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TITLE

The Particularities of Exceptional Review of Judgments Entered into Force in the Criminal Procedure of Armenia: Recent Developments

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Abstract

Exceptional review procedures have the aim of restoring a right in case of its violation in previous proceedings. Such exceptional review procedure empowers courts to reopen a case due to the emergence of new facts, or where a Fundamental Defect is detected in the previous proceedings, which could affect the outcome of the case.

The exceptional review of judgments entered into force is aimed at empowering higher courts to correct past judicial errors and miscarriages of justice. At the same time, the discussed procedure is by no means a procedure for fresh examination.

The Thesis focuses on the specific issue of the exceptional review of judgments entered into force. In particular, the notion of the Fundamental Defect as a ground for exceptional review is scrutinized. The review procedure on the ground of a Fundamental Defect, in comparison with other grounds, is still comparatively unexplored in scholarly work. This unexplored area, in turn, has motivated the author of the Thesis to focus on the exceptional review of judgments entered into force on the ground of a Fundamental Defect.

Keywords: double jeopardy, right not to be tried or punished again, exceptional review, new circumstances, newly discovered circumstances, Fundamental Defect.

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LIST OF ABBREVIATIONS

Ne bis in idem	The right not to be tried or punished twice
ICCPR	International Covenant on Civil and Political Rights
ECtHR	European Court of Human Rights
ECHR	The European Convention on Human Rights
Article 4 of Protocol No. 7	Article 4 of Protocol No. 7 to the European Convention on Human Rights
Russian Supreme Court	Supreme Court of the Russian Federation
Russian Prosecutor General	Prosecutor General of the Russian Federation
Armenian Cassation Court	Cassation Court of the Republic of Armenia
Armenian CPC, CPC	Criminal Procedural Code of the Republic of Armenia
Appeals Court	Criminal Court of Appeal of the Republic of Armenia
Armenian Constitutional Court	Constitutional Court of the Republic of Armenia
Supreme Judicial Council	Supreme Judicial Council of the Republic of Armenia
Constitution	Constitution of the Republic of Armenia
Armenian Criminal Code	Criminal Code of the Republic of Armenia
First Instance Court	Court of First Instance of General Jurisdiction of the Republic of Armenia

“Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made”.

Lord Brightman, the case of Chief Constable of North Wales Police v. Evans

INTRODUCTION

The double jeopardy principle (or *ne bis in idem* principle), is not in itself an absolute ban for the reopening of criminal proceedings. Article 17 of the International Covenant on Civil and Political Rights (ICCPR) and Article 4 of Protocol No. 7 of the European Convention on Human Rights (ECHR) provide that, while no one can be liable to be tried or punished again, there are limited grounds for reopening of criminal proceedings under a procedure for exceptional review of judgments.

The Armenian Criminal Procedure Code, together with ordinary review procedures for acts not entered into force, envisages three bases the review of judgments entered into force, which are

a) the review on the ground of new circumstances,
b) the review on the ground of newly discovered circumstances,
c) the review on the ground of a Fundamental Defect.

Next, the recent judgments of the ECtHR have had a significant impact on the jurisprudence of the Armenian Cassation Court in terms of reopening of proceedings under a procedure for exceptional review. In particular, the legal positions of ECtHR, laid down in *Mushegh Saghatelyan v. Armenia* judgment of 2018, considerably impacted the Armenian Cassation Court’s interpretation of Fundamental Defect as a ground for the exceptional review of judgments.

The judgment of *Mushegh Saghatelyan v. Armenia* maintained that the Armenian authorities breached Mr. Saghatelyan’s right to free trial (guaranteed by Article 6 of the ECHR). This conclusion was reached as the authorities limited the applicant’s defense rights in a way that was incompatible with the guarantees of a fair hearing. The ECtHR stressed that in recent years it developed case-law on the issue of prosecution and conviction of individuals for their conduct at a public event, while such prosecution was based exclusively on the submissions of police officers who had been actively involved in the contested events.

In *Saghatelyan v. Armenia*, the ECtHR pointed out that the quality of the evidence (taken within criminal proceedings) must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. The ECtHR considered that Armenian national courts, in a dispute over the key facts underlying the charges, failed to use every reasonable opportunity to verify the incriminating statements of the police officers. The ECtHR highlighted that the police officers, who testified against the applicant, were the only witnesses for the Prosecution and had played an active role in the contested events. The ECtHR declared a violation of para. 1 of Article 6 as the Armenian authorities unreservedly endorsed the police's version of events, failed to address any of the applicant's submissions properly, and refused to examine the defense witnesses without proper regard to the relevance of their statements.

In a judgment issued in 2019, the Armenian Cassation Court has incorporated the legal standards of *Mushegh Saghatelyan v. Armenia* into its current jurisprudence. In detail, the Armenian Cassation Court used these standards to record Fundamental Defects in the initial criminal proceedings concerning Gagik Jhangiryan. In deciding to quash the previous judgment, the Cassation Court noted the common features of Mushegh Saghatelyan and Gagik Jhangiryan cases.

The Cassation Court recorded that the national authorities failed to comply with Article 6 guarantees (developed in *Saghatelyan* case by the ECtHR) in initial proceedings against Mr. Jhangiryan. This conclusion was reached as the lower courts had based the conviction predominantly on the incriminating statements of the police officers, who had actively taken part in contested events. Analyzing that the conviction was based upon such incriminating statements, the Armenian Cassation Court concluded that the initial judicial proceedings were conducted with a Fundamental Defect. The Cassation Court underscored that the Fundamental Defect disrupted the very essence of justice and violated the appropriate balance between the interests protected by the Constitution (Article 21 of the Armenian Criminal Procedure Code). Thereupon, the Armenian Cassation Court "adopted" the recent developments from the *Mushegh Sagahtelyan v. Armenia* into its jurisprudence and declared that there was a Fundamental Defect in initial proceedings.

These particular cases will have a central role in the analysis of the Research. Thus, the specific issue examined in the Research is **"how have recent judgments of the European Court of Human Rights (ECtHR) against Armenia affected the Armenian Cassation Court's interpretation of Fundamental Defect as a ground for exceptional review of judgments (to the benefit of the**

accused)"? The conducted Research demonstrated that the Armenian Cassation Court interpreted Fundamental Defect as a ground for exceptional review to quash flawed convictions and acquit the accused or to order a new trial, resulting in acquittal. In doing so, Fundamental Defect was employed as a legal ground to improve the situation of the accused. Thus, the Thesis Paper will concentrate on the instances when the ground of Fundamental Defect was recalled to the benefit of the accused.

We would like to underline the aim of regulations on the exceptional review of judgments entered into force and its correlation with the respect of res judicata principle (the principle for the finality of judgments). This principle entails that no party is entitled to request a review of a final and binding judgment merely for obtaining a rehearing and a fresh determination of the case. Nevertheless, the mere possibility of reopening a criminal case is prima facie compatible with Article 6 guarantees of the ECHR. Such exceptional reopening of proceedings allows a state to reopen a case due to the emergence of new facts, or where a Fundamental Defect is detected in the previous proceedings, which could affect the outcome of the case.

The policy consideration behind the Thesis Paper is the notion that the procedure for the exceptional review of judgments is designated to correct past judicial errors and miscarriages of justice, and is by no means a procedure for fresh examination of a case.

To summarize, the Thesis Paper does not intend to discuss the broad topic of the entire system for the review of judicial acts in criminal procedure. It merely focuses on the issue of exceptional review of judgments entered into force. We have attempted to narrow down the topic of the Thesis by primarily focusing on the notion of the Fundamental Defect as a ground for exceptional review (in Chapter 3).

The review procedure on the ground of a Fundamental Defect was selected because it is comparatively unexplored in scholarly work. The issue is also addressed in a few recent and important judicial decisions. On its turn, this unexplored area has motivated us to concentrate on the exceptional review of judgments entered into force on the ground of a Fundamental Defect.

In the case of new or newly discovered circumstances, the exceptional review is conducted under some already established facts (for example, the ECtHR judgments of Constitutional Court decisions). However, in case of exceptional review on the ground of a Fundamental Defect, the Armenian Cassation Court is tasked to independently establish whether there were Fundamental Defects in initial proceedings. This, in turn, raises the following issue: what will be a source for the determination of the existence of

such Fundamental Defect. Or, more specifically, can the Armenian Cassation Court rely on recent developments on ECtHR case-law in interpreting the notion of a Fundamental Defect in cases submitted for an exceptional review?

To put it in another way, **the Thesis will primarily focus on the analysis of the recent ECtHR case-law, declaring a violation of para. 1 of Article 6 of the ECHR. The mentioned analysis will then focus on how these legal positions were transformed into the modern jurisprudence of the Armenian Cassation Court**. Then, based on the meticulous analysis, the author will conclude that the last judgments of the Armenian Cassation Court attest to the progressive development of jurisprudence regarding the interpretation of the notion of the Fundamental Defect. In other words, the present Thesis will conclude that, with time, **the notion of Fundamental Defect has received a progressive interpretation by the Armenian Cassation Court**.

The present Paper is composed of an introduction and three chapters. **Chapter 1** is focused on the correlation between the principle of prohibition of double jeopardy and exceptional review of judgments entered into force in criminal procedure. It will discuss the substance of double jeopardy, relevant international regulations, and the interpretation of the principle by international courts. Next, **Chapter 2** will examine the grounds for an exceptional review, with particular attention to the ECtHR judgment on *Saghatelyan v. Armenia* as a basis for exceptional review.

Last but not least, **Chapter 3** will contemplate the exceptional review of judgments entered into force on the ground of a Fundamental Defect, and how have the recent judgments of the ECtHR against Armenia affected the Armenian Cassation Court's interpretation of Fundamental Defects. The Chapter will also reflect the recommendations, elaborated as a result of the analysis, as well as the considerations regarding further judicial practice. **The Conclusion** will summarize the main findings of the Research.

Chapter 1. The correlation between the principle of ne bis in idem and exceptional review of judgments entered into force

The main trait of the extraordinary review of judicial acts in criminal procedure is that, in contrast to ordinary review, the judicial acts are reviewed after they have entered into legal force. In most cases, verdicts may be reviewed even years after they have become final.

