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THE ELIMINATION OF THE LEGAL DEFECIENCIES OF FINAL JUDGMENTS

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Abstract

The final convicting verdict marks the beginning of the process of enforcing the final court decision, as stated in the formal pronouncement of the judgment passed by the court. The court verdict evolves from a thorough and meticulous factual reonstruction of the criminal act, and the application of the criminal code norms to the determined facts. The institutionalised reaction to the offender's suspected wrongdoing is crowned by the final verdict, passed in the closing stages of the court proceedings. Filing an appeal against the final verdict ensures the supervision of the legality and the regularity of the verdict rendered during the first-instance proceedings. The court's decision about the legal remedy is final and executive. The consequences of any deficiencies present in the final verdict may be removed only by a decision passed by a high court in the proceeding initiated by extraordinary legal remedies. The final verdict can be annulled because of its factual or legal deficiencies. This paper examines the deficiencies of the legal grounds of the final verdict.

Key words: final verdict, legal grounds of the verdict, legal remedies, request for the protection of legality, legal deficiencies of the verdict.

ОТКЛАЊАЊЕ ПРАВНИХ НЕДОСТАТАКА ПРАВНОСНАЖНИХ ПРЕСУДА

Апстракт

Правноснажност пресуде означава моменат којим започиње поступак извршења одлуке о казненоправном захтеву, садржане у изреци ове судске одлуке. Донета пресуда је резултат темељне чињеничне реконструкције кривичног догађаја и примене норми кривичног законодавства на утврђено чињенично стање. Круну институционалног реаговања на сумњу да је окривљени својим понашањем остварио биће одређеног кривичног дела чини пресуда донета у завршној фази спроведеног кривичног поступка. Изјављивањем жалбе против првостепене пресуде омогућава се контрола законитости и правилности одлуке донете у првостепеном поступку. Одлука суда правног лека је правноснажна и извршна.

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Последице произашле из извршења правноснажне пресуде, изузетно и по закону стриктно прописаној процедури могу бити отклоњене једино одговарајућом одлуком врховне судске инстанце, донетом у поступку иницираном ванредним правним лековима. Правноснажна пресуда може бити анулирана због чињеничних или правних недостатака. Недостаци правне основице правноснажне пресуде биће фокус излагања које следи.

Кључне речи: пресуда, правноснажност, правна основица пресуде, правни лекови, захтев за заштиту законитости, правни недостаци пресуде.

INTRODUCTION

The first-instance verdict is based on legally valid facts, and on the legal subsumption of the factual construction of the criminal act under the appropriate provisions of the Criminal Code. The factual and legal foundation of the first-instance verdict may be assessed in the meritorious decision included in the first-instance verdict. The final verdict gives legitimacy to all decisions made in relation to the penal charges against the offender imposed by the state. The only legally valid instrument for disputing the legality and legitimacy of the final verdict is the application for an extraordinary legal remedy.

The system of extraordinary legal remedies is a system of special solutions used to remove any possible flaws or deficiencies present in the factual and legal construction of the final verdict. Factual deficiencies of the final verdict may be remedied by the renewal of the criminal proceedings, initiated by the appeal of authorised subjects unsatisfied with the determined factual grounds used for rendering the final verdict. The renewal of the criminal proceedings makes possible the revision of the conclusive facts on which the final verdict is based.

The legal flaws of the final verdict involve the incorrect application of the provisions of the substantive and procedural law concerning the determined factual grounds of the final verdict. An inadequate application of the provisions of the Criminal Code means that the final verdict is unlawful. Moreover, an incorrect application of the procedural provisions undermines the legality of the rendered verdict. As regards the Serbian positive law, any flaws in the proceedings of rendering the final verdict can be remedied by the decisions made upon the request for the protection of legality. Unlike the Serbian positive law, certain legislations retained the possibility of applying extraordinary legal remedies that enable the convicted persons (the offenders) to contest any legal deficiencies of the final verdict.

The application of extraordinary legal remedies relativises the principle of claim preclusion (*res iudicata*). Therefore, appropriate interational laws, constitutions of modern states and procedural laws allow for the possibility of the suspension of citizens' legal security through the initiative for 'reopening a case' which has already been concluded by rendering a final verdict. This possibility is prescribed by the Additional Protocol to the Europen Convention for the Protection of Human Rights and Fundamental Free-

doms (Additional Protocol to the Europen Convention for the Protection of Human Rights and Fundamental Freedoms, 2010 and 2015, Art. 4, para. 2).

Besides the violaton of the substantive and procedural law, certain legislations, including the Serbian positive law, prescribe the lawful influence that the decisions made by the Constitutional Court and the European Court for Human Rights have on the decisions made by criminal courts. This is evidently reflected on the grounds on which the application for an extraordinary legal remedy is based. The comparative law also presupposes the possibility of eliminating any legal deficiencies in final verdicts. Various forms of cassation are applied for annulling any violation of the law and proceedings determined during the revision of the legality of final verdicts, as well as any deficiencies ascertained by the verdicts rendered by the European Court for Human Rights.

