



The Right to Appeal as a Fundamental Right under International Acts and Jurisprudence, with Special Emphasis on Criminal Procedure

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Abstract: The right to appeal, respectively the right on complaint as per our legal vocabulary, constitutes the basic trunk of the second phase of court decisions in a certain procedure, in particular the criminal proceedings. The aim of this paper is to emphasize the main notions of appeal, but also in other aspects through the comparative description it aims to bring more clarity in differences and similarities that exist in between the appeal which is used in our criminal proceedings and the appeal which is used in the criminal proceedings that take place in the supranational courts. It is known that in courts which consist of international elements, the appeal is positioned in a more advanced level, due to the fact that there are grounds of suspicion used over every element that could be used in any national criminal proceedings. Overall, in any place of the world, the appeal has the goal to remedy court decisions brought by the court of first instance, while, in the procedural aspect it has more or less differences depending on the regulations of criminal procedures of that state. Such difference due to the diversity of the legal systems today are also accepted as the universal legal value, since establishment of international tribunals provides the best practice in this field.

Keywords: appeal; international tribunal; international treaty; legal error; error of fact; extraordinary legal remedy

1. Notion of Appeal in Criminal Proceedings, in General

The right to appeal takes place into the historical category, due to the fact that this right, as such, has existed since the establishment of judiciary as a form of judging a person with criminal charges for committing a crime.

The notion of appeal refers to the right of the accused and the prosecutor (the prosecuting authority) to have the chance to appeal the judgement of the court of first instance, under the pretense of any eventual error undertaken by this level of

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trial. Therefore, the appeal plays the role of the instrument that fixes the eventual errors, which could have been done by the court of first instance. The right to submit the appeal guarantees the procedural parties that the principal of two instances will be respected.

Taking into account the importance of the appeal, it is necessary that the reviews of the court of appeal, concerning the appeal submitted for a criminal case, should be authentic and in the highest level of quality. This indicates that during exercise of its duties, the court of appeal expected to review very carefully the cases forwarded for judgement and interpret and apply the law in most accurate and uniform manner within the limits of legal procedures. Furthermore, they should analyze in details the case forwarded for trial, the reasons provided by the judge in the decision appealed, and also the arguments and claims of the party that submitted the appeal. To continue, once the court has properly assessed the evidences that are pro and against the defendant, the most important thing that should be done is that the court of appeal should give a full and clear argument and also reasonable explanations for decisions taken in the underlying issues. (The analysis of the proceedings of criminal cases on appeal in the Republic of Albania, 2007, p. 11)

Worldwide, in general, the appeal has the aim to correct the judicial decisions issued by the court of first instance, while in the procedural aspect it has more or less differences depending on the arrangement of criminal procedure of that country.

2. The Right to Appeal in Criminal Cases as Per the International Human Rights

The international human rights also recognize the right of the indicted to appeal court decision in criminal proceedings, to whom the first instance initiated the procedure for one or more criminal offences, for which the accused is found guilty, and he/she has guaranteed the right to appeal in the higher court instances. This way he/she has enough space to provide his/her claims and submit his/her reasons in relation to the judgement of the first instance court. This is a fundamental and inalienable right. What is more, this right derives from the commitments of countries, in relation to their role in the international relations field.

The dynamic development of the human rights and freedoms is intensified only after the World War II. The states that won the WWII (*Great Powers*) took their

initiative and agreed that there should be a legal regulation in regards to the aspect of bilateral relations, after both world wars had destroyed everything. It was necessary to “strengthen again the faith in the fundamental human rights, in the dignity and values of our personality and in the equality of people and nations”.¹ Moreover, after the World War II, in democratic societies the human rights and freedoms were developed very fast. As such, they are defined and protected with numerous international documents at European and worldwide levels. Thus, the human rights are not an internal issue of the state anymore, but instead they are the subject of the extensive involvement of the international community. (Murati, 2006, p. 26)

The Charter¹ of the United Nations does not define the fundamental human rights and freedoms in general, or the right to appeal the court decisions. Furthermore, there is not a provision that would ensure their compliance. Nevertheless, the United Nations Charter offers a general concept to recognize and to protect the fundamental human rights and freedoms and to have international cooperation in order to ensure such rights.²

Even though the Charter of the United Nations does not have a provision “*expressis verbis*” mandatory to the countries to ensure the full and effective compliance of fundamental human rights and freedoms, it exists a dominant understanding for the necessity of fundamental compliance for human rights and freedoms. This is a moral but not a legal obligation. With the adoption of the Charter, the human rights became part of the positive international rights. Therefore, once and forever they stop being a matter of states and became a matter of legitimate concern of the international community.

