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Ivan Tironi, PhD, Judge
County Court in Split
E-mail: ivan.tironi@zsst.pravosudje.hr
ORCID ID: 0000-0001-6122-6239

JUDGMENTS MADE WITHOUT THE FREE WILL OF JUDGES AND BY MENTALLY ILL AND UNAUTHORIZED JUDGES (EXISTENT OR NON-EXISTENT?)

ABSTRACT

The purpose and goal of civil proceedings is to deliver correct and lawful judgments that decide on the main subject of the dispute, i.e., the validity of the claim. Various objective and subjective reasons can lead to incorrect and unlawful judgments. Such decisions can cause numerous harmful consequences for both the parties involved and society as a whole. The quality of judgments largely depends on the individual judge, who should be competent, honest, and reasonable. In exceptional cases, the correctness and legality of the proceedings, and thus the judgments, may come into question if, due to various influences, the judge no longer has free will during the trial. Furthermore, it is clear that a judge, like other people, may have certain psychological issues or be mentally ill, which can certainly affect their judgment and ability to make valid decisions. Additionally, there are theoretically possible, and in practice there have been cases where decisions are made by judges who, for various reasons, should not have judged the specific case (for example, due to exclusion of judge or because they were not appointed as judges by the competent state body). Although these cases are not common in practice, it does not mean they do not exist. Therefore, it is necessary to point them out and consider how parties can achieve legal protection against judgments made under these circumstances. This is especially important because the issue in question is not the focus of legal doctrine and the professional public. In this sense, it is first necessary to determine the legal nature of decisions made, for example, by a mentally ill judge, a judge under physical coercion, or a judge appointed by occupying authorities. The question arises whether such judgments are merely voidable or non-existent. Depending on the answer, different legal remedies are available to parties to challenge such decisions, ensuring they do not produce legal effects.

Keywords: voidable judgment, non-existent judgment, judge's mental illness, lack of free will, unauthorized judge

1. INTRODUCTION

In civil proceedings, a judgment is a decision by which the court, as a rule, decides on the merits of a claim concerning the main matters and secondary claims.¹ In this way, the dispute between the parties that led to the initiation of civil proceedings is resolved. Crnić rightly points out that a judge is expected to conduct the proceedings lawfully, to ensure equality of the parties in the proceedings, to issue decisions within a reasonable time, to base his legal positions on the evidence presented and its assessment, and to state reasonable and clear positions for his decision in the reasoning of the decision, based on the Constitution, laws and other acts that bind him in the trial.² Indeed, there should be no doubt about this, every honest and reasonable judge will strive to issue a correct and lawful judgment. However, due to various subjective and objective reasons, errors occur in the trial, which can ultimately result in an incorrect and unlawful judgment. In order to prevent such invalid judgments from producing legal effects, and thus jeopardizing the goals of the legal order (legality and fairness), modern legal systems allow litigants to review the correctness and legality of judgments through legal remedies (in one, and sometimes in several, stages of the trial).

Rosenberg, in the context of considering the incorrectness - invalidity of court decisions and the possibility of their correction, correctly notes that, in order to discuss these legal categories at all, it is necessary that a court decision as such exists, and not just that there is an appearance of a decision.³ In this sense, he emphasizes that in law we also speak of non-existent decisions, especially non-existent judgments. Indeed, we share the understanding that there are cases when a particular act, which is formally judicial in law and which should be a judgment, cannot acquire the status of a court decision - judgment at all due to its major shortcomings, i.e. significant violations of the provisions of civil procedure regarding its origin and content. In such cases, we are dealing with the so-called non-existent judgment, as the described act is called in the section on legal doctrine and jurisprudence. When a particular violation of the provisions of civil procedure is characterized as so serious or of such great importance that its very existence leads to the non-existence of the judgment, it is a matter of legal and political evaluation of the particular violation.

It is quite exceptional that a judgment is rendered in civil proceedings by a judge who rendered it against his or her free will, for example due to duress. It is also

¹ Pravni leksikon, editor in chief: Pezo, V., Leksikografski zavod Miroslav Krleža, Zagreb, 2007, p. 1260.

² Crnić, I., *Ustav Republike Hrvatske u praksi*, Organizator, Zagreb, 2018., p. 847.

³ Rosenberg, L.; Schwab, K. H.; Gottwald, P., *Zivilprozessrecht*, C.H. Beck, München 2010., p. 324.

conceivable that a judgment is rendered by a mentally ill judge or a judge with certain psychological disorders, in whom the mental illness or disorder affects his or her ability to understand the meaning of his or her actions and the consequences that arise from them, all of which can affect the correctness and legality of the judgment. In the above cases, it is justified to ask whether these judgments are existent and as such refutable, or whether they are non-existent judgments. The same question regarding the legal existence of decisions can also be raised in cases where decisions purporting to be judicial decisions were made by judges who were not authorized to judge in the cases in which they were made or were not made by judges within the framework of proceedings conducted before the court.

A special problem, in terms of the legal existence of judgments, is that judgments are, admittedly, made by a court respectively judges, but not by courts established by the sovereign state on whose territory they are located, or not by judges to whom that state has entrusted judicial duty. This problem is particularly pronounced when, on the territory of a sovereign, internationally recognized state (or on a part of it), judgments are made by courts established by hostile occupation authorities. Therefore, in the context of the existence or non-existence of a judgment, we will also consider the aforementioned situation, all the more so since the Republic of Croatia unfortunately also had experience with this problem in the nineties of the last century, when its territory was partially occupied.

Dika rightly notes that from the aspect of rebutting court decisions by legal remedies, only the so-called non-existent judgments require special attention, as other decisions are undoubtedly rebuttable under general rules allowing rebuttal by appropriate legal remedies.⁴

In this context, we must consider whether the lack of free will of the judge when making a judgment, and judgments passed by mentally ill or unauthorized judges, can result in the non-existence of a judgment rendered under such circumstances.

⁴ Dika, M., *Građansko parnično pravo, Pravni lijekovi, X knjiga*, Narodne novine, Zagreb, 2019., p. 45.

A special problem in properly defining a non-existent judgment is the fact that it is not provided for by either domestic procedural law⁵ or the procedural laws of the Federal Republic of Germany⁶ and the Republic of Austria.⁷

The fact that these legal issues are not the special focus of the legal profession is all the more reason to write about them, to raise awareness of potential problems and offer answers regarding the existence or non-existence of judgments rendered under such circumstances, as well as the possibilities of legal protection for parties from such judgments.

2. LACK OF FREE WILL OF JUDGES WHEN MAKING JUDGMENTS

2.1. Introductory remarks

In a valuable, interesting and historically significant legal work from the seventeenth century, "Methodical instruction in judicial procedure according to the customary law of the glorious Hungarian kingdom", its author Ivan Kitonić, in response to a question about the qualities required of a judge, answers: "fifth and last, let him do nothing out of request, profit, fear, love or hatred..."⁸ Indeed, a judge may encounter various difficulties and even fear during the procedure, and precisely in connection with it. However, a judge should be endowed with the virtue of courage in the sense of overcoming this fear, whatever its cause, to remain honest and impartial, and find the strength to fulfill his obligation to make a lawful and correct judgment. This despite the feeling of fear about the consequences that the judgment he makes, due to various external factors, could have on his private or professional life. However, hypothetically, situations are possible when even an honest and courageous judge renders a judgment contrary to his or her own convictions and inner will. For example, if a person (a litigant or a third party) makes it seem as if some harm will happen to the judge or someone close to him

⁵ Civil Procedure Law (Zakon o parničnom postupku, Official Gazette, No. 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 2/07, - Decision USRH, 84/08., 96/08. – Decision USRH, 123/08, 57/11, 148/11, 25/13, 89/14 – Decision USRH, 70/19, 80/22, 114/22 and 155/23, hereinafter: ZPP).

