

## REVISION (SECOND APPEAL ON THE POINTS OF LAW) IN SERBIAN LITIGATION PROCEEDINGS\*\*

### *Summary*

Revision is an extraordinary legal remedy in Serbian litigation proceedings that enables access to the Supreme Court in litigation proceedings. This paper examines whether the provisions on the second appeal in litigation proceedings are adequate to enable the Supreme Court to fulfil its role – the unification of the case law. The focus of the analysis is the admissibility criteria for the second appeal that constitute filters for accessing the Supreme Court. It has turned out in practice that the filters are not only excessively permeable but inadequate too. A similar problem occurred in the Republic of Croatia and the Republic of Slovenia which is why the law of these countries was analysed in this paper. Recent draft amendments to the CPA are a step forward in reforming the second appeal in Serbia, even though there are provisions that could be improved.

**Keywords:** admissibility criteria, role of the Supreme Court, ex-Yugoslav countries, second appeal on the points of law.

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## REVIZIJA PROTIV PRESUDE U PARNIČNOM POSTUPKU

### *Sažetak*

Revizija protiv presude je vanredni pravni lek u parničnom postupku o kome odlučuje Vrhovni sud Republike Srbije. U ovom radu je analizirano da li su odredbe o reviziji u parničnom postupku adekvatne da omoguće Vrhovnom sudu da ispuni svoju ulogu obezbeđivanja jedinstvene primene prava na teritoriji države. Praksa je pokazala da uslovi za dozvoljenost revizije kao filteri za pristup Vrhovnom (doskoro Vrhovnom kasacionom) sudu nisu adekvatni, kao i da su previše propusni, što je dovelo do preopterećenosti najvišeg suda u zemlji. Slične probleme su imale i Republika Hrvatska i Republika Slovenija pa su rešenja ovih prava analizirana u radu. Najzad, analiziran je i nacrt izmena i dopuna odredaba o reviziji protiv presude iz 2021. godine za koji autorka ocenjuje da bi predstavljao korak napred u reformi revizije, iako su i poboljšanja moguća pre svega kako bi se sprečila dalja preopterećenost Vrhovnog suda.

**Ključne reči:** revizija, dozvoljenost revizije, uloga Vrhovnog suda, pravo zemalja bivše Jugoslavije.

### 1. Introduction

Changes in the rules governing the revision<sup>1</sup>, particularly the special appeal<sup>2</sup>, was one of the core tasks of the workgroup for drafting the Act amending the Civil Procedure Act ('CPA'). The reason therefore was also the need to improve the efficiency of the proceedings before the then Supreme Court of Cassation<sup>3</sup> ('SCC'). Namely, a huge caseload of special appeals was most often rejected as inadmissible<sup>4</sup>. However, it backlogged the SCC. In practice, apparently, the special appeal has become a remedy frequently filed. Therefore, even though Art.

<sup>1</sup> Several terms are being used as translations from the Serbian Revizija and similar remedies in litigation proceedings. Some of these are "second appeal on the points of law," "further appeal on the points of law," or just simply "revision" as translated by Prof. Aleš Galič in his book about civil procedure in Slovenia (Galič, 2019, 309-311). Both terms revision and the second appeal will be used in this paper interchangeably.

<sup>2</sup> In Serbia, there are two subtypes of revision: general appeal and special appeal.

<sup>3</sup> Supreme Court of the Republic of Serbia, since 2023.

<sup>4</sup> As much as 95% of cases according to data in the text of the SCC Initiative to amend the provisions of the Civil Procedure Act governing general and special appeals.

404 of the CPA provides for the second appeal to be permitted only exceptionally, the practice neglects exceptionality which comes down to a rule when the general appeal is not permitted.

Such practice does not correspond to the second appeal objectives. Therefore, amendments are required. Namely, the Supreme Court should be the one to decide on the major issues rather than be a third instance which, usually, follows the second one. The question is how in-depth such amendments should be – whether only to modify the existing second appeal rules or change the entire concept of the second appeal, i.e., extraordinary remedies. Finally, the question is whether the second appeal objectives are set appropriately, or they should be modernized.

Considering the intended amendments to the CPA, the professional community has focused on this issue. Recent discussions and papers concerning revision lack a comparative law analysis that would result in valuable conclusions regarding the second appeal rules in Serbian litigation proceedings. Comparative law in this area is diverse. However, what we find most interesting is the development of the second appeal rules in the former SFRY countries with which we have a shared tradition. Special focus should be on Slovenia's and Croatia's law as these countries have relatively recently reformed their second appeal rules for similar reasons underlying the necessity for modifying the second appeal rules in Serbian law.

