WAYS TOWARDS JUSTICE

IDEOLOGICAL PROVISIONS IN THE NEW CRIMINAL PROCEDURE CODE

Discriminatory, hence unconstitutional

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Provisions in question certainly do not give credit to the new democratic legislature, which in Serbia is emerging with many difficulties and sidetracks. It is the society's general interest to have Serbia's legislature eliminate such provisions as soon as possible. The Constitutional Court has the opportunity to do this, because before this court there is an ongoing trial upon initiative to investigate the constitutionality of the provisions of Article 573 of the CPC in force, i.e. the Article 550 of the new CPC.

Summary: In this essay the author is asking why the new Criminal Procedure Code (CPC) – (2006) has preserved the ideological provisions which limit citizens' access to the court competent to allow a reopening of criminal proceedings which were terminated by a final ruling, and their right to get compensation of damages for an unjustified judgment in cases which go back to times immediately after the socialist revolution was performed, i.e. until January 1, 1954 (Article 550, paragraphs 1 and 2 of CPC). In the author's view the new democratic legislature, which in Serbia is emerging with many difficulties and resistance, should eliminate these provisions as soon as possible because they are neither in accordance with the Constitution, nor with the European Convention on Human Rights, nor the demands of the new social reality.

Key words: reopening of criminal proceedings, rehabilitation, free access to courts, discrimination, compensation of damage, illegal deprivation of liberty, unjustified conviction

I.

The new Criminal Code Procedure was adopted in mid-2006 (Official Journal RS, 46/06) and it contains further on the spirit of the far away year 1948 and the ideological norms of the revolutionary legislature of these times. Article 550 of the "new" Criminal Procedure Code reads: (1) The right to the reopening of criminal proceedings terminated by a final judgment before January 1, 1954 shall be regulated by a separate act. Until the adoption of that act, the provision of Article 6 of the Initial Act for the Criminal Procedure Act ("Official Gazette of the Federal People's Republic of Yugoslavia", No. 40/53) shall be in force. – (2) After this Act enters into force, provision of Article 7 of the Initial Act for the Criminal Procedure Act ("Official Gazette of Federal People's Republic of Yugoslavia", No. 40/53) shall also be applied in regard to compensation of damages to unjustifiably convicted persons or persons illegally deprived of liberty, except as otherwise provided by the federal act referred to in paragraph 1 of this Article."

In the mentioned provisions of the Initial Act for the Criminal Procedure Code from 1953, which the Code from 2006 is recalling, it is envisaged that: a) reopening of criminal procedures terminated by a final judgment shall be in accordance with the provisions of the Criminal Procedure Act from October 12, 1948, and not with the much more advanced provisions of the new Code – Article 6; and, b) the provisions of the new Code related to compensation of damage to unjustifiably convicted persons, which in the Criminal Procedure Act from 1948 did not exist, shall apply only to cases in which the final judgment was rendered after January 1, 1954, but not to unjustified rulings which became final before that – Article 7. These provisions of the Initial Act for the Criminal Procedure Code from the distant year 1953 have remained in all our later laws, i.e. criminal procedure codes (from 1976, 2001 and the most recent one from 2006).

II

Hence, the new CPC continues to keep in force the provision of the Article 6 of the above mentioned Initial Act for the Criminal Procedure Code from 1953, which for cases in which there was a final ruling before January 1, 1954, excludes the implementation of provisions of the Code in force which relate to the reopening of criminal proceedings and orders the implementation of provisions of the Criminal Procedure Act from 1948 (paragraph 1, Article 550). Provisions of the 1948 Act's Articles 289 to 295 pertaining to the reopening of criminal procedures, which due to transitional provisions of the 1953 Code and transitional provisions of all later laws on criminal procedures remained in force until today, differ

from the today's ones in a number of details, particularly in that: a) the reopening procedure can be initiated only by the Republic's Public Prosecutor – Article 294 of the CPC/48 (the Code adopted in 1953 says that requests for the reopening procedures can be filed by the parties and the attorney, and after the death of the defendant by the public prosecutor and individuals authorized to file appeals in favor of the defendant – Article 408, paragraph 1 of the CPC now in force); b) criminal proceedings can be repeated also to the detriment of the defendant – Article 292 and 293, CPC/48 (since the 2001 Code only in his favor); and c) reopening of the criminal proceedings is approved by the Supreme Court – Article 295, CPC/48 (the 1953 Code says – within the jurisdiction of the court which in the former proceedings was ruling in the first degree – Article 409, paragraph 1 of the CPC now in force).