It is not coincidental that this procedure is referred to as "exceptional": criminal procedural law has stringent and limited criteria for reviewing final judgments. These strict rules are inherently tied to fundamental principles of *ne bis in idem* (the right not to be tried or punished twice) and *legal certainty*. The Thesis will establish that the extraordinary review of judgments does not contradict these legal principles.

In terms of structure, the present Chapter will present the historical background of the exceptions to the *bis in idem* principle (Subparagraph 1.1.), the correlation between extraordinary review procedure and the principles of *ne bis in idem and legal certainty* building upon the international principles, best practice of other states as well as Armenian legislation (Subparagraph 1.2.)

1.1. The historical context of ne bis in idem principle and the exceptions to the rule

Throughout history, the prohibition of *ne bis in idem* (the right not to be tried or punished twice, or the prohibition of double jeopardy) guaranteed the finality of court decisions and that people could be confident that there would not be other proceedings on their cases. In ancient Greece, the principle of *ne bis in eadem re* was in force in Athens and Sparta, and provided that no one could be tried twice for the same offence. The purpose of this principle was to prevent the same person from facing repeated Prosecution[1]. In the fourth century BC, Demosthenes defined that *ne bis in eadem re* is a fundamental guarantee for a defendant facing trial.[2]

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[1] Walter J. Jones, *Law and Legal Theory of the Greeks* 148 (1956).
[2] R. Glazebrook*, Double Jeopardy. By Martin L. Friedland*, Faculty of Law, University of Toronto,15-16 (1969).

In Roman times, Ulpian confirmed that a final court judgment should not be changed (*res judicata pro veritate accipitur*).[3] Roman lawyers believed that if a judgment was to serve the aim of the trial, it had to constitute law in that specific case[4]. This conclusion was another way of formulating the principle of legal certainty: that the law should be constant so that the citizens would have an opportunity to predict the consequences for their actions.

The principle of the legal validity of judgments in criminal cases was considered as a principle of both canon law and older German legislation. Gratian, with reference to the Old Testament, applied the formulation of *non iudicabit Deus bis in id ipsum*.[5]

Despite the fundamental meaning behind the right not to be tried or punished twice, the concept of reopening a case soon emerged in various legal systems. This was due to the understanding that initial proceedings might have had such substantial defects, and in cases when the final judgment contradicted the concept of basic fairness.

For example, in 16th-century continental Europe, the principle of *ne bis in idem* was replaced by the institution of "release from the court of the first instance" (*absolutio ab instantia*) prepared by Milanese lawyers. It meant that where there was insufficient evidence to pass judgment, the proceedings were suspended, but could be reopened on new evidence.[6] In 1751, "release from the court of the first instance" was included in the Codex Juris Bavarici Criminalis (German Code of Criminal Procedure), providing for the reopening of a case dependent on new circumstances coming to light.[7]

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[3] Maciej Rogalski, *Exceptions to Res Judicata and the Prohibition of Ne Bis in Idem in Criminal Law*, 8 Int'l L. Y.B. 103 (2017-2018).

[4] Resich, *Res judicata*, Warszawa 7 (1978).

[5] While reflecting on the principle of non iudicabit Deus bis in id ipsum, Gratian relied for the most part on Nahum 1:9: "God will not judge the same [crime] twice". According to Gratian, Nahum 1:9 applies only to those who perform penance for their sins and reform their lives after having been punished by God. Schroeder, *Die Rechtsnatur des Grundsatzes "ne bis in idem", Juristische Schulung*, in JZ No.3, 228 (1997) and Wei, *Gratian the theologian,* Washington, D.C., Catholic University of America Press (2016).

[6] Schwarplies, *Die rechtsgeschichtliche Entwicklung des Grundsatzes "ne bis in idem" im Strafprozess*, Zurich 27 (1970).

[7] Dithmar, *Der Gundsatz "ne bis in idem" und dasfortgesetzte Delikt*, Berlin 6 (1993).

Similar exceptions to the *ne bis in idem* principle were also included in the French legal system[8] as well as in the Anglo-Saxon legal system[9]. In the American legal system, the double jeopardy clause[10] prohibited the state with all its resources and power to make repeated attempts to convict an individual for an alleged offense, thereby subjecting her to embarrassment, expense, and ordeal and compelling her to live in a continuing state of anxiety and insecurity.[11]

Notwithstanding the essential protection provided under the Double Jeopardy Clause, the Supreme Court of the U.S. clarified that the clause does not bar reopening of proceedings if the defendant successfully appeals their conviction[12]. The explanation for this rule was altered several times over the years: (1) in a case when the defendant has waived his right to protection of double jeopardy; (2) the jeopardy continues until there is a "legitimate" final verdict;[13] (3) and without such a rule, courts would be reluctant to find errors and overturn convictions[14].

1.2. The aim of exceptional review as a form of exception from the principle of *ne bis in idem*

The fundamental principle of *ne bis in idem* is not an obstacle to the restoration of infringed rights, and it cannot in any manner impede proceedings aimed at correcting errors made during criminal proceedings. The procedure for the extraordinary review of judgments is a justified exception to *ne bis in idem* prohibition and is vital in terms of having an effective system for restoring infringed human rights.

The correlation between res judicata and reopening of criminal proceedings

Ne bis in idem principle is also tightly connected with the doctrine of *res judicata*. In simple terms, *res judicata* means a matter judicially acted upon or decided; an issue settled under a judgment[15]. The American scholars identify that the doctrine of *res judicata* is policy-driven: strong, but contesting policies

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[8] See footnote 5.
[9] Paul A. McDermott, *Res Judicata and Double Jeopardy*, Butterworths 200 (1999).
[10] The Constitution of the United states, Amendment XIV Sec. 1.
[11] *Green v. United States*, 355 U.S. 184, 187–88 (1957).
[12] Richard G. Singer, *Criminal Procedure II: from bail to jail*, 224 (2nd ed. 2008).
[13] *United States v. Ball*, U.S. (1896).
[14] *United States v. Tateo*, 377 U.S. (1964).
[15] The American Journal of Comparative Law, at 637–53 (Volume 22 1974), https://academic.oup.com/ajcl/article-abstract/22/suppl_1/637/2632693?redirectedFrom=fulltext.

underlie the scope of *res judicata*. The most influential concepts behind such policies are the values of justice, procedural efficiency, and fairness.[16]

The European Convention on the International Validity of Criminal Judgments interprets that *res judicata* enters into force once a decision becomes final and legally binding. In criminal procedure, a decision is final when it is irrevocable, that is to say, when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of such remedies[17].

The doctrine of *res judicata* is based on the following three notions:

●the prohibition of trying a person twice for the same cause,

●the interest of states that there should be an end to litigation,

●the interest of the state in having an authoritative judicial system, in which judicial decisions are accepted to be correct and final.[18]

Nevertheless, *res judicata* doctrine is a restrained one. Clermont clarifies that almost every legal system has such limitations, as their absence would raise concerns about basic fairness, especially when a case is reviewed to the detriment of the accused.[19]

It is generally accepted that the principle of *ne bis in idem* serves foremost to protect those who have been judged, whether convicted or acquitted.[20] However, it *should be noted that the ne bis in idem prohibition may in certain circumstances prevent the accused from demonstrating their innocence*.[21]

In case the initial criminal proceedings did not afford a full and fair opportunity to litigate, the concept of basic fairness would require to have a legal procedure for remedying the errors of the initial

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[16] *Montana v. United States*, 440 U.S. 147, 153-54 (1979).
[17] *Nikitin v. Russia*, 50178/99, para. 37 (ECtHR 2004), http://hudoc.echr.coe.int/fre?i=001-61928.
[18] Revathi N. Sundar, *Res Judicata*, International Journal of Advance Research, Ideas and Innovations in Technology 529 (2017), www.IJARIIT.com.
[19] Kevin M. Clermont, *Res Judicata as Requisite for Justice*, 68 Rutgers U.L. Rev. 1087 (2016).
[20] Grunwald, *Die materielle Rechtskraft im Strafverfahren der Bundesrepublik Deutschland*, Deutsche strafrechtliche Landesreferate zum IX Internationallen Kongre3 flir Rechtsvergleichung, Berlin-New York 97 (1974).
[21] See footnote 2.

proceedings[22]. In other words, the concept of basic fairness requires that everyone should have a full and fair opportunity to litigate the claims and defenses or the issues in the prior proceedings.

If this guarantee is not complied with by lower courts, the legal systems have appeals procedures for judgments that have not entered into legal force. Nevertheless, as nearly all legal systems can have flaws, it is conceivable that reviewed judgments may contain fundamental errors even after higher courts have reviewed them. Consequently, to preserve basic fairness, legal systems have reopening proceedings in case fundamental flaws are discovered in the final judgments.

In other words, if an error in initial proceedings leads to the sentencing of an innocent person, *res judicata* should not be an obstacle for exoneration and rehabilitation. This is the justification behind the measures allowing even those verdicts which are legally valid to be overturned, which be discussed in Chapters 2 and 3.

International principles

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) and Article 4 of Protocol No. 7 of the ECHR provide that extraordinary review is compatible with the right not to be tried or punished again. The general rule sets out that no one can be liable to be tried or punished again in criminal proceedings for an offense for which they have already been finally acquitted or convicted. Nevertheless, there are cases when the exceptional review of final judgments is permitted.

ICCPR and ECHR set out that the principle *legal certainty* (under the terminology of the European Court of Human Rights) is not violated of a case is examined under the exceptional review procedure. The exceptional grounds for such review are as follows

1. new circumstances,

2. newly discovered circumstances, or when

3. a Fundamental Defect in the previous proceedings that could affect the outcome of the case.[23]

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[22] See footnote 19.

[23] European Convention on Human Rights (as amended by Protocols Nos. 11 and 14 and supplemented by supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16), Nov. 4 1950, https://www.echr.coe.int/Documents/Convention_ENG.pdf.

The European Court of Human Rights (the ECtHR) has elaborated that the principle of legal certainty is not infringed in case of the exceptional review of judgments in legal force[24,25].

In *Mihalache v. Romania,* the ECtHR confirmed that ECHR permits the states to reopen a case where new facts emerge or where a Fundamental Defect is detected in the proceedings[26]. The procedure for the exceptional review can have two developments: review either to the benefit or to the detriment of the accused. The legal systems are more tolerant of the exceptional to the benefit of the accused as it is considered as a valid means for the restoration of violated rights. On the other hand, systems have stringent limitations on exceptional review to the detriment of the accused (the ECtHR has underlined that such review can take place in very limited cases and only in the form of reopening proceedings)[27].