## **2. Scope of Application of the Second Appeal in Serbian Law**

The central issue that the reform of the second appeal rules revolves around is the question of the admissibility conditions for the second appeal that constitute filters for accessing the Supreme Court. It has turned out in practice that the filters are not only excessively permeable but inadequate too. As a result, a huge caseload is brought before the Supreme Court, but second appeals are rejected due to inadmissibility in a disproportionately large number of special appeal cases. Therefore, the Supreme Court is backlogged, but primarily with cases in which it does not fulfil its function. This is not a new problem. On the contrary, it has tagged along with the Serbian judiciary for a long time which is attested to by the history of second appeals in litigation proceedings. The scope of application of the second appeal has often been changed in an attempt to resolve this issue.

As the scope of application of the second appeal changed in Serbian law, so did the access to the highest court in the litigation proceedings. The issue of backlogging the Supreme Court and how it affects the authority of the judiciary, i.e.,

the highest court in the country, has been standing out as a motive for changes to the second appeal rules ever since the SFRY era (Poznić, 2009, p. 952). The scope of application of the second appeal depends on the definition of the admissibility conditions for the second appeal which serve as the filters for accessing the Supreme Court. If the filters are inadequate, then the access is either too broadly defined so that the Supreme Court is reached by such cases that are ineligible or too narrowly defined that it fails to encompass such cases that are eligible for accessing the second appeal court. To be able to define the filters, and hence anticipate the scope of application of the second appeal, we need to know what the second appeal objectives are, which will be addressed below.

### **3. Development of the Admissibility Criteria in Serbian Law**

The scope of the second appeal has been changed ever since the 1956 Civil Procedure Act. Under this act, the second appeal was an ordinary remedy (Marković, 1957). Namely, after the takeover of power post-WW2 and the set-up of a new economic system, the decision was made that the system of remedies, as existed per Austrian model that included the second and third instance, was unfit for the new economic system introduced post-1950 (Kamhi, 1967, p. 345). Therefore, after the war the proceedings were at first conducted in two instances (Rakić-Vodinelić, 1981, pp. 79-80) and then the 1956 Civil Procedure Act reintroduced the second appeal, but as an ordinary remedy. The act stipulated the conditions for its admissibility (Kamhi, 1967, p. 368). Then the 1965 amendments significantly limited the second appeal (Poznić, 1970, p. 304) only to have its scope expanded again in the 1976 Act (Poznić, 1977, p. 579). The 1965 amendments limited the second appeal so that it could be filed in one situation only – when the second-instance court decided on the basis of the facts that differ from the facts ascertained by the first-instance court. Such an unusual solution had not been encountered in comparative law (Poznić, 1970, p. 304). The grounds for narrowing the scope of the second appeal concerned disburdening the highest courts and enhancing procedural efficiency back in the SFRY, as well.

The 2004 CPA – Art. 395, in addition to the general appeal, stipulated the special appeal the admissibility of which was decided by the appellate court and the direct appeal, i.e. an appeal with an alternative motion to decide in second appeal proceedings (Art. 389 2014 CPA). The 2009 amendments considerably narrowed the possibility to file a second appeal by increasing the proprietary census for filing a general appeal. The scope of application of the second appeal was further expanded by the applicable CPA, i.e., its 2014 amendments – Art. 13.

#### **4. Unrestrained Increase of Second Appeal Cases**

The possibility to file a second appeal was more broadly determined by the CPA than it had been the case in the time period preceding the 2014 amendments. Since then, the number of proceedings before the SCC continuously grew from 9161 in 2014 to more than 20,000 in 2015 and 2019 to 14,046 received cases in 2020 (2020 Annual Activity Report of the SCC, Belgrade, 2021). Occasional leaps to over 20,000 could be explained by the widely known problem of mass claims in the Serbian judiciary (Association of Judges and Prosecutors in Serbia, Information published 18<sup>th</sup> February 2021). However, apart from this argument, there was a continuous rise in inflowing cases before the SCC.

From the 2020 SCC statistics, it can be concluded that the highest inflow of cases is recorded in civil matters, while it is many times lower in criminal matters and eventually in other cases. As inflowing cases increased, so did the share of special appeal cases in the total number of second appeal cases from 28.5% in 2016 to 56.8% in 2019 (Initiative by the Session of All Judges of the SCC to amend the Civil Procedure Act of 25 December 2019, 4).