⁶ (German) Civil procedure act (njem. Zivilprozessordnung), Bundesgesetzblatt nr. 6/72/2005 – 328/2024, <https://dejure.org/gesetze/ZPO>, January 15, 2025.

⁷ (Austrian) Civil procedure act (njem. Zivilprozessordnung), Reich – Staats und Bundesgesetzblatt, nr. 113/1895 – 85/2024, hereinafter: A ZPO), <https://www.jusline.at/gesetz/zpo>, January 15, 2025.

⁸ Kitonić, I., *Metodična uputa u Sudbeni postupak po običajnom pravu slavnog Ugarskog kraljevstva*, first edition, Trnava 1619., second edition, Beč, 1634., second edition translate, Jovanović, N., Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2004, p. 485.

or her if he or she does or does not render a judgment of a certain nature, thereby causing fear in the judge and thereby inducing him or her to render a judgment that he or she would not otherwise render, it is justified to raise the question of the legal existence of such a judgment. Namely, in such a case, the judgment would not be the result of the judge's free will, but rather of threats or psychological unlawful compulsion against him or her. Furthermore, situations are possible where an individual judge is forced by physical unlawful compulsion to render a judgment of a certain nature that he or she would not otherwise render if that circumstance did not exist. Here too, the question can be raised whether such a judgment can even be considered existent because the judge's free will is absent as one of the *conditio sine qua non* of every trial.⁹ It seems that the prevailing understanding in legal doctrine is that judgments rendered under the aforementioned circumstances (lack of free will of the judge due to threat or unlawful compulsion) would be existent, and that they could be challenged like all other judgments, by filing regular or extraordinary legal remedies. However, there are also different views.

2.2. Croatian doctrine

A very small number of Croatian legal theorists have dealt, and mostly sporadically (with the exception of Mihajlo Dika), with the phenomenon of a non-existent judgment. However, it seems that there has been no consideration of whether the judge's lack of free will could result in the non-existence of the judgment that the judge would have made under such circumstances.

It is noteworthy that only Črnko, dealing with the problem of defining and legal consequences of a non-existent judgment in relation to objective joinder of claims, mentions that the concept of adjudication undoubtedly means the intellectual work of a specific judge or several of them. It is precisely this intellectual activity of decision-making by a judge (or judges) that represents a *conditio sine qua non* for an act to be called a decision or judgment on the merits of a matter.¹⁰ Essentially, Črnko believes that an act can only be considered a judgment if there are several elementary things: 1) a judge, 2) a claim, 2a) a proposal of facts and evidence, 3) the plaintiff and the defendant, and 4) the mental stage of deciding on the merits. There is no doubt that a serious threat to a judge who is threatened with harm if he

⁹ It is worth noting that the difference between a threat and unlawful compulsion is that a threat involves the appearance of some evil (usually a threat that force will be used), while unlawful compulsion only exists if physical force has already been used, vidi: Pravni Leksikon, *op. cit.* (note 1.), p. 1300.

¹⁰ Črnko, J., *Nepostojeća presuda u svezi eventualne kumulacije*, Odvjetnik, Hrvatska odvjetnička komora, Zagreb, no. 7-8, year 70, 1997, p. 51 and 52.

does not render a judgment of a certain content can certainly affect his mental work, and if physical unlawful compulsion were exerted on him in connection with the decision-making, the question arises as to whether he had any possibility of deciding at all (for example, if someone guided his hand to sign the appropriate judgment).

2.3. German doctrine

In German doctrine, the concept of a non-existent judgment has been seriously considered for about a hundred years, both in terms of defining this legal phenomenon, i.e. the cause that leads to it, as well as the possibility of refuting such "decisions". However, it is interesting to note how the question of the judge's lack of free will when making a judgment was problematized in older legal theory, while it seems to be absent in modern German doctrine.

Wurzer seriously and thoroughly dealt with the non-existent judgment almost a hundred years ago in his work "The Non-existent and Nullity Judgment" (German: *Nichturteil und Nichtiges Urteil*).¹¹ He also considers the question of the judge's free will when passing the judgment and the possible impact on the (non)existence of the judgment, which would have been passed after the judge received a serious threat to pass a judgment with a specific content. Essentially, he believes that the judgment passed in civil proceedings would not only be nullity because of a threat to the judge, even a serious one. Namely, he maintains that it is logically and psychologically justified to conclude that, despite the threat to the judge aimed at passing a certain judgment, the free expression of the will of the affected judge is not excluded. A threat to the judge to issue a judgment of a certain content, in order to represent only an influence on his free will, but not its automatic suspension. Despite the threat to pass a certain judgment, according to Wurzer, the judge remains the master of his will, and if he submits to the threat, it is a matter of "*coactus volui*" (a declaration of will created by illegal threats and unlawful compulsion). In such a case, the judgment still exists, and legal remedies can be filed against it. Such a judgment can acquire the characteristics of formal and substantive final judgment.¹²

Ratzke in his dissertation from 1930, entitled "Non-existent Judgment and Ineffective Judgment in Civil Procedural Law" (German: *Nichturteil und Unwirksames Urteil im Zivilprozessrecht*).¹³ He looks at the existence of the

¹¹ Wurzer, G., *Nichturteil und Nichtiges Urteil*, Verlag von M.&H. Marcus, Breslau, 1927.

¹² Ibidem, p. 125. and 126.

¹³ Ratzke, B., *Nichturteil und Unwirksames Urteil im Zivilprozessrecht, Inaugural – Dissertation*, Druck von R. Gorschalky, Danzig, Marburg, 1930.

judge's free will to issue a certain judgment, and especially the influence of the judge's mental illness on the existence of the judgment. It can be concluded from his consideration that he considers it sufficient that a judge has the capacity of a judge, regardless of whether he is capable of performing that duty. In line with the above, Ratzke rejects those understandings that question the existence of the judgment only because the judge was in a drunken state when passing the judgment or because he was threatened, and even in cases where the judge is deaf or blind. Namely, in all the mentioned cases, there is only an influence on the free will of the judge, which, according to Ratzke, is not a reason for the non-existence of the judgment.¹⁴

2.4. Austrian doctrine

Fasching also links the concept of a non-existent judgment to certain volitional states of the judge who makes the judgment. In this context, he emphasizes that a judgment that a judge would make under the threat of direct or irremovable force (*vis absoluta*) represents a non-existent judgment.¹⁵ Similarly, Rechberger believes that a non-existent judgment would be spoken of if the "decision" came from a judge who made it under the threat of direct and irremovable physical force, e.g. when a judge was threatened with a gun to make a specific decision.¹⁶

3. JUDGMENTS MADE BY MENTALLY ILL JUDGES

3.1. Introductory remarks

Mental illnesses (mental, psychological illnesses) are disorders of mental life that are qualitatively or by the intensity of their manifestation separated from the so-called normal. It is believed that every tenth person is affected by some mental illness or disorder during their lifetime.¹⁷ There is no doubt that mental illnesses or various psychological disorders, in certain cases, can lead to the fact that a person affected by them cannot make rational decisions both in their private and professional lives. The possibility cannot be ruled out that certain court judgments were made by mentally ill judges, or judges with psychological disorders.

