



## Review Of A Final Decision As Part Of The Correct Legal Process

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**Abstract:** *One of the essential elements of a correct legal process, as one of the main human rights, among the others, is to appeal to court to object a sentence given by a lower court. The request for reviewing a final decision is part of the rights which represents a special way of complaining, an extraordinary instrument, as by this instrument can be opened as a final claim at the court. Parties can request to review only facts, conditions or events for which there was no information before that they had existed or that they had happened, or which were proved during the legal process and which have affected in giving the sentence which has been contested to be reviewed. Often an individual's right is violated because of proper legal process in disaccordance with the procedural legal provisions as well as their interpretation by the Supreme Court, since the demands/or procedural requests are not fulfilled as foreseen by the law. In this case, the person files a request for the final decision to be reviewed.*

**Key words:** *Court; Code of Civil Procedure; review; court decision; law*

### INTRODUCTION

The right to go to court is one of the essential elements of a proper legal process, acknowledged not only by the Constitution<sup>1</sup> but also by the European Convention on Human Rights<sup>2</sup> (ECHR). This human right does not include only the right to start a trial, but also the right to be given a final solution by the court about the disagreement being on trial as the access to the court has to be substantive and not just formal. For this framework, the Constitutional Court emphasises that the right to appeal to a court is a guarantee for a good administering of justice itself<sup>3</sup>. Denying the right to appeal to court and to get a final answer for the assumed claims, violates the essential right for a correct trial. However, this right cannot be considered as absolute, as it is foreseen by legislation in the Article No. 43 of the Constitution: *Every person has the right to complain against a court sentence in a higher instance court, except cases which are differently foreseen by the law because of minor offences, civil or administrative cases of a low importance or value, pursuant the conditions foreseen in the Article No.17 of the Constitution*. Based on this, we can say that decisions/sentences given by the Court of First Instance and the Court of Appeal can be appealed, always within the limits defined by law such as importance or value referring to the object being sent to court. It is therefore foreseen, regarding the

<sup>1</sup>Law No. 76/2016 On some subsidiaries and changes in law no. 8417, dated on 21.10.1998, "Constitution of Albanian Republic", amended, no.43;

<sup>2</sup> [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf), **European Convention on Human Rights, Article 6;**

<sup>3</sup>Decision No. 17 dt. 24.03.2014, Constitutional Court;

appealing decisions in higher courts pursuant the value of suing by the law<sup>4</sup> on settling administrative disagreements, whereas in the Code of the Civil Procedure (CCP) the suing value of the petition is connected with the judges' panel with one or three members when the case is higher than 20 million Albanian leks.<sup>5</sup> According to the European Court of Human Rights (ECHR), the concept of civil rights and obligations has evolved and is becoming more and more liberal, especially in cases which include elements of public rights.<sup>6</sup> ECHR in its decisions has modified the initial frameworks regarding disagreements on employment in the civil service and the rights that derive from social security<sup>7</sup>. Therefore, ECHR has not established a limit regarding the right to appeal, but this referring to ECHR<sup>8</sup>, is up to the governments to adapt their own legislation with the recommendations and conclusions reflected by the jurisprudence of ECHR<sup>9</sup>.

Appealing ways are manners, which enable parts of the trial to state their objections to a higher court<sup>10</sup>, by which the request for appeal as an instrument is the act by which is demanded to review a court's final decision.<sup>11</sup> This is an extraordinary instrument<sup>12</sup> against the civil decisions which aims to review the case because the court decision is wrong regarding valuing the fact(s). The appeal can be considered by the Supreme Court (SC) only for facts, proof, circumstances or events, which one of the parts was unaware of during the trial and which have affected the decision to be appealed. SC can also accept to proceed the appeal only when the person has respected some procedural aspects that this case demands.

