

The effects of the new judicial map on family disputes resolution

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Abstract

The family is one of the most important institutions of our society, which has been given a special protection in national and international acts. In 2004, the Family Code entered into force, providing a set of legal norms for the regulation of relations between spouses, cohabitants, parents and children. In addition to these norms, there were also provided provisions which regulate the resolution of other disputes within family relations.

Due to social, political, cultural and technological changes, affected as well by Albania's long transition since 1990, the core of the family has been challenged,

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affecting the increase of disputes and the number of cases presented to the courts. On the other side, the vetting process in Albania has led to a backlog of cases, most of which are civil procedures. Recently, the High Judicial Council has taken the initiative to create a new judicial map, which will lead to the reorganization of the judicial system and the reduction of the number of district courts and courts of appeal. This reorganization and reduction of courts will also affect the resolution of family disputes, especially of those who are vulnerable, in economic difficulties, minors, individuals with disabilities, limiting de facto the right to access the court.

In order to provide a complete picture of the effects that the new court mapping may have on resolving family disputes, this paper will analyze the Albanian legal framework, related case law and the challenges that have been encountered so far. It will focus as well on the doctrinal debate, giving concrete recommendations to the revision of the draft report on the new judicial map.

Keywords: *vulnerable groups, family dispute, access to court, judicial map.*

I. Introduction

One of the most crucial human rights is access to justice as one of the main pillars of our civil society. To guarantee this practically, every country has built up a network of courts with the purpose of bringing the administration of justice as close to residents as feasible. This is a time of constant and consequential change: the development of new infrastructure facilities makes certain places (cities or rural countries), more available than they were previously. In addition, the development of modern modes of transportation makes traveling from one city to another faster and easier.

The European Network of Councils for the Judiciary (ENCJ), which includes the judiciaries of most (aspiring) EU member states as members or observers (if they do not have a council for the judiciary) is aware of the impact of the economic crisis on the judicial system. It adopted the so-called Vilnius Declaration in 2011. This proclamation, aimed to provide sustainable reforms on the judicial system, developing long term policies to assure their efficiency and accountability (<https://www.encj.eu/articles/89>). The ENCJ established a special committee to identify and analyze changes happening in European nations, as well as provide related recommendations (Van Dijk, Dumbrava, 2013).

The ECEJ (European Commission for the Efficiency of Justice) makes a connection between economic theory and the process of reorganization of courts

known as Supply Chain Management. According to that judicial geography reorganization is a problem of balance between different factors such as:

- Access to justice in terms of proximity of citizens to courts.
- Minimum size of a court so that the presence of various competences and functions can be ensured.
- Reduction of costs as the resources of the public administration cannot and must not be wasted but rather optimized.
- Maximization of quality and adequate performance of the service provided.

Thus, the preparation of a judicial map, as a complex process, should take in consideration the following elements: a) current access to judicial map; b) objectives and criteria to be set by the countries; c) indicators to be build and measured by the countries (Comparative study of the reforms of the judicial maps in Europe, 2012).

II. Resolution of family disputes through the court in Albania

The family is considered an institution as important as the state, as both of them, through their organization and functioning, aim to maintain a social cohesion necessary for the modern society. As a result, the family remains a social, economic, moral, and traditional organization (Omari, 2008: 23). As one of the most important nuclei of society's existence, the family is often faced with difficulties, misunderstandings, and problems, which are not resolved between family members, and consequently addressed for solution to the courts.

The Family Code and the Code of Civil Procedure provide norms for regulating the conduct of court proceedings in the family field. Family issues, among others, consist of dissolution of marriage, parental responsibility, maintenance obligation, authorization to marry, recognition of paternity/maternity, authorization to move with children outside the territory of Albania, protection orders, removal procedures, restriction of capacity to act etc.

