

Rehabilitation of Persons Convicted for Ideological or Political Reasons and the Role of Public Prosecutor in the Republic of Serbia

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Abstract:

As an expression of an urgent need to break-up with the past, one can distinguish legal violence, which was committed after the end of World War II in Democratic Federal Yugoslavia. The new communist authorities convicted many respectable citizens by conducting numerous court trials, accusing them of supporting the occupier, after which they confiscated their entire property. In order for the totalitarian past to be legally defeated, it was necessary to create a process by which the historical injustice could be corrected, not only through personal rehabilitation, but also through the restitution of the confiscated property.

Fifty years later, when reforms and democratisation of political processes began, Republic of Serbia also faced the consequences of selective and orchestrated justice. The process of rehabilitation and restitution was an attempt, mainly successful, to eliminate the anomalies in the field of final court decisions and their effect. It can be said that the results are significant, but at the same time insufficient. Simple analyses of archived data show that in the period from 1945 to 1952 many more sentences were passed pursuant to the applicable laws in comparison with the number of submitted requests for rehabilitation. The rehabilitation proceedings have shown that those laws were used as a foundation for taking revenge on the previous regimes.

The Public Prosecutor's office in the Republic of Serbia has made a great contribution to establishing legal certainty in this field. To the already wide scope of jurisdictions of the Public Prosecutor's office, the 2011 Rehabilitation Act added a new obligation: to represent the Republic of Serbia in cases related to rehabilitation.

The key question, which is likely to remain unanswered, is whether the proceedings that involved Public Prosecutors rehabilitated those convicted for the most serious criminal acts, who de facto committed those crimes.

Key words: *rehabilitation, restitution, political and ideological reasons, public prosecutor, court trial, Rehabilitation Act, human and civil rights.*

Introduction

The establishment and reinforcement of the totalitarian regimes in Europe, after the end of World War II were based on the same model, which was a physically and legally violent break-up with the past. The newly established regimes saw the embodiment of the previous regimes in the rich and the successful, believing that their

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wealth originated from the familiarity with the previous regimes. A great number of people were executed without any court's decision.

On the other hand, in addition to physical, one can also distinguish legal violence, which was committed after the end of World War II. This scenario was also present in the Democratic Federal Yugoslavia and the Republic of Serbia as its constitutional part.

The new communist authorities convicted many respectable citizens by conducting numerous court trials, accusing them of supporting the occupier, after which they confiscated their entire property. The authorities used legal ways to deal with both Serbian people and ethnic minorities. We have witnessed dozens of smaller places and villages, with 100% of German or Hungarian population being deleted from statistical reports. Their propriety was confiscated due to the fact that they belonged to one of these two nations, without any further analysis whether they cooperated with the occupation authorities or not.

The second great attack on human rights and citizens' property occurred after the Resolution of Informbiro, when the country's authorities, again using legal ways, dealt with certain citizens who had been sympathizers of the Soviet Union and deprived them of their basic human rights.

In order for the totalitarian past to be legally defeated, it was necessary to create a process by which the historical injustice could be corrected, not only through personal rehabilitation, but also through the restitution of the confiscated property. Following the fall of the communist regimes in Eastern Europe, a democratically elected government gave the process of rehabilitation of convicted persons for political and ideological reasons a top priority, which was later carried out. Furthermore, there was also the return of the property confiscated on the basis of decisions of court or administrative bodies, which had nothing to do with the law and justice, but were based on politics and ideology.¹ Having established the mechanisms for the rule of law, the former communist countries have been trying and mostly succeeded in correcting the historical injustice via processes of moral, political, legal and economic rehabilitation.²

When it comes to the Republic of Serbia, the first Rehabilitation Act was not passed until 2006 (hereinafter RA06) which did not leave any deeper mark. Passing of this Act was not followed by passing of the Law on Property Restitution and Compensation, therefore the expectations were not met.

Only with the passing of both the Rehabilitation Act which has been enforced since 2011 (hereinafter RA) and the Law on Property Restitution and Compensation, were the conditions created for the beginning of with moral, political, legal and economic rehabilitation in the Republic of Serbia. Unfortunately, the abovementioned laws were not followed by passing the regulations on access to the secret services' files, which would make the access to the rehabilitation of the large number of citizens convicted after World War II significantly easier.

From the legal point of view, rehabilitation implies the reestablishment of the lost rights, *i.e.* the return into the previous state before the rights were diminished or violated. In theory, there is a great number of definitions by which one has tried to

¹ Jovica Trkulja, *Rehabilitation of Political Convicts and Writers in Serbia*, Magazine "Hereticus" 1-10, 2011. Beograd.

