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Determining Factors which Impact the Lawyer's Defense Preparation

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Abstract

The aim of this paper is relatedto one of the elements of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, namely the right to have sufficient time to prepare a defense in court.The study analyzesthe information about the objective or subjective elements that affect the extension or termination in the shortest possible time to prepare the defense and cases taken from the case law of the European Court of Human Rights.The study shows that there are some elements that affect time and efficiency in defense preparation, such as the behavior of the institutions of justice as well as the behavior of the complainant or the accused, the professionalism of the lawyer and the raltionship of trust between the lawyer and the complainant or the accused. The preparation of the defense is the main means of defending a legal right in court. In some cases, various cases have been brought before the Strasbourg Court where it is alleged that one party did not have sufficient time and facilities to defend himself.

Keywords: Strasburg Court, facilities to defend the rights, preparing the defense, professional training of the lawyer.

1. Introduction

The ECtHR underlined a reasonable time limit in the case of Anagnastopoulos and others v. Greece **(Anagnostopoulos and others v. Greece, 2000)**. Regarding the access to justice, the efficiency of a court's performance is divided into three areas: quality, accessibility and enforceability. The indicators that measure the quality of a due process of law are satisfaction, alternative services and grievance rates. The indicator that measures the enforceability of due process is generally the authority to exercise control. Access to justice itself is divided into two areas: affordability and timeliness. Affordability is about court costs. The deadline is measured by the rates of completion of cases and how much they are postponed in time. These barriers can be geographical, economic, and procedural **(UNICEF, 2007)**. They can be caused by deficiencies in the language and knowledge of individuals participating in court proceedings. Moreover, psychological barriers can be created by unfamiliar, inaccessible, unfairly complicated court proceedings that cause the population to withdraw **(UNICEF, 2007)**.Article 6 .3 3 (a) and (b) of the Convention "All charges of a criminal offense of the following minimum protection: a. to be informed as soon as possible, in the language he/she better understands, the nature and cause of the accusations against him; b. give him time and facilities to prepare his defenses. Defendants, without question, taking into account the cause and

circumstances of the cases, should at least provide information on the meaning of the charges against him. This information helps the accused to be properly admitted and facilitated in preparing the defense**(Guide of Council of Europe, 2014)**.Related to due process, there are more cases in court comared to any other type of right provided in the Convention **(Council of Europe, n.d.)**. We must distinguish the time needed to prepare the defense against the length of proceedings before the court.In its jurisprudence, the ECtHR has defined methods for calculating the length of proceedings. In administrative matters, the point of calculation is the date on which the first applicant refers the matter to the administrative authorities. In civil matters, the time limit corresponds to the date on which the decision becomes final.As above, we can not complain, e.g. in the Albanian Constitutional Court or the ECHR, about the prolongation of the time of preparation of the defense**(Musaraj, 2017)**.Judgment within a reasonable time is not a categorization of fixation and determination in another way, but it is a standard of a court of evaluation of a different type for each specific case.

2. Review of Related Studies

In the research of various studies on the reasonable time limit that a case requires, from the preparation of the defense by the lawyer and its trial in court, various authors have listed the causes of delays encountered by the lawyer, how the complainant can help and what more state institutions can do. The findings are influenced by the behavior of state authorities, the lack of trust between the lawyer and the complainant and the level of professionalism of the lawyer.These studies analyze not only theoretical data but also the decisions of the European Court of Human Rights and Fundamental Freedoms.**Gomien (2005)**supports the contribution of ECHtRwhich is expressed in its inclusion of a provision under which a High Contracting Party may accept the supervision of the ECHR, in cases where the one initiating the process is an individual and not a state. **Kelsen (1982)** found a positive relationship of national and international law. The complainants or the accusedinitially rely on domestic law to ensure the recognition and protection of rights but we must not forget the importance of international law. International law is valid for one state because it is recognized by it through an act that is in accordance with the domestic legal order, with the Constitution of that state **(Kelsen, 1982).Sefa (2008)** has noticed that despite the number of decisions given to our country, their impact on the Albanian internal system is direct. From an analysis of some of the most important decisions given by ECHR to Albania, it is noticed that the problems identified in the Albanian internal system, as well as the recommendations for taking measures of a general nature, are serious, important and very relevant. Some of these decisions highlight fundamental concerns of the Albanian internal system, which require the immediate intervention of state institutions responsible for its reform and compliance with ECHR standards.**Oeter (2011)**analyzes the indirect positive effect that the element of "reasonable time" has in the need to prepare the defense as soon as possible and to present it in court. Because the Convention must apply to many Member States whose legal systems are fundamentally different, the Court has given "autonomous" meaning to many of the terms in the Convention.If state authorities, the legislature or the judiciary violate international human rights, it is not intentionally done. They just aren't used to always having international human rights in mind.