The Universal Declaration of Human Rights³, differs from all the previous classic texts on human rights, due to the efforts to connect the civil and political rights with the economic, social and cultural rights for the first time. The UDHR consists of preambles and 30 Articles, which include numerous amount of fundamental human rights and freedoms that belong to all citizens. Moreover, the right to appeal is a guaranteed right that is found in the provision of Article 8 in UDHR, which states that “Everyone has the right to an effective remedy by the competent

¹ Fragment taken from preamble of the United Nations Charter.

² The Charter is also known as United Nations Constitution, because is the fundamental act and the act that regulates the organization and function of United Nations mechanisms. The Charter is signed on June 26 1945 in San Francisco (USA) and came into force on 24 October 1945.

³ UDHR is adopted by the United Nations General Assembly on 10 December 1948.

national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.

According to the Article 2, Protocol no. 7 of European Convention for the Protection of the Human Rights and Fundamental Freedoms,¹ the right to appeal in criminal proceedings is considered a guaranteed right where every person declared guilty from the court on criminal offense charges, has the right to submit a review on being guilty or not at the higher level court. Exercise of this right, including reasons for use of this right is defined by legal acts. Furthermore, there might be exceptions in this right particularly when dealing with minor offense cases that are defined by law, or when the interested party was judged in the first instance by the highest court or declared guilty and sentenced in the continuation of an objection against his/her innocence. The mechanism, which exclusively deals with protection of human rights, guaranteed by this convention, in the last instance is the European Court for Human Rights. The court has jurisdiction over the cases that deal with the interpretation and application of the Convention and its Protocols as it is defined in the Articles 33, 34 and 47. (Gruda, 2010, p. 64)

Even the International Convention on Civil and Political Rights (ICCPR)² guarantees equal rights to everybody as it is defined in the Preamble of this international document, the recognition of dignity and equal human rights for everyone is the foundation of freedom, justice and peace in this world. According to this international act, every state that ratifies this document and makes it an integral part of the legal system is obliged to respect and to ensure the guaranteed rights of this treaty³ to all individuals of the territory without distinction.

¹ European Convention for the Protection of Human Rights and its Protocols, according to the Article 22 of the Constitution of Kosovo have direct application and also have priority in case of dispute in between provisions and laws and other acts of public institutions.

² This international document was adopted and opened for signature, ratification and accession from the General Assembly with its resolution 2200 A (XXI) on 16 December 2006. This treaty is directly applicable even in Kosovo approved by the Constitution of the Republic of Kosovo, Article 22, which has direct application and priority in case of any conflict towards provisions, laws and other acts of public institutions.

³ The guaranteed rights in this treaty include: the right to life (Article 6); the right for effective remedy (Article 2); the right to liberty and security of person (Article 9); the right for liberty of movement and freedom to choose his residence (Article 12); the right to freedom of thought, conscience and religion (Article 18); the right to freedom of expression (Article 19); the right of peaceful assembly (Article 21); the right to freedom of association with others and form and join trade unions (Article 22); the right to vote (Article 25); respect for human dignity (Article 26) and other rights.

The right of effective remedy, in the text of this treaty is found in the Article 2, paragraph 3, points a, b and c. The states that ratify this treaty are obliged to: “ensure that every person when his rights and freedoms of this treaty are violated has the right for the effective remedy, even if the violations are done by people who are acting in an official capacity (Article 2, paragraph 3, point 1 of ICCPR). The adhering country is obliged to ensure that the competent judicial, administrative or legislative authority, or any other authority that is competent under state legislation, will determine the rights of the person that has legal remedy and will give the chance to represent the legal remedy (Article 2, paragraph 3, point 2 ICCPR). Furthermore, every state party is obliged to ensure that the competent authorities will act upon any remedy that is defined by legal acts (Article 2, paragraph 3, point 3 of ICCPR).

Unlike these acts, appeal in criminal proceedings, as a fundamental and inalienable right, is also guaranteed with other international documents. It has taken a very significant position in many provisions of these international documents by protecting and the same time promoting the right of remedy against court decisions in a regular criminal proceeding held by the first instance.

The Constitution of the Republic of Kosovo in its 2nd chapter points out that the accused has the right of the legal remedy, where it states that: “Every person has the right to use the legal remedy against court and administrative decisions which impinge his/her rights defined by law.” (Constitution of Republic of Kosovo, Article 32). Moreover, the right to complaint forecasted within the Constitution, namely in the general principles, which states: “The right to appeal against any court decision is guaranteed, unless otherwise provided by law. The right for legal remedies is regulated by law. The law may permit the right to refer a case directly to the Supreme Court where in such cases there is no right to appeal.” (Constitution of Republic of Kosovo, Article 102, paragraph 5)

3. The Right To Appeal Court Decisions As Per The ICTY

Article 25 of the Tribunal statute, chapter 7 of the Rules of Procedure and Evidence foresees the right on appeal. Procedure of the review of court decisions arranged with the provision of the Article 26 and chapter 8 of the Rules. As per the legal science, remedies divided in regular and extraordinary ones. These types of remedy vary in final version of the court decision.

