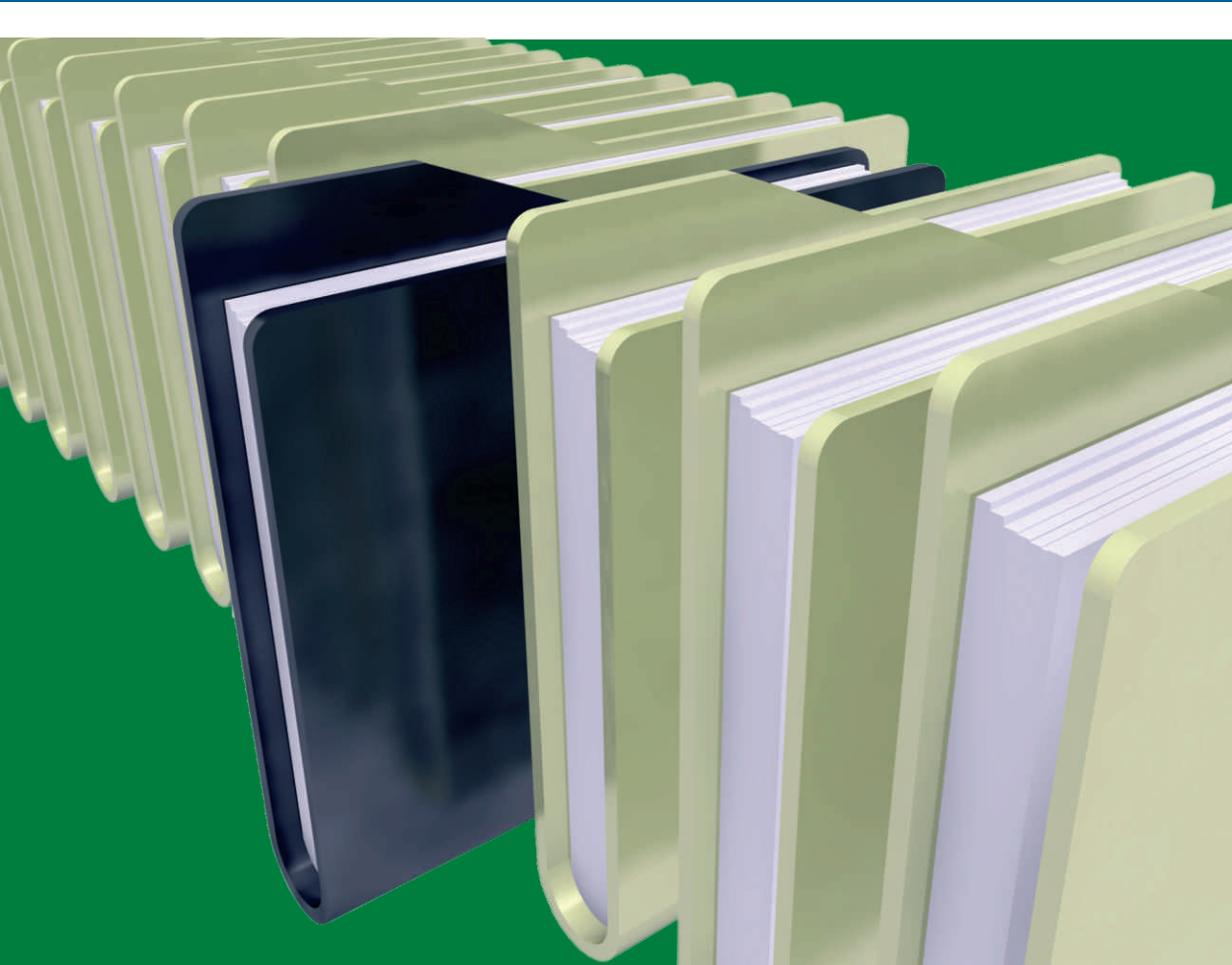


New trends in Serbian criminal procedure law and regional perspectives (normative and practical aspects)

Editors: Ana Petrović and Ivan Jovanović



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- normative and practical aspects -

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Ana Petrović and Ivan Jovanović
(National Legal Officers, OSCE Mission to Serbia)

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The compilation of papers by a group of authors under the title “New trends in Serbian criminal procedure law and regional perspectives (normative and practical aspects)”, initiated by the OSCE Mission to Serbia, has as its focus of attention an exceptionally important and topical issue of the current situation of criminal procedure legislation, not only in the reviewed regional countries (Serbia, BiH, Croatia and Montenegro) but, one may say, in a much wider context. This holds true as one of the underlying characteristics of criminal procedure legislation of these countries in the first decade of this century is an intensive effort in addressing its reform. As an outcome of this determining feature all the above countries not only enacted new criminal procedure codes, but some of them (as is the case in Serbia and BiH primarily) made annual (or even more frequent) amendments, which, in turn, not only underscores the topicality of the issue at hand but also the endeavours to find solutions, without prior scientific and expert analysis, to achieve the goals from the reform. In other terms, enactment of codes of these countries and subsequent amendments thereto was preceded in a number of cases by what appears, insofar as this branch of legislation is concerned, an unusually short period for statutory regulation that should, in line with the concept of legislators of each of these countries, achieve the goals of the reform among which two are key, regardless of the legislative text in question. These goals are, first, harmonisation of norms with contemporary trends in legal science of criminal procedure and, second, creation of a normative foundation for a more efficient criminal procedure, whilst concurrently taking into consideration that the former is not at the expense of international treaties and relevant national legislation on guaranteed freedoms and rights of the subjects of criminal proceedings (primarily, but not limited to, the defendant and injured party).

Namely, using as a point of departure that criminal proceedings of these countries are inefficient, this also being the case in a number of other countries, the indisputable fact is that the normative foundation is also one of the key factors for efficient criminal procedure, despite the fact that causes for lack of efficiency of criminal proceedings lie frequently outside the scope of criminal

procedure legislation. In the process of reforming these legal texts and in line with trends and views of contemporary theory of criminal procedure law, solutions are sought to establish a normative foundation to enhance efficiency of criminal procedure in terms of its qualitative and quantitative component. One may say, without any dilemma whatsoever, that this is the underlying characteristic of the reform process of all of these legal texts. Given the above, it may be appropriate to recall here and in this context also Beccaria, who advocated the necessity for quick trial, and he was not alone in his belief that only an immediate punishment of the perpetrator can be just and useful. Even the Old Testament says that “when the sentence for a crime is not quickly carried out, people’s hearts are filled with schemes to do wrong”. Given the above, and the fact that one criminal procedure norm, regardless of what it is, does not constitute sufficient foundation for the desired degree of normative efficiency of criminal proceedings, the process of reforming these criminal procedure legislations – this also being the case in contemporary comparative criminal procedure legislation in general – is seeking multiple possibilities to increase efficiency of criminal procedure, from the normative point of view. All of these - despite certain distinctions that may be bigger or smaller, albeit sometimes also fundamental - share a common denominator of institutes of general character, institutes that as such represent the essence of reform and of the examined criminal procedure legislations. This is the case, for example, with plea agreement, principle of opportunity of criminal prosecution, change of the concept of investigation, omission of certain procedural phases and stages of criminal proceeding (depending on the specific form of simplification), shortening of procedural deadlines and deformalisation of proceedings (omission of certain formalities and safeguards), introducing special criminal procedures and special bodies for particular types of criminality, providing new procedural methods and means in uncovering particular criminal offences, more efficient system of legal remedies, providing detention only as an exceptional measure, ensuring presence of defendant in criminal proceedings, witness immunity et al. Furthermore, the majority of these novelties have a base in elements related to a criminal matter, state of evidence and conduct/attitude of participants in criminal proceedings, and a lower level of procedural complexity in respect to the general form of proceedings in criminal matters.

Normative elaboration of these, in principle, justified novelties is not easy at all and it is imperative that their normative elaboration takes into consideration one issue above all – that efforts to attain the desired degree of efficiency do not negate the fundamental principles of criminal procedure and, thus, also the ratio legis for its precise regulation. This particularly refers to the new legislative solutions, specifically those that are more radical and require deeper theoretical explanation and expert interpretations. If this is augmented with the also indubitable fact that a norm in itself is not sufficient but that its adequate application is also essential, where a well-conceived preparation is a prerequisite, i.e. essential harmony between the penal policy of the legislator and the policy of the entity applying the appropriate norms of criminal legislation (its practical application), then such a statement is even more relevant. Only when there is mutual correlation of these two aspects of penal policy it may be deemed an instrument of accomplishment in fighting criminality in general. Given the all the above, publication of a book that in a critical, scientific and professional and reasoned manner addresses the subject issues is more than justified.