¹⁴ Ibidem, p. 29, 30 and 31.

¹⁵ Fasching, H. W., *Lehrbuch des österreichischen Zivilprozessrechts*, Manzsche Verlags – und Universitätsbuchhandlung, Wien, 1990, p. 798.

¹⁶ Rechberger, W.; Simotta, D.A., *Grundriss des österreichischen Zivilprozessrechts*, Erkenntnisverfahren, Manzsche Verlags und Universitätsbuchhandlung, Wien, 2010, p. 521.

¹⁷ Medicinski leksikon, editor in chief: Padovan, I., Leksikografski zavod „Miroslav Krleža“, Zagreb, 1992., p. 201.

Therefore, the question of the legal fate of such judgments arises, given the possibility that judges who would judge under such circumstances (mental illness or disorder) would not be mentally capable of such intellectual activity.

It seems that the aforementioned issue has not been considered in Croatian legal doctrine, but it has not been completely neglected in German and Austrian legal theory, which have hesitated over the answer to the question of whether judgments rendered by mentally ill judges are rebuttal or non-existent.

3.2. German doctrine

Wurzer in his study of the circumstances that could lead to a non-existent judgment, he also touched on the issue of the judge's mental health and, in connection with this, the judge's ability to properly conduct the proceedings and render a judgment. In this regard, he raised the question of what impact the judge's mental illness has on the existence of a judgment as particularly significant. After examining this problem in great detail, Wurzer essentially concludes that as long as a mentally ill judge is not dismissed from office, there is no legal obstacle that would prevent him from performing his judicial duties and rendering judgments. Therefore, the judgments of a mentally ill judge (who has not been dismissed from office), according to Wurzer, are still, in terms of the issuance itself, "within the law", and cannot be considered non-existent judgements.¹⁸

We have already mentioned how Ratzke considered the existence of the judge's free will and, in particular, the influence of the judge's mental illness on the legal fate of the judgment. Ratzke thus believes that the judgment represents an act of the judge's free will, which can be more or less reduced in the case of mental illness. However, even in such cases there is a will that led to the actions taken. Therefore, it can be concluded that for Ratzke, even the mental illness of the judge who makes a specific judgment in such a state cannot call into question its existence.¹⁹

3.3. Austrian doctrine

Austrian legal theorists have been dealing with the issue of the possible influence of a judge's mental state on the existence of a judgment he would make even before the Second World War. Thus Pollak states that the mental capacity, or inability of

¹⁸ Wurzer, *op. cit.* (note 11.), p. 121.

¹⁹ See about that: Ratzke, *op. cit.* (note 13.), p. 29, 30 and 31.

a judge to properly express his will when making a judgment, cannot affect the existence of a judgment, but it can make it rebuttal.²⁰

In modern Austrian legal doctrine, the issue of the influence of a judge's mental illness on the existence of a judgment that such a judge would make was addressed by Fasching. He states that a prerequisite for the validity of any legal expression of will is legal capacity. However, if a judgment were made by a judge who is incapacitated, e.g. due to mental illness or mental disorder, or who has been appointed a guardian due to mental illness, then such a "judgment" would in any case be non-existent. In support of these claims, Fasching points out that it would be unacceptable to set lower criteria for state bodies (e.g. judges) in relation to their legal capacity and in connection with their declarations of will (decision-making) than for persons who would make their declarations of will in private law transactions. Unless, of course, state authorities have double standards.²¹

Unlike Fasching, Rechbereger is "more lenient", because he considers the judgement of a mentally ill judge to be existent and only rebutting, equating it with the judgement of the judge who issued it, even if he should have been exempted from the trial.²²

4. JUDGMENTS RENDERED BY UNAUTHORIZED JUDGES

4.1. Introductory remarks

As a rule, judgments in court proceedings, including civil proceedings, are rendered by judges authorized by state authorities. Thus, in the Republic of Croatia, the State Judicial Council is a body that, in accordance with the Constitution and the law, independently decides on the appointment, promotion, transfer, dismissal and disciplinary liability of judges.²³ However, it is possible that judgments are rendered by judges who, for various reasons, are not authorized to act in a specific civil proceeding. Of course, we are not referring to cases of judges who rendered judgments as judges of courts without territorial or subject-matter jurisdiction, since these omissions in the trial can be remedied by filing legal remedies against the judgments rendered in this way. However, if, for example, a judgment is rendered by a judge who is not an employee of the court

²⁰ Pollak, R., *System des österreichischen Zivilprozessrechtes*, Manz, Wien, 1932, p. 82.

²¹ Fasching, *op. cit.* (note 15), p. 798.

²² Rechberger, W.H., *Die Fehlerhafte Exekution*, Manz, Wien, 1978, p. 37.

²³ Article 124. paragraph 2. Constitution of the Republic of Croatia, Official Gazette, No. 85/10 and Decision of the Constitutional Court of the Republic of Croatia, Official Gazette, No. 5/14.

in which the judgment was rendered, or if the decision is rendered by a judge but not in the course of performing a judicial function, the question arises whether such decisions would be merely challenging or could they not be called judgments at all. In the following article, we will see what positions domestic and foreign legal doctrines have taken on the aforementioned issues.

4.2. Croatian doctrine

Dika, within the framework of studying the phenomenon of non-existent judgment, also considered the problem of participation in the decision-making of judges who are not authorized to do so. In this sense, he asks the following questions:

1. Can a person who is appointed as a judge, but in another court, be considered a judge, and would not be a person who would be authorized to judge in that court on some other legal basis?
2. Can the capacity of a judge in a specific case be recognized as a person who does have the capacity of a judge in a specific court, and who would in principle be authorized to make decisions in that court, but who in the specific procedure, according to the schedule of work in that court, is not authorized to judge in the dispute in question (the judge "took" the case of another judge)?

Dika offers answers to both questions.

Regarding the first question posed, Dika emphasizes that there are at least two interpretative solutions to this dilemma. According to one, a judge should be considered any person who has been appointed as a judge in the Republic of Croatia, regardless of which court they were appointed to. Therefore, according to this interpretation, there is no significant violation of the participation in the decision-making of a person who does not have the capacity of a judge, whenever a person who generally has the capacity of a judge participates as an individual judge or a member of a panel, even if they were not appointed to the court in which the decision was made or are not authorized to judge in that court on some other basis.

According to another opinion, the concept of a person who does not have the capacity of a judge would be linked to a specific court, meaning that such a person would be considered any person who was not appointed to the court in which the decision was made or who was not authorized to judge in that court on some other legal basis.