As a result of a higher inflow and a continuous increase since 2014 onward this court also faced a growing number of unresolved cases from 3582 in 2014 to 9642 in 2020. With a minor drop in 2017, the increasing number of cases was continuous. Therefore, according to all statistical criteria, the SCC backlog consistently grew.

The overwhelming backlog, by all accounts, made the Session of All Judges of the SCC launch an initiative for amendments to the CPA. The proposed amendments are aimed at limiting the scope of the second appeal. Namely, it is proposed that the provision of Art. 403(2)(2) and (3) be deleted, and the provision of Art. 404 of the CPA be amended, i.e., the admissibility conditions for the second appeal be specified. The objective of the proposed amendments is to unburden the Supreme Court and discontinue the growing inflow of cases. We have seen that this problem is not new in our law, and that there have been attempts at its resolution before.

#### **5. Role of the Supreme Court**

Clearly, the Supreme Court cannot exercise its function duly if backlogged. Namely, a huge caseload of special appeals not even ruled on merits prevents the achievement of the core objective of introducing the second appeal in the first place, that is, reinforcing the role of the highest judicial instance in ensuring uniformity in the law and legal certainty (Stanković, 2004, p. 29). According to the ECtHR,

the Supreme Court should “deal only with matters of the requisite significance” (ECtHR Case 2611/07, 15276/07, para 54). Therefore, the filters to be set by the legislator should be such as to provide access to the second appeal court to the cases that are important, not only in the interest of the parties thereto but in the general interest as well. Today, the objectives in comparative law are quite similar.

The 2021 ELI/UNIDROIT Model European Rules on Civil Procedure state in Rule 172 that second appeal proceedings may be instituted with a view to correcting a violation of fundamental human rights, securing uniformity in the law, resolving a legal issue which is not limited to the case at hand but is of general importance or to developing the law. It is further stated that the court itself may decide whether the permissibility conditions for the second appeal have been fulfilled. So, the second appeal function is determined primarily as public – permitted in situations where the Supreme Court would decide on issues of general importance, and only sporadically private – to achieve individual justice for the parties to litigation proceedings (Bratković, 2018). Such function of second appeal proceedings is justified by the Supreme Court’s role which is also significant in the systems not founded on common law because decisions of the highest court in the country enjoy great authority in the judiciary.

## **6. How to Choose Filters for Accessing the Second Appeal Court?**

If we start from the second appeal objectives and the role of the Supreme Court, we can check if the existing admissibility conditions stipulated by the CPA are adequately regulated. Namely, the current law includes a general appeal with the admissibility conditions that pertain to the value of the dispute’s subject matter, but also to the second-instance court decisions reversing a judgment and deciding on the parties’ claims, i.e., the second-instance court decisions adopting an appeal, revoking a judgment, and deciding on the parties’ claims, and when it is defined so by a special act. In addition, a special appeal is stipulated. A special appeal is exceptionally permitted due to a misapplication of substantive law and against a second-instance judgment that could not be challenged by a general second appeal if, as assessed by the Supreme Court, it is necessary to address legal issues in the general interest or legal issues in the interest of equality of citizens, in order to harmonize jurisprudence, or if a new interpretation of law is required.

Therefore, the second appeal under the current law predominantly serves the private interest, i.e., achieves justice for the parties if filed as a general appeal, while the special appeal is primarily intended to achieve the public interest. However, ruling in general appeal proceedings prevailed in practice. Even though the

number of special appeals is not low, a high share of them is rejected. Therefore, the second appeal proceedings are such that the foregoing public function is not sufficiently fulfilled. In addition, the caseload before the Supreme Court is disproportionately large and the admissibility conditions for the second appeal do not adequately function as the filters for accessing that court.

Namely, the highest court in the country rules in second appeal proceedings as an extraordinary remedy. Access to a third-instance court is not guaranteed by the European Convention on Human Rights within the guarantee of the right to a fair trial and the right of access to a court as its integral part. However, when proceedings before a higher-instance court are stipulated, then all guarantees under Art. 6(1) of the ECHR apply in such proceedings (Jakšić, 2012, p. 83).