In respect to its content, the book focuses on the analysis of four groups of issues. First, this is the plea agreement as a crucial representative of simplified forms of proceeding in criminal matters, and forms related thereto. Next, the change of the concept of investigation (transfer from judicial to prosecutorial/prosecutorial-police) represents the most disputable set of issues of all of these

reforms, both in terms of criminal policy reasons justifying such change and in terms of normative drafting of its new concept. There are also issues related to finding of fact in criminal proceedings with particular reference to the role of the court in this process and the place and importance of the (material) truth doctrine therein. Finally, the fourth group of issues deals with measures to ensure presence of the defendant and unobstructed conduct of criminal proceedings with particular reference to detention as an exceptional measure of this character, as a rule.

The issues addressed in this publication have been approached from multiple aspects. The ones that stand out are the normative, where each of the above issues is analysed from the viewpoint of current criminal law norms of countries of the region (Serbia, Montenegro, BiH and Croatia), pertinent international legal standards and relevant comparative procedural legislation and degree of their mutual harmonisation. Furthermore, there is the aspect of practical application of analysed topical issues with underscoring of the manner of practical application of provisions set forth in these laws. In conclusion, what appears as a separate aspect is the element of their theoretical component in, but not limited to, criminal law theory. Various theoretical postulates regarding the subject issues were analysed. Given such an approach to addressing the issues it may be said that this publication is valuable in terms of understanding the degree of incorporation of contemporary procedural law trends in the newly enacted criminal procedure codes of the mentioned countries, as well as for perceiving the paths and ways of their even more profound application here. Also, a point was made regarding the ways of adequate application of solutions so regulated, thus giving the publication additional importance. Only an adequately applied norm attains its full criminal policy justification. If we add to the above also the irrefutable fact that the publication addresses the subject issues from a critical, scientific and professional standpoint supported by valid arguments, then the above statement is even more to the point. In respect to all of the above it may be concluded that this publication is also in the function of realizing this goal of the reform of criminal procedure legislation of the countries in the region. Analytical and comprehensive interpretation of procedural rules under review makes the substance and meaning of analysed institutes understandable, and the pervading critical tone of argumentation in some of the cases sheds light on imprecision and ambiguity of legal norms, their internal and external contradiction, which ultimately should be a warning signal to legislators of at least the need to once more re-examine these norms. The to-the-point explanations of new procedural bodies and rules, criminal policy or procedural law rationale for their enactment and the purpose these are to serve may serve as a firm foundation for their proper interpretation and application in judicial practice. Although the subject of debate is not a draft law or Bill but the text of laws already in operation (in entirety or in part, this being the case of the Serbian CPC which should soon come into force also for all criminal offences), the publication provides analysis of potential legislative solutions and gives recommendations *de lege ferenda* aimed at upgrading the legal text and its coherence, which should signal the competent authorities to react accordingly. Theoretical explanations of the regulation of new criminal proceedings, interpretation of new procedural principles and institutes, or even those already existing but in a new procedural environment, as well as the new procedural status, primarily of the public prosecutor, makes this publication a must-read for further research of doctrines and proper application of laws in judicial practise. Well-devised and definite proposal *de lege ferenda* may be of great assistance to legislators in further amplifying of criminal procedure and restoring the disrupted equilibrium between its efficiency and fair proceedings that provides optimal safeguards of human rights.

In line with the above I give the following

Opinion

The book by a group of authors “New trends in Serbian criminal procedure law and regional perspectives (normative and practical aspects)” has as its focus an exceptionally significant and topical issue of the current state of criminal procedure legislation in the observed countries of the region (Serbia, BiH, Croatia and Montenegro), and even elsewhere. Regarding the manner of addressing and starting point aspects for analysing these issues, one may say that this publication is significant both in terms of perceiving the degree of implementation of contemporary trends in criminal procedure law in legislations of the observed countries, as one of the goals of the reforms, as well as ways and means of thorough application of such trends. Also, a point was made regarding the ways of adequate application of solutions so regulated, thus giving the publication additional importance. Only an adequately applied norm attains its full criminal policy justification. Otherwise it remains only a shell without substance. Theoretical explications of analysed issues and in-depth, scientifically-founded deliberations that distinguish a number of analysed solutions of legal texts under review, may serve as valid research for further doctrinal study and confronting of arguments on the nature, structural elements and principles of regulating the novel criminal procedures of the observed countries.

Theoretically well-based systematisation of the topics and issues, valid theoretical viewpoints, comprehensive deliberation, critical analysis of normative solutions and jurisprudence ensure a scientific and professional level that makes this publication both topical and original. Theoretical explications and expanded presentation of some of the addressed issues are contributive not only to criminal procedure law of the observed countries but also generally. Interpretations of new procedural rules under review are both analytical and comprehensive making the content and meaning of analysed institutes understandable and the pervading critical tone of argumentation in some of the cases indicates the necessity for their further study, not only in theory but also in their normative development which is certainly underway despite the fact that all of the subject countries have enacted new CPCs. Substantive explanations of new procedural bodies of rules, criminal policy or procedural law rationales for their enactment and the purpose these are to serve may provide a firm foundation for their proper interpretation and application in judicial practice. Although the subject of debate are not draft laws, but the legislation in force and already in operation, either in entirety or in part (depending on the country), the publication provides analysis of potential legislative solutions and gives recommendations *de lege ferenda* aimed at upgrading the legal text and its coherence. Theoretical explanations of the regulation of new criminal proceedings of analysed countries, makes this publication relevant both for further research of doctrines and for proper application of the legislation in judicial practise. Proposals *de lege ferenda* are meaningful and precise and may be of great assistance to legislators in further interventions in respect to a number of issues and a guide for restoring the disrupted equilibrium between the desired efficiency of criminal proceedings and proceedings that provide optimal safeguards for human rights. Hence, I recommend with great pleasure to the OSCE Mission in Serbia to publish the book by a group of authors “New trends in Serbian criminal procedure law and regional perspectives (normative and practical aspects).” Once it becomes available the book will become a reference script for all for whom it is intended (academic and professional community, lawmakers and legislators), and for the OSCE Mission in Serbia, as publisher, a lasting

testimonial of its contribution not only to the quality of the reform of criminal procedure legislations in the region, but also to the forging of even stronger and versatile ties among colleagues and practitioners in criminal law in the region.

In Belgrade,

20 August 2012

Reviewer

Prof. Stanko Bejatović, PhD

The Concept of Investigation in Criminal Proceedings in the Light of the New Criminal Procedure Legislation

Summary

The subject of this paper is a critical review of the concept of prosecution-led investigation in new criminal procedure legislation of the countries in the region (Montenegro, Serbia, BiH, and Croatia). From the point of view of the structure of contents the said issue is analysed through six groups of questions. The first group deals with the general remarks regarding the process of reform of criminal procedure legislation of the countries of the region and the role and place of the system of investigation within these processes. The key conclusion resulting from the consideration of this issue is that the change of the concept of investigation (moving from the court- to prosecution-led investigation) is the general characteristic of all four criminal procedure legislations of the countries of the region which were subject to review. The next four groups of issues consist of a critical overview of the concept of prosecution-led investigation in each of the reviewed criminal procedure legislations in the region. The key conclusion of the review regarding these groups of issues is the presence of a number of differences in the legislative elaboration of the concept of prosecution-led investigation among the analysed criminal procedure legislations.

At the end, the paper presents some views of the author of two groups of issues. The first refers to the critical review of reasons in favour of and against the concept of prosecution-led investigation, and the second refers to preconditions for a practical implementation of the key reason for moving from court to prosecution-led investigation (increasing the efficiency of the criminal procedure) as a whole and not only of this one stage in it.

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Key words: investigation, concept, prosecution, court, defendant, suspect, Montenegro, Serbia, Croatia, BiH, Criminal Procedure Code

I Introductory remarks

1. The contemporary system of criminal procedure such as exists in the countries of continental Europe from the beginning of 1820's has been regulated in a system-wide and methodical manner so that it undergoes certain stages, each of which has a specific purpose within the general purpose of criminal procedure – to shed light on and resolve the criminal case at hand. The prototype of the contemporary system of criminal procedure was the French Criminal Investigation Code dating back to 1808, according to which the first instance procedure consisted of two stages – the preparatory (preliminary) procedure and the trial.² This division, with lesser or greater modifications, caused by different historical circumstances, has practically without exceptions been preserved in all the countries of present day continental Europe, and also in such non-European countries which have, for different reasons, accepted the continental European civil law legal tradition.³

2. Irrespective of the fact that also today there are two major criminal procedure systems – the continental European (civil law) and the Anglo-Saxon (adversarial, common law) system, it should nevertheless be emphasised that over the recent decades there is increasing convergence of elements of these two major systems, which is a consequence of globalisation trends present not only in the political and economic domain, but also in legislative domain.

