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EXTRAORDINARY REMEDIES AND CONSTITUTIONAL COMPLAINT IN SERBIAN CIVIL PROCEDURE AS AN ADMISSIBILITY CONDITION FOR ECtHR APPLICATIONS[***]

This article examines the European Court of Human Rights' (ECtHR) approach to the exhaustion of extraordinary legal remedies and constitutional complaints in civil cases against Serbia. It explores when an applicant, alleging a human rights violation based on facts considered in civil proceedings, must exhaust such remedies to satisfy admissibility requirements. While it is generally accepted that an ordinary appeal must be used, the obligation to pursue extraordinary legal remedies – such as requests for revision or reopening of proceedings – and the constitutional complaint is less clear. The article highlights that the necessity of exhausting these remedies depends on the specific circumstances of each case and whether the remedy is considered effective. Through an analysis of ECtHR case law, the authors seek to clarify the conditions under which the Court expects applicants to exhaust these legal avenues before filing an application, aiming to identify consistent patterns in the Court's admissibility decisions.

Key words: *European Court of Human Rights. – Conditions of admissibility. – Exhaustion of legal remedies. – Extraordinary legal remedies. – Constitutional complaint.*

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1. ON OTHE RULE OF EXHAUSTION OF LEGAL REMEDIES

The European Court of Human Rights (ECtHR or Court) considers exclusively the merits of those applications that had previously been examined by all effective domestic instances – a rule known as the exhaustion of legal remedies.[1]

In the system of European protection of human rights, of which the Republic of Serbia is a part, Article 35 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) is relevant,[2] stating that "[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of four months from the date on which the final decision was taken."[3]

The Court has also pointed out in its jurisprudence that the rule of exhaustion is one of the fundamental principles that constitute an indispensable part of the functioning of the judicial system under the Convention.[4] The rule is closely linked to one of the main features of the modern system of settling disputes in the field of human rights at the supranational level – the principle of subsidiarity (see Spano 2014; Todorović 2017).[5] The nature of the protection of human rights at the

[1] In English, *domestic remedies rule* or *rule of exhaustion of domestic remedies*. The rule of exhaustion of legal remedies exists also a part of international customary law. *See* Romano 2013, 561; ICJ, Elettronica Sicula S.p.A. (ELSI) (United States v. Italy), Judgment (20 July 1989), paras. 46, 50, 59; ICJ, Interhandel (Switzerland v. United States), Judgment (21 March 1959), p. 27. *See also* the position of the International Law Commission in codifying international customary law of diplomatic protection (International Law Commission 2006, Arts. 14 and 15.

[2] The Convention's previous Article 26. The ECtHR case law that refers to this Article, before Protocol No. 11 of November 1998 came into force (which modernized the Convention and the human rights protection system at the European level with a permanent court in Strasbourg) is also relevant for the application of Article 35.

[3] The Convention on the Protection of Human Rights and Fundamental Freedoms, Article 35(1). Emphasis added. The referenced and current four-month period was previously set to six months, which changed with the coming into force of Protocol No. 15 in August 2021. See Council of Europe, Protocol No. 15 to the European Convention on Human Rights, *Council of Europe Treaty Series*, No. 213, Strasbourg, 24 June 2013.

[4] ECtHR, *Demopoulos et al. v. Turkey*, No. 46113/99, 1 March 2010, p. 69, 97.

[5] Judge Cançado Trindade also stresses that the ECtHR was sufficiently careful to emphasize the subsidiary nature of the international apparatus for the protection of human rights, established by the Convention. In the Belgian Linguistics case (merits), judgment of 23 July 1968, p. 34 paras. 9–10, the Court held that it "cannot assume the rôle of the competent national authorities, for it would thereby

international level is secondary to that afforded by the Contracting States. The practical application of the principle of subsidiarity takes shape in the rule that before turning to the supranational apparatus, the individual must first utilize the legal means available to them in their home country (see Romano 2013, 563).[6] The local protection system is primary because there is a presumption that each state is best placed to provide a system of human rights protection for its citizens. On the other hand, the objective of protection at the supranational level is reflected in the promotion of certain universally accepted values, while at the same time guaranteeing the minimum standards that complement the national ones. Such dynamics allow for the protection of national autonomy and diversity among the member states of international human rights protection systems (whether it is the ECtHR or some other regional protection regime) (Feichtner 2007, para 5, 23; Marinković, Krešimir 2016, 336), while at the same time guaranteeing a certain minimum of protection at the supranational level.

Additionally, in the context of the former law of diplomatic protection of aliens (an area that yielded the original practical application of the exhaustion rule), Chittharanjan F. Amerasinghe considers that the rule of exhaustion of legal remedies in this type of law concerns three interests: first, the interest of the respondent state to utilize its domestic means of dispute resolution; second, the interest of the foreign citizen in resolving the dispute in the most effective, equitable and cost-efficient way; and third, the interest of the international community in ensuring the fair and effective resolution of disputes. In the law of diplomatic protection, primacy is given to the interests of the respondent state, leaving the other two interests in second place. On the other hand, the same author deduces that, due to the nature of the individual in the protection of human rights (who is not, as in the case of the law of diplomatic protection, identified through their state, *i.e.*, an impersonal entity) the interest of the individual is more dominant in

lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention" (Trindade 1978, 333–370, 346). See Trindade 1976, 501–02; Duruigbo 2006, 1272. On the effect of the exhaustion requirements to the ECtHR's ability to afford redress to the victims of human rights violations and the protection of the rule of law erosion in "neoliberal democracies", see Hanci 2024.

6 Systems that do not require this step and allow for direct access are rare but existent; see, e.g., appeals procedure of the International Labor Organization Article 26, and the collective appeals procedure of the European Social Charter.

the rule of exhaustion of legal remedies in human rights law. This is reflected primarily through the exceptions to the application of the rule (Amerasinghe 1968, 269–271).

Returning to Article 35(1) of the Convention, it is important to note that the provision that reads "according to the generally recognised rules of international law" is interpreted by the same author (albeit in the context of a similar article of another international instrument) in terms of two principles: local remedies must be used and there are exceptions to this rule in favor of the interests of either the individual or the state. In the context of the European system of protection of human rights, it is noted that the *travaux préparatoires* give little indication on how the old Article 26 of the Convention (now Article 35) should be interpreted (Amerasinghe 1968, 272).

Further, with regard to Article 35(1) of the Convention, it should be noted that the exhaustiveness of "all domestic remedies" is a very general and broad condition.[7] Cesare P. R. Romano points out that it is precisely the generality and vagueness of the exhaustion rule in international human rights regimes that has given the decision-making bodies room for maneuver in elaborating the exact scope of the rule and its exceptions (Romano 2013, 565).

The Contracting Parties apply the condition of exhaustion of "all domestic remedies" to the extent permitted by their domestic judicial systems. In this regard, there is also the issue of understanding the definition of domestic remedies in each specific local legal order and its practical implication for a potential applicant before the Court.

Rodoljub Etinski points out that the official translations into Serbian of the English term "remedy" in international instruments may sometimes also mean "the right to appeal", as in the International Covenant on Civil and Political Rights of 1966. Generally, however, under Serbian law, legal remedies are understood as appeals "and extraordinary legal remedies, such as revision, request for the protection of legality or motion for retrial" (Etinski 2004, 430, translated by author).

In the context of the Court's case law, there is no doubt that an appeal, as the first and ordinary instance, must be used in order to proceed in accordance with Article 35 (1) of the Convention. But, what about the other legal remedies that are available in most cases, once the decision has become final and binding? Within the meaning of Article 35 (1) of the Convention, are extraordinary legal remedies – those that can be filed even after the

[7] On the legal nature of the exhaustion rule, see Tubić 2008.

decision becomes final and binding, including constitutional complaint, as a special type of legal remedy – considered being internal remedies within the meaning of Article 35 (1) of the Convention? If so, does the ECtHR always expect *all* extraordinary legal remedies to be exhausted in each specific case, or only some of them? Is it expected that the constitutional complaint will always be used?

The answers to these questions are shaped by the Court's practice, and its conclusions are constantly evolving, so monitoring the progress in this field is a dynamic and challenging task. The Convention is interpreted as a "living instrument", in the context of changing social circumstances in the European countries. Therefore, it should not be surprising that the answers given by the ECtHR to certain questions are not static, but change over time (Etinski 2004, 436). Taking into account the fact that the case law of the ECtHR is constantly changing, Romano points out that it is often difficult for the applicant to conclude for themselves whether, in a particular case, the exhaustion rule has been observed with the legal remedies they have used or whether there is scope for the application of certain exceptions (Romano 2013, 567).

As a general remark, the rule emerges that there is no single solution. In each specific case in which an application to the ECtHR is being prepared, it is necessary to determine separately whether the applicant has previously exhausted everything that the domestic system offers them in this type of dispute, given the nature of the facts and legal violations in that particular case. In the first place, the differences are reflected in the nature of the dispute, *i.e.*, whether the alleged violation of human rights occurred in criminal, civil or administrative proceedings.

While the number of applications before the ECtHR against Serbia is not negligible,[8] the issue of exhaustion of legal remedies in terms of admissibility of Serbian applications to the ECtHR in various types of disputes has so far not been the subject of more detailed academic considerations. The general observations, with reference to the case law of the Court against various States Parties to the Convention on the condition of exhaustion, provide a general framework, but do not facilitate the task of a potential applicant against Serbia in considering whether the procedural condition will also be considered satisfied in terms of its admissibility. The ECtHR's Practical Guide on Admissibility Criteria (Admissibility Guide) does not provide an unambiguous solution to this issue. In the section dealing with the exhaustion

[8] See European Court of Human Rights 2024, 7. See also, Republic of Serbia ECtHR Representative n.d.

rule, the Admissibility Guide points out that it is not a requirement that discretionary[9] or extraordinary legal remedies have been exhausted, except in situations where it has been established that a particular remedy is effective under local law or that challenging a decision that has already acquired the force of finality is the only way to obtain the protection at the local level (Registry of the European Court of Human Rights 2023, 31).