Higher courts' power of the exceptional review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The procedure for exceptional review does not entail an appeal in disguise, and in other terms, the mere possibility of there being two views on the subject is not a ground for re-examination.

Article 4 of Protocol No. 7 prohibits the repetition of criminal proceedings that have been concluded by a final decision. This prohibition is not only confined to the right not to be punished twice but also extends to the right not to be prosecuted or tried twice. It applies even where the individual has merely been prosecuted in proceedings that have not resulted in a conviction.[28]

The ECtHR heard a number of cases on specific supervisory review procedures (a form of exceptional review) and their compatibility with the prohibition of *ne bis in idem* under Article 4 § 2 of

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[24] See footnote 20, para. 45.
[25] With regards to observing legal certainty, Winter is of the opinion that "the ECtHR judgment might require to sacrifice the principle of certainty in order to put an end to a breach of the Convention during the procedure of execution of ECtHR judgments". She further substantiates that the states have a responsibility to have procedure for extraordinary review so that a new trial can take place after a ECHR violation had been recorded. Lorena Bachmaier Winter, *The Implementation of the ECTHR's Case-Law and the Execution Procedure after Protocol No. 4*, ET Scientia Int'l J. 9 14-147 Lex (2010).
[26] Article 4 § 2 of Protocol No. 7 sets a limit on the application of the principle of legal certainty in criminal matters. The requirements of legal certainty are not absolute, and in criminal cases, they must be assessed in the light of Article 4 § 2 of Protocol No. 7, which expressly permits Contracting States to review judgments entered into legal force. In Mihalache v. Romania (GC, paras. 131-33), the Court clarified the concepts of new or newly discovered facts or the discovery of a Fundamental defect in the previous proceedings. It explained that they are alternative and not cumulative conditions.
[27] Waltog, *Nowa kasacja w procesie karnym*, Palestra 21-22(1996).
[28] *Sergey Zolotukhin v. Russia*,14939/03, paras. 110-11, (ECtHR 2009), http://hudoc.echr.coe.int/eng?i=001-91222.

Protocol No. 7 of the ECHR. The supervisory review may be regarded as a special type of re-opening, which is compatible with Article 4 § 2 of Protocol No. 7 (including the guarantees of Article 6) in circumstances when such a review does not amount to a "second trial".[29,30]

The first paragraph of Article 4 § 2 of Protocol No. 7 sets out the three key components of the *non bis in idem* principle:

1. whether both proceedings were "criminal" in nature,

2. whether the offense was the same in both proceedings and

3. whether there was a duplication of proceedings.[31]

Ne bis in idem under Article 4 § 2 of Protocol No. 7 protects the persons against prosecution or trial for a second "offence" (or duplication of proceedings) in so far as it arose from identical facts or facts which were substantially the same.[32] Thus, a review procedure that amounts to for a second "offence" (or duplication of proceedings) will violate *ne bis in idem* principle.

In *Savinsky v. Ukraine* the ECtHR established that to assess the compatibility of extraordinary review proceedings with *ne bis in idem* principle, it had to analyze whether the power to launch such a review was exercised by the authorities to strike, to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice.[33]

Nikitin v. Russia standard on compliance of exceptional review procedure with the ne bis in idem principle

The scope of application of the *ne bis in idem* principle in extraordinary review procedure under Article 4 § 2 of Protocol No. 7 was further clarified in *Nikitin v. Russia*. *Nikitin.* The case concerned the supervisory review of the acquittal of the applicant from Russia, who was initially tried on suspicion of treason against the Russian Federation, was acquitted, and later this acquittal was upheld by the Russian Supreme Court in 2000. Following this decision on upholding the acquittal, the judgment became final

[29] See footnote 17, paras. 46-47.
[30] *Savinskiy v. Ukraine*, 6965/02, para. 2, (ECtHR adm. dec. 2009)http://hudoc.echr.coe.int/fre?i=001-69432.
[31] *Mihalache v. Romania*, 54012/10, para. 49, (ECtHR 2019), http://hudoc.echr.coe.int/eng?i=001-194523.
[32] See footnote 28, para. 82.
[33] See footnote 30, para. 3.

under the Russian criminal procedural law. In May 2000, the Russian Prosecutor General lodged a request with the Presidium of the Supreme Court to review the case in supervisory proceedings. In the ECtHR application, Nikitin alleged the Presidium of the Supreme Court's deliberation on reopening proceedings after his final acquittal was a violation *ne bis in idem* principle and was a second trial regarding an offence of which he had been finally acquitted.[34]

To decide whether the supervisory review of an acquittal complied with Article 4 of Protocol No. 7 guarantees, the ECtHR focused on the following aspects:

●whether there had been a "final" decision before the supervisory instance intervened, or whether the supervisory review was an integral part of the ordinary procedure and itself provided a final decision;

●whether the applicant was "tried again" in the proceedings before the Presidium; and

●whether the applicant became "liable to be tried again" under the Procurator General's request.[35]

The essential criterion on determining whether *ne bis in idem* principle was violated, was that the following: the ECtHR considered whether in given circumstances the extraordinary review gave rise to any form of duplication of the criminal proceedings contrary to Article 4 of Protocol No. 7 guarantees. [36]

The ECtHR observed that Article 4 of Protocol No. 7 draws a clear distinction between a second prosecution or trial, which is prohibited by the first paragraph of that Article, and *the resumption of a trial in exceptional circumstances*, which is provided for in its second paragraph. Article 4 § 2 of Protocol No. 7 expressly envisages the possibility that an individual may have to accept prosecution on the same charges, under domestic law, where a case is reopened following the emergence of new evidence or the discovery of a Fundamental Defect in the previous proceedings.[37]

For *Nikitin case*, the subject matter of extraordinary review proceeding was the determination whether the previous proceedings were valid. If the proceedings on his charges were reopened (the Russian Supreme Court ultimately declined the reopening), the ultimate effect of supervisory review would be to annul all decisions previously taken by courts and to determine the criminal charge in a new

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[34] See footnote 17, paras. 8-21.
[35] Ibid., para. 28.
[36] Ibid., para. 36.
[37] Ibid., para. 45.

decision[38]. To this extent, the effect of supervisory review was the same as reopening, because both constitute a form of continuation of the previous proceedings. The Court therefore concluded that for the purposes of the *non bis in idem* principle, supervisory review (as a method of exceptional review) was a specific type of reopening permitted under Article 4 § 2 of Protocol No. 7.[39]

In other words, the crucial point of the case was that supervisory review could not have given rise to duplication of criminal proceedings, and complied with the ECtHR standards. To summarize, an extraordinary review does not violate non *bis in idem* principle as it is not aimed at starting a second trial. Supervisory review merely examines whether the previous proceedings were flawed or not.

The case-law of the ECtHR established that exceptional review is conducted under stringent rules and only if circumstances of substantial and compelling character justify the initiation of the procedure for exceptional review. To determine the circumstances that compel exceptional review, the ECtHR employs the term "*blatant infringement of the law*" [40]. It would be difficult to acknowledge that the use of the institution of cassation for correcting blatantly defective legally valid judicial decisions is an infringement of the principle of *ne bis in idem.* Hence, in case domestic proceedings were impaired because of blatant infringement of the law (both substantial and procedural), the exceptional review can serve as an appropriate remedy for the restoration of violated rights.

Articles 61 and 63 of the Armenian Constitution stipulate that everyone has a right to effective judicial protection of her rights and freedoms, as well as a right to a fair and public hearing of their case, within a reasonable time period, by an independent and impartial court. Article 68 of the Armenian Constitution, further, encompasses the double jeopardy principle, providing that no one may be tried twice for the same act. This principle, however, does not hinder the review of judgments under the exceptional procedures.

[38] Ibid., para. 46.
[39] Ibid.
[40] Doda, *Kontrola odwolawcza w procesie karnym*, Dom Wydawniczy ABC (45-46) 1997.

Chapter 2. The exceptional review of judgments entered into force

Chapters 2 and 3 will discuss the mechanisms for exceptional review in the light of review to the benefit of the accused. Such limitation to the scope of the Research is due to the author's effort to analyze a particular legal issue and formulate a precise and concise research question.

2.1. The distinction between the extraordinary and ordinary review of a judgment in criminal procedure

The two major differences between ordinary and extraordinary review proceedings are *firstly*, their grounds and *secondly*, the time-bar for submission of applications for a review.

The exceptional review procedure is conducted only upon a judicial decision on the merits of the case that has entered into force, while ordinary review envisages reviewing decisions that have not entered into force yet (are not final)[41]. Thus, there are two cumulative conditions for the review of decisions under extraordinary procedure: *firstly*, such decisions should be in legal force, and *secondly*, they should be on the merits of the case.

The different grounds for the review of judicial acts in ordinary and exceptional review proceedings are essential elements for distinguishing them. In *the case of Mkrtich Sargsyan*, the Armenian Cassation Court distinguished between the grounds for ordinary (review of acts not in force) and extraordinary review (review of final acts). In contrast to the review of acts not in force, there are very stringent grounds for reviewing final judicial acts. These limited grounds include the review of acts under new or newly discovered circumstances or based on a Fundamental Defect (in the context of the application of substantial or procedural rules). The Cassation Court concluded that this regulation arises from the principle that the review of a final act is an exception to the general rule, and this exception should be allowed only under stringent rules and in limited cases.[42]

The differences between time periods for lodging appeals for ordinary and extraordinary review proceed are analyzed in *the case of Artur Karnazyan*[43]. The Armenian Cassation Court examined the rules on reviewing judgments not in force and on final judgments and concluded that

●there is no special condition for appealing a judicial decision on the merits of the case that has not entered into force,

●a one-month period is prescribed for lodging such appeal,

●and after this period is expired, the appeal is left without examination.[44]

As opposed to this regulation, Armenian law envisages an exceptional condition for appealing final decisions on merits issued by first instance courts (the exceptional review of the decisions of first instance courts). Under this exceptional rule, a final decision of a first instance court could be appealed in case the first instance proceedings were conducted with a Fundamental Defect that could have had any effect on

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[41] Aleksandr Smirnov, Criminal Procedure: a textbook 40 (4th ed. M. KNORUS 2008).
[42] *Decision on Mkrtich Sargsyan*, ԵՄԴ/0020/01/14, para. 19 (RA Court of Cassation 2015).
[43] *Decision on Artur Karnazyan*, ԵԸԴ/0071/01/12, (RA Court of Cassation 2013).
[44] See footnote 44, para. 13.

the outcome of the case. A six-month period (following the entry into force of the first instance court decision) is prescribed for lodging this extraordinary appeal.[45]

2.2. The grounds for the ordering of exceptional review under international standards, comparative law and Armenian legislation

It is widely accepted that determinations in criminal proceedings can be flawed. Miscarriages of justice are an expected consequence of imperfect procedures of investigation, prosecution, and court trials, and they are ordinarily conceived as exceptional and unacceptable events[46]. According to Ogletree and Sarat, wrongful convictions are not random mistakes but rather organic outcomes of a misshaped larger system that is rife with faulty eyewitness identifications, false confessions, biased juries, and racial discrimination[47].