The civil procedural law provides for the competent courts to resolve these disputes, while taking as a general criterion the place of residence/abode of the spouses. Article 51 Code of Civil Procedure provides that: "Lawsuits for proving the existence or non-existence of marriage, marriage annulment and its dissolution, can be filed either in the court of the country where the spouses had their last joint residence or in the court of the country where the defendant resides. When the defendant has no residence or place of residence or domicile in the Republic of Albania, the lawsuit is filed in the court of the country where the plaintiff has



residence, or domicile and when the plaintiff has neither of them, the lawsuit is filed in the court of the capital city.”

In the absence of the above general criterion, the law provides the criterion of residence of the defendant, or the person required to have his/her capacity to act limited/removed. Article 382 Code of Civile Procedure provides that: “The ability to act can be removed or restricted by request of the spouse, close family member, the prosecutor, as well as everyone else who has a legitimate interest with this regard. The request is submitted to the court of the territory where the person whose residence is requested to be removed or the capacity to act is restricted”.

Regarding of protection orders, the competent court is that of residence of the applicant claiming to have been subject to violation. According to Article 9 of Law no. 9669/2018 “On measures against domestic violence”, amended: “In case of domestic violence, the victim can address a request to the nearest police station (of the area where he/she lives or is domiciliated), the relevant local unit (commune, municipality), the health center of the area where he/she lives or is domiciliated or he/she can file a lawsuit to the court of the district of her proper residence or domicile or of the perpetrator, in order to take the necessary measures”.

The official national data show that 36% of the cases registered in the court are family related ones (Ministria e Drejtësisë, Vjetari Statistikor, 2020). This is a considerable percentage, which should be taken into account for the reorganization of the judicial system. In the specific, the different categories are summarized below:

- Lawsuit for divorce - 9,328
- Alimony lawsuit -78
- Paternity recognition lawsuit -65
- Lawsuit for derecognition of paternity - 135
- Other - 2,436

The number of divorce lawsuits filed in court has increased in: Tirana, Vlora, Saranda, Elbasan, Lezha, Fieri, Shkodra, Durrës, Dibra, Gjirokastra and Berat. In 2020 there is an increasing tendency in other districts as well. According to these data, the divorce is requested by women in over 80% of cases (Ibid). A considerable number of family cases are also related to seeking protection orders (mostly by women), which have increased in the last years. The number of requests for protection orders, in Tirana District Court for 2021, is 1052 (Ministria e Drejtësisë, Vjetari Statistikor, 2021).

III. Resolving family disputes of the vulnerable groups through the courts

Resolving family disputes requires special attention due to the close relationship between the litigants, the fact that often part of these processes are people with disabilities or children (for whom must be taken into account their highest interest). Considering the difficulties that may arise in different family contexts such as in economic or social conditions, culture and traditions, when a family member often has no opportunity to go to court, risking reinstatement of his/hers violated rights and in some cases endangering health or life.

Referring to the procedural provisions, the person (family member) who initiates the process has the obligation to prepay the costs of the process such as: taxes and fees, notarization of documents, lawyer, and expert costs et³c. In most cases, especially in the cases of divorce or protection orders, the person/family member who refers to court is in a difficult economical and psychological situation. In most cases, applicants have no apartment to stay, and they're obliged to provide food for their children. In order to guarantee access to justice of those who are financially disabled, victims of criminal offenses, domestic violence etc., Law no. 111/2017 "On legal aid guaranteed by the state" was approved. It aims to guarantee a fast, fair and equal access to justice as established by Copenhagen criteria, in accordance with the rule of law principles, guarantying the human rights.

The main purpose of this law is to assist the categories in need and the discriminated ones who can benefit from free legal aid services provided by the state. The restructuring of the legal aid system transfers the examination of requests for legal aid from the State Commission for Legal Aid in Tirana to the competent courts throughout the Albanian territory. The later operate closer to the place of residence of residents, and deal with similar issues for the implementation of Article 158 of the Code of Civil Procedure (Report of the draft law no. 111/2017 «On legal aid guaranteed by the state»).