THE ELIMINATION OF THE VIOLATION OF LAW AND COURT PROCEEDINGS

A final verdict may be based on valid and legally proven facts, as well as on the wrong application of law onto factual grounds. Moreover, the provisions of the procedural law may be impaired when making a decision about the appealed case. Therefore, the legal ground of the final verdict is re-examined by means of extraordinary legal remedies. As already mentioned, the Serbian criminal and penalty law prescribes that any request for the protection of legality is an exclusive extraordinary legal remedy aimed at eliminating the legal deficiencies of final verdicts.

The very possibility of re-examining the legal ground of the final verdict initiates some dilemmas in the theory of the criminal procedural law. Namely, the question is how to justify the violation of the principle of claim preclusion, particularly in cases whose final verdicts are not characterised by significant factual deficiencies. Moreover, unlike the various ways of final verdict revision (including the reopening of a proceeding), a re-examination of the legal deficiencies of the final verdict is not founded on any new evidence or facts. It is simply a legal opinion, founded on the litigants' reasonable suspicion that the legal basis of the final verdict is not valid. Contrary to facts, which are real and not open to interpretation, legal opinions are 'variable and aleatory'. When creating the normative framework for a potential contesting of the legal basis of the final verdict, it is of utmost importance that it be clearly differentiated from the possibility of reopening a proceeding. The grounds for re-examing the legal basis of the final verdict have to be undoubtedly stated, whereas the very re-examination of the legal basis of the final verdict must not become an incessant and continuous violation of the principle of claim preclusion. Thus, both the public interest and the legal interests of the litigants are protected (Vasiljević, 1981, pp. 663-664).

The Request for the Protection of Legality as a Legal Mechanism for Eliminating the Legal Deficiencies of Final Verdicts

The request for the protection of legality is an extraordinary legal remedy which may refute the final verdict because of the *violation of law or proceedings* preceding the rendering of the final verdict. As regards the fact that it exclusively considers the *legal deficiencies* of the final verdict, the request for the protection of legality is not a true legal remedy. This extraordinary legal remedy is a devolutive, not suspensive, legal remedy.

The Criminal Procedure Code of the Republic of Serbia (CPC, 2011-2021) significantly changed the aspect and manifestation of this legal remedy. The public prosecutor of the highest rank (Supreme Public Prosecutor) no longer holds the exclusive titulary right to apply for the request for the protection of legality. According to the law, this legal remedy, used for contesting the legal basis of the final verdict, may be submitted by the convicted person and their defence counsel, which introduces the claimant aspect. However, certain limitations imposed on the right of the convicted to submit a request for the protection of legality impair the principle of the 'equality of arms'. Not only is the convicted party constrained when applying for this legal remedy but they are also conditioned by the demand that they may file the request for the protection of legality only after they *have previously exercised* their right to apply for ordinary legal remedies. In addition, the convicted party is allowed to file the appeal *exclusively based on legal grounds* (CPC, Art. 485, para. 1, it. 2 and 3, para. 4), and the deadline for the appeal is 30 days after the Notice of Entry of Judgment has been served to them. The Supreme Public Prosecutor has to respect the deadline for appeal only in case the final verdict is contested because of the application of the *law held unconstitutional*, or because the decisions made by the Constitutional Court or the European Court for Human Rights *determined the violation of the human rights* of the convicted party or any other party involved in a lawsuit (CPC, Art. 485, para. 1, it. 2 and 3). Then, the deadline for appeal is three months after the Notice of Entry of Judgment has been delivered by the Constitutional Court or by the European Court for Human Rights.

The request for the protection of legality can be filed against all court decisions – *verdicts*, *decrees and orders*, regardless of the position that the court passing the judgment occupies in the hierarchy of courts (including the decisions of the Supreme Court of the Republic of Serbia, with the exception of the decisions brought on the request for the protection of legality). Decisions are then refuted because of unlawfulness in the application of law or in the procedure preceding the final verdict. The deisions of the procedural authorities, courts and public prosecutor can be the subject matter of revision and re-examination. The initiation of the procedure for re-examining the final verdict's legality is conditioned by the existence of both the formal and the substantive legal effectiveness of the verdict. Therefore, decisions which do not have the legal force of

claim preclusion cannot be refuted on the basis of the request for the protection of legality. This is further supported by the provisions of the Supreme Court of the Republic of Serbia, which prescribe that this appeal is not permitted to be filed against the verdicts that are not final, but only against the verdicts rendered as final verdicts, which means that the criminal procedure is meritoriously concluded (Serbian Supreme Court, 1972). This is the reason why this extraordinary legal remedy cannot be filed against *the dismissal of the criminal complaint* (regarded as in internal act performed by public prosecution offices), *the order to initiate an investigation* and *the order to stop an investigation.* Also, the request for the protection of legality cannot be filed against *the verdict revoked per appeal,* which has no force of claim preclusion, and which is sent back to the court of first instance to render the judicial decision. Considering the fact that public prosecutor's decisions also refer to third parties, some authors think that they can be revoked by the request for the protection of legality. The decisions made by the public prosecutor can be revoked "only in case of the violation of the offender's rights" (Ilić, 2016, pp. 367-369), i.e., in order to render the final verdict according to Article 493 of the Criminal Procedure Code.