Without denying the significance of or the need for taking over certain elements from other criminal procedure systems, especially such elements which contribute to the efficiency of criminal procedures, it is still necessary to preserve, to a certain degree, the national legal tradition. This is not so only for the sake of preserving one's identity in this segment as well, but primarily because artificial borrowing of elements from a different type of criminal procedure could cause significant practical problems, primarily the inability of parities in the procedure to find their way in the new structure, which in turn can lead to inefficient and/or unjust criminal procedure.⁴

Irrespective of the fact that clear boundaries between the two above mentioned criminal procedure systems are being increasingly erased, it should still be noted that during recent decades legislators in European countries increasingly adopt solutions which are at the foundations of the adversarial model of criminal procedure and ideas which, directly or indirectly, are derived from the Anglo-American culture.⁵

2 Both in laws and in theory the first stage of the procedure is somewhere termed the preparatory and somewhere the preliminary procedure and a question could be raised whether these two terms are in fact synonymous or whether there are differences between them? We think that these two terms are different. The term preparatory, in our opinion, suffers from the weakness that it suggests the ephemeral nature of the procedure (the stage) in comparison to the trial whose preparation it in fact serves. However, many empirical studies indicate that not seldom the preliminary procedure is of crucial significance for the outcome of the whole procedure, it is appropriate to mention the old saying "like investigation, like judgement". (for more details of such studies, see: M. Petranović and I. Josipović: *Prethodni krivični postupak – neki praktični aspekti*, Naša zakonitost, br. 2-3, 1989.).

3 For the most part this reason lies in the fact that some non-European countries have long been colonies of European countries.

4 Škulić, M., *Koncepcija istrage u krivičnom postupku*, RKK br. 1, 2010., p. 66.

5 Đurđić, V., *Komparativnopravna rešenja o prethodnom krivičnom postupku i njihova implementacija u srpsko krivičnoprocesno zakonodavstvo*, RKK br. 1, 2009., p. 44.

The first stage of the preliminary procedure is the investigation which is not imminent only to the contemporary criminal procedure system, but is in fact older than it, and used to be the key stage of investigation system of criminal procedure. From its inception until the present time investigation has changed its form, starting from who was in charge, what was its purpose, what was its scope, and other practical-political considerations. Even the present-day problems related to investigation, and to the whole criminal procedure, results from two key underlying controversies: the tendency to maximise the efficiency of investigation (and of the criminal procedure) and the tendency to protect the rights of citizens. The fundamental axiom in undertaking an investigation and the criminal procedure as a whole should therefore be to strike the greatest possible balance between these two tendencies. In an investigation, the conflict between the individual and the general interests manifests itself very strongly and dramatically, and future development should pursue the resolution of this conflict minimizing the damage to either side.

The investigation, more than any other institute, demonstrates the structural problems of mixed-type criminal procedure. Namely, the question arose as to how to adjust the criminal procedure legislation with the changes in the fields of substantive criminal law where, under the influence of new schools of thought, the attention is moving from the objective (the criminal offence) towards the subjective (the perpetrator). This resulted in a stronger position of the accused as a party in the proceeding, and especially in terms of the right to defence which generally is related to the overall development of understanding regarding the rights of citizens, and their international law and constitutional law protection. Having all of these issues in mind, as well as problems arising in investigation, it is not surprising that we can find in legal literature even such thinking which states that the strategy of criminal investigation should be seen as a new field of scientific study dealing with “planning and applying complex measures in investigation, as well as crime control and prevention.”⁶

One of the key pre-requirements for the fulfilment of the tasks of investigation (to strike a balance between the above stated two tendencies) is to create a normative basis, which is a problem not only of legislators but also of theoreticians and practitioners who are to assist the legislators in developing the normative environment.

The reform of criminal procedure legislation in the countries of the former Yugoslavia has covered without exception the issues of investigation and, within it, the key issue of who should be in charge of investigation. These reforms were somewhere embarked upon without preparations and empirical research done in advance, somewhere they were a bit more grounded and more studious, and overall it was more or less mostly undertaken by taking over solutions from other legislations often forgetting that the legislative basis, even if it boils down to “copying” solutions from other legal systems, is just one element in the mosaic of other conditions (elements) for good investigation, such as material and technical, human resources, and other similar conditions. There is an impression that there was an attempt, as soon as possible, to get rid of the old and put on the new clothes, sometimes even without thinking of how it can be implemented in practice. This paper will focus on the concept of investigation in the light of the new Criminal Procedure Code of Montenegro, and to a lesser degree it will look at issues of investigation in the legislations of Bosnia and Herzegovina, Croatia, and Serbia, where a move has been made from

6 For more details see: Lowe-Rosenberg, *Die Strafprozessordnung und das Gerihstverfassungsgesetz*, Groskomentar, 23. Auflage, Zweiter Band, Berlin, 1988, par. 160-169, C., Roxin, *Strafverfahrensrecht*, 22, Auflage, Munchen, 2002.

the traditional court-led concept of investigation, which used to be common to all of these countries, to prosecution-led investigation.

II Investigation in the legislation of Bosnia and Herzegovina

1. Bosnia and Herzegovina was the first⁷ to move from court-led investigation to prosecution-led investigation and it has practically moved to the adversarial criminal procedure system not only with respect to investigation, but also in terms of trial.

Investigation covers not only such actions which, in the court-led investigation were undertaken as investigative actions, but also those that were undertaken previously in the pre-trial (pre-investigation) procedure. In that respect, in order to undertake an investigation it is sufficient that there exists reasonable suspicion that a criminal offence has been committed.

Reasonable suspicion is described as a form of probability founded on certain circumstances and indicating the likelihood of the existence of a criminal offence and a person as a possible perpetrator. It is the prosecutor who is in charge of initiating and undertaking investigation⁸ – Article 216 of the CPC, along with the participation of enforcement officers with sufficient competences within the police of BiH, including the State Investigation and Protection Agency, the National Border Agency, court and financial police, customs and tax administrations and the military police of BiH.

The investigation is initiated by an order, as an internal act of the prosecutor, which fulfils a number of purposes. Firstly, as of the day of making the order the time limit for the prosecutor to undertake the investigation commences; secondly, the order contains data on the person for whom there is basis of suspicion that such person has committed a criminal offence and, thirdly, the order contains a detailed description of actions by the suspect which is the reasonable suspicion that the specific offence has been committed. The order also states the circumstances which need to be investigated and the investigative actions that are to be undertaken for that purpose, based on which grounded suspicion/probable cause/ is to be determined that a person has committed a criminal offence, which is the basis for the indictment to be made. Investigation of other circumstances outside those relevant to the characteristics of the criminal offence and criminal responsibility would represent violation of basic human rights of the accused and other persons.⁹

2. The position of the injured party, in comparison to previous legislation, is significantly changed and aggravated. It can not participate in the role of subsidiary prosecutor in the case if the prosecutor fails to initiate an investigation or if the prosecutor desists from criminal prosecution. Article 216, paragraph 4, of the CPC states that the prosecutor shall notify the injured party and the party filing the criminal report of not undertaking investigation, stating reasons for this, within three days after which they have the right within eight days to file a complaint to the office of the prosecutor. The code does not state what they can achieve by filing such complaints.

7 The Criminal Procedure Code of BiH was published in the Official Gazette of BiH Nr. 26/2004 and Nr. 63/2004.

8 This refers to the state prosecutor because BiH is among the few countries which do not recognise the institute of the injured party as prosecutor or private prosecutor.

9 See Commentaries to the Criminal Procedure Code in BiH, a Joint Project of the Council of Europe and the European Commission, Sarajevo, 2005, p. 588.

We stated above that in the investigation the prosecutor is assisted by certain enforcement officers, thus Article 219 of the CPC regulates the issue of taking statements from certain persons and gathering other evidence, undertaken by such enforcement officers. Where such statements have been taken in the legally prescribed manner and officially recorded they can be used as evidence in criminal procedure. When the legislator states that it can be used as evidence in criminal proceedings, it is not clear if it refers only to evidence used to raise the indictment, or whether it can be used also as evidence at the trial. Having in mind the provision of Article 223 of the CPC regarding the so-called preservation of evidence by the court, this would rather lead to the conclusion that it is evidence used to raise the indictment.

Preservation of evidence by the court refers to hearing of witnesses (Article 223) and a number of pre-conditions need to be fulfilled here: a) hearing if witnesses must be in the interest of justice, b) there should be a possibility or likelihood that such witnesses would not be accessible to the court at the time of the main hearing, which is to be justified by the party which provides this form of preservation of evidence, and c) there should be a motion of the parties or of the defence counsel to the court requesting it. Preservation of evidence by the court is decided upon by the judge for the preliminary proceedings.