² *Ibid.*

define the word rehabilitation in the right way. Regarding the rehabilitation of the persons convicted for political or ideological reasons, it seems that the complete return into the previous state is impossible due to the passing of time or the consequences caused by such decisions. Thus, the most acceptable point of view is that since it is generally not possible to erase the legal consequences, it is insisted on decreasing their effects to minimum.³

Although there are certain similarities, it is important to highlight the significant distinctions between the persons who were unreasonably convicted or deprived of liberty in the sense of criminal law from political rehabilitation. In fact, numerous authors have assumed an attitude that the political rehabilitation cannot be considered the matter of law, since it is about the correction of the anomalies from the past by returning the persons who were at one point of social-history considered enemies to public and political life.

The first (unsuccessful) attempt

The first Serbian Rehabilitation Act (hereinafter RA06) was administered from 2006 to the end of 2011 when the new Rehabilitation Act was passed. RA06 was applied to all the requests on rehabilitation submitted according to this Act.

This act regulated the rehabilitation of the persons residing on the territory of the Republic of Serbia who were without any judicial or administrative decision or by a judicial or administrative decision deprived of their lives, liberty or other rights for political or ideological reasons, from 6th April 1941 (the Nazi attack on the Kingdom of Yugoslavia- the author's comment) to the day of the commencement of the Act, *i.e.* 25th April 2006.

Pursuant to the same Act, the right to submit the request for rehabilitation did not have a deadline. The wording of this Act is striking. Namely, the legislator had tried to solve the destinies of a great number of citizens of the Republic of Serbia, whose real number will most likely stay unknown, and who were deprived of their basic human and property rights by passing a micro-Act consisting of 9 articles.

Article 8 of this Act envisaged that the right to compensation and the right to the return of the confiscated property would be regulated by a *Lex specialis*. Such *Lex specialis* has never been passed. The legislator has decided on the rehabilitation in a narrow sense, by annulling the decisions made for political or ideological reasons, without more clear elements for the remedy of the legal consequences of the decision or compensation for the damage.⁴

The first crucial problem of this Act is the lack of closer circumstances by which the court or any other decision or the act of exile or violence committed may be qualified to oblige the rehabilitation court to rehabilitate a person whose rehabilitation has been demanded.

The second crucial problem of this Act is strictly declared unilateral holding of the hearing. The person interested demands the rehabilitation from the court without the other side's involvement to protect the interest of the Republic of Serbia and directly control the decision made, all of this with the aim of preventing any abuse. It is assumed

³ Bora Čejović, *Criminal Law*, Belgrade, 2006, page 383.

⁴ Vladimir Budinović, *Rehabilitation Act*: "A sad story with a possibly happy ending".

by the Act that the only legal remedy is the appeal, which could be issued to the Supreme Court of Serbia and only against the decision in which the request for rehabilitation is denied. The failure of the legislator, at least in the Appellate Court, lies in the fact that they did not introduce the obligation to submit the decision to the Public Prosecutor, who could appeal against the meritum of the first-instance decision.

The most illogical provision is the fact that the Act includes the period from 6th April, 1941, which means that its jurisdiction is expanded to include the decisions of the occupation authorities. It is in the nature of political rehabilitation that the state rehabilitates the persons who were convicted for political or ideological reasons by legitimate and legal predecessors of the state authorities, which certainly cannot include the occupation authorities. War crime victims cannot be rehabilitated in this way.

2011 Rehabilitation act

A small number of authors dealt with the theory of rehabilitating persons sentenced after World War II, because of political or ideological reasons, but there was significant resistance and critique of the legislative solutions in the 2006 Rehabilitation Act. Hence, a new Rehabilitation Act was passed and it came into effect on 13.12.2011.

The Act regulated rehabilitation and legal consequences of the rehabilitation of persons who were executed, deprived of liberty and other rights before the Act came into effect on the territory of the Republic of Serbia, without a verdict or administrative decision of military and other Yugoslav bodies, if they resided or still reside on the territory of the Republic of Serbia or hold the citizenship of the Republic of Serbia.

Unlike the 2006 Act, the 2011 RA envisaged that entitlement to rehabilitation covers the period from the day when a particular settlement was liberated, i.e. from the day when a new administration was established, replacing the occupation authorities, thus being effectively established, without interruption. This provision limited the liability of the Republic of Serbia and it does not include the acts of the occupation authorities from 6th April 1941 until the new administration was established, as it was the case in the 2006 RA.

