



Research Article

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Suspension of sentencing of revised decisions, legal provision and enforcement in practice

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Abstract

The review of a final criminal decision is an extraordinary appeal instrument, because it does not follow the usual rules of appeal. This is related to subjects, deadlines and cases. The review, at first glance, seems to be a violation of the principle of legal certainty, because it is intended to review, retry a final decision, but in fact it is the opposite. The purpose of the review is essentially that of effective justice, that justice which must be done at all times, irrespective of the fact that the sentence imposed by the final decision may be fully served or extinguished.

The review institute has undergone legal reforms in order to increase efficiency and respond to the needs of time. The legal reform of this institute aimed to expand the ratifications, adding in addition to the issues of fact and issues of law, but also issues of the right to a fair legal process. The legal reform was also in line with the evolving jurisdiction of the ECHR, but also of Albania's Constitutional Court. Along with the reform for review, changes were also made to the institute of suspension of the execution of the final sentence, when the request for review of the decision is accepted. Suspension as an institute seems an effective means when it comes to suspending a final decision, which should not be executed because it is being reviewed.

The lawmaker has left the implementation of this institute in the hands of the court, which on a case-by-case basis can assess whether it can impose the suspension or not? This increased discretion of the court and the lack of a clear legal regulation has brought problems in practice, with different interpretations of this institute. From practice we have noticed that often the criteria for deciding whether to suspend or not when the request for review is accepted is objective, but there have been no subjective criteria. In these conditions, arises the need to make a clear legal adjustment as to when the suspension should be imposed and when not, or to have a unification of practice by Albania's High Court, in relation to legal cases as to when it should be accepted or not and what legal criteria should be considered in approving or rejecting this request.

Keywords: review of the verdict, suspension of execution, conviction.

1. Introduction

The review of final criminal decisions is an extraordinary tool for cracking down on criminal convictions, aimed at reviewing the finished case with a final decision. These decisions, being final decisions, do not have the usual means of appeal that can be used, due to the exceeding of the time limit for each mean of appeal, appeal, recourse or due to the use of these means and the affirmation of these decisions, which means that it cannot be challenged through the usual means of appeal and the case is considered closed on the basis of the principle of the judged thing, or *res judicata*.

The revision of final decisions is an exception or deviation from the principle of legal security, as a protective principle provided for in the Constitution of the Republic of Albania and by the Code of Criminal Procedure.

The Constitution in its Article 34 provides that:

"No one may be convicted more than once for the same criminal offense neither judged again, except in cases when the retrial of the case is decided by a higher court, according to the law."

That is, the Constitution itself has envisaged revision as an exclusive means, when the highest court decides on the revision.¹ In fact, this provision in the Constitution is not consistent with the changes that the Code of Criminal Procedure has undergone, as the latter has given the power to review the decision of the court of first instance that rendered the decision and no longer the Supreme Court.

The regulation in the Code of Criminal Procedure, in its article 7, is more accurate, as it provides for the possibility of review by a competent court and not a higher court:

"No one can be tried again for the same criminal fact for which he was tried with final decision, except in cases when a retrial of the case has been decided by the competent court".

However, the purpose of both the Criminal Code and the Constitution is the same, to prohibit the trial twice for the same criminal offense, except when the review is decided.

In this constitutional and procedural norm, three of the most important principles of criminal procedure are foreseen: i) the principle of not being judged twice for the same criminal offense (*ne bis in idem*); ii) the principle of legal certainty (*res judicata*); and iii) the possibility of reopening the criminal case as an opportunity to avoid the principle of legal certainty. Deviation from the principle of legal certainty through review under the conditions provided by law is intended to remedy the judicial error in delivering justice. Regarding this case, the ECHR in some cases stated that: *"The Court considers that the requirements of legal certainty are not absolute. Deviation from the principle is justified only if such a thing becomes necessary by the circumstances and by the substantive nature of the obligation, or when there are serious legitimate reasons that are more important than legal certainty."*²

¹ See ECHR decisions, *Ryabykh v. Russia* nr.52854/99, p.52, ECHR 2003-IX; *Bratyakin v. Russia* nr.53203/99, pp.63-68, 15 December 2005.