III Investigation in the Croatian legislation

The new Criminal Procedure Code of Croatia was adopted by the Croatian Parliament at its session held on 15 December 2008.

The Code, compared to the previous one, introduced a number of novelties, including the changed concept of investigation. It is in principle the State Attorney (originally, in the Croatian language: “državni odvjetnik”) who is in charge of investigation. We emphasise “in principle” because the code also prescribes the participation of investigators and investigative judges in certain cases. Similarly to the concept of court-led investigation, the investigation is preceded by the undertaking of certain police actions within the investigation of criminal offences, and even undertaking certain evidence related actions for which there is danger of delay (Article 213 of the CPC).

There are two types of investigation – mandatory investigation which is undertaken for criminal offences punishable by long imprisonment sentences and optional investigation which is undertaken also for other criminal offences subject to regular criminal proceedings.

The State Attorney issues the order to conduct the investigation within 90 days from the date of entry of the crime report in the crime report register, if a reasonable suspicion exists that a criminal offence was committed for which investigation must be conducted. Thus, this is a lower level of probability from the one that was required in the court led investigation concept. The order is delivered to the suspect within eight days of the date of its issue together with the instructions on rights from Article 239, paragraph 1, of the CPC, except in cases when the identity of the suspect is not known, from which it is possible to conclude that the State Attorney may issue an order to undertake investigations even against an unknown suspect, which was not allowed under the court led investigation concept. The delivery of the order to initiate investigation may be postponed until one month if such delivery would endanger the life or body or property of

substantial value. The order is also delivered to the injured party including instructions on rights from Article 55 of the CPC (Article 218 of the CPC).

The investigation is conducted by the State Attorney, who may transfer the conduct of evidence collecting actions to an investigator, whose profile shall depend on the type of the case under investigation. On the basis of the decision of the State Attorney, in complex investigation cases, apart from the investigator, state attorney advisors and associates may also participate. They can undertake preparations for the conduct of certain evidentiary actions, taking of statements and proposals, and independently undertake certain evidentiary actions entrusted them by the state attorney.

The position of the injured party is much more favourable than in the case of the CPC of BiH. Thus, the injured party can submit to the state attorney motions to extend the investigation, and can take part in investigation actions when so prescribed by the CPC. In case of dismissal of crime report or in case of discontinuance of investigation, the injured party which undertook criminal prosecution may make a motion to the investigating judge to undertake investigation¹⁰, except in cases when this is not allowed by the law (Article 225 of the CPC). If the investigating judge accepts the motion, the investigation is not conducted by the investigating judge, but it is conducted by an investigator under the order of the investigating judge and the injured party may be present during the investigation actions and may propose to the investigating judge motions to order investigators to undertake actions. If the investigating judge does not accept the motion of the injured party as the subsidiary prosecutor to undertake actions, the investigating judge shall so notify the injured party. Once the investigating judge finds that the investigation is concluded, he shall so notify the injured party and shall instruct it by notification of the location of the documentation and other files and give instruction when the injured party can inspect them. The investigating judge will also instruct the injured party that the deadline for preferring of indictment is eight days.

After receiving the order to conduct investigation, the injured party may file a motion to the state attorney to undertake evidence related actions. If the state attorney accepts the motion he shall undertake the relevant evidence related action, and if not he shall submit such motion within eight days to the investigative judge and shall so notify the injured party in writing. The judge shall adjudicate regarding the motion by order.

The new law has introduced a new instrument, which is the evidentiary hearing, which is undertaken by the investigative judge at the proposal of the state attorney, the injured party as the subsidiary prosecutor or the accused. Evidence hearing shall be undertaken if:

1. It is necessary to interrogate especially sensitive categories of witnesses (child, minor),
2. If the witness can not be interrogated at the main hearing,
3. If the witness is exposed to influence which may bring to question the truthfulness of the testimony,

¹⁰ According to the CPC of Montenegro, it is possible to motion the undertaking of certain investigation actions, but not an investigation as a whole.

4. If other evidence can not be presented at later time.

The evidentiary hearing shall be attended by the state attorney and, if not otherwise prescribed, it can be attended by the accused, the injured party as the subsidiary prosecutor, the defence counsel, and the injured party (Article 236 of the CPC).

If the motion for the undertaking of the evidentiary hearing is refused, the investigative judge shall issue a ruling within 48 hours refusing the motion, and the proposing party may file an appeal against it within 24 hours. The decision regarding the ruling shall be made by a panel within 48 hours.

It is premature to draw any conclusions regarding the effects of prosecution-led investigation in practice, since the provisions of the new CPC have been implemented in practice for a period of less than one year.

IV Investigation in the Serbian legislation

1. The reform of criminal procedure legislation in Serbia began at the time when Serbia was still part of the state union with Montenegro (both as the Federal Republic of Yugoslavia and as the State Union Serbia and Montenegro), first by the adoption of the Criminal Procedure Code of the SRY in 2001, which in practice was the code only of Serbia, since it was not implemented in Montenegro for political reasons (because its drafting did not include the legitimate representatives of Montenegro), and afterwards by the adoption of the Criminal Procedure Code of Serbia in 2006 which, although it came into effect, was never applied and was abolished. This period was followed by work preparing the new CPC which was adopted by the National Assembly of the Republic of Serbia on 26 September 2011 and which was published in the "Official Gazette of RS", nr. 72/2011 of 28 September 2011.

It is very seldom that a law, while still in the stage of draft or proposal was subject to such criticism as was the case with the new CPC of Serbia.¹¹

It is a unanimous assessment of the stated authors that the new CPC has abandoned the previous concept of continental European (civil law) criminal procedure model and became adversarial. This is reflected not only in the abandonment of the court-led investigation model,¹² but also in the establishment of adversarial procedures, as the key characteristic of the adversarial system. Otherwise, our procedural legislation, in contrast with that of countries with more stable legal order, has undergone changes more frequently, but never before the adoption of the new CPC has the link with the tradition of this region, but also beyond it, been broken. So far the

11 See: Škulić, M., Pogrešna koncepcija Nacrta Zakonika o krivičnom postupku Srbije, RKK br. 2, 2010. g., str. 41-71, Koncepcija istrage u krivičnom postupku RKK br. 1, 2010, p. 57-79, Škulić, M., i Ilić, G.: Novi Zakonik o krivičnom postupku Srbije – Reforma u stilu "jedan korak naprijed – dva koraka nazad", Beograd 2012, published by Faculty of Law Belgrade and Prosecutor's association of Serbia; Bejatović, S., Radna verzija ZKP Republike Srbije i tužilački model istrage, RKK br. 2, 2010. g., pp. 23-41. Aktualna pitanja tekuće reforme krivičnog procesnog zakonodavstva Srbije, RKK br. 1, 2010. g., pp. 37-57; Đurđić, V., Komparativnopravna rješenja o prethodnom krivičnom postupku i njihova implementacija u srpsko krivičnoprocesno zakonodavstvo, RKK br. 1, 2009. g., pp. 49-63.

12 The non-court model of investigation is not characteristic only of continental European legislative systems, because these systems also have prosecution-led investigation (examples: Austria, Germany), but they have maintained the mixed system of criminal proceedings with the active position of the court in deriving and proposing evidence.

theoreticians have given their evaluation of the new CPC of Serbia. However, that is a perception of the CPC from just one point of view. The picture will be more complete once that it is implemented in practice, and it is expected that the integral text of the law shall come into effect as of 15 January 2013.

2. Although the issue regarding investigation was positioned as the central issue or the question of all questions, it is our opinion that it is not the issue of greatest significance with respect to the new CPC of Serbia. It is our opinion, and opinion of others as well, that the problem which will be mostly reflected on the position of the parties involved in criminal proceedings is the absence of the principle of truth and the passivisation of the court in the evidentiary procedure. That, however, is not the topic of this paper. This paper is to focus on the issue of investigation in the new CPC legislations which has been transferred to the public prosecutors. The nature and the scope of this paper do not allow detailed analysis and evaluation of provisions of the CPC on investigation, and we shall therefore review only the key issues related to investigation.

3. The investigation which, according to Article 7, paragraph 1, of the CPC, is preceded by actions by different subjects which is now termed pre-investigation procedure (previously termed the pre-trial procedure). The public prosecutor is in charge of pre-investigation procedure and he is authorised to transfer the competence to the police, which shall be obliged to complete such measures and actions and inform the public prosecutors on such measures and actions (Article 285 of the CPC). The police may conduct evidentiary actions during the pre-investigation procedure and evidence gathered by the police during such actions, if they are conducted legally, can be used in the further course of the criminal proceedings (Article 287, paragraph 2 of the CPC). It is not clearly defined what is meant by the “further course of the criminal proceedings”, whether it implies creating the basis for the ruling to initiate investigation, raise indictment, or possibly making of the judgement.