Legal Grounds for Filing the Request for the Protection of Legality

Generally speaking, the grounds for filing the request for the protection of legality in the positive law framework include legal solutions that are actually a symbiosis of the grounds for applying for the three legal remedies as prescribed in the earlier procedural code. Besides the violation of law (CPC, Art. 485, para. 1, it. 1), which was considered a valid ground for filing for this legal remedy in the earlier legislation, the normative milieu for the protection of legality is extended to include the grounds that were earlier assumed as *a special case of the retrial of a criminal case,* or were the basis for expressing *an extraordinary legal remedy – appeal for the re-examination of the verdict*.

The grounds for filing the request for the protection of legality (CPC, Art. 485) are the following: (a) the *violation of law* – resulting from the wrong application or even the non-application of the norms of the substantive or procedural law; (b) the application of the law that was determined as unconstitutional by the *Constitutional Court,* the generally recognised rules of international law and acknowledged international contracts; (c) the violation or denial of the human rights of the convicted party or any other party involved in a lawsuit, which are granted by the *Constitution* or *the European Court for Human Rights;* and (d) violations of law in the first-instance proceeding and in the Appellate Court, *listed comprehensively and prone to revocation by the defendant* by means of the request for the protection of legality. These violations are the following: (a) *critical violation of the criminal procedure provisions* in relation to mandatory defence; obsolescence of prosecution or its termination due

to permanent obstacles (amnesty, pardon, first-instance verdict); the trial is presided over by a judge that had to be exempt from the case; the court violated the legal provisions in relation to the prosecutor's charges, i.e., permission granted by the competent authority; the verdict did not bring any final resolution to the trial; the verdict exceeds the accusation; the prohibition *reformatio in peius* is violated; the verdict is based on evidence it cannot be based on, unless the same verdict would have been evidently rendered even without that evidence (*relatively critical violation of the criminal procedure*); and (b) *violations of the criminal code* – the question whether the act with which the accused is charged is a criminal act; whether the criminal act, which is the object of prosecution, is tried by the application of the adequate law; whether the criminal sanctions imposed, or confiscation of property benefit or parole revocation violated the law; *unlawful* decisions upon the property claim, confiscation of property acquired by crime, as well as *unlawful and improper* decisions concerning the costs of the criminal proceedings.

The change of the aspects of this legal remedy is also reflected in the restrictions imposed on the Supreme Court regarding its decisions if the request for the protection of legality is filed because of the *violation of law*. In that case, the Supreme Court makes decisions *only about the issues that are considered significant for the correct and unifrom application of the law* (CPC, Art. 486 para. 2). Therefore, the court passes a decree that disclaims the request for the protection of legality if it is not significant for a proper or uniform application of law, even though it is filed because of a violation of law (CPC, Art. 487 para. 1 it. 4), or even though it is a violation to the detriment of the defendant. The court is thus enabled to select the cases for which it will hold trial on merits. This conceptual approach to one of the fundamental principles for initiating the procedure for the supervision of the legality of the final verdict "*makes room for the acceptance of unlawful decisions or procedures, which is inadmissible from the point of view of legal order"* (Bugarski, 2016, p. 93). The effectiveness of this legal remedy is thus diminished and the constitutional norm requiring that all court decisions be based on law is violated (Constitution of the Republic of Serbia, 2006-2021, Art. 145 para. 2). Moreover, the dismissal of the request for the protection of legality of the verdict rendered to the detriment of the defendant unless it considers "*the issue significant for the correct and unifrom application of the law"* (Brkić, 2014, p. 177) is a deviation from a long practice of the Public Prosecutor who has always used this legal remedy to react to the violation of law undertaken to the detriment of the defendant (*ibid.*). Finally, the legal protection of the legality of final verdicts is executed within the framework of the correct and unifrom application of the law, so that the defined purpose of filing the request for the protection of legality is in contrast to the very name of this extraordinary legal remedy. This legal remedy has to subsist as a legal mechanism aimed at eliminating any legal

deficiencies present in final verdicts and at reestablishing legality, not as a means for creating regularity and uniformity in the application of law.

Proceeding on Request for the Protection of Legality

The filed appeal states the reason (grounds) for revoking the final verdict. In case the final verdict is revoked by the decisions of the Constituional Court or the European Court for Human Rights, it is necessary to submit these decisions as well. The request for the protection of legality, together with possible decisions made by relevant courts, is submitted to the *Supreme Court*, which decides on the submitted appeal.

The Supreme Court holds a session of the Council, which is composed of five judges. The Council president appoints a *judge reporter*, who is in charge of preparing the procedure necessary for passing a judicial decision. Based on his/her report, the Council decides on the grounds for the dismissal of the request for the protection of legality. If it is not dismissed, the judge reporter submits a copy of the filed legal remedy to the public prosecutor or defence counsel. Prior to the meritorious decision, he/she can obtain certain information about the reasons for the revocation of the final verdict. The Council of the Supreme Court makes an unbiased assessment whether to inform the public prosecutor and defence counsel about its session.

