

INTERNATIONAL LAW STANDARDS ON THE RIGHT TO COMPENSATION FOR WRONGFUL CONVICTION^{1*}

Saša Knežević, LL.D,

Full Professor, Faculty of Law, University of Niš, Republic of Serbia

e-mail: knez@prafak.ni.ac.rs

Abstract

Once the criminal procedure has been initiated, the mechanism of criminal-law protection of social values is set in motion, imposing immediate restrictions on the fundamental human rights of the accused. To ensure that the judgment rendered in criminal proceedings is fully legitimate, the legislator has to ensure that the defendant has the opportunity to articulate his/her position on the matter at issue. The legislator has to balance the public interest of the state to punish the criminal offender and the fundamental human rights and freedoms of individuals who are subjected to the criminal-law repression. To this effect, it is necessary to create an optimal institutional setting which would embody these opposing goals. The defendant's fundamental human rights and freedoms may be restricted only if the judgment imposing such restrictions has been the result of a confrontation of arguments between the prosecutor and the defendant in proceedings instituted before an independent criminal court which has fully observed the principles of legality, impartial justice and fairness. This is the essence of the right to a fair trial, which is contained in the international human rights' protection documents and the supreme legal acts of the states based on the rule of law. The right to a fair trial comprises the right of the injured party (the "victim" of unfair criminal proceedings) to seek compensation from the state for wrongful conviction. This right is considered infringed if there has been a serious omission in the course of proceedings which is detrimental to the defendant's interests. It encompasses the rights arising from wrongful conviction and wrongfully applied procedural repression measures. As such, this right is envisaged in the most important international law documents in the field of human rights' protection.

Keywords: criminal procedure, right to compensation, wrongful conviction, human rights' protection, international document, Serbian legislation

Introduction

In criminal procedure, the final judgment of conviction does not imply that the court has established the absolute truth on the convicted offender's guilt because the first-instance judgment may be invalidated in the proceeding initiated by filing a

^{1*} This article is the result of research conducted within the framework of the Scientific Research Institutions projects financially supported by the Ministry of Education, Science and Technological Development of the Republic of Serbia (ref. no. 451-03-68/2020-14/200120).

request for extraordinary legal remedies. The unjustifiable use of repressive measures by the state may have severe consequences for the person who is subjected to such measures. The violation of the fundamental human rights and freedoms and the stigmatizing effects of unjustifiable repression are facts that necessarily impose the need to establish responsibility for illicit conduct of criminal procedure authorities.

There is no doubt that a legal state based on the rule of law must assume the burden of responsibility for the illegal and improper conduct of its authorities. The state legislature recognizes the risk and harmful consequences of such conduct by prescribing the powers of state authorities in charge of ensuring the criminal-law protection of the society. Such misconduct constitutes a violation of the legal order and a criminal offence. The power of the state to take appropriate action against the holders of public offices in criminal proceedings must be correlated with the responsibility of the state for illegal and improper acts of bodies acting on behalf of the state. In that way, the issue of responsibility for omissions and unlawful conduct of criminal procedure bodies becomes part of the social agenda, and the state necessarily acquires the passive procedural legitimacy in the proceedings for the compensation of individuals whose fundamental human rights and freedoms have been unjustifiably restricted or denied.

The responsibility of the state for wrongful conviction has to be established irrespective of whether the defendant's rights and freedoms have been suspended due to an error, abuse or intentional unlawful or improper conduct of the criminal procedure authorities. The established ill-founded decision that adversely affected the defendant's human rights and freedoms is a sufficient reason to invoke the responsibility of the state for misconduct of responsible persons in its service. The concentration of power in the hands of state authorities must be accompanied by establishing the objective responsibility of the state for their actions.

The general civil law principle of compensation for damage (by the one who has caused it), the public interest to ensure proper operation of the legal system in compliance with the law, and the increasingly articulated aspiration to protect human rights (particularly in criminal proceedings as an environment conducive to their violation) impose the obligation of the state to prescribe mechanisms for monetary compensation and moral rehabilitation of the persons unjustifiably subjected to repression in criminal proceedings.

Wrongfully convicted persons have the right to seek compensation from the state as well as invalidation of all the accompanying consequences of stigmatization they have sustained as a result of the unjustifiably applied measures. Social rehabilitation of wrongfully convicted persons entails the proceedings for compensation of material (pecuniary) damage as well as for annulment of the stigmatizing effects of the unjustifiable use of repressive mechanisms; these proceedings may be the legal ground for reinstating all rights that the injured party has been deprived of as a result of wrongful conviction. The state must assume responsibility for the omissions of the

criminal procedure bodies; moreover, the general public must be informed about the wrongfully applied measures in order to enable the wrongfully convicted persons to regain their moral integrity and receive moral satisfaction. The state is also obliged to restore the rights lost by wrongful conviction. A comprehensive social rehabilitation of these persons can only be achieved by a cumulative application of all the above measures.

1. The Right to Compensation for Wrongful Conviction in international human rights' protection documents

Even a cursory glance at the existing catalogues of human rights contained in the most important international law documents on the protection of fundamental human rights and freedoms is sufficient to observe a wide range of rights applicable to persons who have been subjected to the wrongful application of criminal repression mechanisms. The most significant international law documents of universal and regional nature contain an array of rights guaranteed in criminal proceedings, including the rights of persons who have been exposed to coercive measures in the proceedings before initiating the formal criminal procedure.

