

Legal Remedies in Criminal Procedural Law in the Republic of Macedonia

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ABSTRACT

Macedonian criminal law legislation was subjected to some serious reform resulting in a nearly novel Law on Criminal Procedure (Official Gazette 150/10) adopted on 18.11.2010 with a suspended enforcement as of December 2013. This new law transformed domestic criminal procedure from a so-called mixed neo-inquisitorial procedure into a fully adversarial, thus almost fully abandoning the investigation principle and the court paternalism accompanying it. Court investigation was cancelled with trials now being held in an adversarial proceeding through cross examination of the defendant, witnesses and expert witnesses by the parties.

Constrained by time, the legal reform failed to introduce practically any important novelties in the area of remedies, so this field went without any significant change compared to the former LCP of 1997. Hence, it must be acknowledged that not only in Macedonia, but throughout the entire Western Balkan region, the reform of criminal procedure legislation pays very little attention to remedies, their redefinition within the context of the parties, the emphasized adversarial concept, including the equality of arms of the parties, the scope of the remedies, the grounds underlying the remedy, the hearings before the second-instance court, etc. Practically speaking, this led to the preservation of the remedy system from the LCP of former Yugoslavia.

The Macedonian system of criminal proceeding contains the following remedies:

- Ordinary: appeal to a first-instance judgment, appeal to a second-instance judgment, complaint to a decision.
- Extraordinary: Motion for the protection of legality; motion for extraordinary review of an effective judgment, and motion for a re-trial. The reform has made a small rationalization of the remedy system in the sense that the extraordinary remedy entitled 'Extraordinary mitigation of the sentence' has been taken out.

Keywords: Legal remedies, appeal, extraordinary mitigation

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I. CONCEPT, TYPES AND FEATURES

1. Introduction

Macedonian criminal law legislation has gone through the process of serious reform resulting in a new Law on Criminal Procedure (LCP) adopted in 2010 with a suspended enforcement (*vacation legis*) as of December 2013.¹ This new law has transformed the criminal procedure from a so-called mixed neo-inquisitorial procedure into a fully adversarial. Court paternalism was abandoned, as well as court investigation. There is a new concept of a main hearing based upon principles of adversarial proceeding through direct and cross examination of the defendant, witnesses and expert witnesses by the parties, not by the court.

Constrained by time, throughout the process of reform there was not enough time for in-depth analysis of the issues regarding legal remedies in criminal procedure. This is the main reason why this field is without any significant change compared to the former LCP from 1997. LCP from 2010 introduced changes into the system of legal remedies. Namely, there is a rationalization of the extraordinary legal remedies and more frequent hearings before the second instance court instead of returning the case to the first instance court.

However, it must be acknowledged that not only in Macedonia, but throughout the entire Western Balkan region, the reform of criminal procedure legislation pays very little attention to the concept of legal remedies, their redefinition within the context of criminal procedure based on the activities of the parties, the emphasized adversarial concept, including the equality of arms, the scope of the remedies, the grounds for filing the remedies, the hearings before the second-instance court, etc.² Due to such a situation, the remedy system from the LCP of former Yugoslavia has, in practical terms, remained intact in the new LCD.

1 Official Gazette of the Republic of Macedonia, No. 150/2010, 100/2012 и 142/2016.

2 M. Skulić, Commentary, *Commentary of the Law on Criminal Procedure* (Official Gazette, Belgrade, 2007); D. Kos, D. Novosel, S. Nola, H. Božić, G. Klarić, A. Koridej, A. Pavičić *Zakon o kaznenom postupku i drugi izvori kaznenog postupovnog prava* (Narodne novine, Zagreb, 2014); B. Pavišić, *Komentar Zakona o kaznenom postupku* (Drugo izdanje, Dušević & Kršovnik d.o.o, Rijeka, 2013); Š. Pavlović, *Zakon o kaznenom postupku* (2.Izdanje, Libertin Naklada: Biblioteka pravo i zakon, Rijeka, 2014); D. Tripalo, "Tijek kaznenog postupka - kontrola optužnice, rasprava, pravni lijekovi" (2008) Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, vol. 15, br.2; H. Sijerčić- Čolić, *Krivično procesno pravo, Knjiga druga – Tok redovnog krivičnog postupka i posebni postupci* (Pravni fakultet Univerziteta u Sarajevu, 2005); Tadija Bubalović, *Pravo na žalbu u kaznenom postupku* (Sarajevo, 2006).

The Macedonian system of criminal proceeding contains the following remedies:

- An appeal as a regular legal remedy: This can be filed against different decisions (a first-instance judgment; second-instance judgment; decisions; complaint to a decision);
- Extraordinary legal remedies: Motion for repetition of the procedure; motion for the protection of legality and motion for extraordinary review of an effective judgment.³

2. An Appeal as Regular Legal Remedy

Since 2010, the changes in the system of regular legal remedies in the LCP 2010 of the Republic of Macedonia do not concern the monistic system of regular legal remedies, so there is only one regular legal remedy – an appeal. It is directed toward remedying errors and shortcomings before the judgment becomes final.⁴

The same situation also prevails in the region of the Western Balkans.⁵

2.1. An Appeal Against Judgment Rendered by the First Instance Court.⁶

Main features of the appeal. An appeal is the only regular legal remedy in Macedonian criminal procedure legislation. It can be submitted against different decisions. An appeal is the sole remedy to challenge a judgment rendered by the first instance court. This remedy is complete because it challenges both substantial (*error facti*) and legal issues (*error juris*) pointed out as deficiencies of the particular judgment, as well as the procedure after which that judgement was announced.

As regarding the competent authority for decisions regarding the appeal, this legal remedy is devolutionary (Article 420 paragraph 2 of the LCP). Namely, the decision upon

3 G. Lažetić – Buzarovska, G.Kalajdziev, B. Misoski and D. Ilić, *Criminal Procedure* (Faculty of Law “Justinianus Primus”, Skopje, 2015); G. Lazetic – Buzarovska, Legal Remedies in the Draft Law on Criminal Procedure, in: *Essays in Honour of Prof. Nikola Matovski*, (Faculty of Law “Justinianus Primus”, Skopje, 2011).

4 G. Lažetić – Buzarovska, G.Kalajdziev, B. Misoski and D. Ilić, *Criminal Procedure* (Faculty of Law “Justinianus Primus”, Skopje, 2015).

