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LEGAL INTEREST IN CIVIL PROCEDURE

ABSTRACT

In everyday life the rights defined by substantive law can often be affected by the subjects of law. In practice, the parties whose rights were violated, have a legal interest to seek judicial protection.

The article "Legal interest in civil procedure", explains primarily the notion of "legal interest", with a particular look into the civil procedure. It will continue then with the elaboration of a legal interest in low-value disputes, legal interest connections versus types of indictments and third interveners in civil proceedings.

And, at the end will have the conclusion of the article wherein will be presented a summary of whole paper, and opinions around the dilemmas and raised issues as a result of the paper.

Key words: legal interest, judicial protection, the right, indictment, law, intervener, protection.

1. Legal interest in civil procedure

Legal interest means a personal gain of a procedural entity to ask for judicial protection for its subjective right. Legal interest for indictments and claims should be understood as a special interest of the plaintiff to protect its subjective right which is violated or at risk to be violated in the future. Pursuant to Article 2 paragraph 4 of the Law for Civil Procedure of the Republic of Kosovo, each party in civil proceedings should have legal interest for the indictment, as a legal remedy, and for other procedural actions carried out during the procedure, so as it is seen the LCP has paid a special importance to the legal interest, ranking it in the first articles of the law, as one of the first premises to consider before starting civil proceedings. Legal interest, as procedural-legal notion, is closely related to the subjects of

law and remedies (indictment). In order to fill better the meaning of the term legal interest we refer also to Article 254.2 of LCP.¹⁴¹

In practice, subjective rights may be violated by the subjects of the law itself. Consequently, there is a need for judicial protection of these rights (ultimate ratio), or a genuine legal interest appears for judicial protection of those rights.

Since in principle, the legal system of our country does not allow self-judgement as a form of protection of subjective law (except in some certain cases), then judicial protection should be requested in order to protect the violated rights, or the rights threatened to be violated in future, if the court doesn't issue a judgment in favour of plaintiff.

Judicial protection by the courts should be provided only in cases in which without its intervention, the subject of law cannot perform legal protection interest which is recognized by law¹⁴². It derives from this that in the formal law, the legal interest or interest for legal protection as a procedural-legal notion is different from the substantive law, since in the formal law legal interest represents special interest of the legal subject to ask judicial protection of its right, whereas within the substantive law the legal interest is considered to be protected by law. So in formal law, legal interest represents the initial premise for the initiation of civil proceedings, while in the substantive law legal interest is protected by law, such interest may also be economic, political or of any other type of social interest.

Any individual who claims that his/her right has been violated can ask its legal protection with indictment, but court will not admit claim of every individual as admissible if the claim is not presenting particular legal interest in relation with the threatened/violated right.

2. Legal interest in legal issues with small social value

Principally, as mentioned above, the competent court, ex-officio is obliged to provide judicial protection for the subject who claims that his/her right has been violated. However, exclusively a dilemma is presented and the court should provide judicial protection even if the legal interest of the party represents small or large social value of the dispute. There are different opinions related to this issue, some think that the court should not provide judicial protection because small social value does not represent a real

¹⁴¹ See Law on Contested Procedure, of the Republic of Kosovo, article 254.2, Second Part, Chapter XV

¹⁴² Brestovci, Faik: *"The Law on Civil Procedure I"*, Pristina, Edition 2006, page 161

genuine interest, which means it doesn't represent a sufficient basis for the approval of the claim as permissible, while another group of researchers think that despite social value, the court shall provide judicial protection even when social values are small, provided that it should not be considered as an abuse of procedural rights.

Regardless of the social value, whether great or small, the legal interest in relation with party has the same meaning, so it is special interest of the subject to ask judicial protection of his subjective rights. The dilemma here usually stands in the fact whether the competent court shall provide judicial protection for the claiming party or not due to the small social value of the dispute.

3. Indictment and legal interest in civil procedure

The indictment, as regular legal remedy, enablesthe legal subject to protect the right guaranteed by the law, through judicial way, and that by initiating the procedure for judicial protection of its violated right. So the indictment, namely by submitting the claim in court, presents the first step to start civil proceedings, and also expresses legal interest of the subject to ask judicial protection of the violated right, by the court. The judgement of a case in the court starts with the submission of a written claim (the binding indictment, attestation indictment and indictment for change).¹⁴³

The indictment and legal interest have an interdependent connection, and it is because the indictment as a remedy arises from legal interest of the party to file a claim, and that also the legal interest presents sufficient basis or not for allowing the indictment as a regular one. The indictment can be made to ask for the restoration of a right or legitimate interest which has been violated.¹⁴⁴ After receiving the indictment the court among other also reviews whether the claiming party, which alleges through the claim that its right was violated, has a particular and concrete legal interest. In this case the legal interest could be civil, criminal, administrative or constitutional. If the Court finds that there is not a genuine legal interest for the provision of judicial protection, it may dismiss the indictment because of lack of particular legal interest. In this case, the party may have a particular interest of political or

¹⁴³ See the Law on Contested Procedure, of the Republic of Kosovo, article 252 , Part two, Chapter XV

¹⁴⁴ Civil Procedure Code of the Republic of Albania, article 32 (changed with law no.17.05.2001 article 5)

economic type, but this interest does not constitute a sufficient basis for the initiation of civil proceedings, namely the approval of the indictment as a real one, and in this case it is dismissed as inappropriate.

