

The right to appeal on contested procedure under the Republic of Kosovo legislation

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Abstract

The right to appeal as one of the fundamental human rights is foreseen by international legal acts and domestic legislation. In this scientific paper we have handled the right to appeal under article 6 (1) of the European Convention on Human Rights and Kosovo legislation, with special emphasis on contested procedure by including the appeal against judgment and the appeal against ruling, the grounds of appeal against judgment and limitation of appeal grounds against several judgments. All those abovementioned matters are the main object of review in this scientific paper. Handling the right to appeal against the first instance court judgment is important also due to the fact that in Kosovo according to the new Law on Courts as a competent court to review and decide on appeal submitted by the appellant is the Court of Appeals as a second instance court. In this scientific paper we have used normative, deductive, descriptive methods. At the end of this scientific paper there are conclusions in relation of the right to appeal with special emphasis on contested procedure.

Keywords: *the right to appeal, the European Convention on Human Rights, Kosovo legislation, contested procedure, judgment, court.*

JEL Classification: K40, K41.

1. Introduction

It is important to analyze and review the right to appeal on contested procedure by bearing in mind the fact that the main goal of appellant is the appeal submitted against the first instance court decision to be reviewed by the second instance court, due to the fact the appellant claims that he has been denied or violated any right by the first instance court decision. Furthermore, the right to appeal is guaranteed through international legal acts and domestic legislation applicable. The fact itself that the party submits an appeal, it gives us the impression that the party consider that it has been denied the realization of any certain right recognized by applicable legislation. Since, the right to appeal is one of the most fundamental human rights, in this scientific paper we have handled the right to appeal under article 6 (1) of the European Convention on Human Rights of 1950 (hereinafter ECHR). Also, there has been handling for the right to appeal according to Kosovo legislation by including reviews according to Constitution of the Republic of Kosovo of 2008 (hereinafter the CRK), the Law no. 03/L-006 on

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Contested Procedure of 2008 (hereinafter LCP) and other legal acts. Having in mind the fact, the handled topic in this scientific paper is related with special emphasis of the right to appeal on contested procedure, there has been handling according to LCP, which is a special law concerning this procedure.

In this scientific paper in addition of the right to appeal under Article 6 (1) of the ECHR, also it has been handled the right to appeal on contested procedure according to Kosovo legislation, by making specific reviews concerning the appeal against judgment and the appeal against ruling, grounds of appeal against judgment, where with special emphasis have been handled essential violations of contested procedure provisions, what are absolute essential violations and substantive essential violations and then cases dealing with incorrect or incomplete finding of factual state, cases dealing with incorrect application of substantive law and what are various types of judgments which cannot be appealed for all the appeal grounds foreseen under LCP. Their handling is very significant having in mind the fact in cases when the parties have disagreements related to particular matters of legal-civil nature, and those disagreements cannot be resolved through alternative procedures for dispute resolution then the parties seek for judicial protection of their rights on contested procedure.

Also, these reviews have been made based on the Law on Kosovo Courts No. 03/L-199, which entered into force on January 1, 2011 for Articles 29, 35, 36, 38 and 40, while for other articles it has begun to be applicable starting from January 1, 2013. Article 8, paragraph 1 of this Law foresees as following "The court system of the Republic of Kosovo consists of: Basic Courts, The Court of Appeals and The Supreme Court". Hence, in Kosovo there is a new regulation of judicial system. Based on this Law on Courts, there is a Basic Court as a first instance court, Kosovo Court of Appeals with its headquarters in Prishtina as a second instance court and The Supreme Court as the highest judicial instance in Kosovo. Therefore, shall be handled the right to appeal under Article 6 (1) of the European Convention on Human Rights and under Kosovo domestic legislation by making a thorough handling in order matters related to the right to appeal on contested procedure to be analyzed in a concrete manner.

2. The right to appeal under article 6 (1) of European Convention on Human Rights

The right to appeal as one of the basic human rights is foreseen by article 6 (1) of the European Convention on Human Rights of 1950 which states as following: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the

opinion of the court in special circumstances where publicity would prejudice the interests of justice". Through article 6 of the ECHR is clearly defined the guarantee for a regular judicial process, which implies that within this process is also included the right to appeal as a fundamental right of the party.

Also, concerning the importance of the ECHR it is worth emphasizing the fact that upon signing the Convention by member states of the Council of Europe, the Convention signatory parties take obligations to respect fundamental freedoms and human rights as foreseen by the ECHR.³ The respect of fundamental freedoms and human rights is an immediate requirement in the contemporary world. Undoubtedly, we cannot claim that the realization of fundamental human rights is fully achieved if there are obstructions or violations in terms of exercising the right to appeal for parties which interests have been affected or violated. It is worth mentioning the fact that the right to appeal against court decisions is also foreseen by the Universal Declaration of Human Rights of 1948 (hereafter UDHR).⁴ The right to use legal remedies is foreseen by international legal acts as a fundamental right.⁵ However, it should be outlined that the ECHR is a treaty or agreement that only Council of Europe member states have the possibility or the right to sign it, which upon signing take legal obligations to respect and implement the Convention entirely.