4. An investigation is initiated by and order issued by the competent prosecutor. An order to conduct an investigation is made before or immediately after the first evidentiary action undertaken by the public prosecutor or the police in the pre-investigation proceedings, and not later than thirty days after the public prosecutor was notified of the first evidentiary action undertaken by the police (Article 296 of the CPC). The order is delivered to the suspect and his defence counsel, if he has one, together with the information on the first evidentiary action which they can attend, and the public prosecutor also informs the injured party about undertaking the investigation, instructing the party of his/her rights from Article 50 of the CPC. Similarly as in the case of the legislations of BiH and Croatia, investigation can be initiated against a perpetrator whose identity is not known. This has been subject of criticism accompanied by the thinking that this provision is not only unjustified, but is also in direct conflict with many generally accepted solutions contained in the criminal procedure and substantive legislation.¹³ So, for instance, it is in contrast with provisions of Article 14, paragraphs 1 and 2, of the CPC clearly stating that there is “no criminal offence without guilt”, and the issue of guilt can be considered only in the context of the specific, and not some unknown person.¹⁴

13 Bejatović,S., Tužilački model istrage, p. 33.

14 Brkić,S., Kritički osvrt na prvu glavu radne verzije Nacrta ZKP Srbije od 14. septembra 2010. godine, RKK br. 2/2010, pp. 71-95.

Furthermore, similarly as in the case of the legislation of BiH and Croatia, in order to initiate investigation it is necessary to have the lowest degree of reasonable suspicion – reasonable grounds to suspect. This degree of suspicion is required also for the actions by the police in the pre-investigation proceedings, therefore this provision was subject to criticism, because the initiation and undertaking of criminal proceedings cannot be based on indications, but only on actual and specific data,¹⁵ and in view of all the implications related to the initiation of proceedings, it can not be initiated on the basis of indications.¹⁶

5. Greatest criticism was focused on the provisions of Article 301, paragraph 1, of the CPC according to which the accused and his defence counsel can independently gather evidence and materials for the defence, which is interpreted as parallel investigation,¹⁷ and in order to enforce this right the suspect and his defence counsel are entitled:

- a) To talk to the person who can provide them with data (with the consent of such person),
- b) To enter private premises or areas not open to the public, a residence or premises linked to a residence (with the consent of the holder of such residence) and
- c) To take from physical or legal persons objects and documents and acquire information possessed by such person, with their consent.

Only practice will show how this provision will be implemented, whether and how these sources of evidence would be accessible as sources of evidence, but there are also opinions that this will be the “privilege” of the affluent accused who will be in a position to engage the best defence counsel.¹⁸

6. Although investigation is in principle led by the prosecution, it is also possible that police can be involved in conducting certain evidentiary actions, if the prosecutor authorises the police to do so (Article 299, paragraph 4).

Apart from the police, the judge in charge of the preliminary proceedings can also be involved in the investigation, if the public prosecutor refuses the motion of the accused and his defence counsel to undertake evidentiary action, or if the prosecutor fails to make a ruling within eight days of the day of filing of the motion. In such a case, the accused or his defence counsel can file a motion to the judge in charge of the preliminary proceedings and, if such a motion is granted, the judge in charge of the preliminary proceedings shall order the public prosecutor to undertake evidentiary action in favour of the defence and shall state a time limit for doing so (Article 303 of the CPC).

7. As stated above, in all the above named legislations, although they have accepted the prosecution-led investigation, the court is also involved in undertaking certain evidentiary actions in certain cases. According to the legislations of BiH, Croatia, as well as Montenegro (which will

15 Simović, M., Značenje “osnovane sumnje” iz četvrtog amandmana na Ustav SAD, Zbornik “Krivično zakonodavstvo Srbije i standardi EU”, Beograd, 2010.

16 See: Soković, S., Dokazivanje indicijama, Kragujevac, 1997.

17 Bejatović, S., Tužilački model istrage, str. 35. M., Škuljić: Pogrešna koncepcija..., p. 53

18 Škuljić, M., Reforma u stilu..., p. 58

be discussed hereinafter) the court is involved for the purpose of the so-called court gathering of evidence in cases when there is a risk that some evidence will not be possible to be repeated during the main hearing, because different credibility is attached to the evidence gathered during the investigation by the prosecutor and by the court. Evidence gathered during the investigation by non-court entities are again presented during the main hearing in line with the principle of direct presentation of evidence before the court. According to the CPC of Serbia, the involvement of the judge in charge of preliminary proceedings in the investigation is different than the other two legislations in terms of the provisions that it is not the judge himself who undertakes such evidentiary action, but he issues an order to the public prosecutor to undertake the evidentiary action.

It thus turns out that the prosecutor as the entity in charge not only of the pre-investigation procedure, but also of investigation itself receives orders to undertake a certain evidentiary action and, what is more, in the interest of the defence. This is a consequence (negative, in our opinion) of the absence of the principle of truth in the new Serbian CPC and in this part of the proceedings.

V Investigation in the Montenegrin legislation

1. The reform of the criminal procedure legislation in Montenegro started already at the time of the State Union Serbia and Montenegro, by the adoption of the Criminal Procedure Code in 2003¹⁹. Soon after that, the reform was continued by the adoption of the Amending Law to the CPC in 2006.²⁰ And, by the time that we almost got “used” to the new code, it was amended yet again. Thus, three years later, in July 2009²¹ the new CPC was adopted, but its implementation was postponed by one year. However, as if this was not sufficient, in July 2010,²² the Amending Law to the CPC was adopted, including only one article, whereby the implementation of the code was postponed by one year, so that the new CPC of Montenegro has now been implemented for less than one year.

The key reason for the most recent reform of the criminal procedure legislation is the transfer from the court- to prosecution-led investigation. During the time of adoption of the CPC of 2003, the question was raised regarding the change of concept of investigation, but no response was given to this question in the CPC, because at that time it was evaluated that conditions had not yet matured for such a change, thinking primarily that the reforms of police and state prosecution and their readiness to take upon them the investigation. Until recently, one of the reasons for postponing the introduction of prosecution-led investigation was the fact that court-led investigation is the greatest guarantee for human rights and freedoms, and that moving it to non-court entities would have negative consequences on the issues related to human rights and freedoms. However, today this reason no longer exists because the issues of human rights, especially after the ratification of the European Convention, have been institutionalised to a significant degree, and there is no longer a risk with respect to any other entity entrusted with conducting investigation. By ratifying the said Convention, the state has undertaken that the decisions

19 The Official Gazette (of Montenegro) Nr. 71/03.

20 The Official Gazette Nr. 47/06.

21 The Official Gazette Nr. 57/09.

22 The Official Gazette Nr. 49/10.

made by its authorities are under the supervision of the European Court for Human Rights, thus under the conditions of external control all national authorities shall have to equally exercise caution and attention to the citizens and their human rights.²³

2. Thus, the investigation is conducted by the state prosecutor. For investigation to be initiated, the following conditions need to be fulfilled: a) grounded suspicion that a person has committed a criminal offence, b) that the accused is individualised, and c) that there exists a specific criminal offence. The difference in comparison to the above analysed legislations is with respect to the degree of probability (greater degree of probability) and with respect to the fact that investigation cannot be initiated against an unknown perpetrator. The code does not specify what is considered to be the grounded suspicion, what degree of “capacity” of certainty is implied regarding the criminal offence or the perpetrator, and it is true that this degree of probability was needed in this region in practice and it did not represent a problem. In this respect, it has been accepted both in theory and in practice that this concept implies such situations in which facts and circumstances of the specific criminal event lead to the conclusion that a certain person is the perpetrator of the criminal offence that he is charged for.²⁴

During the investigation, the state prosecutor acts as a state authority obliged by the principle of truth, meaning that he is obliged to gather and derive evidence not only to the detriment of the accused, but also in his favour. The investigation is preceded by the activities undertaken by certain subjects, which in the CPC is termed inquiry (previously termed the pre-trial procedure), the purpose of which is to ensure sufficient evidence and data which will transform the grounds of suspicion as a degree of probability required for the initiation of inquiry, into the grounded suspicion of the degree of probability required to initiate the investigation. The person managing both the inquiry and the investigation is the state prosecutor. The state prosecutor makes the order to conduct the investigation, after having first heard the suspect. It is not clear from the text of the CPC whether there will be within prosecution offices investigative state prosecutors (or the deputies), similarly to investigative judges, who will conduct the investigation, but since the new CPC has preserved the possibility to establish investigation centres (so that one prosecution office conducts investigation for a number of prosecution offices) it can be concluded that there are investigative state prosecutors. It is then rational to have one state prosecutor (the deputy) conducting the investigation, and then having him pass on the case to another deputy to raise the indictment.