Still, review by the Supreme Court should not be unlimited because the decision to be reviewed in second appeal proceedings has become final. Thus, if the access is restricted and if the grounds for the second appeal are limited, second appeal cases should not be as many as to obstruct the Supreme Court's functioning. The related criticism sounded by the judicial community that the second appeal court has become another appeal instance, even though it should not be so, is justified. Such a system of the "second appeal" benefits the instances-mentality which in the event of the countries resulting from the break-up of the SFRY is the legacy of the socialist country litigation system pursuing substantive truth (Bratković, 2018, p. 51). The instances-mentality persevered, but the court's task in the present litigation is different (Bratković, 2018). The victims of such situation are also the interpretations of the admissibility conditions for the special appeal giving rise to overwhelming the Supreme Court of Cassation with a huge caseload of special appeals most of which get rejected. As stated by Bratković, the instances-mentality is one of the reasons for resisting the limitation of the scope of the second appeal in Croatia (Bratković, 2018, pp. 335-336), and in other countries of the former SFRY for that matter, and at the same time for reforming the second appeal by limiting its private function. Finally, it is when second appeal proceedings are stipulated that such remedy is used to ensure the fulfilment of the conditions for exhaustion of remedies for instituting further proceedings.

The resolution of such problem was proposed in 2021 when the Ministry of Justice published the Draft Act amending the CPA on its website.

## **7. Draft Act Amending the CPA**

Both SCC and Ministry of Justice of the Republic of Serbia have been working on the proposal of amendments to the CPA. After the initiative by the Session of All Judges of the SCC had been launched to amend the CPA, the Ministry

of Justice of the Republic of Serbia assembled the workgroup for drafting the Act amending the CPA. The draft also contained proposed amendments concerning the second appeal (Bodiroga, 2021, pp. 159-163). The workgroup proposed amendments to the general appeal rules so that the amount in dispute would no longer be a criterion for the second appeal admissibility, while a second appeal could be filed against an appellate court judgment: when required so by a special act; when the appellate court reversed a first-instance judgment and decided on the parties' claims; when the appellate court adopted an appeal, set aside a first-instance judgment and decided on the parties' claims. Therefore, the proposal by the workgroup was to eliminate the amount in dispute as an admissibility criterion, but at the same time to specify that the second appeal would be permitted only against appellate courts' decisions.

### ***7.1. The Amount in Dispute as Admissibility Criteria***

It was none other than the second appeal census that was the core criterion in our law for accessing the second appeal court for a long time. It was also applied in other legal systems, kindred to ours, such as the German legal circle, and in the countries resulting from the break-up of the former SFRY. The amount in dispute as a filter for accessing a second appeal court is not an illegitimate means of limiting access to the highest judicial instance. This was also confirmed by the European Court of Human Rights in the case *Dobric vs Serbia* (ECtHR Case 2611/07, 15276/07, para 54). However, the question is whether it is adequate.

The adequacy of this filter depends on how the second appeal function is understood. If the second appeal function is more private, i.e., such that the parties achieve justice in individual cases that are of greater importance to them, then the filter is adequate. If the second appeal function is more public, then this means of limiting access to the ECtHR will be inadequate. The tendency to cancel the amount in dispute as an admissibility criterion for the second appeal has long been present in comparative law of the procedural law systems similar to ours. In the Federal Republic of Germany, the amount in dispute was cancelled as an admissibility criterion for the second appeal back in 2001. The second appeal remained a remedy used by parties, but access to a second appeal court was generally limited to the general interest (Rosenberg *et al.*, 2010, p. 819). A change in the paradigm is also present in the countries of the former SFRY, so Slovenia, followed by Croatia, both abandoned the amount in dispute as an admissibility condition for the second appeal and redirected the role of the Supreme Court more towards the general interest.

## 7.2. Other Admissibility Conditions for the Second Appeal

According to the Draft Act, the second appeal would be permitted only when the appellate court has reversed a judgment and decided on the parties' claims, i.e., if the appellate court has adopted an appeal, set aside a judgment, and decided on the parties' claims. In addition, the second appeal is permitted when provided so specifically by the law. Such general appeal is aimed at providing a possibility for a third instance when the first two have disagreed in judgment (Bodiroga, 2021). Apart from that, the grounds on which a general appeal may be filed remain the same, considering no amendment to Art. 407 has been proposed. Therefore, the starting point for this admissibility condition is that the position of a party thereto changed after the second-instance decision had been taken, but it did not require a more general importance as in the case of the admissibility grounds for the special appeal. So, this has left a narrowed scope for fulfilling the second appeal's private law function which is further fulfilled through checking the same grounds for the second appeal as it had been the case earlier. The Supreme Court's public role would come second here as it would be fulfilled indirectly through ruling in these cases. If such a draft were adopted in the legislative procedure, the second appeal would maintain its private function which would exist in its narrow form on the same grounds as before.