Generally speaking, the article 6 of the ECHR guarantees the right to a fair trial, including the right to use legal remedies against decisions rendered by court in all judicial proceedings. The ECHR also provides full realization of persons' rights in judicial proceedings from the beginning until the conclusion of trial. However, the foreseen legal provisions, depending on nature of a case to be conducted in a reasonable time and the case to be resolved within legal deadlines. Hence, in order not to have any delays in court proceedings because it should be kept in mind that duration of civil proceedings in an unreasonable period of time violates Article 6 (1) of the ECHR.⁶ The time factor is very important for realization of a particular right because depending on deciding manner by a competent court depends on the parties whether they shall acquire rights or be charged with obligations. And if there shall be possible delays by court in terms of resolving disputes between the parties, then the parties shall certainly be damaged. Therefore, states also through domestic legislation pay a special attention to the trial conducted within a reasonable time.⁷

Except through the ECHR is foreseen the protection of human rights and fundamental freedoms, it is very important the fact that this Convention provides

³ See Gruda, Zejnullah, *International Human Rights Protection*, Fifth Edition, Prishtina, 2010, pp. 47-49.

⁴ See article 8 of the United Nations Universal Declaration of Human Rights (UDHR), of 1948, which provides: "Everyone has the right to an effective recourse before competent national jurisdictions for acts that violate the fundamental rights recognized to him by the constitution or law".

⁵ Qehaja, Rrustem, *Procedural actions concerning appeal in civil dispute under Kosovo legislation*, *Civil Procedure Review*, v.8, n.3: 79-92, sept-dec., 2017, ISSN 2191-1339, pp. 81-82.

⁶ See Binaku, Ledi, *Jurisprudence of the Strasbourg Court*, Revision, Tirana, 2007, pp. 342-343.

⁷ See Terihati, Franc, *Civil Procedure*, Tirana, 2015, pp. 30 -32.

the establishment of the European Court of Human Rights,⁸ which is a very important judicial body for the protection of human rights and fundamental freedoms foreseen in this Convention. Likewise, the jurisdiction of the European Court on Human Rights is clearly defined by Article 32 of the European Convention on Human Rights.⁹ Article 34 of the ECHR concerning individual applications provides as following: “The Court may receive applications from any person, nongovernmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right”. Therefore, through this article has been emphasized the matter concerning individual applications that may be submitted by any person, non-governmental organizations or group of individuals regarding denial or violation of basic rights by a state which is a contracting or signatory party of the ECHR. “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken”.¹⁰

Hence, as preconditions for a person to submit an appeal or application at the European Court on Human Rights with its headquarters in Strasbourg are the following: firstly, to be exhausted all legal remedies under domestic legislation in terms of addressing to competent courts; and secondly not to be exceeded more than six months from the moment the court decision has become final. Decisions rendered by the European Court on Human Rights are obligatory to the signatory states of the European Convention on Human Rights.¹¹ Whereas, states which are not signatory states of the European Convention on Human Rights may give priority to this Convention in case of a conflict with provisions of laws and other acts of public institutions.¹² Thus, respective states through constitution may foresee and determine the direct implementation of international agreements and instruments.¹³

In the following part of this scientific paper, shall be handled the right to appeal on contested procedure under the Republic of Kosovo legislation. This handling shall be made based on domestic legislation due to the fact that Kosovo is

⁸ Article 19 of the European Convention on Human Rights (ECHR) of 1950 stipulates: “To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as “the Court”. It shall function on a permanent basis”.

⁹ See Article 32 of the ECHR, which states: “1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47. 2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide”.

¹⁰ Article 35, paragraph 1, of the ECHR.

¹¹ Article 46 (1) of the ECHR states: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties”.

¹² See Article 22, of the Constitution of the Republic of Kosovo (CRK) of 2008.

¹³ See Omari, Luan, *Constitution of the Republic of Kosovo in a Comparative Overview*, Tirana, 2009, pp. 12-13.

not yet a signatory party of the European Convention on Human Rights, but through the Law on Contested Procedure left the possibility for implementation of this Convention on contested procedure.¹⁴

3. The right to appeal on contested procedure

The right to appeal is guaranteed by the Constitution of the Republic of Kosovo (CRK) of 2008, which provides the right to use legal remedies,¹⁵ judicial protection of human rights¹⁶, and general principles of judicial system¹⁷, these rights are guaranteed expressly. The Constitution of the Republic of Kosovo provides in general terms the guarantee of these rights, whereas the realization of these rights by litigants is specifically defined by the Law on Contested Procedure. Therefore, in the following part of this scientific paper we have handled the foreseen legal proceedings by LCP in order the appellant to realize its undeniable right to appeal against a court decision, in a concrete case against the first instance court decision. Also, it is worth emphasizing the fact that Kosovo through its Constitution foresees the direct implementation of International Agreements and Instruments.¹⁸ Furthermore, what can be said without hesitation is that these international legal acts have a direct impact on states legislations, so also at national level to have a proper regulation of the rights of parties included on trials. Having in mind the importance of appeal right of the parties, this right is foreseen by international acts as well as by national legislation.¹⁹ Hence, Kosovo legislation is also drafted in the spirit of international legal acts which fully guarantee the

¹⁴ See Article 141 of the Law no. 03/L-006 on Contested Procedure (LCP), Official Gazette of the Republic of Kosovo/Prishtina: Year III/No. 38/20 September (2008).