The Supreme Court examines the revocation of the final verdict in relation to the reasons stated in the request for the protection of legality, and referring to the revocation required by this legal remedy. The law does not allow the expansion of the scope of this examination even in case any form of violation is perceived. On the other hand, the policy of *benefits of cohesion* (*beneficium cohaesionis*) enables an extensive impact of the filed request for the protection of legality in the form of the *subjective extension* of the legal remedy. This is possible if the request for the protection of legality is filed to the benefit of the defendant.

Decisions of Court of Legal Remedy Concerning the Request for the Protection of Legality

The Supreme Court can decide (a) to dismiss (issuing a decree), (b) to reject, and (c) to accept the request for the protection of legality. The decisions are passed in the form of judgment.

The Supreme Court passes a decree by which the request for the protection of legality is rejected for the following reasons: (a) it is not submitted within a prescribed deadline period, in case the deadline period is binding (always when the titular is the defendant, and sometimes when the appeal is submitted by the public prosecutor); (b) it is unlawful (submitted contrary to the Supreme Court decision passed upon the request for the protection of legality); (c) its contents are not proper; and (d) it is submitted because of the violation of law that is not significant for a

proper or uniform application of law. It is not necessary that the decree by which the request for the protection of legality is rejected be accompanied by an explanation (CPC, Art. 487).

The Supreme Court passes a judgment that the request for the protection of legality is rejected as ungrounded if it ascertains that the appeal does not state the reason that the appellant refers to. If the appeal is submitted because of the violation of law that was ungroundedly emphasised in the proceeding on the ordinary legal remedy, and if the Supreme Court accepts the reasons stated by the Appellate Court, the explanation of the verdict focuses on these reasons (CPC, Art. 491).

Accepting the request for the protection of legality, the Supreme Court passes a judicial decision to revoke or partially revoke the final verdict and the verdict rendered in the proceeding on the ordinary legal remedy, or only the verdict rendered in the proceeding on the ordinary legal remedy, and to return the case to the court whose verdict has been revoked (first-instance or appellate court). The case is returned to the stage of the first hearing in the first-instance court, or to inquest in the second-instance court. This decision is based on previous charges, or the part related to the revoked part of the verdict. The court in question is obliged to respect all the procedural regulations and discuss the issues indicated by the Supreme Court. During a retrial, in the first-instance court, i.e. Appellate Court, the litigants are allowed to state new facts and submit new evidence. When rendering a new verdict, the corresponding court is legally bound not to render a verdict to the worse, in case the proceeding is retried on the request for the protection of legality submitted to the benefit of the defendant. The court of legal remedy may order that a new trial be held in the presence of a completely changed council. This is frequently decided in case of significant violations of the criminal procedure provisions.

Accepting the request for the protection of legality, the Supreme Court can pass a judgment to reverse, partially or in full, the final verdict and the verdict rendered in the proceeding on the ordinary legal remedy, or only the verdict rendered in the proceeding on the ordinary legal remedy. Also, it is possible to reverse only a conviction. This judgment is passed on conditions that there is a violation of law or proceeding the appellant refers to in their request for the protection of legality, and that the appeal is submitted to the benefit of the defendant. The possibility of reversing verdicts, not just deeming them unlawful and revoked so that the case is returned to lower courts for reconsideration, expands the domain of the Supreme Court intervention beyond the regular system of cassation.

When the Supreme Court passes a judicial decision by which it determines that there exists a violation of law, and when it adopts the request for the protection of legality that is submitted to the detriment of the defendant, it does not contest the final verdict. It is the so called detrming (declaratory) judgment. It does not ascertain any violation of law. This is the reinforcement of the constitutional principle that it is not pos-

sible to reverse a verdict in the proceeding on the extraordinary legal remedies to the detriment of the defendant and of one of the procedural concessions of the defendant partaining to the *favor defensionis*.

With respect to the law, the Supreme Court can revoke even a legal decision. This is made possible by the legal restrictions imposed upon the scope of examination of the revoked verdict in the proceeding on appeal. Namely, during the proceeding on appeal, the second-instance court has to reject the appeal and confirm the verdict if it was not authorised to eliminate the violation executed in the revoked verdict or in the proceeding (the violations not referred to by the appellant nor liable to be eliminated by court). Therefore, the decision of the Court of legal remedy is lawful. However, upon adopting the appeal for the protection of legality filed to the benefit of the defendant, if the appeal is deemed well-grounded and if the contested verdict is to be either revoked or reversed with the purpose of eliminating the violation of law, the Supreme Court will revoke or reverse this decision, passed in the proceedin on ordinary legal remedy even though it does not violate the law (CPC, Art. 492 para. 2).