5 G. Lažetić – Buzarovska, B. Misoski, A. Gruevska, Comparative Research of Legal Remedies, Macedonian Review on Criminal Law and Criminology (Skopje, No. 2-3, 2008); Tadija Bubalović, *Pravo na žalbu u kaznenom postupku* (Sarajevo, 2006); M. Skulić, Commentary, *Commentary of the Law on Criminal Procedure* (Official Gazette, Belgrade, 2007); B. Pavišić, *Komentar Zakona o kaznenom postupku* (Drugo izdanje, Dušević & Kršovnik d.o.o, Rijeka, 2013); Š. Pavlović, *Zakon o kaznenom postupku* (2.Izdanje, Libertin Naklada: Biblioteka pravo i zakon, Rijeka, 2014).

6 In accordance with the Law on courts (Official Gazette of the Republic of Macedonia, no. 58/2006, 62/2006, 35/2008 and 150/2010), the basic courts are first instance courts.

the assessment of its merits and justification of the elaborated grounds is in competence of the higher court (*judex ad quem*) than the court having reached the prior judgment (*judex ad quo*). The second instance court is competent since there is an assumption that the judges are more experienced and competent for taking the final decision.

The appeal has suspensive effect, so the judgment cannot become effective before the decision regarding the appeal is taken by the competent higher court. (Article 410 of the LCP).

The appeal has also extended effect as regard the grounds for which it was submitted (Article 429 of the LCP). Due to this effect, the second instance court should consider any appeal in favor of the defendant, submitted due to wrongly established facts of the case or due to violation of the Criminal Code, which also contains an appeal in respect of the first court decision regarding the criminal sanction and forfeiture of illegal obtained property gain and assets. crime proceeds.

The privilege of cohesion (*beneficium cohaesionis*) of an appeal primarily refers to the co-defendants who have failed to use the right to an appeal (Article 430 of the LCP). Namely, if the second instance court, when proceeding upon an appeal, establishes that the circumstances for the favorable decision for the defendant in that case might also be beneficial for some other co-defendants who did not appeal against the judgment or appealed against it in respect of other issues, it shall proceed ex-officio as if such an appeal existed.

Authorized persons for appealing. Among the authorized persons that can appeal to the first instance court judgment are the parties, the defense attorney, and the legal representative of the defendant and of the victim. They are usually divided into two major groups: one that may ask for the judgment to be reviewed on behalf of the defendant; and one that may file an appeal to the detriment of the defendant. The public prosecutor is in both groups and can appeal both on behalf of and to the detriment of the defendant. (Article 411 p. 3 of the LCP).

The transformation of the procedure model from mixed (neo-inquisitorial) to adversarial (contradictory) led to the emergence of different opinions as to whether there should be a limit on the right to request review by the public prosecutor and to change their dominant position in the procedure with regards to the remedy for purposes of ensuring greater equality of arms of the parties in the procedure. However, the right of appeal of the public prosecutor remains possible.

Grounds for an appeal. Since the appeal is a completely regular legal remedy, it can be filed both for substantial and legal issues. The LCP has systematized all grounds in four basic groups (Art. 414, LCP):

1. Substantial violations of the provisions of the criminal procedure (*error in procedendo*) are violations of the LCP as a procedural law which have a decisive importance for the enforceability and lawfulness of a court judgment. All violations of the procedure do not have the same importance, nor does each one of them, due to its intensity, bring under question the sustainability of the judgment. The violations of the procedure can be divided into two categories, namely absolute and relative:

1.1. Absolute substantial violations of the procedure are those which make an assumption of the causal relation between the violation found and the irregularity of the judgment, and once the violation is established, the judgment must be nullified and the case returned for a repeat adjudication. Absolute violations to the LCP are listed in Art. 415 p. 1, items 1-12 of the LCP.

Judicial practice:

.. According to the assessment of this court, the lower court has violated the provisions of the Law on criminal procedure under Art. 465 para. 1 item 2 in connection with Article 415 paragraph 1, item 1, because the first instance court was improperly constructed due to participation of the judge who had to refrain from acting in the present case... Such a circumstance is creating a doubt on the impartiality in the actions of the other judges in the same court, taking into account the collegial relations and the everyday contacts, that do not entrust the convict with the confidence and certainty that a fair and impartial trial will be ensured, which was actually manifested through the submitted request for exemption of all judges of that Basic Court. (Verdict of the Supreme Court of the Republic of Macedonia, No.12 / 2016 from 25.05.2017).

1.2. Relative substantial violations of the formal law are those violations where in each individual case it must be determined whether and to what extent the violation found has contributed to the irregularity of the judgment. In other words, after relative substantial violations are found it is necessary to consider if they had an effect or could have had an effect on the legality and regularity of the judgment. There is no legal assumption with them regarding the causal relation between the violation and

the judgment, but this relation must be determined in each and every case regarding the relevant circumstances.

2. Violations of the material law (*error in iudicando*) are failures of application, i.e. incorrect application or interpretation of a provision of the Criminal Code. A violation of the Criminal Code is only the process of subsuming the facts under a certain abstract legal norm, i.e. its application in a specific legal case, but not the process of determining the factual state of play. The violations to the substantial law which may be the grounds for the filing of an appeal are precisely determined in the LCP (Art. 416, p. 1, items 1-6, LCP).

3. Incorrectly determined factual state of play (*error facti*) is a special ground to challenge the first instance judgment. Namely, the judgment may be appealed due to wrongly established facts of the case or when some of the decisive facts have been wrongly established or have not been established at all (Art. 417, LCP).

4. Decisions regarding criminal sanction, forfeiture of proceeds of crime, criminal procedure expenses, legal claim of property, as well as decisions regarding proclamation of the judgment through the press, radio or television. The judgment can be appealed upon this ground regardless of whether it convicted or acquitted the defendant (Art. 418, LCP).

Content of the appeal. The components of the appeal are precisely determined in the Article 413 of the LCP:

- 1) designate the judgment against which the appeal is filed;
- 2) list the ground for the annulment of the judgment;
- 3) rationale of the appeal;
- 4) a motion for the disputed verdict to be completely or partially nullified or reversed; and
- 5) signature of the person filing the appeal

With regards to whether or not the appeal may list new facts and evidence, the LCP introduces a new feature in that it precludes the proposal of evidence – the appeal cannot list new facts or new evidence except for those that the parties can prove were unable to be presented up to the completion of the evidentiary procedure due to being unknown or unavailable to them.

