UDC: 343.156:340.13(497.115)
Professional paper

COMPLAINT AS A LEGAL REMEDY, THEORETICAL AND PRACTICAL ASPECTS

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Abstract

In criminal procedure, a "remedy" refers to a legal solution or course of action that is available to individuals who believe their rights have been violated during the criminal justice process. Remedies are designed to protect the rights of defendants and ensure that the criminal justice system operates fairly and in accordance with the law. Of course, the complaint as a regular legal remedy can be exercised within the specified legal deadlines and in the previous legal procedure.
It's important to note that not all legal remedies follow these exact stages, and the specific procedures can vary based on the legal system and the type of case. Additionally, some legal issues may be resolved through administrative processes or through negotiation without ever entering the formal legal system.
The judgments issued by the court, with which the party is dissatisfied and which have not yet taken the final form, are struck with legal means. The legal remedies are regulated by the provisions of the Code of Criminal Procedure and serve to exercise the legal remedy in case of dissatisfaction with the court's decision, therefore we can rightly conclude that the legal remedies are a kind of guarantee for the respect of the rights of the parties in the procedure.
The purpose of this paper is to find, through research methods, how these legal remedies are regulated, the changes that have occurred in criminal legislation, their application in practice, where through comparative, statistical, normative and other methods, it will be more easy for us to reach correct conclusions. With the conviction that this work will bring innovation and be a summary for all those readers who intend to study this field in the future.

Keywords: Complaint, Criminal Procedure, Legal Remedy, Criminal Procedure Code

1. Introduction

The first-instance trial consists of several stages, therefore a case which is in the above procedure has the possibility to be filtered, then to verify or not the contested evidence until the moment when the case is resolved or decided definitively. . Although our legislation in force has established procedural guarantees for making a fair and legal decision, in practice the opposite often happens. The centuries-old experience of jurisprudence shows that the judgment of rank often contains errors of a factual and legal nature.
The most frequent reasons that can lead to an unfair and illegal trial are: various deviations, incorrect assessment of evidence, the appearance of unknown evidence until after the verdict is received, lack of professionalism, court overload and many other reasons others. Therefore, to avoid exactly these omissions, most of the legislations of contemporary states, including the Republic of Kosovo, have included regular legal remedies as part of the legislation.
When we talk about legal remedies, we can conclude that historically it has been observed that all the changes that have affected the criminal legislation have tried to bring the defendant to a more favorable procedural position, where we can therefore understand that our criminal legislation has constantly been tried to announce the trend for the protection of human rights.

https://doi.org/10.62792/ut.jus.v12.i21-22.p2753

It is important to note that the Republic of Kosovo has included the European Convention on Human Rights[1] as part of its constitution, where the issue of the right to appeal the court decision is foreseen as a fundamental human right. Consequently, from this we can conclude that the same provision is also incorporated in our constitution.[2]

2. Types of Legal Remedies

Before talking about the types of legal remedies, it is worth noting that the procedural institute of appeal was born in the framework of the inquisitorial procedure. It was based on the emperor's right to interfere in the actions of his servants. The prayer that was made to the emperor to intervene in the actions of the officials is called "apellatio". Over time, the appeal understood the right of the procedural subject to challenge the decision of a lower judge before the higher judges. From now on, every higher court had the right to review the case, giving a new decision. The procedural principle of two-level trial, based not on the dependence of the lower judge on the higher one, because judges depend only on the law.[3]
In the theory of the law of criminal procedure, legal remedies are divided into remedies in the narrow sense and in the broad sense[4]. In the narrow sense, regular legal remedies and extraordinary legal remedies are considered. The main difference between regular legal remedies and extraordinary ones lies in the specific form of the decision. Therefore, the regular legal remedies can be used against court decisions that have not reached the final form and consequently the same prohibit the full power of the decision, while the extraordinary remedies are applied to the decisions that have acquired the final form and the same do not prohibit the execution of the decision.
Legal remedies in the broad sense include, in addition to legal remedies in the narrow sense, other requests allowed by law, such as: opposition to the indictment, appeal, request for return to the previous situation, request for the dismissal of the judge, response to the appeal , request for termination of detention, etc.[5]
Further, legal remedies are divided into devolutionary and non-devolutionary remedies. By devolutionary legal means, that the highest court always decides.
In addition, legal remedies are divided into suspensive and non-suspensive remedies. In addition, the regular legal remedies such as the complaint have a suspensive character because they suspend the execution of the court decision and not suspensive when they do not suspend the execution of the court decision.