Additionally, the analysis of the Court's case law regarding the admissibility of applications in cases against Serbia has a practical significance when the scope of consideration is narrowed according to a criterion, such as the type of procedure or the violation of a specific right. In this paper, the authors focus on the study of these issues in relation to civil proceedings, *i.e.*, to claims arising from the violation of personal rights and disputes arising from family, labor, commercial, property and other civil law relations.

In particular, the question under investigation is as follows: when an ECtHR applicant against Serbia argues that its human rights have been violated with reference to the facts that were addressed in civil proceedings, will they be expected to use extraordinary legal remedies, in what situations, and which ones? Although the ECtHR is clear in its position that the assessment of which legal remedies must be met depends on the particularities of each individual case, the authors aim to analyze the current practice of the ECtHR in cases involving Serbia[10] and to determine whether certain regularities can be found in the ECtHR's considerations concerning alleged human rights violations where the applicants had sought their protection through civil proceedings. As such, even if it does not identify clear regularities capable of facilitating future considerations, the analysis aims to at least shed light on the criteria and parameters that guided the Court in its assessment of the effectiveness of an extraordinary legal remedy in the light of the rule of exhaustion.

In that regard, below we provide an overview of the ECtHR's views on the characteristics of the rule of exhaustion in the application of Article 35 (1) of the Convention[11] in practice (Section 2), followed by an overview on how the ECtHR approaches the need for the exhaustion of extraordinary legal remedies in general (Section 3). Finally, the types of extraordinary

[9] It should be noted that not all extraordinary legal remedies are discretionary.

[10] The authors aimed to present the most relevant cases involving Serbia regarding the issue of exhaustion of legal remedies and the application of Article 35(1) of the Convention, available as of July 2024.

[11] This paper analyzes only the exhaustion of legal remedies in the context of admissibility of ECtHR applications. The exhaustion of local remedies may also be relevant on the merits, but this issue is excluded from the analysis.

legal remedies available in Serbian civil proceedings will be presented (Section 4), and the practice of the ECtHR will be discussed in relation to the effectiveness of any extraordinary legal remedy that can be used for violation of rights in litigation in the Republic of Serbia (Sections 5, 6, and 7), as well as constitutional complaints (Section 8), concluding with remarks (Section 9).

2. CHARACTERISTICS OF THE RULE OF EXHAUSTION: APPLICATION OF ARTICLE 35 (1) OF THE CONVENTION IN THE PRACTICE OF THE ECtHR

The judgments of the ECtHR have so far crystallized the understanding that the applicant must exhaust all the remedies that, in the light of the facts and circumstances of the specific violation of the law, are "available", "effective"[12] and "sufficient" in the case at hand.[13] However, these terms also have their own specific meaning created by the case law of the ECtHR. The commentary of Serbian authors on the Convention points out that it is possible to conceptually distinguish between the concepts of sufficiency and effectiveness, despite the overlap between the two that is often observed in practice (Beširević *et al.* 2017, 468). In short, it can be said that sufficiency means that a legal remedy, if successfully used, may provide satisfaction to the victim for the violation of their rights. Effectiveness, in turn, means that the remedy is affordable, can directly remedy the situation to which the complaint relates, and offers a reasonable chance of success.[14]

[12] Regarding the definition of effectiveness, Etinski also examines the relationship between the right to an effective remedy (Article 13 of the Convention) and the exhaustion of domestic remedies as a procedural prerequisite for the admissibility of a request for initiating proceedings. He finds that if the question of the admissibility of a request is closely linked to the question of the merits of the request, the ECtHR may combine its decision on both issues and decide them in its judgment. The ECtHR may do so when the issue of remedies is raised before it as a State's objection to the admissibility of a request, on the one hand, and as the request brought before it by an individual, on the other. The same author also notes that in some cases when it judges the effectiveness of a remedy on the basis of a request under Article 13 of the Convention, the ECtHR refers to the criteria it has established in its decisions on admissibility regarding the exhaustion of domestic remedies (Etinski 2004, 436, 454).

[13] ECtHR, *Krstić v. Serbia*, Application No. 45394/06, Judgment of 10 December 2013, para. 71 *https://hudoc.echr.coe.int/eng*.

[14] ECtHR, *Riđić and Others v. Serbia*, Applications Nos. 53736/08, 53737/08, 14271/11, 17124/11, 24452/11, and 36515/11, Judgment of 1 July 2014, para. 65.

Nevertheless, "[t]he applicant is exempt from the obligation to exhaust domestic remedies if, having regard to previous and established domestic case law, that form of protection is doomed fail, as well as if domestic remedies are ineffective or inadequate having regard to the nature of the violation of rights committed" (Kristić, Marinković 2016, 54).[15] Krstić and Marinković point out that with such a flexible interpretation of Article 35, the Commission and the Court have expanded the possibility of initiating a European system of protection of human rights (Kristić, Marinković 2016, 54; Sudre 2003, 426–427). In this light, Etinski also points to the *Egmez v. Cyprus* case where the ECtHR considered the existence of a violation of Article 13 of the Convention guaranteeing the right to an effective legal remedy before national authorities. In that case, the ECtHR found that recourse to the Ombudsman was not considered to be a legal remedy required by Article 35 (1) of the Convention, but that its use may make sense in the context of Article 13 of the Convention. The Ombudsman sent his report to the Public Prosecutor that Erkan Egmez had been subjected to torture, but the Public Prosecutor did not initiate criminal proceeding. For this reason, the ECtHR found that Egmez, by addressing the Ombudsperson, had fulfilled his obligation under Article 35 (1) of the Convention, even though he had not initiated a civil action for damages because his chances of success would have been slim without evidence that would have been obtained in the criminal proceedings (Etinski 2004, 455).[16]

In addition, the Court has repeatedly held that the remedy must provide additional monetary compensation in order to be considered effective within the meaning of the exhaustion rule.[17] In *Đermanović v. Serbia*, the Court held that "the decisive question in assessing the effectiveness of a remedy concerning a complaint of ill-treatment is whether the applicant can raise this complaint before domestic courts in order to obtain *direct and timely redress*, and *not merely an indirect protection* of the rights guaranteed in Article 3 of the Convention".[18]

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[15] Krstić and Marinković opine that by such a flexible interpretation of Article 35, the Commission and the Court have expanded the possibility of launching a European system of human rights protection.

[16] ECtHR, *Egmez v. Cyprus*, Application No. 30873/96, Judgment of 21 December 2000, para. 66.

[17] ECtHR, *Mirković and Others v. Serbia*, Applications Nos. 27471/15, *et al*, Judgment of 26 June 2018, para. 114. Similarly, in ECtHR, *Đermanović v. Serbia*, Application No. 48497/06, Judgment of 23 February 2010, para. 39.

[18] *Đermanović v. Serbia*, 23 February 2010, para. 39, emphasis by author.

As previously pointed out, the definition of domestic remedies is approached differently, depending on the jurisdiction under consideration. In addition, the ECtHR itself tends to change its position in its judgments depending on the national judicial authority of a State party to the Convention that the applicant should have addressed before submitting the application in Strasbourg. The change in the position of the ECtHR is primarily motivated by a different understanding of the effectiveness of a specific legal remedy in the protection of a human right in a single judicial system of a Member State. The ECtHR is not satisfied with a formal and theoretical observation of the elements of exhaustion, but essentially considers the effect, *i.e.*, the effectiveness that each individual legal remedy has on the satisfaction of the right protected by the Convention before the domestic judiciary. The ECtHR takes into account not only the existence of formal remedies in the legal system of a Contracting State "but also the legal and political context in which they operate, as well as the personal circumstances of the applicants" (Etinski 2004, 455, translated by author). Such an approach results not only in frequent changes in the conclusions as to which remedy must be exhausted but also provides a clear indication to the Member State on whether the work of the courts to protect rights before a particular domestic judicial authority can be considered effective.[19]

On the other hand, the Court stresses that Article 35(1) of the Convention must be applied with "some degree of flexibility and without excessive formalism",[20] and that the rule of exhaustion of legal remedies was "neither absolute nor capable of being applied automatically".[21] In addition to the general availability of remedies, the application of this provision also accounts

[19] In the Serbian public, the new position of the ECtHR expressed in one of its judgments, that the legal remedy is considered effective and necessary to satisfy exhaustion, is sometimes received in an extremely positive manner. See, for example, the statement by Bosa Nenadić, President of the Constitutional Court of Serbia at the time when the decision was made in the *Vinčić and Others v. Serbia* case, in which the ECtHR declared the constitutional complaint an effective legal remedy (see below). M. Petrić. 2009. "U Strazbur samo posle ustavne žalbe". *Politika*. December 2009.

[20] See also *Mirković and Others v. Serbia*, 26 June 2018, para. 114. A good example is also an old case dating back from 1979, where, then the Commission found that an application by a prisoner against the United Kingdom was admissible, as the applicant was justifiably unable to exhaust the local legal remedies because the state had prevented him from doing so for almost two years. ECtHR, *Reed v. UK*, No. 7630/76, paras. 8–11. See Bratza, Padfield 1998, 222.