² See ECHR decisions, *Ryabykh v. Russia* nr.52854/99, p.52, ECHR 2003-IX; *Bratyakin v. Russia* nr.53203/99, pp.63-68, 15 December 2005.

So, the revision is aimed at providing effective justice, having the opportunity to reconsider the issue once again. The revision was considered an effective tool, but in practice it did not cover all legal cases and thus it was possible for this institute to undergo improvements and changes.

2. Legal reform, in the review institute with law no. 35/2017

Given the problems encountered in practice in relation to the review institute, the contradictory jurisdiction of the High Court and the jurisdiction of the ECHR, it was considered necessary to reform this institute. The reform consisted of several qualitative improvements of this institute:

Firstly, the revision of the final decision was allowed only when it was for the convict and not against him, i.e., for reo and not against reo, in accordance with the principle of legal security.

Secondly, the legislation included several more cases (Art. 450 of the Albanian Criminal Procedure Code):

1. The revision may be requested:

a) if the facts stated in the merits of the decision are not compatible with those of another final judgment; b) if the decision is based on a civil or administrative court decision, which has been revoked subsequently; c) if, after the decision, new evidence appeared or has been discovered which solely or along with the ones already evaluated prove that the decision is wrong; ç) if it is proven that the decision was issued as a result of the falsification of the acts of the trial or of another fact provided by law as a criminal offence. d) if the ground for the revision of the final decision results from a European Court of Human Rights judgment making the re-adjudication of the case indispensable. The request shall be filed within 6 months from the notification of that decision; dh) if the extradition of a person tried in absentia is granted on the explicit condition that the case be re-tried. The request for re-trial may be submitted within 30 days from the date of extradition of the person. The request submitted within that time limit may not be refused. e) if the person is tried in absentia pursuant to article 352 of this Code and requests the case to be re-tried. The request shall be filed within thirty days from the date he is informed. The request submitted within that time limit may not be refused.

Regarding the cases of review provided for in points "a" "b" "c" and "what" are cases that existed before the reform by the Law 35, 2017. These cases are a matter of fact, they are circumstances that constitute a cause for review that were not considered in the decision, these are circumstances that were not known at the time, but that appear later and their existence alone or together, show that the decision is wrong. But the commonality of all the legal reasons foreseen above lies in the fact that the criminal decision for which the review is requested is wrong not for the negligence of the court, but for reasons independent of it and that were not known at the time of the decision. So, in these cases there will be no resumption of the process from scratch, but the review court makes a partial opening of the judicial investigation and takes the evidence which was not known by it at the time of the decision and which has recently come out after it.

With the amendments made by Law no. 35/2017 we note that three other review cases have been added, namely those in points “d” “dh” and “e”. These cases are not genuine cases that constitute the essence of the review as an extraordinary tool for striking down criminal decisions that aim at reviewing the case completed with a final decision because the court decision is wrong regarding the assessment of the fact.

These cases are intended to guarantee the convicts a due process of law, enabling him to be heard, to be present, to object and to dispose of the evidence, to bring evidence, to bring witnesses, thus essentially guaranteeing the principle of equality and contradiction to the convicted person.

Thirdly, the competent court was determined, which will review the request, which will be the court of first instance that rendered the decision.

Fourthly, the request would be reviewed in the counseling room without the presence of the parties.

Fifthly, the position of the person who would be punished, was also specified.

In this sense, the request for review is intended to do an effective justice, aiming at the possibility of retrial, therefore this request is also accompanied by the request for suspension of the sentence given, based on the decision for which the request for suspension is being considered.

