

# Certain Aspects of Proceedings in Cassation Instance in Ensuring a Fair Trial to a Person

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## Abstract

The right of a person to a fair trial is absolute. This right has a long democratic history, without which no democratic society can be imagined. Without this constitutional scope, the right to a fair trial is the basis for the sustainable development of society, as it ensures legal stability. Litigation in the cassation instance is on the top of right-to-court pyramid. The cassation instance is the last instance in the national judicial system, the decisions of the cassation instance are not subject to appeal; secondly, the court ruling in the cassation instance constitute case law, which is an important auxiliary source of law. This confirms that litigation in the cassation instance is one of the most important tools in securing the right to have a court hearing. The extent of the quality of the legal framework regulating cassation litigation points to the right to a fair trial overall. The study focuses on the issues of cassation litigation. The issues of the right of parties to file a cassation appeal (cassation protest) in civil and criminal cases as well as the jurisdiction of the court in deciding the admissibility of a cassation appeal (cassation protest) are analyzed within the multidisciplinary perspective. The aim of the research is to study the legal framework, which determines the right of a party to submit a cassation appeal (cassation protest) in civil and criminal case in the context of court jurisdiction, when deciding on whether to adopt it in order to make proposals for enhancement of the legal framework. There were used the descriptive, analytical and deduction-induction methods as well as the methods of interpretation of legal norms. Using these methods, legislation and the views of legal scholars were analyzed, and conclusions were drawn.

*Keywords: cassation, court proceedings, right to a fair trial*

## 1. Introduction

The right to a fair trial is a fundamental right of every person. However, it would be too myopic to consider these rights only from the perspective of individual rights. The right to a fair trial provides for such important basic elements of public existence as legitimate expectations, prohibition of arbitrariness and safety. Ensuring the right of every individual to an independent and competent court ensures that society has the opportunity to develop in the long term and to achieve it without social turmoil. We agree with Ilma Čepāne, Ph.D. in Law, that the mentioned rights lay the foundation for ensuring other rights (Čepāne: 2005).

The right to a fair trial is guaranteed by Section 92 of the Constitution of the Republic of Latvia, stipulating that "everyone may defend his or her rights and lawful interests in a fair court" (the Constitution of the Republic of Latvia, 1922). The scope of this norm has been extensively analyzed in court practice, approaching it from both the constitutional and procedural perspectives. This Section focuses on the procedural

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aspect, specifically, on how the legal regulation of certain procedural actions of cassation proceedings correlates with a person's right to a fair trial.

In Latvia, cassation proceedings fall under the jurisdiction of the Supreme Court or Senate (On Judicial Power, 1993). In turn, the procedural actions of the cassation instance are regulated by procedural legal acts - the Civil Procedure Law, the Criminal Procedure Law and the Administrative Procedure Law. The authors of this Section will analyze the aspects of cassation proceedings specified in the Civil Procedure Law and the Criminal Procedure Law, paying special attention to the procedure for initiating cassation proceedings, as this is the first step to initiate cassation proceedings at all, which in turn ensures the right of a person to a fair trial. Cassation proceedings are the last instance of legal proceedings which, in a democratic society, guarantees that a court decision is lawful, reasoned and fair. Everyone whose case is heard in cassation must be convinced that the decision taken is not only in line with the legal framework, but also that it is democratic, it is based on justice and is in line with human rights. Because it is understandable that in any legal claim proceedings where two parties often have conflicting interests, it is a great challenge to strike a balance between the interests of both parties. The same is true in criminal proceedings. It will be difficult to expect satisfaction with the sentence from the accused, especially if he/she has not pleaded guilty, or, conversely, from the victim if the accused is acquitted. However, the loser must also be convinced that the court's decision is the best possible outcome of the dispute settlement attained in a balanced and judicial process.

## **2. Research**

Cassation as a process has a characteristic function of monitoring legality.