To balance this flaw, there are legal procedures for overturning wrongful convictions (for example, when a case is reopened when new evidence or circumstances come to the surface). When a case is reopened, our confidence in a just legal system is supported. However, too many reopened cases suggest too many wrongful convictions, which may be understood as a threat to the legitimacy of justice[48].

The exceptional review proceedings aimed at correcting miscarriages of justice engage the protection of Article 4 § 2 of Protocol No. 7 and Article 6 of ECHR. When an extraordinary remedy leads to the reconsideration of a case, Article 6 guarantees also apply to such "reconsideration" proceedings. *Moreira Ferreira v. Portugal* established that the national characterization of the proceedings (either classifying them into ordinary or extraordinary proceedings) should not be regarded as decisive for the applicability of Article 6 guarantees. Similarly, supervisory review proceedings resulting in the amendment of a final judgment fall under the criminal head of Article 6.[49]

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[45] Ibid.
[46] Richard Nobles, Understanding miscarriages of justice: law, the media, and the inevitability of crisis(1st ed. Oxford Univ. Press 2000).
[47] Charles Ogletree & Austin Sarat, *When law fails making sense of miscarriages of justice* (Charles J. Ogletree, Jr. & Austin Sarat eds., New York Univ. Press 2009).
[48] Philos S. Magnussen, *Prevention of Wrongful Convictions: Norwegian Legal Safeguards and the Criminal Cases Review Commission*, 80 U. Cin. L. Rev. 1373 (2012).
[49] *Vanyan v. Russia*, 53203/99, para. 58 (ECtHR 2005), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-7167%22]}.

By bringing extraordinary review into the scope of Article 6 guarantees, the ECtHR also considered the justification behind the stringent rules and grounds for ordering an exceptional review. The ECtHR establishes that although it is required to have statutory requirements for lodging extraordinary appeals, the national courts should avoid excessive formalism that would infringe the fairness of the proceedings.[50]

Various means for extraordinary review are envisaged under the legislation of many states. In Germany, extraordinary review proceedings are aimed at quashing final judgments that are inconsistent with "basic concepts of truth, justice, and legal proof"[51]. German criminal procedure is based on the notion that the conviction of an innocent would be an "*unbearable violation of justice*".

Nevertheless, the bar for reopening a case is rather high in Germany: the petitioners for exceptional review based on new facts should establish that such facts are so essential that their consideration may lead to an acquittal or a less severe penalty. In other words, to order an exceptional review, the high courts should establish that a re-trial will materially improve the position of the convicted person.[52,53] Proceedings can be opened both to the benefit or to the detriment of a person under the following grounds

●if an examined document is later found as false or forged,

●if a witness or expert was guilty of an intentional or negligent breach of the duty imposed by the oath or made a false statement,

●if a judge was guilty of a culpable breach of his official duties concerning the case.[54]

The German law envisages more possibilities for the exceptional review to the benefit of the accused that include the new judgment of a civil court[55], new facts or evidence[56], as well a judgment of the ECtHR (that recorded a violation of the ECHR).

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[50] *Walchli v. France*, 35787/03, para. 29, (ECtHR 2007), http://hudoc.echr.coe.int/eng?i=001-81921.
[51] Katja Sugman Stubbs, *Criminal Procedure in Slovenia*, 322 (Richard Vogler & Barbara Hubereds., 2008).
[52] German Code of Criminal Procedure, sec. 370, http://www.gesetze-im-internet.de/englisch-stpo/englisch stpo.html.
[53] German attorneys and scholars alike think of the reopening procedure as being an important yet very complex instrument and call for a practice of that instrument that is in line with its intended purpose.
[54] See footnote 53, sec. 359, 362.
[55] In case a civil court judgment on which the criminal judgment is based is afterwards quashed by another final judgment.
[56] In case such new facts or evidence, independently or in connection with the evidence previously taken, tend to support the defendant's acquittal or to application of a more lenient criminal provision.

The Swiss law provides for the possibility of the extraordinary review once all procedural remedies have been exhausted, and the decision has become final. An application for extraordinary review can be satisfied (1) when new facts or new evidence[57] are found, (2) when the decision is irreconcilably in contradiction with a later criminal decision which involves the same factual circumstances, or (3) in case the outcome of previous proceedings was influenced by criminal activity.[58]

During the conduct of the extraordinary review, the high courts of Norway are very attentive to the procedural conduct of previous proceedings. The high courts order reopening of proceedings in case serious procedural flaws[59] are discovered.

In comparison with European systems, the Canadian courts are generous in allowing both appeals out of time and new evidence to be admitted, especially in cases where the prosecutor consents to such procedures. This procedure is mostly used to quash convictions. Although due diligence is a formal prerequisite for the admission of new evidence, Canadian courts have consistently held that this requirement should not stand in the way of a correction of a miscarriage of justice.[60] Henceforth, Canadian courts are more willing to "sacrifice" procedural peculiarities to remedy wrongful convictions.

Turning to the Armenian regulations for exceptional review procedures, Article 21 of the Armenian CPC expressly provides that exceptional review proceedings under new or newly discovered circumstances, as well as in the case of a Fundamental Defect in previous proceedings comply with the prohibition of double jeopardy.[61]

Once again, a judgment in force may be revised only under the procedures for revision under new, newly discovered circumstances or in case a Fundamental Defect in previous proceedings is discovered[62]. Based on new or newly discovered circumstances, the Appeals Court reviews the final judgments of the first instance courts[63], while the Cassation Court reviews the final judgments of the Appeals Court and the

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[57] Which were not available at the first trial may lead to a different conclusion.
[58] See footnote 3, pp. 118-19.
[59] As an illustration, discovery of new psychiatric examinations of some mental problems not identified before, procedural wrongs, lack of justification for the appeal refusal amount to such serious procedural flaws.
[60] Kent Roach, *Wrongful Convictions in Canada*, 80 U. Cin. L. Rev. 1465 (2012).
[61] Armenian Criminal Procedure Code, Article 21 para. 5.
[62] Ibid. Articles 414.2. and 426.1
[63] The Criminal Court of Appeal of the Republic of Armenia.

Cassation Court[64]. While lodging application to the Cassation Court, the party has to demonstrate the new or newly discovered circumstance or mention the violation of the law that could have affected the outcome of the case[65].

The Cassation Court is entitled to initiate exceptional review proceedings on three grounds

- new circumstances,
- newly discovered circumstances,
- Fundamental Defect in the previous proceedings.

The Cassation Court permits examination of an application against a final judgment if it finds an appearance of a fundamental violation of human rights and freedoms[66]. This appearance of a fundamental violation of human rights of freedoms can be established in case of new or newly discovered circumstances, or Fundamental Defect in previous proceedings (when adopting the judgment, the court committed miscarriage of justice infringing upon the very essence of justice) [67]. In *Mihalache v. Romania*, the ECtHR clarified the concepts of new or newly discovered facts or the discovery of a Fundamental Defect in the previous proceedings, explaining them not as cumulative, but as alternative conditions[68].

2.3. New circumstances as grounds for the exceptional review

The present subchapter will mostly explore the judgments of the ECtHR as a ground for exceptional review, with a particular highlight on the *Mushegh Saghatelyan v. Armenia* judgment and its subsequent reopening under Armenian Criminal Procedural law.

"New" circumstances are those factors that concern the case but arise only after a final judgment. The term "new or newly discovered facts" includes new evidence relating to previously existing facts.[69]

Armenian CPC outlined for bases for exceptional review of final judgments under new circumstances. Firstly, *the decisions of the Armenian Constitutional Court* are a new circumstance. Such

[64] Armenian CPC, 426.1. para. 2.
[65] Ibid. Article 407. para. 1.
[66] Ibid. Article 414.2. para. 1.
[67] Ibid. Article 414.2. para. 3.
[68] See footnote 31, paras. 131-133.
[69] Right not to be tried or punished twice para, Guide on Article 4 of Protocol No. 7 59, https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_7_ENG.pdf.

decisions are recognized as new a circumstance if a provision of the law, applied in the said case, was declared as contradicting the Constitution and void. Or, a decision on the conformity of a provision in question with the Constitution can still be classified as a new circumstance, if during the previous proceedings, the courts applied such a provision in a manner contradicting the constitutional interpretation of the provision. [70]

Secondly, *the judgments of international courts* are identified as a new circumstance. They are a basis for exceptional review when the violation of a human right guaranteed under an international treaty has been confirmed by a final and lawful decision of an international court to which Armenia is a party[71]. Thirdly, *other circumstances prescribed under the international treaties* to which Armenia is a party may be classified as a new circumstance. [72]

Furthermore, at last, the *decisions of the Supreme Judicial Council* can be classified as a new circumstance. In case the Supreme Judicial Council issues a decision on subjecting a judge to disciplinary liability on the ground of blatant manifest violation of a substantive or procedural rule, such decision falls under the category of a new circumstance permitting the exceptional review of a final judgment.[73]

Under Article 426.4, an application based on a new circumstance should be lodged within three months starting from the moment when the applicant received information or had an opportunity to be informed about the emergence of the new circumstance. In the cases of lodging application based on an ECtHR judgment or a decision of Constitutional Court, such a time period starts to run since the applicant receives the ECtHR judgment or the decision of the Constitutional Court.