Thus, the new court mapping should take into account not only the access to justice and the distances from citizens residences to the court, but also economic, social and cultural factors in order to effectively guarantee the access to justice. The question is: Can the provisions of this law guarantee equal access to justice if the judicial system is reorganized and reduced according to the proposed draft / report? To our opinion that would be difficult to achieve, as the law itself contains some problems in implementation in practice, which will deepen with the reduction of courts. To illustrate our approach, we will analyze two cases:

³ For example, in divorce processes, the participation of the spouses in the first hearing is mandatory even if they are represented by a lawyer.



A. The case of filing a lawsuit for divorce by one spouse

If one of the spouses, financially unable, seeks to dissolve the marriage because it has lost its purpose, he/she can proceed in two ways:

- a) he/she can present a request for secondary legal assistance before the beginning of the trial⁴;
- b) he/she can file a lawsuit for the dissolution of the marriage and in the same lawsuit can request secondary legal assistance.

In both cases, the claim is filed at the residence of both spouses, or at the residence of the respondent. In both cases, proof of financial impossibility must be attached to the application. In the second case in drafting the lawsuit, the spouse needs legal advice, but in case of financial impossibility, the question is who will draft the lawsuit? The collection of documents has financial costs, as well as the filing of a claim / lawsuit in court, especially if the court is distant from the applicant's residence/domicile. In these cases, the inability to provide the reasons for divorce may entail the rejection of the request for secondary legal aid, endangering the prosecution of the court process.

As an example of the first case, we bring the decision of Tirana District Court, no. 127, dated 01.02.2022, according to which: "The judge considers that he must return the request and its acts to the requesting party (...). From the review of the submitted request, it results that this request is not complete. It lacks the probative acts in the form required by law (in the original or the unit with the original) according to the provision in article 154 / ç of the Civil Code (...)"

As an example of the second case, we refer to the decision of the Tirana District Court, no. 183, dated 14.01.2021, according to which: "Based on these provisions, the applicant did not prove in the court hearing written evidence that he is in the conditions provided by this law. Thus, his insufficient income has not been proven. The applicant claims to be unemployed, but this claim was not substantiated by any written evidence. Occurring in the conditions when the applicant did not prove with any written evidence his claims regarding the economic impossibility, the court concludes that the conditions provided by articles 11 and 12 of law No. 111/2017 are not met. In view of the above considerations, the court deems that the request is unfounded in evidence, and as such should be rejected." Even in the ideal case that the request for legal aid is accepted and a lawyer is assigned to follow the court proceedings, access to justice is not still guaranteed. In case of divorce, the participation of the spouses in the first hearing is mandatory. Article 134 of the

⁴ Explanation: this includes representation by a lawyer, exemption from court fees and costs.

Family Code provides that: “In reviewing the lawsuit for divorce, the court first schedules a conciliation session, in which the spouses must appear in person. The judge may hear them individually and then jointly, without the presence of their representatives.”

In the absence of the defendant in the second or third hearing (depending on the reasons for non-participation) the participation of the plaintiff is mandatory, resulting in the termination of the trial. Article 135 of the Family Code provides: “If the plaintiff is not present at the conciliation hearing, although he is regularly informed, the judge decides to adjourn the trial. When the respondent does not appear, although he is regularly informed, the judge adjourns the conciliation hearing, reiterating the notification to the respondent. If even in this hearing the defendant is not present without any reasonable cause, the judge, after hearing the plaintiff and being convinced that the reconciliation of the spouses cannot be reached, schedules the court hearing, ordering the collection of the necessary evidence”.

