UDC: 343.157.3:340.13(497.7)
Review article

REPETITION OF THE CRIMINAL PROCEDURE, A LEGAL REMEDY FOR THE PROTECTION OF HUMAN RIGHTS

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Abstract

This article elaborates the importance of extraordinary legal remedies, which are presented to us as remedies for the protection of human rights. Special attention is given to the analysis of the legal provisions which are related to the reduction of the request for reduction of the sentencing and its replacement with new basis presented in the frame of the request for the uneven criminal procedure as well as other changes which reflect other means remaining in the repertoire of the extraordinary legal remedies: the representation of the request for the defense of the legality against the decision, constitutional violations, removal of the obligation of the Supreme Court to evaluate of the factual condition as well as the conditions for the presentation of the motion for the review of the decision. The legal reforms soften the consolidation of the domestic legislation with the international democratic standards of the criminal procedure.

Keywords: criminal procedure, repetition, legal remedies.

1. Introduction

A legal remedy, also referred to as judicial relief or a judicial remedy, is the means with which a court of law, usually in the exercise of penal law jurisdiction, enforces a right, imposes a penalty, or makes another court order to impose its will in order to compensate for the harm of a wrongful act inflicted upon an individual.

The extraordinary legal remedies enable the elimination of the irregularities and unlawfulness which can exist after the decision in made final. Such is the case when after the decision takes is final form other facts are presented which can lead to a whole new factual situation and can produce different legal sanctions or when it is about for new circumstances which are related with the criminal sanction which means that it has been made erroneously, it is possible for a sanction to be reduced, softened and so on. The existing and support of the extraordinary legal remedies is in the context of the efforts to make a right court decision which, in some cases, suspends the effect of the maxim that every court case is true (judicata pro veritatehabetur) and the final decisions unchangeable. The extraordinary legal remedies can be represented in special cases as provided by the CCP (Code of Criminal Procedure). So, those are not allowed for every deficiency, but only for defects which are especially important and lead to the change of the final decisions. Therefore, not every possible discrepancy, opposition or mistakes of the court decisions can be basis for the presentation of the extraordinary legal remedies. The Code of Criminal Procedure is made of three extraordinary legal remedies: the request for the

repetition of the criminal procedure as a mean for the correction of the deficiencies in the factual situation; the request for the protection of the legality and the request for the revision of the final decision.

2. Repetition of the criminal procedure

Any criminal procedure that has ended with a decision or judgment that has entered into effect, upon a motion by an authorized person, may be repeated only in the instances and under the conditions as prescribed in Law. (Article 446 PCC of North Macedonia) The repetition of the criminal procedure is only an extraordinary remedy which enables the removal of the aberrations in the factual situation which has been verified with the final decision. Vasiljevic says that demand for the repetition of the criminal procedure is defined in order to satisfy both interests: public interest and the convicted person with the final decision (Matovski, N., Buzharovska, G., Kajalxhiev, G., 2011). Even with the new CCP, it still contains its characteristics as not suspension, not devolution, in time undefined (except for the request for trial in absence), and the extraordinary legal remedies which can be applied as pro or contra of the defendant. The modalities of the repetition of the procedure remain unchanged as in the previous Code of Criminal Procedure, but some of them have undergone changes which need to be elaborated. The change of the final decision due to new circumstances related with the criminal sanctioning – represents a new basis for the incorrect review of the criminal procedure. The working group that was engaged in the drafting of the Code of Criminal Procedure from 2010 decided that it is beneficial to remove from the repertoire of the extraordinary legal remedies the request for the extra reduction of the sentencing as an extra remedy, and its absence to ne added with new basis of the eventual change of the final decision due to the new circumstances related with the criminal sanctioning. So, the change of the final decision due to the new circumstances related with the criminal sanctioning is allowed when the decision takes its final form there will be circumstances which were not present in the moment when the decision as announced or where not allowed although existed in the first place, where they undoubtedly lead to a softer decision (Article 447, para. 1, p. 3, Code of Criminal Procedure). The basis for the modification happens when new circumstances are presented (facts and evidence) which can influence the criminal sentencing in the direction of its softening i.e. leading to a softer decision. The main difference with the previous system is that instead of the Supreme Court, in the frames of the repetition of the criminal procedure the competent decision making body is the first instance court which has made the decision. This competence is justified, of the reasons court judge in the first instance is more likely objective for verification of facts and evidence (Илић, Г., 2007). The first instance court is competent to make a decision of the same form for an incorrect review of the procedure similar to the Supreme Court based on the request for the extra softening of the decision. With such decision, the lack of request for the extra softening of the sentencing as extraordinary legal remedies does not influence the rights of the defendant, but is makes easier for the Supreme Court from the overload of cases which can be dealt by the first instance courts. Reducing the demand for extraordinary mitigation of penalty is justified also with position the,, correction" the penalty can be realized by other institutions such as: Institute of forgiveness, repetition of the procedure the case of submitting facts and new evidence and the possibility of parole (Tripalo, D.,2008). The