¹⁵ Article 32 of the Constitution of the Republic of Kosovo states: "Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law".

¹⁶ Article 54 of the Constitution of the Republic of Kosovo provides: "Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated".

¹⁷ Article 102, paragraph 5 of the Constitution of the Republic of Kosovo provides: "The right to appeal a judicial decision is guaranteed unless otherwise provided by law. The right to extraordinary legal remedies is regulated by law. The law may allow the right to refer a case directly to the Supreme Court, in which case there would be no right of appeal".

¹⁸ Article 22 of the Constitution of the Republic of Kosovo provides: "Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions: (1) Universal Declaration of Human Rights; (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; (3) International Covenant on Civil and Political Rights and its Protocols; (4) Council of Europe Framework Convention for the Protection of National Minorities; (5) Convention on the Elimination of All Forms of Racial Discrimination; (6) Convention on the Elimination of All Forms of Discrimination Against Women; (7) Convention on the Rights of the Child; (8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment".

¹⁹ See Hasani, Enver, & Cukalovic, Ivan, *Commentary: Constitution of the Republic of Kosovo*, First Edition, Prishtina, 2013, pp. 495-497.

fundamental human rights and freedoms. Observing also from the aspect of International law, European law, and national or local law the legal framework is quite accurate in terms of what it provides and stipulates for the right to appeal against court decisions. Also, article 53 of the Constitution of the Republic of Kosovo states as following: “Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”. Therefore, concerning fundamental human rights and freedoms the Constitution of the Republic of Kosovo provides that their implementation shall be done in accordance to ECHR jurisprudence.

Thus, the parties are guaranteed the right to submit an appeal as an ordinary legal remedy within legal deadlines, in cases when they claim that by decisions rendered from the first instance court has come to denial or violation of their rights. Based on applicable legislation is guaranteed the right of submitting ordinary legal remedies against decisions of the first instance court and the right to submit extraordinary legal remedies against decisions of the second instance court as final decisions. Because the fact itself that the party appeals a court decision this implies we are dealing with complaining issues or expression of dissatisfaction by appellant in relation to decision rendered by court.

Through the Law on Contested Procedure is foreseen the right to appeal on contested procedure, by including explicitly all the rights and course of procedure to appeal against judgment of the first instance court up to rendering a decision by the second instance court according to appeal submitted by appellant.²⁰ Litigants are entitled to submit an appeal as an ordinary legal remedy against decisions rendered by the first instance court. The decisions of the first instance court shall be rendered in a form of judgment or in a form of ruling, depending on the nature of dispute and manner of deciding. “Courts publish the final decisions on their official website within sixty days (60) from the date of enactment of judgment in accordance with applicable legislation and Kosovo Judicial Council rules (hereinafter the Council), by providing the personal data protection”.²¹

3.1. The appeal against judgment

The parties are entitled to appeal against judgment rendered by the first instance court based on legal provisions. “Against judgment rendered by the first instance court the parties may submit an appeal within fifteen (15) days from the day of delivery a copy of judgment unless another deadline has been set by this law. In disputes from the reports in which the judgment has been rendered on basis of bill and check the appeal period is seven (7) days”.²² Basically, the deadline for submitting an appeal against judgment of the first instance court is fifteen (15) days, however in special contested proceedings the deadline for submitting an

²⁰ See Chapter XIII of the LCP.

²¹ Article 2 of the Law no. 05/L-032 on amending and supplementing the Law no. 03/L-199 on Courts, Official Gazette of the Republic of Kosovo/No. 17/30 June 2015, Prishtina.

²² Article 176, paragraph 1 of the Law on Contested Procedure (LCP).

appeal is seven (7) days. If the party does not respect the legal deadline for submitting an appeal, then the judgment rendered by the first instance court shall become final and the party who has won the trial and having legal interest shall take the initiative to request the execution of final judgment. However, the Law on Contested Procedure provides the institute of returning to the previous state,²³ in cases when without the will of the party has come up to impossibility to submit an appeal. Against final decisions the parties may submit extraordinary legal remedies for which shall decide the Supreme Court.

Despite the fact that the right to appeal is guaranteed there shall be no review of the appeal against judgment by the second instance court if the parties did not submit an appeal or did not respect the legal deadline for submitting an appeal. In cases when the party submits an appeal as an ordinary legal remedy against judgment, it considers that the first instance court has rendered an unjust judgment. And in this case, the party through appeal claims that the second instance court shall correct the first instance court rendered judgment in order for the appellant to bring a more favorable decision or annul the first instance court judgment and return the case to retrial for deciding. The party is entitled to appeal the first instance court judgment but it is not obliged to do such a thing. It's in party's will after receiving a copy of the first instance court judgment to decide whether shall appeal the first instance court judgment. If the party decides to appeal the first instance court judgment then "the appeal shall be submitted to the court which has rendered the first instance court judgment in sufficient number of copies for the court and the opposing party".²⁴ The respect of this procedure is required to be always done by the appellant in order for the appeal to be reviewed in the second instance court.