Proceedings in the Court of Cassation are one of the optional stages in the case proceedings. Whether this optional stage will take place depends on the parties or the circumstances of the case. As for the case parties, it is a free choice of a party as to whether this party will appeal the court decision. In addition, it is hypothetically plausible that a party will not appeal against the decision even if the court has committed a material or procedural violation. The free choice of whether to appeal the decision or not does not apply to the prosecutor's protest in criminal proceedings, considering the role of the prosecutor's office. For example, a prosecutor in criminal proceedings performs the functions of investigation monitoring, investigation, prosecution, sustaining state prosecution and other functions specified in the Criminal Procedure Law (Kaija, 2016). The prosecutor represents the institution whose task is to monitor legality. Consequently, the prosecutor represents the interests of the state and society or public interests in criminal proceedings. It is the prosecutor's duty to protest *ex officio* against any decision that he/she considers to be unlawful. In Latvia, such a statement will be confirmed by the powers of the prosecutor specified in the Prosecutor's Office Law (Office of the Prosecutor Law. Entry into force: 1994), Section 450 of the Civil Procedure Law and Paragraph 5 of Section 551 of the Criminal Procedure Law (Criminal Procedure Law, 2005).

Paragraph 3 of Section 450 of the Civil Procedure Law determines the grounds of cassation. Cassation proceedings are possible if there applies at least one of the

circumstances specified in the law, such as incorrect application of substantive legal norms or incorrect application of procedural norms by the court, or violation of the limits of its competence when considering the case (Civil Procedure Law, 1999). The Criminal Procedure Law sets out the grounds for a cassation appeal in Section 572 of the Criminal Procedure Law, which provides that a cassation complaint or protest shall include a justification of the claims expressed therein with a reference to the violation of the Criminal Law or of the norms of Criminal Procedural law, as well as a reasoned request regarding examination of a case in oral proceedings in a court hearing, if the submitter of the complaint or protest so wishes (Criminal Procedure Law, 2005). Comparing the norms of both procedural laws, it can be concluded that the regulation of criminal procedure is similar. The procedural regulation *expressis verbis* determines the cases when cassation proceedings are possible. From the point of view of the right to a fair trial, this is an essential condition, as it guarantees equal rights to rightholders in comparable circumstances. In addition, the Civil Procedure Law and the Criminal Procedure Law precisely define what is to be assessed as incorrect application of substantive norms and what as violation of procedural law norms.

It is necessary to emphasize that Sections 451 and 452 of the Civil Procedure Law stipulate that naturally the existence of facts is not the basis for initiating cassation proceedings. Cassation proceedings are initiated only if what happened has led or could lead to misjudgment of the case (Civil Procedure Law: 1999). Such legislation could *prima facie* be regarded as an infringement of the right to a fair trial. However, this would be an erroneous view, as it is clear that cassation proceedings would not be initiated after each complaint when the complainant subjectively considers that his/her rights have been violated. This would lead to an overload of courts and also devalue the essence of cassation. The Case Law of the Latvian Constitutional Court has established the notion that the right to a fair court “pertains to the duty of the legislator to unambiguously envisage in legal norms such a procedure that would create a clear and secure conviction for an individual about the possibilities to defend his/her fundamental rights” (Constitutional Court, 2013).

The Case Law of the Supreme Court also states that a violation of the Criminal Procedure Law which is not significant and has not led to an illegal ruling does not provide grounds for annulment of a court ruling (Supreme Court, 2013).

Section 453 of the Civil Procedure Law provides the requirements for the content of a cassation complaint. Furthermore, in accordance with Paragraph 1 of Section 458 of the Civil Procedure Law, a security deposit of EUR 300 is payable for the submission of a cassation appeal (Civil Procedure Law, 1999). The submission of a cassation appeal must be distinguished from the initiation of cassation proceedings. The fact that a person has filed a cassation appeal prepared in accordance with the requirements of the law and paid a security deposit does not *a priori* mean that cassation proceedings will be initiated. The decision on the initiation of cassation proceedings takes place during an action hearing composed of three judges of the Supreme Court, as provided for in Paragraph 1 of Section 464 of the Civil Procedure Law (Civil Procedure Law, 1999). The competence of these judges includes deciding on the issue of initiating cassation proceedings. When evaluating the submitted cassation complaint, certain legal facts specified in law are taken into account. Even if there has been a violation of substantive legal norms that indicates