3. It is in two cases that an investigative judge can be involved in the investigation in order to undertake certain actions. The first case is stated in Article 276, paragraph 2 of the CPC (the so-called preservation of evidence by court) where, at the request of the prosecutor or of the accused (the CPC says at the request of the parties, which is wrong as there are no parties in the investigation) certain evidentiary actions in the investigation can be conducted by the investigative judge if there are circumstances which obviously indicate that such actions cannot be repeated during the main hearing, or indicating that the establishing of such evidence would not be possible or would be difficult during the main hearing. It is worth noting that this does not refer to evidence needed to raise the indictment.

23 Grubač, M., *Kritika novog Zakonika o krivičnom postupku*, RKK br. 2, 2006, p. 29.

24 See: Vasiljević, T., *Sistem krivičnog procesnog prava SFRJ*, Beograd 1981. g., str. 479, Bejatović, S., *Krivično procesno pravo*, Beograd, 2008, p. 385.

The second case for involvement of the investigative judge to undertake certain evidentiary actions is exactly for the purpose of raising the indictment, but not the indictment by the state prosecutor, rather by the injured party as subsidiary prosecutor. In contrast to the Serbian CPC, where the judge in charge of the preliminary procedure orders the prosecutor, at the motion of the injured party, to undertake certain evidentiary actions, in this case it is the investigative judge undertakes certain evidentiary actions, at the motion of the injured party who has undertaken criminal prosecution, since the injured party had estimated that he needs this in order to raise the indictment. If the investigative judge refuses such a motion, the motion is to be decided by a non-trial panel as stated in Article 24, paragraph 7, of the CPC. Any issues related to the measures and actions which represent the limitation of freedoms and rights of the accused during the investigation are decided by the investigation judge.

4. Other issues related to the investigation, such as the purpose of the investigation, the openness/transparency of the investigation, the closing of investigation, and other similar issues, are regulated in the same manner as was the case in previous investigation practice. It should be stated, however, that in terms of the purpose of investigation in the part related to the gathering of evidence and data for which there is a risk that they can not be repeated during the main hearing or where their derivation would significantly be impaired, that this must be done by the investigation judge, not by the prosecutor, so that the court decision could later be based upon such evidence.

The state prosecutor closes the investigation by recording an official record.

Apart from introductory remarks, we have in above paragraphs briefly looked at the issues of the concept of investigation in four former Yugoslav states. We have seen similarities and differences in the concepts. In the remaining part of this paper we shall look briefly into some other issues and problems that can be considered to be relevant for all the legislations reviewed here.

VI Some other investigation related issues

Irrespective of the fact that the majority of continental-European (civil law) countries have moved from court to prosecution-led or prosecution-police investigation, including also countries which are considered to be the pioneers of court investigation,²⁵ opinion is still divided, therefore there are still many who advocate the court investigation,²⁶ although they are the minority, and there are also those who advocate the prosecution-led investigation.²⁷

25 Ilić, G., Položaj i uloga policije u prekrivičnom i prethodnom krivičnom postupku u francuskom krivičnom procesnom pravu, "Policija i prekrivični i prethodni krivični postupak", VUSP, Beograd, 2005.

26 Grubač, M., Krivično procesno pravo, Posebni deo, Official Gazette, Beograd 2002, p. 46. Lazin, Đ., Sudska istraga – dileme i problemi, RKK, br. 2, 2006. g., p. 80.

27 Bejatović, S., Tužilački koncept istrage i novi Zakonik o krivičnom postupku RS, "Primena novog Zakonika o krivičnom postupku Srbije", Kopaonik, 2007. g., str. 51-77, Đurđić, V., Konceptijska doslednost tužilačke istrage prema novom Zakoniku o krivičnom postupku, u publikaciji "Primena novog Zakonika o krivičnom postupku Srbije", Kopaonik, 2007. g., pp. 77-95, Simović, M., i Simović, V., Krivično procesno pravo II, Istočno Sarajevo, 2011. g., pp. 34-40, Radulović, D., Krivično procesno pravo, Podgorica 2009. g., str. 274, Škuljić, M., Konceptija istrage u krivičnom postupku, RKK br. 1, 2010. g., pp. 57-78.

Criticisms of court-led investigation stated that it does not contribute to the efficiency of the criminal proceedings,²⁸ that it is too bureaucratic and that the engagement of the investigative judge is, mostly, focused on gathering of personal data.²⁹

Except in the case of BiH, where the prosecution-led investigation has been implemented for almost ten years, in other countries whose legislations were the subject of this review the period of their implementation is too short to enable any value judgement to be made, therefore it is too early to answer the question whether prosecution-led investigation will also be bureaucratic and rely on evidence and data gathered in the inquiry (pre-investigation proceedings).

The reasons in favour of preserving court-led investigation stated by the advocates of this concept include the possibility of less objectivity on the side of the state prosecutor who in prosecution-led investigation combines the roles of investigation and the role of criminal prosecution. This criticism cannot be accepted, however, at least not in the case of the Montenegrin legislation. Namely, the state prosecutor in investigation acts as a state body which, just like the court, is obliged by the principle of truth (Article 16, paragraph 1 of the CPC) which states that “the court, the state prosecutor and other state bodies participating in criminal proceedings are obliged to truthfully and in full determine facts of relevance for the making of a legal and just decision and to exercise equal care in examining and determining facts which incriminate the accused as much as those which are in his favour”. It is another and still open issue to see how this provision will be implemented in practice. The discrepancies between theory and practice do happen.

However, in making the move from the court- to prosecution-led investigation and expecting that it will be efficient and that the state prosecutor will, in conducting evidentiary actions, be objective and independent, the constitutional law definition has been forgotten which defines the state prosecutor differently than it defines the court in as much as according to the Constitution (in the case of Montenegro) prosecutor is not independent, but only autonomous. On the other hand, the law relevant to the organisation and structure of the state (public) prosecution promote certain principle, such as the principle of hierarchy (the subordination of the junior prosecutor to the senior one), so a question could be raised whether the state prosecutor who is not independent and who is subordinated to the senior prosecutor can be objective in conducting the investigation. What is more, whether before the move to the prosecution-led investigation, as regulated in the CPC, there was need to establish a legislative basis for the new position of investigative state prosecutor, including constitutional changes and amendments to laws on the organisation and structure of the state prosecution.

Moving the investigation from courts to prosecution offices will certainly be reflected on certain principles of criminal proceedings, primarily the principle of direct presentation of evidence before the court and the principle of contradiction. This means that evidence derived during investigation by non-court bodies (state prosecutor and police) must be derived again at the main hearing, which has resulted in the need for court deriving evidence during investigation (which, with the exception of Serbia, was provided in the legislation of all other countries that were subject to this review).

28 Objections that court-led investigation is inefficient are not based on empirical research as, to our knowledge, such research has not been conducted in this region in the recent past.

29 Bejatović, S., *Nove tendencije u savremenoj nauci krivičnog procesnog prava i neka pitanja našeg procesnog krivičnog zakonodavstva*, in “Nove tendencije u savremenoj nauci krivičnog prava i naše krivično zakonodavstvo”, Zlatibor, 2005.

That is why even in case where we do not have specific provisions as to who is undertaking which evidentiary action, such as gathering of evidence that obviously will not be possible to repeat during the main hearing (within the investigation), such actions are undertaken by the court and not the prosecutor. This then means that preservation of evidence by the court during investigation is not in the service of providing evidence for the indictment, but evidence for the judgement.

The purpose of the investigation determines its scope. What should be the scope of investigation? It should not be such that the main hearing will be a full repetition of the investigation (as was the case under the concept of court-led investigation), but it should be sufficient to provide grounding for the indictment, meaning that it should neither be full nor summary, but it should be reduced to what proves to be necessary in the specific case, with the complexity and not the severity of the case being the dominant factor.³⁰

Finally, instead of a conclusion, it is necessary to note that in order to have good investigation it is not sufficient just to have a legislative basis, because even the best of legal solutions cannot guarantee good effects in practical implementation without the adequate social, cultural, political and general legislative environment.