In these international law documents, protection mechanisms have an important place in safeguarding the rights of defendants and suspects, particularly given the fact that the criminal procedure framework entails the reconstruction of facts and the application of law, on the committed criminal act, and the necessary suspension of the basic human rights. As noted by Claus Roxin (1998)², criminal procedure is a “seismograph” of the exercise of human rights and freedoms. Thus, the legal setting in which the court decides on the criminal-law claim for punishment of the accused has a significant impact on the implementation of the basic postulates contained in the international law documents.

The most significant international documents on human rights' protection envisage the *right to compensation of damage for wrongful conviction* (judicial error), or the *right to compensation for a miscarriage of justice* in court proceedings. Pursuant to these legal acts, the state is obliged to compensate the persons who have been unjustifiably convicted.

The International Covenant on Civil and Political Rights (1966) stipulates: “When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated in accordance with the law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him” (Article 14 (6) ICCPR).

² For more, see: Roxin, Claus (1998). *Strafverfahrensrecht. (Criminal Procedure Law)*, München: C.H. Beck Verlag

The original text of the European Convention on Human Rights and Fundamental Freedoms (ECHR, 1950) did not envisage the right to compensation for wrongful conviction, but this right became part of the catalogue of human upon the adoption of Protocol no. 7 to the ECHR (in Strasbourg on 22 November 1984). In case of a miscarriage of justice, Article 3 of this Protocol prescribes the right of unjustifiably convicted persons to compensation for wrongful conviction, unless it is proven that the convicted person is fully or partially accountable for the untimely disclosure or non-disclosure of the fact indicating a judicial error (Art. 3, Protocol 7).

The American Convention on Human Rights (1969) envisages the right to compensation in case of a miscarriage of justice (Article 10). The Rome Statute of the International Criminal Court (1998) envisages the right of victims to reparation, including restitution, compensation and rehabilitation (Article 75). Notably, the Statute of the ad hoc Tribunal for the former Yugoslavia (1993) does not provide for the right to compensation for wrongful conviction.

Upon analyzing the provisions in the most significant international law documents on the compensation of damage for wrongful conviction (judicial error) or a miscarriage of justice in criminal procedure, it can be concluded that procedural legitimacy for initiating compensation proceedings for a wrongful conviction is vested in: a) persons who have been issued the final conviction which can no longer be challenged by invoking legal remedies; b) persons sentenced to imprisonment or some other punishment; c) persons who have been pardoned on the basis of new or newly discovered facts, or whose final judgment has been reversed, which proves a judicial error or a miscarriage of justice in the proceedings, provided that untimely disclosure or non-disclosure of facts cannot be attributed to the accused (Haris, O’Boyle, Warbick, 1995, p. 586). In addition, the Explanatory Report to the Protocol no. 7. to the European Convention³ specifies that compensation for wrongful conviction shall not be awarded “if the conviction has been reversed or a pardon has been granted on some other ground” (item 23): it also does not apply to accused persons whose charges have been dismissed or who have been acquitted either in the first-instance proceeding or in the procedure on appeal (item 22).

It should be noted that the European Court of Human Rights (ECtHR) has no case law on the violation of the right to compensation for wrongful conviction provided for in Art. 3. Protocol no. 7. to the European Convention on Human Rights and Fundamental Freedoms.

³ Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms Strasbourg, 22.XI.1984, prepared by the Steering Committee for Human Rights and submitted to the Committee of Ministers of the Council of Europe; <https://rm.coe.int/16800c96fd>

2. The Right to Compensation for Wrongful Conviction in the Serbian legal system

The right to compensation for damage and rehabilitation of wrongfully convicted persons is also a constitutional right. It is proclaimed in Article 35 (para.1) of the *Constitution of the Republic of Serbia* (2006),⁴ which provides that “any person who is unlawfully deprived of liberty, detained or convicted for a criminal offence without grounds shall have the right to rehabilitation and compensation of damage” by the state, including compensation for pecuniary and non-pecuniary damage inflicted by unlawful work of state bodies (Article 35, para.2).

Article 1 of the *Criminal Procedure Code*⁵ specifies that the Code aims “to prevent the conviction of any innocent person” (Art. 1, para.1 CPC) and provide for “the exercise of the rights of persons wrongly deprived of liberty and wrongly convicted”, including “rehabilitation, termination of security measures and legal consequences of conviction” (Art. 1, para. 2 CPC).

In order to put these constitutional and legislative provisions into effect, it is necessary to upgrade the architecture of the criminal procedure so that the accused person cannot be convicted unless the judicial belief in the defendant’s culpability evolves to the highest legal standard of certainty (the truth). Otherwise, if the conviction is insufficiently substantiated and grounded in facts, it may constitute a substantial violation of the defendant’s human rights.

