengthening this guaranteed right. If we look at statistics, this right is moving more seriously and with a value importance, creating an appropriate space in state bodies when a defendant faces the state organs, by providing him all the guarantee procedural that belongs to him with international and internal acts.

The general working conditions of judges and prosecutors, also the financial independence at the institutional level of the judiciary in general, create optimal parameters for the judiciary to be independent and equitable. Independence and equitability are not just normative objectives, they are also the touchable realities that are present where judged and decided on the cases. Normally, in cases when the defendant is unable to face his case in the court as an independent pair and by representing himself as the defendant, a defense lawyer has to be assigned to the defendant. However, it often happens that defense lawyers are not interested in representing the legal interests of their client in the best possible way, in some cases by their involuntary, and in other cases by the lack of professional knowledge to deal professionally with the prosecutor of the case, or even with the judges who are judging in the concrete case.

The cultural level, education and the influence that illiteracy can have, indirectly affect to violate the right to a fair trial. The parties in these situations may not understand the nature of the accusations against them or even the nature of the trial that developed in their judgment case as defendants. Representatives with defense lawyers who are professionally in the level, but have also with his will to represent cases, can help them not be in the level of complete uncertainty and watching how will be decided against their case and they will not understand ever what is judged and decided.

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