3.2. The appeal against ruling

The Law on Contested Procedure provides also the right to appeal against the first instance court ruling. "Against the first instance court ruling the appeal is allowed unless otherwise specified by this law"²⁵. Legislators through legal provisions may foresee several rulings against which parties are not entitled to appeal. However, these rulings usually may be procedural rulings conducted by the court so that the legitimate interests of the parties in this procedure are not violated. It is worth mentioning the fact that in cases when the party submits an appeal against the first instance court ruling within specified legal deadlines then the appeal submitted impacts in the ruling not to become final in the part appealed by appeal.²⁶ Article 207, paragraph 2 of the Law on Contested Procedure states "A ruling against which a separate appeal is not allowed can be executed immediately".

²³ See Article 129 to 133 of the Law on Contested Procedure.

²⁴ Article 185 of the LCP.

²⁵ Article 206, paragraph 1 of the LCP.

²⁶ See Article 207, paragraph 1 of the LCP.

Since, basically procedural rules applicable to appeal against judgment on contested procedure suitably applies also to appeal against the ruling, in the following paragraphs of this scientific paper we shall handle only the appeal against judgment on contested procedure by including grounds of appeal against judgment on contested procedure and limitation of appeal grounds against several judgments rendered by the first instance court on contested civil proceedings. For each of these abovementioned matters, there shall be handlings based on Kosovo applicable legislation.

4. Grounds of appeal against judgment on contested procedure

Usually, in civil procedure legislation, in the part where the content of appeal is defined, are foreseen also the grounds of appeal. Therefore, Article 178 of the Law on Contested Procedure states as following: "The appeal should consist of: a) narrative of the verdict against which is submitted the appeal; b) statement that the verdict is appealed in complete or in specific parts; c) reasons for appeal and justification; d) signature of the appellant". One of the elements that appeal should contain is also the grounds of appeal. Hence, the appellant emphasizes the grounds for which submits an appeal as well as gives a reasoning related to grounds of appeal against the first instance court judgment by specifying in appeal the main reasons that the appellant submits an appeal. It should be also kept in mind the fact that in order for the appellant to appeal against a court decision is required to have legal interest.²⁷

Grounds of appeal against the first instance court judgment are foreseen by the Law on Contested Procedure, chapter XIII, article 181, which stipulates that "The judgment may be appealed due to the following grounds:

- a) Due to violation of contested procedure provisions;
- b) Due to incorrect or incomplete finding of factual state;
- c) Due to incorrect application of substantive law".

The existence of all these grounds of appeal or any ground of appeal in the first instance court rendered judgment constitutes a sufficient legal basis to the parties in order to submit an appeal against judgment. Each of the grounds of appeal foreseen by this law have their own specifics because depending on which violations the party estimates to have been committed in the first instance court rendered judgment, the party shall present in appeal the grounds of appeal by reasoning. The party may submit an appeal for grounds foreseen by law upon receiving a copy of the first instance court decision, if it claims that by the first instance court judgment has come to denial or violation of its rights. The appellant through appeal submitted against the first instance court judgment claims that the judgment rendered by the first instance court contains violations stipulated by legal provisions and as a result of violations committed by the first instance court claims that its rights have been denied or violated.²⁸

²⁷ See Brati, Alban A., *Civil Procedure*, First Edition, Tirana, 2008, pp. 441-443.

²⁸ Pozniq, Borivoje, *Civil Procedure Law*, second edition, Prishtina 1981, pp. 360-361.

Submitting an appeal as a regular legal remedy against judgment on contested procedure can be conducted by both parties whether by the plaintiff or respondent. However, it is worth emphasizing the fact, if claims of the appellant are not sustainable concerning grounds for which has been appealed the first instance court judgment nor grounds for which the second instance court takes care *ex officio*, then the second instance court after reviewing the appeal through judgment shall reject the appeal and shall confirm the first instance court judgment.²⁹ Hence, such decision is rendered by the second instance court in cases when considers the appeal of appellant to be ungrounded and confirms the first instance court judgment.

4.1. The essential violations of contested procedure provisions

In contested procedure in order to have lawful and fair decisions, it is required for the courts to always act strictly when it comes to application of procedural provisions provided by law. If the foreseen legal provisions are not applied for this procedure, it is considered that we are dealing with the essential or substantial violations of contested procedure provisions. Article 182, paragraph 1 of the LCP, provides as following: “The essential violation of provisions of contested procedures exists in cases when the court during procedure didn’t apply or wrongfully applied any provisions of this law, whereas this matter had or could had impact in rendering a rightful and lawful decision”. This article generally states the cases when we are dealing with essential or substantial violations of contested procedure provisions.