A final judgment may be the result of a judicial error (omission), unlawful or improper court proceedings, illicit conduct of other criminal procedure subjects, as well as the circumstances arising from the flawed evidentiary instruments, which are essential for establishing the decisive facts as the legal ground for rendering judicial decisions. The common legal instruments for the annulment of an unlawful and improper judgment are extraordinary legal remedies, which entail filing a request for a review of the factual and legal grounds of the final judgment. If the unlawful final judgment which has caused damage to the convicted person is quashed in the proceeding initiated by invoking extraordinary legal remedies, it is only the first step towards re-establishing the principle of legality. The principles of legality and procedural fairness also entail the opportunity to seek pecuniary and non-pecuniary damages, as well as moral satisfaction of the unjustifiably convicted person. In cases involving a judicial error (omission) or a miscarriage of justice, the social reaction embodied in criminal proceedings and final conviction has proven to be unjustifiable because the repressive mechanism has been used against an innocent person who has not committed a crime. The price paid for a wrongful conviction (reflected in depriving an innocent person of his/her human rights, loss of income, and stigmatizing

⁴ Constitution of the Republic of Serbia (2006), Official Gazette of the RS, no. 98/2006.

⁵ The Criminal Procedure Code, Official Gazette of the RS, 72/11, 101/11, 121/12, 32/13, 45/13, 55/14 and 35/19.;

effects of a wrongful conviction) is too high for the unfairly convicted person. As mere cancellation of an unlawful conviction does not suffice in terms of justice and fairness, the state must compensate the wrongfully convicted person by providing the legal instruments for compensation of both pecuniary and non-pecuniary damage, as well as for the restitution of lost rights, social rehabilitation, and moral satisfaction of the wrongfully convicted persons.

In some legislations, the fulfilment of conditions for compensation of wrongfully convicted persons is the subject matter of judicial assessment (e.g. in French law), while other legislations explicitly provide the criteria for qualifying a conviction as ill-founded (e.g. in Serbian law). Another approach to the regulation of conditions for compensation of wrongfully convicted persons is embodied in envisaging the legal conditions for compensation of damage as well as the obligation of the court to establish that the convicted person is innocent (not guilty), or at least to discard the suspicion about the defendant's guilt (e.g. in German and Austrian law).

The legal qualification of a conviction as ill-founded causes difficulties in conceptualizing the right to compensation for damage sustained by unjustifiably convicted persons, but also in the theoretical justification of this right. Namely, the ill-founded nature of the conviction does not arise from the declaration that the formerly convicted person is innocent but on the objective fact that the first-instance conviction was invalidated. The judicial decisions rendered in the proceedings initiated by invoking an extraordinary legal remedy have the force of an enforceable decision for initiating a proceeding for the compensation of damage for wrongful conviction. It gives rise to dilemmas about the theoretical justification of the right to compensation for wrongful conviction in case the proceeding initiated by invoking an extraordinary legal remedy has been terminated for some procedural reasons, or in case the first-instance judgment has been invalidated by a second-instance judgment on dismissing the charges.

Having in mind the above, in this part of the paper we will examine the conditions envisaged in the Serbian positive law for exercising the right to compensation for damage sustained by unjustifiably convicted persons.

2.1. Conditions for compensation of damage to wrongfully convicted persons

Article 585 of the Serbian Criminal Procedure Code clearly entails that the right to compensation for wrongful conviction may be exercised by a person who was found guilty in the first-instance proceeding but whose final conviction was subsequently invalidated (in the proceeding initiated by filing a request for an extraordinary legal remedy), either by rendering another judicial decision or by terminating the criminal proceeding (Article 585 para.1 CPC). Although it is not explicitly stated in this legal provision, the obligation of the state to compensate the wrongfully convicted person ensues if the damage is caused to the person who was initially convicted in the first-

instance proceeding, and if there is a causal link between the wrongful conviction and the damage caused thereby. The unjustifiably convicted persons is entitled to compensation only if the damage was caused by a wrongful conviction. The existence of damage is determined by applying the general rules of civil (obligation) law.

In addition, Article 585 (para.2) of the Criminal Procedure Code specifies the so-called negative conditions (unfavourable circumstances) when the unjustifiably convicted person is precluded from seeking damages for wrongful conviction. Thus, a wrongfully convicted person shall not be entitled to compensation for damage caused by wrongful conviction: 1) if the person deliberately caused his/her own conviction by a false confession or in any other way, unless coerced into it; and 2) if the criminal proceedings were terminated or if criminal charges were dismissed in a retrial due to the fact that the injured party (acting in the capacity of a private or a subsidiary prosecutor) has abandoned the prosecution or has withdrawn the prosecution claim as a result of an agreement with the defendant (Article 585, para.2, items 1-2 CPC). The presence of these circumstances excludes the right to compensation even if all the positive requirements for acquiring this right have been met.

2.1.1. Positive presumptions for compensation of damage for wrongful conviction to wrongfully convicted persons

The right to compensation for damage caused by wrongful conviction exists if the defendant has been initially convicted (found guilty) by a final first-instance judgment, and if the final judgment has been subsequently invalidated in the proceeding initiated by filing a request for an extraordinary legal remedy (Article 585, para.1 CPC).

2.1.1.1. The original final judgment on conviction as a condition for compensation

The exercise of the right to compensation of damage for wrongful conviction presupposes that the defendant has been found guilty by a final judgment, whereby it is irrelevant whether a criminal sanction has been imposed or whether the defendant has been exempt from punishment. As for the right to compensation, the legislator does not make a distinction in terms of the type and scope of the imposed criminal sanction.