Dika believes that the second understanding should be opted for because it would be in accordance with the legal rules on when and where (in which court) a person

appointed as a judge is authorized to judge. By adopting this second position, it prevents circumvention of the rules on the election and appointment of judges, removes suspicions of possible manipulations and non-objectivity, enables the right to a legal judge, respects the regulations on subject and territorial jurisdiction, and ensures trust in the work of the courts.²⁴

In further consideration of the issue of who can be considered a judge in a specific case, Dika states a possible situation and doubt: whether the capacity of a judge should be recognized to a person who admittedly has the capacity of a judge in a specific court and who would in principle be authorized to issue judgments in that court, but who in a specific dispute, according to the schedule of work in that court, would not be authorized to judge. This would be a judge who unauthorizedly took the case for which another judge was responsible. According to Dika, a judgment rendered by such a person would only be rebutting, because it would still be a person who is a judge in a specific court.²⁵

It is especially worth noting, in the context of the adoption of a judgment by unauthorized persons, the problem of correctly defining participation in decision-making. According to the first, broader understanding, participation in decision-making would mean participating in the substantive preparation of the decision-making, including the presentation of evidence and enabling the parties to discuss it. According to the second, narrower understanding, which Dika opts for, participation in decision-making would mean participating in deliberations and voting during the decision-making in panels, or in other words, making a decision based on the collected procedural material.²⁶

In the event that a person who has the status of a judge but who is not authorized to judge in the court in which the decision was made participated in the rendering of the judgment, Dika states different opinions regarding the legal consequences of such a decision and the possibility of its rebuttal:

- 1) if the position were taken that, according to the provision of Article 354, paragraph 2, item 1 of the ZPP, an absolutely essential violation of civil procedure would only exist if a person who does not have the status of a judge at all participated in the rendering of the judgment, then the circumstance that a person who does not have the status of a judge in the specific court participated in its rendering, and that this was concealed, would have no consequences,
- 2) if the position, which Dika pleads for, that such a violation would exist even if a judge who is not authorized to judge in that court participated in the rendering

²⁴ Dika, M., *op. cit.* (note 4.), p. 132.

²⁵ *Ibidem*

²⁶ *Ibidem*, p. 133.

of the judgment were accepted, the rendered judgment would certainly be rebuttable.

Dika concludes that the issue of its (in)existence should be resolved analogously to the issue of the (in)existence of the decision of the court counselor.²⁷

When a court counselor issues a judgment, Dika recognizes different situations and, accordingly, different possible consequences.

If a judgment were issued by a court counsellor who was otherwise authorized to participate in the proceedings, in the sense that he signed it as his own act, such an act would certainly be contestable in the sense of the provisions of Article 354, paragraph 2, item 1 of the Civil Procedure Code, but it is doubtful whether such a judgment can even acquire the status of final judgment, or whether such a defect could be remedied by not filing legal remedies, i.e. is such a judgment possibly non-existent or existent but rebuttable? Dika offers 2 possible answers.

1) If the provision of Article 354, paragraph 2, item 1 of the Civil Procedure Code is understood literally, according to which a essential violation of the provisions of civil procedure always exists if a person who does not have the status of a judge participated in the issuance of the judgment, then there would be no basis for the position that a judgment that would not be challenged due to that significant violation could not acquire the status of final judgment. Namely, that by not challenging that violation, it would be remedied. But here too, the precise author notes two possibilities:

a) if the parties were aware of the circumstance that the decision was made by a court counselor who was not authorized to judge,

b) if the parties were not aware of the aforementioned circumstance, i.e. that the court counselor signed the judgment declaring himself to be a judge or under the name of the judge who was supposed to sign the decision. Dika believes that it is undeniable that in the case under a) the parties could challenge such a decision by means of an appeal, an appeal on points of law and request to reopen the proceedings. However, he immediately raises the question of whether, after the possibilities of such a challenge have been exhausted or have ceased (e.g. due to the expiry of the deadlines for legal remedies), a decision made by a court counselor in the circumstances specified under a), could become a valid judicial act. The answer to this question depends on the position on what would be considered a judicial decision, i.e. whether only decisions made by judges or also decisions made by persons authorized to perform certain procedural actions in court. The constitutional legal positioning of the authorities in the Republic of

²⁷ Ibidem, p. 134.

Croatia would speak in favor of the first position, while pragmatic, unprincipled reasons would speak in favor of the second position. Dika pleads for the acceptance of the second position, i.e. that the failure to rebut a judgment made by a court counselor should still be considered a non-existent decision, i.e. one that can never acquire the status of final judgement. Rebutting such decisions only by filing legal remedies would be only one way of removing such acts.²⁸

In the second case (under b) when the parties are not aware of the fact that the court counselor issued the judgment by declaring themselves a judge or under the name of the judge who was supposed to sign the decision, for Dika the matter is clear. This is a forgery, and such an act should be treated the same as other extrajudicial forgeries. Namely, it would be a non-existent judgment, which would allow any party to file a lawsuit to establish its falsity (Art. 187, paragraphs 1 and 2 of the Civil Procedure Code). It would be a non-existent judgment, allowing any party to file a lawsuit to establish its falsity (Art. 187, paragraphs 1 and 2 of the Civil Procedure Code). It is worth noting that the 2019 Amendment to the Civil Procedure Code, in Jakovina's opinion, aimed to speed up the procedure and relieve the courts,²⁹ prescribed greater authority for court counselors. Namely, until then, in a certain types of first-instance proceedings, court counselors were authorized to conduct proceedings, evaluate evidence and submit a written proposal to the judge for making a decision,³⁰ while in second-instance proceedings and proceedings regarding extraordinary legal remedies, they were authorized to report on the state of the file and prepare draft decisions.³¹ Now, after the 2019 amendment to the ZPP, in addition to the aforementioned powers, court counselors are also authorized to make some decisions independently.^{32, 33}

4.3. German doctrine

In his work *The Wrong Civil Judgment* (German: *Das Fehlerhafte Zivilurteil*), Jauernig also paid due attention to non-existent judgments, or apparent

²⁸ Ibidem, p. 134. i 135.

²⁹ Jakovina, D., *Promjene u zakonodavnom uređenju prvostupanjskog parničnog postupka prema noveli iz 2019.*, in: Godišnjak 26, Aktualnosti hrvatskog zakonodavstva i pravne prakse, ed. Sessa, Đ., Organizator, Zagreb, 2019, p. 33.

³⁰ See the provision of Article 13., paragraph 1. of the ZPP.

³¹ See the provision of Article 13., paragraph 4. of the ZPP.

³² Dika, M., *op. cit.* (note. 4.), p. 136.