### **Procedural aspects of an appeal as part of a correct trial**

1. The right to go to a court referring to provisions of CCP (articles 1-30), Article No.42 and No.43 of the Constitution, and Article No.6 of ECHR, implies the individual's right, whether physical or legal one, to sue in court, or to appeal against a court decision to a higher court. According to Article No.494 of CCP *The interested part can request the appeal of a decision of its final form, when...*, but can each of the interested parts involved ask for an appeal and how should this interest be? The procedural legislation of the 1958<sup>13</sup> had foreseen that the appeal of decisions can be requested by the interested part, by the chairman of the SC and by the General Prosecutor<sup>14</sup>, and the last ones can write a request for an appeal even after the deadlines<sup>15</sup> defined in Articles

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<sup>4</sup>Law No. 49/2012, On organisation and functioning of the administrative courts and trial of administrative disputes, (*amended by law no. 100/2014*);

<sup>5</sup>Code of Civil Procedure of the Albanian Republic, (*approved by law no.8116, date 29.3.1996 and amended by law no.8431, date 14.12.1998; no.8491, date 27.5.1999; no.8535, date 18.10.1999; no.8812, date 17.5.2001; no.9953, date 14.7.2008, no.10 052, date 29.12.2008, no.49/2012; 122/2013; 160/2013; no.114/2016, date 3.11.2016*) published by Center of Official Publications, Tirana, 2016, no. 35;

<sup>6</sup><https://www.asgi.it/wp-content/uploads/public/sentenza.8.dicembre.1999.pellegrin.c.francia.pdf>, Case of Pellegrin v. France, (Application no. 28541/95), European Court of Human Rights, Strasbourg, 8 December 1999;

<sup>7</sup> *ibidem*;

<sup>8</sup><http://website-pace.net/documents/19838/2008330/AS-JUR-INF-2016-04-EN.pdf/12d802b0-5f09-463f-8145-b084a095e895>, The Impact of the European Convention on Human Rights in States Parties: selected examples, Parliamentary Assembly, Council of Europe, (8 January 2016).

<sup>9</sup>(June 2010). Summary of decisions of European Court for Human Rights against Albania, published by Center of Official Publications,

<sup>10</sup> Tafaj F., Vokshi A., (2014), "Procedura Civile", Part II, pg. 263;

<sup>11</sup> Code of Civil Procedure, (2014). Published by Center of Official Publications, Tirana, no. 494/1;

<sup>12</sup> In CCP in 1958 (no. 291 - 305), as an instrument was known the request for a legal protection against a final decision which included the petition for review and recourse;

<sup>13</sup> (1958). Code of Civil Procedure of Popular Republic of Albania, Tirana,

<sup>14</sup> Recent procedural Legislation foresees only the interested parties;

<sup>15</sup> Lamani A, (1962), "Civil Procedure of Albanian Republic", pg. 230;

No.299 - 301 of CCP<sup>16</sup>. This law has foreseen the *interested party* and not every interested person, admitting that the right to appeal is of the parts in trial or judging or the ones who suffer in their rights, thus not every person who might be interested in it. We would say that the recent law has foreseen that the right to appeal a decision of its final form is only of the part who has been part of the trial and not of third parties, which is one of the main characteristics in this trial, different from the former one. Even the Constitutional Court has argued that: *Pursuant no.494 and of the CCP, the right to appeal to SC, to review a decision of its final form, is the right of every person who has been part of the case in trial, and for which the decision is given, and has legal interest to appeal it. This means that is up to the above mentioned person's will to appeal or not, or to appeal it with other people who are part of the same case.*<sup>17</sup>. As it can be seen, the party has to be part of the trial<sup>18</sup> which decision has an effect upon and the legal interest can be reviewed. By party we mean even the people who inherit or lose their rights, referring in this case who do the effects of the final decision affect<sup>19</sup> and who contest it by appealing to it.