In comparative law, the lack of envisaged conditions in terms of the type and scope of the imposed criminal sanction is not a generally accepted position in regulating the right to compensation for wrongful conviction. In some legislations, the limitations on the right to compensation depend on the type of imposed criminal sanction. Thus, in German and Austrian law, the right to compensation for wrongful conviction is only applicable in cases pertaining to the originally imposed punishment. Some legislations recognize the right to compensation of damage on the basis of the initial conviction which was the legal ground for imposing punishment or security measures (e.g. in Italian law). In some other legislations (e.g. in Hungarian law),

the right to compensation for wrongful conviction is acquired only in case certain security measures (e.g. forced hospitalization) have been imposed (Grubač. 1977, p. 31).⁶ Given the different approaches to compensation for wrongful conviction which, in some legislations, resulted in imposing some criminal sanctions other than punishment (e.g. security measures), it is necessary to theoretically justify the need for obliging the state to compensate the wrongfully convicted person irrespective of the type of wrongfully imposed criminal sanction.

In the criminal procedure law theory, the right to compensation for damage caused by wrongful conviction which resulted in imposing security measures raises the fewest dilemmas. Security measures are criminal sanctions aimed at protecting social values by imposing relevant medical or other treatment, banning the perpetrator from performing certain activities, and confiscating certain items. Given the nature of security measures, there is no reason to deny the right to compensation in cases where the court wrongfully imposed this type of criminal sanctions. The potential damage caused by the wrongfully applied security measures is not less substantial than the damage caused by wrongfully imposed punishment. Within the framework of medical security measures, it primarily refers to forced (involuntary) hospitalization. Here, we will try to examine the motives of certain legislators to recognize the right to compensation only in cases involving wrongful imposition of the security measure of forced hospitalization. The essence of forced hospitalization as a security measure of medical nature is to restrict the freedom of movement of the convicted offender (and other rights and freedoms); thus, a person who has been imposed this security measure is subject to similar restrictions that are applicable in case he/she is delivered a criminal punishment. Therefore, there is no reason to deny the right to compensation in cases where this security measure has been wrongfully imposed. However, there is a question why the right to compensation is denied in case of wrongful imposition of other security measures, primarily those involving the ban on performing certain activities. In effect, the prohibition of performing certain activities causes both material damage (e.g. loss of income) and non-material damage to the person who has been imposed this measure (e.g. if an artist is excluded from public life, it may harm his reputation and popularity). Therefore, there is no reason to deny the right to compensation for damage caused by the wrongful imposition of these security measures. Moreover, in cases involving wrongful imposition of these types of security measures, the compensation for damage awarded under the general civil-law compensation rules seems to be insufficient, which is likely the reason for recognizing the right to compensation for wrongful conviction. In the latter case, the inflicted damage is the result of wrongful criminal conviction rather than a consequence of the obligation-law relationship between the state (as a wrongdoer) and the person who has been subjected to a security measure.

Finally, it follows from the above that the right to compensation for damage for wrongful conviction as well as the right to complete social rehabilitation of

⁶ For more, see: Грубач, М. (1979, p. 31).

wrongfully convicted persons should not be conditioned by the type and scope of the imposed criminal sanction.

2.1.1.2. The epilogue of the proceeding initiated by invoking an extraordinary legal remedy as a condition for compensation of damage for wrongfully conviction

A convicted person may acquire procedural legitimacy to initiate a proceeding for compensation of damage caused by wrongful conviction only if the final (first-instance) judgment has been invalidated in the (second-instance) proceeding initiated by filing a request for an extraordinary legal remedy. More specifically, the proceeding on an extraordinary legal remedy shall be terminated by rendering the final judgment on the defendant's acquittal the dismissal of criminal charges, or the termination of the proceeding initiated by invoking an extraordinary legal remedy. The first-instance judgment may also be invalidated in the proceeding initiated upon: a) the request (motion) for a retrial; b) the request for the protection of legality; and c) the request for an extraordinary review of the final judgment. The ultimate result of the proceeding initiated by filing a request for the mitigation of punishment (as an extraordinary legal remedy) cannot be the exemption from criminal charges, dismissal of criminal charges, or termination of criminal proceedings; the only possible outcome of this proceeding can be the acquittal. For this reason, the judicial decision rendered on the mitigation of punishment cannot invalidate the original final conviction. Therefore, the proceeding initiated by invoking the extraordinary mitigation of punishment cannot lead to the acquisition of procedural legitimacy to initiate the proceeding for compensation of damage for wrongful conviction.

A final judgment of conviction may also be invalidated by a judgment on dismissing the charges, which is rendered in the proceeding initiated by invoking an extraordinary legal remedy. In principle, the Serbian legislator recognizes that the judgment on dismissing the charges has the character of a prerequisite on the basis of which the wrongfully convicted person may acquire the right to initiate the proceeding for compensation of damage for wrongful conviction. However, considering the provisions of Article 585 (para. 2, items 1-2), specifying the circumstances when the wrongfully convicted person is not entitled to exercise the right to compensation, the defendant cannot acquire the right to initiate compensation proceedings for wrongful conviction on the basis of a second-instance judgment on dismissing the charges.