The reason for retaining the mentioned provisions on the reopening of the criminal proceedings in the old CPC/48 after the new, more liberal CPC, entered into force in 1953 was of a pure ideological nature: there was the desire of the regime to retain under its strict control the possibility to reconsider the verdicts announced immediately after World War II and a successfully conducted socialist revolution, because it knew that in a big number of cases these verdicts were pronounced upon demands of revolutionary justice, without any foundation in laws, legal standards and universal rules of international rule. Although in those times the courts, too, were serving the new regime, the legislator was counting to be on the safer side if it were the public prosecutor – and not the court, as envisaged in the Code – who would be authorized to issue the permission to reopen proceedings in which the regularity of revolutionary criminal verdicts would come under revision, because in the court there could happen to have a judge who would give priority to the defendant's justified reasons over the revolutionary reasons for his conviction. In these times, such a possibility was excluded in regard to the public prosecutor. Therefore, the legislator retained the old solution, by which the defendant further on had to approach the public prosecutor with the demand to reopen criminal proceedings, and not directly to the court, as the new Code envisaged. The public prosecutor was under absolute control of the regime and it was certain that he would never allow the reopening of proceedings which would be to the detriment of the revolutionary interest. So, in a certain number of cases, the citizens were denied direct access to the court of appeal, and in realizing their right they were depending on the will and political assessment of the public prosecutor. In order to reach the court and realize their right, they first have to approach the public prosecutor, who continues to have the function of the controller and protector of some higher state interest, and not of human rights. In the case of conflict of these interests, he should regularly reject their demands.

The logic of the ideological legislator in 1953 can be understood today as well, although not justified, but there is no way to comprehend the logic of the new democratic legislators who retained this heritage although since the year 2000 there is no need to protect ideological achievements of the socialist revolution. When the CPC was adopted in 2001 the relevant provisions were retained, because at that time it was still believed that the issue will be solved through the act on rehabilitation of political convicts and that this act will be passed soon. In this context was also changed the provision of the Criminal Procedure Code, which was in force until then (see the elaboration of the proposal for the CPC/01, p. 224). In the new Article 573, paragraph 1, it is said that the provisions of the old Law from 1948 will be applied only until the right to a reopening of criminal proceedings which were terminated by a final judgment prior to January 1, 1954, will be dealt with in a separate law, hence, temporarily. However, this separate law has not yet been passed. In April 2006 the Rehabilitation Bill was passed (Official Journal of the Republic of Serbia, 33/2006) which, however, did not solve this problem because it was conceptualized in a too narrow manner, so that it does not encompass all cases in which a reopening of criminal proceedings finally terminated in the post-revolutionary period could be requested. Besides, the courts claim that this law is inapplicable, so that in the half year after it was passed not one reopening procedure started, although a few hundreds of requests were filed. According to this law, not all citizens who in their time had been deprived of the right to have their proceedings reopened can request and get rehabilitation, but only those who can prove that their case has a political background. The others, "non-political" or ordinary citizens, remained without court protection also after the Rehabilitation Bill was passed. As regards their right, relevant remains further on the politically motivated decision of the public prosecutor, i.e. the executive branch of power. Less than two months afterwards, when the new Criminal Procedure Code was passed, the legislator had a new opportunity to eliminate these ideological provisions. However, without any explanation, the legislator did not do this. The legislator transferred without hesitation the temporary provision of the Article 573 of the 2001 CPC literally to the Article 550 of the "new" Code, so that it has completely lost its temporary character. This demonstrates that the somewhat earlier passed Rehabilitation Bill the legislator does not see as a "separate law" recalled in Article 550, paragraph 1 and 2 of the CPC. It seems that the contemporary legislator will also do nothing when the forthcoming law on amendments to the most recent Criminal Procedure Code, which is already in the parliamentary procedure (although the Code has not yet began to be implemented), will be passed although from many sides attention was drawn to the problem of the Article 550. This leads to the conclusion that this is perhaps not an accidental omission, as it seemed to be the case at the beginning.