2. Secondly, the case can be appealed when/if we compare to the other means of appealing such as appealing to the High Court or in the recourse in SC, which are shown in the Court of First Instance. Before changes in CCP in 2001<sup>20</sup> the request for an appeal was sent to the Court of First Instance<sup>21</sup>, as a common complain/suing. Studies of the authors of the Right state that this fact had problems since the Court of First Instance could have given a decision that was different from the one given by the Court of Appeal.<sup>22</sup> Referring to this attitude, I do not think that sending the appeal to the Court of First Instance would be a problem because each of the courts can argue or judge differently on the disagreement to be tried. Courts are obliged to consider any kind of requests by the subjects of the right and not to prejudice certain cases for which they might have given a decision that may have been nullified by the Court of Appeal or SC (there have been many cases which have been appealed and reappealed). Even in the case of appealing, regardless of the fact that the decision which has been contested can be one of the courts of fact, SC can send it back to be reviewed by each of them, after having proof that the conditions foreseen in the Article No.494 of CCP exist. Eventhough this change has been made, I think that sending the appeals, even requests about reviews, in the Court of First Instance would not result in any negative consequences neither for the court nor for the individual. On the contrary, all the requests would be grouped all together in the same place with the appeal or the recourse. Another argument would be the harmonious interpretation of the provisions of the CCP, (Part III, Title I, Chapter I, Means and deadlines of an appeal) respectively the Articles No. 443 – 447, where no. 446 foresees that the appeal is sent to the court that has given the decision that is to the Court of First Instance.

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<sup>16</sup> (1958). Code of Civil Procedure Popular Republic of Albania, Tirana,

<sup>17</sup> Decision No.2, dt, 05.02.2008, Constitutional Court;

<sup>18</sup>(2014). Code of Civil Procedure, published by Center of Official Publications, Tirana, no. 451/a: *A final decision is obligatory of the parties, their heirs, those who give up their rights from the parties, for the court that decided and all other courts and institutions. A final decision exercises its power only on what is decided upon these parties, for the same subject and the same cause.*

<sup>19</sup> *ibidem*, no.451/a: *A final decision is obligatory of the parties, their heirs, those who give up their rights from the parties, for the court that decided and all other courts and institutions.*;

<sup>20</sup>Law No. 8812, date 17.5.2001, On some subsidiaries and changes in law no.8116, date 29.3.1996 "Code of Civil Procedure of Albanian Republic", no. 101, amended no. 497: The petition for review is filed to the Supreme Court ... ;

<sup>21</sup>Law No.8116, date 29.3.1996, Code of Civil Procedure of Albanian Republic, *Article 497: The petition for review is filed to the same court that sentenced the decision on which is being claimed;*

<sup>22</sup> Tafaj F., Vokshi A., (2014), Civil Procedure, Part II, pg. 367;

3. Sending the claim to be appealed is the beginning of reviewing the legal process which can be divided in three specific and very important moments<sup>23</sup>, if the claim is accepted.

**The first moment** is the discussion in the Counselling Room without the presence of members of the Civil College (SC) when /if the circumstances foreseen by law are proved and the case is passed to a court hearing session<sup>24</sup>. By doing this in the presence of all parties and after the provisions regarding parties' notification are respected, consists of the **second moment**. If the SC decides not to pass the case to a trial session because there are no causes to accept the claim<sup>25</sup>, then it is the party's right to go further or not (considering the circumstances or the law application by the courts), by appealing to the Constitutional Court (CC), for violation of a correct legal process.

**The third moment has to do with** analysing the case in the competent court referring to no. 498 of CCP, which foresees when SC decided to completely or partly nullify a decision and send it to be reviewed by another court in the competent one. This is similar adaptation of the procedural law in the 1958.

4. Regarding participating or not of the parties in the Counselling Room of the SC there is enough practice which in some cases has been contested by a party even in CC <sup>26</sup> pretending violation of a correct legal process. SC's practice<sup>27</sup> has been reviewing without the parties' presence in the Counselling Room until it was unified by the SC, and oriented by CC. The SC of SC by decision no.1704/2004 after analysing the case in the Counselling Room, based on no.498/2 of CCP, has concluded that the proves brought by the party consist of/are a good reason to review the decisions. Then the case is passed on to CC which argued that the causes claimed by the petitioner for an irregular process have to do with the lack of communicating the request for a review/appeal and it also has to do with analysing the case in the Counselling Room without the presence of the parties. These two violations claimed by the petitioners are connected to each other and interdependent from each other, and have to do with the defined standards of a correct process, the right to be defended and the principle of contradictions. Their dependence and complexity are conditioned by the fact of necessity of analysing the case in a session with the parties' participation, not in the Counselling Room. Not notifying on the petition for the appeal is another important aspect of the claimed violation. This decision was defined as anticonstitutional by CC arguing on the precession created during the review in the Counselling Room without the presence of the parties as it was in opposition with the Provision No.6 of ECHR and of the jurisprudence of ECHR, referring to a correct legal process. Once the CC resent the case back to the SC, which came to the conclusion that the analysis in the Counselling Room will be considered as a preliminary review of the case and not as a hearing