The Armenian Constitutional Court has interpreted the rules envisaging the review of judicial acts based on new circumstances. It established that after new circumstance emerge, the initiation of extraordinary review procedure by a competent court is a legal necessity and also the legal obligation of such court. The aim of such a review is the restoration of human rights and freedoms protected both under international treaties and the Constitution. [74]

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[70] Armenian CPC, 426.4 para 1.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Decision on the conformity of Article 426.9 of Armenian CPC with the Constitution, ՍԴՈ-984 (Armenian Constitutional Court 2011), https://www.arlis.am/DocumentView.aspx?docID=69892.

The scope of the review of the judicial acts based on a decision of the Constitutional Court (a type of a new circumstance) is determined by

- the subject-matter of the rule applied in previous proceedings,
- the essence, and particularities of the legal relationship,
- the scope of application of the rule as well as by the specific violation of rights resulting from such a rule.[75]

Most importantly, the Constitutional Court also examined the legal implications of the extraordinary review based on a new circumstance. In case the competent court finds that the new circumstance could have affected the outcome of the case, the review of judicial acts should *ipso facto* result in quashing the initial judgment. After the previous judgment is quashed, the competent court is entitled to choose either to order reopening proceedings (to the court that had adjudicated on the initial case) or to amend the overturned judgment itself. The second option is selected when the established factual circumstances enable reaching a judgment without a new examination. The Constitutional Court concluded that the exceptional review is conducted based on a new circumstance in case it is necessary to restore a violated right. [76]

Classifying a judgment of an international court as a new circumstance under the exceptional review procedure has a fundamental influence on the development of Armenian Criminal Procedural law. These judgments serve not only as a basis for ordering an exceptional review but also guiding the Armenian law-makers to improve the national legislation. Hence, the present Research will focus on the specific mechanism of implementing the position of the ECtHR extraordinary proceedings, and it will address the significance of *Mushegh Saghatelyan v. Armenia* in terms of the national criminal proceedings.

The Armenian Constitution (with the amendments of 2015) enshrines that every citizen has a right to apply to international bodies in case they consider their rights violated. Article 61(2) of the Constitution established that to protect their rights and freedoms, every person has a right to apply to the international bodies of protection of rights and freedoms. ECHR has a subsidiary system for human rights protection, meaning that it is not aimed at replacing national law-enforcement bodies, but will merely at trying to

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[75] Ibid.
[76] Ibid.

record cases when the national authorities fail to respect human rights (according to Article 13 of the ECHR).[77]

After the ECtHR records a violation of the ECHR, the issue of execution of such judgment arises. The Convention would be merely declaratory if there were no requirements for mandatory executions of judgments adopted in the result of a review of the applications submitted in line with the requirements, which is set by Article 46[78]. For this purpose, Article 46 of the ECHR sets out that by joining ECHR, the contracting parties undertake the international obligation to abide by the ECtHR judgment and take measures for their implementation. The underlying ideas of execution procedure envisage that "a judgment in which the ECtHR it finds a violation of the Convention or its Protocols, it imposes on the respondent State a legal obligation

●not just to pay those concerned the sums awarded by way of just satisfaction,

●but also to choose, the general and/or, if appropriate, **individual measures** to be adopted in its domestic legal order to put an end to the violation found by the Court and

●make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach"[79,80].

In the case of *Jirayr Sefilyan*, the Armenian Cassation Court turned to the substance of measures constituting restitution. The Cassation Court noted that obligations to pay the decided compensation, undertaking individual measures or measures of a general character to prevent such violations in the future constitute restitution. Such individual measures include

●ceasing the violation recognized by the ECtHR or the its effects or

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[77] *Selmouni v. France*, 25803/94, para. 74 (ECtHR 1999), http://hudoc.echr.coe.int/eng?i=001-58287.
[78] *Armen Hovhannisyan*, Judgment of the European Court of Human Rights as a basis for exceptional review in criminal procedure in a form of new circumstance 259 (Mat. of YSU Conf. 2018), http://ysu.am/files/Law_faculty_English_book_85.pdf.
[79] *Gabrielyan v. Armenia*, 8088/05, para. 198 (ECtHR 2012), http://hudoc.echr.coe.int/eng?i=001-110266.
[80] After an internationally wrongful act committed by a state is recorded, the issue of restitution for such violation arises. Article 35 of the ILC Draft Articles reflects the international principles prescribing the responsibility of the state for committing a wrongful act. According to this principle, after a violation of a human rights is fixed by an international court, the state is obliged to adopt measures constituting restitution, in Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts (Yearbook of Int. Law. Com. vol. II 2001)

●**restoring the situation** before the violation (restitutio in integrum) as much as it is possible.[81]

The practice of the Committee of Ministers in supervising the execution of the Court's judgments shows that in exceptional circumstances, the re-examination of a case or a reopening of the proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*.

Reopening of proceedings under extraordinary review procedure may be qualified as an effective measure for achieving *restitutio in integrum*[82]. As an illustration, reinitiating of proceedings is an accepted measure for achieving *restitutio in integrum* after ECtHR records a violation of Article 6[83].

Specific examples of exceptional review procedures by the Cassation Court based on the ECtHR judgment recognizing a human rights violation: the case of Mushegh Saghatelyan v. Armenia

Within its practice, the Cassation Court has taken into consideration the importance of recognition of violations by the ECtHR. However, although the recognition of violence in ECtHR judgment has a major role in determining the deficiencies of the Armenian legal system, not every recognition of violation results in the re-examination of a case based on a new circumstance.

In particular, even certain types of Article 6 violations (violations to the right to fair trial guarantees that are fundamental in terms of setting standards in a criminal procedure) do not result in the re-examination of previous proceedings and subsequent amendment of a final judgment. In other words, even in the case of a recognition of a violation of Article 6 standards, the proper execution of the ECtHR judgment does not always entail a new trial.

The Cassation Court distinguished two types of ECHR violations, and such division is fundamental in terms of their legal implication in the proceedings for the exceptional review. *The first type of violations* concerns cases when the recorded violation could not have had any effect on the outcome of previous proceedings. Hence, this kind of violations will not result in a new trial. *The second type of violations* concern such serious infringements of human rights, that should ultimately result in the re-examination of the case and amendment of the final judgment. The primary determining factor is

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[81] *Decision on Jirayr Sefilyan*, ՎԲ/07/13 (RA Court of Cassation 2014).

[82] Recommendation of the Committee of Ministers on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, CM/Rec (2000).

[83] *Claes and others v. Belgium*, 46825/99, para. 53 (ECtHR 2005), http://hudoc.echr.coe.int/eng?i=001-69231.

whether the human rights infringements could have influenced the outcome of serious proceedings. If under the second type, the recorded violations were so serious as to call for a re-examination of the case, then the Cassation Court orders quashing of the final judgment, and either reviews the case itself or orders reopening proceedings.

Such distinction is in place because ordering a new trial has a judicial policy behind it. In case too many cases are reopened (when every ECtHR position results in reopening), the principles of legal certainty and the authority of the judiciary may be put at risk. On the other hand, when serious miscarriages of justice are recorded, the exceptional review should result in the amendment of a faulty judgment to restore basic fairness.

In the case of *Ararat Muradkhanyan*, the Cassation Court conducted an extraordinary review in the light of an ECtHR judgment. The Cassation Court highlighted that the recorded violation of Article 6 was not serious; hence, it did not affect the outcome of the case. It subsequently set a standard for ordering reopening of a case: for the reopening of a case, the nature of Article 6 violation should be such that it could have had any effect on the outcome of the previous proceedings.[84]

The recent ECtHR judgment of 2018 on *Mushegh Saghatelyan v. Armenia* has a fundamental importance in finding a violation of Article 6 that has affected the outcome of domestic proceedings. Furthermore, the judgment sets out quite a precise definition of a right to a fair hearing by a tribunal[85], and how a violation of this specific right amounts to a serious procedural violation.

Facts of Mushegh Saghatelyan v. Armenia: On 19 February 2008, a presidential election was held in Armenia, following which Mr. Serzh Sargsyan, the then Prime Minister, was declared the winner. Mr. Mushegh Saghatelyan was an active supporter of the main opposition candidate, Mr. Levon Ter-Petrosyan, who had served as President between 1991 and 1998. During that time, the applicant was the Head of the Penitentiary Department at the Ministry of the Interior. Immediately after the announcement of the results, Mr. Ter-Petrosyan called on his supporters to gather in central Yerevan to protest against alleged irregularities in the election process.

[84] *Decision on Ararat Muradkhanyan*, ՎԲ/01/13, para. 22 (RA Court of Cassation 2013).
[85] See footnote 23.

Between 20 February and 1 March 2008, the demonstrators held rallies, in which the applicant actively participated, and some demonstrators, including the applicant, camped overnight in Freedom Square. In the early morning of 1 March, without warning, about 800 armed police officers violently dispersed the encampment. The demonstrators, including the applicant, fled the Square. The applicant was arrested and later convicted for allegedly assaulting a police officer and for carrying a bladed weapon. He alleged that he was beaten repeatedly during his arrest and at the police station, on the instructions of the police chief, to the extent that he lost consciousness. [86]

Mr. Mushegh Saghatelyan was later convicted on the ground of assault or threat of such assault on a public official and for illegally carrying a weapon [87], and was sentenced to five years of imprisonment[88].

The recognized violation under Article 6 of ECHR: Along with other violations under ECHR (Articles 5 and 11), the ECtHR recognized the violation of Mr. Saghatelyan's right to a fair hearing (Article 6 para. 1).

Right to fair trial standards set out in Mushegh Saghatelyan v. Armenia: In finding a violation of Mr. Saghatelyan's right to a fair hearing, the ECtHR focused on whether the proceedings against the applicant were conducted in a fair manner. Specifically, the ECtHR assessed whether the proceedings in which the evidence was taken, were overall fair.

ECtHR observed that the quality of taken evidence has a central role in such determination, and the circumstances in which it was obtained should cast no doubt on its reliability or accuracy[89]. In the context of taking evidence and equality of arms, the ECtHR paid particular attention to the notion that the persons must be afforded a reasonable opportunity to present their case under conditions that do not place them at

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[86] *Mushegh Saghatelyan v. Armenia*, 23086/08, para. 7-90 (ECtHR 2018), http://hudoc.echr.coe.int/eng?i=001-186114.