precondition for the first instance court to announce a softer verdict by the incorrect repetition of the criminal procedure is that new facts and evidences not to be recognized for the defense during the first instance proceeding so that it cannot propose them when the defense has not been aware for them although they have existed. The first instance court which has made the final decision proving that the modification of the decision with incorrect repetition is justified, is obliged to change the previous decision with a new decision but only if related sentencing and it can choose on these options: it can announce a new decision, to soften the previous sentencing or to determine how much must it serve from the sentencing based on the initial decision (Article 447, para. 4, Code of Criminal Procedure).

The synthesis of the request for the extra legal softening with the decision for the repletion of the criminal procedure does not represent a practical problem, having in mind the fact that as result of the repetition of the criminal procedure the decision of the first instance court can be changed in relation with the guilt and the sentencing, where as the new basis in the incorrect repetition of the criminal procedure enables changes only in the part connected with the sentencing where the changes don't result from the bad application of the disposals form the Criminal Code in the measurement of the sentencing, but are result of the changed circumstances for the determination of the type and length of the sentencing. The synthesis of these two extraordinary legal remedies leaves unclear the theorizing of the differences between the repetition of the criminal procedure and the extra softening of the sentencing, in achieving the truth, has often been followed by insufficient arguments which did not explain to the end the dilemma which facts and evidences are basis for the repetition of the criminal procedure, and who influences in the sentencing and that are basis for the softening of the sentencing. Especially when the presentation of the facts pts in doubt the evaluation of the evidence material from the procedure conducted in the first instance, so, once the existing evidences have been reevaluated in the light of new evidences can lead to the conclusion which relevant legal facts are important for the guilt and the criminal sentencing. Repeating this procedure can occur when the base after the final decision will be presented mitigating circumstances or other circumstances that go in favor of the defendant if they are provided for by the provisions of Criminal Law in relation to determining the sentence, the base for mitigation of punishment, the basis for exemption from punishment, specific grounds for exemption from punishment namely dismissal as a result of the elimination of the harmful consequences of the offense.

According to the changes in the provision (Article 448, para. 1, 2, Code of Criminal Procedure) for the continuation of criminal proceedings two bases are sanctioned for the resumption of criminal proceedings. Namely, the continuation of criminal proceedings provided at the request of the authorized prosecutor when: Court issued a decision to dismiss the charge as groundless, when before the judicial review claim is rejected or final form was rejected and when the procedure with a final decision has been stopped. Court will not allow repetition of criminal proceedings if the public prosecutor will bring new evidence on the basis of which it will ascertain that sufficient condition to resume the criminal proceedings. To the continuation of criminal proceedings on the proposal of the public prosecutor may come when criminal proceedings in final form has been stopped until the beginning of judicial review in cases where the public prosecutor has withdrawn the charge, but it is confirmed that the resignation is made as a result of the offense. Offenses committed by public prosecutor must

be evidenced by a final judgment. This support for the continuation of the criminal proceedings in some jurisdictions recognized as the basis for repetition of criminal proceedings damage the convicted person.