INSTRUMENTS FOR ELIMINATING THE LEGAL DEFICIENCIES OF FINAL VERDICTS IN COMPARATIVE LAW SYSTEMS

The Elimination of the Legal Deficiencies of Final Verdicts – Practice Exercised in Former Yugoslav Republics

The request for the protection of legality is used as an instrument for the elimination of legal flaws in the legislations of the states evolved from the former Yugoslav federation. However, the aspect of this legal remedy has not been changed in the legal systems of these newly-formed states. Filing a request for the protection of legality may annul a violation of law and proceeding, without intending to have an impact on the correct and unifrom application of the law. Besides, the Supreme Public Prosecutor still holds the titular position regarding the submission of this legal remedy, which has transformed it into the litigants' legal remedy. The same conceptual approach is adopted by the legislations with the adversarial system of criminal proceedings (North Macedonia, in the first place). It is interesting that the CPA of Bosnia and Herzegovina prescribes a request for the repetition of criminal proceedings as the only extraordinary legal remedy (Criminal Procedure Act of Bosnia and Herzegovina, 2003-2018). There is no legal possibility of refuting the exclusively legal basis of a legally binding judgment. On the other hand, the CPC of the Republic of Srpska foresees the possibility of submitting a request for the protection of legality (Criminal Procedure Code of the Republic of Srpska, 2012-2021, Art. 350-358). Holders of the right to submit this legal remedy are the Republic Public Prosecutor, the convicted person and the defense attorney. In addition, the number of grounds for initiating the procedure for reviewing the legal basis of the final verdict

has been reduced. This is possible only because of violations of the criminal law and the violation of the right to defense. Other elements of the positive legal regime of requirements for the protection of legality are identical to the legal solutions of the Procedural Code of Serbia, except that the decision on violations of the criminal law is not reduced only if it is an issue of importance for the correct or uniform application of the law. The Criminal Procedure Act of the Federation of Bosnia and Herzegovina does not recognise extraordinary legal remedies intended to refute the legal deficiencies of the final verdict. The transitional provisions of this law only foresee the possibility of ending the procedure initiated by the request for the protection of legality which was submitted before the entry into force of the current procedural law (Criminal Procedure Act of the Federation of BiH, 2003-2020, Art. 456).

The procedural law of North Macedonia allows the possibility of submitting a request for the protection of legality against final verdicts due to violations of the constitution, laws and provisions of international treaties, ratified in accordance with the Constitution (Criminal Procedure Act, 2010-2022, Art. 457). The sole holder of the right to submit this legal remedy is the Public Prosecutor of North Macedonia, and the decision on the merits of the submitted request is made by the Supreme Court of the Republic of North Macedonia (Criminal Procedure Act, Article 458). At the same time, the Supreme Court can make decisions identical to those that exist in the legal system of Serbia.

Unlike the positive criminal procedural legislation of Serbia, the positive legal regime of extraordinary remedies in the legislation of North Macedonia retained the possibility of refuting the legal basis of the final verdict by submitting a request for an extraordinary review of the final verdict. The convicted (defendant) can submit this extraordinary legal remedy on their own, or through a lawyer, if they have been sentenced to at least one year in prison or juvenile prison, within 30 days of the date of receiving the final verdict. The condition for submitting this legal remedy is that the defendant has previously used the right to regular legal remedies, unless the second-instance verdict has acquitted him from punishment, court warning, or suspended sentence, or unless a fine has been replaced by a prison sentence or an educational measure has been replaced by a juvenile prison sentence. A request for an extraordinary review of the final verdict is not possible against the judgment of the Supreme Court (Criminal Procedure Act, Article 463). Similar to the former Yugoslav legislation, the Macedonian legislation reduces the range of grounds for filing this extraordinary legal remedy, namely to the exhaustively enumerated violations of the criminal law committed to the detriment of the defendant, expressly stated violations of the criminal procedure, and violations of the right to defense and violations of the appeal procedure, if they were of significance for the legal and proper judgment (Criminal Procedure Act, Art. 465).

The Criminal Procedure Code of Montenegro foresees the possibility of refuting the legal basis of the final verdict by submitting a request for the protection of legality. The grounds for filing this remedy are identical to those that exist in the positive law of Serbia (Criminal Procedure Code of Montenegro, 2009-2020, Article 437). However, this code does not provide that the violation that is the basis for challenging the final verdict is a matter of importance for the correct or uniform application of law. In contrast, the Montenegrin legislator also prescribed the procedural legitimacy of the defendant and the defense attorney to, albeit indirectly, refute the legal basis of the final verdict. Namely, the defendant and the defense attorney can request that the Supreme State Prosecutor's Office submits a request for the protection of legality. If the Supreme State Prosecutor's Office rejects the proposal, the defendant and the defense attorney can appeal the decision of the Supreme Court. The appreciation of the appeal implies that the defendant's or defense counsel's proposal is considered a validly submitted request for the protection of legality. Like our legislator, the Montenegrin legislation, considering the grounds for submitting a request for the protection of the legislator (through the submission of a proposal by the defendant or defense counsel), includes those grounds that were prescribed for the submission of a previous request for the examination of the legality of the final verdict (Criminal Procedure Code of Montenegro, Art. 438). Unlike the CPC of Serbia, Montenegrin legislation allows for the possibility of repeating the criminal procedure on the basis of a request for the protection of legality, if there is considerable doubt about the veracity of the decisive facts established in the decision against which the request was submitted (Criminal Procedure Code of Montenegro, Article 444). The system of extraordinary remedies in the Montenegrin procedural legislation, in contrast to the positive law of Serbia, retained the extraordinary mitigation of punishment.