3. Suspension of enforceable judgment institute

The Institute of Suspension is an exception to the general rule of execution of criminal decisions, which are executed when they become enforceable, or even final. The execution of final or enforceable criminal sites is the final part of the criminal proceedings and aims to provide justice and prevent further criminal activity. The general rule is that as soon as there are executable or final decisions, they must be executed, but as any rule it has its exceptions, as is the institute of suspension of execution of the decision. This institute had a human and corrective purpose and was part of the legal provisions of the Criminal Procedure Code. Prior to the amendments to the Code of Criminal Procedure of August 2017, Article 454 of the Criminal Code provided that:

“The Criminal Chamber of the High Court and the court appointed to retrial the cases may order the stay of execution of the decision “.

Based on the above, the Supreme Court had the power to impose a stay of execution when it considered the request for review. Prior to the amendments to Article 450 of the Criminal Procedure Code, the Supreme Court had the power to review requests and it was the only competent court, by returning a fact-checking court,³ to adjudicate

³ Article 453 Consideration of the application by the High Court.

1. The request for review is reviewed by the Criminal College of the High Court in the counseling room, without the presence of the parties. 2. When the request is made outside the cases defined in article 450 or when it is made by those who do not have this right or when it proves to be manifestly unsupported, the Criminal College decides not to accept it. 3. When the application is accepted, the Criminal College decides on the annulment of the decision and the sending of the case for retrial by another trial panel to the court of first instance that rendered the decision or to the court of appeal,

requests for review. The same court was also competent to decide to suspend the execution of the revised decision when it accepted the request for review.

The provision provided that: *“The Criminal College of the High Court and the court appointed for the retrial of cases”*, the imposition of the link and seems like a mistake or omission by the lawmaker, since we think that it should be either, i.e. *“the Criminal College of the High Court or the court appointed for the retrial of cases”*, i.e. one of these two courts, or the High Court reviewing the request for review, or the one that will retry the case after accepting the request for review, could decide to suspend the case.

So even the court that will retrial the case can decide to suspend the execution of the decision for which the review has been accepted. After the amendments of the Criminal Procedure Code with the Law 35, of 2017, the competence of the High Court changed, depriving the latter of the competence to adjudicate these requests, which were essentially a matter of fact and not the law.⁴

4. The institute of suspension of the enforceable decision, after the changes that the review institute went through law 35/ 2017

The changes of the review institute brought as an inevitable consequence also changes in the institute of suspension of the revised decision. As explained above, the High Court is no longer competent to adjudicate on the admissibility of the request for review or not, as the court of first instance is competent to give the decision. The court of first instance reviewing the request for review may also decide on the acceptance of the request for suspension of the sentence given, for which the request for review has been received. Thus, with the current legal regulation, in Article 454 of the Criminal Procedure Code, it is provided that:

- *The court receiving the request may decide to suspend the enforcement of the conviction;*
- *Against such decision, the parties may file an appeal to the Court of Appeals, whose decision is subject to appeal;*
- *Upon request of the civil defendant, the court in charge of the re-trial of the case may order the suspension of execution of civil obligations for the duration of the trial;*

So, with the current legal regulation, the legislator has given the competence to the competent court that will decide the acceptance of the request for review, to decide the suspension of the sentence given based on the revised decision. The lawmaker has left discretion to the court, without specifying the cases or legal reasons as to when the request for suspension should be accepted. In case of refusal of the request for suspension, the lawmaker has provided the right to appeal to the Court of Appeal and no appeal is allowed against it. When the court decides to suspend the execution of the decision on criminal effects, it also decides on the civil consequences.

Suspension of the execution of the decision for which the review has been accepted is

when the application was made only against its decision. The judgment is final.

⁴ Article 453 Review of the claim 1. The request for review shall be reviewed by the court of first instance that rendered the decision in the counseling room, without the presence of the parties.

an exceptional remedy, as is the request for review itself, since the status of the person is convicted and does not change even when the request for review is accepted. In these conditions, legal provisions seem a bit contradictory. The Court accepts the request for review, allowing the party to be retried once again, whether on a matter of fact, new evidence, revoked civil decisions but also the law, as the right to a fair legal process, the right to participate in the trial due to trial in absentia, but refuses to always suspend this decision, leaving it to the discretion of the court, on a case-by-case basis, to decide whether to suspend it or not.

