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EXTRAORDINARY LEGAL REMEDIES BASED ON THE PROVISIONS OF CODE OF CRIMINAL PROCEDURE IN THE REPUBLIC OF MACEDONIA

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Abstract

This article presents the latest changes in the system of extraordinary legal remedies included in the Code of Criminal Procedure of the Republic of Macedonia. 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.

***Key words**: criminal procedure, reforms, extraordinary legal remedies, and final court decisiontract*

Abstrakt

Në këtë artikull paraqiten risitë në sistemin e mjeteve të jashtëzakonshme juridike të përfshira në Ligjin e procedurës penale të Republikës së Maqedonisë. Vëmendje e veçantë i është përkushtuar analizës së dispozitave ligjore të cilat kanë të bëjnë me reduktimin e kërkesës për zbutjen e jashtëzakonshme të dënimit dhe zëvendësimin e saj me anë të bazave të reja të paraqitura në kuadër të kërkesës për përsëritjen jo të drejtë të procedurës penale si dhe ndryshimet e tjera që prekin mjetet tjera të mbetura në reportalin e mjeteve të jashtëzakonshme juridike: paraqitja e kërkesës për mbrojtje të ligjshmërisë vetë kundër aktvendimeve të formës së prerë, për lëndime kushtetuese, largimi i detyrimit të Gjykatës Supreme për vlerësim të gjendjes faktike si dhe kushtet për paraqitjen e kërkesës për rishqyrtimin e jashtëzakonshëm të aktgjykimit të formës së prerë. Me reformat ligjore më shpejt , në mënyrën më të mire të mundshme është zbutur konsolidimi i legjislacionit vendor me standardet demokratike ndërkombëtare të procedimit penal.

***Fjalë kyçe**: procedura penale, reforma, mjete të jashtëzakonshme juridike, aktgjykim i formës së prerë.*

Апстракт

Во оваа статија се прикажани иновациите во системот на вонредни правни лекови содржани во Законот за кривична постапка на Република Македонија. Посебно внимание е посветено на анализата на законските одредби кои се однесуваат на редукцијата на барањето за вонредното ублажување на казната и неговото надополнување со нов основ поднесено во рамките на барањето за неправо повторување на кривичната постапка како и други измени кои ги тангираат останатите средства во репертоарот на вонредните правни лекови: поднесување на барањето за заштита на законитост против правосилните одлуки, за уставни повреди, напуштена е обврската на Врховниот суд да ја оценува фактичката состојба како и условите за поднесување на барањето за вонредно преиспитување на правосилната пресуда. Со законските измени побрзо, на најдобар можен начин е ублажен консолидација на националното законодавство со меѓународните демократски стандарди на кривичната постапка.

***Клучни зборови:** кривична постапка, реформи, вонрдени правни лекови, правосилна пресуда.*

Introduction

Having in mind that the legislation of the criminal procedure has suffered serious and overall changes, it was not possible to remain out of these reforms the issue related with the level of legal remedies in general and also the extraordinary legal remedies.

The code of criminal procedure brought changes in the system of legal remedies which are a combination of the tendency to speed up the criminal procedure and its efficiency by reducing the overall number of the extraordinary legal remedies (the request for extra reduction of the sentencing), certain changes have been incorporated in the disposals that tangle the remaining three extraordinary legal remedies.

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 veritate habetur) 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.

Below in the text shall be shortly elaborated the novelities, changes and remarks which with the Code of Criminal Procedure of 2010 (CCP) have been incorporated in the system of the extraordinary legal remedies.

Repetition of the criminal procedure

Outlining the provisions in Code of Criminal Procedure 2010 preceded comperativ research which led reform directions in the area of extraordinary legal remedies (Бужаровска, Г., Мисоски, Груевска.,2008). The repetition of the criminal procedure is only an extraordinar remedies 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 intersein and the convicted person with the final decision (Матовски, Н., Бужаровска, Г.,

Кајалџиев, Г., 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 remedien, 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, po. 3, Code of Criminal Procedure).

The basis for the modification 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 kopmpetence 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 an extraordnar 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 faakteve 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 stwo 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 conditions 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. From this I agree with the

conclusion of Grubisha, which says:,, damaged party no right to present the request for repeating the procedure, because also if he raises the indictment the procedure stopohet 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 Ministres to member states on the reexamination or reopening of certain cases at domestic level following judgements of the European Court of Humman Rights, 19.01.2000).