[87] Article 316 § 1 of Armenian Criminal Code provides that non-life-threatening or non-health-threatening assault or threat of such assault on a public official or her next-of-kin, connected with the performance of her official duties, is punishable by a fine of between 300 and 500 times the minimum wage or detention of up to one month or imprisonment for a period not exceeding five years. Article 316 § 2 provides that a life-threatening or a health-threatening assault on persons mentioned in the first paragraph of this Article, connected with the performance of their duties, is punishable by imprisonment for a period from five to ten years. Article 235 § 4 Article 235 § 4 provides that illegal carrying of a gas, bladed or missile weapon is punishable by a fine of between 200 and 600 times the minimum wage or detention of between one and three months or imprisonment for a period not exceeding two years.

[88] Mushegh Saghatelyan was convicted under Article 316 § 1 and 2, as well as Article 235 § 4.

[89] *Bykov v. Russia,* 4378/02, paras. 89-90 (ECtHR 2019), http://hudoc.echr.coe.int/eng?i=001-91704.

a disadvantage vis-à-vis their opponent[90]. When national courts do not satisfy the defendant's request to examine witnesses, they are under strict obligation to provide reasons for dismissing such a request[91].

Next, the international court identified the obligation of national courts to properly examine evidence without prejudice to its assessment. Article 6 provides that national courts should conduct a proper examination of the submissions, arguments, and evidence and also give reasons for the decisions they make during the proceedings[92].

Turning to the evidence implicating the guilt of Mr. Saghatelyan, the ECtHR noted that the evidence against Saghatelyan was circumstantial and did not link him directly to imputed acts. Particularly, in convicting Mr. Saghatelyan, Armenian Courts based their reasoning primarily upon the witness statements of police officers.[93]

The ECtHR next turned to the importance of checking the incriminating statements by police officers who took an active part in the contested events. In *Navalnyy and Yashin v. Russia,* it was established that if charges are based on statements of police officials who had played an active role in the contested events, it was indispensable for the national courts to use every reasonable opportunity to check their incriminating statements[94]. When all evidence in the defendant's favor is dismissed without justification, the national courts place an extreme and unattainable burden of proof on the applicant, and this directly infringes the requirement of proving one's guilt beyond reasonable doubt[95].

Accordingly, the ECtHR found that the proceedings against Mr. Saghatelyan were conducted similarly as in the cases of *Kasparov and Others* and *Navalnyy and Yashin v. Russia*. The ECtHR recognized that Armenian courts based their judgments exclusively on the version put forward by the police officers and denied Mr. Saghatelyan of opportunity to adduce evidence on the contrary. In case the

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[90] *Kasparov and Others v. Russia*, 21613/07, paras. 57-58 (ECtHR 2013), http://hudoc.echr.coe.int/eng?i=001-126541.
[91] *Topić v. Croatia*, 51355/10, para. 42 (ECtHR 2013), http://hudoc.echr.coe.int/eng?i=001-126638.
[92] *Huseyn and Others v. Azerbaijan*, 35485/05, paras. 199-200 (ECtHR 2011), http://hudoc.echr.coe.int/eng?i=001-105823.
[93] See footnote 85, para. 206.
[94] *Navalnyy and Yashin v. Russia*, 76204/11, para. 83 (ECtHR 2014), http://hudoc.echr.coe.int/eng?i=001-148286.
[95] *Nemtsov v. Russia*, 1774/11, para. 92 (ECtHR 2014), http://hudoc.echr.coe.int/eng?i=001-145784.

evidence, requested by Mr. Saghatelyan would be admitted, that could have allowed him to challenge all the charges against him, and ultimately could have had influenced the outcome of the case.

The Armenian courts practically did not address the applicant's arguments and submissions regardless of their strength and relevance and whether they could cast doubt on the evidence of the Prosecution (namely, the statements by police officers). The ECtHR established that Armenian courts rejected Saghatelyan's relevant argument without any analysis whatsoever, while admitted the version of the events described by the police officers. The resulting judgments were a mere recapitulation of the indictment against the applicant, which in its turn was based entirely on the testimony of the police officers concerned.

ECtHR recorded a violation of the right to a fair hearing as the Armenian courts

●based Mr. Saghatelyan's conviction on conflicting evidence,

●failed to address the applicant's submissions properly and refused to examine the defense witnesses and did not properly consider the relevance of their statements,

●failed to use every reasonable opportunity to verify the incriminating statements of the police officers who were the only witnesses for the Prosecution and had played an active role in the contested events. [96]

Following the judgment of the ECtHR on *Mushegh Saghatelyan v. Armenia*, the attorney of Mr. Mushegh Saghatelyan and the Prosecutor General of Armenia brought applications to the Armenian Cassation Court. The parties sought for extraordinary review of Mr. Saghatelyan's case based on the judgment of the ECtHR.

In the light of violations of Mr. Saghatelyan's right to fair hearing recorded in *Saghatelyan v. Armenia*, the Armenian Cassation Court concluded that the most proper measure for eliminating violations and achieving *restitutio in integrum*, would be quashing the judgment of 2008 and send the case for new examination (in other words, the Cassation Court ordered reopening of proceedings). The Cassation Court maintained that in the reopened proceeding, the First Instance Court should eliminate the violation of Mr.

[96] See footnote 85, para. 209-11.

Saghatelyan's right to a fair trial on the part criminal proceedings and subsequent conviction[97]. Ultimately, the First Instance Court acquitted Mr. Saghatelyan on every charge he was indicted for[98].

To summarize, the judgment of the ECtHR recognizing a violation of a human right that could have influenced the outcome of the case is an effective means for achieving *restitutio in integrum* and putting an end to an internationally wrongful act by a state. Specifically, Article 6 violations in *Mushegh Saghatelyan v. Armenia* were of such nature that they could have influenced the outcome of previous proceedings. Hence, the subsequent exceptional review on the case and Mr. Saghatelyan's acquittal was a way of restoring his violated rights, remedying miscarriage of justice, and reaching basic fairness.

[97] Decision on Mushegh Saghatelyan, ԵՔՐԴ/0396/01/08, paras. 40-41 (RA Court of Cassation 2019).
[98] Judgment on Mushegh Saghatelyan, ԵՔՐԴ/0396/01/08, (RA Court of First Instance 2019).

Chapter 3. The concept of Fundamental Defect in criminal proceedings as a separate ground for exceptional review

Given the Research Question of the Thesis, Chapters 3 discusses the mechanisms for exceptional review in the light of reopening to the benefit of the accused. The author has selected issues on exceptional review to the benefit of the accused in the light of the recent practice of the Armenian Cassation Court. In particular, the Armenian Cassation Court has interpreted the Fundamental Defect ground to review verdicts that date back to 2008-2009. Moreover, relying on such a reformative position of the Armenian Cassation Court, the Prosecutor General has brought complaints for exceptional review of convictions of persons who were imprisoned in the aftermath of 1 March events.

This reformative approach by the law-enforcement Armenian authorities has a scientific significance, as the Armenian Cassation Court attempted to directly incorporate the position of the ECtHR in *Mushegh Saghatelyan v. Armenia* (on the right to a fair hearing) into its practice. In other words, the Armenian Cassation Court, relying on the conclusions of *Mushegh Saghatelyan v. Armenia*, found that violation of the right to fair hearing can be construed as a Fundamental Defect, that could have influenced the outcome of previous proceedings. The Prosecutor General's Office later used the Fundamental Defect as a ground for exceptional review. Relying on Fundamental Defect ground as a ground for exceptional review, the Prosecutor General brought applications to the Cassation Court for reviewing cases that have been closed for more than 10 years.

Within the scope of Armenian Criminal Procedure, the notion of Fundamental Defect, as a ground for exceptional review, is quite an unexplored concept. The notion of Fundamental Defect is not addressed by Armenian lawyers in detail, as Armenian Courts have reviewed judgments on this basis in few cases. Notwithstanding the vast scholarly work dedicated to new and newly discovered circumstanced as a basis for exceptional review, the present Research Paper finds it also important to discuss the basis of Fundamental Defect as an effective tool for correcting previous faulty proceedings and restoring justice.

Article 21 of Armenian CPC envisages the legal basis for conducting extraordinary review under Fundamental Defect ground. Extraordinary review based on Fundamental Defect is imperative when the

previous proceedings were conducted with a Fundamental Defect resulting in the adoption of a judgment that infringes upon

- the very essence of justice,
- or the necessary balance of interests protected under the Constitution.

Article 21 para. 6 specifies that a Fundamental Defect can manifest itself as fundamental infringements of both material and procedural law. The Exceptional Review based on a Fundamental Defect is distinguished from other bases of exceptional review with its legal grounds. For example, new or newly circumstances are not discovered or could not have been discovered during initial proceedings. New circumstances arise after a judgment becomes final, while newly discovered circumstances are within the case facts in initial proceedings, but can only come to the surface after a case is closed[99]. Fundamental Defect differs from such grounds because when proceedings are conducted with a Fundamental Defect, then all the circumstances for adopting correct judgment are present, but the presiding court adopts its judgment with a blatant violation[100].

The appeal for exceptional review based on a Fundamental Defect can be brought both to the benefit or the detriment of the accused. Armenian Procedural law imposes strict time limitations on the possibility of lodging such an application to the detriment of the accused, by setting a 4-month time period for bringing such an appeal[101]. This strict requirement aims to limit the cases of a review that can result in the deterioration of the situation of the accused. Such a strict time-bar is also a stimulus for law-enforcement authorities to put maximum effort in conducting proceedings without Fundamental Defects. The logic behind this regulation is that the law-enforcement authorities will be aware that in case of such a blatant violation, an appeal to the detriment of the accused can be brought under stringent time limitations.

The Armenian Cassation Court, as it will be demonstrated, has implemented the rule on Fundamental Defect to correct blatant violations mostly to the benefit of the accused. Under Armenian Criminal Procedure, an appeal for exceptional review based on a Fundamental Defect is lodged without

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[99] As an example, the conviction of the judge whose illegal actions could have influenced the outcome of the case.
[100] Davit Avetisyan, *Compilation of academic works* 260 (Yerevan YSU publication 2016).
[101] Armenian CPC, Article 412 para. 2.

any time limitations[102]. The law provides no limitation for lodging the appeal to the benefit of the accused to have a provision allowing remedying blatant human rights violations even after decades.