There is no preliminary decision on the justifiability of the grounds of the appeal in the sense that there is no preliminary assessment as the one in comparative law (*leave to appeal*) or an evaluation of whether the appeal is manifestly ill founded as is the case before the human rights court in Strasbourg.

Deadline for submission of an appeal. Any authorized person may file an appeal against the first instance judgment, within fifteen days from the day of receipt of the certified copy of the judgment (Article 410 paragraph 1 of the LCP). If the person authorized to use the right to appeal, does not file an appeal within the prescribed deadline, the judgment shall become enforceable thereupon.

Procedure after the appeal is submitted. The appeals procedure commences in the presence of the court that has issued the judgment under appeal. The court of first instance, under the LCP, has several actions that must be taken following the receipt of the appeal and before the case is submitted to the second instance court. Due to these obligatory actions of the first instance court, the whole appeal procedure is divided into two parts: the first part is linked with the action taken by the first instance court, and the second part has to do with actions in the second instance court after the appeal and whole file has been submitted.

1. Procedure before the first instance court (*iudex a quo*) The appeal is filed to the court having issued the first instance judgment and must include a sufficient number of copies for the court, as well as for the opposing party and the defense attorney for their answer (Art. 419 p. 1).

The court of first instance examines whether all necessary conditions for conducting the appeals procedure have been fulfilled. With regards to the appeal as a writ, the court is authorized to check the following circumstances:

a) contents of the appeal. The court first checks if the appeal contains all the elements prescribed. If not, the first instance court sends the appeal back to the defendant for its completion within a certain deadline, if the appeal has been submitted by:

- the defendant or another person on his behalf when the defendant does not have an attorney, or
- the victim or the private plaintiff who has no attorney.

The court will dismiss the appeal if the authorized person fails to complete the appeal within the given deadline, if there is no ground to overrule the judgment, if the

appeal lacks reasoning or if it is not signed by the person who has submitted it. If the appeal has been submitted on behalf of the defendant and it fails to list to which judgment the appeal refers, the first instance court will file it to the second instance court when it will be possible to determine to which judgment it refers. Thus the appeal will only be dismissed if the court cannot determine to which judgment the appeal refers ;

b) deadline for sending the appeal. The deadline in which the appeal has been filed is the second element inspected by the first instance court. The deadline for the submission of the appeal is set in law and it is 15 days (Art. 410, LCP). If the appeal is submitted after the given deadline, the presiding judge from the first instance court panel will dismiss the appeal with a decision.

c) Leave of appeal. This is the third element inspected by the first instance court. Since the subject of the appeal is precisely determined in the LCP (Art. 411), if the court of first instance finds that the appeal is filed by an unauthorized person, it means that it will be unpermitted and the president will dismiss it with a decision. An unpermitted appeal is one submitted by a person who is the subject of the appeal, but who has been renounced from the right to appeal or who has been renounced from the already filed appeal.

With regards to the care extended to ensure the principle of adversariality, the court of first instance is obliged to submit to the opposing party a copy of the appeal filed. The opposing party then has the right to respond to the court within 8 days as of the receipt of the appeal. The court of first instance submits the appeal and the answer to the appeal including all case files to the court of second instance within three days as of the receipt of the answer to the appeal, i.e. after the expiry of the deadline for the answer to the appeal.

2. Procedure before the second instance court (*iudex ad quem*) is the second part of the appeal procedure. When the file reaches the second instance court, a reporting judge is designated within three days.

The reporting judge is authorized to take certain procedural actions upon his own initiative with the purpose of enabling unhindered work of the panel, as follows:

- collect from the first instance court a report on the violations of the provisions of the criminal procedure,

- check the allegations in the appeal regarding new evidence and new facts through the first instance court or through the judge of the preliminary procedure of the court on whose territory the action should be conducted;
- collect the necessary reports or files from other authorities or legal persons;
- if he finds that the file contains the minutes and reports prescribed in Article 93 of the LCP, the file shall immediately be submitted to the court of first instance prior to the holding of the session of the second instance panel so that the president of the first instance panel can make a decision for them to be separated from the file. Once the decision becomes effective, he should submit them back to the judge of the preliminary procedure in order to keep them separately from the other file.

The court of first instance, i.e. the competent public prosecutor having conducted the investigative procedure, and from whom the reporting judge is requesting reports or undertaking of certain actions, is obliged to act under the request within 30 days.

Judicial practice:

The second-instance court violated the right to defend of the convicts in an appeal procedure when he did not inform the defendants and their attorney about the day and hour of the public session, although such a request was pointed out in the responses to the appeals lodged by the defendants (Supreme Court of the Republic of Macedonia, Collection of Court Decisions 2004-2014, p. 208).

Limits of examination of the first-instance judgment. When determining the scope within which the disputed judgment is examined with an appeal, Macedonian criminal and procedural law is based on the *tantum devolutum quantum appellatum* principle, i.e. the second-instance court examines the judgment in that part which is disputed by the appeal (Article 427 paragraph 1 of the LCP). This should be understood as meaning that the second-instance court does not, as a rule, engage in examining those parts of the first-instance judgment which are not questioned by the appeal, i.e. *ultra petitum* does not apply.

However, there are three exceptions to this general rule when the second-instance court must always examine the first-instance judgment *ex officio* with regard to the following grounds:

- when there are any of the absolute substantial violations of the provisions of the criminal procedure (Article 415, Paragraph 1, Items 1, 5, 6, 8 to 11 of the LCP);
- if the main hearing, contrary to the LCP provisions, was held in the absence of the defense attorney. The examination of these violations may be beneficial, but also to the detriment to the defendant, and
- if the Criminal Code (Article 416 of the LCP) has been violated to the detriment of the defendant regardless of who submitted the appeal. This may only serve to the benefit of the defendant and not to his detriment.

If an appeal filed in favor of the defendant does not contain the grounds for appealing nor an elaboration, the second-instance court shall be limited in its procedure and only examine the stated grounds *ex officio*, as well as examining the sentencing, safety measures and confiscation of property decisions as referred to in Article 418 of the LCP.

However, the appellate court is obliged *ex officio* to examine some violations of the criminal procedure and the Criminal Code even if those legal issues are not grounds of the appeal (Article 427 of LCP).