2.1 General Rules Regarding Legal Remedies : There are some rules that must be followed in the appeal procedure, which are defined in advance by the criminal procedure code. The key rule is to avoid contact between the procedural parties on the one hand and the judge on the other. Any contact would cause mistrust on the part of the other party and would be considered a violation of procedural provisions. For this reason, the judge of the highest court, whether of appeal or even in specific cases, of the supreme court, are obliged to notify the opposing party of the attempt made by the other party.

[1] Available from https://www.echr.coe.int/documents/convention_sqi.pdf , Accessed 10.04.2023, Council of Europe, European Convention for the Protection of Fundamental Human Rights and Freedoms, protocol no. 7, article 2, page 45.
[2]Available from https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702, Accessed 10.04.2023, Constitution of the Republic of Kosovo, article 32, page 10.
[3] Islami.,H, (2003), "Procedura penale, komentar", Tirane, page 525.
[4] Sahiti E., Murati R.,(2016), "E drejta e procedures penale", Prishtinë, page.401.
[5] Grubac M., (2006) , " Krivicno Procesno Pravno " page.429

3. Appeal Against the Judgment

At the moment when the sole trial judge or the president of the trial panel assesses that the case has been dealt with sufficiently, all the evidence has been exhausted and there is no need for the trial to be reopened, then the verdict is pronounced. After the judgment is issued, the parties who are dissatisfied with the verdict can appeal to the court of second instance as the highest court. The authorized parties have the right to appeal and this procedure is started before the appeal court only after the submission of the request, the court of appeal does not start the case ex officio.
The judgment is struck for several reasons: due to the incorrect and incomplete verification of the factual situation, due to the violation of procedural and material provisions as well as due to the decision regarding criminal sanctions, the confiscation of the property benefit acquired through a criminal offense, procedural expenses, legal property claims as well as due to the decision on the publication of the judgment.
Authorized persons can file a complaint within 15 days, while with the provisions of the New Code of Criminal Procedure, which entered into force in February 2023, the deadline for filing a complaint is 30 days.[6] This procedure is two-stage except for the cases where an appeal can be submitted to the Supreme Court of Kosovo against the judgments of the second degree, these are two cases determined in a decisive manner in the Code of Criminal Procedure when the court of the first degree has imposed a prison sentence of for life and the appellate court has confirmed it, when the appellate court itself pronounces the sentence of life imprisonment as well as in cases where the appellate court changes the acquittal of the basic court into a conviction.

3.1 The Persons Authorized to Submit the Complaint : As for the persons authorized to submit the complaint, the specificity rests with the injured party, because based on the provisions of the Code of Criminal Procedure, the same has a limitation regarding the cases when he can file a complaint and they are: related to criminal sanctions for criminal offenses against life and body, for criminal offenses against sexual integrity, for criminal offenses against public traffic, as well as for the costs of the criminal procedure.
Complaints can also be submitted by persons whose property has been confiscated. While for the defendant and the state prosecutor as the main party in the criminal procedure, there are no restrictions regarding the appeal, the same can be presented for all bases, for all offenses and for all sanctions.