Zendeli (2009)in his study supports the idea that the time which is calculated as a reasonable time starts to flow from the moment of initiating the appropriate procedures to the final moment in the highest possible instance.**Omari, L. Anastasi, A.' attitude (2008)**is similarto**Zendeli (2009)**. Efficiency in justice is an important criterion for the development and consolidation of a due process

of law as well as for the restoration of the rights of the parties allegedly violated. Therefore, these delays directly affect the parties in the process as the latter are violated, their constitutional rights and eventually the judicial process degrades into an ineffective process.**Boodoosingh, R.K (2013)**finds that the main criterion related to the time spent to prepare the defense in court depends on the lawyer's professionalism and training. From the moment of filing the lawsuit, the lawyer must know and understand well the law, the facts, the problems and the available circumstances.**Slater (2017)**agrees with**Boodoosingh, R.K (2013)**, whenhe states that being prepared gives lawyers the confidence they need to seize the moment. Attorneys are competing for the trust of the complanin or accused person and the confidence of the judge and jury as well.**Lee Gaudineer (1977)** goes further when listing some of the areas where the lawyer should definitely be prepared, as it consequently brings defense realized faster in time and more efficiently.He mentionsacquaintances ofknowing the current law on the subject, ascertaining the facts by the client, conducting an independent investigation, and using the necessary disclosure procedures after a lawsuit is filed.O'Neill specifically lists the 4 main pillars of the activity from the moment the lawyer agrees to defend a case. They relate to: explaining the options available in legal matter; discussing and defining the strategy, providing a timeline for the stages of defense preparation and necessityto answer the phone calls and client's questions.

3. Methodology

This research is realised by qualitative method based on record keeping and case study research from European Court of Human Rights.The qualitative method is used to gather the information about the objective or subjective elements that affect the extension or termination in the shortest possible time to prepare the defense. Cases taken from the case law of the European Court of Human Rights, explain why there are cases when more time is required to prepare the defense and how the complainant or the accused, can help.Judicial case decisions have been analyzed in terms of their reasoning and disposition. Researchers, in addition to the above, have intertwined practice issues with secondary sources such as various scientific documents or articles. These data givea clear picture of the causes, consequences and the need to have a reasonable time to prepare thedefense. On the other hand, what it's important to understand, that is not good to insist in any case, on rushing in defense preparation, if its quality is violated. Taking into account the large number presented over the years in the European Court of Human Rights, in Strasbourg, with the object of violating Article 6 of the European Convention on Human Rights, where one of the elements is the reasonable time that a case requires to be prepared and concluded with a final court decision, the need arises to strengthen the relationship between the legal counsel and the complainant/accused, legal counseland state and judicial institutions.

4. The necessity for a professionally trained lawyer.

The lawyer in the exercise of the profession acts in standard with the law, the Statute, the Code of Ethics and the legitimate interests of the client by providing him with professional support service in his best judgment.The lawyer should explain to the client the law and the line of action he will follow identified the possible legal consequences in his favor or disadvantage. The lawyer should respond to reasonable customer requests for information. The lawyer should inform his client about important matters that concern him with timely representation in order for the client to reasonably

protect himself, or take advantage of an opportunity provided by law, including any solution offered by the other party **(Advocate Code of Ethics, 2005, articles 2 and 16)**.Also he must provide quality representation to the client. Ability includes legal knowledge and professional skills that are needed in each case. The lawyer should not handle a case for which he does not have the necessary skills other than that when cooperating with a lawyer who is competent to handle it.He has the duty to develop his skills through continuous preparation professional programs**(Advocate Code of Ethics, 2005, article 7-9).**The right to be defended either by oneself or through a lawyer of one's choice, provided free of charge when required by the interests of justice (paragraph 3 (c)) **(Council of Europe, n.d)**. In this context, in the case where a prisoner was interrogated for almost seven days without being allowed to contact a lawyer, the Court held that there had been a violation of Convention's article, because the defense risked prejudice**(Öcalan v. Turkey, 2005).**One of these elements is also addressed to the lawyer. The lawyer needs to know what can be accepted and what the other party's claims are. For example, in a case of injury to a person, when the medical report is clear and categorical and there is nothing to defend over this fact, then the only weapon that would not be placed on the lawyer is the amount of damages, claiming as low as possible. The attorney has the duty to keep the client informed on the progress of the case. This is done to avoid any obstacles that may arise from the lack of communication between the lawyer and the client (**Boodoosingh, R.K., 2013, p.91)**.Lawyers must be credible, careful in acting according to the client's instructions and not to influence the client. A professional lawyer needs to know when the time is right to intervene, ask clear questions, summarize information, or even get the client to the proper course of the case**(Boodoosingh, R.K., 2013, p.54)**.Demonstrating knowledge of the facts offers the lawyer the opportunity to direct the course of the trial, just as the director of a film decides how and when to set the scene**(Slater, 2017)**.Preparation is not only a good idea tactically, but is legally and ethically required. Proper preparation includes knowing the current law on the subject, ascertaining the facts by the client, conducting an independent investigation, and using the necessary disclosure procedures after a lawsuit is filed **(Lee Gaudineer, 1977)**.Lawyer Andrew Willimas says that in a criminal trial, the rules of evidence can be complex. For example, during the course of a trial, unrepresented persons often ask questions which do not comply with the rules of evidence. He also explains that a good criminal lawyer will know what questions should be put to a witness and how the question should be framed. A criminal lawyer will also have a strategic plan for the cross-examination of particular witnesses which can ultimately change the outcome of the case.