a violation of the complainant's rights and there would be grounds to initiate a cassation appeal, the cassation appeal may not be initiated if it is acknowledged during the action hearing that case-law and the judgment under appeal complies with it or there is no obvious reason to consider that the outcome of the case contained in the judgment under appeal is incorrect and that the present case plays a key role in ensuring uniform case law or further development of rights. Such rights are established in Paragraph 2 of Section 464<sup>1</sup> of the Civil Procedure Law (Civil Procedure Law, 1999).

It should be emphasized that the decision to refuse to initiate cassation proceedings may be prepared in the form of a resolution, and such rights are granted to judges by Paragraph *prim* 4 of Section 464 of the Civil Procedure Law (Civil Procedure Law, 1999). This legal norm has been in force for a relatively short time, only since April 1, 2012 (Amendments to the Civil Procedure Law, 2012). What changes in factual circumstance has laid the foundation for the need for amendment and why should this fact be given special attention? A decision taken in the form of a resolution should not be motivated. This is clearly stated in Paragraph 2 of Section 229 of the Civil Procedure Law. Therefore, it can be concluded that the appellant of cassation is denied the opportunity to settle the dispute in the cassation instance and that he/she is not informed about the motives and reasoning for the denial.

The legal regulation is created by the legislator, and judges in the respective context may be considered as its executors. What should be assessed is the legitimate aim of the legal regulation mentioned above. We agree with Prof. J. Landau that courts are very concerned about the motivation of the political sector because of the difficulty of identifying an inappropriate government intention (Landau, 2019). Consistently with prior reasoning, upon evaluation of the legislator's intention, it can be concluded that the action of the legislator is justified for a general restriction related to the right to cassation, namely, establishing limited grounds for cassation. In essence, the cassation instance is not an instance of dispute examination, therefore it examines only such issues that are important not only for the specific legal entity, but are important for the formation of legal thought and practice. Evaluating the scope of the right to a fair trial, legal scholars have come to the conclusion that for a restriction to be legal, it and the purpose for which it has been adopted must be legitimate, the restriction must be proportionate and unattainable by other, more lenient means (Balodis, 2015). The findings of theorists have also obtained approval in the Case Law of the Constitutional Court of the Republic of Latvia (hereinafter *the Constitutional Court*). This follows from several judgments, such as judgement of November 23, 2015 in case No. 2015-10-01 (Constitutional Court Judgment, 2015).

The issue of accepting a refusal to initiate cassation proceedings in the form of a resolution is to be assessed differently. It is undeniable that the reasoning of any court decision is an essential element of legal awareness. It should be considered that the assessment of the facts made by the judges during the action hearing and which supported a refusal to initiate cassation proceedings will not always be comprehensible to a lay person. It is therefore important that the rightholder understand the grounds for refusal, thus gaining confidence that his case has been considered legally. This will increase legitimate expectations, secondly, remove doubts about possible violations of fundamental rights and, thirdly, increase the credibility of the courts in the long term. We

agree with the opinion earlier expressed in the scientific literature that “legal consciousness reflects the correct understanding of the legal phenomena prevailing in society by the law enforcer” (Matjušina, 2013). The process of legal formation of consciousness is related to the actions of the law enforcer as the two processes interact with each other.

The expression of public legal consciousness shows that the legitimate aim of the above mentioned legal regulation is not understandable to the public, which is confirmed by the fact that since passing the norm and until now eight constitutional complaints regarding the compliance of the norm with the Constitution of the Republic of Latvia have been submitted. This can be established by reviewing the website of the Court (Constitutional Court, 2020).