In contested procedure essential or substantial violations of contested procedure provisions are divided into:

- a) Relative essential violations of contested procedure provisions; and
- b) Absolute essential violations of contested procedure provisions.³⁰

This division is made bearing in mind the impact having these violations in enacting lawful and fair judgment in this procedure. Because not all essential or substantial violations of contested procedure provisions have the same gravity and importance in order to influence in rendering a judgment with violation of legal provisions.

4.1.1 Absolute essential violations

Absolute essential violations of contested procedure provisions are foreseen by article 182, paragraph 2 of the Law on Contested Procedure from point a) to o). If the appellant appeals the first instance court decision due to the fact the judgment is involved with these absolute essential violations of contested procedure provisions, and the second instance court finds that the judgment has been rendered with absolute essential violations then the second instance court

²⁹ See article 200 of the LCP.

³⁰ See Brestovci, Faik, *Civil Procedure Law II*, Fourth Reprint, Prishtina, 2006, pp. 77-78.

annuls the first instance court judgment. However, if we refer to the article 194 of the Law on Contested Procedure it is stated as following: “The Court of Appeals examines the first instance court judgment in that part which was appealed and within limits of grounds indicated in appeal by taking care *ex officio* for application of substantive law as well as for violation of contested procedure provisions under Article 182, paragraph 2, points b), g), j), k) and m) of this law”. Hence, despite the fact that under article 182 paragraph 2 of the LCP it is foreseen that when there are always substantial violations of contested procedure provisions, article 194 of the LCP states for what grounds the second instance court takes care *ex officio* after the party submitted an appeal. It’s a controversial issue whether such definition is right, but as long as there is such a legal provision in force, it constitutes a legal obligation for the second instance court that always when it comes to appeal against the first instance court to take care *ex officio* except enforcement of substantive law as well as for essential violations of contested procedure provisions under article 194 of the LCP.

The absolute essential violations of contested procedure provisions have a direct impact in rendering decisions in contradiction with foreseen legal norms. Because if there is no proper functioning of court proceedings course in the first instance court, then it cannot be considered that has been rendered a lawful and fair decision. If we refer to article 182 paragraph 2, of the Law on Contested Procedure it may be noted that several of absolute essential violations of contested procedure provisions are as following: when the first instance court has no substantive jurisdiction for adjudicated case; when in rendering of judgment participated the judge who according to the law should have been excluded; the court based its decision in unauthorized availability of the parties; if in procedure as plaintiff or respondent participated the person who cannot be a party to the proceedings; if basic principles of contested procedure have not been respected; if the court has refused the request of the party to use its own language and writing in proceedings and to attend the process in its own language etc. Hence, these are several absolute essential violations of contested procedure provisions.

In cases when the second instance court, after reviewing the appeal submitted by the appellant against the first instance court decision, finds that the rendered judgment by the first instance court contains absolute essential violations of contested procedure provisions, then annuls the first instance court decision by rendering a ruling and returns the case to the same first instance court for retrial.³¹ Whereas if analyzed according to legislation, only one of these absolute essential violations of contested procedure foreseen by article 182 paragraph 2, point j) dealing with cases when the first instance court in contradiction to legal provisions has refused the request of the party to use its own language and writing in proceedings, then it is pretty obvious that these actions are in contradiction with the highest legal acts, with the Law on Contested Procedure provisions,³² with the Law

³¹ See article 197 of the LCP.

³² See Article 6 and Article 96 of the LCP.

on the Use of Languages³³ and the Law on Amending and Supplementing the Law on Contested Procedure.³⁴

In case when the first instance court has rendered a decision with absolute essential violations of contested procedure provisions, then it cannot be considered that the dispute between the litigants has been resolved and decided by lawful and fair judgment. Absolute essential violations do not raise the issue to assess whether these violations have affected in rendering a fair judgment but the issue to be assessed or found in these cases is only whether there are absolute essential violations in the first instance court decision. Because if the first instance court has rendered a judgment which contains these violations then the first instance court decision must be annulled by the second instance court. In cases when the party appeals the first instance court judgment, then the second instance court shall take care *ex officio* for application of substantive law and concerning absolute essential violations of contested procedure provisions, regarding cases provided by law.³⁵

4.1.2 Relative essential violations

The appellant may also submit an appeal against the first instance court judgment due to relative essential violations of contested procedure provisions. Relative essential violations are not explicitly defined by law because relative essential violations may be so present in practice in several cases that they cannot be enumerated in a taxation manner. These violations do not have the same gravity and importance in relation to absolute essential violations due to the fact the judgment rendered by the first instance court containing absolute essential violations shall be annulled as such, whereas to relative essential violations must be confirmed whether these violations have been decisive in rendering an unlawful decision where the party was denied or violated the rights provided by law.³⁶ In cases dealing with relative essential violations of contested procedure provisions it comes to expression the active role of litigants in contested procedure, since the second instance court shall consider these violations only if the parties have specified in appeal concrete relative essential violations.