3.2 The Content of the Complaint : Since the complaint is a formal act, it is clear that its content is determined by the procedural provisions in force. Therefore, the complaint must include:

1. Data for the judgment which is being appealed
2. Reasons for contesting the judgment
3. The proposal for complete or partial annulment of the judgment or for its change
4. The signature of the complainant

As soon as the first instance court receives the complaint, it is obliged to examine it and see if it is compiled in accordance with the legal provisions. If the complaint contains omissions of a very important nature that would make it impossible to proceed further, the single trial judge or the president of the trial panel invites the complainant to make all the improvements within a reasonable period of time, which is a judicial period necessary. If the complainant does not make the requested changes, then the court will dismiss the complaint.

[6] Official Gazette of the Republic of Kosovo, Code of Criminal Procedure of the Republic of Kosovo, no. 08/L-032, Prishtina, 2022, article 380 page 184.

The complainant has the right to present new facts or evidence in the complaint, but the same must accompany the complaint with a witness that proves the reasons why the complainant did not present them during the entire procedure in the first instance.

3.3 The Reasons for Exercising the Appeal: The reasons for challenging the court decision according to Article 402 of the Code of Criminal Procedure are:

1. Essential violations of the provisions of the criminal procedure
2. Violations of the criminal law
3. Erroneous and incomplete verification of the factual situation
4. The decision on criminal sanctions, the confiscation of property benefits, the costs of the criminal procedure, legal property claims, due to the decision on the publication of the judgment[7]

Some grounds for appeal, especially the first two, which can be presented in the form of non-application of the law, or in the form of its incorrect application, the reasons on the basis of which the verdict can be appealed are presented in a taxing manner.[8] When the complainant claims that the court by judgment has violated the law, he must support his claim with one of the essential violations of the procedural provisions or in violation of the criminal law. Meanwhile, when the appellant claims that the court with the judgment made a factual omission, he will use the erroneous or incomplete verification of the factual situation as a basis for the appeal.[9]

3.3.1 Essential Violations of the Provisions of the Criminal Procedure: Violations of the procedural provisions made by the court of first instance can be relative and absolute. Absolute violations are regulated in a tax manner, while relative violations are not presented in a tax manner, but it can be considered an essential violation when the decision of the first degree can be successfully appealed.

The Code of Criminal Procedure[10] foresees the following violations of procedural provisions:

1. When the court was not constituted in accordance with the law or when the judge who was not present at the trial took part in the decision, or when he was excluded from the trial by a formal decision.
2. When the judge who had to be excluded took part in the examination.
3. When the trial was held without the persons whose presence in the trial is required by law or when the accused, the defense, contrary to his request, was denied the use of the language in the trial and to convey the trial in his own language judicial
4. When, contrary to the law, the public is excluded from judicial review
5. When the court has violated the provisions of the criminal procedure regarding the issue of whether there is an accusation of the state prosecutor, the proposal of the victim, or the permission of the competent public body
6. When the judgment was given by the court which, due to the material incompetence, could not judge this case
7. When the court with the judgment has not fully judged the case of the charge
8. When the judgment is based on inadmissible evidence
9. When the accused, summoned to plead guilty, has not admitted guilt to the charge or any of its points, he has been questioned before the presentation of the evidence
10. When the judgment exceeded the charge

[7] Official Gazette of the Republic of Kosovo, Code of Criminal Procedure of the Republic of Kosovo, no. 08/L-032, Prishtina, 2022, article 383 page 185..
[8] Sahiti E., Murati R.,(2016), "E drejta e procedures penale", Prishtinë, page.407.
[9] Ibid
[10] Official Gazette of the Republic of Kosovo, Code of Criminal Procedure of the Republic of Kosovo, no. 08/L-032, Prishtina, 2022, article 384 page 186.

11. When the prohibition of reformatio in peius has been violated by judgment
12. When the judgment does not contain the appropriate form, it is not compiled in accordance with the law.

Since the relative violations are not defined by law in a tax manner, however, such violations can be considered when, at any stage of the procedure, either the police, the judge or the state prosecutor have not implemented any provision of the Code of Criminal Procedure or have implemented it in a way wrong. How and when the rights of defense have been violated and this has affected or could have affected the obtaining of a legal and fair judgment.