In addition, the proposed amendments concerned the special appeal, i.e., instead of the present conditions they proposed the introduction of itemised admissibility conditions for the special appeal. Namely, the proposed amendments in Art. 420a stipulate that a second appeal may be exceptionally filed due to a misapplication of substantive law if "the ruling on a second appeal *is required* to consider legal issues of importance for ensuring uniformity in the law and equality of all in its application, i.e., for ensuring legal certainty or developing the law through jurisprudence". The specificity of proposed amendments is reflected in the legislator itself itemizing when such a need arises. So, Art. 420a(2) details this issue, and the foregoing admissibility conditions are specified and exist: "in the event of a legal issue decided by an appellate court judgment contrary to the Supreme Court of Cassation's established jurisprudence; in the event of a legal issue relative to which no position exists in the jurisprudence of the Supreme Court of Cassation; in the event of a legal issue on which the judgments of different panels of judges of the same appellate court or different appellate courts did not take the same legal view; in the event of a legal issue for which there is uniform jurisprudence of the Supreme Court of Cassation and appellate courts but due to an international agreement concluded or changes in legislation there is a need to take a new interpretation of law and a new legal position on that issue; in

the event of a legal issue for which there is uniform jurisprudence of the Supreme Court of Cassation and appellate courts which due to the legal position taken in decisions by the European Court of Human Rights or the Constitutional Court must be reviewed.”

Even though the proposed draft special appeal rules clearly define the second appeal’s public function and the wording used is common in comparative law for the second appeal function, the proposed draft takes an unexpected turn. Namely, the act itself was clearly defined when there was a need to address legal issues of importance for ensuring uniformity in the law and equality of all in its application, i.e., for ensuring legal certainty or developing the law through jurisprudence. There would be no room left to courts for the interpretation which is common in other countries with the procedural law systems kindred to ours (the German-Austrian legal circle and the former SFRY that have reformed the legal concept of second appeal in litigation proceedings). The legislator would be the one to anticipate and stipulate all situations where a need could arise for filing a special appeal, i.e., specify in detail when a need exists to address legal issues of importance for ensuring uniformity in the law and equality of all in its application, that is, for ensuring legal certainty or developing the law through jurisprudence.

### ***7.3. Change of the Second Appeal Function***

Given that the admissibility conditions for the second appeal as the filters for accessing a second appeal court affect the fulfillment of the second appeal function, it is necessary to analyze how the proposed change of the filters or the admissibility conditions for the second appeal would affect backlog and adequate selection of second appeal cases or what function would be exercised by the Supreme Court.

In the SFRY, the second appeal was defined as a remedy which “in addition to the goal pursued by other remedies, should also have a specific goal: to maintain equal application of the law by lower courts.” (Poznić, 2009, p. 95). Poznić further states that the achievement of this other role of the second appeal was not possible given the organisation of the judiciary and the division of competences and that second appeal proceedings were in fact the third instance of trial. According to the 1976 CPA, the second appeal was “trading off” (Triva, Dika, 2004, p. 719) against the Request for the Protection of Legality in order to achieve not only the goals of trial legality in a specific case, but also of ensuring uniformity in the law. Therefore, in Yugoslav courts’ jurisprudence, the second appeal function was not significantly different from the appeal function. In

the SFRY era, the Supreme Court's public function was fulfilled not through acting on extraordinary remedies but through adopting legal positions (Uzelac & Galič, 2017, p. 11). Some authors insisted that the second appeal objectives should be different; the SC's function in the SFRY era was defined by Rakić-Vodinelić as ensuring uniform and correct application of law, the authority of law and the judiciary, and achieving further development of law by acting in second appeal proceedings (Rakić-Vodinelić, 1981, pp. 61-69). Nonetheless, the private function of achieving individual justice for the parties was not only equally desirable as the public one but also prevailed in practice. After the break-up of the SFRY, the second appeal was changed on several occasions, but in this period its private function also prevailed in practice as it is usually the case when (i) it is statutory provided (Uzelac & Galič, 2017, p. 225).