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<sup>23</sup>Lamani A, (1962) Code of Civil Procedure of Albanian Republic, pg. 230. The author states that the review goes through two phases, first one is done in SC and the second one in the Court of First Instance competent that performed the first trial. Therefore we come to the conclusion that regardless of the final decision, in the Court of First Instance or the Appeal, the review will be done in the Court of First Instance that has previously judged the case;

<sup>24</sup>Code of Civil Procedure, Published by Center of Official Publications, Tirana, 2014, no. 498: *When the claim is accepted, the court decides to nullify it completely or partly and the case is sent to be retried by another judge in the respective court;*

<sup>25</sup> ibidem, no. 498: *When the claim is not on cases defined in the article 494 or by those who have no right to, and when it obviously results not to be supported, the court decides not to accept it;*

<sup>26</sup>Constitution of Albanian Republic, published by Center of Official Publications, Tirana, 2016, no. 131: The Constitutional Court decides on: *f) final judgement of the individual's claims against every act of the public jurisdiction or court decision that violates the rights and essential freedoms guaranteed by the Constitution, when all effective legal tools to protect these rights, except when it is foreseen differently in the Constitution. Before amendments this paragraph used to be: Constitutional Court decides: f) the final decision on individuals' claims on violation of their constitutional rights for a correct legal process, after all effective legal tools to protect these rights are used. Essentially, it is the same thing regardless of the formulation, i.e. protecting the essential human rights.;*

<sup>27</sup> Unifying decision, No.8, dt. 24.03.2005, United Colleges of the Supreme Court, In this decision the United Colleges concluded that the claim for a review of a final decision is analysed by SC in the Counselling Room without the parties' participation;

session, during which the SC decided not to accept the request for appeal when the legal criteria is not met to review a final decision, that is when this analysis is done without the presence of the parties<sup>28</sup>. Hereafter, in the following decisions<sup>29</sup> the CC has argued that the selective activity in the Counselling Room is not infringement of the right of a party to address itself to the court, but it is a necessary activity that functions to access to court and only for those cases that are foreseen by the law, thus excluding the unreasonable requests and undoubtedly not based on the law<sup>30</sup>. If in the Counselling Room the SC ascertains that the facts demonstrated by the interested party can be the cause for a review of a final decision, the case is not silenced in the Counselling Room but on a court session by notifying the parties to take part in the session which is not an essential judgement but a hearing session in which each of the parties represents the arguments on causes demanded by the law for an appeal<sup>31</sup>.

5. The deadline about sending a petition for a review is part of the procedural aspects which have to be respected strictly as it is foreseen by the procedural provisions. Regarding these deadlines, there has been such a practice that until it was unified by the SC, it has violated the individual's right to solve his/her case in a higher court, thus violating the right for a correct legal process. In the following, we will analyse the procedural provisions in order to come up with the deadlines that the interested part has to respect so as to request an appeal. The Article No.443(3) of CCP foresees that: *The petition for reviewing a decision by the Court of First Instance has to be filed within 30 days*, whereas no.444 (2) clarifies when this deadline begins, that is *from the day the circumstances being talked about in the respective provisions are found out* and we refer to no.494 which defines the causes of a review/appeal. The Article No. 496 of CCP foresees that: *The request for a review can be filed within 30 days since the day the party gets information for the cause of the review, but in any case no later than one year from the day on which the cause for review arises. In the cases foreseen in the Article No.495, the 30-day deadline begins since the day of the final decision*. The judicial practice has advanced in the article no.445, and this refers to the period prior to changes done by CCP with the Law No.122/2013, in which the deadline was preclusive and could not be done one year after the decision was made public. First provisions themselves, regarding the legislative changes for the deadlines, have been contradictory for the fact that if Article No.443 talks about a 30-day deadline, no.444 says that these deadlines are set/final, no.445 foresees the preclusivity of the petition, whereas the Article No.496 foresees that the party had to respect this deadline since the moment they are notified for the causes of the review. SC in its unifying decision<sup>32</sup> has argued that: *Regardless of the cause of the review, the beginning of the 30-day deadline from being notified about it, as well as the one-year deadline since the day the cause of the review was triggered, is the same for all cases which are cause of a review of a final court decision. These deadlines, being preclusive, cannot be suspended, interrupted or regiven*, in a time when its argument has to be interpreted by no.445 together with no.496 which foresees the deadline of a petition for a review, a provision exclusively established for the institution. Regarding the procedural deadlines, CC has come with its attitude, and in the case filed to it for violation of a correct legal process amongst others has argued that: *The Supreme Court, by deciding not to accept the petition for a review reasoning that the preclusive deadline is over, has violated the petitioners' right to have access to the court, as an element of the right for a correct legal process, according to the Article No. 42 of the Constitution*<sup>33</sup>. Changes in 2013 brought changes in no.445 where the paragraph which foresaw