The Cassation Court accepts an appeal based on the Fundamental Defect ground in case the applicant successfully demonstrates the particular violation that influenced the outcome of previous proceedings. In their appeal, the applicant should mention the particular violation of substantive and substantiate and how that violation amounts to the infringement of the very essence of justice[103]. The Cassation Court permits examination of an application against a final judgment if it finds an appearance of a fundamental violation of human rights and freedoms[104]. Specifically, the appearance of a fundamental violation of human rights and freedoms includes the adoption of a judgment that infringes upon the very essence of justice.

Criteria for determining a Fundamental Defect: recent case-law of the Cassation Court

The Guide on Article 4 of Protocol No. 7 provides useful guidance in terms of assessing whether a particular violation of substantive or procedural law amounts to a Fundamental Defect. Only a serious violation of a procedural rule severely undermining the integrity of the previous proceedings can serve as the basis for ordering reopening proceedings. As regards to situations where an accused has been found guilty, and a reopening of proceedings might work to his advantage, Article 4 of Protocol No. 7 does not prevent a reopening of the proceedings to the benefit of the convicted person and any other changing of the judgment to the benefit of the convicted person. In such situations, therefore, the nature of the defect must be assessed primarily in order to ascertain whether there has been a violation of the defense rights and, therefore, an impediment to the proper administration of justice.

Most importantly, the ECtHR particularly stresses that a violation of a substantive or procedural rule is classified as Fundamental Defect in case such violation affected the outcome of the case either to the benefit or the detriment of the accused[105]. In *Fadin v. Russ*ia, the ECtHR held that a Fundamental Defect is in place when the lower-level court, by not following the instructions given to them high courts regarding the investigative measures to be carried out, raise serious infringements[106]. The Criminal Procedural Law

[102] Ibid.
[103] Armenian CPC, Article 407 para. 2.3.
[104] Armenian CPC. Article 414.2. para. 3.
[105] See footnote 70, paras. 60-61.
[106] *Fadin v. Russia*, 58079/00, para. 32 (ECtHR 2006), http://hudoc.echr.coe.int/eng?i=001-76489.

of Norway defines a Fundamental Defect as a procedural error that may have influenced the substance of the final judgment. In such cases, to remedy the harm that the serious error has caused, the courts order for a reopening of the case[107]. *Mkrtich Sargsyan's case* established that Fundamental Defect predetermines the incorrect path of the proceedings, makes these proceedings pointless and results in illegal and unsubstantiated judgments[108].

Nevertheless, the Fundamental Defect ground cannot be applied for the initiation of extraordinary review proceedings in case the applicant seeks the mere reassessment of facts of the final judgment where no such blatant violation was recorded[109].

Therefore, not every breach of procedural law is a Fundamental Defect. In other words, the exceptional review is based on the determination of whether a particular breach seriously affected the outcome of the case. Fundamental Defect is different from the incorrect application of criminal law (Article 397 of the CPC) and essential breach of procedural law (Article 398 of the CPC): Articles 397 and 398 are applied as reviewing judgments in ordinary review proceedings (in case of judgments that are not final). In contrast, the Fundamental Defect ground is applied in exceptional review proceedings.

The Armenian Cassation Court has applied the Fundamental Defect ground in order to conduct extraordinary review proceedings in cases that are related to the 1 March events. In the complaint brought by the former Deputy Prosecutor General of Armenia Mr. Gagik Jhanghiryan, the applicant requested an exceptional review of his conviction. In short, this was a significant extraordinary review, as there was no new circumstance in Mr. Jhanghiryan's case that could lead to a review based on a new circumstance. Instead, the Armenian Cassation Court attempted to directly incorporate the position of the ECtHR in *Mushegh Saghatelyan v. Armenia* (on the right to a fair hearing) into its practice (under the Fundamental Defect ground), reasoning that both Mr. Saghatelyan and Mr. Jhanghiryan were convicted as a result of flawed criminal proceedings. In other words, the Armenian Cassation Court directly incorporated the right to fair hearing standards into its practice and considered Mr. Jhanghiryan's application for exceptional review in the light of such standards.

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[107] Norwegian Crim. P. Act, para. 391 (1981).
[108] See footnote 43, para. 19.
[109] See footnote 31, paras. 134-38.

Facts of the case: In 2009, the First Instance Court convicted Mr. Gagik Jhanghiryan on the charges of assaulting a public official[110] and sentenced him to three years of imprisonment. Later, Mr. Gagik Jhanghiryan applied to the Appeals Court and the Cassation Court, but the verdict remained unaltered. The factual circumstances of Mr. Saghatelyan's and Mr. Jhanghiryan's cases are quite similar, the justification behind their conviction mainly was based on the testimonies of police officers who had taken active part in the contested events. Moreover, the common point in both of these cases is that while admitting the Prosecution's evidence, the Armenian courts failed to examine the witnesses of the applicants and endorsed the version of the events formulated by the Prosecution. Thus, in both cases, the applicants did not have an opportunity to present their version of the events.

Right to fair hearing standards from Saghatelyan v. Armenia, incorporated into Mr. Gagik Jhanghiryan's case: The Armenian Cassation Court reiterated that in *Saghatelyan v. Armenia*, the ECtHR focused on the quality of evidence taken within criminal proceedings. In particular, it stressed that the quality of the evidence is a crucial point during the criminal procedure. This standard includes whether the circumstances in which it was obtained casts doubt on the reliability or accuracy of such evidence.

The ECtHR considered that Armenian national courts, in a dispute over the key facts underlying the charges, failed to use every reasonable opportunity to verify the incriminating statements of the police officers. The ECtHR highlighted that the police officers, who testified against the applicant, were the only witnesses for the Prosecution and had played an active role in the contested events. The ECtHR declared a violation of para. 1 of Article 6 as the Armenian authorities unreservedly endorsed the police's version of events, failed to address properly any of the applicant's submissions, and refused to examine the defense witnesses without proper regard to the relevance of their statements.[111]

The Cassation Court's reasoning for quashing Mr. Gagik Jhanghiryan's verdict: Overall, the Cassation Court then recorded that the national authorities failed to comply with Article 6 guarantees (developed in Saghatelyan case by the ECtHR) in initial proceedings against Mr. Jhangiryan.

In the light *Saghatelyan v. Armenia* ECtHR judgment, as well as in the light of current development of the standards of the right to fair trial, the Cassation Court found that when the charges against the applicant were confirmed, the ECHR standards were not complied with. The lower courts had based Mr.

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[110] See footnote 87.

[111] *Decision on Gagik Jhanghiryan*, ԵԿԴ/0134/01/08, para. 15 (RA Court of Cassation 2019).

Jhangiryan's conviction predominantly on the incriminating statements of the police officers, who had actively taken part in contested events. Nevertheless, the courts failed to ensure the proper balance in the pool of evidence and considered predominantly the testimonies introduced by the Prosecution. This approach casts reasonable doubt on the credibility of the police officers' testimonies.[112]

This reasoning served as a basis for the Armenian Cassation Court to conclude that the initial judicial proceedings occurred with such Fundamental Defects, which infringe upon the very essence of justice or the necessary balance of interests protected under the Constitution.

Furthermore, The Cassation Court concluded that lower courts failed to properly check and assess the factual circumstances of Mr. Jhangiryan's case. The criminal case was not based on sufficient evidence that would prove the applicant's guilt beyond reasonable doubt. In other words, the evidence was insufficient to conclude that Mr. Jhangiryan committed the alleged crime (physically assaulted a police official).[113]

The Cassation Court held: At last, the Cassation Court satisfied the request for exceptional review and quashed the previous judgment with regards to Mr. Jhangiryan. The Cassation Court recognized Mr. Jhangiryan's innocence and acquitted him.

Therefore, by relying on the conclusions of *Mushegh Saghatelyan v. Armenia*, the Cassation Court directly incorporated the relevant standards into Gagik Jhangiryan's case. In other words, the Cassation Court adopted a reformative approach and attempted to correct a Fundamental Defect on a national level. Such a reformative approach has the following policy considerations:

●firstly, it is an attempt to bring the high standards of the right to fair trial into national criminal proceedings,

●secondly, this interpretation of the Fundamental Defect ground is aimed at demonstrating that the national courts are capable of correcting their previous mistakes independently (self-correction of the judiciary) before the ECtHR (or other international bodies) recognize a human rights violation,

●and lastly, the basis of Fundamental Defect may be applied in the future for correcting serious violations of human rights and providing restoration for such violations.

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[112] Ibid., para. 17.

[113] Ibid., paras. 19-20.

3.1. Recommendations and considerations regarding further judicial practice

Recommendation N1: ***It is recommended to adopt the new Criminal Procedure Code in the shortest possible time, as the new Criminal Procedure Code envisages that an application based on a Fundamental Defect can be brought only to the benefit of the accused.***

Under the current regulations of CPC (Article 412 para. 2), an application based on a Fundamental Defect can be brought both to the benefit and the detriment of the accused. The difference between the two is constituted in the time period for lodging such appeal.

Nevertheless, the analysis of the topics brings us to the conclusion that having a provision on bringing such applications to the detriment of the accused may be problematic from the perspective of the protection of human rights. For example, the Prosecution may rely on this regulation to bring an application to the detriment of the accused, which may result in overturning a final acquittal.

To avoid the deterioration of the situation of the accused, the Draft of the Criminal Procedure Code provides that an application based on a Fundamental Defect can be brought only to the benefit of the accused. Article 403 of the new Criminal Procedure Code also clarifies the scope of the term for "Fundamental Defect". In particular, it enlists that a Fundamental Defect is in place when

- the conviction is rendered while circumstances precluding criminal prosecution existed,
- the person is convicted for an action that received an evidently improper legal assessment,
- the conviction entered into legal force is rendered exclusively based on the defendant's confession,
- the court that had rendered the judicial act was composed illegally,
- the judicial lacks the rationale of a judgment, etc.