Unlike some legislations, the Serbian Criminal Procedure Code provides ample opportunities for exercising the right to compensation for wrongful conviction in cases involving the annulment of a final (first-instance) judgment by a final judgment on termination of criminal proceedings or a final judgment on dismissing the charges. Other legislations have a more restrictive approach to the issue of the right to compensation for wrongful conviction. For example, Hungarian law provides for the possibility of seeking damages only if a judgment on acquittal has been rendered in the proceeding initiated by invoking an extraordinary legal remedy (Grubač. 1977,

p. 31). The German and Austrian laws allow this possibility in cases of rendering a judgment on acquittal and a judgment on termination of criminal proceedings, alongside with the additional condition that the defendant's criminally liable has been fully invalidated. In effect, it means that there is no right to compensation of damage for wrongful conviction if acquittal was rendered due to the lack of evidence in the proceeding initiated by invoking an extraordinary legal remedy (Roeder, 1963, p. 129). Such a restrictive approach to exercising the right to compensation on the basis of invalidated conviction is in conflict with the very nature of modern criminal procedure. Namely, the immediate result of the prosecutor's failure to prove the defendant's guilt (in this case, to maintain the judicial belief in the justifiability of the original conviction) may be a violation or denial of the defendant's rights. The failure of the criminal-law request for punishment cannot prevent the exercise of the defendant's rights, notwithstanding why the final (first-instance) conviction has not been confirmed in the proceeding initiated by invoking an extraordinary legal remedy. Therefore, as the prosecutor has failed to justify (in the second-instance proceeding) the factual grounds for conviction in the first-instance judgment, the defendant shall not bear the consequences of the burden of proof envisaged by the law.

The fewest dilemmas about the right to compensation for damage caused by wrongful conviction are raised in cases where the original final judgment is invalidated by a judgment on acquittal rendered in the proceeding initiated by invoking an extraordinary legal remedy. Therefore, it is indisputable that the right to compensation of damage for wrongful conviction is acquired when the final judgment in the procedure on an extraordinary legal remedy is invalidated by the judgment on the defendant's acquittal.

2.1.2. The right to compensation in case of a milder punishment and a milder legal qualification of the criminal offence

The right to compensation for wrongful conviction is acquired if the original final first-instance judgment has not been confirmed in the second-instance proceeding on an extraordinary legal remedy. However, a question arises as to whether wrongful conviction may also refer to a conviction involving a less serious offence and a milder punishment (e.g. a fine instead of a term of imprisonment, or a guilty plea accompanied by exemption from punishment in a judgment rendered on an extraordinary legal remedy). Unlike some other legislations (e.g. German, Hungarian), the Serbian Criminal Procedure Code envisages that the right to compensation for wrongful conviction cannot be exercised in these situations. According to Serbian positive law, a conviction is wrongful if a final first-instance judgment is invalidated in the second-instance proceeding initiated by invoking an extraordinary legal remedy. Thus, acquittal or a milder punishment imposed in a judgment rendered on an extraordinary legal remedy (except for the request for the extraordinary mitigation of punishment) cannot be the legal grounds for compensation of damage for wrongful conviction.

Yet, exemption from punishment or a milder punishment may be the legal ground for compensation of damage for *-wrongful deprivation of liberty*, in compliance with the conditions stipulated in Article 584 (para.1, point 2) of the **CPC**.

In case a first-instance conviction has been confirmed in the proceeding initiated by invoking an extraordinary legal remedy but the second-instance judgment provides a milder legal qualification of the criminal offense, it is not deemed to be a wrongful conviction. However, in this situation, the defendant has the right to moral satisfaction for violation of one's reputation (i.e. reparation as a moral component of social rehabilitation), as provided in Article 592 of the Criminal Procedure Code. Therefore, in case the inadequate legal qualification of the criminal offense contained in the original conviction infringes on the defendant's reputation, it may be modified in the final judgment rendered in the (second-instance) procedure on an **extraordinary** legal remedy and published.⁷

2.2 Legal grounds for exclusion of the right to compensation of damage for wrongful conviction (negative circumstances)

In Serbian law, the conviction is deemed to be wrongful in cases involving the annulment of the final first-instance judgment in the (second-instance) proceeding instituted by invoking an extraordinary legal remedy. Consequently, the wrongfully convicted person acquires the right to full social rehabilitation. However, in case there are statutory circumstances of either objective or subjective nature pertaining to the defendant's own conduct, the responsibility of the state for wrongful conviction is excluded. The circumstances that exclude the exercise of the right to compensation of damage for wrongful conviction are provided in Article 585 (para.2, items 1-2) of the Criminal Procedure Code. These so-called negative circumstances provide that a convicted person shall not be entitled to damage compensation:

- a) if the defendant deliberately caused his own conviction by a false confession or in any other way, unless he was coerced into it; and
- b) if the criminal proceedings were terminated or if criminal charges were dismissed in the retrial due to the fact that the injured party (acting in the capacity of a private or a subsidiary prosecutor) has abandoned the criminal prosecution or has withdrawn the prosecution claim as a result of an agreement with the defendant (Article 585, para. 2, items 1-2 CPC).