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<sup>28</sup> Decision No.6, dt.26.02.2003, Constitutional Court. In this decision CC argued that *when the petition does not fit with the foreseen cases defined in the article 494 of CCP, or when done by those who do not have the right, and when obviously results unsupported, the court decides to refuse it. Verifying such a claim, if it fulfills or not the conditions to be analysed, is attribute of the Counselling Room and not of the trial session;*

<sup>29</sup> Decision No.36, dt. 26.07.2011, Constitutional Court;

<sup>30</sup> Decision No.52, dt.24.07.2017, Constitutional Court;

<sup>31</sup>Unifying Decision, No.1, dt.31.01.2006, United Colleges of Supreme Court;

<sup>32</sup> Unifying Decision, No.8, dt. 24.03.2005, United Colleges of Supreme Court;

<sup>33</sup> Decision No.17, dt. 24.03.2014, Constitutional Court ;

the preclusive deadline about claiming a review was omitted thus leaving room to the procedural deadline, i.e. *since the moment the part is notified of it*. In the following we will stop in another moment which refers to foreseeing the no.443/3: *The deadline to petition a review on a decision of the Court of First Instance is 30 days*. This provision may cause confusion for the fact of predicting because only the decisions of the court of the first instance are reviewed at a time when the institution of reviewing means that the petition can be filed for the final decisions. To clarify the situation when a decision gets its final form we will see the Article No.451 of CCP, which says that a court's decision is final when:

*a) cannot be appealed against it;*

*b) it has been petitioned within the deadlines defined by the law or when the claim has been withdrawn;*

*c) the petition has been refused;*

*d) court's decision remains into force, has been changed or suspended in the second instance.*

Therefore, the final decision can be of a Court of First Instance or the Court of Appeal which the above mentioned provision shows a review only for the decisions of the Court of First Instance<sup>34</sup>. To avoid possible confusion, I think that no.443/3 should be reformulated by foreseeing that: *The deadline to request a review of a court final decision is 30 days*. I support this argument with the prediction done by no.494 of CCP: *The request for a review is the act by which a review of a court's final decision is demanded*.

## Conclusions

To sum up, we would say that only the parties taking part in the legal process, and not every interested party, can appeal for a review. This is not a violation of the right for a correct legal process because the party may sue to ask for the right it claims to have been violated. The involved/participating party that may be the petitioner or the accused one, or people who give up their rights upon them, need to prove the legal interest by a petition for a review, otherwise it cannot be accepted by the court. This legal interest has to do with a final decision and it is always because of the reasons foreseen in the Article No.494 of the CCP.

Referring to deadlines, which have to be respected as another procedural aspect in order to avoid confusion, the respective provision has to be interpreted dependant on each-other so that the individual's right for a correct legal process is not violated. Often, cases have ended the CC regarding the violation of this right and that was because of lack of interpretation by the SC, a situation that went on until the unification of the judicial practice and the changes hereafter in CCP.