[21] The rule of exhaustion of domestic legal remedies is neither absolute nor automatic, "primarily because the Court takes into account the fact that its primary function is the protection of human rights and fundamental freedoms." (Krstić, Marinković 2016, 54, citing Leach 2001, 78, translated by author)

for "the particular circumstances of each individual case".[22] This means, *inter alia*, that it is necessary to take into account not only the existence of formal remedies but also the "personal circumstances of the applicants".[23] Also, in one case, the Court held that, in situations where the national legal system offers "more than one potentially effective remedy", the applicant should have recourse to only one remedy of his choice.[24] Further, from the Court's case law,[25] Etinski concludes that the effectiveness of the legal remedy is not conditioned by the certainty of a positive outcome for the applicant, but by the speed of the State's response (Etinski 2004, 437). This means that effectiveness puts an important emphasis on the efficiency of the State in the protection of rights. If a legal remedy is known to be subject to a procedure that is inefficient due to its length, such a legal remedy may be considered ineffective. However, the question arises in which situations the applicant will rightly be able to argue that the slowness of the procedure renders the remedy ineffective, and that this is not the usual slowness of legal systems, which is often the case in certain States Parties to the Convention.[26]

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[22] ECtHR, *Grudić v. Serbia*, Application No. 31925/08, Judgment of 17 April 2012, para. 49.

[23] *Grudić v. Serbia*, 17 April 2012, para. 49.

[24] See ECtHR, *Popović and Others v. Serbia*, Applications Nos. 26944/13, *et al*, Judgment of 30 June 2020, para. 58. This rule, however, applies to situations in which the Court was faced with the respondent State's argument that the applicant allegedly had the opportunity to avail themselves of a remedy not only from one but several different domains of law (civil, administrative, criminal, etc.), and does not sufficiently assist in understanding the Court's case law when it comes to considering the need to use extraordinary legal remedies. See ECtHR, *Karako v. Hungary*, Application No. 39311/05, Judgment of 28 April 2009, paras, 13–14; ECtHR, *Kozacioğlu v. Turkey*, Application No. 2334/03, Judgment of 19 February 2009, paras. 39–46.

[25] Relying on ECtHR, *Smith and Grady v. the United Kingdom*, Applications Nos. 33985/96 and 33986/96, Judgment of 27 September 1999, para. 135.

[26] Similarly, in ECtHR, *Šorgić v. Serbia*, Application No. 34973/06, Judgment of 3 November 2011, para. 55. "[I]t has been repeatedly recognized that the speed of the domestic procedure is relevant to whether a given remedy is to be deemed effective and hence necessary to exhaust in terms of Article 35 § 1 of the Convention (see, for example, *Mitap and Müftüoğlu v. Turkey*, no. 15530/89 and 15531/89, Commission decision of 10 October 1991, DR 72, p. 169; see also the reference to the said decision in the matter of *Selmouni v. France*, no. 25803/94, Commission decision of 25 November 1996, DR 88–3, 55). Indeed, the excessive length of domestic proceedings may constitute a special circumstance which would absolve the applicants from exhausting the domestic remedies at their disposal (see *X. v. the Federal Republic of Germany*, no. 6699/74, Commission decision of 15 December 1977, DR 11, p. 24; and *Okpisz v. Germany* (dec.), no. 59140/00, 17 June 2003)."

When submitting their application, the applicants must also comply with the applicable rules and procedures of domestic law, including time limits, and the submission of appropriate evidence in support of the submissions in the domestic proceedings. Otherwise, there is a risk of noncompliance with the condition laid down in Article 35 (1) of the Convention.[27] On the other hand, in proceedings before a domestic authority, it is not necessary to explicitly invoke an infringement of a right protected by the Convention if such a complaint is raised, at least tacitly.[28] In addition, the existence of these remedies must be sufficiently certain not only in theory but also in practice, because a failure would deprive them of the necessary accessibility and effectiveness.[29]

The respondent State bears the burden of proof that an effective remedy has not been exhausted and that the application is inadmissible (unless a remedy is not considered effective as a matter of principle).[30] The respondent State must satisfy the Court that an effective remedy was available both in theory and in practice at the relevant time – in other words, that the remedy was available, that it could have provided satisfaction in relation to the applicant's complaint, and that it offered a reasonable prospect of success.[31] Once this burden of proof is discharged, the applicant must establish that the legal remedy offered by the respondent State had been essentially exhausted, or that it was inadequate and ineffective in the particular circumstances, or that specific circumstances relieved the applicant of this requirement.[32]

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[27] ECtHR, *Pop-Ilić and Others v. Serbia*, Application Nos. 63398/13, 76869/13, 76879/13, 76886/13, and 76890/13, Judgment of 14 October 2014, para. 37. See also *Mirković and Others v. Serbia*, 26 June 2018, para.113.

[28] *Riđić and Others v. Serbia*, 1 July 2014, para. 64. It is not required that the applicant has expressly alleged in the domestic proceedings that a right guaranteed by the Convention has been violated, but it is sufficient that they have presented the essence of their subsequent complaint to the Court alleging a violation of that right (Beširević *et al.* 2017, 465). However, in order to remove any doubt, it is advisable to refer to the relevant provision of the Convention in the domestic proceedings as well. In addition, it should be borne in mind that domestic legal remedies must be exhausted in relation to each violation of the Convention alleged in the representation (Beširević *et al.* 2017, 465).

[29] *Mirković v. Serbia*, 26 June 2018, para. 97. Also *Đermanović v. Serbia*, 23 February 2010, para. 37.

[30] That said, Romano points out that the admissibility of the application must first be established by the applicant, precisely in their submission (Romano 2013, 568).

[31] *Krstić v. Serbia*, 10 December 2013, para. 71.

[32] *Pop-Ilić and Others v. Serbia*, 14 October 2014, para 38. For more on burden of proof, see Robertson 1990.

3. EXHAUSTION OF EXTRAORDINARY LEGAL REMEDIES IN ECtHR CASE LAW

First, it should be noted that extraordinary legal remedies are understood to be all those remedies that can be filed after the decision has become final and do not have a suspensive effect on the execution of that decision. Ordinary legal remedies, on the other hand, are filed against decisions that have not yet become final and may still be subject to review by higher instances, with a suspensive effect on enforcement. Extraordinary legal remedies are rarer than the ordinary ones, and the requirements for lodging them are narrower and more stringent. They are dedicated to correcting the actions of lower courts that are of such nature or gravity that they could not be corrected in regular proceedings, while also harmonizing law at the system level. Extraordinary legal remedies are often decided by the highest judicial instance.[33]

Despite the fact that the practice of the ECtHR with regard to extraordinary legal remedies is not sufficiently crystalized, at times and depending on the case-specific circumstances, extraordinary legal remedies may be considered domestic remedies within the meaning of Article 35 of the Convention. This is especially the case when in the given legislation a particular extraordinary remedy is clearly considered effective and has a reasonable prospect of success.

There are cases in which the ECtHR has taken the view that Article 35 (1) does not require the mandatory lodging of extraordinary legal remedies or that the period of six months (now four) can be extended, with the argument that these remedies had not been exhausted.[34] In addition, Krstić and Marinković point out that the exhaustion of internal remedies can only apply to those forms of intervention "that do not represent a mere possibility or privilege, such as extraordinary remedies or a request for a pardon" (Krstić,

[33] This is also the case with revisions and request for review of a final and binding judgment in the Serbian legal system, and, exceptionally, with motions for retrial. See Articles 405, 423, 433a of the CPA. In the French legal system, the Court of Cassation (*la Cour de cassation*) decides on the request for cassation (*le pourvoi en cassation*). See Article 604 of the French Code of Civil Procedure. This is not the case with the remaining two extraordinary legal remedies: *la tierce opposition* and *le recours en révision*.

[34] See ECtHR, *Çincar v. Turkey*, Application No. 30281/06, 2003; ECtHR, Prystavska v. Ukraine, Application No. 21287/02, 2002; Registry of the Council of Europe 2023, p. 32.

Marinković 2016, 54, translated by author). Bratza and Padfield reach a similar conclusion, citing the *Deweer v. Belgium* case (Bratza, Padfield 1998, 222).[35]

It is important to note that the value of understanding whether a particular extraordinary legal remedy is a condition for the admissibility of an application to the ECtHR is relevant primarily for the clarity of the deadlines and a better action strategy for the potential applicant who claims to have been a victim of a human rights violation. Whether a particular extraordinary legal remedy constitutes a condition for filing an application also leads to a different running date of the four-month deadline for submitting an ECtHR application.

On the other hand, the adoption of unambiguous conclusions on the effectiveness and thus the necessity of exhaustion of extraordinary legal remedies in a legal system cannot be given without a prior detailed consideration of the Court's case law, with special reference to the facts of the particular case and the specifics of the legal system in question. This is because an exception may be based on the facts of the underlying case, with the Court finding that the domestic authority does not afford sufficient protection by a legal remedy in question, and taking the view that the applicant has the right to have immediate recourse to the supranational authority without further hindrance, even if the ECtHR previously considered the legal remedy to be effective and subject to exhaustion.

4. EXTRAORDINARY LEGAL REMEDIES IN SERBIAN CIVIL PROCEDURE

In the part on extraordinary legal remedies, the Civil Procedure Act[36] of the Republic of Serbia (CPA), prescribes that a final and binding judgment issued at the second instance may be subject to: revision,[37] request for review of a

[35] ECtHR, *Deweer v. Belgium*, Application No. 6903/75, Judgment of 27 February 1980, para 32.

[36] Civil Procedure Act, *Official Gazette of the Republic of Serbia*, Nos. 72/2011, 49/2013, 74/2013, 55/2014,87/2018, 18/2020, and 10/2023.