During the application of different indictments and claims, in some cases legal interest is expressed and has to be argued, while in some others there is no need for argument since the legal interest is understood, so there is a legal presumption that the party has a particular legal interest. The issue of legal interest is not presented in same way and equally in all kinds of indictments. Below we will describe three types of indictments and their relations with legal interest. Ex-officio court has a duty to consider each request for legal protection, even when objectively the claimant's subjective right is probably not threatened or violated.¹⁴⁵

4. Legal interest versus type of indictment

The binding indictment is an indictment through which the plaintiff requests from the court that with the judicial verdict orders the defendant to fulfil the certain prestation that derives from a legal issue in favour of the plaintiff. Legal interest for this type of indictment has any creditor to whom the debtor doesn't fulfil obligation voluntarily.¹⁴⁶ In this type of indictment, the court assumes that the plaintiff has a certain legal interest (interest that is proved through legal work or the law itself) to the fact that the same has to gain the executive title for the obligatory implementation of its subjective law, so through binding indictment, the plaintiff (creditor) requires from the court to order the defendant with the judicial verdict, to fulfil a certain prestations in benefit of plaintiff (to return the debt, to deliver the item, etc.). Through this judicial verdict, the creditor obtains executive document (*titulus executionis*), with which, nevertheless, in the execution procedure and with the help of court realizes its subjective right. So, in this case the legal interest (legal gain) of the creditor is undeniable, and this presents the final stage of realization of the legal benefit of plaintiff (the creditor). In this type of indictment, the court does not ask to prove the certain legal interest, since as stated above, there exists the legal assumption.

Attestation indictment represents the legal remedy, with which the plaintiff proposes court to conclude a legal report.¹⁴⁷ As a basic condition for

¹⁴⁵ Brestovci, Faik, *The Law on Civil Procedure I*, Pristina, Edition 2006, page 161

¹⁴⁶ Brestovci, Faik, *The Law on Civil Procedure I*, Pristina, Edition 2006, page 162.

¹⁴⁷ Pozniq Borivoje, *The Law on Civil Procedur*, Pristina, Edition 2006, page 161

presenting an attestation indictment is legal interest of the plaintiff party.¹⁴⁸ So, unlike the binding indictment, which is described above, attestation indictment doesn't request from the court to bring the judicial verdict for the realization of any certain prestation; but it is required from the court to ascertain, respectively to confirm through the judicial verdict if it exists a certain legal report or not. This kind of indictment can be made when it is determined with special provisions, but also in cases when the plaintiff has legal interest that court should confirm the existence or nonexistence of any right or legal report; also in the cases when is required the attestation of any document, before the request for prestation is needed from the same report.¹⁴⁹ Different from the other types of indictment, in the attestation indictment the court requests from the party to prove that there exists legal interest.

The Indictment for change as a legal remedy, differs substantially from the aforementioned two types of indictment. With the indictment for change is understood the plaintiff's request for change of a particular legal report. Basically, by the judicial verdict cannot be created, modified or extinguished civil legal relations, but neither rights of civil subjects. In addition, except in certain specific cases, for the change of legal reports there should exist a judicial verdict issued by the court. This happens more in the category of statutory rights and in some types of real rights (absolute). Me anë të padisë së ndryshimit, the plaintiff doesn't need to prove the existence of a legal interest because in this case the court assumes that the plaintiff has a particular legal interest.

From what was said above, we can conclude that with the conduct of attestation indictment, the plaintiff must to argue also the existence of a legal interest (to make it reliable) before the court, while during the conduct of binding and change the indictment the plaintiff doesn't need to prove the existence of a legal interest, just for the fact that the court assumes that there is a certain legal interest.

5. Legal interest and third party interveners in a civil procedure ***Interesi juridik dhe ndërhyrësit e tretë në një procedurë civile***

¹⁴⁸ Morina, Iset & Nikqi, Selim, *Comment of Law on Contested Procedure*, First edition 2012, pg. 463.

¹⁴⁹ See the Law on Contested Procedure, of the Republic of Kosovo, article 254.2 Part two, Chapter XV

Apart from parties which start a contentious procedure in order to protect their subjective rights, in practice often appear third party interveners who have a specific legal interest who complete contested proceedings in favour of one or the other party. Beside this, the parties involved in a dispute have the right to invite a third person, if the person concerned has a certain legal interest in the dispute. Anyone may intervene in a contentious process that takes place between other persons, when there is legal interest to support one or the other litigant party, with whom joins the judgment in order to help the same.¹⁵⁰ The Law on Civil Procedure of the Republic of Kosovo and the Code of Civil Procedure of the Republic of Albania, regulate the legal interest of the third parties almost in the same way. (See Article 271 and 276 of the LCP of Kosovo and Article 189 and 192 of the CCP of Albania).