Judicial practice:

... the second-instance court was obliged to examine the verdict only in the part in which the appeal challenged it, so in the part that refers only to the convicted AJ, and not to alter the verdict regarding the convicted persons SK and CC, for which the defendants there was no appeal filled by the public prosecutor (Verdict of the Supreme Court of the Republic of Macedonia, No.61/2013 from 10.04.2013).

Decision-making process in second instance court. The second instance court makes decisions in two ways – at the panel session or by holding a hearing.

Decision-making at the panel session. After the listed procedural actions have been taken and the file has been studied, if the case refers to a crime prosecuted under the motion of the public prosecutor, the reporting judge, without any delay, submits the file to the competent public prosecutor who is obliged to review it and immediately, or within 15 days (30 days for more complex cases), return the file to the court. The public prosecutor, in returning the file, submits a written motion to the

court or will inform the court that there will be a written motion submitted and presented during the panel session.

The competent public prosecutor (from the higher public prosecution office) and the defendant and his attorney will be informed about the panel session, as well as the private plaintiff who has requested to be informed of the session within the term prescribed for the appeal or for the answer to the appeal or who has motioned to hold a hearing before the second instance court. Failure of the duly informed parties to appear in court does not prevent the panel session from being held. If the defendant has not informed the court of a change of his residence, the panel session may be held although the defendant has not been informed thereof. The public can be excluded from the panel session attended by the parties only in line with Art. 353, 354, 355 and 356 of the LCP.

The second instance court panel session is public at the request of the parties for a crime punishable by more than five years' imprisonment.

If the defendant is in custody, or serving the sentence, and has a defense attorney, the defendant's presence will be provided only if the panel president or the panel itself consider this to be necessary

In line with the LCP, the panel session is opened with a report by the reporting judge on the state of play, then the applicant explains the appeal followed by the opposing party being given the right to answer the allegations in the appeal, i.e. in the answer to the appeal. In doing so, it is crucial that the party does not repeat what is already contained in the report by the reporting judge. For the purpose of completion of the report, one may ask for certain files to be read. The defendant and their defense attorney always have the last word (*in favorem defensionis*). The plaintiff may, taking into consideration the outcome of the hearing, waive the indictment completely or partially or amend the indictment in favor of the defendant.

Minutes covering the course of the hearing are taken and attached to the case files.

Decision-making at the hearing. - A hearing before the second-instance court panel shall be held in the following cases:

- if it is determined that there is substantial violation of the provisions of the criminal procedure from Article 415 Paragraph 1 of the LCP, which according to the panel may be corrected by holding a hearing before the second-instance court panel;

- if it is determined that the facts of the case have been wrongly established during the first instance procedure; or
- when any new facts and evidence, presented in the appellant's brief for the first time, have been evaluated as admissible.

Should the panel at the session determine that it is necessary to hold a hearing, it shall be set for no later than 15 days from the day the panel session took place.

The second-instance court panel session shall be held in accordance with the provisions regulating the main hearing of the first-instance procedure, unless otherwise provided for in the LCP.

The defendant and their defense attorney, the plaintiff, the victim, the legal representatives and attorney of the victim and the private plaintiff, as well as the witnesses and witnesses-experts who are to testify upon the court's decision shall be summoned to the hearing before the second-instance court. The purpose of the hearing shall be to examine evidence which was unknown or unavailable in the course of the first-instance procedure, as well as that deemed by the panel necessary to be presented for correct determination of the factual state.

Judicial practice:

There was a violation of the provisions of the Law of criminal procedure in an appeal procedure, when despite the request of the defense for holding a public session, the second instance court did not provide presence of the defendant who was currently serving the sentence of imprisonment, but held the public session in the absence of the defendant, noting that the defendant was properly informed about holding the public session through the administration of the institution. (Supreme Court of the Republic of Macedonia, Collection of Court Decisions 2004-2014, p. 202).

The decisions rendered by the second-instance court. These may be in the form of a decision or judgment. The second-instance court may render the following decisions:

- *overruling the appeal as untimely* (Article 432) - when the preclusive deadline for filing the appeal had not been met, resulting in the party losing his right to file an appeal afterwards;

- *overruling the appeal as inadmissible* (Article 433) - when it is determined that the appeal was filed by a person who was not authorized, or by a person who waived the right to appeal, or if it is established that the person withdrew the appeal, or filed another appeal following the previous withdrawal, or if an appeal is not allowed according to the law;
- *suspending the first-instance judgment and returning the case to re-trial* (Article 436) - when the second-instance court having accepted the appeal, or after *ex officio* examination of the judgment within the limits of examination of the first-instance judgment, determines that there is a substantial violation of the provisions of the criminal procedure unless it decides to hold a hearing. The second-instance court may order a new main hearing to be held before the first-instance court with a completely new panel, and it may suspend the first-instance judgment only partially should some portion of the judgment be set aside without damage toward lawful judging. When the first-instance judgment is suspended due to substantial violations of the provisions of criminal procedure, the explanation should state which provisions were violated and what exactly the violations found by the second-instance court were;
- *suspending the first-instance judgment and ordering a hearing before the second-instance panel* (Article 437) - When the second-instance court, accepting the appeal or *ex officio*, finds that the conditions for holding a hearing have been met. The second-instance court may only partially suspend the first-instance judgment if certain portions of the judgment can be set aside without harm to lawful judging and to hold a hearing regarding that portion of the judgment;
- *reversing the judgment and rendering a court reprimand* (Article 435, Paragraph 2) - If it is found that there are legal circumstances to render a court reprimand.
- *reversing the first-instance judgment* (Article 435 paragraph 1) - The second instance court, granting the appeal or *ex-officio*, shall reverse the first instance judgment. It shall take a decision in this regard in two cases: a) if it establishes that the decisive facts in the first instance judgment have been properly established, but the correct application of the law led to the different judgment; or b) when there is any violation as referred to in Article 415, paragraph 1, items 5, 9 and 10 of the LCP;

- *confirming the first-instance judgment* (Article 434) - When the second-instance court dismisses the appeal as unfounded and when it determines that there are no grounds for appealing the judgment, nor are there violations of the law which the second-instance court is obligated to consider *ex officio*.

2.2. An Appeal Against Decisions Rendered by the First Instance Court

During the procedure, starting from preliminary proceeding, and continuing through the stage of approval of the indictment to the phase of main hearing, the court decides on different legal issues with decisions. Procedural decisions are taken during the main hearing. They are part of the trial minutes and are not in written form and there is no possibility for the party to file an appeal against them during the procedure. Any decisions brought for the purpose of the preparation of the main hearing and the judgement may be disputed only through an appeal against the judgment (Article 440 paragraph 3, LCP).