Regarding the analysis of the request for review in the SC for which the procedural law foresaw to be performed in the Counselling Room until the unification of the judicial practice, it would be a violation of the party's right to be part of the legal process as well as of the principle of contradiction. After the orientations were given by the CC about unifying the judicial practice, the SC found it reasonable that the selective activity in the Counselling Room is not a violation of a party's right to address to court, but it is a necessary activity in order to provide access to the court and only for the cases foreseen as such by the law, thus leaving aside the unreasonable requests and obviously not based on the law. However, the ECHR, for the cases it dealt with stated that the authority that exercises the competence of reviewing an act or process, has to make all possible efforts to find a fair balance between the individual's rights and the need to ensure the efficiency of justice system. The situation is different if the SC accepts the request for a review. Then the parties will be notified by respecting all proper legal regulations so that they can participate in the process of analysing their claim.

The procedural law foresees that the request for a review of a final decision will be filed in the SC. I think that filing all kinds of claims, including the ones for appeals, in the Court of First Instance, will not have negative consequences neither for the court nor for the individuals. On the contrary, all requests would be grouped in one place together with the appeal and the recourse.

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<sup>34</sup> Decisioni No.233, dt.07.07.2016, Civil College of Supreme Court. In this decision of SC the petition is to review a decision of Court of Appeal for which the case has been returned for trial;

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21. (29.3.1996). Law No.8116. Code of Civil Procedure of Albanian Republic. *Article 497: The petition for review is filed to the same court that sentenced the decision on which is being claimed.*
22. Tafaj, F., Vokshi, A., (2014). Civil Procedure. Part II. p. 367.
23. Lamani, A., (1962). Code of Civil Procedure of Albanian Republic. The author states that the review goes through two phases, first one is done in SC and the second one in the Court of First Instance competent that performed the first trial. Therefore we come to the conclusion that regardless of the final decision, in the Court of First Instance or the Appeal, the review will be done in the Court of First Instance that has previously judged the case. p. 230.
24. (2014). Code of Civil Procedure. *When the claim is accepted, the court decides to nullify it completely or partly and the case is sent to be retried by another judge in the respective court.* Published by Center of Official Publications. Tirana. no. 498.
25. Ibidem. *When the claim is not on cases defined in the article 494 or by those who have no right to, and when it obviously results not to be supported, the court decides not to accept it.* no. 498.
26. (2016). Constitution of Albanian Republic. The Constitutional Court decides on: *1) final judgement of the individual's claims against every act of the public jurisdiction or court decision that violates the rights and essential freedoms guaranteed by the Constitution, when all effective legal tools to protect these rights, except when it is foreseen differently in the Constitution.* Before amendments this paragraph used to be: *Constitutional Court decides: 1) the final decision on individuals' claims on violation of their constitutional rights for a correct legal process, after all effective legal tools to protect*



- these rights are used.* Essentially, it is the same thing regardless of the formulation, *i.e. protecting the essential human rights.* published by Center of Official Publications. Tirana. no. 131.
27. (24.03.2005). Unifying decision. No.8. United Colleges of the Supreme Court, In this decision the United Colleges *concluded that the claim for a review of a final decision is analysed by SC in the Counselling Room without the parties' participation.*
  28. (26.02.2003). Constitutional Court. Decision No.6. In this decision CC argued that *when the petition does not fit with the foreseen cases defined in the article 494 of CCP, or when done by those who do not have the right, and when obviously results unsupported, the court decides to refuse it. Verifying such a claim, if it fulfills or not the conditions to be analysed, is attribute of the Counselling Room and not of the trial session.*
  29. (26.07.2011). Constitutional Court. Decision No.36.
  30. (24.07.2017). Constitutional Court. Decision No.52.
  31. (31.01.2006). United Colleges of Supreme Court. Unifying Decision. No.1.
  32. (24.03.2005). United Colleges of Supreme Court. Unifying Decision. No.8.
  33. (24.03.2014). Constitutional Court. Decision No.17.
  34. (07.07.2016). Civil College of Supreme Court. Decisioni No.233. In this decision of SC the petition is to review a decision of Court of Appeal for which the case has been returned for trial.