³³ Thus, the 2019 Amendment to the Civil Procedure Code added a new paragraph 9 to Article 164 of the Civil Procedure Code, which reads: "The court counselor is also authorized to make a decision on the request for reimbursement of costs referred to in paragraph 8 of this article."

judgments.³⁴ In his opinion, when the essential features of a judgment are so lacking that it does not exist in the legal sense at all, then we are talking about a non-existent judgment. The answers to the questions of what are the shortcomings that prevent the realization of the essential features of a judgment, or the creation of the judgment itself, are provided by the science of non-existent judgment. That in a positively formulated sense means that the science of non-existent judgment actually indicates the prerequisites that are necessary for the creation of a judgment. If one of these prerequisites were not met, then the judgment could not have been created. Regarding the issue of the legal nature, or the existence/non-existence of judgments rendered by judges who are not authorized to render them, Jauernig asks 2 questions, namely:

1. can only courts render judgments? and
2. under what conditions does a judgment come from a "court" and what significance do the regulations on the form of judgment have for the issuance of a judgment?³⁵

Jauernig calls a judgment a decision that is issued in a certain form, during the proceedings, by a court. Therefore, a judgment differs from other state acts in the manner of issuance, i.e., it is issued in a special procedure by a court. In the context of a non-existent judgment, he specifically warns that the fact that a judgment "pronounces law" (German: "*Recht gesprochen*") does not make a difference in relation to other legal acts of government, which can also issue legal decisions. However, by issuing decisions in accordance with the law, an administrative body does not become a court, and therefore its decisions are not judgments, which can only be issued by a court, but remain administrative acts.³⁶

Jauernig believes that in order to distinguish between a judgment and a non-existent judgment, it is irrelevant whether the administrative act is labeled as a "judgment" and whether it contains a decision that only a court is authorized to make (e.g., the Housing Authority "judgments" a party to pay rent). What is important to the author in the above context is that it is a decision of an administrative body, not a court, and for this reason such a decision is a non-existent judgment. He notes that a state body that is not a court is not able to make judgments, but that it may make other state acts that are not invalid simply because they are called "judgments".³⁷

³⁴ Jauernig, O., *Das Fehlerhafte Zivilurteil*, Vittorio Klostermann, Frankfurt am Main, 1958.

³⁵ Ibidem, p. 6.

³⁶ Ibidem, p. 7.

³⁷ Ibidem, p. 8.

It is worth mentioning that Jauernig also considered the legal nature of decisions made within the jurisdiction of the judicial administration. They would always be non-existent judgments, which would not even need to be discussed, unless they were decisions made by "judges". However, as in the case where the "judicial authority" decides in cases of judicial administration, their decisions are also non-existent judgments.³⁸

Furthermore, Jauernig states that to this part of the consideration of the non-existent judgment, the question of whether courts in noncontentious proceedings (German: *Freiwilligen Gerichtsbarkeit*) can issue judgments should be added.^{39, 40} Their activity is often referred to as "court administration" (German: *gerichtliche Verwaltung*). However, according to Jauernig, it is more than doubtful whether such a characterization corresponds to the factual content of their tasks. Namely, numerous decisions issued in noncontentious proceedings represent a substantive verdict, that is, they contain an independent and binding ruling that can acquire the property of substantive final judgment, and which was issued in accordance with the law. It seems that the name "court administration" is correct, because courts in noncontentious proceedings do not issue judgments in the formal legal sense, and which are the only subject of consideration of non-judgment. Namely, in this procedure, decisions are issued in the form of resolutions and they cannot be judgments. Jauernig therefore concludes that noncontentious courts are judicial bodies that lack the "ability" (German: *Fähigkeit*) to make judgments.⁴¹

Jauernig also touched on the case where the court, when issuing a judgment, lacks jurisdiction in the subjective sense (German: *Gerichtsbarkeit im subjektiveben Sinne*). In this sense, the author believes that when a court of another branch of the judicial power issued a judgment (and not the one that should have), this circumstance does not make such a judgment non-existent. Specifically, if a

³⁸ Ibidem, p. 9.

³⁹ Noncontentious proceedings in the narrow sense are a type of judicial civil proceedings, and in the broader sense we define them as all judicial civil proceedings that are different from litigation proceedings. Noncontentious proceedings can (in the narrow sense) be classified into status (e.g. proceedings for the deprivation and restoration of legal capacity, for permission to marry, for the withdrawal of parental care), property law (e.g. proceedings for the dissolution of a co-ownership community, for the regulation of boundaries, inheritance proceedings, for the drawing up and preservation of a will, land registry proceedings) and registration proceedings, while in the broader sense this group of proceedings should include enforcement and bankruptcy proceedings. In noncontentious matters, there is no dispute, so they are most simply defined negatively, as a judicial civil procedure that is not litigation procedure.

⁴⁰ More about non litigation proceedings in German law (German: *Freiwilligen Gerichtsbarkeit*) see: Creifelds, C., *Rechtswörterbuch*, Verlag C.H. Beck, Munich 1994, p. 443 and 444.

⁴¹ Jauernig, *op. cit.* (note 34.), p. 10. i 11.

criminal or administrative court issued a judgment in a civil law case, this fact would not make the issued judgment non-existent. This stems from the unity of the judicial power prescribed by the Basic Law of the Federal Republic of Germany (constitution), (German: *Grundgesetz für die Bundesrepublik Deutschland*).⁴²

However, Jauernig notes that some authors previously took the position that a civil judgment can only be considered a judgment if it was issued by a competent court in civil proceedings, and that it would be a non-existent judgment assuming that it was issued by a criminal or administrative court. Jauernig considers this opinion to be outdated and contrary to the constitutional arrangement of the unity of the judicial power.⁴³

Rosenberg in the context of the existence of circumstances that would make a certain "judgment" non-existent, Rosenberg mentions the case when the judgment was made by a judge, but not in the performance of judicial duties (e.g. when a judge made a "judgment" during a gathering of regular guests at a table in a pub).⁴⁴
⁴⁵

Prütting, on the other hand, warns that a decision that was not made in the performance of judicial duties cannot be considered a judgment, whether it was made by a retired judge or a judge at a private meeting.⁴⁶

4.4. Austrian doctrine

Austrian theorists have also considered the situation if a judgment was rendered by an unauthorized judge, and this by considering the legal consequences for the judgment that would be rendered under such circumstances. When considering

⁴² Indeed, the provision of Article 92 of the Basic Law (Constitution) of the Federal Republic of Germany, which regulates the organization of the courts, stipulates the following: "Judicial power is vested in judges; judicial power is exercised by the Federal Court, the federal courts provided for in this Basic Law and the state courts", see: *Grundgesetz für die Bundesrepublik Deutschland*, Bundeszentrale für politische Bildung, Bonn, 2013., p. 61 and in: *Basic Law (Constitution) of the Federal Republic of Germany*, Pan Liber, Osijek, 1994, p. 58.

⁴³ Jauernig, *op. cit.* (note 34.), p. 13. i 14.

⁴⁴ Rosenberg, *op. cit.* (note 3.), p. 324.

⁴⁵ See similar and Kramer, W., *Die Berufung in Zivilsachen*, C.H. Beck, München, 2015, p. 16.

⁴⁶ Prütting, H.; Gehrlein, M., *Zivilprozessordnung, Kommentar*, 14. Auflage, Luchterhand Verlag, available on: https://www.haufe.de/recht/deutsches-anwalt-office-premium/pruettinggehrlein-zpo-kommentar-zpo-vorbemerkung-vor-i-schein-bzw-nichturteil_idesk_PI17574_HI15259691.html, January 15, 2025.

and defining non-existent judgments, Fasching classifies them into certain groups depending on the circumstances that lead to them, and thus, among other things, also lists decisions rendered outside civil litigation. According to this criterion, non-existent judgments, from the point of view of civil litigation, should be considered all judgments that were not rendered in such proceedings. However, he notes that decisions of some other courts (arbitral judgments and, in part, judgments rendered in criminal proceedings) are legally equal to civil judgments.⁴⁷ According to Fasching, judicial powers belong to a person (an individual judge or a panel), not to a court, and if the judgment were not rendered by a person with the capacity of a judge, such a "decision" would be a non-existent judgment.