However, there are two other types of decisions taken by the court that can be appealed against:

- any party or persons whose rights have been violated may appeal against the decision taken by the judge of the preliminary proceeding and other court's decisions in first instance, except for procedural decisions and those decisions for which the LCP explicitly stipulated that a separate appeal shall not be allowed.⁷ (Article 440 paragraph 1, LCP);
- the decisions of the panel referred to in Article 25 paragraph 5 of the LCP issued before and during the investigation, by rule, cannot be challenged by a special appeal. However, a special appeal is being possible, but only as an exception, unless differently determined by the LCP (Article 440 paragraph 2, LCP).

Regarding the devolutionary of this appeal, it should be emphasized that the competent authority to decide upon the appeal against the decision taken by the judge of the preliminary proceeding is the panel referred to in Article 25 paragraph 5 of the LCP, which is actually the second-instance panel in the court of first instance. For the

⁷ The decisions of the court during the criminal procedure can be appealed unless those for which the LCP expressly forbids to be appealed, as for instance, a decision taken by the court about the manner in which the protected witness will be examined is not allowed (Article 228 paragraph 3 of the LCP), or one against a decision to postpone the main hearing (trial).

purpose of efficiency, those appeals are not within the competence of the higher courts. So, the devolutionary principle is not violated although the decision is taken by the panel in the basic court.

If there is a legislative possibility for filing an appeal against the decision of the panel referred to in Article 25 paragraph 5 of the LCP, the panel of the higher court is competent for taking a decision regarding the appealed decision.

2.3. An Appeal Against Decisions Rendered by the Second Instance Court.⁸

There is an exceptional legislative possibility for filing an appeal against the judgment of the second instance court only when the second instance court (Article 439):

- 1) passed a sentence of life imprisonment, or if the second instance court confirmed a sentence of life imprisonment passed by first instance court's judgment;
- 2) passed a judgment on the basis of a hearing before second instance court panel; and
- 3) if the second instance court reversed the acquittal judgment of the first instance court and passed a judgment declaring the defendant guilty.

The Supreme Court makes decisions at the session of the panel. There shall be no hearing before this court.

The appeal procedure in the Supreme Court is undertaken in accordance with the provisions that are applicable to the second instance procedure.

3. Extraordinary Remedies

Main features. Once all the regular legal remedies have been exhausted and the higher court has rendered a decision thereof (i.e. the parties explicitly or implicitly expressed their will not to use the regular legal remedies, or the submitted legal remedy has been dismissed as unfounded), the first-instance decision remains in effect, rendering the hearing upon the case concluded and assigning it a status of a closed matter (*res judicata*). The existence and use of extraordinary remedies is in the context of an endeavor to reach an appropriate and lawful judicial decision. Their existence and final outcome suspends the action of the maxim that any judgment has

⁸ In accordance with the Law on courts, the appellate courts (total number of four: Skopje, Bitola, Štip and Gostivar) are second instance courts.

been establishing the truth (*judicata pro veritate habetur*). Nonetheless, in certain cases new facts and evidence might be found or discovered that substantially amend the effective decision partially or fully. In such a situation, there is a possibility that the additionally submitted evidence and facts may lead to an alteration of the factual state on which the first-instance judgment is based. In certain cases, it may appear that the court has wrongly applied the law, i.e. that the circumstance discovered later leads to the fact that the court has rendered too severe a punishment, despite being within the legislative framework. Within the basic characteristics of the extraordinary legal remedies, except for suspensive effect, some of them are devolutionary, others are not. They are incomplete remedies with a different nature and some of them can be submitted for factual and legal issues or only for legal issues. As regards the authorized persons who may submit an extraordinary remedy, there are extraordinary legal remedies that can be submitted only by the defense, or only by the public prosecution or by both parties.⁹

There are three types of extraordinary legal remedies:¹⁰

1) **Repetition of the criminal procedure** – extraordinary legal remedy with suspensive but not with devolutionary effect. It can be filed only for factual matters (*question facti*) by any party. The final judgment can be challenged on several grounds: Reversing a judgment that entered into effect without repetition of the procedure; Repetition of the procedure which has been terminated with a final court decision; Repetition of the procedure in favor of the convicted; Repetition of the procedure to the detriment of the convicted or repetition of the procedure for a person convicted in absence. With a decision, the court can deny the request for repetition of the criminal procedure (if the request was submitted by an unauthorized person; if there are no legal grounds for repetition of the procedure; if the facts and evidence that the request is based upon were already presented in a former motion to repeat the procedure that was denied with a previous final court decision; if the facts and evidence are obviously not suitable to be used as a basis for repetition etc.) or the court can accept the request and allow for the criminal procedure to be repeated.

9 G. Lažetić – Buzarovska, B. Misoski, A. Gruevska, Comparative Research of Legal Remedies, Macedonian Review on Criminal Law and Criminology (Skopje, No. 2-3, 2008).

10 G. Lažetić – Buzarovska, Extraordinary Legal Remedies in the Criminal Procedure, in: *Essays in Honour of Prof. Nikola Matovski*, (Faculty of Law “Justinianus Primus”, Skopje, 2009).

Judicial practice:

The extraordinary legal remedy “repetition of the criminal procedure” is not allowed for a procedure concluded with the revocation of the suspended sentence, since the final verdict with which the suspended sentence has been revoked cannot be put out of force. (Decision of the Court of Appeal in Bitola, KSJ.no.81/11, 07.07.2011, Bulletin of the Court of Appeal in Bitola, December 2012.)

2) **The request for protection of legality** – With suspensive and devolutionary effect. This is an extraordinary legal remedy through which the Public Prosecutor of the Republic of Macedonia may challenge the final judgments should they violate the Constitution of the Republic of Macedonia, the law or an international agreement ratified in accordance with the Constitution (Article 457). The Supreme Court decides upon this request of the public prosecutor. When deciding upon the request, the Supreme Court is bound by a privilege of cohesion (*beneficium cohaesionis*) and prohibition of changes for the worse.