30 Grubač, M., i drugi: Komentar Zakonika o krivičnom postupku Crne Gore, Tivat, 2010, p. 662.

Prosecutorial Investigation – the Experiences of Bosnia and Herzegovina

Summary

The application of new legislation on criminal prosecution, in which the roles of those involved in the investigation have been substantially changed, have placed prosecutors in Bosnia and Herzegovina before an exceptionally difficult challenge. Although we may regard the process of adaptation to the new system of adversarial proceedings as being largely complete, and say that in their everyday work public prosecutors are successfully managing and directing criminal investigations, including complex investigations of serious acts of organised crime and war crimes, it is obvious that in actual practice there still appear various difficulties, caused both by incomplete or not sufficiently precise regulations and by organisational and/or institutional shortcomings in the criminal justice system. What proceeds from this is the need for further legal and institutional reforms in the area of criminal law and criminal procedure law in Bosnia and Herzegovina, both to harmonise them with international standards, fill existing legal voids, and eliminate dilemmas appearing in practice.

Keywords: criminal offence, criminal proceedings, investigation, prosecutor, court, suspect, defender, injured party, authorised public officials

I. Introduction

The end of the war in Bosnia and Herzegovina in 1995 was followed by the beginning of a lengthy and complex process of transition aimed at establishing peace, democracy and the rule of law. The transition included a comprehensive reform of the judicial system, in particular a reform of the criminal justice system, where the most radical about-turns have taken place. A firm

1 Justice of the Supreme Court of the Federation of Bosnia and Herzegovina.

continental European legal tradition (civil law tradition) in the prosecution of criminal offences and offenders has been substantially derogated by the adoption of new criminal procedural laws into which were built numerous features of the Anglo-Saxon (common law) legal tradition, including a strong emphasis on an adversarial criminal procedural system, in the context of all of which the status of the public prosecutor has undergone major changes. By the abolition of the institution of investigative judge, the prosecutor has been proclaimed the ‘master’ of the investigation and given new and completely different powers and duties demanding continuous and active participation in conducting the investigation, instead of what in earlier times was a rather passive status. This new role has given new tasks to prosecutors in Bosnia and Herzegovina and placed them before major challenges, and placed on them a great deal of responsibility in respect of planning, managing and directing investigations, all without any preparation, education and reasonable *vacatio legis* before the application of the new procedural laws in actual practice.

After the new laws have been enforced for almost ten years, one may conclude that prosecutors have substantially fulfilled their demanding tasks. Nevertheless, even after several years there has been a failure to completely resolve numerous problems stemming from various sources, including inadequacy or impreciseness of the procedural laws, dilemmas caused by differing prosecutorial and judicial practices, complex relations with the law enforcement agencies emanating from their fragmented nature and/or insufficient professionalism, lack of resources, a continuous need for education and advanced training in the prosecutorial skills, etc. It is therefore the primary task of this paper to make an analysis of the application of provisions of the criminal procedure code and thereby identify the most pronounced problems and dilemmas prosecutors face in their practice in Bosnia and Herzegovina.

II. The roles of participants in criminal proceedings in the investigation

The most important changes in the Criminal Procedure Code of Bosnia and Herzegovina² (CPC BiH) concern the roles of participants in criminal proceedings in the investigation stage. The earlier pre-criminal and preliminary criminal proceedings phases have been joined into a single investigation managed by the prosecutor, who may transfer his powers to other authorised public officials (law enforcement agents). In this way the position of law enforcement agents has been strengthened, and their actions are no longer solely operational in character, but they are also empowered to conduct investigatory activities whose results may be used as evidence in criminal proceedings, provided such actions are carried out in accordance with the CPC.

The role of the court in the investigation stage is also very different – the court is no longer an authority which investigates, but one controlling whether actions and measures restricting human rights and fundamental liberties during the investigation are justified.

2 Effective from 1 March 2003, Official Gazette of BiH, No. 36/03. Legislation enacted thereafter included the Criminal Procedure Code of the Republika Srpska, effective from 1 July 2003, Official Gazette of the RS, No.broj 50/03; Criminal Procedure Code of the District of Brčko, effective from 1 July 2003, Official Gazette of the BD, No.10/03, and the Criminal Procedure Code of the BiH Federation, effective from 1 August 2003, Official Journal of the Federation of BiH, No. 35/03. For this paper we shall use the provisions of the Criminal Procedure Code of BiH; it should be noted that analogous provisions exist in the criminal procedure codes of the entities and the District.

The status of suspects has also been changed considerably, and is characterised by a certain ambivalence. On the one hand, the protection of suspects' rights in accordance with the highest international standards is guaranteed by a number of procedural mechanisms, but on the other the moment their awareness of their status and their active participation in the investigation begin only when the prosecutor decides to notify them thereof, in contrast to their earlier procedural status, when immediately after a ruling instituting an investigation was issued suspects could challenge (by an appeal) the grounds for the investigation. Accordingly, defence counsels' powers are restricted by the rights of the suspects, and they may begin obtaining evidence and facts in favour of suspects only from the moment the suspects are notified of the investigation.

The rights of injured parties have been considerably restricted, and they can no longer act as subsidiary prosecutors in criminal proceedings – i.e., assume the position of the case's prosecutor when the prosecutor decides not to prosecute or to drop the charges. We shall focus here on those procedural actions in which actual practice has shown the imprecision of the criminal procedural legislation.

1. The prosecutor

The prosecutor's basic right and duty are to uncover and prosecute criminal offenders.³ The right and the duty stem from the accusatorial principle⁴, is constituted at the moment awareness arises of the existence of grounds for suspicion (reasonable grounds to suspect) that a criminal offence has been committed,⁵ when the prosecutor undertakes independently, or with the help of authorised public officials, all necessary investigatory action, including: interrogating the suspect, questioning the injured party and witnesses, conducting crime scene investigations and reconstructions of events, implementing special measures to safeguard witnesses and information, and issuing orders for requisite expert examinations.⁶ It might at first seem that there is nothing disputable or unclear in the aforementioned, but practice has shown that nothing is quite as it seems. It is clear that the existence of reasonable suspicion initiates a prosecutor's activities, but when does such a level of suspicion exist? This question is not insignificant, as the moment the prosecutor decides to conduct an investigation depends on it. Given that the law does not define this concept, and that commentaries to the CPC contain only descriptive and indistinct definitions of grounds for suspicion,⁷ in actual practice there are numerous cases that the police submit to the prosecutor a report about a certain event lacking information and evidence that a criminal offence is involved in the concrete case. Whether this happens because of insufficient police knowledge about the elements of a criminal offence, or an attempt to transfer responsibility to the prosecutor, the result is that the prosecution service is unnecessarily burdened with cases which waste valuable time. A debate is in progress in professional circles in respect of the concept of grounds for suspicion and the need to define it in law, but it appears that the prevalent arguments are on the side of those who think that there is no sufficiently broad definition which

3 Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette of BiH, Nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, Article 35 para 1.

4 *Idem*, Article 16.

5 *Idem*, Article 35 para 2.a).

6 *Idem*, Article 217.

7 See, for example, Group of authors, *Komentari Zakona o krivičnom/kaznenom postupku u BiH*, 2005, p. 93: "Grounds for suspicion (reasonable grounds to suspect) are designated in legal literature as a form probability based on specific circumstances which indicate a certain possibility of the existence of a criminal offence, and a certain person as its perpetrator."

would include all practical situations which could be defined as grounds for suspicion, and that the problem can be resolved by improved training of police personnel and co-operation of the prosecutor and authorised public officials.

In the initial stage of the application of new criminal procedure codes, another dilemma which appeared in Bosnia and Herzegovina concerned the legal nature of the order to institute an investigation. Although no one questioned the fact that the prosecutor issues an order when he finds that in a concrete case grounds for suspicion exist that a criminal offence has been committed⁸, drawing an analogy from the earlier criminal procedure law some analysts understood the order as a formal procedural act replacing the earlier ruling on instituting an investigation. Others, however, held the view that the order was an internal prosecutorial document of operational nature producing no legal effect for the suspect. The argument that prevailed was that the Criminal Procedure Code does not prescribe an obligation to serve the order to a suspect, a defender or the court, that no procedural sanctions or consequences exist in the event that the prosecutor fails to draft an order in writing, and, particularly, that by the issuance of an order to institute an investigation a suspect's rights are not restricted in any way; consequently, no more dilemmas exist in connection with the legal nature of this act. The order to institute an investigation is an internal prosecutorial act deciding on the grounds for and subject matter of the investigation⁹, but also the manner of conducting the investigation, i.e., the investigatory actions and measures to be undertaken during the investigation.¹⁰

Nevertheless, it should be emphasised that the moment of issuance of an order to institute an investigation is not totally insignificant, if we take into consideration provisions of the Criminal Procedure Code concerning the duration of the investigation.¹¹ Given that the six-month time limit prescribed by the CPC for completing the investigation begins to run from the date of issuance of the order to institute an investigation, in actual practice prosecutors often, especially in complex cases, conduct investigatory actions even before issuing the order, in order to gain time. This practice arose as a consequence of a completely illogical provision which does not take into account the differences in the complexity of investigations of various criminal offences, but prescribes the same deadline for completing all investigations. It is for this reason certain that appropriate revisions of the law would contribute to the elimination of the irregularities found in actual practice which are described above.