In the context of a panel (senate) that issues judgments, it is worth noting that Fasching does not consider a judgment rendered by a panel instead of an individual judge authorized by law to be non-existent if it was otherwise properly composed. However, if the panel (which should be composed of judges) included even one person who did not have the status of a judge, the body as a whole would not be authorized to judge. In this sense, Fasching highlights the doubt as to whether in that case, when all members of the panel are not holders of judicial power (e.g. if the panel is composed of 2 professionally appointed judges and one aspiring judge), a decision rendered by such a body could be characterized as a non-existent judgment. Fasching, developing this problem, emphasizes that the A-ZPO recognizes 2 different holders of judicial power, namely an individual judge and the panel (senate). The panel as a collective, and not an individual judge as a member of the panel, has the power to decide, but always, unconditionally, all members of the panel should be judges (not necessarily all members should be professional judges). Therefore, according to Fasching, if all members of the panel do not have judicial powers (they are not appointed as judges or lay judges), then the panel as a whole cannot be the holder of decision-making authority. The judgments that such a body would issue would be non-existent.⁴⁸

In the context of the judge's authority to issue a judgment in a certain legal matter, let us mention that Buchegger, like Fasching, considered the problem of a panel in which all members do not have judicial powers. Thus, Buchegger states that a judgment would not exist when the panel (senate) does not have the number of members - judges prescribed by law from the very beginning of the procedure. Such a panel is incapable of issuing judgments, and therefore such a body lacks judicial power (German: *Gerichtsgewalt*). Judgments issued by such a body (a

⁴⁷ Fasching, *op. cit.* (note 15), p. 796.

⁴⁸ Ibidem, p. 796-798.

panel without the required number of members) would be irrelevant, or non-existent judgments.⁴⁹

5. JUDGMENTS MADE BY OCCUPATION AUTHORITIES

In our opinion, the consideration of the legal fate of judgments rendered by unauthorized judges would be incomplete if we did not at least briefly address the situation of judgments rendered by judges appointed by the occupying authorities to act as judges on the territory or part of the territory of an internationally recognized and sovereign state. Since the cases in question differ somewhat from situations when judgments are rendered by judges who have been entrusted with judicial duties by legal state authorities, we will present this issue in a separate chapter.

Therefore, in the context of the existence or non-existence of judgments, we will address the question of the consequences for the existence of a judgment, if it were rendered during the hostile occupation of the whole or part of the state, and what judgment would be rendered by a judge appointed by the hostile occupying authorities. This problem, albeit quite incidentally, was pointed out by Neumann even before the II. World War II as part of considering the nullity of the judgment due to the irregular composition of the court,⁵⁰ as well as Ratzke, also quite incidentally, just mentioning it.⁵¹

The Republic of Croatia unfortunately had experience with this problem in the 1990s when its territory was partially occupied, and on whose territory, as part of the enemy occupation, Serbian autonomous regions as well as the Republic of Serbian Krajina itself were established. Brekalo thus states that these creations, according to the positive legislation of the Socialist Republic of Croatia and the Socialist Federal Republic of Yugoslavia, ipso iure and ipso facto represented an illegitimate act of the rebel Serbs. The aforementioned qualification is identical from the point of view of the provisions of international law. Therefore, the Republic of Serbian Krajina never became an international legal entity. Also, the normative activities of the rebel Serbs, which were the basis for the process of establishing and organizing the Serbian autonomous regions and the Republic of

⁴⁹ Buchegger, W.; Roth, M., *Zivilprozessrecht, Sammlung kommentierter Fälle*, Springer-Verlag, Wien, 2011, p. 67 and 68.

⁵⁰ Neumann, G., *Komentar građanskog parničnog postupka*, preveo Gregović, S., Planeta, Beograd, 1935, p. 1283 and 1284.

⁵¹ Ratzke, *op. cit.* (note 13.), p. 21 and 22.

Serbian Krajina on the territory of the Republic of Croatia, were sub colore iuris (under the guise of law), i.e. illegitimate.⁵²

Courts were established in the occupied territory by normative acts of the occupying authorities, which exercised judicial power in the occupied territory of the Republic of Croatia, previously within the Serbian autonomous regions, and then within the framework of the Republic of Serbian Krajina.

Namely, with the merger of the Serbian Autonomous Region of Krajina, the Serbian Region of Slavonia, Baranja and Western Srem, and the Serbian Region of Western Slavonia into the Republic of Serbian Krajina on December 19, 1991, a new organization of judicial bodies that operated in the occupied territories of the Republic of Croatia was established. Courts of general jurisdiction and commercial courts were established by the Law on Courts of the Republic of Srpska Krajina.⁵³ Municipal courts, district courts and the Supreme Court of the Republic of Srpska Krajina were established within the courts of general jurisdiction. Commercial courts and the Higher Commercial Court were established within the commercial courts.^{54, 55} The Law on Misdemeanors⁵⁶ established municipal (municipal) misdemeanor courts as bodies authorized to conduct first-instance proceedings, and the Republic Court for Misdemeanors to decide in second-instance proceedings.

After courts in the occupied territory of the Republic of Croatia conducted proceedings and rendered judgments, including in civil cases, the question of the legal existence of such decisions arose.

⁵² Brekalo, M., *Povijesni prikaz i pravni karakter normativnih akata Republike Srpske Krajine*, Zbornik Pravnog fakulteta u Rijeci, 2012, br. 2, p. 551.

⁵³ Zakon o sudovima, Službeni glasnik Republike Srpske Krajine, No. 4/1992.

⁵⁴ For more information on the organization of the judicial power in the occupied territory of the Republic of Croatia, see: Rončević, M., *Organizacija sudbene vlasti na okupiranom području istočne Hrvatske u razdoblju od 1991. do 1997. godine*, in: Arhivi i Domovinski rat, Radovi, 49. savjetovanje hrvatskih arhivista, ed. Babić, S., Hrvatsko arhivističko društvo, Plitvice, 2016, p. 111-125.

⁵⁵ On the organization of the judicial system of the Republic of Serbian Krajina, see also: Holjevac, Tuković, A.; Rupić, M., *Arhivski fondovi srpske provenijencije pohranjeni u Hrvatskom memorijalno - dokumentacijskom centru Domovinskog rata*, in: Scrinia Slavonica, Godišnjak Podružnice za povijest Slavonije, Srijema i Baranje Hrvatskog instituta za povijest, svezak 20 (2020.), Hrvatski institut za povijest, Podružnica za povijest Slavonije, Srijema i Baranje, Slavonski Brod, 2020, p. 432.

⁵⁶ Misdemeanor Law - Zakon o prekršajima, Službeni glasnik Republike Srpske Krajine, No. 4/1992.