3) **The request for exceptional re-examination of the final judgement** - With suspensive and devolutionary effect, this can be filed by any person convicted to an unconditional prison sentence or juvenile prison of at least one year. This extraordinary legal remedy is provided only for the defense. There are two additional conditions for filing this request: a) a request for exceptional re-examination of a judgment that had already entered into effect shall be filed within 30 days from the day when the defendant received the final and enforceable judgment and b) any convicted person who did not use a regular legal remedy against the judgment may not put forward a request for this extraordinary legal remedy.

4. Other Remedies for Protection of Constitutional Rights and Trial within a Reasonable Time

Constitutional complaint. In the Republic of Macedonia there is no constitutional complaint (appeal) in terms of *recurso de amparo* as a legal remedy protecting particular violations of the constitutional rights and freedoms before the Constitutional Court. More precisely, according to Article 110 of the Constitution of the Republic of Macedonia, to some extent this right exists for the violation of certain so called political rights - 1) freedom of conviction, conscience, thought and public expression of thought; 2) the right to political assembly and action and 3) discrimination

prohibition. Outside of these expressly stated rights and freedoms, there is no immediate protection afforded by the Constitutional Court for other freedoms and rights. This option, on the other hand, is very rarely used even for these rights and freedoms, hence the criticism in theory of this constitutional solution as a ‘quasi-constitutional’ appeal. In this regard, in 2014, the Government of the Republic of Macedonia proposed amendments to the Constitution envisaging a wider application of the constitutional appeal for violations of the right to life, freedom, a fair trial, privacy etc., but this initiative did not receive the necessary support and to a certain extent this and other proposed constitutional amendments remained wedged in the procedure.

Trial within a reasonable time. As a result of a vast number of cases related to the violation of the right to a trial within a reasonable time brought before the Court on Human Rights in Strasbourg, the Republic of Macedonia amended the Law on Courts (LC) from 2006. With the adopted Law on amendments and modifications of the Law on Courts from 2008 it introduced and put in motion a new legal remedy for the protection of the right of the citizens to a trial within a reasonable time. This law introduces the authority of the Supreme Court to rule on claims by parties and other participants in the procedure regarding the violation of the right to a trial within a reasonable time, in a procedure outlined by law before the court of the Republic of Macedonia, in accordance with the rules and principals set forth by the European Convention on Human Rights and stemming from the criteria outlined by the court practice of the European Court for Human Rights. The Supreme Court decides upon approximately 500 cases a year on these grounds, less than 20% of which, or some 100 cases a year, are criminal cases.¹¹

After the exhaustion of the domestic legal remedies, the citizens of the Republic of Macedonia and all persons under its jurisdiction may ask for protection of their fundamental civil rights and freedoms before the ECtHR and before the UN Human Rights Committee. By the end of 2016, the ECtHR rendered 133 judgments in cases against the Republic of Macedonia and 410 decisions for admissibility of applications against the Republic of Macedonia.¹²

The introduction of this legal remedy was in accordance with the Recommendation

11 <<http://www.vsrn.mk>>accessed 3 March 2018.

12 <https://www.echr.coe.int/Documents/Annual_report_2016_ENG.pdf; https://www.echr.coe.int/Documents/CP_The_former_Yugoslav_Republic_of_Macedonia_ENG.pdf> accessed 3 March 2018.

of the Council of Europe for effective remedies for excessive length of proceedings.¹³ It recommended member states to take the necessary steps for ensuring that all stages of the domestic procedure are conducted within a reasonable time. There are procedural possibilities for speeding up the procedure, as well as existence of effective remedies before the national authorities for all requests regarding violation of the right to a trial within a reasonable time. For the very first time in the case of *Atanasović et al. against the Republic of Macedonia* the ECtHR considered that there was a lack of an effective remedy regarding the length of the proceedings in the Macedonian legal system. For these reasons, ECtHR assessed that there was a violation of Art. 13 of the ECHR since the applicants did not have a domestic remedy to exercise their “right to a trial within a reasonable time”, guaranteed by Art. 6 para. 1 of the ECHR.¹⁴ After a several years, the European Court established the effectiveness of this remedy with the decision based on the permissibility of the application of *Ms. Shurbanovska and other applicants* in 2008.¹⁵ The ECtHR assessed that the Macedonian court had awarded an amount of compensation which is within the framework of the ECtHR practice in similar cases of lengthy court proceedings. As for the question whether the applicants can claim to be victims of a violation of Article 6 para. 1 of the ECHR with regard to the length of the proceedings, the ECtHR points out that they do not have victim status in this regard since the national authorities have established this position and awarded them fair compensation for the duration of the proceedings and set a time limit for the case to be completed.

II. QUESTIONS REGARDING PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

The right to a fair trial in the appellate procedure. According to the comparative law and the practices of the ECHR, the procedure upon an appeal and other legal remedies does not always reflect to the full extent all guarantees from Article 6 which apply to a first-instance trial. In this sense, the immediate participation of the parties

13 Recommendation CM/Rec [2010] 3 of the Committee of Ministers to member states on effective remedies for excessive length of proceedings.

14 *Atanasović et al. v. FYROM* App no 13886/02 (ECHR, 12 April 2006).

15 Decision as to the admissibility of Application no. 36665/03 by Slavica Šurbanoska and others against the FYROM (ECHR, 31 August 2010).

with their personal attendance and a contradictory dispute is limited and is required especially in cases where the higher court discusses the facts or renders a decision on the merits. The ECtHR reiterates that the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for the trial hearing and that the manner in which Article 6 applies to proceedings before courts of appeal depends on the special features of the proceedings involved. Account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein.¹⁶ In assessing the question whether the applicant's presence was required at the hearing before the court of appeal, according to the Strasbourg case-law regard must be had, among other considerations, to the specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it,¹⁷ as well as of their importance for the appellant.¹⁸ However, where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence.¹⁹

Nonetheless, as in other Western Balkans and European countries, in Macedonian legislation there are still serious remnants of the inquisitorial approach of the court and the dominant role of the public prosecutor. The Republic of Macedonia, similar to Croatia and some other states mentioned above, kept the old Yugoslav procedure in the legal remedies part, due to which there are cases in ECtHR due to violation of the 'equality of arms' as an essential element of the right to a fair trial according to Article 6 of the ECHR.²⁰

Specifically, the defendant is not always summoned to the second-instance court hearing, especially if they are in detention, in which case only the defense attorney is called. Moreover, the prosecution office is still in a privileged position before the

16 *Kamasinski v. Austria* Ser.A 168 (ECHR, 19 December 1989) 106; *Ekbani v. Sweden* Ser.A 134 (ECHR, 26 May 1988) 27; *Monnell and Morris v. UK* Ser.A 115 (ECHR, 2 March 1987) 56.