A specific feature of the Act is the provision that envisages that the right to submit a request for rehabilitation is terminated after 5 years from the day when the Act came into effect.

A single judge decides on the request for rehabilitation, while a complaint against the adjudication in a rehabilitation proceeding can be filed with the competent appellate court.

A decision regarding the request for rehabilitation is made *ex-parte*, pursuant to the rules of extra-judicial proceedings, with an obligation to obtain the opinion of the competent higher public prosecutor. When the public prosecutor disputes the request for rehabilitation, the court decides in a bilateral proceeding, where the other party is the Republic of Serbia, represented by the higher public prosecutor. Hence, a rehabilitation proceeding requires the mandatory presence of the public prosecutor.

As the provisions state, the Act allows for the requests for rehabilitation to be decided on in extra-judicial proceedings, with mandatory participation of the public

prosecutor. There are no other provisions that further regulate the role of the Higher Public Prosecutor. Bearing in mind that the Act issued the rule that the Higher Court decides on the request for rehabilitation, with mandatory involvement of the competent public prosecutor, it is obvious that the competent prosecutor is the Higher Public Prosecutor, who represents the state before the court which decides on rehabilitation. Bearing in mind the fact that there are 25 Higher Public Prosecutor's offices in Serbia, there was a concern that different practices of law in the proceedings would be established, which is why the Republic Public Prosecutor had to intervene.⁵

Mandatory instructions from the Republic Public Prosecutor

Bearing in mind the procedural shortcomings of the 2011 RA and insufficiently applicable provisions of the Law on Extra-judicial Proceedings on the role of the Public Prosecutor in a rehabilitation proceeding, the Republic Public Prosecutor issued the General Binding Instructions ⁶ to closely regulate the role of Higher Public Prosecutor's offices in the matters related to rehabilitation. Firstly, a register has to be established for registering cases and it is labelled K-Reh. The register has to contain all elements prescribed by the Rehabilitation Act in order to have an adequate record of cases.

In order to create conditions for the work of public prosecutor's offices in the Republic of Serbia to be as uniform as possible, the Instructions stipulate that the Higher Public Prosecutors are obliged, once the Higher Court submits a request for rehabilitation and all the collected documents, to compile a report, in which they would express their opinion, based on the analysed evidence, whether the request for rehabilitation is founded or not. After all, the expressed opinion of the Public Prosecutor influenced the nature of the rehabilitation proceeding, *i.e.* whether it was *ex-parte* or bilateral.

Higher Public Prosecutors were obliged to submit the report to the competent Appellate Public Prosecutor's office prior to submitting their opinion and explanation to the court. The Appellate Public Prosecutor's office would analyse the report and the collected documentation and make a decision, which may or may not be in agreement with the opinion of the Higher Public Prosecutor.

In case of opposing legal stands of the Higher Public Prosecutor and the Appellate Public Prosecutor regarding the merits of the request for rehabilitation, the attitude of the Republic Public Prosecutor was deemed decisive.

Higher Public Prosecutor's offices and Appellant Public Prosecutor's offices were obliged to designate persons who should represent the state in the cases related to rehabilitation.

The aim of issuing the Instructions was a lawful, effective and uniform acting of competent public prosecutors, as representatives of the Republic of Serbia in the proceedings regarding the Rehabilitation Act.

⁵ Zoran Pavlović, *Krivično procesno pravo II*, (Postupci za rehabilitaciju, p.199-202), 2nd ed., Novi Sad, 2015.

⁶ General Binding Instructions of RPP, no. A 64/12 of 5.04.2012.

Total number of cases in progress

Bearing in mind the fact that the period during which a request for rehabilitation could be submitted ended on 13.12.2016, since the 2011 Rehabilitation Act stipulated that a request for rehabilitation could be submitted within 5 years from the day when the Act came into effect, the data presented show the total number of cases related to rehabilitation registered at the Public Prosecutor's offices in the Republic of Serbia.

As it has already been mentioned, bearing in mind the provisions of the 2011 RA and the General Binding Instructions issued by the Republic Public Prosecutor, the cases registered at the Appellate Public Prosecutor's offices present the total number of cases in progress in the Republic of Serbia. The Appellate Public Prosecutor's office in Belgrade registered 2,819 cases related to rehabilitation.

The Appellate Public Prosecutor's office in Novi Sad registered 4,182 cases related to rehabilitation during the legally prescribed period.

On the other hand, the Appellate Public Prosecutor's office in Kragujevac registered 887 such cases. Finally, the Appellate Public Prosecutor's office in Niš registered 715 cases related to the same matter.