The Republic of Croatia responded to this question by adopting the Convalidation Act (1997),⁵⁷ and then the Regulation for the Implementation of the Convalidation Act in Cases of a Judicial Nature (1998).⁵⁸

The provisions of the Convalidation Act and the Regulation prescribe a legal path by which an interested person can establish, through a competent court in the Republic of Croatia, that decisions in cases of a judicial nature, made on the territory of the Republic of Croatia that were under the protection or administration of the United Nations (occupied territory),⁵⁹ are in accordance with the Constitution of the Republic of Croatia, the Constitutional Act on Human Rights and Freedoms and on the Rights of Ethnic and National Communities or Minorities in the Republic of Croatia, or the laws of the Republic of Croatia. Therefore, these are decisions made by courts of Serbian regions, or the Republic of Serbian Krajina, on the occupied territory of the Republic of Croatia. There is no doubt that such decisions could not be treated in the same way as decisions made by judges in the free, unoccupied part of the Republic of Croatia, because, among other things, they were not made by authorized judges. Namely, these judges were not appointed or appointed as judges in a certain court by a decision of the legal bodies of the state government of the Republic of Croatia. On the other hand, the reasons for the reintegration of the occupied territories into the constitutional and legal order of the Republic of Croatia, and related reasons for legal certainty, imposed the need for the judgments rendered in the occupied territory to be "strengthened" or convalidated, if they are in accordance with the Constitution and laws of the Republic of Croatia. It is for this purpose that the Croatian legislator passed the Convalidation Act and the Regulation. For example, let us state that the Municipal Court in Gospić, deciding on the proposal of the proposer for convalidation of the decision on inheritance, on 29 January 2013 passed a decision with the following dictum: "It is established that the decision on inheritance of the Municipal Court in Gračac, case no. O-14/93-3 of 29 April 1993 is in accordance with the Constitution, Constitutional laws and laws of the Republic of Croatia."⁶⁰

⁵⁷ Law on Convalidation - Zakon o konvalidaciji (Official Gazette, No. 104/97, hereinafter: ZOK).

⁵⁸ Regulation for the implementation of the Law on Convalidation in Judicial Matters - Uredba za provođenje Zakona o konvalidaciji u predmetima sudbene naravi (Official Gazette, No. 51/98, hereinafter: Uredba za provođenje ZOK-a).

⁵⁹ On the peacekeeping operation of the United Nations in the Republic of Croatia, see: Miškulin, I., *Republika Hrvatska i mirovna operacija Ujedinjenih naroda: kada, kako i zašto je došlo dio njezine realizacije?*, Historijski zbornik, Društvo za hrvatsku povjesnicu, Zagreb, No. 1, 2012, p. 121-159.

⁶⁰ Decision of the Municipal Court in Gospić, number: 13 R1-110/2011 from January 29, 2013.

The Municipal Court in Vukovar also decided on a proposal for the convalidation of a decision - a judgment based on the ZOK and the Regulation for the Implementation of the ZOK. Thus, in its decision of June 4, 2021, it adopted the proposal of the proposer and decided: "convalidates the judgment of the Municipal Court Vukovar, Republika Srpska Krajina, No. P- 202/94 of March 6, 1995."⁶¹

In this context, it is worth mentioning that in the procedure initiated by a proposal for the convalidation of a certain decision, the interested party may request that the decision subject to convalidation is contrary to the Constitution of the Republic of Croatia, the Constitutional Act on Human Rights and Freedoms and on the Rights of Ethnic and National Communities or Minorities in the Republic of Croatia, or the laws of the Republic of Croatia.⁶²

Following the above, we are of the opinion that all judgments rendered in civil proceedings in the occupied territory of the Republic of Croatia in the 1990s, either in the courts of the Serbian autonomous regions, or later in the courts of the Republic of Srpska Krajina, are formally non-existent from a legal perspective. This is because they were issued by unauthorized persons, persons who were not appointed as judges in certain courts by the legal and competent institutions of the Republic of Croatia. Only by conducting noncontentious procedure for their convalidation, of course assuming that the convalidation procedure has been completed by accepting the proposal for convalidation of a specific decision, do they cease to be non-existent. Of course, everything said about the case of judgments issued by courts - occupation authorities on the territory of the Republic of Croatia during the nineties of the last century also applies at a general level.

Therefore, we are of the opinion that judgments issued by courts established by occupation authorities on the occupied territory of a sovereign state would be non-existent judgments, unless the authorities of the state on whose territory such judgments were issued decide otherwise. In this sense, it is worth noting that, unlike the Republic of Croatia, on the basis of whose regulations (the Civil Procedure Act and the Regulation for the Implementation of the Civil Procedure Act), as we have seen, a court decision made in an occupied territory can only be validated after conducting an appropriate procedure, post-war Yugoslavia (the Federal People's Republic of Yugoslavia) resolved the problem of court decisions - judgments made in a territory it considered to be under enemy occupation in a

⁶¹ Decision of the Municipal Court in Vukovar, number: R1 - 61/2019-2 from June 4, 2021. The decision in question decided on the convalidation of the judgment of the Municipal Court in Vukovar, case number: P-202/94 of 6 March 1995, for the purpose of divorce and entrusting the custody and upbringing of a minor child.

⁶² See: Decision of the Vukovar County Court, case number: Gž 968/2001 from March 12, 2002.

different, actually opposite way. Namely, Yugoslavia considered that decisions made by the occupiers, in civil - legal relations, were valid. However, the interested (injured) person was left with the possibility of initiating court proceedings with a request to discuss the disputed legal relationship and make a new decision.^{63, 64}

6. OWN POSITION

After studying domestic and comparative legal doctrine, and considering the judge's ability to reason and his free will when rendering a judgment, we are of the opinion that these circumstances, under certain assumptions, may be a reason for challenging the judgment, but by no means for its non-existence. Namely, the judge's mental illness, psychological disorder, as well as a possible trial under the influence of alcohol or narcotics, do not make the judgment non-existent, just as a serious threat to the judge to render a judgment of a specific content does not make the judgment non-existent. In our understanding, these are possible reasons for filing an appropriate legal remedy against a judgment rendered under such circumstances (which otherwise has all the essential characteristics of a court decision), but we repeat, they are not reasons for its non-existence.

⁶³ The provision of Article 7, paragraph 1 of the Act on the Invalidity of Legal Regulations Adopted Before 6 April 1941 and During the Enemy Occupation (Official Gazette, No. 86/46, 105/46, 96/47, hereinafter: ZONPP), stipulates that decisions (judgments, rulings, conclusions, etc.) of courts in civil law relations adopted after 6 April 1941 remain in force. Paragraph 2 of the same article stipulates that if the court's decision on such a relation is based on legal regulations adopted by the occupiers and their accomplices or on regulations from Article 2 of this Act that are in conflict with existing regulations, a person who is considered to have been harmed by such a court decision may, within one year from the date of entry into force of this Act, initiate proceedings with a request that the competent court review the legal relationship and make a decision based on existing regulations.

⁶⁴ According to the mandatory interpretation of the regulations of articles 1, 2, 4, 7, 10 and 11 of the ZONPP, it is prescribed that under the decisions of the courts on civil-legal relations, which in the sense of art. 7 of the ZONPP remain in force, they include those decisions of the courts on civil-legal relations that were made after April 6, 1941. "Legal regulations adopted by the occupiers or their helpers", specified in Article 7 paragraph 2 of the same law, are understood to mean the legal regulations that were adopted for that area by the authorities of the Kingdom of Italy after April 6, 1941, as well as by the authorities of the German occupier, the republican-fascist regime and other helpers of the occupiers. Likewise, the "regulations referred to in Article 2 of this Law", referred to in Article 7, paragraph 2 of the same Law, are understood to mean the legal regulations that were in force in the annexed territory on 6 April 1941. Mandatory interpretation available at: <https://www.iusinfo.hr/zakonodavstvo/zakon-o-nevaznosti-pravnih-propisa-donesenih-prije-6-travnja-1941-i-za-vrijeme-neprijateljske-okupacije/clanak-12>, January 15, 2025.