It's not the second instance court duty to take care *ex officio* about relative essential violations. Quite a different case from this one is when dealing with absolute essential violations, because the lawmaker through legal provisions stipulates the second instance court duty to take care *ex officio* about absolute essential violations of contested procedure provisions, in cases provided by law. They are considered to be essential violations of relative importance by bearing in mind the fact that these violations do not have such a great effect in rendering a

³³ Article 12, Law no. 02/L-37 on the Use of Languages, Official Gazette of the Provisional Institutions of Self Government in Kosovo/Prishtina: Year II/No. 10/01 March 2007.

³⁴ Article 2, Law no. 04/L-118 on amending and supplementing the Law no. 03/L-006 on Contested Procedure, Official Gazette of the Republic of Kosovo/No. 28/16 October 2012, Prishtina.

³⁵ See Article 194 of the LCP.

³⁶ See Morina, Iset, & Nikçi, Selim, *Commentary: Law on Contested Procedure - LCP*, first edition, Prishtina, 2012, pp. 363-364.

judgment by means of which the parties are denied or violated their rights. When it comes to relative essential violations may be claimed about cases when the court did not approve any proposal of the parties when appointing an expert, hearing a witness etc. However, it is the right of appellant to specify in appeal all alleged violations for which claims to have influenced in rendering a judgment that has denied or violated its rights. Likewise, the appellant may present in appeal also proposals concerning deciding manner by the second instance court regarding appeal against the first instance court decision, however the proposals of the appellant have no impact in reviewing and deciding by the Court of Appeals as the second instance court.³⁷

4.2. Incorrect or incomplete finding of factual state

One of the grounds for which the party may submit an appeal against the first instance court decision is also the incorrect or incomplete finding of factual state. The party based on facts and evidence provided to the first instance court claims to indicate its right in relation to the opposing party, and if the first instance court did not achieve to confirm them, then the appellant shall submit an appeal by invoking in this ground of appeal.³⁸ Article 183, paragraph 1 of the LCP states: “There is a wrong ascertainment or incomplete one regarding the factual state when the court wrongly has verified a decisive fact, respectively when the fact of the kind wasn’t verified”. It’s court duty to properly confirm and ascertain the decisive facts in a judicial process. The litigants are obliged to present facts and evidence on contested procedure being conducted in court, in order for the court based on facts and evidence provided by the parties to render a decision. This is also due to the fact that the principle of availability comes more to expression on contested procedure rather than investigative principle. However, it becomes clear that “the court shall not approve dispositions of the parties that are in contradiction with: a) legal order; b) legal provisions; c) rules of public morality”.³⁹

About incomplete finding of factual state article 183, paragraph 2 of the LPC states as following: “There is an incomplete finding of factual state also when it comes to presentation of new facts and evidence”. This by having in mind the fact that the whole conducted procedure in a contested process as its main goal has rendering a lawful and fair decision according to legal provisions as well as according to facts and evidence presented by litigants. Hence, it may occur that in the first instance court for the parties not to be able to present all the relevant facts on conducted contested procedure, or even despite the fact that the parties have presented facts and evidence but the court did not review all facts and as a result of that has rendered a judgment without making a complete finding of factual state.

³⁷ See Article 195, paragraph 2 of the LCP.

³⁸ Brestovci, Faik, Morina, Iset, & Qehaja, Rrustem, *Civil Procedural Law Contested Procedure*, fifth edition, Prishtina, 2017, pp. 418-419.

³⁹ Article 3, paragraph 3.3 of the LCP.

However, it should be emphasized the fact that in civil contested procedure the burden of proof belongs to litigants.⁴⁰

4.3. Incorrect application of substantive law

By legal provisions is provided that the court in rendered decision indicates which substantive law provisions has applied when deciding on claims of the parties.⁴¹ A ground for appeal is considered to be also the incorrect application of substantive law and it is deemed that: "There is an incorrect application of substantive law when the court did not apply the substantive law provision that it should have applied, or in cases when such provision was not fairly applicable".⁴² Through this legal provision, the lawmaker determines when we are dealing with incorrect application of substantive law on contested procedure, by including cases when the first instance court in rendered decision did not apply the respective provision from substantive law that it should have applied or when the first instance court despite the fact that has made attempts to implement the substantive law provision did not achieve to do such a thing fairly. So, this is the case when the first instance court did not apply fairly the substantive law legal provision, but nevertheless rendered a decision. In practice may occur, that in particular cases the first instance court not to achieve to apply concretely the substantive legal norm, and as a result of this the decision of the first instance court to be unfair. In cases when the party claims that as a result of non application of substantive law or its incorrect application has come to denial or violation of any of its rights the party appeals the first instance court judgment.