Provisions in question certainly do not give credit to the new democratic legislature, which in Serbia is emerging with many difficulties and sidetracks. It is the society's general interest to have Serbia's

legislature eliminate such provisions as soon as possible. The Constitutional Court has the opportunity to do this, because before this court there is an ongoing trial upon initiative to investigate the constitutionality of the provisions of Article 573 of the CPC in force, i.e. the Article 550 of the new CPC.

In our view, the provision of paragraph 1, Article 573 CPC/2001, i.e. paragraph 1 of the Article 550 CPC/2006, should be removed for the following reasons:

a) This provision deprives the right of the citizens to approach the court, which is contrary to Article 6 of the European Convention on the Protection of Human Rights and Basic Freedoms, which after ratification (Official Journal of Serbia and Montenegro – International Treaties, 9/2003) obliges Serbia as well. According to this provision of the Convention "…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…" Provisions of Article 550, paragraph 1, of the CPC also do not agree with Article 2 of the Protocol No. 7 of the mentioned European Convention, according to which "Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal". There is no way to justify a legal act making this right of the defendant dependant upon the will of the prosecutor, i.e. the adversary party in the proceedings with which in principle he is equal, like in the provision of Article 550 of our CPC. Since the generally accepted rule of international law and ratified international treaties represent a component part of the national legal order in which they are directly implemented (Article 16 of the Constitution of the Republic of Serbia), and since national laws must not be contrary to ratified international treaties and generally accepted principles of international law (Article 194, paragraph 5 of the Constitution), it can be concluded that the mentioned provisions of the CPC are simultaneously also unconstitutional. This is sufficient ground for the intervention of the Constitutional Court.

b) It could be claimed that the mentioned provisions of Article 550, paragraph 1, of CPC are anti-constitutional also because they are discriminatory. The Constitution proclaims equality before the law, guarantees to everyone the right to equal legal protection and prohibits discrimination on any grounds (Article 21 of the new Constitution of Serbia). According to CPC the provisions on the reopening of criminal proceedings apply to all citizens except those who were convicted prior to January 1, 1954. When one takes into account that this exception is not established in favor, but rather to the detriment of one category of citizens and is motivated by political reasons, it can be concluded that this is a case of discrimination on the basis of political convictions. Anyway, new procedural laws can exceptionally envisage the implementation of certain provisions of procedural laws which are no longer in force, but not to the detriment of parties to a lawsuit. So, for instance, deadlines will be counted according to the provisions of the former, and not the new law if for the parties this is more favorable, i.e. if formerly they were longer (Article 548 of the CPC). Article 552, paragraph 2, of the CPC envisaged that due to justified legal and technical reasons there is also one other case in which the old procedural law is applied, but here too without detriment to the defendant.

III.

In regard to the provision of Article 550, paragraph 2, of the CPC/06 which excludes implementation of the rules on compensation for damages due to unjustified conviction which were terminated by a final judgment before January 1, 1954, at first glance it could be said that it is unnecessary and that it should be removed from the legislature on criminal proceedings because it does not serve any purpose. According to this theory, without this provision there would be anyway the same legal situation: since the provisions of procedural laws, if not envisaged differently, are applied to cases of ongoing criminal proceedings and upon future criminal proceedings, and not to cases which were terminated by a final judgment, unjustifiably convicted persons would anyway not have the right to compensation of damages even if it were not for the provision of Article 550, paragraph 2. It is left to the legislator to decide whether a new human right will be recognized retroactively, or not. Although the legislator did not recognize the retroactive implementation of rules which introduce a new human right to compensation for this type of damages, unjustifiably convicted citizens can realize this right like they could before the new law was adopted, in a civil suit in which they will prove the guilt of declaring a wrong or unlawful verdict, which is, to be honest, very hard to achieve, much harder than to realize the right to compensation of damages due to unjustifiable conviction. The position of the damaged person is much more favorable if there is no need to prove anybody's guilt for unjustified conviction, but is realizing the right to compensation as soon as the verdict is annulled, regardless of whether it was declared by fault of the judge, or the fault of some other person, or without anybody's fault.