5. Suspension of the sentence given on the basis of the revised decision in practice

The changes of the review institute, made with the legal reform of 2017, have a relatively long period of time that have entered into force, just as long as there are requests for suspension of the sentence given on the basis of the revised decision.

Given that the lawmaker has foreseen the possibility of imposing a suspension by the court adjudicating the request for review, i.e., not the obligation to accept or not, we have studied some practical cases from the Court of First Instance in Tirana for 2024. The suspension of the execution of the decision is made only in those cases when the request for review is accepted, but not necessarily. From the analysis, we have concluded that the court did not necessarily accept the request for suspension, but acted according to the factual and legal circumstances.

Decision no. 701 of the Court, dated 23.09.2024 accepted the request for review, but rejected the suspension with the following arguments:

"On the other hand, the applicant requests the suspension of the execution of the criminal decision of the form taken..., a request for which the court concludes that in the present case it should be dismissed, because from the acts that occurred in the file it results that he has indeed become aware of the criminal decision of the form, but it is not proven that the execution of this decision has been realized, that the applicant has been detained, or arrested and his arrest has extended its effects"

Decision no. 776 of the Court, dated. 12.08.2022, sanctioned:

"As above, the Court concludes that the requests of the convict Th. S, to review the criminal decision and suspend the execution of the criminal decision No.1233, dated 05.05.2022 of the Tirana Judicial District Court, are based on law and evidence and as such should be accepted, this is proven by the documentary documents found in the merits file."

Acceptance of the request for suspension is unsubstantiated.

Decision no. 865 of the Court, dated 06.06.2024, sanctioned:

Acceptance of the request, suspension of the execution of the sentence given, based on Article 454 of the Criminal Procedure Code. Facts of the case include:

- *the applicant has been previously unpunished;*
- *is married with a minor child according to the family certificate dated 31.05.2024, which means that he has basic obligations for raising and educating the minor child;*
- *the applicant has been sentenced to a relatively substantial sentence but for which, according to the law, there is a possibility of applying an alternative sentence, since he is*

sanctioned under 5 years of imprisonment;

- *acceptance of the request for review puts the applicant in the position of the defendant and consequently, the applicant does not pose a high social risk.*

Decision no. 330 of the Court, dated 19.03.2024 suspended the execution of the decision:

“Given the fact that the applicant is not previously convicted, is married, has been charged with a minor criminal offense, such as forgery, has been investigated in a free state without any security measure and has been sentenced to a relatively light sentence of 8 months, the court considers that the applicant poses a low social risk. Consequently, there are reasons to allow him to be retried in a free state, suspending the execution of the sentence”.

6. Conclusion

Reviewing the final criminal verdict is an extraordinary means of appeal. As such it is a deviation from the principle of legal certainty and is intended to provide effective justice. With the Albanian reform of the Criminal Procedure Code, with Law 35/2017, the revision underwent significant improvements. The request for review would not be tried by the Supreme Court, but by the court of first instance that rendered the decision. With this change, the court of first instance was also given the power to decide the suspension of the sentence given when the request for review is accepted. Suspension of the sentence given, is an opportunity given to the court, which has no obligation ex-officio, to decide the suspension, but exercises its legal discretion on a case-by-case basis. Referring to the court practice, it has resulted that the court imposes the suspension when several conditions are met together, the criminal offense is not of great social risk, there is no security measure, there are obligations for the family. In this sense, there is the opportunity to apply alternative sentences, by deciding to suspend the execution of the prison sentence and their application.

The lack of a clear legal regulation for the institute of suspension, leaves cause for subjectivity, the legal provision that the court can impose the suspension, leaves room again for subjectivity. The Court may not exercise its discretion without a clearly defined legal limit.

In these conditions, there is an obligation to make a clear determination of Article 453 of the Criminal Procedure Code, in which cases, the suspension of the sentence should be decided when the request for review is accepted. At the same time, the Supreme Court is obliged to make an interpretation of this article, setting out the legal conditions when the request for suspension will be accepted and when it will not.

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