It is evident that the presently proposed amendments to the second appeal provisions are more comprehensive than before. The previous amendments made minor interventions into the existing concept. What triggered changes to the act was the backlogging of the Supreme Court. So, the amendments could concern only the scope of the second appeal by having the filters narrowed as was done in the past when the second appeal census was reduced from EUR 100,000 in general litigation proceedings and EUR 300,000 in commercial disputes to EUR 40,000 in general litigation proceedings and EUR 100,000 in commercial disputes. Nonetheless, such changes to the proprietary census failed to yield a satisfactory outcome in practice. The most often given reasons for the then amendments were access to a second appeal court for the cases of significant value to the broader population, i.e., the exercise of the right of access to a court. However, the right of access to a court according to the jurisprudence of the ECtHR does not include a guarantee for access to a highest judicial instance. Hence, the amendments were outside the scope of scholarship, any comparative law knowledge or experience, but also contrary to the ECtHR positions, all of which is indicative of the legislator's disorientation in this area.

The change of the amount in dispute as an admissibility condition for the second appeal also reduced the scope of exercising the second appeal's private function, but it still survived. It is emphasized in the scholarship that the combination of the second appeal's private and public functions in practice hardly works because the second appeal's private function always prevails in that situation (Uzelac, Galič, 2017, p. 225). Nonetheless, it seems that such second appeal concept would still limit access to a second appeal court since the admissibility of the second appeal would depend on the type of decision and whether the first- and second-instance courts agreed. However, that approach would continue to be potentially broad and for achievement purposes the grounds for the second

appeal are not compliant with the change in the concept. Therefore, although aimed at the substantive law position, the second appeal is reviewed for the same reasons it used to be.

#### ***7.4. Supreme Court's Function in Second Appeal Proceedings***

The Constitution of the Republic of Serbia does not define the Supreme Court's function further than its designation as the highest court in the country (Art. 143(2)). The Court Organisation Act in its Art. 32(1) prescribes that the Supreme Court shall decide on extraordinary remedies and in other matters defined by the act, and in paragraph 3 of the same Article it prescribes that "the Supreme Court shall ensure uniform judicial application of law and equality of the parties in judicial proceedings, examine application of the act and other regulations and operation of the courts...". This act does not further specify how this function will be fulfilled, or what the functions of extraordinary remedies are. It rests with the CPA to define in litigation proceedings.

The Supreme Court has most cases concerning civil law matters ruled in second appeal proceedings. However, based on Art. 143(3) of The Court Organisation Act it cannot be concluded that the second appeal should principally or at all have the function of ensuring uniformity in the law, equality of the parties or principally have the function of achieving justice for the parties having failed to do so in the previous instances, or that the second appeal should have the private and public functions. In addition, some Supreme Court activities serve none other than to fulfil the public function which is the adoption of interpretative opinions at a session of the Supreme Court's Civil Department. Given the share of second appeals in rulings regarding civil law matters before the Supreme Court, the determination of the second appeal also largely affects the function of the highest court in the country. If the second appeal had a significantly smaller private function of achieving individual justice for the parties to the proceedings, then there would be little room left to fulfil that function before the Supreme Court in litigation proceedings.

Considering the present concept of litigation proceedings and the fact that the court no longer pursues substantive truth (see supra p.7), it is evident why in the legal systems kindred to ours the role of the highest court in the country has changed to be mostly public. In the contemporary societies of European legal area to which we traditionally belong, the Supreme Court will fulfil its public function principally in extraordinary remedy proceedings. However, it is in second appeal proceedings that the Supreme Court cannot adequately fulfil this function. The situation was similar in other countries resulting from the break-up of the SFRY.

Applying the second appeal rules in a similar inherited legal environment, Slovenia and Croatia both faced inefficient proceedings before the highest judicial instance and merely a shadow of the court's role that it once was. To resolve these changes, Slovenia was the first, closely followed by Croatia, to modify the second appeal rules, assigning them a different function. The regulation of the second appeal leading to it being merely another appeal in practice was abandoned and this legal concept was regulated so as to transform the second appeal function into a more public function than a private one. Consequently, the highest judicial instances in these countries are disburdened of a huge influx of cases.

It was first Slovenia and then Croatia that introduced the second appeal by permission in order to reinforce the second appeal's public function and reduce the pressure of a huge caseload. Consequently, supreme courts are not expected to act in proceedings as on any other appeal, but to exercise the public function.