5. Factors that determine the needed to prepare the defense

The following points and issues need to be addressed during the preparation of the evidence: Relevance. Evidence should be relevant to proving any of the facts or events of your case: Witnesses, verify the evidence, lay a foundation and logistical problems**(Preparing for trial, p.44)**.On the other hand, the client should be given the appropriate time to tell his version of events, in his own way. This is not only a good method of communication but also an ethical need. Understanding and analyzing the case allows the lawyer and his client to focus on the substance of the case, helping them to understand which part should be emphasized and what helps to anticipate the other party's claims. This analysis also helps to prepare the final conclusions, before the court makes a decision.The right to be consulted and to have all the facilities to prepare for trial is recognized in all the nature of the case. The ability of a party to consult the minutes of a civil case is a fundamental

expression of the right to have the "appropriate facilities" for the preparation of the defense. In the case of *Lobo Machado v. Portugal*, the ECtHR emphasized that the right to a trial where the principle of adversarial proceedings is respected means, in principle, that parties to a criminal or civil case have been given the opportunity "to know and comment on all evidence brought or submissions submitted, even by an independent member of the national legal service, which were intended to influence the court's decision". In the case of Nideröst-Huber v. Switzerland, the same court held that "… the parties's trust in the administration of justice… is basedon the knowledge that they have had the opportunity to express their views on any dossier". In this case, the Court found a violation of the right to a fair trial. The Swiss Cantonal Court had forwarded the appeal to the Federal Court together with the case file, which contained a page of submissions which had not been communicated to the applicant. The court stressed that it is up to the parties to say whether or not a document requires their comments **(OSCE, 2013, p.102)**.

In case of *Borisova v. Bulgaria*, where the ECtHR ruled that in criminal matters, the provision of full and detailed information to the accused and consequently the legal measures that the court must take in the present case is a precondition for ensuring fair proceedings. In this case, the Court found that the applicant had been informed about the charges against her only shortly before her appearance before the Pazardzhik District Court and that she had not had time to read the documents in advance. Although the file does not provide the time at which the notice was given to the accused and that neither does the accused remember such a thing, the Court saw that the time available to the accused to prepare her defense could not have been more than a few hours. Even during these hours, the accused was either being transported to court or was still being held in the police region. The Court therefore held that the complainant had not had sufficient time to contact and consult with her lawyer.The hours a lawyer can take to prepare for trial varies depending on the type of law practices and type of trial. Sometimes it could be a couple of days other times it can be weeks depending on the date of the trial and type of case.Three criteria have been applied continuously by the ECHR, in both cases, in both civil and criminal cases (Neumesiter vs Austria, n.d).They relate to the complexity of the case, the conduct of the applicant and the conduct of judicial or non-judicial authorities. In the Koning v. Germany case (Koning vs Germany, 1978), the ECtHR added another criterion relating to the applicant's conduct. Based on these criteria, it also acts in relation to its jurisprudence. This criterion is a special one, as it is the only criterion that can bring a report of non-infringement, even though it may be a length of proceedings. If the applicant's conduct will be the main cause of the delays, the ECtHR will state that there is no violation of Article 6 of the Convention**(CEPEJ, 2011, p. 20)**. In the multitude of cases of the ECHR and the Albanian CC, several determining factors of the reasonable time frame of a process emerge. The most essential are:

a. Complexity and nature of the case (number of participants, number of witnesses, connection of the case with other cases, etc.). The complexity and nature of the case relate mainly to the object of the case, the facts of the case and the volume of written evidence.

b. Number of participating parties;

c. Number of witnesses;

d. Linking the issue to other issues;

e. Conduct of complainants and judicial and administrative authorities**(Musaraj, 2017)**.