The removal of the legal deficiencies of a legally binding judgment in Croatian legislation is initiated by submitting two extraordinary legal remedies – a request for the protection of legality and a request for an extraordinary review of a legally binding judgment. Therefore, the approach to the system of extraordinary legal remedies that existed in the former Yugoslav law remained in place. The exclusive holder of the right to submit a request for the protection of legality is the Chief State Prosecutor. He/she can submit this legal remedy due to violations of the law and the court decision "which was made in the procedure in a way that represents a violation of fundamental human rights and freedoms guaranteed by the Constitution, international law or the law" (Criminal Procedure Act, 2008-2022, Art. 509). The procedure according to the request, as well as the decisions made in this procedure, are identical to the positive legal regime of this extraordinary legal remedy in our legislation.

The basic principles of 'equality of arms' in the procedure initiated by extraordinary legal remedies in Croatian law are implemented through

the possibility of the convicted person and the defense attorney refuting the legal basis of the final verdict by submitting a request for an extraordinary review of the final judgment. The authority to submit this legal remedy within one month of receiving the verdict is available to a convicted person who has been sentenced to prison, or juvenile prison, as well as to a person who has been ordered to be placed in forced accommodation as a medical safety measure. The condition for reviewing the legal basis of the final verdict by the convicted person and the defense attorney is the prior use of regular legal remedies. The grounds for overturning the legal basis of the final verdict with this remedy are identical to those prescribed in the former Yugoslav law, and represented in the positive law of North Macedonia (expressly stated violations of the criminal law, certain violations of the provisions of the criminal procedure, violation of the right to defense and relatively important violations of the appeal procedure). The procedure and decisions on the submitted request for an extraordinary review of the legally binding verdict fully correspond to the physiognomy of this legal remedy profiled in the law of the former Yugoslav state (Criminal Procedure Act, Art. 515-520).

The positive law of Slovenia, as well as the legislation of Serbia, envisages a request for the protection of legality as an exclusive legal remedy for refuting the legal foundation of the final verdict. This legal remedy can be submitted for violations of the criminal law, absolutely essential violations of the provisions of the criminal procedure, as well as relatively essential violations of the procedure (if they affected the legality of the verdict). In addition, the request can also be submitted if the judgment of the European Court for Human Rights has established a violation of human rights provided for in the European Convention. It is curious that this extraordinary legal remedy can be submitted in a procedure that has not been legally concluded. Namely, a request for the protection of legality can be filed against a final verdict on detention, except if the detention was ordered by the Supreme Court, if it was extended by a decision of the Senate of the Supreme Court, or in the case of the extension of detention after the indictment (Criminal Procedure Act, 2003-2021, Article 420). Holders of the right to submit requests for the protection of legality are the State Prosecutor, the convicted person and the defense attorney. At the same time, the legislator does not reduce the grounds for submitting this legal remedy submitted by the convicted person and the defense attorney. The Slovenian legislation has retained the possibility of repeating the criminal proceedings in the proceedings initiated by the request for the protection of legality, if there is considerable doubt about the decisive facts on which the final judgment is based. The procedure under this legal remedy, as well as decisions that can be made in the process of reviewing the legal basis of a final verdict, correspond to the positive legal decisions of other countries in the South Slavic legal area (Criminal Procedure Act, Art. 420-429).

Mechanisms for Eliminating Legal Deficiencies in the Most Important European Legislations

The Criminal Procedure Code of the Federal Republic of Germany provides for a specific system of legal remedies. Regular legal remedies include: the appeal against judgment (Strafprozessordnung der Bundesrepublik Deutchland – StPO, 1987-2023, § 312-332), and the review (StPO, § 333-358) and appeal against conclusions and orders (StPO, § 304-311a). It is interesting that the review refutes only the legal basis of the first-instance verdict. Namely, the reason for contesting the judgment by review is a violation of the law, which consists in the non-application or improper application of a legal norm (StPO, § 337). However, the system of extraordinary legal remedies in German law does not provide for the refutation of the legal basis of a final judgment. Repetition of the criminal procedure (StPO, § 359-373a) is the only extraordinary legal remedy, which primarily refutes the factual basis of the final verdict. In addition to the factual grounds that allow the possibility of a legally concluded criminal procedure, the German procedural law also prescribes the repetition of the criminal procedure in favor of the convicted person, if the judgment of the European Court of Human Rights establishes a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the judgment of the domestic court, which is based on that violation (StPO, § 359 para. 6). Therefore, the refutation of the legal basis of the legally binding judgment of the German court is indirectly allowed. The legal defects of a final judgment can be annulled by applying the Act on the Federal Constitutional Court of Germany (Gesetz über die Bundesverfassungsgerichs – BverfGG, 1951-2019, § 79 para. 1). The provisions of this Article of the Law allow the repetition of criminal proceedings against final judgments based on regulations that are contrary to the Constitution or regulations that were declared null and void by the decisions of the Constitutional Court, or judgments based on the interpretation of regulations that the Constitutional Court declared null and void (Haller & Conzen, 2001, p. 655). The positive legal regime of repetition of criminal proceedings to the detriment of the convicted person does not even allow the indirect possibility of reviewing the legal foundation of the final verdict of the German criminal courts (StPO, § 362). In addition, the possibility of repeating the criminal procedure "for a different assessment of the punishment based on the same provision of the criminal code" is excluded, as is true of reduced sanity (StPO, § 363).