2.2.1. Legal ground for exclusion of the right to compensation for wrongful conviction caused by the defendant's false confession or in any other way

The Criminal Procedure Code comprises general provisions on the exercise of the rights of wrongfully convicted persons. Thus, it is logical that legal provisions sanction the consequences of the defendant's conduct by which he caused his own conviction. In these circumstances, the legislator specifies the legal grounds

⁷ For more on this situation in Austrian law, see: Roeder, 1963, p. 355.

for exclusion of the right to compensation for wrongful conviction caused by the defendant's false confession and other similar conduct.

A false confession may be a circumstance that excludes the right to compensation only if the confession meets certain requirements. First, the confession must be the result of the defendant's freely expressed will. Otherwise, if the false confession is a consequence of coercion, it will not have a legally recognized impact on the exercise of rights stemming from wrongful conviction (Article 585, para. 2, item 1 CPC). Given the fact that the legislator has envisaged coercion as a circumstance that nullifies the effect of false confession (as an unfavourable circumstance precluding the exercise of the rights stemming from wrongful conviction), we should point out to other illicit and undue influences on the will of the accused, such as: the use of force, duress, medical interventions without informed/voluntary consent, and the like. However, the mention of coercion in this context seems to be unnecessary. Namely, in order for a false confession to have the character of a negative/unfavourable circumstance relevant for exercising the rights arising from wrongful conviction, it must be given with the aim of intentionally causing the defendant's own conviction (Article 585, para. 2, item 1 CPC). Given that coercion is one of the circumstances that exclude liability for unlawful behaviour, it is quite certain that coercion excludes intent. Therefore, it is unnecessary to explicitly mention coercion within the circumstances affecting the consequences of the defendant's false confession.

A false confession may be a circumstance that excludes the right to compensation of damages for wrongful conviction only if it is a confession in the true sense of the word (Vasiljević, 1968, p. 291). In addition, false confession should refer to the facts and circumstances that constitute the act of committing the criminal offense for which the defendant is accused (Grubač, 1977, p. 38). If a false confession refers to a fact that does not relate to the committed criminal offense, then a false confession on that fact does not exclude the right to compensation of damage caused by the wrongful conviction. There must be a causal link between the false confession and the wrongful conviction. The judgment by which the defendant was wrongfully convicted should be primarily based on the defendant's testimony which contains a false confession about the committed criminal act. On the other hand, if the defendant's conviction is based on evidence obtained from other evidentiary instruments (e.g. witness testimony, expert testimony, documents), then false confession does not constitute a circumstance that excludes the right to compensation for wrongful conviction. In this situation, the defendant would be convicted even if there is no testimony containing a false confession.

In order to be established as a circumstance that excludes the right to compensation of damage for wrongful conviction, a false confession must be given in the main trial proceeding because the judgment can be rendered only on the basis of evidence and facts presented at the main trial (Article 352, para. 1 CPC). The decisions of the Supreme Court of Yugoslavia (VSJ - Kž 3/61) and the Supreme

Court of Vojvodina (VS Vojvodina 10/70) show that false confession given in the course of investigation and later refuted in the main trial proceeding does not exclude the right to compensation of damage for wrongful conviction. From the point of view of exercising the right to compensation, a false confession contained in the appeal against the first-instance judgment is also irrelevant.

The legal reasoning of the judgment should provide an explanation on whether the conviction is substantially based on a false confession or not. In most cases, we can clearly learn from the rationale to what extent the false confession affected the defendant's conviction. However, there is a problem of relativization of the court's obligation to provide a reasoned justification of the judgment. A written judgment does not have to contain a reasoning if the parties (and the injured person, if he/she has the right to appeal) waive the right to appeal as soon as the judgment has been pronounced, and if they have not expressly requested the delivery of the judgment. The lack of reasoning in a judicial decision can create problems in the proceedings initiated upon the request for a retrial and the request for the protection of legality, where the final judgment can be invalidated, thus providing an opportunity for the compensation of damage for wrongful conviction.

When assessing the fulfilment of the conditions for compensation of damage for wrongful conviction, it is necessary to determine the possible impact of false confession on the final judgment, which can be observed only on the basis of the legal reasoning contained in the judgment. The stance that judicial practice (case law) can help in resolving this issue, by disregarding the possible lack of legal reasoning in the judgment, seems to be appropriate for two reasons: the omission does not contribute to speeding up the procedure, and it is not a serious impediment in court proceedings because the legal reasoning may be (re)constructed on the merits (Vasiljević, 1977, p. 64). Moreover, in case of waiving the right to appeal immediately after the judgment is pronounced (Article 429, para. 1 of the CPC), the possible lack of legal reasoning raises the issue of the right to compensation of damage for wrongful conviction in case of failure to appeal. Namely, in addition to stipulating false confession as an unfavourable circumstance for exercising the right to compensation for wrongful conviction, the legislator also mentions "the other ways" of causing one's own conviction. This group of circumstances may include presenting false documents to the court, different forms of illicit influence on witnesses, and the like. Thus, the right to compensation is excluded if the second-instance judicial decision invalidating the final (first-instance) conviction is based on the evidence obtained from a false document or a witness testimony obtained by use of force, threats, coercion and other forms of undue influence. The legal requirement for the existence of this negative circumstance should be the established and proven causal link between the evidence obtained in an illicit manner and the judicial decision invalidating the final conviction.