3. Repetition of the procedure for a person convicted in absence

From this I agree with the conclusion of Grubisha, which says: damaged party has no right to present the request for repeating the procedure, because also if he raises the indictment the procedure stopped by the same reasons and deals he allegedly drawn from the indictment, thus lose the right the application of request for retrial. As with changes in Code of Criminal Procedure innovation brought the possibility that provisions for a review of criminal procedure can be applied even in the case when final decisions in the European Court of Human Rights confirmed violations of human rights and fundamental freedoms during the criminal proceedings. The reason for this is the Recommendation (2000) 2 of the Council of Europe to review respectively retrial for special occasions as a result of the conduct of the judgment by the European Court for Human Rights (Recommendation no. R (2000)2 of the Committee of Ministers to member states on the reexamination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, 19.01.2000). Repeating the criminal proceedings moon is in favor and to the detriment of the convicted person. Code of Criminal Procedure of 2010 have expanded the possibilities for repeating the procedure in favor of the convicted person if it is proved that the judgment is based on false tonal and visual images that can be used as evidence during the evidentiary proceedings. Recordings are provided in detail with some provisions of the Code of Criminal Procedure, such as: recordings of investigative actions, recordings visual-technical recording session of a conference telephone, technical recording receipt in question the accused by the public prosecutor or the presence of him, etc. Repeating the procedure for the person to whom held for extradition procedure has been completed in terms of the obligations that the Republic of Macedonia has undertaken by ratifying the European Convention on Extradition and the Additional Protocol to the European Convention on extradition no. 98 of the Council of Europe in connection with the guarantee of trial, in the presence of the person sought to be extradited. In this sense, outside the conditions laid down for repeating the procedure for the person tried in absentia, the court will allow the repetition of the procedure in any case where the person convicted in absentia is ongoing extradition proceedings and if the state in which is the person requires a guarantee that the person will allow them the right to a retrial in his presence (Article 456, para.1, 2, 3, Code of Criminal Procedure).

The inability to apply for the repetition of the procedure for trail in absentia for the second time, with the changes in Code of Criminal Procedure has disabled the filing of the request in such case to avoid the possibility of procedural abuse that the convicted in absentia has – during the repeated procedure to be again unavailable for the competent organs, and then again to demand repetition of the procedure. So, this means that there has been established a basis on which the court cannot allow the repetition of the criminal procedure in the absence of the accused and during the trial he/she is still unavailable for the law enforcement organs. Having in mind that it will not have the right to demand more repetitions of the procedure based on the decision in absence this will influence that the convicted which has been sentenced in absentia

to appear before the law enforcement organs until the end of the first instance procedure (Article 456, para. 4, Code of Criminal Procedure).

4. Conclusions

From what is elaborated above, the reform in the system of legal remedies is improved taking into account that the Code of Criminal Procedure from 2010 shows an improvement of the system of extraordinary legal remedies. Basis have been incorporated which ease the extradition proceedings and enforce internationally recognized standards. Abandoning the request for extraordinary mitigation of punishment as a separate legal tool particularly extraordinary, where such protection is provided by change of the decision without repetition of the criminal procedure otherwise known as incorrect repetition of the criminal proceedings. As a consequence of the change of the concept of criminal procedure, the request for protection of legality suffered corrections, which can be filed only against court decisions that have received final form, and having issued High Court to assess the facts ex officio. In theory there has been sometime since the appearance of the signals for the reduction of the extraordinary remedies, because the large number of judicial bodies leads to the reduction of the importance of a final judicial decision. And can conclude that a criminal procedure does not improve by the large number of emergency remedies, but through the successful procedure in the first and second instance. The fact that the unusual juridical acts through its checking function on court verdicts on lower level by courts of higher level, omit mistakes, eventual verdict acts against the law, and its impact on the general work of the court, our conclusion is that with a reformed Code of the penal proceedings within international standards with higher percentage than the former legal framework can be achieved better outcomes. Especially the reduction of the unusual juridical mechanisms will affect on the protection of the principle "hearings within the deadline" which encroach would be gangrene in the juridical system of RM. The delay and postpone of the penal proceedings due to its listing in the Supreme Court of RM with the new Code of the Penal proceedings would highly reduce its negative consequences out of it.

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