The system of legal remedies in the French criminal procedure prescribes the division of legal remedies into regular and extraordinary. However, this classification is not based on the criteria prescribed in our law. Ordinary legal remedies (*les voies du recours ordinaires*) are declared for any reason (factual or legal), and can cause the procedure to be repeated. On the other hand, extraordinary legal remedies (*les voies du recours extraordinaires*) are filed to review the legality and regularity of

court decisions in cases provided by law, when it is not possible to declare regular legal remedies (Pradel, 2000, p. 712).

The refutation of the legal basis of final judgments in French law (*pour raison de droit*) is possible by submitting a cassation request in the interest of the law, and a request for a review of the criminal judgment following the pronouncement of the decision of the European Court for Human Rights (*le pourvoi en cassation dans í intérét de la loi*). The legal basis of the final judgment is refuted and therefore it is a 'real' extraordinary legal remedy. On the other hand, the cassation request in the interest of the party, although the French procedural code classifies it as an extraordinary remedy, is by its legal nature a regular remedy. It is filed against non-legally binding judgments that cannot be challenged by other regular legal remedies (objection or appeal).

A cassation request in the interest of the law can be filed by the Supreme Prosecutor acting before the Court of Cassation against final judgments of the Appellate, Jury, Correctional or Police courts, against which the authorised persons did not file a cassation request in a timely manner in the interest of the party. When deciding on this extraordinary legal remedy, the Court of Cassation cannot worsen the position of the parties, and the goal of the decision is to standardise judicial practice and respect the law. The physiognomy of the cassation request in the interest of the law conceived in this way inspired French theorists to label this legal remedy as a 'real' cassation request in the interest of the law. On the contrary, the 'false' cassation request in the interest of the law is, in fact, the annulment order of the Minister of Justice, by which he orders the Supreme Prosecutor to refer the first-instance or second-instance judgment that violates the law to the criminal panel of the Court of Cassation. The Court of Cassation, in this situation, can cancel the judgment and refer the case for a retrial to another court of the same type and degree as the court that made the challenged decision, with the prohibition of *reformatio in peius* being valid in the repeated proceedings (Mathias, 2007, p. 219).

The legality of legally binding court decisions (judgments, decrees and orders) in Russian law is reviewed by supervisory appeals and petitions. This extraordinary legal remedy is submitted due to significant violations of criminal material or procedural law, which may affect the outcome of the proceedings (Criminal Code of Russian Federation, 2002-2023, Art. 412). Supervisory appeals and petitions may be filed against: (a) decisions of first-instance courts of federal subjects against which an appellate appeal or petition to the Supreme Court of the Russian Federation was used; (b) the decision of district (*maritime*) courts against which an appellate appeal or a petition to the Supreme Court of the Russian Federation was used; (c) the decision of the appeal panel, the judicial collegium for criminal offenses and the military collegium of the Supreme Court of the Russian Federation made in the appellate procedure; (d) de-

cisions of the judicial collegium for criminal offenses and the military collegium of the Supreme Court of the Russian Federation made in cassation proceedings; and (e) orders of the Presidency of the Supreme Court of the Russian Federation.

The authorised holders to initiate the procedure for reviewing the legal basis of a legally binding judgment by submitting a supervisory appeal are: the convicted person, the defense attorney, the legal representative of the convicted person, the injured party, the Private Prosecutor, the legal representative, and the attorney of the Private Prosecutor, along with other persons to the extent to which the disputed issues affect their rights and interests. The right to submit an evidentiary petition, on the other hand, belongs to the Supreme Public Prosecutor of the Russian Federation and his deputies, Prosecutors of subjects of the Russian Federation, and Military Prosecutors and their deputies. A legally binding judgment in the part related to a civil lawsuit is held by both the applicant of the civil lawsuit and the civil defendant (Lupinskaja, 2009, p. 890). Deciding on this legal remedy consists of a preliminary procedure, in which the formal correctness of the filed supervision of appeals and petitions is assessed, and a supervisory procedure in which a meritorious decision is made. The Presidency of the Supreme Court can reject, cancel and return the final decision to the first-instance court, or the Appellate court, or it can return it to the cassation stage, and can even change the contested decision.

Similar to German law, Italian criminal procedure legislation creates an optimal normative framework for eliminating legal deficiencies in the procedure by regular legal remedies. The Italian Code of Criminal Procedure, in addition to appeals, provides for the possibility of filing a cassation appeal as a regular legal remedy (Codice di procedura penale – CPP, 1988-2022). At the same time, the cassation trial, apart from the decisions of the Appellate courts, decides on the merits of the first-instance courts against which no appeal or direct cassational appeal can be filed. Thus, the Italian legislation allows the possibility of reviewing the application of law and the substance of the accusation, which form the legal backbone of the second-instance decision. This postpones the entry into force of court decisions and, generally speaking, puts an end to any further possibility of changing the legal basis of the judgment after it becomes final. Revision, as the only extraordinary remedy represented in Italian law, allows the possibility of ‘reopening the case’ based on gross factual deficiencies. Exceptionally, if a conviction or a criminal order was based on a decision of a Civil or Administrative court that was later revoked (and had the status of a preliminary issue when deciding in a criminal proceeding), this constitutes grounds for revision (CPP, art. 630 com. 2). This is the only legal possibility to review the legal foundation of a final judgment in the Italian criminal procedure legislation in the procedure for an extraordinary remedy (Sfrappini, 2002, pp. 251-256).