With its judgment of March 12, 2020 in case No. 2019-13-01, the Constitutional Court acknowledged that the decision to refuse to initiate cassation proceedings in the form of a resolution in civil proceedings complies with the Constitution of the Republic of Latvia, thus not violating fundamental human rights (Constitutional Court, 2020). However, a separate assessment should be made of the court's arguments. The Court has acknowledged the crucial importance of the need to provide reasons, but at the same time it stated that it is not essential to respond to all the arguments of the parties, in other words, whether it is necessary to provide the arguments depends on the nature of the decision. Such a consideration should be assessed critically, because in essence it repeats the provisions of the Civil Procedure Law without providing an answer, namely, the Civil Procedure Law already determines the right of a court to decide on the form of refusal. While the issue of the constitutionality of this right being central to the scope of the constitutional complaint, does the preparation of a refusal to initiate cassation proceedings in the form of a resolution comply with the right to a fair trial? The authors of this paper claim that the answer to this question has not been provided.

As the guarantor of fundamental rights there is used the fact that the court passes a decision collegially. However, this fact is not properly encoded in the court judgment, and according to the authors of this paper, the collegial decision-making does not in itself guarantee its legality. Collegiality determines the decision-making procedure and binds decision-makers; specifically, it is common knowledge that a simple or qualified majority is required for decision-making, but does not bind the person in respect of whom the decision is made. The collegial decision merely means that the decision has been made after consultation (Letonika, 2020). The consultation does not welcome the statement of reasoning; it merely confirms that all three judges of the Supreme Court have opposed the initiation of cassation proceedings.

A different approach was chosen for criminal cases. In 2018, amendments were made to the Criminal Procedure Law regarding the procedure for initiating cassation proceedings on the basis of the Constitutional Court judgment of June 14, 2018 in case No. 2017-23-01 “On Compliance of Paragraphs 2 and 3 of Section 573 of the Criminal Procedure Law to the first sentence of Section 92 of the Constitution” (Constitutional Court, 2017). The mentioned judgment of the Constitutional Court resulted in recognizing that the first sentence of Section 92 of the Constitution was inconsistent with the legal norm which determined that the question of whether there were grounds to review the decision in cassation procedure was decided by a judge alone and the legal norm which

provided that the decision to refuse to review the decision in cassation was taken in the form of a resolution

The Constitutional Court concluded that “the court of cassation instance, especially in criminal proceedings, plays an important role in the development of the legal system, in ensuring the unity of application and interpretation of legal norms and in ensuring the protection of fundamental rights of a person.” The Constitutional Court also refers to the judgment of the Grand Chamber of the European Court of Human Rights of November 16, 2010 in the case "Taxquet v. Belgium" and points out that a motivated decision is especially important in criminal proceedings in order to enable a person to understand why he/she is found guilty of a criminal offense. Additionally, the motivated ruling promotes the person's acceptance of the decision made by the court (Constitutional Court, 2017).

The Constitutional Court emphasized the special role of the court of cassation instance in criminal proceedings – publically ensuring the legal interests of the society, including the right of an individual to a fair trial. A motivated decision would make it possible to ascertain that the arguments provided by the person have been properly assessed, answers have been provided in pertinence to arguments about significant violations of the Criminal Law and the Criminal Procedure Law and information has been provided on the court's assessment of the validity of the arguments of the cassation appeal. At the same time, the Constitutional Court points out that the amount of motives may vary depending on the arguments used in the case. The motives must be such that the person can understand why the cassation proceedings were not initiated. The Constitutional Court has noted that the legal regulation about the decision to refuse to initiate cassation proceedings is made in the form of a resolution does not sufficiently ensure the right to a fair court (Constitutional Court, 2017).

The Constitutional Court emphasizes that as a result of criminal proceedings there might occur such legal consequences that significantly restrict the fundamental rights of a person; the court of cassation instance in criminal proceedings ensures the public legal interests of the society, including personal rights and legitimate interests, thus promoting trust in a democratic state governed by the rule of law. Consequently, the legislator is obliged to establish such access to the court of cassation instance in criminal proceedings that effective protection of the fundamental human rights could be ensured.