A data analysis shows that the role of the Higher Public Prosecutor, i.e. Public Prosecutor's offices in Serbia in the matters related to rehabilitation of persons convicted based on political or ideological reasons, generated the total of 8,603 K-pex cases during the period of five years after 13.12.2011.

An overview of cases related to this matter at Public Prosecutor's offices in the Republic of Serbia is presented in this table:

Appellate Public Prosecutor's office	Number of cases	%
Belgrade	2819	32.77
Novi Sad	4,182	48.6
Niš	715	10.31
Kragujevac	887	8.31

Activities of Higher Public Prosecutor's Offices

This paper does not intend to analyse the activities of Higher Public Prosecutor's offices in Serbia regarding the registered 8,603 K-Reh cases. When it comes to the activities of Higher Public Prosecutor's offices in Serbia, only the activities of one Higher Public Prosecutor's office from each of the listed Appellant Prosecutor's offices will be analysed, i.e. two Higher Public Prosecutor's offices that are subordinate to the Appellant Public Prosecutor's office in Novi Sad, since the record shows that this Prosecutor's office, i.e. its subordinate Higher Public Prosecutor's offices have registered 48.61% of the total number of registered cases.

In order to adequately show the increase in the number of cases from the moment when the new Act came into effect, the analysis will use the data from the Higher Public

Prosecutor's offices in Subotica and Sombor, which, due to geopolitical and historical reasons, registered the highest number of cases related to rehabilitation in relation to the number of citizens and the number of other criminal cases.

When it comes to the Higher Public Prosecutor's office in Kragujevac, in the period during which requests for rehabilitation were submitted, there were 3,453 criminal cases in progress, relating to various matters. Criminal cases fall within the main competence of this Public Prosecutor's office. At the same time, there were 223 cases registered relating to rehabilitation, which means that they comprise 6.46% of all criminal cases being dealt with.

During the same period, the Higher Public Prosecutor's Office in Niš registered 11,891 criminal cases, which are the main competence of the Public Prosecutor's office. When it comes of the subject of rehabilitation, 168 cases were registered, which is 1.41% of the total number of cases being dealt with.

A similar situation is at the Higher Public Prosecutor's office in Užice, where 6,329 criminal cases were registered, with 138 of them related to the subject of rehabilitation, *i.e.* 2.18% of the total number of cases being dealt with.

When it comes to the two Prosecutor's offices on the territory under the jurisdiction of the Appellate Public Prosecutor's office in Novi Sad, the Higher Public Prosecutor's office in Subotica and the Higher Prosecutor's office in Sombor, the analysis shows quite different results and many more cases related to the subject of rehabilitation. Namely, the north of Vojvodina was inhabited with a much higher number of Hungarian nationals than after the World War II. Luckily for the multicultural aspect of the region, a large number of Hungarians continued to inhabit their traditional territories, which cannot be said for the west part of Vojvodina and the Danube region, where a large number of Germans used to live until the end of World War II. Today, their number has been reduced to a symbolic figure.

The Higher Public Prosecutor's office in Sombor registered 6,210 criminal cases, with 981 of them related to the subject of rehabilitation, which means that this subject matter had a share of 15.80% of the total number of cases being dealt with.

The Higher Public Prosecutor's office in Subotica registered 637 cases related to rehabilitation and 6,485 other criminal cases, which means that the subject analysed in this paper was registered in 9.83% of all cases.

Report

The 2011 Rehabilitation Act and the Act on Extra-judicial Proceedings did not envisage a report from the Higher Public Prosecutor on the request for rehabilitation. This was introduced in the General Binding Instructions from the Republic Public Prosecutor among the activities of public prosecutor's offices.

The report was basically an elaboration of the decision of the Public Prosecutor related to the merit of the request for rehabilitation.

Namely, respecting the established procedure, a request for rehabilitation with certain evidence was submitted to the competent Higher Court, which studied the case

and collected additional documentation, if needed, *ex officio*. Only when the court found that the collected evidence represented sufficient factual material for making a decision about the request, regardless of the nature of the final decision, did it submit the materials to the competent Higher Public Prosecutor.

Having received the materials and acting in accordance with the Instructions, the Higher Public Prosecutor was obliged to carefully and meticulously examine the evidence and make a decision.

In practice, the Public Prosecutor had the right to return the case to the court should they found that the factual material was insufficient for making an adequate decision, with an initiative to collect the necessary missing documentation.

Generally speaking, the documentation related to the proceedings that mostly took place between 1945 and 1955 and its availability posed the greatest challenge in the proceedings related to rehabilitation. The documentation was collected from various archives, from local to national, *i.e.* centralised ones, or even in some cases the so-called *divisional courts* (a type of court-martial – author's comment) and the documents related to those cases were almost impossible to find.