Repeating the criminal proceedings moon be 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).

The request for protection of legality

The request for protection of legality has remained conceptually unchanged with disposals of Code of Criminal Procedure of 2010 which still appear on offense. To eliminate lawlessness from judicial decision which otherwise could not be removed (Грубач, М., 2006).

Changes to this extraordinary remedy focus on the inability with it to influence the current situation that has been proved in the final decision, irrespective of whether it is brought on by the court of first or second degree, as well as the limit the demand for protection of legality to appear only against judgments but not to the proceedings that preceded these final decisions.

The request for protection of legality is exercised only against the final judgments (Article 457, Code of Criminal Procedure) of the court of first instance or second instance. The possibility of exercising the request for protection of legality against the proceedings that preceded the judicial decision for procedural action that is taken during the course of the proceedings has been removed. This solution is quite understandable considering the new concept of the procedure, which is not fully judicial, but preliminary proceedings conducted by the public prosecutor, if the jurisdiction of the judge in preliminary proceedings is excluded, the court will be involved in handling even in the stage of controlling of the indictment.

The new Code of Criminal Procedure has expanded the possibilities of the submission of the request for protection of legality for violations of the Constitution of the Republic of Macedonia, which have met existing basis for the filing of the application request for the protection of legality for legal violations of international acts, which after ratification become part of domestic law and cannot be changed by law.

Having in mind the new concept of criminal proceedings with applicative features and the new role of the sides and the court, and official obligation of the court to assess the actual situation. New Code of Criminal Procedure does not contain legal provisions (Article 409, Code of Criminal Procedure, 1997), according to which if when deciding on the request for protection of legality appear significant doubts to the authenticity of all material facts set forth in the decision against which the request for protection of legality, as a result of the can be placed on the request for protection of legality, the Supreme Court decides on the request for protection of legality will rescind this decision and will also command held judicial review before the same court or another competent first instance court (D.Tripalo 2008). As the current rules, the High court of RM is not legally competent to get in the evaluation of the factual case prior to the assessment of the basis due to the inquiries submitted for protection

of the legality. Even in selected criminal literature it is pointed out that this basis means that the High Court of RM, respectively confirms the factual account, questions containing facts and not juridical questions which are admitted by this unusual right medication .(Лажетиќ-Бужаровска2011).This regulation unjustly deprives the high court and very often there is discrepancy between the inquiry effects for repeat of the proceedings and protection of legality.(Грубач.М 2008). The only procedural entity may submit a request for protection of legality is the public prosecutor.

The request for extraordinary review of the final decision

The request for extraordinary review of the final decision is an extraordinary legal remedy in many respects similar to the request for protection of legality. It is regulated in the law in an analogue manner with the request for protection of legality (Шкулиќ, М.,2008) and it's its counterbalance. This extraordinary remedy at any time cannot be filed by the public prosecutor, but only by entities that are in the function of defense, under certain conditions, having a similar position as that of the public prosecutor related with the of the request for legal protection. According to that, while the request for protection of legality may be filed for violation of the law which explicitly are not determined, the basis for the filing of the request for extraordinary review of a final decision and legal violations are defined in explicitly order.

The opportunity to present this extraordinary remedy is limited to the provisions of the Code of Criminal Procedure from 2010 under which it is envisaged that this requirement be limited by the length of the sentence imposed. Instead of basing the current imposition of a sentence of imprisonment or juvenile imprisonment under the new CCP such a request may be submitted only if sentenced to unconditional imprisonment for a period of at least one year or when the minor is sentenced to prison (Article 463 para.1,Code of Criminal Procedure). This provision limits the scope of an adult person sentenced to imprisonment up to one year to file a request for extraordinary review of a final judgment. In relation to minors there is no restriction, but taking into account the provisions of the Code for Minors, which is clearly established that juvenile imprisonment may not be less than one nor more than ten years, with which concluded that the request for extraordinary review of a final decision can be submitted in all cases when the juvenile board appoints sentence with juvenile imprisonment. In draftin of such concept Republic Macedonia follow the model of the Republic of Croatia since it has the same solution in the Code of Criminal Procedure.(Tripalo, D.,2008) Other provisions remain unchanged to this extraordinary remedy (In the Code of Criminal Procedure of Kosovo and Serbia application for protection of legality can submit except public prosecutor, the defendant and his counsel).

Conclusion

From what was elaborated above, the reform in the system of extraordinary legal remedies can be said 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 a 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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