However, here we do not have a case of a retroactive implementation of a law (as the Federal Court said in the decision of September 15, 1999), because an unjustifiable conviction, which is subject to the proceedings for compensation of damage, and the proceedings themselves are not a matter of the past but of the times in which the proceedings are opened. Therefore, if there were no provision of paragraph 2 of Article 550, the right to compensation on these grounds should not be excluded even for unjustifiable convictions which were terminated by a final judgment before January 1, 1954. This

provision introduced yet another deviation from the general rule that procedural provisions are applied to all cases which are ongoing or will be initiated after the new procedural laws will enter into force, and this again to the detriment of the defendant, like in the case of paragraph 1 of Article 550. Therefore, this provision of the CPC is also unconstitutional for the same reasons. CPC prevents access to court for one group of citizens, while others do have this access in same legal situations, and therefore puts these citizens into an unequal position before the law, which the Constitution is explicitly forbidding. If we also have in mind that the right to compensation for unjustifiable conviction in criminal proceedings in this territory was introduced by the Code on criminal proceedings in the court adopted as long ago as February 16, 1929 (paragraphs 466-475) and that the revolutionary Criminal Procedure Act from 1948 suspended this right for only five years, only to have it later introduced again, the conclusion on discrimination of citizens convicted in this period looks as even more convincing.

One has also to have in mind that the right to compensation for damages due to unjustifiable conviction, introduced in 1953, was later constantly expanded: in 1965 was introduced compensation for unjustifiable custody (since then it was recognized only for illegal custody), and since 1970 started recognition of compensation for non-pecuniary damage (up to then only for pecuniary damage). In both cases there were transitional provisions by which the new right was recognized only for verdicts which were terminated by a final judgment after entering into force of the law by which the broader right was established. As different from provisions contained in Article 550 of the CPC these transitional provisions were not transferred into new criminal procedure laws, i.e. criminal procedure codes, so that for instance today it would be possible to get compensation for damages also for unjustifiable custody and compensation of non-pecuniary damages due to unjustifiable conviction in cases from 1950, although these rules did not exist at that time. However, compensation for damages due to unjustifiable conviction could not apply today to citizens (i.e. their heirs) convicted prior to 1054, even if in reopened criminal proceedings or within a rehabilitation procedure they would be freed of charges. They would have to prove in a civil lawsuit that their verdict was unlawful and that guilt for this goes to the judge who pronounced the verdict, which because of the elapse of time and other reasons is almost completely impossible.

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1 Article 555 says that the Criminal Procedure Code shall apply after June 1, 2007, except for certain provisions mentioned in this Article which shall apply after the Code entered into force.
2 It should be noted that, apart from the CPC of Serbia and Republic of Srpska, all new laws on criminal procedures of states which emerged from the former Yugoslav republics (Croatia, Slovenia, Montenegro, Federations of Bosnia-Herzegovina, Bosnia-Herzegovina's District Brcko) have excluded such provisions. Croatia's CPC has a separate chapter dealing with revision and other extraordinary judicial remedies regarding decisions of the courts of the former SFRY (Article 490-499) which envisages the procedure for revision of judgment of conviction upon request of persons "whom the courts in former Yugoslavia convicted in times of communist rule for political offenses, politically motivated criminal offences, if the verdict was reached by misuse of political power." – The new CPC of Slovenia no longer has ideological limitations for the reopening of criminal proceedings and envisages a special period of three years for filing requests for compensation for damages due to unjustified convictions which became final before January 1, 1954, because the general deadline in Article 539, paragraph 1, of the law for these cases has passed (Article 562).
3 More detail in our study Naknada štete za neopravdanu osudu i neosnovano lišenje slobode, Savremena administracija, Belgrade 1979. See also T. Vasiljević – M. Grubač: Komentar Zakonika o krivičnom postupku, Belgrade 2005, p. 897. i 898.
4 Kritika novog Zakonika o krivičnom postupku („Glasnik Advokatske komore Vojvodine", 5/2006,p. 291); also the collections of essays Novo krivično zakonodavstvo: dileme i problemi u teoriji i praksi, Belgrade/Budva 2006; and Nova rešenja u krivičnom zakonodavstvu i dosadašnja iskustva u njihovoj primeni, Zlatibor/Belgrade 2006.
5 M. Grubač, Krivično procesno pravo, Law school - University „Union" and Sluzbeni. glasnik, Belgrade 2006, p. 50-52.