[37] A request for revision may be submitted within 30 days of the date of receipt of the second instance judgment and it is always allowed if: it is prescribed by a special law; the second-instance court has modified the judgment and decided on the parties' requests; and the second-instance court has accepted the appeal, revoked the judgment and decided on the parties' requests. The monetary threshold for property disputes is the dinar equivalent of EUR 40,000 at the mid-market exchange

final and binding judgment,[38] or motion for retrial.[39] Article 434 of the CPA further addresses when these remedies may be filed jointly, stating that the

rate of the National Bank of Serbia on the day the lawsuit is filed. A special revision is one that is exceptionally permitted due to the incorrect application of substantive law and against a second-instance judgment that could not be challenged by revision, if, in the opinion of the Supreme Court (previously the Supreme Court of Cassation), it is necessary to consider legal issues of general interest or legal issues in the interest of equality of citizens, for the purpose of harmonizing judicial practice, as well as if a new interpretation of the law is necessary. The submitted revision does not stay the execution of the final judgment against which it is filed. The reasons for filing a revision are a significant violation of the provisions of civil procedure, incorrect application of substantive law, and exceeding the claim only if such violation was committed in the proceedings before the second-instance court. The Supreme Court decides revisions. The revision must be filed through a lawyer (except if the party is a lawyer).

[38] The Public Prosecutor of the Republic of Serbia has the legal standing to file a request for review of a final and binding judgment rendered in the second instance, which violated the law to the detriment of the public interest. The request is to be filed with the Supreme Court, within three months from the date of the judgment becoming final and binding. The Supreme Court decides on the request without a hearing. If both revision and request for review of a final and binding judgment are filed against the same decision, the Supreme Court will decide on these legal remedies in a single decision. The former request for protection of the legality by the public prosecutor is today called a request for review of a final and binding judgment (Rakić-Vodinelić 2011, 554).

[39] There are 12 reasons why a procedure that has been terminated by a court decision, in a final and binding manner, may be repeated at the request of a party within 60 days or 5 years. See Article 426 of the CPA. These reasons are: 1) the court was improperly composed or a judge who was required to be excluded by law or was exempted by a court decision was adjudicating, or a judge who did not participate in the main hearing participated in the judgment; 2) the party was not allowed to argue before the court due to unlawful conduct, in particular due to a failure to serve documents; 3) a person who cannot be a party to the proceedings participated in the proceedings as a plaintiff or defendant, or a party that is a legal entity was not represented by an authorized person, or a party that is incompetent to litigate was not represented by a legal representative, or the legal representative, or the party's attorney, did not have the necessary authorization to conduct the proceedings or for individual actions in the proceedings, unless the conduct of the proceedings, or the performance of individual actions in the proceedings was subsequently approved; 4) the court decision is based on a false statement by a witness or expert; 5) the court decision is based on a document that was forged or in which untrue content was certified; 6) the court decision was made as a result of a criminal act of a judge, or a lay judge, the legal representative or attorney of the party, the opposing party or a third party; 7) the party gains the opportunity to use a legally binding court decision that was previously made between the same parties on the same claim; 8) the court decision is based on another court decision or on a decision of another body, and that decision is legally binding, revoked, or annulled; 9) the previous issue (Article 12) on which the court decision was based was subsequently legally binding, or finally resolved before the competent body in a different manner; 10) the party learns of new facts or finds or acquires the opportunity to use new evidence on the basis of which a more favorable decision

court decides how to proceed when a party has filed a revision or a request for a review of a final and binding judgment, as well as a retrial motion.[40] When a party first submits a retrial motion and, subsequently, files a revision or a request for a review of a final and binding judgment, the court as a rule suspends the revision or the review proceedings, pending decision on the retrial motion. In this way, the CPA prioritizes the legal remedy that allows for repeated proceedings and ultimately, for the rendering of a "correct" final and binding judgment.[41]

5. THE EFFECTIVNESS OF REVISION IN THE CONEXT OF EXHAUSTION RULE UNDER ECtHR CASE LAW AGAINST SERBIA

In its case law, the ECtHR has often stated that revision is in principle considered an effective remedy, but this position has suffered exceptions, guided by the interpretation of the (in)effectiveness of this remedy in the specific facts of the cases before the Court.

In 2007, in a case concerning issues of paternity and child support,[42] during the admissibility stage of the application, it was noted, among other things, that the applicants had not complained to court presidents, the Ministry of Justice, or the Supervisory Board of the Supreme Court;

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could have been made for the party if those facts or evidence had been used in the previous proceedings; 11) the party gains the opportunity to use a decision of the European Court of Human Rights that established a violation of a human right, and this could have had an impact on the adoption of a more favorable decision; 12) the Constitutional Court, in the proceedings on a constitutional appeal, has established a violation or denial of a human or minority right and freedom guaranteed by the Constitution in the civil proceedings, and this could have influenced the adoption of a more favorable decision.

40 CPA, Article 434.

41 CPA, Article 434.

42 In the case of *Jevremović v. Serbia*, the Court considered an application submitted by two Serbian nationals who had initiated civil proceedings to establish paternity and secure child support. The proceedings began in 1999 and lasted for over eight years, marked by numerous delays and repeated remittals for retrial. The main reason for the prolonged duration was the respondent's persistent refusal to undergo DNA testing, which significantly slowed down the process. Although the domestic courts issued rulings in favor of the applicants on three occasions, a final judgment establishing paternity and awarding child support was not rendered until 2007. ECtHR, *Jevremović v. Serbia*, Application No. 3150/05, Judgment of 17 July 2007, paras. 1–44.

that they had not initiated a civil lawsuit for damages due to the excessive length of proceedings; and that they had not used the opportunity to appeal to the Court of Serbia and Montenegro. The Court, however, rejected these objections and found that none of the mentioned legal remedies met the effectiveness requirement under Article 35 (1) of the European Convention. It emphasized in particular that so-called "hierarchical complaints" – such as addressing court presidents or the ministry – have no binding legal effect and do not constitute a means of legal protection, but rather administrative measures of a discretionary nature. Likewise, the option of initiating a separate civil proceeding for damages was deemed ineffective, as it would involve a new dispute that could last for years and lacks the capacity to expedite the original proceedings or provide timely redress. Similarly, the Court of Serbia and Montenegro was not functional until July 2005 and was abolished following the dissolution of the state union. The Court therefore concluded that the state had not provided any legal remedy that was effective and accessible to the applicants during the relevant period, and thus declared the application admissible.[43] Specifically, in response to Serbia's argument that the applicant could have lodged a revision against a second-instance judgment rendered by the District Court,[44] the Court found that revision was not a tool that had to be exhausted, as it noted that *the revision could not expedite proceedings* that had already been completed in the lower courts, nor to provide the first applicant with *financial compensation for the delay of the proceedings*.[45] The criteria that the ECtHR used here to consider the effectiveness of the revision as a remedy were primarily the efficiency of the procedure.

In 2010, the Court pointed out that revision must, *in principle* and whenever available in accordance with the relevant civil procedure rules and given its nature, be *considered an effective domestic remedy* within the meaning of Article 35 (1) of the Convention.[46] However, the effectiveness of revision was assessed through the prism of legal certainty under the specific facts of the case. The *Rakić and Others v. Serbia* case concerned 30 applicants, police officers living and working in Kosovo, who complained

[43] *Jevremović v. Serbia*, 17 July 2007, paras. 67–76.

[44] *Jevremović v. Serbia*, 17 July 2007, para. 89.

[45] *Jevremović v. Serbia*, 17 July 2007, para. 91. In this case, revision could have been filed only under very specific circumstances.

[46] ECtHR, *Rakić and Others v. Serbia*, Applications Nos. 47460/07 *et al*. Judgment of 5 October 2010, para. 38. The Court referred to *Jevremović v. Serbia*, 17 July 2007, para. 41; ECtHR, *Ilić v. Serbia*, Application No. 30132/04, Judgment of 9 October 2007, paras. 20–21; and, ECtHR, *Debelić v. Croatia*, Application No. 2448/03, Judgment of 26 May 2005, paras. 20–21.

about the inconsistent practice of the domestic courts regarding the payment of salary increases. Although some of them won their cases in the first-instance proceedings, the second-instance court (the District Court in Belgrade) dismissed their claims. Paradoxically, that same court, during the same period, ruled in favor of plaintiffs in more than 70 other identical cases. This practice led to significant judicial inconsistency, given that the cases were based on the same facts and identical legal grounds. Despite a principled understanding of the effectiveness of revision, the Court found that the inconsistent practice of the domestic courts had created a state of persistent uncertainty. The Court rejected Serbia's objection that the applications should be dismissed as inadmissible, holding that the state of *permanent legal uncertainty* deprived the applicants of a fair trial before the District Court.[47] According to the ECtHR, this state of permanent uncertainty must have in turn undermined public trust in the judiciary – such trust being one of the basic components of a state founded on the rule of law.

The *Rakić and Others v. Serbia* case is specific because the ECtHR considered it important to link the issue of admissibility of the application, compliance with the exhaustion rule, and assessment of effectiveness, with the question of the merits of the complaints by the applicants, who claimed that the inconsistent practice of the Serbian courts had led to a violation of their rights protected by the Convention. The Court held that, even if revision were available and utilized, it could not have ensured the consistency in judicial decision-making, with respect to the claims in question.[48]

The examination of whether it was necessary for the applicants to exhaust revision before submitting the application to the ECtHR in order for the application to be considered, i.e., to exceeded the initial admissibility threshold, was practically reduced to the question whether another legal remedy (an extraordinary legal remedy) would have protected the applicants from a violation of the Convention (the right to a fair trial).[49] In the end, the notion of revision as an effective remedy "in principle", did not deprive the applicants of access to the European Court in this case, in light of the practice of the Serbian courts, which had left citizens in legal uncertainty, and the ECtHR's understanding that the filing of a revision would not have

[47] *Rakić and Others v. Serbia*, 5 October 2010, paras. 43–44. The Court referred to *Jevremović v. Serbia*, 17 July 2007, para. 41, *Ilić v. Serbia*, 9 October 2007, paras. 20–21; and, *Debelić v. Croatia*, 26 May 2005, paras. 20–21.

[48] *Rakić and Others v. Serbia*, 5 October 2010, paras. 43–44. The Court referred to *Jevremović v. Serbia*, 17 July 2007, para. 41, *Ilić v. Serbia*, 9 October 2007, paras. 20–21; and, *Debelić v. Croatia*, 26 May 2005, paras. 20–21.