In cases concerning parental responsibility or in other cases involving minors, the court should hear the child. Article 6 of the Family Code provides that: “In any procedure involving minors, he has the right to be heard, in accordance with his age and ability to understand, while retaining the right given by the special provisions that guarantee his intervention and consent”. The question is: how will the spouse/child participate in such hearings in cases of financial impossibility, especially if the courts are too far from the place of residence? If we refer to the analysis made in the report on the drafting of the new court mapping, we find that these factors and circumstances have not been considered.

b. The case of requesting a protection order

The situation in the case of requesting a protection order is better regulated, due to the recent changes made to the law on protection from domestic violence. Its main objectives are the prevention and reduction of domestic violence cases, non-discriminatory protection of each group that presents special needs, improvement of protection measures provided by law, increase of free qualified legal aid, determination of clear procedural deadlines for registration of the application for Defense Order and Immediate Defense Order, appeals against court decisions etc. (Report on the draft law «On some additions and changes to the law no. 9669, dated 18.12.2006» On measures against domestic violence», as amended).

Despite the fact that the law against domestic violence has been drafted in accordance to international standards and has offered some solutions to the problems encountered in practice, the proposals for reorganization and reduction of the number of courts, will bring up several concerns related to the distance

between the courts and the residence/domicile of the interested parties. In fact, the law provides a number of subjects that can request a protection order to the court, such as the police, a relative, the prosecutor, etc. Even in these cases, the applicant must be present in court personally or through a representative. If there are no financial means to cover the transportation costs, the court may dismiss the case.

In the decision no. 419, dated 24.03.2021, Tirana District Court argued that: “The court considers that in the conditions when the plaintiff is not present during the process, even though she has knowledge and has not submitted any reasonable cause, considers that it is not in the conditions of article 19 of law 9669/2006, amended, are not met . Point 2/1 where it is provides that” Court issues the protection order even in cases when the parties claim that the conflict has been resolved or should be resolved by conciliation or mediation”. It did not result that the parties have resolved the issue by conciliation or mediation. In these circumstances based on article 179 of Civile Procedure Code, where it is provided that “If the plaintiff or any of the parties, without any reasonable cause, are not present in both the preparatory actions and the court hearing, and it turns out that they are regularly informed, the court or the single judge decides to adjourn the trial”.

IV. The new judicial map and access to justice in family disputes

In drafting the new judicial map, which will reduce some courts, the High Judicial Council states that it has taken into account some principles such as: guaranteeing access to justice, reducing costs, increasing the quality and adequacy of the judicial service, and demographic development, the number of inhabitants in relation to the number of courts, economic development, geographical characteristics and development of roads and transport (Këshilli I Lartë Gjyqësor, 2022).

More specifically the working group states in their report that: «Although it might be important to include an indicator of the time required to travel to court using public transport, the Working Group requested information from the National Road Authority, but there was no data available.» The report also claims that distances between villages/towns and the proposed new courts have been considered, referring to a unified distance system.

According to authoritative doctrine, “the new judicial map undermines citizens’ rights” (Euronews 2022). The Head of the National Chamber of Advocacy in Albania, Max Haxhia, criticized the proposal to reduce the number of courts, proposing a “gradual reduction of the courts’ number” (Harta e re gjyqësore, Dosja 18 shkurt 2022). The Minister of Justice, Ulsi Manja, argues on the other side that the new court mapping is dictated by law, which specifies that the courts of first

instance must have at least 7 judges, and the Appeal Courts at least 10 judges (Ibid). A detailed analysis on the criteria established by Law 98/2016 “On the organization of the judicial power in the Albanian Republic” and other internal and external factors, criticize the drastic reduction of court numbers, taking into consideration the Albanian context (Halimi, 2022).

In our opinion the criteria used in the working group report have not been analyzed in terms of implementation in practice and the effects they will bring. The report refers to average data, according to a unified system, but a more detailed information lacked on: infrastructure, public transport and how accessible the latter is from many villages and towns, as there is no study or data costs for the use of public transport, considering the recent increase the fuel and consequently of the tickets price (Këshilli i Lartë Gjyqësor, 2022). In the absence of this important data and information to determine the reduction of courts, the working group could have conducted monitoring of the actual distance of these villages/towns from the proposed new courts and the real costs to access the court.