17 *Helmert v. Sweden* Ser.A 212-A (ECHR, 29 October 1991) 31-32.

18 *Kamasinski v. Austria* Ser.A 168 (ECHR, 19 December 1989) 106; *Kremzow v. Austria* Ser.A 268-B (ECHR, 21 September 1993) 59; *Zahirović v. Croatia* App no 58590/11 (ECHR, 25 April 2013) 55.

19 *Dondarini v. San Marino* App no 50545/99 (ECHR, 6 July 2004); *Zahirović v. Croatia* App no 58590/11 (ECHR, 25 April 2013) 56.

20 *Zahirović v. Croatia* App no 58590/11 (ECHR, 25 April 2013).

higher court.²¹ The ECtHR considers that there has been a violation of Article 6 § 1 of the ECHR on account of the public prosecutor's presence at the Court of Appeal's session, of which the applicant was not even notified.

In the ECtHR's view, the applicant's failure to request notification should not be held against him, given the statutory inequality that the LCP created by providing only the public prosecutor with a right to be apprised of the appellate court's session automatically, while restricting that right for the accused to a specific request by him or her to attend. The Government did not provide any reasonable explanation for this procedural inequality flowing from the LCP. Therefore, the ECtHR considered no justified reason why such preferential treatment was offered to the public prosecutor, which acts as a party to the proceedings and is accordingly the applicant's adversary.²² Moreover, given that the factual issue of the applicant's intention was under close scrutiny by the Supreme Court, there was an even stronger need to summon the applicant and give him the opportunity to be present at that court's session on an equal footing with the public prosecutor.²³

The three-level judicial proceedings and its effect toward the estimation of the reasonable period. The yearly court reports make it clear that legal remedies are used extensively in the Republic of Macedonia, as is the case in the rest of former Yugoslavia, contributing to a delaying of the procedure. Furthermore, the number of repealed judgments returned to a repeated trial is also significant, again largely contributing toward the delaying of the procedure. The attempts of the legislator to have the higher courts more frequently resolve the dispute meritoriously, i.e. the decision that the once repealed case must be decided upon meritoriously in the repeated procedure, yielded limited results. This practice has been met with disapproval in the ECtHR. In several judgments, the ECtHR recalled that it is for the countries to organize their legal systems in such a way that their courts can guarantee everyone's right to obtain a final decision on disputes relating to civil rights and obligations within a reasonable time.²⁴

21 *Nasteska v. FYROM* App no 23152/05 (ECHR, 27 May 2010) 17; *Atanasov v. FYROM* App no 22745/06 (ECHR, 17 February 2011).

22 *Atanasov v. FYROM* App no 22745/06 (ECHR, 17 February 2011) 32; *Eftimov v. FYROM* App no 59974/08 (ECHR, 2 July 2015).

23 See, *mutatis mutandis*, *Zahirović v. Croatia* App no 58590/11 (ECHR, 25 April 2013) 62-63.

24 *Kostovska v. FYROM* App no 44353/02 (ECHR, 15 June 2006) 41; *Lazarevska v. FYROM* App no 22931/03 (ECHR, 5 July 2007).

On the other hand, the ECtHR often finds significant delays due to the actions of the domestic courts. In this respect, it observes that the proceedings had lasted for several years before the Supreme Court. In the case of *Dimitrijoski* the ECtHR found that this time cannot be regarded as reasonable.²⁵ The workload of domestic courts, to which the Government referred in their observations, cannot be considered as an excuse for the protracted length of the proceedings.²⁶

The delaying of court procedures is additionally affected by the refusal of the criminal courts to rule on the damages, i.e. the legal claims of the victim (which, according to the LCP should be a rule), generally referring the victims to a separate civil lawsuit.

Protection of fundamental rights and freedoms when the second-instance court is deciding without a hearing. We should note that the prosecution office is treated in a different manner and is even openly put in a privileged position both *ex lege* in the LCP itself and *de facto* through an unconcealed ‘collegiality’ with the court, which may often result in a problem considering the ‘equality of arms’. This applies to what has already been mentioned (mandatory attendance and summons for the prosecutor), at times when the defendant is not summoned nor present, .

The issue of the somewhat strange role of the higher prosecution office in the appeal procedure is also relevant. In order to consider the effect of this problem, it is necessary to explain the organizational hierarchy and authority of the prosecution office in the domestic legal system. The basic prosecution offices (much like the basic courts) are authorized to act upon all criminal acts of the first instance. The higher prosecution office, following the judiciary reforms of 1995, no longer acts in the first instance upon severe acts according to the previous legislative solution, but remains competent to act solely before the appellate courts in appellate proceedings. Out of practical reasons and in view of the familiarity with the case, the basic prosecution office, which also responds to the defense appeal, continues to file an appeal concerning the first-instance judgment, but the appeal of the prosecution before the appellate court is represented by the higher prosecution office. The higher prosecution office is in this case authorized (but not obligated) to submit its own opinion, which is unfortunately not submitted for a response to the defense, as is the case with the appeal of the basic

25 *Dimitrijoski v. FYROM* App no 3129/04 (ECHR, 10 October 2013); *Mihajloski v. FYROM* App no 44221/02 (ECHR, 31 May 2007) 38.

26 *Dumanovski v. FYROM* App no 13898/02 (ECHR, 8 December 2005) 45.

public prosecution in the first-instance proceeding. Thus, the prosecution office has the advantage of submitting practically two legal opinions, whereas the defendant is unable to get acquainted with and to respond to the opinion of the higher prosecution office in a timely manner and to be well prepared for the hearing. This problem is particularly serious taking into consideration the fact that not only has Macedonia, but also Croatia, lost a case in the ECtHR over a similar situation.²⁷

Principle of impartiality regarding the appellate hearing. There are special legal grounds in LCP regulating the compulsory exemption of a judge who has participated in a first degree ruling, where they cannot be included in the procedure before an appellate court. These grounds fall under *absolute grounds* for exemption (*iudex inabilis*) and are enforced when a judge from the same criminal case participated as a judge of the preliminary proceedings or took part in the assessment of the indictment. The reason for the mandatory exemption of the judge is due to the fact that because of previously undertaken steps and rendered decisions with regard to the same case, the judge acquired preconceived notions which cannot pass the test of impartiality. This provision is in line with the ECtHR practice.²⁸ Namely, the ECtHR rules that impartiality requires the absence of prejudice or bias, and that their existence or lack thereof can be tested in different ways. According to its established court practice, the existence of impartiality in terms of Article 6 Paragraph 1 of the ECHR must be determined in accordance with the subjectivity test, where the personal conviction and conduct of a certain judge must be taken into consideration, i.e. has the judge had any personal prejudice or bias in a given case; and also according to the objectivity test, i.e. through determining whether the panel at the domestic court offered sufficient guarantees in order to exclude any justified doubt with regard to the impartiality of the judge.