## **8. Slovenia and Croatia**

The Republic of Slovenia and the Republic of Croatia have reformed the concept of the second appeal and introduced the second appeal by permission. These countries are the ones we share legal traditions with. However, a growing number of legal systems opt for a different approach where the second appeal's public function prevails in order to solve the problems of backlogging the highest judicial instance with second appeals that are doomed to fail (Bratković, 2018). For example, the 2001 German reform included the second appeal apart from other filters, only by permission of the then appellate or second appeal court when the importance of such a second appeal exceeds the personal interest (Rosenberg *et al.*, 2010, p. 819).

Thus, Art. 382 of the Croatian Civil Procedure Act prescribes that the parties may file a second appeal against a second-instance judgment if the Supreme Court permitted the filing of a second appeal. Similarly, the Slovenian Civil Procedure Act contains in Art. 367 a provision stating that against a final second-instance judgment the parties may file a second appeal within 15 days of service of the Supreme Court's decision permitting a second appeal.

Such remedy originates from American law (Rakić-Vodinešić, 1981), but as early as in the 1970s, it was transposed into German law. Slovenia (Galič, 2019, pp. 309-311), and then Croatia reformed the legal concept of second appeal to disburden supreme courts and by doing so enable faster decision-making and better filtering of cases to be ruled by the Supreme Court. However, the consequence of this change is also a change to the second appeal function and a change in the Supreme Court's role. In the earlier system of general and special appeals

per a similar model that continues in Serbian law, the second appeal had a two-fold function – to ensure the regularity and legality of decisions and achieve uniformity in the law in the area of application (Bratković, 2016, pp. 322-323). In the first case, the individual interest prevailed, while in the second case, the general interest was primary. However, the general interest prevailed following the reform as a guiding interest of the second appeal regulation. Consequently, the Supreme Court's role became more prominent in the harmonization of jurisprudence, while the highest court's role as a third instance similar to that of an appeal instance almost disappeared.

Thus, the Slovenian CPA stipulates that second appeal proceedings are instituted by a petition to grant a leave to revision. The Supreme Court is competent to grant leave to revision that a party thereto may file within 15 days of serving the decision permitting it. The court permits the second appeal if the Supreme Court's decision can be expected to rule on a legal issue important for ensuring legal certainty, uniformity in the law or developing the law through jurisprudence. Therefore, the second appeal has a predominantly public function. The legislator further specifies in which cases the court will "in particular" permit the second appeal. However, it does not pertain to the enumeration of examples, but room is left for the court to permit the second appeal in other cases as well. The legislator accentuates the legal issue in respect of which a second-instance court decision derogates from the Supreme Court's jurisprudence, the legal issue in respect of which the Supreme Court's jurisprudence is non-existent, in particular, if the jurisprudence of higher courts is not uniform, i.e., the legal issue in respect of which the Supreme Court's jurisprudence is not uniform.

To ensure procedural efficiency, the petition to grant a leave to revision must contain stipulated elements and a party must state specifically and concretely the disputed legal issue and the legal rule that would be infringed upon, the circumstances indicative of its importance, and a brief reasoning as to why the second-instance court has ruled on such issue unlawfully; the claims of procedural violations must be described specifically and concretely, and in the same manner, the existence of the Supreme Court's jurisprudence from which the decision allegedly derogates – lack of uniformity in jurisprudence – must be demonstrated. If the party filing a second appeal invokes the Supreme Court's or second-instance court's jurisprudence, it must state the reference numbers of the cases, and enclose the copies of the court decisions it invokes if they are not made available to the public. Failure to do so results in the rejection of the notice of appeal.

Even though the provisions on the second appeal in the Croatian CPA were written based on the Slovenian counterpart, there are derogations (Bratković, 2020, p. 180). Thus, the Croatian CPA also prescribes the second appeal by

permission. The parties are authorized to file a motion for appeal, and Croatia's Supreme Court will permit the second appeal if a decision on a legal issue important for the ruling in the specific dispute can be expected, but also for ensuring uniformity in the law, equality of all in its application or developing the law in jurisprudence, in particular, if the second-instance court derogated by its decision from the jurisprudence of the Croatian SC, and if the jurisprudence of the Croatian SC is non-existent, especially if the jurisprudence of lower courts is not uniform or if under the statutory required conditions it is necessary to review the jurisprudence of the Croatian SC due to a new decision by the Croatian Constitutional Court, European Union Court or ECtHR. In addition, the Croatian SC will permit the second appeal if a fundamental human right has been violated in lower court proceedings, and a party thereto, whenever possible, has argued so. Therefore, just like the Slovenian legislator, the Croatian legislator does not close the door for the court to permit the second appeal whenever possible, but it specifies in what cases it will particularly do so.