The monitoring process could have also included vulnerable groups, their ability to access public transport, the financial ability to cover these costs, especially in cases where they rely on a retirement pension, disability pension, economic assistance, or are even unemployed. More specifically, individuals with disabilities or those who are in a difficult economic situation are not considered in the study and as a result, being the most vulnerable part of society, they will remain even more discriminated compared to other citizens. If the number of courts will be reduced, there will be a lack of services (experts, notaries, translators, etc.) in the related areas. This will inevitably lead to forcing this category to either not take any action to seek implementation of their rights or protection of their legitimate interest or to face additional costs, perhaps even higher, due to their physical limitation or other disabilities (Alushaj, 2023).

The reorganization of the judicial system and the reduction of the number of courts will create difficulties for the access of courts to resolve family disputes by vulnerable groups, individuals with financial disabilities, persons with disabilities, etc. The Working Group recommends only one National Court of Appeal, merging the six current courts of appeal. According to the data reported in the report, the maximum travel time within the new proposed appeal jurisdiction is 4 hours and 56 minutes for citizens coming from Konispol in the south and 4 hours and 10 minutes from Bajram Curri – Margegaj (Një hartë e re gjyqësore për Shqipërinë, KLGJ, 2021).

This distance is several times higher than the average distance of 1 hour and 30 minutes taken as a measuring etalon by the working group. It did not take into account neither the conditions of infrastructure and public transport, nor the transport costs for a person from South to Tirana. In addition, what will happen

to people with disabilities? Does public transport meet the conditions for a long journey for a person with disability and the person who will accompany him? Creating opportunities to access the nearest court to resolve a dispute, at the lowest possible cost is fundamental for the protection of human rights and the implementation of the rule of law principles. The high and disproportionate level of legal costs or lack of legal aid may discourage citizens from filing a lawsuit in court, impeding effective access to justice. Furthermore, the availability and quality of legal assistance at the national level is likely to affect effective access to justice. Studies have shown that the costs of justice and the rules governing legal aid can impede effective access to justice. Furthermore, other issues may affect access to appropriate legal aid and have a negative impact on citizens' ability to gain effective access to justice (European Parliament, 2017).

In the decision no. 55, dated 23.12.2013, the Constitutional Court stated that: "In a democratic society, the right to good administration of justice occupies a distinct place and a narrow interpretation of Article 42 of the Constitution and Article 6 of the European Convention on Human Rights (ECHR) is not in line with their aims and scope. Good administration of justice begins with guaranteeing that an individual will have access to court. Access to court should be substantial and not merely formal (see also decision no. 42, dated 29.09.2011, of the Constitutional Court).

The denial of the right to access the court makes the rights merely affirmative, lacking the opportunity to apply and restore those rights in place, when they are violated. The right to access to court includes not only the right to initiate a trial, but also the right to have a final settlement of the dispute by the court. Considering the difficulties in Albania related to the implementation of free legal aid, the economic crisis which will mostly affect the most vulnerable citizens, the infrastructure, security and quality issues in public transportation, the reduction of the number of courts will inevitably lead to the restriction of the right to access the court.

V. Conclusions and recommendations

Undertaking an initiative for the reorganization of the judicial system is a necessity related to the economic, social, legal, cultural changes of a country. Nonetheless, it should be implemented on the basis of an in-depth examination, taking into account all factors, not just policies/models of other countries. In fact, even in these model countries the reorganization of the courts has faced difficulties in access to courts. As analyzed in this paper, in which for objective reasons not all the problems of resolving disputes in court have been considered, concrete examples

were analyzed on what consequences and effects the new draft of the judicial map may have for vulnerable groups, people with disabilities, minors, etc.

Therefore, we recommend that, in order to guarantee for every citizen equal access to the justice system, before the approval of the proposed court mapping, in-depth studies, monitoring and analysis of several factors should be considered. In the specific, economic and social conditions, concrete possibilities for people with disabilities to access the court; public transportation costs, living standard, minimum wage, etc. We also recommend taking into account the recommendations of attorneys, notaries and lawyers who face the every-day problems of such cases in the judicial system.

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