The case study for each specific case must follow several stages in order to conclude with a dignified and professional presentation of the defense by the lawyer. The order of progress of these stages may vary from case to case, depending on the specifics and peculiarities of each legal situation, but it is important to understand that they should all be cumulatively part of the research and scientific work of lawyer in any legal matter. More specifically, the steps to be followed in the field of research for the preparation of the case are, as follows:

• Analysis of the circumstances and facts presented by the complainant/accused regarding the legal situation that needs legal protection and the construction of a protection strategy;

• Listing the necessary evidence, determining the manner of securing them and depositing them in court, as well as analyzing the evidence;

• Determining the claim that ensures in a more complete, simplier and safer way the placement in place of the violated right of the client or the realization of the acquisition of a denied right;

• Determining the necessary legal basis for the protection of the case;

• Selection and analysis of unifying decisions of the High Court or of decisions of the Constitutional Court that have similarities with the plot of the concrete case that the lawyer prepares to defend;

• Selection and analysis of decisions of the ECHR in Strasbourg or the Court of Justice in Luxembourg, which have similarities with the plot of the concrete case that the lawyer prepares to defend; • Selection of the necessary legal doctrine to provide answers to the questions raised for discussion. All these stages must be part of a strategic planning carefully built and followed by the lawyer and known and approved by the client (OSCE, 2014, p.102).

6. Results

We are ahead of "enough time to prepare the defense" when:

- We talk about the facilitiesin preparation to appear before the court, where the accused and the accusing party have the right to make their submissions without much effort;

- It is not necessary to give the accused access to the file, but it is necessary to inform his representative;

- To facilitate the defense, the accused should not be deprived of copies of documents in the file, keeping records or even using them.

- From the comparative study between the provision of access to justice between the Constitution of the Republic of Albania and the Convention, it became clear that they give equal legal value to access to justice but if the Constitution dwells on the provision of the right to a fair legal process in the narrow sense and formal, the ECHR in my judgment gives procedural and substantive meaning. Access to court is recognized as a constitutional right and must be guaranteed, but for legitimate reasons and in accordance with the law we can restrict access to court, without violating it. Restriction of the right of access to court must meet the criteria set out in the Constitution and laws

and this restriction must not be contrary to the law and the will of the person. In the interest of a regular justice system is its non-appeal as well as the impossibility of opening the process after a period after the process, even in case of subsequent appearance of new facts.

- With regard to the search for, recognition or protection of a fundamental right, it was proved that there is a need for temporal and jurisdictional limits on the right to rule and the right to decide by some state bodies. This is because otherwise the principle of legal certainty would be openly violated. Access to justice is closely linked to the institution of statute of limitations. If the person does not exercise his right within the set time limits, his right to go to court is barred.

7. Conclusions

In order to understand how much time should be needed to prepare the defense, the ECHR states that the nature of the proceedings, the complexity of the case and the stage of the proceedings should be taken into account in particular. Undoubtedly the circumstances that may lead to the calculation of the time required are related to changes in the charge, the reading of new evidence brought by the prosecutor or the sudden and drastic change in the opinion of an expert during the trial.Given these factors, preparation for the trial should begin three months (at least) before the trial. It is impossible to do this if the trial is scheduled for a time only a few weeks in the future. And to wait up to months, or even weeks, before the trial to start preparing the trial is too late. While there are trial preparation tasks, often best done on the eve of the trial - witness preparation is paramount - many of the useful trial preparation tasks described above cannot be accomplished in such a short framework.

From the moment the lawyer is in contact with his client, time management is of great importance, and from time to time it takes on an important dimension, even for the fate of the case itself. Time matters not only in the mutual sense of both the lawyer and the client, as it is important to mention here the popular expression that "time is gold" and both parties have no time to lose, but time also matters in the procedural and material sense. In the latter we can say that the in-depth study of the case by the lawyer is important for the statute of limitations of the subjective right to address the competent body, ie for the first consideration of the statute of limitations. Time management is also important for setting up urgent searches in the procedural sense, which are related to guaranteeing the very rights that are claimed to be acquired at the end of the trial **(OSCE, 2014, p.91)**.

The better the lawyer knows, the types of evidence recognized by law and their division according to the doctrinal view, the manner and time of their appearance in the Vademekum for lawyers - Advice and acts for the civil process 94 court, theoretical and practical issues of the burden of proving, for the right he claims in the interest of his own client, we can say that he not only achieves his objectives in relation to his client, but also helps in the realization of justice and in the development of a regular legal process (OSCE, 2014, p.93). Thus, the study shows that the main factors influencing the preparation of the court case are related to the professional skills of the legal representative (lawyer) and the ability to gather evidence about the case through cooperation with state institutions.

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