Mandatory defense lawyer during appellate procedure. Although the right to have a defense lawyer, in particular indigent people's right to have a defense lawyer, in criminal proceedings, as required by interest of justice and fair trial, is listed among the fundamental human rights guaranteed by international instruments, the Constitution and the laws, it is completely dysfunctional in practice. Available data show that in Macedonia indigent people face difficulties in exercising their right to a defense lawyer in criminal proceedings, and defense services they do receive are

27 *Zahirović v. Croatia* App no 58590/11 (ECHR, 25 April 2013) 62-63.

28 *Morice v. France* App no 29369/10 (ECHR, 23 April 2015) 73-78.

inadequate and do not guarantee them justice. Few people are aware that except for mandatory defense, there are practically no cases in which defendants have been appointed attorneys only on the basis of their poverty status.²⁹

The domestic law stipulates mandatory defense by means of a court-appointed defense lawyer in cases when due to the gravity of criminal charges or any other obvious handicap defendants are not able to represent themselves. In such cases, defendants (or their family members, etc.) can contract a defense lawyer of their choice, but if they do not have a lawyer, the court appoints them an ‘official defense lawyer’.

LCP stipulates different stages and different circumstances in criminal proceedings when a defense lawyer must be involved. However, except in cases of children, the defense lawyer needs to be engaged in court proceedings, but not in police or prosecutorial proceedings. Hence, according to Article 74 of LCP, when defendants are deaf, hard-of-hearing or incapable of successfully representing themselves, or when criminal proceedings are initiated for criminal offences, and even one of them is punishable with life imprisonment, defendants must have a lawyer present at the first questioning (refers to court hearings). Persons’ inability to represent themselves is a factual matter assessed by the court. Scholarly writings and court practice do not have a clear answer about situations in which persons are unable to represent themselves in order to be appointed a defense attorney.

Another novelty is the fact that defendants who have been given detention must have a defense lawyer for the entire duration of their detention. In cases of indictment for criminal offence which, by law, is liable to imprisonment for ten years or more, defendants must have a lawyer at the time they are presented with the indictment. Defendants tried *in absentia* must have a lawyer from the moment the court has ordered trial in absence. Finally, the new LCP stipulates mandatory participation of defense attorneys in sentence bargaining procedure from the very beginning.

Although the right to a lawyer formally covers the appeal procedure too, in practice it is rarely used. We found that unlike the basic courts which spend significant amount of money on this issue, the appellate courts do not have any budget for this purpose.³⁰

29 G.Kalajdziev, *Effective defense in criminal proceedings in the Republic of Macedonia* (FIOOM - Skopje, 2014, <<http://www.brrln.org/uploads/documents/36/Effective%20defence%20in%20criminal%20proceedings%20in%20the%20Republic%20of%20Macedonia.PDF>> accessed 3 March 2018).

30 G.Kalajdziev, *Effective defense in criminal proceedings in the Republic of Macedonia* (FIOOM - Skopje, 2014).

Reasoning in the second-instance courts' judgement. The judgments rendered by the judges of the appellate courts must contain a reasoning. The LCP contains particular provision envisaging that in the reasoning of the judgment, the second-instance court should assess the allegations presented on the appeal and elaborates the violations of the law it took into consideration *ex officio* while deciding. Nonetheless, depending on the nature of the rendered decision, the reasoning may differ significantly. Namely, when the appellate court holds a hearing and renders a decision, it acquires a status of a first-instance judgment for the parties and must contain a reasoning as is the case with the first-instance judgment. In cases when the appellate court decides to confirm, suspend judgement, send the case to re-trial or to reverse a judgment, the elaboration does not resemble the reasoning of the first-degree decision, but contains the necessary instructions required to be undertaken in the repeated procedure (when the judgment is suspended), and elaborates the reasons justifying the reversal of the judgment, i.e. the reasons behind the court's finding that the appeal (or appeals) are unfounded and the first-degree judgment should be confirmed.

Overcoming differences in the case-law among appellate panels and among appellate courts. The court practice is not a source of law in the Republic of Macedonia. The Supreme Court adopts general standpoints and general legal opinions, but they are mandatory only for the Supreme Court panels and not for the lower courts. Nonetheless, the lower courts abide by them owing to argumentation and for the sake of standard practice. The appellate courts may adopt standpoints and opinions on certain issues that lead to un-unified practices between two different appellate courts or between panels at one appellate court. The lower courts should, as a rule, follow the common standpoints adopted by the appellate judges, although in reality this is not always the case.

Macedonia has lost several cases before the ECtHR due to an un-unified court practice. In case of *Atanasovski*, the ECtHR noted that the Supreme Court changed the practice in the case of the applicant through decision-making contrary to the already established court practice concerning that issue.³¹ In this respect, the ECHR stated that the development of court practice is not in itself contrary to the rule of administration of justice, considering the fact that failure to maintain a dynamic and evolutionary approach threatens to turn into an obstacle for reforms or the improvement

31 *Atanasovski v. FYROM* App no 36815/03 (ECHR, 14 January 2010).

of the court practice. Nonetheless, it was pointed out that the existence of an established court practice should be taken into consideration during the assessment of the scope of the elaboration given for a certain case. In this particular case, the Supreme Court deviated from both the lower court's practice and from its own. The requirements for legal security and protection of legitimate expectation do not include the right to a set practice, but considering the specific circumstances of the case, the ECHR feels that a well formed court practice imposes the obligation that the Supreme Court provides a more fundamental elaboration of the reasons justifying the deviation in every single case.

In the case of Stoilkovska, the applicant lodged a complaint that the appellate court stripped her of her right to a fair trial by rendering a decision in her case contrary to its prior court practice set in identical cases.³²

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32 *Stoilkovska v. FYROM* App no 29784/07 (ECHR, 18 July 2013).

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