The third person intervenes in a civil proceeding or has legal interest to intervene if any of its rights or obligations depends on the final judicial verdict of the dispute. As the third intervener, intervenes with the purpose of helping one side or the other, depending on legal interest that has. The intervener and other parties should fulfil the general requirements to be the party and he can perform the same procedural actions as the party itself to which intervener claims to help. With the legal interest of third intervener deals ex-officio court throughout the all procedure. A party, to which intervener doesn't provide assistance, can reject the involvement of intervener in dispute claiming that there is no legal interest in connection with the civil issue, and can claim in not respecting of deadline, and the phase of judgement. Third intervener in dispute has assistance character, in addition to this with the consent of the parties it may become a party in dispute. Besides ordinary interveners, there are also particular interveners (*sui generis*) which intervene with the purpose to make the court to not adopt the available actions of the parties, the actions that can be contrary to mandatory legal provisions and the morality of society. So, as the intervener of particular type is the public prosecutor. Legal interest of the public prosecutor is protection of mandatory legal provisions, as well as the morality of society from eventual abusers. The particular intervener in civil proceeding is not foreseen with Law on Civil Procedure, and this could be considered as a huge shortage of this law since it allows the misuse of the parties, of the legal provisions, and morality of the society, with the available actions that are in their favour, but to the detriment of public interest, and morality of society.

¹⁵⁰ See the Law on Contested Procedure, article 271.1 of the Republic of Kosovo, Part two, Chapter XVII

6. Conclusion

From everything that was discussed in content of this paper can be concluded that the legal interest in civil proceedings presents a basic premise for the start of a civil procedure, because without a certain legal interest the party is not interested in initiating civil proceeding for protection or securing his subjective right. Nevertheless, if the legal interest is proved in front of court, or court presumes that there exists real legal interest, it should exist, otherwise the indictment is considered impermissible. It is quite controversial dilemma how to act when the subject does not have a real legal interest, and yet requires judicial protection, so should the judicial assistance be provided or not. In these basically the ex-officio court is tasked to review indictment that makes the subject, but exclusively, the court for the approval of the indictment as the acceptable should ensure if the legal interest is unlawful. When explained the meaning of the legal interest above, has been said that it should be legal (i.e. by the law should be foreseen the legal consequences) in order to start a civil process. We should recall here that with the active legitimacy of an applicant should understand the verification of the legitimacy of his research. With the connection of these two legal notions derives that if an applicant requests initiation of a process for an interest foreseen by law, so when he lacks the legal interest, then at the moment when the legality of his claims are verified (that is, at the moment of legitimization), he would not be legitimized, and his indictment will be considered as not allowed. The matter is further complicated with the fact that what decisions the court would take when it concludes the lack of active legitimacy of the plaintiff, and there are two solutions in regards to this: *suspension of the judgement of the issue and declining of the request from the beginning*. In regards to these two solutions there are two point of views in practice, according to the first one, the court, after it concludes the lack of legitimacy by the plaintiff, should refuse the indictment as not permissible, so right at the start, whereas the second point of view considers that although concludes right at the beginning the lack of legitimacy by the plaintiff (with the insistence of plaintiff), it should initiate the procedure with the condition that the plaintiff's request as not permissible due to the lack of legitimacy by the plaintiff. So, completion of the civil issue (cauza civiles) is the same, only in the second case the plaintiff is given one more opportunity.

Legal interest must necessarily be legal. In case a legal interest is foreseen by law (without legal consequences) or is unlawful, it is not considered acceptable for initiation of a civil proceeding. For instance, it a lawsuit cannot be brought to force a subject with a recurring obligation in cash, without a legal basis, or to force a subject to sell drugs. This is because in the

first case this is not prescribed by law, while in the second case there is unlawfulness, so in both cases the realization of the plaintiff request is unable. So, as it is known, the dismissal of demand or suit is decided due to lack of legal basis in law (legal cause) or for lack of evidence (actual cause).

In conclusion, the legal interest shall be prescribed by law and not be unlawful, which conditions validate the raise of the claim. It is also considered that there is no genuine legal interest in the case when in a civil case, the object of the request of the plaintiff is determined earlier through some other ways e.g. administrative ones. So it cannot be called a legal civil interest, if it can be accomplished through some other administrative or judicial manner.

Ordinary interveners as well as the special ones should have a specific legal interest in order to be participants in civil proceedings. As a conclusion, I think that non-anticipation of the special interveners (Basic Prosecution Office), in the Law on Civil Procedure (Chapter XVII) presents a deficiency of this law, because this loophole in the law creates the possibility of manipulation of the parties with the actions at their disposal, with the public interest as well as mandatory legal provisions not excluding the moral of the society and damaging public property.

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