The party appeals the first instance court judgment if claims that it has not been applied the adequate substantive law legal norm. In order to have lawful and fair decisions rendered by the first instance court concerning disputes between the parties, it is also required to have a fair application of substantive law legal norms.⁴³ In contested procedure is a rule that the second instance court, when it comes to submission of appeal, to take care *ex officio* also for application of substantive law, despite of the fact whether the party has specified this ground in appeal. In trial conducted in the first instance court, where the evidence provided by the parties included in contested process have been administered, the important role plays the referral to respective legal provisions of substantive law for a concrete case. It cannot be considered that it has been fairly decided or resolved for a particular legal matter if previously the substantive law has not been applied or when the substantive law has not been properly implemented. Bearing in mind the fact that the parties seek to realize their right through court proceedings if they consider that for the claimed right have sufficient legal basis recognized by substantive law. The correct application of substantive law by the court related to

⁴⁰ Kola-Tafaj, Flutura, & Vokshi, Asim, *Civil Procedure (lectures part I)*, Tirana, 2011, p. 296.

⁴¹ See Article 160 paragraph 5 of the LCP.

⁴² Article 184 of the LCP.

⁴³ Brestovci, Faik, *Civil Procedure Law II*, Fourth Reprint, Prishtina, 2006, p. 83.

disputes between litigants is indispensable, due to the fact that the substantive law is the one which determines whether to the party is recognized a particular right.

5. Limitation of appeal grounds against several judgments

It is important to emphasize the fact that not all types of judgment may be subject of appeal. Several of judgments which cannot be appealed for all foreseen grounds for appeal are as following:

- a) Judgment based on statement;
- b) Judgment based on waiver from lawsuit;
- c) Judgment by means of which the marriage is dissolved according to joint proposal of spouses for divorce by mutual agreement.

“Judgment based on statement and judgment based on waiver of lawsuit may be appealed due to violation of contested procedure provisions, or due to the fact the statement of assertion respectively of waiver from the lawsuit was given in error or under influence of violence and fraud”.⁴⁴ Through this legal provision of the LCP the lawmaker has stipulated two types of judgments which cannot be appealed from the existence of all appeal grounds determined by this law. Hence, the judgment based on statement and judgment based on waiver from lawsuit may be appealed only due to violation of contested procedure provisions or due to the fact the statement of assertion respectively of waiver from lawsuit was given in error or under influence of violence and fraud.

These two types of judgments are specific, because being as such are stipulated by legal provisions. In the first case when dealing with the judgment based on statement, the respondent agrees to plaintiff claims, whereas in the second case we are dealing with waiver from the lawsuit of plaintiff, where to this judgment the party requires for a submitted application not to be decided by the first instance court. The LCP foresees only these two types of judgments for which are not applicable the same rules related to appeal grounds, which implies the exclusion of submitting an appeal due to incorrect or incomplete finding of factual state and due to incorrect application of substantive law.

If dealing with violation of contested procedure provisions and giving a statement in error, coercion or fraud, the parties may submit an appeal due to existence of these grounds, which resulted in rendering a judgment based on statement and rendering a judgment based on waiver from the lawsuit. Through the LCP legal provisions has been stipulated that these two types of judgments, even though cannot be appealed related to all foreseen grounds for other types of judgments, nevertheless the court shall not render these judgments despite the fact there is a consent of the parties for any of these judgments, in cases when the first instance court finds that we are dealing with an application that parties cannot freely dispose of.⁴⁵

⁴⁴ Article 181, paragraph 2 of the LCP.

⁴⁵ See Article 148 paragraph 2 and Article 149 paragraph 3 of the LCP.

It is also important to emphasize the fact that in Kosovo Family Law (2006) article 87 states as following: "The judgment dissolving marriage according to the joint proposal of the spouses for divorce by mutual agreement may be appealed only because of: 1. essential violations of the provisions of the contentious procedure, 2. or due to the fact that the proposal was submitted by mistake or under coercion or deceit".⁴⁶ Therefore, even for this judgment are provided similar grounds for appeal as in cases dealing with the judgment based on statement and judgment based on waiver from lawsuit, which are regulated explicitly by the LCP.⁴⁷ Hence, even for this judgment are applicable legal provisions, which limit the grounds for appeal against judgment by means of which the marriage is dissolved according to joint proposal of spouses.⁴⁸

6. Conclusion

Bearing in mind what has been handled in this scientific paper it has achieved to clearly emphasize that the right to appeal as a fundamental human right is guaranteed by international legal acts and domestic legislation. In terms of European legal acts, a special attention is paid to article 6 (1) of the European Convention on Human Rights, which provides the right to a fair trial. Also, we have emphasized the fact that the Republic of Kosovo through its Constitution guarantees the direct application of the ECHR and this convention prevails in case of conflict with applicable laws in Kosovo. Hence, the Constitution of the Republic of Kosovo guarantees the right to appeal against court decisions in the spirit of rights guaranteed by Universal Declaration of Human Rights and the European Convention on Human Rights.