[49] *Rakić and Others v. Serbia*, 5 October 2010, paras. 30–32.

altered the State's treatment. In this case, the Court reiterated its position that applicants are required to exhaust only those legal remedies that are effective and practically accessible, and not merely those that exist formally but offer no realistic prospect of success or do not provide effective protection of rights. It emphasized in particular that inconsistency in judicial practice – when it is persistent, obvious, and cannot be remedied within the national legal system – constitutes a valid basis for concluding that domestic remedies are insufficient within the meaning of Article 35 of the Convention.

In 2011, the Court noted "in passing" that it had already established that revision in civil proceedings was, in principle, an effective legal remedy within the meaning of Article 35 (1) of the Convention.[50] In this case, the Court ruled on the effectiveness of a request for an extraordinary review of a decision in an *administrative dispute*, relying on its position on the effectiveness of extraordinary legal remedies in civil and criminal proceedings. The Court pointed out the following: "As the request for judicial review in the administrative dispute, even if described as 'extraordinary' in the Administrative Dispute Act (*zahtev za vanredno preispitivanje sudske odluke*) corresponds to the said remedies in civil and criminal proceedings [revision and request for review of the lawfulness of a final judgment], the Court considers that, given its nature, it must also, in principle and whenever available in accordance with the relevant rules on procedure, be considered an effective domestic remedy within the meaning of Article 35 (1) of the Convention."[51]

In the *Mirković and Others v. Serbia* case from 2018, several retired public sector workers initiated civil proceedings against the Republic Pension and Disability Insurance Fund, claiming that their pensions had been calculated contrary to the law and government decisions. Although some of them prevailed at first instance, the Court of Appeal overturned those judgments and dismissed their claims. The applicants lodged revision requests with the Supreme Court of Cassation, but these were rejected. In the proceedings before the European Court, the Government of Serbia argued that it was necessary for the applicants to make use of a revision, given that this remedy was effective in the cases of fellow applicants and it was "highly probable

[50] ECtHR, *Lakićević and Others v. Montenegro and Serbia*, Application Nos. 27458/06, 37205/06, 37207/06 *et al*., Judgment of 13 December 2011, para. 50. The Court relied on *Rakić and Others v. Serbia*, 5 October 2021, paras. 37 and 27; *Debelić v. Croatia*, 26 May 2005, paras. 20–21; and ECtHR, *Mamudovski v. the Former Yugoslav Republic of Macedonia*, Application No. 49619/06, Judgment of 10 March 2009.

[51] *Lakićević and Others v. Montenegro and Serbia*, 13 December 2011, para. 50 (emphasis added).

that had the applicants used it, they would have succeeded."[52] The Court observed that revision was an extraordinary legal remedy that is granted only exceptionally in the Serbian legal system, referring to an interpretation of the CPA provision that prescribes the conditions for a "special revision", stating that a competent court of appeal may "exceptionally" decide that a revision is admissible if it would be expedient to resolve "a legal issue of general interest", to harmonize inconsistent case law, or to adopt a "new interpretation of the law".[53] A "special revision" is an exceptional legal remedy under Serbian law that may be used even when the value of the dispute does not exceed the statutory threshold, provided that the case involves matters of significance to the legal system or deviations from constitutional or Convention standards. However, the Court rejected this objection. It found that the Government had failed to provide concrete evidence that the "special revision" was available and effective in practice under the circumstances of the case, nor had it identified any instance in which it had actually led to the correction of inconsistent judicial practice. The Court emphasized that the burden of proving the effectiveness of a legal remedy lies with the State, not with the applicants.

In that regard, the European Court reaffirmed its position that, under Article 35 (1) of the Convention, applicants are only required to exhaust those remedies that are not only formally available but also effective in practice. Although revision is recognized in principle as an effective remedy, in this case it failed to prevent the existence of clear and lasting inconsistencies in judicial decision-making. The State did not provide an internal mechanism to harmonize judicial practice in cases that were factually and legally identical. The Court therefore declared the applications admissible and once again reiterated that the exhaustion of domestic remedies is not a formality, but requires a real and effective possibility of redress within the national legal system.

Referring to the Guidelines of the Constitutional Court related to the procedure for a preliminary examination of constitutional complaint of 2 April 2009, the Court pointed out that it would be overly formalistic to require of the applicants to exercise a remedy that even the highest court of their country would not oblige them to exhaust.[54] Relatedly, it is necessary

52 *Mirković and Others v. Serbia*, 26 June 2018, para. 91.

53 *Mirković and Others v. Serbia*, 26 June 2018, para. 102.

54 *Mirković and Others v. Serbia*, 26 June 2018, paras. 103–104: "In its guidelines (*Stavovi Ustavnog suda koji se odnose na postupak prethodnog ispitivanja ustavne žalbe*) of 2 April 2009 the Constitutional Court noted that an appeal on points of law must be exhausted before a constitutional appeal may be lodged only if the former

to bear in mind the position of the Constitutional Court from 2019 that according to the currently applicable regulations, the "special revision" does not constitute an effective legal remedy,[55] and the proposal by the Supreme Cassation Court (currently the Supreme Court) to amend the provisions of the CPA regarding this remedy, which, if adopted, would significantly tighten the conditions for its filing.[56]

It follows from the above case law of the Court that, while the ECtHR often emphasizes that revision is in principle considered to be an effective legal remedy, the above examples point to situations in which the Court, for various reasons, has accepted applications where the applicants had not utilized

Civil Procedure Act itself provided for the direct admissibility of the former, thus implicitly excluding Article 395 of the former Civil Procedure Act, whose application has always been contingent upon a favourable, discretionary, assessment of the court of appeal concerned. In view of the above, it would be unduly formalistic of the Court to require the applicants to exercise a remedy which even the highest court of their country would not oblige them to exhaust [...]. In any event, the Constitutional Court did not reject the applicants' constitutional appeals for their failure to lodge appeals on points of law."

[55] The authors note that on 25 December 2019, the General Session of the Supreme Court adopted the Initiative and Proposal for Amendments to the Provisions of the CPA, which include amendments to the provisions on the admissibility of revision. The position of the General Session of the Supreme Court was that the conditions for declaring both regular and special revisions must be tightened, in order to enable the "effective and timely decision-making" of the Supreme Court on this legal remedy. The initiative and proposal of the Supreme Court are based on an analysis of the effectiveness of existing legal remedies. It is interesting that since the introduction of the institute of special revision by the Law on Civil Procedure in 2012, until 31 October 2019, the Supreme Court had dismissed 95% of special revisions for the lack of admissibility, while only in 5% of cases a decision was made on the merits. In support of the proposed amendments, the General Session of the Supreme Court of Justice cited the overloading of the resources of the highest court in the Republic of Serbia due to the large number of cases under special revision, as well as the fact that the Constitutional Court had assessed special revision an "ineffective legal remedy". The proposed amendments to the provisions of the CPA on special revision issued by the General Session of the Supreme Court of Justice were included in the Draft Amendments to the Law on Civil Procedure of 19 May 2021. Nacrt zakona o izmenama i dopunama Zakona o parničnom postupku. *https://www.mpravde.gov.rs/obavestenje/33408/nacrt-zakona-o-izmenama-i-dopunama-zakona-o-parnicnom-postupku-1952021-godine.php*, last visited June 1, 2024.

[56] At writing time, the status of the procedure for adopting the current Draft Amendments to the LPP (which includes the aforementioned proposal to amend the provisions on special revision) is still unknown, and it remains unclear whether and how the position of the Supreme Court on this extraordinary legal remedy will affect the right to seek protection before the ECtHR. However, it should also be noted that given that special revision is already considered an ineffective legal remedy, stricter conditions would likely result in this remedy being regarded as even less effective.

revision or where the revision procedure had not been completed by the time the application was submitted to the ECtHR. Revision's admissibility-relevant status is contingent on its practical ability to resolve the alleged violation and to offer redress within the domestic legal system. Inconsistent application by domestic courts, particularly where identical legal and factual situations are treated divergently, combined with a lack of evidence that revision (including "special revision") can rectify such discrepancies, leads the ECtHR to conclude that exhaustion is not required in such contexts.

In situations where there is an established practice of the Supreme Court to rule on a revision in a way that favors a potential ECtHR applicant, the revision should be filed because the ECtHR is very likely to consider this remedy effective. On the other hand, if there are clear indications that filing a revision would only prolong the proceedings, with no realistic prospect that the party would receive adequate compensation through this remedy or for the national judicial system to allow for consistency in the decision-making, it appears that the ECtHR would have reasons to consider that the revision does not constitute a remedy that must have been exhausted. Revision appears to be a safe step, as it is often difficult to have clear insight into the Supreme Court's revision-related rulings, both in terms of potential chances for success and the speed of the decision-making, especially if the potential ECtHR applicant is not represented by a lawyer.

On the other hand, it is clear from the aforementioned judgment in *Mirković and Others v. Serbia* that, before filing their application, the applicant should also consult the practice of the Constitutional Court on the necessity of revision, as a precondition for filing a constitutional complaint in the specific type of dispute. In particular, if the Constitutional Court ruled on the merits of a constitutional complaint, regardless of the fact that the party had not first resorted to the Supreme Court with a revision, it is likely that the ECtHR will not consider such an application inadmissible. It should be borne in mind, however, that such situations will, as a rule, be less frequent than those where filing a revision was expected, with the exception of cases concerning the abovementioned "special revision".

The above-mentioned decisions collectively establish that while revision is generally accepted as an effective legal remedy in Serbian civil law, it cannot be presumed effective *in abstracto*. Its acceptance for admissibility purposes under Article 35(1) ECHR depends on a case-specific, pragmatic evaluation of its practical accessibility, legal certainty, and remedial potential. The Court's approach confirms a consistent preference for substance over form in the application of admissibility criteria and highlights that the mere formal availability of a remedy is not sufficient to meet the exhaustion requirement under the Convention.