In the criminal procedure law theory, there is a controversy about the failure to file an appeal as one of the ways of "intentionally causing the conviction" by the

defendant himself. The right to appeal is the first opportunity for the defendant to challenge the conviction and preclude all its consequences, by contesting the factual and legal grounds of the final judgment. The key question is whether the defendant's failure to file an appeal demonstrates his/her belief that the conviction is justifiable. If the answer to this question is affirmative, it may called into question the justifiability of the defendant's subsequent claims for damages. This line of reasoning is most likely to have contributed to the legislator's motives to enact relevant provisions in the former legislation, the Criminal Procedure Code of the Kingdom of Yugoslavia (1929) and the Criminal Procedure Code of the FPRY (1953), where the right to compensation of damage for wrongful conviction was denied if the defendant had failed to file an appeal, or waived the right to appeal.

This legal solution may be criticized. The first disputable issue is how to determine the nature of the defendant's failure to file an appeal, i.e. whether it has been done “intentionally” or in “gross negligence”, and the like. Second, by enacting such provisions, the right to appeal is transformed into an obligation to appeal (Sržentić, 1966, p. 441). Third, in case the appeal has been filed by the public prosecutor or a close relative acting in the name and on behalf of the defendant, can it be taken to mean that the defendant intentionally failed to file an appeal?

In addition to the presented argumentation, we consider it necessary to point out to the circumstances which, essentially, make the causal link between the right to compensation for wrongful conviction and the prior use of regular legal remedies ill-founded. As a matter of fact, the legislator has not envisaged a requirement that the right to file a request for extraordinary legal remedies is pre-conditioned by the prior use of regular legal remedies. By analogy, the exercise of the right to compensation for wrongful conviction should not be conditioned by the prior use of the right to appeal, given that such a condition does not exist in terms of the right to file a request for extraordinary legal remedies.

The prior obligation of the defendant to challenge the first-instance judgment by filing an appeal, as a precondition for exercising the right to compensation for wrongful conviction, is made redundant by the possibility of invalidating the final judgment in the procedure for extraordinary legal remedies. In addition, the facts and evidence leading to acquittal may appear only after the judgment becomes final. Moreover, the defendant does not have to present new facts and evidence in the appeal procedure but can only focus on the illegality of the first instance judgment (Vasiljević, 1987, p. 724). The failure to file an appeal may exclude the right to compensation for wrongful conviction only if it is established that the appeal was not filed for the purpose of intentionally causing one's conviction.

Certain legislations sanction the omissions in exercising the right to defence by excluding the right to compensation for wrongful conviction in such cases. Thus, the Italian Criminal Procedure Code (1989) excludes the right to compensation for wrongful conviction “if the defendant has caused a conviction or contributed to

passing a wrongful conviction either intentionally or in gross negligence” (Article 571). In the Italian criminal procedure law theory, a conviction is considered to have been intentionally caused if a person’s conduct is aimed at deceiving a judge, while contribution to conviction implies gross negligence in exercising the right to defence.

2.2.2. Exclusion of the right to compensation for wrongful conviction due to the injured party’s abandonment of prosecution or withdrawal of the prosecution motion on the basis of an agreement with the defendant

Pursuant to the principle of *mutatis mutandis*, the authorized prosecutor may abandon prosecution at any stage of the criminal procedure, including the proceeding initiated by invoking an extraordinary legal remedy. In that context, the prosecutor’s decision to drop the charges results in the judicial decision to terminate the criminal proceeding. Given that the Criminal Procedure Code recognizes the right to compensation for wrongful conviction even in case the final judgment has been invalidated by the second-instance judgment on the termination of criminal proceedings or a judgment on dismissing the charges in the proceeding for an extraordinary remedy, the mere fact that the prosecutor has dropped the charges does not jeopardize either the interest of the wrongfully convicted person or the public interest. However, the legislator attempts to prevent the termination of criminal proceedings or the dismissal of charges in the proceedings for an extraordinary legal remedy in case they are established to be the result of an informal agreement between the injured party (acting in the capacity of as a subsidiary or a private prosecutor) and the defendant. As a rule, the public prosecutor cannot make an agreement with the defendant because the public prosecutor is bound by the principle of legality of criminal prosecution. If the prosecutor abuses his authority and makes an agreement with the defendant, the right to compensation is excluded.

Unlike the current legal provisions contained in Article 585 of the CPC, the Criminal Procedure Code of FPRY (1953) did not envisage the possibility of awarding compensation for wrongful conviction if the private prosecutor’s decision to abandon criminal prosecution resulted in the judicial decision to dismiss the charges. The downside of this legal solution is reflected in the fact that the injured party acting as a private prosecutor (but not as a subsidiary prosecutor) could prevent the defendant’s acquittal by abandoning the prosecution claim. Thus, the defendant would be precluded from acquiring the requisite procedural legitimacy for initiating the proceeding for compensation of damage for wrongful conviction. Recognizing the harmful impact of this provision on the defendant’s rights, the legislator amended the Criminal Procedure Code in 1970 and, in principle, recognized the right to compensation in case the (second-instance) judgment on dismissing the charges was the result of the (private and subsidiary) prosecutor’s abandonment of or withdrawal from the prosecution claim, unless the abandonment or withdrawal was the result of the prosecutor’s agreement with the defendant.