A regular legal remedy in this case considered the right to appeal, whereas other remedies are extraordinary legal remedies. Even in the treatment of this case, we can say that regular legal remedy is the right to appeal, whereas request for review considered as extraordinary legal remedy. This legal remedy is allowed to be exercised, even after the second instance court issued a final decision, only following any new fact disclosure, which was not known to the court and parties.

Notification on the exercise of the appeal, as regular remedy of the appeal of court decisions of the Court Chamber, as per the rule 108¹ of the Rules of Procedure and Evidence should be submitted latest 30 days after the judgement is issued, and it should contain justification. Nonetheless, file of the appellant, with all arguments and sources utilized, as per the rule 111² submitted within 75 days after the presentation of the appeal notification as per the rule 108.

Appeal, as regular legal remedy to appeal an court decision, can be submitted by the court parties in the certain criminal case, whenever within the general term of 75 days, after submission of the notice to exercise the right on appeal. 75 days term is a term provided in the Rules of Procedure and Evidence, and as such, it is a subject to amendment and negotiation by the court and court parties in terms of reduction or extension of such a term. (Rules of Procedure and Evidence, Rule 127)

However, from the general term of 75 days, there is a substantial difference in regard to the term of the submission of the appeal only regarding the appeal against the sentence issue. Difference consists in the fact that the terms changes and it is shorter in comparison to the general term, and in this case term of 35 days is valid after submission of the notice on appeal as per the rule 108. (Rule 11 (File of the Appellant), par. (A), Rules of Procedure and Evidence)

According to the Rule 108 (Notice for Appeal), term for submission of the notice to exercise the right on appeal commences from the day of the judgment being pronounced. Trial panel, in the appeal session prior to the holding of the session where pronounced the judgement of the Court Chamber, formulates a brief summary with inclusion of basic elements of the judgement, its provision, and a

¹ This Rule adopted on February 11, 1994, and reviewed on January 30, 1995, amended on July 25, 1997, amended on November 12, 1997, amended on July 10, 1998, amended on July 2, 1999, amended on November 17, 1999, and December 13, 2001.

² Rule 111, which foresees regulation of the appellant adopted on February 11, 1994, reviewed on November 12, 1997, amended on July 10, 1998, November 17, 1999, December 13, 2001, and July 21, 2005.

short history with reasoning. After reading of this summary, judgement of the Court Chamber is announced, with information to parties that they will be equipped with a copy of the judgement. Practice of the copy of the judgement differs from the national courts because in the most of them judgement is pronounced in the day set in advance, whilst copy of the judgement given within a certain time term.

Appeal is a regular legal remedy and as such it has suspensive consequences in terms of the judgment execution. However, depending on the type of the judgement given, there are different rules which to reflect the status of the accused. In the first case, if the accused found guilty immediately after the notice for appeal, application of the judgment is suspended until the announcement of the appeal decision, whereas person found guilty continues to be detained, as per the Rule 64. Nonetheless, in this situation, there can be exclusion, since Rule 99, paragraph (B) foreseen that even if the accused found guilty, he/she can stay in detention after request made by the Prosecutor, and Court Chamber after the request of the Prosecutor and hearing of both parties, in its judging, can issue an order for further detention of the accused, awaiting the appeal decision.

In the second case, if the accused found guilty, applies Rule 102. Based on this rule, immediately following the notice for appeal, implementation of the judgement is suspended until the announcement of the decision of the appeal, whilst, person found guilty remains detained, as per the Rule 64. In addition, if based on the earlier decision of the Court Chamber, person found guilty is freed, or in freedom due to any other reason and not attending announcement of the judgement, Court Chamber issues an order to arrest the person being guilty. During the arrest, person found guilty is informed about his/her guiltiness and sentence and procedure defined in Rule 103 is pursued.

Parties may waive of the right on appeal because the right on appeal is not the obligation of the party but only as the opportunity that can be used by them in order to appeal the judgement issued by the Court Chamber. Waiver from the right to appeal expressed when procedural parties within the term defined for the submission of the appeal do not exercise such a right. Waiver can be expressed explicitly during the judgement being issued, when the party declares that it will not exercise the right to appeal, and in the manner of non-exercising it within the term defined for the motion for submission of the appeal. Not exercising the right to appeal by both procedural parties produces legal consequences because judgement of the Court Chamber is final. But, in order for judgement to be final in

this stage, we have to keep in mind the fact that both parties should not exercise their right to appeal because if one party exercise the right to appeal, such judgement should not become executable, but an appeal proceeding commensurate rules for this procedure will take place.