6. THE EFFECTIVENESS OF THE REQUEST FOR REVIEW OF FINAL AND BINDING JUDGMENTS IN THE CONTEXT OF THE EXHAUSTION RULE UNDER ECtHR CASE LAW INVOLVING SERBIA

The ECtHR case law in the domain of the exhaustion rule interprets legal remedies that the applicant may lodge in person as accessible and effective (Registry of the European Court of Human Rights 2023, 118). Since a request for review of a final and binding judgment may be brought only by the Public Prosecutor of the Republic of Serbia,[57] it appears that this legal remedy does not *a priori* fall within the group of remedies that must be exhausted in order for an ECtHR application to be regarded as admissible.

In particular, in the case of Serbia, the ECtHR took the view that the request for the protection of legality was not considered effective precisely because it was discretionary.[58] In *Lepojić v. Serbia* (albeit in the context of criminal proceedings) the Court held in 2007 that only the competent public prosecutor could file a request for review of the legality of a final and binding judgment, on behalf of the applicant, and, moreover, that the authority had complete discretion as to whether to do so. While the applicant was entitled to request it, they certainly had no right to personally lodge this legal remedy. The request for review of the legality of a final and binding judgment was therefore considered ineffective under Article 35 (1) of the Convention.[59]

Still, in a later judgment, the Court made an exception in favor of the applicant, when this extraordinary remedy was successful.[60] During the proceedings before the Court in *Petrović v. Serbia*, the Government of Serbia argued that the applicant had waited for the decision of the Supreme Court

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57 CPA, Article 421(1).

58 ECtHR, *Petrović v. Serbia*, Application No. 40485/08, Judgment of 15 July 2014, para. 59, relying on ECtHR, *Lepojić v. Serbia*, Application No. 13909/05, Judgment of 6 November 2007, para 54.

59 *Lepojić v. Serbia*, 6 November 2007, paras. 54 and 57.

60 "[T]he Court notes that the request for the protection of legality was admittedly of a discretionary character, and normally such a remedy is not considered to be effective [...] and could not restart the running of the six-month limit [...]. Nevertheless, situations in which a request to reopen the proceedings actually results in a reopening, or in which a request for extraordinary review is successful, may be an exception to this rule [...], though only in relation to those Convention issues which served as a ground for such a review or reopening and were the object of examination before the extraordinary appeal body [...]. The Court considers that the situation in the present case falls into the category of exceptional cases." *Petrović v. Serbia*, 15 July 2014, 59, 60.

of Cassation on the request for the protection of legality, instead of applying to the Court in Strasbourg immediately. The Court, however, considered that the applicant's conduct was reasonable because: (1) she had submitted a request to the public prosecutor to initiate the protection of legality procedure, which directly addressed the same allegations she later raised before the Court; and (2) the request for the protection of legality was successful – the Republic Public Prosecutor sharply criticized the previous decisions of the domestic courts as incorrect and arbitrary. For these reasons, the Court found it reasonable that the applicant had awaited the Supreme Court's ruling on the prosecutor's request, and thus concluded that she had not deliberately attempted to delay the time-limit under Article 35(1) of the Convention by using potentially inappropriate remedies that could not have provided her with effective redress, as the Government had claimed.[61]

The ECtHR additionally declared the decision of Supreme Court on the request for review of the legality of a final and binding judgment in this case as a final decision within the meaning of Article 35(1) of the Convention, finding that the deadline for submitting the ECtHR application (then six months) starts running only from the moment of receipt of this decision.[62]

It follows from the foregoing that, in the ordinary course of events, it is not necessary to exhaust the request for review of a final and binding judgment in order for an application to the ECtHR to be considered admissible. However, if the use of that remedy were to relate directly to the issues of the Convention to be brought before the ECtHR, and the Public Prosecutor of the Republic of Serbia decides to submit a request to the Supreme Court, the future applicant before the ECtHR may wait for the decision on that extraordinary legal remedy, arguing that only the decision of the Supreme Court will be considered final in the proceedings in question, and that the four-month period begins to run after the receipt of that decision.

Although a request for the review of a final judgment (request for the protection of legality) does not constitute an effective legal remedy in most cases, the case of *Petrović v. Serbia* serves as an important confirmation that the Court assesses the effectiveness of legal remedies in a functional and context-specific manner. When concrete results are demonstrated and when the conduct of the parties is deemed reasonable in the given circumstances, the Court is willing to make an exception and recognize the effort as relevant for the admissibility assessment.

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61 *Petrović v. Serbia*, 15 July 2014, para. 60.

62 *Petrović v. Serbia*, 15 July 2014, para. 61.

Such interpretation, however, should be approached cautiously and exceptionally. In the first place, the question arises whether the potential ECtHR applicant will have time to inform the Public Prosecutor of the Republic of Serbia of the relevant violation of rights, within the period of four months from the adoption of the final decision required by the Convention, and learn whether the authority will decide to file a request for review with the Supreme Court. The deadline for filing a request by the Public Prosecutor is three months from the date the judgment becomes final and binding.[63] The rather short deadline suggests that the applicant must be prepared to promptly adjust its strategy concerning the ECtHR application. Irrespective of the Public Prosecutor's actions, it would be advisable for the applicant to be prepared to ground the application's admissibility with the argument that the final and binding judgment rendered at the second instance represents a final decision within the meaning of Article 35(1) of the Convention, as well as to submit the ECtHR application swiftly, without waiting for to the Public Prosecutor to act.

7. THE EFFECTIVENESS OF THE MOTION FOR RETRIAL IN THE CONTEXT OF EXHAUSTION RULE UNDER ECtHR CASE LAW INVOLVING SERBIA

While referring to judgments rendered against other states, in a 2011 case, Court pointed out that a retrial of a case that had ended with a final and binding court decision cannot *usually be regarded as an effective means* within the meaning of Article 35 (1) of the Convention, but that the situation may be different if it is established (in view of the previous practice of courts in similar proceedings) that such a motion may be considered effective.[64]

In the given case, *Šorgić v. Serbia*, the applicant had initiated compensation proceedings which lasted excessively long – more than eight years. After exhausting ordinary legal remedies and having his constitutional complaint rejected, the applicant submitted an application to the Court. The Government of Serbia, among other things, argued that the applicant had failed to await the outcome of a request for the retrial, which he himself had submitted and which remained unresolved at the time he applied to the Court. The Court noted that, while the case was *not without all chances of*

[63] CPA, Article 421(3).

[64] *Šorgić v. Serbia*, 3 November 2011, para. 54.

success (referring to similar practice of the Serbian courts), *the proceedings had been pending for more than five years, with two referrals to the lower court*. The Court observed that the case was again before the court of first instance at that moment, with little chance that a final and binding decision would be issued soon. The ECtHR therefore deemed that Serbia's objections must be rejected.[65]

The foregoing prompts the question whether the decision of the ECtHR would have been different had the procedure for deciding on this extraordinary legal remedy before the Serbian courts been shorter. If the retrial procedure had been shorter and had led to some compensation or a positive outcome for the ECtHR applicant, the Court would have potentially focused on assessing the effectiveness and proposing retrial directly, without addressing the speed of justice. In any case, it is evident that the relevant criteria for the Court's assessment were precisely the efficiency of the procedure and the prospects of success before the court that had been hearing the case at the moment of the ECtHR's consideration (bearing in mind the previous similar practice of said court).

In a case from 2018, Serbia argued that a motion for a retrial was an effective remedy, pointing to the relevant decision of the Constitutional Court that had established a violation of the right to a fair trial in circumstances that mirrored those of the ECtHR applicants.[66] In this case, the Court rejected Serbia's objection, emphasizing that applicants are not required to exhaust extraordinary and uncertain remedies, such as the reopening of proceedings, unless the State convincingly demonstrates that such a remedy is effective in practice. In this case, the Government failed to provide evidence that a request for reopening could have led to the correction of inconsistencies in judicial practice. Referring to *Šorgić v. Serbia*, the Court stressed that, in any event, a motion for the retrial of a case concluded on the basis of a final and binding judgment cannot as a rule be regarded as an effective remedy within the meaning of Article 35 (1) of the Convention.[67]

The presented case law suggests that, in principle, a motion for retrial will not be regarded as an effective legal remedy that must be exhausted before resorting to the ECtHR. Exceptionally, if the proceedings on the motion have already been submitted while the ECtHR is deciding on the application, the

65 *Šorgić v. Serbia*, 3 November 2011, para. 56.

66 *Mirković and Others v. Serbia*, 26 June 2018, para. 91.

67 *Mirković and Others v. Serbia*, 26 June 2018, para. 100.

Court will rule on admissibility taking into account the previous practice of the Court in similar proceedings, the length of the retrial proceedings and the realistic possibility of the applicant to exercise their rights within a reasonable time.

8. THE EFFECTIVENESS OF CONSTITUTIONAL COMPLAINTS IN THE CONTEXT OF THE EXHAUSTION RULE UNDER ECtHR CASE LAW INVOLVING SERBIA

8.1. Conditions for Submitting Constitutional Complaints in the Republic of Serbia

In the Serbian legal system, a constitutional complaint may be lodged against individual acts or actions of state bodies or organizations vested with public authority that violate or deny human and minority rights and freedoms guaranteed by the Constitution, within 30 days from the moment of receipt of the act by the last exhausted legal remedy, or from the date of the applicant's knowledge of the undertaking or termination of the action. A constitutional appeal is a special and subsidiary remedy that can be brought only if other legal remedies for their protection have been exhausted or are not provided for, or if the right to judicial protection is excluded by law.[68] Both in the case of constitutional complaint and in the case of Article 35 (1) of the Convention, it is not specified exactly what legal remedies must be exhausted in order to comply with the admissibility requirements, i.e., in the case of a constitutional complaint, not to be dismissed by a decision without entering into the merits of the request, due to the lack of procedural prerequisites.