It may be interesting to discern the legislator's motive to eliminate the possibility of a “consensual” abandonment of the criminal prosecution. The legislator seems to have started from the hypothetical situation involving a “settlement” between the defendant and the injured party (as a private or a subsidiary prosecutor); thus, the defendant would pay a certain amount of money to the private/subsidiary prosecutor and, in return, the authorized (private/subsidiary) prosecutor would abandon the criminal prosecution. In such a case, the authorized prosecutor would not be opposed to the defendant acquiring the right to be compensated from the budget. For this reason, the legislator sanctioned the possibility of a settlement between the defendant and the private or subsidiary prosecutor, made in the aforesaid manner.

The current Criminal Procedure Code provision (Article 585 CPC) seeks to preclude the defendant's acquisition of the right to compensation for wrongful conviction in case the injured party (acting as a subsidiary and a private prosecutor) withdraws the prosecution claim on the basis of an agreement with the defendant. Relying on the critical analysis of this provision, we may observe some disputable facts. First of all, we cannot see the reason for stipulating the injured party acting in the capacity of a subsidiary prosecutor as a potential actor in endangering the public interest (by making an agreement with the defendant) because, in such a case, the public prosecutor would be obliged to take over the prosecution. On the other hand, the question arises as to the actual possibility of the court to find out the motives of the private prosecutor's withdrawal from the prosecution. The private prosecutor (or any other prosecutor) is not obliged to explain his/her decision to abandon the prosecution claim. This intention can also be manifested by a conclusive action or conduct, such as failure to appear in the main trial hearing even though he/she has been duly summoned. Next, the legislator has to sanction the “agreement” between the defendant and the private prosecutor which is based on coercion, threats and duress. Yet, considering the fact that a conviction may be wrongful for reasons other than the private prosecutor's agreement with the defendant, the criminal procedure theory has proposed another solution. It includes a standpoint that the right to compensation for wrongful conviction could be exercised on the basis of the Constitution alone, given that Article 35 of the Constitution of the Republic of Serbia explicitly guarantees that any person unlawfully imprisoned, detained or wrongfully convicted shall have the right to social rehabilitation and compensation of pecuniary and non-pecuniary damages by the state, as well as other rights stipulated by the law. The basic premise of this position is that a wrongfully convicted defendant (who is *de facto* innocent) may also resort to entering into an informal agreement with the private prosecutor, motivated by the uncertainty of the ultimate outcome of criminal proceedings. Given that the agreement between the injured party (acting a private or subsidiary prosecutor) and the defendant may frustrate the exercise of the right to compensation for wrongful conviction, it may be precluded by ensuring that the injured party is entitled to exercise the right to compensation under the Constitution! (Cigoj, 1978, p. 530).

Conclusion

On the whole, the normative framework concerning the right to compensation for wrongful conviction in the Serbian positive law fully observes the universally accepted guarantees contained in the most important international documents on human rights' protection. In Serbian criminal procedure law, the legislator has expanded the scope of protection available to wrongfully convicted persons, who have been harmed by "a miscarriage of justice" in criminal proceedings, by envisaging the right to compensation for wrongful conviction even in cases where the final (first-instance) judgment has been invalidated by (second-instance) judgment on termination of criminal proceedings and the judgment on dismissal of criminal charges in the proceedings initiated by filing a request for an extraordinary legal remedy. The envisaged limitations on exercising the right to compensation for wrongful conviction are in line with the international human rights' standards proclaimed in the most important international documents in the field of protection of fundamental human rights and freedoms. The rationale of the limitations is that the guaranteed rights arising from a miscarriage of justice in criminal proceedings cannot be invoked in case judicial errors have occurred as a result of the defendant's (intentional or negligent) omission, which has contributed to the wrongful conviction.

References

1. Васиљевић, Тихомир (1968). Накнада штете проистекле од неоправдане осуде и неоснованог задржавања у притвору (Compensation of damage arising from wrongful conviction and wrongful detention), Хроника судске праксе, *Југословенска ревија за кривично право и криминологију*, бр. 2/68, стр.291.
2. Васиљевић, Т. (1977). Нове установе и нова решења закона о кривичном поступку од 24. 12. 1976. (New institutes and solution in the Criminal Procedure Act 1976), *Гласник адвокатске коморе Војводине*, бр. 6/77, стр.64.
3. Васиљевић, Т. (1987). Систем Кривичног процесног права СФРЈ (The Criminal Procedure Law of the SFRY), Савремена администрација, Београд, 1987, стр.724.
4. Грубач, Момчило (1979), *Накнада штете за неоправдану осуду и неосновано лишење слободе* (Compensation for wrongful conviction and unjustified imprisonment), Савремена администрација, Београд, 1979, стр.31, 38.
5. Haris, D. J., O' Boyle M., Warbick C. (1995). *Law of the European Convention on Human Rights*, London: Buttenvorths, 1995, p. 586.
6. Roeder, Herman (1963). *Lehrbruch des Osterreichischen Strafverfahrensrechte*, Wien, 1963, p.129, 355.
7. Roxin, Claus (1998). *Strafverfahrensrecht*, München: C.H. Beck Verlag