Recommendation N2: ***It is recommended to develop and implement awareness-raising activities for legal professionals and civil society organizations. The awareness-raising activities should be aimed at informing that the criminal procedural law provides an opportunity to lodge an application based on a Fundamental Defect.***

The ground for lodging an appeal based on a Fundamental Defect may be used to reopen cases apart from 1 March. To be more specific, it would be advisable for legal professionals (tasked to act on behalf

of the defendant), as well as civil society organizations, to be properly informed about the relevant judicial practice.

Considerations regarding the further judicial practice

The results of the Research demonstrated that the basis of a Fundamental Defect was used by the Armenian Cassation Court to correct past decisions: these decisions were reached as a result of criminal proceedings, incompatible with Article 6 guarantees. Thus, the usage of the Fundamental Defect ground implied bringing the high standards of the right to fair trial into national criminal proceedings.

The interpretation of the Fundamental Defect ground in a manner contributing to the acquittal of a person and restoration of her rights demonstrates that the national courts are capable of correcting their previous mistakes independently before an international body recognizes a human rights violation.

The approach of the judiciary in recognizing its shortcomings and attempting to remedy past violations may also be applied in the future for correcting serious violations of human rights. In other words, the ground for Fundamental Defect can be used cases apart from 1 March to correct other types of human rights infringements.

In this light, the subject bringing an extraordinary appeal based on a Fundamental Defect should clearly articulate the reasoning for choosing this ground. It should specifically demonstrate how the defect in serious proceedings infringed upon the very essence of justice, or the necessary balance of interests protected under the Constitution (Article 21 of the current CPC).

CONCLUSION

Given what has been outlined in the present Paper in terms of the importance of *ne bis in idem rule*, enabling exceptional review procedures is a justified exception. In other words, when new circumstances, newly discovered circumstances, or a Fundamental Defect in the previous proceedings are discovered, the states should have effective proceedings of exceptional review. The states should put an end to human rights violations and incorporate procedures that would help achieving *restitutio in integrum*, and exceptional review proceedings serve as such a tool.

A conclusion should be reached that Armenian regulations on extraordinary review proceedings are justified. Moreover, not only new or newly discovered circumstances can be used as a tool by the judiciary to correct their past flawed judgments. The use of a Fundamental Defect ground in the extraordinary review has also proven to be quite an effective tool for correcting past blatant violations of the law, resulting in overturning convictions and subsequent acquittals.

The Armenian Cassation Court has recently adopted a reformative approach and provided an example of the self-correctional ability of the Armenian judiciary. It interpreted that the right to fair hearing standards of the ECtHR in the Saghatelyan case can be used to overturn verdicts that dating back to 2008-2009 (on a ground a Fundamental Defect). This reformative approach by the Armenian law-enforcement authorities has a scientific significance, as the Armenian Cassation Court attempted to directly incorporate the position of the ECtHR in *Saghatelyan v. Armenia* (on the right to a fair hearing) into its practice.

In other words, the Armenian Cassation Court, relying on the conclusions of *Mushegh Saghatelyan v. Armenia*, found that violation of the right to fair hearing can be construed as a Fundamental Defect, which could have influenced the outcome of previous proceedings. The Cassation Court stressed that basing a verdict predominantly on the evidence produced by the Prosecution infringed upon Article 6 guarantees, and this constituted a Fundamental Defect.

The Thesis Paper also proposed several recommendations that would improve the implementation of the ground for Fundamental Defect to restore violated rights. The *first* recommendation constitutes in the adoption of the new Criminal Procedure Code that envisages lodging an application based on a

Fundamental Defect only to the benefit of the accused. The *second* recommendation relates to developing and implementing awareness-raising activities for legal professionals and civil society organizations, which will be aimed at informing that the criminal procedural law provides an opportunity to lodge an application based on a Fundamental Defect.

As a summary of possible developments in judicial practice, the application of the Fundamental Defect as a ground for exceptional review will continue to have a significant impact on the progressive development of Armenian criminal procedure, as numerous requests for extraordinary review based on a Fundamental Defect have been lodged within the Armenian Cassation Court.

BIBLIOGRAPHY

International instruments

1. International Covenant on Civil and Political Rights
2. European Convention on Human Rights
3. Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts (Yearbook of Int. Law. Com. vol. II 2001)

Judgments of international and national courts

4. Nikitin v. Russia, 50178/99, (ECtHR 2004)
5. Sergey Zolotukhin v. Russia,14939/03, (ECtHR 2009)
6. Savinskiy v. Ukraine, 6965/02, (ECtHR adm. dec. 2009)
7. Mihalache v. Romania, 54012/10, (ECtHR 2019)
8. Vanyan v. Russia, 53203/99, (ECtHR 2005)
9. Walchli v. France, 35787/03, (ECtHR 2007)
10. Selmouni v. France, 25803/94, (ECtHR 1999)
11. Gabrielyan v. Armenia, 8088/05, (ECtHR 2012)
12. Claes and others v. Belgium, 46825/99, (ECtHR 2005)
13. Mushegh Saghatelyan v. Armenia, 23086/08, (ECtHR 2018)
14. Bykov v. Russia, 4378/02, (ECtHR 2019)
15. Kasparov and Others v. Russia, 21613/07, (ECtHR 2013)
16. Topić v. Croatia, 51355/10, (ECtHR 2013)
17. Huseyn and Others v. Azerbaijan, 35485/05, (ECtHR 2011)
18. Navalnyy and Yashin v. Russia, 76204/11, (ECtHR 2014)
19. Nemtsov v. Russia, 1774/11, (ECtHR 2014)
20. Fadin v. Russia, 58079/00, (ECtHR 2006)
21. Green v. United States, 355 U.S. (1957)
22. United States v. Ball, U.S. (1896)
23. United States v. Tateo, 377 U.S. (1964)
24. Montana v. United States, 440 U.S. 147, 153-54 (1979)

25. Decision on Mkrtich Sargsyan, ԵՄԴ/0020/01/14, (R.A. Court of Cassation 2015)
26. Decision on Artur Karnazyan, ԵՇԴ/0071/01/12, (R.A. Court of Cassation 2013)
27. Decision on Ararat Muradkhanyan, ՎԲ/01/13, (R.A. Court of Cassation 2013)
28. Decision on Mushegh Saghatelyan, ԵՔՐԴ/0396/01/08, (R.A. Court of Cassation 2019)
29. Judgment on Mushegh Saghatelyan, ԵՔՐԴ/0396/01/08, (R.A. Court of First Instance 2019)
30. Decision on Gagik Jhanghiryan, ԵԿԴ/0134/01/08, (R.A. Court of Cassation 2019)
31. Decision on the conformity of Article 426.9 of Armenian CPC with the Constitution, ՍԴՈ-984 (Armenian Constitutional Court 2011)

National legal acts

32. The Constitution of the United states, Amendment XIV
33. German Code of Criminal Procedure, http://www.gesetze-im-internet.de/englisch-stpo/englisch stpo.html
34. Norwegian Crim. P. Act, para. 391 (1981)
35. Armenian Criminal Procedure Code

Scholarly work

36. Right not to be tried or punished twice para, Guide on Article 4 of Protocol No. 7, https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_7_ENG.pdf
37. Armen Hovhannisyan, Judgment of the European Court of Human Rights as a basis for exceptional review in criminal procedure in a form of new circumstance (Mat. of YSU Conf. 2018), http://ysu.am/files/Law_faculty_English_book_85.pdf
38. Recommendation of the Committee of Ministers on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, CM/Rec (2000)
39. Davit Avetisyan, Compilation of academic works (Yerevan YSU publication 2016)
40. Walter J. Jones, Law and Legal Theory of the Greeks (1956)
41. R. Glazebrook, Double Jeopardy. By Martin L. Friedland, Faculty of Law, University of Toronto (1969)

42. Maciej Rogalski, Exceptions to Res Judicata and the Prohibition of Ne Bis in Idem in Criminal Law, 8 Int' l L. Y.B. (2017-2018)
43. Resich, Res judicata, Warszawa (1978)
44. Schroeder, Die Rechtsnatur des Grundsatzes "ne bis in idem", Juristische Schulung, in JZ No.3, (1997)
45. Schwarplies, Die rechtsgeschichtliche Entwicklung des Grundsatzes "ne bis in idem" im Strafprozess, Zurich (1970)
46. Dithmar, Der Gundsatz "ne bis in idem" und dasfortgesetzte Delikt, Berlin (1993)
47. Paul A. McDermott, Res Judicata and Double Jeopardy, Butterworths (1999)
48. Richard G. Singer, Criminal Procedure II: from bail to jail (2nd ed. 2008)
49. The American Journal of Comparative Law, at 637–53 (Volume 22 1974), https://academic.oup.com/ajcl/article-abstract/22/suppl_1/637/2632693?redirectedFrom=fulltext
50. Revathi N. Sundar, Res Judicata, International Journal of Advance Research, Ideas and Innovations in Technology (2017), www.IJARIIT.com
51. Kevin M. Clermont, Res Judicata as Requisite for Justice, 68 Rutgers U.L. Rev. (2016)
52. Grunwald, Die materielle Rechtskraft im Strafverfahren der Bundesrepublik Deutschland, Deutsche strafrechtliche Landesreferate zum IX Internationallen Kongre3 flir Rechtsvergleichung, Berlin-New York (1974).
53. Waltog, Nowa kasacja w procesie karnym, Palestra (1996)
54. Doda, Kontrola odwolawcza w procesie karnym, Dom Wydawniczy ABC 1997
55. Aleksandr Smirnov, Criminal Procedure: a textbook (4th ed. M. KNORUS 2008)
56. Richard Nobles, Understanding miscarriages of justice: law, the media, and the inevitability of crisis (1st ed. Oxford Univ. Press 2000)
57. Charles Ogletree & Austin Sarat, When law fails making sense of miscarriages of justice (Charles J. Ogletree, Jr. & Austin Sarat eds., New York Univ. Press 2009)
58. Philos S. Magnussen, Prevention of Wrongful Convictions: Norwegian Legal Safeguards and the Criminal Cases Review Commission, 80 U. Cin. L. Rev. (2012)
59. Katja Sugman Stubbs, Criminal Procedure in Slovenia (Richard Vogler & Barbara Hubereds., 2008)
60. Kent Roach, Wrongful Convictions in Canada, 80 U. Cin. L. Rev. (2012)