These conditions or prerequisites for the admissibility of constitutional complaints are determined by the Constitution of the Republic of Serbia and the Law on the Constitutional Court. However, these acts do not contain a detailed explanation on the extraordinary legal remedies that must be exercised before the protection of the infringed right can be sought in proceedings before the Constitutional Court. Recognizing this

[68] Arts. 82–92, Law on the Constitutional Court, *Official Gazette of the Republic of Serbia*, Nos. 109/2007, 99/2011, 18/2013 – Constitutional Court Decision, 103/2015, 40/2015 – other law, 10/2023 and 92/2023).

gap, the Constitutional Court adopted the abovementioned guidelines on 2 April 2009,[69] listing the legal remedies that must be exhausted for certain proceedings.

For civil proceedings, the Constitutional Court took the position that "by issuing a revision judgment, it will be considered that the last legal remedy before the filing of a constitutional complaint has been exhausted". When revision is not permitted by law, "by issuing a decision on an appeal against a judgment or an appeal against a decision, it will be considered that the last legal remedy has been exhausted".[70] The Constitutional Court also states in its Guidelines that "[i]n the event that the applicant of a constitutional complaint in civil proceedings has filed a request for the protection of legality, the time limit for filing a constitutional complaint shall be calculated in relation to

[69] Constitutional Court of the Republic of Serbia, Guidelines of the Constitutional Court in the Procedure of Examining and Deciding on a Constitutional Complaint, Su No. I–8/11/09, 2 April 2009, *http://www.ustavni.sud.rs/page/view/163–100890/stavovi-suda*, last visited May 22, 2025.

[70] Constitutional Court, Guidelines of the Constitutional Court in the procedure of examining and deciding on a constitutional complaint, Full text of 30 October 2008 and 2 April 2009, translated by author. "3.5. Position: In civil and non-contentious proceedings, the issuance of a judgment on revision shall be deemed to have exhausted the last legal remedy before filing a constitutional complaint. In cases where revision is not permitted by law, the issuance of a decision on an appeal against a judgment or an appeal against a decision shall be deemed to have exhausted the last legal remedy before filing a constitutional appeal. Position: In the event that the applicant for a constitutional complaint in civil proceedings has filed a request for protection of legality, the deadline for filing a constitutional complaint shall be calculated in relation to the date of delivery of the court's decision on said legal remedy. Exceptionally: a) if the applicant for a constitutional complaint filed a constitutional complaint before the court's decision on his request for protection of legality, the Constitutional Court shall decide on the constitutional complaint only after the issuance of a decision on the request for protection of legality; b) if the party has filed a constitutional complaint after receiving notification that the public prosecutor will not file a request for protection of legality, and does not file this extraordinary legal remedy itself, the timeliness of the constitutional appeal will be assessed in relation to the date of delivery of the court's decision on the last legal remedy, within the meaning of the previous Paragraph. Position: If a constitutional complaint is filed against a decision of the Supreme Court of Serbia rejecting the revision or the decision on the request for protection of legality or against decisions that preceded the filing of these extraordinary legal remedies, the Constitutional Court may decide on the merits only on the decision made on the declared extraordinary legal remedy, while the constitutional complaint, in the part in which the decisions of lower-instance courts are challenged, will be dismissed as untimely (if filed after the expiry of the deadline set by the Law), or inadmissible (if the challenged acts were adopted before the Constitution)."

the date of delivery of the court's decision on that remedy".[71] Still, the above guidelines do not provide a clarity as to whether a prospective constitutional complainant is obliged to exhaust all extraordinary legal remedies, or only revision. Such a situation is reminiscent of the considerations concerning the exhaustion of extraordinary legal remedies as an admissibility condition of an ECtHR application.

On the other hand, the question whether constitutional complaints are considered an effective remedy that must be exhausted before resorting to the ECtHR has been the subject of detailed consideration by the Court.

8.2. Constitutional Complaint as Admissibility Condition Before the ECtHR

A constitutional complaint is, in principle, considered to be an effective legal remedy that constitutes a condition for the admissibility of an application to the ECtHR. That said, the assessment of effectiveness is subject to change in cases that show that the practice of the Constitutional Court is inconsistent or that this legal remedy cannot provide sufficient protection of the applicant's rights.

Since a judgment in *Vinčić and Others v. Serbia*, the ECtHR has taken the position that a constitutional complaint should, in principle, be considered an effective legal remedy within the meaning of Article 35 of the Convention, in respect of all applications submitted after 7 August 2008 – a date on which the first merits decisions of the Constitutional Court were published in the *Official Gazette of the Republic of Serbia*.[72] The ECtHR regularly refers to this case in its case law as the general rule on the effectiveness of constitutional complaints.

On the other hand, the effectiveness of constitutional complaint was particularly criticized in cases concerning two groups of issues: the inconsistency in domestic jurisprudence regarding the payment of daily

[71] Constitutional Court of the Republic of Serbia, Guidelines of the Constitutional Court in the Procedure of Examining and Deciding on a Constitutional Complaint.

[72] ECtHR, *Vinčić and Others v. Serbia*, Application Nos. 44698/06, *et al*., Judgment dated 1 December 2009, para. 51. See also ECtHR, *Golubović and Others v. Serbia*, Application no. 10044/11, Decision of 17 September 2013, para. 43.

allowances granted to reservists who served in the Yugoslav Army between March and June 1999,[73] and debts from employment relations involving public enterprises.[74]

8.2.1. First Group: Daily Allowance of Reservists

The *Vučković and Others v. Serbia* case involved thirty separate applications. The applicants, reservists in the Yugoslav Army, complained of discrimination and inconsistency in domestic jurisprudence regarding the payment of daily allowances. After the demobilization, the Government refused to fulfill its obligation to the reservists. Following a series of public protests, an agreement was reached with certain reservists, and the payment was arranged for those who resided in municipalities that were considered "underdeveloped", considering these reservists to be vulnerable, *i.e.*, in worse financial condition.[75]

The ECtHR applicants did not live in the municipalities designated by the Government as relevant and did not receive payment of daily allowances. They decided to sue the State. Both the courts of first and second instances considered the claim for payment of daily allowances to be time-barred, applying a three-year time limit, unlike other courts in the country, which used to apply five-year and sometimes 10-years statute of limitation. Due to this inconsistency, the applicants resorted to the Constitutional Court, filing a constitutional complaint.

The ECtHR analyzed the submissions at a time when the constitutional appeals were still pending. For this reason, Serbia argued that the petitions before the ECtHR should be dismissed as premature.[76] For their part, the applicants argued that a constitutional complaint may not be considered an effective remedy, given the specific circumstances of their case.[77]

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[73] See ECtHR, *Vučković and Others v. Serbia*, Applications Nos. 17153/11 *et al*., Judgment dated 28 August 2012, paras. 70–74.

[74] ECtHR, *Milunović and Čekrlić v. Serbia*, Applications Nos. 3716/09 and 38051/09, Decision of 17 May 2011; ECtHR, *Krndija and Others v. Serbia*, Applications Nos. 30723/09 *et al*., Judgement of 27 June 2017, para. 56. Similarly, see *Riđić and Others v. Serbia*, para. 68 et seq. See also Beširević *et al.* 2017, 473–474.

[75] *Vučković and Others v. Serbia*, 28 August 2012, para. 66.

[76] *Vučković and Others v. Serbia*, 28 August 2012, para. 66.

[77] *Vučković and Others v. Serbia*, 28 August 2012, para. 67.

In examining the admissibility of the applications, the ECtHR analyzed the available jurisprudence on constitutional complaints submitted by the reservists. In the cases that were situationally similar to those of the ECtHR applicants, the Court found that the Constitutional Court had "ignored" the complaints "offering no substantive assessment of the issue whatsoever".[78] For this reason, the ECtHR rejected State's objections and found that, although constitutional complaint should, in principle, be regarded as an effective domestic legal remedy, which was not the case with the applicants' applications. In the same case, the Grand Chamber rendered its own decision, where Serbia again raised the exhaustion objection. The Grand Chamber rendered an identical decision, holding that constitutional complaints were ineffective in these cases.[79]

8.2.2. Second Group: Debts to Employees of Public Enterprises

The second group of cases concerns nonenforcement of judgments rendered against companies with a majority public capital[80] arising from debts stemming from employment relations. The ECtHR initially considered the constitutional complaint to be ineffective in this context, because the Constitutional Court did not provide comprehensive compensation, which, in addition to establishing the violation, should have included compensation for material and nonmaterial damages, and not only for nonmaterial damages.[81]

8.2.2.1. Milunović and Čekrlić v. Serbia

The applications in the *Milunović and Čekrlić v. Serbia* case relate to the nonenforcement of final and binding judgments rendered by the Municipal Court in Novi Pazar against the debtor Raška Holding AD (public enterprise) in favor of the applicants, based on a claim for remuneration they were entitled to during forced leave (Serbian State Attorney's Office 2011).

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78 *Vučković and Others v. Serbia*, 28 August 2012, para. 72.

79 *Vučković and Others v. Serbia*, 28 August 2012, paras. 67–68.

80 Including those companies where a later change in their capital structure had taken place, resulting in state and public capital becoming the majority.

81 This exception was established in *Milunović and Čekrlić v. Serbia*, 17 May 2011; *Krndija and Others v. Serbia*, 27 June 2017, para 56. Similarly, see *Riđić and Others v. Serbia*, para. 68 et seq. See also Beširević *et al*. 2017, 473–474.