4. The Appeal under the Statute of the Permanent International Criminal Court

The ad-hoc courts, established to judge the perpetrators of crime in different countries on the contrary to humanitarian right, were not shown so efficient in terms of prosecuting the perpetrators and investigation of crimes happened in countries where war took place together with committed crimes against international right.

Huge necessity raised to establish a permanent court under the UN umbrella, which aimed dealing with the perpetrators of crimes committed against the international right. On July 17, 1998 in Rome it was drafted the Rome Statute for the International Criminal Court. The Statute of this Court entered into force on 1 July, 2002, in full compliance with the Article 126 of the Rome Statute. According to some international affairs analysts, the establishment of this court represented one of the most important events in the international arena. Furthermore, the signing of this agreement was considered a historical landmark, which was evaluated in the same level with the Universal Declaration of Human Rights in 1948. (Salihu, 2005, p. 326)

The International Criminal Court is a permanent institution which has authority to exercise its jurisdiction over individuals who are responsible for most serious crimes considered to of international concern, as specified in its Statute, and it will be a fulfillment of the national criminal jurisdictions.¹

This Court is composed of bodies as follows: a) Presidency; b) The Appeals Division, The Trial Division, and Pre-Trial Division; c) Office of the Prosecutor, and d) The Registry. (Rome Statute for International Criminal Court (RSICC), Article 81)

The decision of this court may be appealed in accordance with the Rules of Procedure and Evidences as follows:

¹ Article 1, Rome Statute for International Criminal Court (RSICC), approved by the United Nations Diplomatic Conference of Plenipotentiaries for establishment of the International Criminal Court on 17 July, 1998, came into power on 1st July, 2002, in compliance with the Article 126.

1) The Prosecutor may appeal based on any of the following reasons: a) Procedural error; b) Error of fact, or c) Error of law.

2) The convicted person or the Prosecutor on behalf of that person can exercise the appeal based on: a) Procedural error; b) Error of fact; c) Error of law, or d) Any other grounds that affect the impartiality and reliability of the proceedings or decision. (RSICC, Article 81)

For the purposes of proceeding according to the appeal, the Appeal Chamber has all the competences of the Trial Chamber. (RSICC, Article 83, par.1.). If the Trial Chamber finds that the proceedings which are under appeal were unfair in a way that affected the reliability of the verdict or sentence, or that the verdict or sentence was impacted from the error in fact or in law, or the procedural error, the Trial Chamber could: a) Cancel or change the verdict or sentence, or b) Order a new trial in another Trial Chamber. (RSICC, Article 83, par. 2)

Due to these reasons, the Appeal Chamber may return the factual issue to the Trial Chamber in order to determine the issue and to report again accordingly, or may seek evidences itself to determine the case. When the decision or sentence has been appealed only by the convicted person or by the Prosecutor on behalf of the convicted person, it cannot be changed on his or her detriment. (RSICC, Article 83, par. 3)

Moreover, if the Appeal Chamber finds out in the appeal that the sentence is disproportionate to the crime, it may change the sentence.

The decision of the Appeal Chamber shall be taken by the majority of judges and it shall be announced in an open court. The decision shall state the reasons on which it is based upon. When there is no unanimity, the decision of the Appeal Chamber shall contain the views of the majority and minority, but one judge can provide separated or different opinion for any legal issues. (RSICC, Article 83, par. 4)

The Appeal Chamber may announce its judgement in the absence of the sentenced or acquitted person. (RSICC, Article 83, par. 5)

5. Conclusion

In today's world, criminal proceedings against an accused held for a certain criminal act cannot be imagined without the use of the right of appeal to a court decision taken on the first instance.

Mistakes of legal and factual nature are possible at any stage of the criminal proceedings. Life itself and its dynamics indicate that no juridical system is perfect to make final verdicts without having to examine them on any stage of the proceeding.

Modern justice is based on a modern and high standard criminal trial as the guarantor of respect for human rights and freedoms. It now takes care that in both legal regulation and in practical application freedom and human rights are on the first plan.

Appeal as a human right, based on the statistics of this level in a high percentage of cases heard, has managed to change judicial decisions rendered by the court of first instance, since the second instance court during the examination of appeals has managed to find numerous of errors factual and legal nature, in benefit or detriment of the accused.

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