3.3.2 Criminal Law Violations: The criminal procedural legislation has determined in a tax manner all the cases where we are dealing with violations of the criminal law. According to Article 385, the violation of the criminal law exists:

1. If the offense for which the accused is prosecuted is not a criminal offence
2. If there are circumstances that exclude criminal liability
3. If there are circumstances that exclude criminal prosecution, and especially if criminal prosecution has been prescribed or prosecution has been excluded due to amnesty or pardon, or the case has been judged by summary judgment.
4. If related to the criminal offense which is the object of the charge, the law was applied which cannot be applied
5. If in making the decision for sentencing, alternative sentencing, judicial warning, or in making the decision for the measure of compulsory treatment for rehabilitation or for the confiscation of property benefits acquired through a criminal offense, the court has exceeded its legal powers
6. If the provisions on the calculation of the sentence and detention have been violated

These violations are of an absolute nature and the court will always hold them accountable for their violation!

3.3.3 Incorrect and Incomplete Verification of the Factual Situation: The issue of verifying the factual situation is quite difficult and complicated, because the opposing parties bring a lot of evidence to the court to verify their claims and often such a large volume of documents can lead to incorrect and incomplete verification of the actual situation. In the case of an appeal, if the appellant does not mention this basis for appeal, then the court of second instance is not obliged to review the verdict in this regard. Although the court of the second instance may express doubt on the accuracy of the factual situation verified by the first instance judgment, but without analyzing the evidence according to the principle of justice, it cannot change the factual situation. It is important to note that a complaint cannot be filed on this basis if the defendant has reached a plea agreement with the state prosecutor.

4.The Procedure Related to the Appeal against the Judgment of the Court of First Instance

The complaint in the court of first instance is submitted by the authorized person within 15 days according to the Code of Criminal Procedure of 2013. While according to the new Code the complaint is submitted within the period of 30 days, the whole procedure takes place in two stages: the first stage and the second stage.

The complaint is presented in a sufficient number of copies for the court and the opposing party. The court sends the same complaint to the opposing party, which must submit an answer to the complaint within a period of 8 days. If the opposite party does not give the answer in the previous term, then the court of first instance sends the appeal with all the documents of the case to the court of second instance for decision. If the court of first instance

encounters errors regarding the compilation of the complaint or the same complaint was sent by an unauthorized party or out of time, this court does not have the competence to decide, but it still remains with the court of second instance. With the new criminal procedure code, the jurisdiction of the first instance court has been expanded due to the same fact that it can decide for itself if the complaint was sent by an unauthorized person or even out of time, this is seen as very positive because there is no need to cases are accumulated in the court of appeals only for the fact of not undertaking some procedural actions.

When the complaint together with the documents of the case reaches the court of second instance, they are delivered to the president of the designated college, the president of the college has the obligation to receive the complaint and examine it first to assess whether the complaint is timely and allowed, if they are fulfilled these two initial conditions, then the president of the college appoints the reporting judge. The reporting judge has the task of examining the case in accordance with the documents of the case at his disposal, if there is any ambiguity regarding the case, complaint or any other issue, the reporting judge can turn to the court of first instance for additional information. When the reporting judge assesses that the case has been sufficiently examined, he notifies the president of the college. The chairman of the college appoints the session of the college. It is important to note that the appellate court can decide in a panel session or in a judicial review.

In the session of the collegium held near the court of appeal, the parties participating in the procedure are only informed about this session, but they are not obliged to participate. The session of the collegium begins with the report of the reporting judge regarding the facts, which he treated well, but he is not allowed to give his personal opinion regarding the matter. After hearing the reporting judge and eventually the parties as well, the appeals panel closes the session and withdraws to a non-public session in which the decision is made regarding the complaint and the appealed judgment.