The State's argument in favor of the inadmissibility of the applications was that one of the applicants had not filed a constitutional complaint at all, and that the other had not filed a claim for compensation in the manner prescribed by domestic law.[82] The Court found that comprehensive constitutional protection should cover compensation for material and nonmaterial damages, in addition to the determination of a violation.[83]

The ECtHR noted that the Constitutional Court had found a violation of the constitutional rights of the first applicant, as well as that she was entitled to claim compensation for nonmonetary damage. With this decision, however, the Constitutional Court did not require the state to pay the material damages from its own funds, i.e., the amounts awarded in final and binding judgments, as it had been previously done in the judgments in *Kačapor and Others*, *Crnišanin and Others*, and *Grišević and Others*.[84]

Despite the fact that the applicant had never submitted a claim to the Damages Commission, the ECtHR held that the applicant had no real chance of obtaining compensation for material damage in the subsequent proceedings before the civil court since the Constitutional Court had not ordered the payment of the sum of money, but only requested the acceleration of the enforcement proceedings.[85]

In view of this factual context, the ECtHR held that, notwithstanding that constitutional complaints should in principle be regarded as an effective legal remedy for applications against Serbia in line with the *Vinčić v. Serbia* judgment, this avenue of compensation could not be considered effective in cases related to the violations alleged by the applicants.[86]

Interestingly, following these considerations, the ECtHR reserved the right to reconsider its position on constitutional complaint in the future, "if there is clear evidence that the Constitutional Court has subsequently harmonized its approach with the Court's relevant case-law".[87] On the same occasion, the ECtHR noted the efforts to develop domestic case law in relation to enforcement proceedings in which the debtor is a company under restructuring. However, notwithstanding such attempts to comply with the case law of the Court, the ECtHR considered that, at that time, no effect had

82 *Milunović and Čekrlić v. Serbia*, 17 May 2011, para. 56.

83 *Milunović and Čekrlić v. Serbia*, 17 May 2011, para. 62.

84 *Milunović and Čekrlić v. Serbia*, 17 May 2011, para. 62.

85 *Milunović and Čekrlić v. Serbia*, 17 May 2011, paras. 63–64.

86 *Milunović and Čekrlić v. Serbia*, 17 May 2011, para. 66.

87 *Milunović and Čekrlić v. Serbia*, 17 May 2011, para. 67.

been achieved in relation to the Court's request that the State pay from its own resources the amounts awarded by the final and biding judgments in question.[88]

8.2.2.2. Marinković v. Serbia; Krndija v. Serbia

A shift was made in the cases of *Marinković v. Serbia* and *Krndija v. Serbia*. Namely, the effectiveness of constitutional complaint as an extraordinary legal remedy was "restored" in cases where the liability of the respondent state for the nonenforcement of judgments rendered against public/state-owned enterprises in bankruptcy proceedings and/or those that had ceased to exist, related to all applications filed after 22 June 2012 – the publication date of Constitutional Court Decision No. UŽ 775/2009 in the *Official Gazette of the Republic of Serbia*. However, this position did not apply to cases related to public/state-owned enterprises undergoing restructuring, because in this context the Constitutional Court was still prepared to award the appellants only compensation for the suffered nonmaterial damage.[89]

In those cases where the company was bankrupt or had ceased to exist, the Constitutional Court upheld the constitutional complaints and awarded the applicants not only amounts of nonmaterial damage, but also amounts of material damage, i.e., it ordered for the salaries to be paid from the budget.[90]

In the second type of cases, involving companies with predominant public capital that were undergoing restructuring, on 19 April 2012 the Constitutional Court adopted the position that there were no grounds for awarding material damages on account of amounts determined by the final and binding judgments of domestic courts, because enforcement proceedings in relation to such debtors could be initiated or continued. In line with the foregoing, several constitutional complaints were upheld (e.g., decisions Nos. UŽ 2544/2009 of 10 May 2012 and UŽ 2701/2010 of 30 May 2012), with the Constitutional Court awarding compensation for nonmaterial damage, while rejecting claims for payment of material damages.

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88 *Milunović and Čekrlić v. Serbia*, 17 May 2011, para. 67.

89 *Krndija and Others v. Serbia*, 27 June 2017, para. 57. See *Marinković v. Serbia*, 22 October 2013.

90 Constitutional Court of Serbia, Decision No. Už-775/2009, *Official Gazette of the Republic of Serbia* No. 61/2012, 22 June 2012; Constitutional Court of Serbia, Decision No. Už-1392/2012, 13 June 2012.

For these reasons, the ECtHR held that constitutional complaints *may be considered effective in the first class of cases, related to bankruptcy*. Conversely, *for companies with predominantly public capital undergoing restructuring, the constitutional complaint remained an ineffective tool*, so the applicants had no obligation to exercise it before resorting to the Court. As in the *Milunović and Čekrlić* case, the Court left the possibility to reconsider this position in the event that the Constitutional Court changes its practice and starts awarding material damages in cases involving companies that are under restructuring, in the same way as those involving companies that are bankrupt or have ceased to exist.

8.2.2.3. Ferizović v. Serbia

In the *Ferizović v. Serbia case* it was established that the Constitutional Court had elaborated and "fully harmonized" its approach to the nonenforcement of judgments rendered against public/state-owned enterprises under restructuring with the relevant case law of the Court, and that, as of 4 October 2013, the constitutional complaint was again considered effective.[91]

In the present case, the applicant was an employee of a state-owned company that was in the process of restructuring at the time that the domestic court proceedings were lodged. A final and binding judgment was issued against the company, based on the applicant's claim, ordering that the plaintiff be paid the amount of material damage (overdue wages, compensation for annual leave) as well as the costs of the proceedings. However, the final and binding judgment was never enforced, and the ECtHR's application concerned the failure of the State to enforce the judgment and the absence of an effective domestic remedy in connection with the disputed nonenforcement. The application was filed without the prior exercise of a constitutional complaint.[92]

The ECtHR observed that the Constitutional Court, in its Decision No. UŽ 1712/2010, in the case of compensation for nonenforcement of a final and binding judgment rendered against a public/state-owned enterprise in the restructuring procedure, ordered the payment of both nonmaterial and material damage at the expense of the state budget, thus fully harmonizing

[91] ECtHR, *Ferizović v. Serbia*, Application No. 65713/13, Decision of 26 November 2013, para. 24; *Krndija and Others v. Serbia*, 27 June 2017, para. 58.

[92] *Ferizović v. Serbia*, 26 November 2013, paras. 2–11, 27.

its conduct with the position of the Court. The Constitutional Court issued decisions with the same effect in cases Nos. UŽ 1645/2010 and UŽ 1705/2010.[93]

As the Decision of the Constitutional Court No. UŽ 1712/2010 was published in the *Official Gazette of the Republic of Serbia* on 4 October 2013, the Court's position was that as of that date, the constitutional complaint was considered an effective legal remedy within the meaning of Article 35, paragraph 1 of the Convention in this type of cases.[94] Considering that on the same day, 4 October 2013, the application was submitted to the ECtHR, without first referring it to the Constitutional Court, the ECtHR considered that the domestic remedies had not been exhausted and dismissed the application as inadmissible.[95]

9. CONCLUDING REMARKS

The authors examined whether, and in which situations, the ECtHR expects applicants from Serbia to exhaust extraordinary legal remedies and the constitutional appeal when claiming that their human rights were violated based on facts considered in civil proceedings. The analysis showed that the ECtHR's stance on the effectiveness of these remedies has evolved over time and that their necessity in proceedings before the Court has always been closely tied to the facts of each specific case.

With regard to revision, although it is generally recognized as an effective means of legal protection, the Court has repeatedly determined that, in certain circumstances–particularly where domestic court practice was inconsistent or the prospects of success were low–revision did not represent a legal remedy that must necessarily be exhausted. The criteria guiding the Court were primarily procedural efficiency and legal certainty.

As for the motion for retrial and the request to review the finality of a judgment, the ECtHR generally does not consider these extraordinary legal remedies to be effective under Article 35(1) of the Convention, except in cases where the state clearly and convincingly demonstrates that these

93 *Ferizović v. Serbia*, 26 November 2013, paras. 12–17, 24.

94 *Ferizović v. Serbia*, 26 November 2013, para. 25.

95 *Ferizović v. Serbia*, 26 November 2013, paras. 26–27.

remedies have produced real effects in protecting an individual's rights. Even in such rare cases, the applicant's actions must be reasonable and aimed at achieving effective protection.

The constitutional appeal is considered an effective and necessary legal remedy that must be exhausted before submitting an application to the ECtHR, starting from 2008, when the first substantive decisions of the Constitutional Court of Serbia were published. However, it too has not always been deemed effective – particularly in cases of inconsistent practice or where it failed to provide concrete and timely protection of rights.

The analysis indicates that there is no single, absolute answer to the question of whether all extraordinary legal remedies and the constitutional appeal must be exhausted in civil proceedings. The effectiveness of a legal remedy is assessed through the lens of specific facts, the domestic legal framework, and judicial practice. This approach by the ECtHR, though requiring careful assessment in each individual case, simultaneously underscores the responsibility of national judiciaries to maintain consistency and ensure timely access to justice.

In light of the analyzed case law of the ECtHR, it can be concluded that the application of the rule on exhaustion of domestic remedies in the context of applications against Serbia is dynamic and highly dependent on the circumstances of each case. Although revision and constitutional appeal are generally considered effective legal remedies, their practical applicability is evaluated based on criteria such as efficiency, legal certainty, and real availability. On the other hand, the request to review finality and the motion for retrial are less often considered necessary steps, except in specific situations where the state can convincingly demonstrate their effectiveness. The practical message emerging from this research is the need for each application before the Strasbourg Court to be prepared with a careful analysis of the domestic procedural context, taking into account not only the formal existence of legal remedies but also their actual ability to provide protection for the violated right. Such an approach reflects the essential nature of the principle of subsidiarity and highlights the importance of transparent and consistent judicial practice in Serbia's judiciary as a prerequisite for effective legal protection.

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