Whereas the realization of appeal right by the parties on contested procedure is regulated in a special manner by the Law on Contested Procedure. The goal of applicable legislation in general is to always realize the fundamental human rights and freedoms, as a value in contemporary law, and at the same time the right to appeal in order for the party to realize the undeniable right to appeal against the first instance court decisions. In this scientific paper we have emphasized that the LCP provides the right to appeal, grounds for which the judgment may be appealed including violation of contested procedure provisions, incorrect or incomplete finding of factual state, wrongfully application of substantive law and limitation of appeal grounds against several judgments. Essential violations of contested procedure provisions are divided into absolute essential violations and relative essential violations. A special importance in contentious process has strictly application of applicable laws. Also when it comes to submitting an appeal, for the party is required to have legal interest. After the party submits an appeal against the

⁴⁶ Law No.2004/32 on the Family of Kosovo, Official Gazette of the Provisional Institutions of Self Government in Kosovo/ Prishtina: Year I/No. 4/01 September 2006.

⁴⁷ See Article 148 and Article 149 of the LCP.

⁴⁸ See Gashi, Haxhi, Aliu, Abdulla, & Vokshi, Adem, *Commentary: Law No.2004/32 on the Family of Kosovo - LFK*, first edition, Prishtina, 2012, pp. 224-227.

first instance court decision under legal provisions, it's the second instance court duty related to absolute essential violations foreseen by law to take care *ex officio*, whereas when it comes to relative essential violations only in cases when the party expressly requests such a thing. It is as well the second instance court duty if the appellant appealed the judgment to take care *ex officio* also for application of substantive law.

In order to have a lawful and fair judgment, the courts are always required to pay a special importance to application of contested procedure provisions, full ascertainment of factual state and adequate referral to substantive law legal norm, where the party in procedural part requests the realization of right deriving from substantive law. The litigants, based on applicable legislation submit the appeal against judgment through the first instance court to the second instance court. The Court of Appeals as the second instance court shall examine the submitted appeal against the first instance court and within legal deadlines shall render a decision. Decisions in the second instance court shall be rendered in a form of judgments and rulings, depending on deciding manner. After deciding on appeal it's the second instance court duty that the rendering decision according to appeal and file case to submit it to the Basic Court as the first instance court. And then, the first instance court undertakes all the necessary procedural actions to notify the parties and persons concerned with the rendered decision according to appeal by the second instance court.

Bibliography

1. Binaku, Ledi, *Jurisprudence of the Strasbourg Court*, Reprint, Tirana, 2007.
2. Brati, Alban A, *Civil Procedure*, first edition, Tirana, 2008.
3. Brestovci, Faik, *Civil Procedure Law II*, Fourth Reprint, Prishtina, 2006.
4. Brestovci, Faik, Morina, Iset, & Qehaja, Rrustem, *Civil Procedural Law Contested Procedure*, fifth edition, Prishtina, 2017.
5. Gashi, Haxhi, Aliu, Abdulla, & Vokshi, Adem, *Commentary, Law No.2004/32 on the Family of Kosovo*, LFK, first edition, Prishtina, 2012.
6. Gruda, Zejnullah, *International Human Rights Protection*, fifth edition, Prishtina, 2010.
7. Hasani, Enver, & Cukalovic, Ivan, *Commentary: Constitution of the Republic of Kosovo*, first edition, Prishtina, 2013.
8. Kola-Tafaj, Flutura, & Vokshi, Asim, *Civil Procedure (lectures part I)*, Tirana, 2011.
9. Morina, Iset, & Nikçi, Selim, *Commentary: Law on Contested Procedure - LCP*, first edition, Prishtina, 2012.
10. Omari, Luan, *Constitution of the Republic of Kosovo in a Comparative Overview*, Tirana, 2009.
11. Pozniq, Borivoje, *Civil Procedure Law*, Second Edition, Prishtina, 1981.
12. Terihati, Franc, *Civil Procedure*, Tirana, 2015.
13. Qehaja, Rrustem, *Procedural actions concerning appeal in civil dispute under Kosovo legislation*, *Civil Procedure Review*, v.8, n.3: 79-92, sept-dec., 2017, ISSN 2191-1339.

14. Universal Declaration of Human Rights, 1948.
15. European Convention for the Protection of Human Rights, 1950.
16. Constitution of the Republic of Kosovo, 2008.
17. Law no. 03/L-006 on Contested Procedure, Official Gazette of the Republic of Kosovo/Prishtina: Year III/No. 38/20 September 2008.
18. Law no. 03/L-199 on Courts, Official Gazette of the Republic of Kosovo/Prishtina: Year V/No. 79/24, August 2010.
19. Law no. 2004/32 on the Family of Kosovo, Official Gazette of the Provisional Institutions of Self-Government in Kosovo/Prishtina: Year I/4/01 September 2006.
20. Law no. 02/L-37 on the Use of Languages, Official Gazette of the Provisional Institutions of Self Government in Kosovo/Prishtina: Year II/No. 10/01 March 2007.
21. Law no. 04/L-118 on amending and supplementing the Law no. 03/L-006 on Contested Procedure, Official Gazette of the Republic of Kosovo/No. 28/16 October 2012, Prishtina.
22. Law no. 05/L-032 on amending and supplementing the Law no.03/L-199 on Courts, Official Gazette of the Republic of Kosovo/No. 17/30 June 2015, Prishtina.