Furthermore, we are of the opinion that the circumstance that the judgment was rendered by a judge who was not in charge of the proceedings in question (court file), or by a judge who was appointed to a different court than the one where he rendered the judgment, would not make the judgment non-existent, but possibly refutable. We are also of the opinion that the existence of a civil judgment would not be affected if it was rendered by a court, for example, in criminal proceedings, this is because there is unity of judicial power.

Regarding the rendering of decisions by unauthorized judges, the following should be said. Judgments in civil proceedings are rendered by judges or panels composed of several judges, and it is they who are the holders of judicial power. In cases in which a judgment is rendered by a panel, it is the holder of judicial power as a whole. Therefore, we are of the opinion that even if there were even one person in the panel that renders the judgment who is not a judge, such a panel would not be the holder of judicial power, and consequently, the acts that such a panel, as a collective body, would not be judgments.

If a judgment were rendered by a person who had lost his/her status as a judge, for example due to retirement, in that case that person would be equated with persons who were never appointed as judges by the state. Acts rendered by such a person could also be characterized as non-existent judgments. Also, if a judge, outside of the performance of his/her judicial duties, for example during a birthday celebration, were to render a "judgment" resolving a property dispute between two friends, then such an act could certainly not be considered a judgment.

It should be noted here that, in our understanding, the circumstance that the judgment were rendered by a judge who was not in charge of the proceedings in question (court file), or by a judge who was appointed to a court other than the one where he/she rendered the judgment, would not make the judgment non-existent, but possibly refutable.

We have explained our own position on the non-existence of judgments rendered by judges who were authorized by the occupying authorities to judge on the territory of a sovereign state in detail in Chapter 5 of this paper.

Although this paper primarily deals with the issue of legal assessment of judgments rendered without the free will of judges and mentally ill and unauthorized judges in terms of the existence or non-existence of such decisions, we will also focus on the possibility of challenging decisions rendered under such circumstances. In cases in which, in our opinion, the judgment rendered exists, i.e. which we consider to be existent (e.g., judgment rendered by mentally ill judges as well as those who rendered the judgment under the influence of a serious threat),

such judgments may be challenged by those legal remedies (regular and extraordinary) that are otherwise provided for by procedural law to be filed against judgments rendered in civil proceedings.

The matter seems more complicated regarding the issue of challenging non-existent judgments (in our view, e.g., "judgments" rendered by a judge who has lost his capacity as a judge due to retirement or rendered by a panel whose members would not all be judges). Namely, in such cases, one can justifiably ask whether legal remedies can be filed against such decisions at all, because there is no act of refutation (a non-existent judgment is actually a "legal nothing"). We believe that in such cases, primarily for reasons of legal certainty (because such a non-existent judgment can create the appearance of a "real" judgment), legal remedies may be allowed, in the sense that they should not be rejected as a rule. For example, if an appeal were filed against a judgment rendered by a judge who has lost that capacity, the second-instance court would not be able to decide on the merits, but it could conclude that the contested decision is not a judgment, and return the case to the first-instance court to render a judgment. The party could also request a continuation of the proceedings, because a "judgment" that does not exist (non-existent) certainly does not end the civil proceedings, not even in the first instance of the trial.^{65, 66}

⁶⁵ Regarding the possibility of challenging non-existent judgments, Rosenberg points out that such a decision is not binding on the court nor does it ends the procedure before the court in which it was rendered. In this regard, he points out that the parties could re-initiate the proceedings (because such a "judgment" does not actually exist). However, for Rosenberg, the situation is somewhat different regarding a illusory judgment (as a manifestation of a non-existent judgment). Namely, considering the possible effectiveness of this "judgment" and the possibility of its refutation, he states that such a "judgment" could still be challenged by legal remedies, if it would create the impression of an effective ("real") judgment among the parties. However, that a non-existent judgment can never be the basis for a merits judgment, and therefore that the non-existent judgment should be reversal and the case returned to the court of first instance (for the purpose of rendering a judgment). He further states that the parties affected by a illusory judgment have the choice of whether to request the continuation of the proceedings in the court of first instance or to file an appeal against the illusory judgment. See Rosenberg, *op. cit.* (note 3.), p. 325.

⁶⁶ Fasching, in relation to the submission of legal remedies against non-existent judgments, states that the first-instance court, and if necessary also the second-instance court, should reject an appeal against such a "judgment" as inadmissible, this because the prerequisite for the admissibility of the appeal – a decision that is contestable – is missing. In the explanation of such a decision rejecting the appeal, it should be stated that the contested "decision" is a non-existent judgment and therefore cannot be contested. Fasching notes that such a determination contained in the explanation of the decision to reject cannot acquire the status of final and binding force. However, for Fasching, the situation is different if it is a fictitious judgment (a non-existent judgment that meets the external characteristics of a judgment), especially in situations in which such a "judgment" was made by non-judges, judges who are incompetent or that were made without the existence of a party's request. Namely, in the presence of such circumstances that a party's real need for legal protection against a "non-existent judgment" can be demonstrated, in such a way

7. CONCLUSION

The issue of the legal nature of judgments rendered without the free will of judges, mentally ill judges and unauthorized judges (taking into account judgments rendered by the occupation authorities) is understandably (due to its rare occurrence) not in the focus of the legal profession. However, this does not mean that these legal phenomena should not be researched and that it is not necessary to try to make a small contribution to the development of legal theory and the improvement of legal security of citizens affected by judgments rendered under "special circumstances" that we have considered in this paper. Moreover, the lack of professional and scientific literature on this topic is even more reason to research and write about this issue.

We have seen that in Croatian, German, and Austrian legal doctrine, there are partly identical, partly different, and partly opposing understandings of the legal nature of judgments rendered without the free will of judges, by mentally ill judges, and by unauthorized judges. Some of these decisions are defined by theorists as existent, while others are considered non-existent. The answer to the question of whether they exist or not also determines the method of legal protection against such decisions, as they can undoubtedly produce legal effects. We have presented our own position on these issues in Chapter 6 of this paper-.

In the end, we hope that this paper will be interesting to the reader, perhaps useful to some, and perhaps an incentive for some aspiring lawyers to further engage with this and similar issues.

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that the ineffectiveness of the non-existent judgment is established in a generally binding and final manner. In this sense, Fasching proposes that the court, at the request of the party, issue a declaratory decision stating that the judgment is to be deemed not to have been rendered. In the event that a party files an appeal against a sham judgment, which appeal would be inadmissible for that reason, Fasching holds that the appeal should be treated as a request for a declaratory decision stating that the judgment is to be deemed not to have been rendered. Fasching finds the legal basis for this treatment of an appeal filed against a non-judgment in the provision of paragraph 84, paragraph 2. A of the ZPO. See: Fasching, *op. cit.* (note 15.), p. 799-800.

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