CONCLUSION

A legally binding judgment represents the crown of the factual and legal establishment of a criminal case. Therefore, the legal basis of the final verdict, not even its factual basis, must leave no doubt as to its correctness. The system of extraordinary legal remedies in Serbian law, unlike some comparative legal systems, allows the legal basis of a legally binding judgment to be refuted by submitting a request for the protection of legality. However, the change in the physiognomy of this extraordinary legal remedy makes it difficult to achieve optimal results in the field of eliminating the illegality of excessive judgments. First of all, stipulating the possibility of refuting the legal basis of a final judgment on the fact that some circumstance was of significance for the correct or uniform application of law objectively narrows the scope of the effort to completely remove the legal deficiencies of the final judgment. Then, the loss of the exclusivity of the Supreme Prosecutor's instance to submit a request for the protection of legality, in parallel with the possibility that the holder of this legal remedy be both the convicted and the defense attorney, violates the very meaning of legality as primarily an instrument of public interest. The return of the request to examine the legality of the final verdict, as a counterpart to the request for the protection of legality, would improve the institutional possibilities of the convicted person to refute the legal basis of the final verdict, but would also respect the basic postulates of the principle of equality of arms in criminal proceedings. Likewise, there is no valid reason for eliminating the possibility of repeating the criminal procedure on the basis of the submitted request for the protection of legality, which is part of the positive legal regulation of many countries. It is not possible to create an optimal legal environment for the annulment of the legal defects of a legally binding judgment if there is no possibility to remove gross factual defects (substantial doubts about the existence of decisive facts) to which the law was applied in the process of reviewing the legal basis of the legally binding judgment.

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ОТКЛАЊАЊЕ ПРАВНИХ НЕДОСТАТАКА ПРАВНОСНАЖНИХ ПРЕСУДА

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Резиме

Моменат наступања правноснажности пресуде подразумева да је донета судска одлука, као резултат законитог и правилно спроведеног поступка утврђивања чињеничне основице кривичног догађаја и на њу примењених норми кривичног закона. Међутим, то не искључује могућност да и у правноснажној пресуди могу опстати правни недостаци. Стога, наше позитивно право, али и упоредноправни системи, предвиђају могућност побијања правне основице правноснажне пресуде. То се може постићи подношењем захтева за заштиту законитости, али и применом других законских решења у прописаном систему правних лекова.

Правна неутемељеност правноснажне пресуде огледа се у погрешној примени одредаба материјалног и процесног права на утврђену чињеничну основицу правноснажне пресуде. Неадекватна примена одредаба Кривичног законика чини правноснажну пресуду незаконитом. Исто тако, непоштовање законских одредаба о поступку у коме је донета правноснажна пресуда нарушава законитост донете одлуке. У позитивном праву Србије, недостаци у примени права и у поступку доношења правноснажне пресуде отклањају се одлукама донетим у поступку иницираном захтевом за заштиту законитости. За разлику од позитивног права Србије, поједина законодавства предвиђају ванредне правне лекове којима ексклузивно осуђени (окривљени) може побијати правне недостатке правноснажне пресуде.

Захтев за заштиту законитости је ванредни правни лек којим Врховни јавни тужилац и осуђени, уз помоћ браниоца, побијају правноснажну пресуду услед мањкавости у поступку примене материјалног и процесног закона. Условљавање могућности побијања правне основице правноснажне пресуде чињеницом да је нека околност била „од значаја за правилну или уједначену примену права“ објективно сужава хоризонт васпостављања нарушене законитости. Повратак захтева за испитивање законитости правноснажне пресуде у наше законодавство побољшао би институционалне могућности осуђеног да побије правну основицу правноснажне пресуде.

Основни принципи „једнакости оружја“ у поступку иницираном ванредним правним лековима у појединим компаративноправним системима реализују се кроз могућност осуђеног и браниоца да побију правну основицу правноснажне пресуде подношењем ванредних правних лекова, чији су ексклузивни титулари окривљени и бранилац. Реч је превасходно о захтеву за ванредно преиспитивање правноснажне пресуде.

У појединим позитивним законодавствима, међу којима је и немачко позитивно законодавство, правни недостаци се побијају искључиво редовним правним леком – ревизијом. Разлог за оспоравање пресуде ревизијом јесте повреда закона, која се састоји у непримењивању, или у неправилној примени правне норме. Насупрот томе, систем ванредних правних лекова не предвиђа нормативни оквир за побијање правне основице правноснажне пресуде.

Компаративноправна законодавства, али и српско законодавство, предвиђају законом прописани утицај одлука Европског суда за људска права на иницирање поступака по ванредним правним лековима, којима се омогућава отклањање правних недостатака правноснажних пресуда.