Balancing between the standards set by the Constitutional Court for the issue of initiation of cassation proceedings in criminal proceedings and the principle of criminal procedure - the right to complete criminal proceedings within a reasonable time, which, besides the motivated decision and the court objectivity emphasized by the Constitutional Court, is also one of the principal elements of the right to a fair trial, which has a particularly significant meaning in criminal processing - the legislator was obliged to create a legal framework that would ensure a process in accordance with the principles of law in the long run.

The legislator considered it necessary to determine the following changes in the Criminal Procedure Law: 1) instead of one judge, the issue regarding the initiation of cassation proceedings is decided by a court consisting of three judges; 2) unanimity for a decision on refusal to initiate cassation proceedings; 3) a motivated decision in the form of a resolution if the court refuses to initiate cassation proceedings; 4) a decision in the form

of a resolution regarding the initiation of cassation proceedings.

The Constitutional Court, substantiating the different approach regarding the necessity to indicate motivation in the decision on refusal to initiate cassation proceedings in a criminal case, does not in itself mean that an analogous conclusion should be made also with regard to the impugned norm, which is part of the legal regulation of civil proceedings. The Constitutional Court has acknowledged that the control of the correct application of substantive and procedural norms of criminal law is of special public importance (Constitutional Court: 2017).

This approach of the court is respectful; however, despite civil proceedings' being the platform for the resolution of private legal disputes, it is important for legal entities to receive constitutional protection in terms of the right to a fair trial. In civil cases, the appellant of cassation and the public must be provided with an opportunity to understand the motives of the court in refusing to initiate cassation proceedings.

The regulation of civil procedure on the execution of a refusal of cassation proceedings in the form of a resolution does not help to strengthen legal awareness, which is damaging for the long-term development of society. The resolution does not contain any reasoning and does not allow the legal entity to understand the court's motives, thus leaving doubts as to the legality of the decision taken.

It is plausible that a resolution as a procedural step can, of course, save court resources, but there are no indications that a specific resource-related benefit has been calculated. And secondly, in a democratic society, the economy of material resources should not take precedence over fundamental human rights. The principle of procedural economy is subordinate to a person's right to a fair trial.

## **Conclusion and Implications**

As a result of this research the authors have made the following conclusions:

- 1) the objective of the court is not only to resolve civil disputes or to decide on the guilt of the accused and the applicable punishment, but also to ensure public confidence in the court. In the long run, it is trust in the court that creates the legal background in which every member of society (a natural or legal person) feels confident about the protection of their rights and interests, which in turn maintains a high level of legal awareness. These aspects are essential for the sustainable development of society and strengthening of democratic values;
- 2) cassation proceedings are the last instance in the national judicial system in which a legal entity can find confidence that his/her case has been heard in a fair court. The Court of Cassation, in essence, provides a convincing and legally sound answer as to the legality and validity of a judgment given in a particular case concerning the rights and interests of a particular person. Consequently, the cassation instance process must be unambiguous, safe and reliable. Therefore, superiority of procedural economy is not allowed in the cassation instance. The enhancement of the legal framework should be carried out in the direction of strengthening the rights of a person, including stricter criteria in the argumentation of non-acceptance of a cassation complaint;
- 3) the proceedings in the cassation instance contain two equally important levels. Firstly, it is the last instance of the judicial system, which ensures the final settlement of the

dispute and provides assurance on the legality of the settlement of the dispute, guaranteeing the individual's right to a fair trial. Secondly, it has led to the development of jurisprudence, providing new insights into the regulation of substantive and procedural law;

4) court independence in deciding on the acceptance of a cassation complaint and the right of a person to a fair court are not competing legal principles;

5) the legal regulation of cassation proceedings must be proportionate, and the legislator must be able to balance the provision of the right of persons to a fair trial with the capacity of the court system.

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