On the other hand, even the cases with comprehensive documentation were very difficult to analyse. Namely, due to inadequate conditions in which the documents were kept, the paper would disintegrate when touched and, due to a shortage of paper, after the World War II all documents were typed on both sides using a mechanical typewriter, which has made them illegible over time.

Having compiled the documentation, the Higher Public Prosecutor would write a report, which included the request of the claimant, a list and analysis of submitted and subsequently obtained evidence, as well as their stand on the fact whether the person against whom charges were brought had their human or civil rights deprived.

Taking a legal stand required a detailed elaboration, after which the report and opinion on the merit of the request were submitted to the Appellant Public Prosecutor's office as a superior body, pursuant to the Instructions issued by the Republic Public Prosecutor.

Having reviewed the documents and the legal stand of the Higher Public Prosecutor, the Appellant Public Prosecutor would take the definite stand on the expressed opinion of the Higher Public Prosecutor. If the stands were identical, the case would be returned to the Higher Public Prosecutor, who would in turn return it to the competent court with an elaboration on the opinion.

However, if the Higher and the Appellant Public Prosecutors disagreed, the final decision, with an elaboration on their legal stand, was made by the Republic Public Prosecutor, based on the elaborations on the legal stands of both Prosecutors.

Activities before the Court

1. Court of first instance

The type of proceeding, *i.e.* whether it was an *ex parte* or bilateral, or whether it was a legal or court rehabilitation, depended on the legal stand of the Higher Public Prosecutor, *i.e.* whether they accepted or rejected the request for rehabilitation.

The Higher Public Prosecutor would take an active part in a rehabilitation proceeding before the court of first instance, only in the situations when the Higher Public Prosecutor objected to the request for rehabilitation, so the decision regarding court rehabilitation had to be made in a bilateral proceeding, where one party was the claimant, while the other one was the Republic of Serbia, represented by the Higher Public Prosecutor, as the opposing party. The court would schedule a court hearing, where the evidence was presented and legal stands were expressed by both parties, after which the court would pass a verdict.

A court decision which was different from the legal stand of the Public Prosecutor expressed in their report and at the hearing would lead the parties to an appellate proceeding.

2. Appellate proceedings

The appeals against the decisions of a court of first instance regarding a request for rehabilitation were dealt with by an Appellate Court, with participation of the Appellant Public Prosecutor.

Conclusion

Legal certainty and the rule of law are the postulates that countries from the former communist block are striving to achieve. After World War II, those countries were greatly affected by human rights violations, threats and executions of a large number of people, as well as confiscation of property, with or without a court decision, all with an aim of establishing new, totalitarian regimes.

Fifty years later, when reforms and democratisation of political processes began, the countries from the former communist block faced the consequences of selective and orchestrated justice. The process of rehabilitation and restitution was an attempt, mainly successful, to eliminate the anomalies in the field of final court decisions and their effect.

The Republic of Serbia did not deal with rehabilitation and restitution proceedings seriously until 2011. The deadline for submitting requests for rehabilitation has passed and it can be said that the results are significant, but at the same time insufficient. Simple analyses of archived data show that in the period from 1945 to 1952 many more sentences were passed pursuant to the applicable laws in comparison with the number of submitted requests for rehabilitation. The rehabilitation proceedings have shown that those laws were used as a foundation for taking revenge on the previous regimes.

The Public Prosecutor's office in the Republic of Serbia has made a great contribution to establishing legal certainty in this field. To the already wide scope of

jurisdictions of the Public Prosecutor's office, the 2011 Rehabilitation Act added a new obligation: to represent the Republic of Serbia in cases related to rehabilitation.

The question then arises as to how much factual material the Public Prosecutors had when dealing with the cases related to rehabilitation to take the correct stand in relation to the request for rehabilitation. Especially because all the decisions were made pursuant to then-applicable substantive and procedural regulations. This specific reopening of proceedings and the fact that a modern state took a stand on the relics of the past were in any case deprived of emotional tension typical of the post-war period. The key question, which is likely to remain unanswered, is whether the proceedings that involved Public Prosecutors rehabilitated those convicted for the most serious criminal acts, who *de facto* committed those crimes. The aforementioned problems with the archives, lack of access to all documents related to the cases in question and lack of witnesses are the circumstances that were in favour of the claimants and to the detriment of the principle of the rule of law and legal certainty, as well as the potential victims of the rehabilitated persons.

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