Nevertheless, the mandatory elements of the motion for appeal are prescribed. This is the common legislative technique when increased procedural efficiency and discipline are desirable.

## **9. 2021 Draft Amendments - Concluding Remarks**

The Serbian Draft amendments CPA still retains both general and special appeals. Even though the Draft CPA has obviously been written under the influence of Slovenia's and Croatia's law. However, this influence is not substantial.

Thus, the special appeal will be permitted due to a misapplication of substantive law to address legal issues of importance for ensuring uniformity in the law and equality in its application, i.e., for ensuring legal certainty or developing the law through jurisprudence. The change is proposed on how to define the notion of 'special appeal'. It is proposed that "issues of the general interest" should no longer be included in the designation of "special appeal", while the entire definition is virtually identical to that of the second appeal by permission in Slovenian and Croatian laws.

It is followed by an itemization of admissibility conditions for the special appeal. The grounds are very similar to those stated in the Croatian or Slovenian act, except that the acts do not itemize when the second appeal is admissible but state the conditions when it will be permitted in particular. Since the itemization of the admissibility criteria is rather untypical, it is hard to assess the effects that such a provision would have in practice.

It is safe to assume that this should address an acute problem in our legislation. This problem is too broad interpretation of the admissibility conditions for the special appeal. Itemizing the admissibility criteria is how this problem is to be alleviated. The intention is to “rescue” the judiciary from any future excessive influx of special appeals that would be rejected in 95% of cases. However, the possibility to permit the second appeal in a situation not provided for by the legislator is being lost. Such an approach is unusual in other legal systems we normally look up to even though specific elements are like those in comparative law.

The question is whether the existing concept of the second appeal that was changed with this is in fact only reshaped to alleviate the problems in practice rather than actually changed. Aversion towards judicial discretion is the legacy of the socialist SFRY (Galič, 2015, pp. 99-124). Nonetheless, the formalistic approach in that era existed within pursuance of substantive truth in litigation proceedings, while in present-day Serbia, an excessively formalistic approach and overly detailed legal regulation are what can yield a totally opposite result.

Would this approach make Serbia move closer to hyper positivism, in which the linguistic and logical interpretation is prioritized over other methods, and the judge is seen as a mechanism for subsuming facts under a norm (Manko, 2013, p. 7), or is this just a pragmatic approach to resolve the backlog? In theory, it relies on the Soviet legal theory where law comes down to whatever is prescribed by authorities, while the law created by judges, the application of general legal principles or good practice are reduced (Manko, 2013, p. 8). But would the special appeal admissibility criteria actually be a good example of hyperpositivism? The difference between itemizing and specifying is not big in this provision and the answer is no.

We can ask the question of how the legislator is to solve the problem of a huge caseload of special appeals overwhelming the Supreme Court if not in the described manner. Certainly, barriers need to be created to bring about a special appeal being filed subject to the highest professional and ethical standards in order to lessen abuses that are frequent.

The barriers set by the legislator should normally serve legal certainty or enable the proper course of proceedings. According to the position of the ECtHR, that is the case with the mandatory representation by legal counsel in the proceedings initiated on the basis of an extra-ordinary remedy (ECtHR judgment no. 3067/08 of 11 February 2013, p. 51). These objectives (legal certainty and enabling proper course of the proceedings) should also be the guidance when writing the mandatory elements of the special appeal.

Furthermore, the Draft stipulates the mandatory elements of the special appeal in a very detailed manner. For example, it distinguishes between the

ECtHR and Constitutional Court decisions that only need to be indicated, while the appellate court decisions invoked by the party need to be submitted. Such a desire for detailed and clear regulation may put the parties in an unfair position. The issue of the availability of jurisprudence may be changed and it should not be a change giving rise to instituting an amendment procedure for the act. Once again, the legislative technique is different in Croatia and Slovenia. In Slovenia, in the event of a claim that jurisprudence is not uniform, the party undertakes either to submit the decision it invokes or to indicate it as required. In Croatia, as we have seen, the party undertakes to submit such a decision if it is not publicly available. Once again, Serbian proposal is a very detailed regulation.

Serbian draft law cannot be designated as hyper-positivistic. However, it does have a judiciary-centered perspective and a high level of formalism, which are all distinctive features of „Mediterranean legal systems“ (Uzelac, 2009).

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