The appellate court will hold the judicial review when, due to the incorrect and incomplete verification of the factual situation, new evidence must be taken or the previously treated evidence must be repeated, as well as when there are reasonable reasons for the case not to be returned to a retrial. The judicial examination is continued in this case with the report to the reporting judge, who is also not allowed to give his personal opinion in this case. The contested part of the judgment or complaint is also read and it continues with the declaration of the parties, of course the first to be declared is the complainant himself. From this we can understand that the judicial review must be held in their presence and the absence of the parties means the decision to be in the session of the college and not holding the hearing.

During the review, the appellate court will review the case only for the part that was appealed, except in cases where we are dealing with:

1. Absolute violation of the provisions of the criminal procedure code[11]
2. Contrary to the criminal procedure code, the trial was held in the absence of the accused
3. In cases of necessary defense, the judicial examination was held without the presence of the defender
4. The criminal law was violated to the detriment of the accused

After holding the judicial review or the session of the collegium, the court of appeal has the right to decide on the matter in question in several forms:

1. Dismiss the appeal as untimely or inadmissible
2. Rejects the appeal as unfounded and verifies the judgment of the basic court
3. Overturns the judgment and returns the matter to a retrial
4. Changes the judgment of the basic court

These decisions are given by the court of appeal in the form of a judgment or in the form of a decision. However, it is worth noting that in the event of a retrial, the basic court is bound by

[11] Article 384, paragraph 1, subparagraph. 1,2,6 and 8 to 12.

the recommendations of the appeals court, but still the judge is free to decide, always taking into account the corruption of the evidence and his free conviction.

5. Application of the Complaint in the Republic of Kosovo

From the data obtained from the evidence of the data in the court of appeal in these last 5 years, we can see a large number of cases that went to this court with appeal, however, we will pay attention to the cases that affect the field criminal.

In the year 2022

Criminal Division 1950 admitted cases

Department for serious crimes 733 cases received

Special department 50 accepted subjects

Department for minors 162 accepted subjects

These figures do not include cases of complaints about detention or any other measure of security.

In the year 2021

Criminal Division 487 accepted cases

The Department for Serious Crimes received 160 cases

Special department 5 accepted subjects

Department for minors 41 accepted subjects

These figures do not include cases of complaints about detention or any other measure of security.

In 2020, we do not have official statistics.

In 2019, in the first quarter, 3909 cases were received, during the remaining nine months, 11947 cases were received. These data are a little unclear regarding the number of accepted criminal cases because in the statistics issued by the Court of Appeals it appears as a general number.

In 2018

Criminal Division 1357 cases received

The Department for Serious Crimes received 636 cases

Special department 5 accepted subjects

Department for minors 92 accepted subjects

These figures do not include cases of complaints about detention or any other measure of security.

From these data we can see how much the complaint is applied as a legal remedy, this shows perhaps two main components, the fact that citizens are aware of the extent of the application of legal remedies and their displeasure in relation to court decisions.

Conclusion and Recomandion

From the above data we can come to some conclusions first regarding the legal regulation of the issue of legal remedies and in this case the complaint, we can see that our legislation has regulated this issue since the first codes always referring to our legal rule from the year 2000. The importance of the appeal as a legal remedy also lies in the fact that in the changes made to the new Code of Criminal Procedure, the appeal deadline was extended to 30 days, in a way the legislator has paved the way even more for the disgruntled party to take advantage of his right to appeal by giving him a relatively long term compared to what was earlier.

Another important issue regarding legal remedies is the grounds for filing a complaint, there is a wide range of cases where the aggrieved party can use the right of complaint. Another very important issue is the application of these remedies, especially the complaint, in practice,

this fact determines many important things, first of all, the fact of a citizen's maturity to use their rights that are guaranteed to them by law. The overload of cases is also highlighted, which as a result can lead to inefficiency and procedural delays, as well as long waits.
Therefore, we can rightly say that the legal basis of the country has been regulated quite well, then all the changes that have been made in the criminal legislation regulate this matter in a more detailed way, the only obstacle that can be seen is the creation of mechanisms to speed up the procedures in so that we don't have dissatisfaction and long waiting of the citizens.

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