It should also be noted that problems appear in practice due to the non-existence of provisions in connection with suspension or expansion of an investigation. Under earlier legislation, an investigative judge was authorised to suspend an investigation when a suspect came down with a mental disease or a temporary mental disorder, or when his abode was not known, and also, acting on a motion of the case's prosecutor, when the suspect was at large or not accessible to the state authorities; the investigation would resume once the aforesaid obstructions were terminated.

8 Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette of BiH, Nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, Article 216 para 1.

9 This stems from a part of the provision of Article 216 para 2 of the CPC BiH which states that the order for instituting an investigation contains: "information about the criminal offender, if known, a description of the act which has the legal elements of a criminal offence, the title of the criminal offence under the law, the circumstances which confirm the grounds for suspicion for conducting an investigation, and the existing evidence."

10 The same provision also states: "The prosecutor shall specify in the order which circumstances should be investigated and which investigatory actions should be undertaken."

11 Article 225 para 2 of the CPC BiH: "If the investigation is not concluded within six months of the issuance of the order instituting the investigation, requisite measures to conclude the investigation shall be undertaken by the Prosecution's Collegium."

Under the current CPC, criminal proceedings (in all their phases) can only be suspended if a suspect or defendant comes down with a mental illness¹². In all of the other aforementioned situations the prosecutor cannot suspend the investigation, and cases of this kind not just needlessly ‘circulate’ between the court registry and the prosecutor, but appear in prosecutorial records as ‘active investigations’ (albeit without any results, which is attributed to the prosecutor), although that obviously does not correspond to the actual situation. As regards expansion of an investigation to encompass another criminal offence, or a new commission of the same criminal offence, or a new offender, the extant CPC has no explicit provisions. For this reason prosecutions in Bosnia and Herzegovina deal with this question in various ways: in situations of this kind some issue a new order to institute an investigation which encompasses the earlier criminal offence/offender and the new criminal offence/offender, others issue a separate order expanding the investigation which includes only the new criminal offence/offender, a third group issues an order expanding the investigation modelled after the earlier ruling on expanding the investigation, and the fourth group issues no order at all. The dilemma which has already been described also appears here: when does the time-limit for completing the investigation begin to run – from the date of issuance of the first order or of the latest order instituting an investigation in the same case, or from the date of issuance of each order separately in respect of the new criminal offence/offender?

As regards the ‘new’ powers invested in prosecutors in Bosnia and Herzegovina which have been causing certain dilemmas and problems in their practice, one should also mention the CPC’s provisions on not conducting an investigation and on discontinuing investigations. The Code is clear as regards reasons for issuing an order not to conduct an investigation¹³ and an order to discontinue an investigation¹⁴, but what causes dilemmas in practice are provisions on the procedure of submitting complaints against the decisions and of deciding on those complaints. When deciding not to conduct an investigation, the prosecutor is required to notify the injured party and the complainant within three days, following which those persons have eight days to complain to the Prosecutor’s Office.¹⁵ When deciding to discontinue an investigation, the prosecutor is required to notify the injured party, who also has eight days to file a complaint with the Prosecutor’s Office, and shall also notify the suspect if the suspect has been interrogated, as well as the person who had reported the criminal offence.¹⁶

It proceeds from CPC provisions worded in this manner that only the injured party is entitled to file a complaint in both cases, while the complainant/person who reported the criminal offence has such a right only in connection with the order not to conduct an investigation, but not the order to discontinue the investigation. The first dilemma appearing in connection with the aforesaid provisions stems from the definitions of the concepts ‘complainant’ and the ‘person who

12 Articles 207 and 388 of the CPC BiH.

13 Article 216 para 2 of the CPC BiH: “The prosecutor shall issue an order not to conduct an investigation if it is obvious from the report and accompanying documentation that the act reported is not a criminal offence, if there exist no grounds for suspicion that the person reported committed the criminal offence, if the statute of limitations on criminal prosecution has expired, or the offence is encompassed by an amnesty or a pardon, or if there exist other circumstances which exclude criminal prosecution.”

14 Article 224 para 1: “The prosecutor shall issue an order to discontinue an investigation if it is determined: a) that the act committed by the suspect is not a criminal offence, b) that there exist circumstances which exclude the criminal responsibility of the suspect, except in the case referred to in Article 206 of this Code (*special procedure in the case of a suspect’s mental incapacity* - author’s note), c) that there is insufficient evidence that the suspect committed the criminal offence, d) that the offence is encompassed by an amnesty or a pardon, or if there exist other circumstances which exclude criminal prosecution.”

15 Article 216 para 4 of the CPC BiH.

16 Article 224 para 3 of the CPC BiH.

reported the criminal offence'. In the former case, there is no doubt that a complainant can both be any citizen who filed a complaint and a competent police agency or other institution, while the wording 'person who reported the criminal offence' seems to indicate that only a natural person could be concerned. In actual practice, for most prosecutions the 'person who reported the criminal offence' also refers to police and other authorities which filed the criminal complaint in the concrete case, and they will notify them of discontinuation of the investigation, but what still remains unresolved is the question of the justifiedness of the different treatment under the law of the right to file a complaint in the two situations described above. There is no doubt that deciding on the complaint should represent a form of control of the prosecutor's decision not to conduct an investigation or to discontinue the investigation. Furthermore, every complainant has a justified interest in 'succeeding' with his complaint in the criminal proceedings, and should therefore also have an opportunity in the event of a 'negative' prosecutorial decision to point to possible irregularities in the issuance of such a decision or to present additional arguments, information or evidence, and the question that can be raised is why the CPC provides for the complainant such an option only when an order not to conduct an investigation is issued, but not when an order to discontinue one is issued?

Procedural law provisions on not instituting/discontinuing investigations are also defective in respect of several other questions: should the decision on instituting/discontinuing investigations be solely up to the acting prosecutor, or the Prosecutors' Collegium, or the collegium of the appropriate prosecutorial department;¹⁷ who makes up the Prosecutors' Office and what are the deadlines for the Office to respond to complaints;¹⁸ what is the procedure in case a complaint is accepted, i.e., should the decision of the Prosecutors' Office accepting/rejecting a complaint be done in writing, should the complainant be notified about that decision, what are the deadlines for the adoption of a new prosecutorial decision in case a complaint is sustained, in the case of another negative decision is the complainant entitled to submit a new complaint, etc. The non-existence of appropriate provisions regulating these matters makes the practice of prosecutors in Bosnia and Herzegovina very diverse, leading to the absence of consistent application of the principle of legal security and equality before the law, which means that further legislative reforms appear necessary.

2. The court

From an entity actively taking part in the investigation through the institution of the investigatory judge, by the new procedural legislation the court has been transformed into a controller in the implementation of those investigatory actions and measures which to a lesser or greater

17 As regards this question, the practices of prosecutions in Bosnia and Herzegovina very diverse and disharmonious. Nevertheless, most of them proceed from an assumption that in the case of 'negative' prosecutorial decisions a certain form of control is necessary; in some prosecutions all the decisions of this kind are taken, or approved, by the Collegium of all prosecutors, in some they are taken by the collegium of the appropriate prosecutorial department, in some cases approval for discontinuing/not initiating investigations is granted by the departmental head, but in certain prosecutions the decision is up to the case's prosecutor. Until the end of 2001 it had been prescribed by the Regulation on the Internal Organisation of the BiH Prosecution (Official Gazette of BiH No. 31/10) that the head of the Special Department for War Crimes approves a prosecutor's decision on discontinuing/not initiating investigations, after first obtaining an opinion from the departmental Collegium (Article 34 para 1.I), but in the Regulation on Revisions of the Regulation on the Internal Organisation of the BiH Prosecution (Official Gazette of BiH No. 104/11), the provision was changed in that such decisions are now issued by the case's prosecutor, while the departmental head only keeps a record thereof (Article 1).

18 Situations appear in practice of unjustifiably lengthy durations of processing complaints, in some cases several years – for example, the BiH Prosecution informed the public on 11 December 2009 that an order had been issued to discontinue the investigation in the so-called 'Tuzlanska kolona' case, following which a number of complaints were filed but no decision on them taken so far.

degree restrict the exercise of the fundamental human rights and freedoms of suspects or other persons. It is the task of the court to limit such restrictions to the smallest possible extent, by assessing whether they are justified in the light of the aims of each particular investigation, based on the facts and evidence presented to it by the prosecutor and the defence, and in comparison with a possibility of implementing such investigatory actions and measures either without infringing any human rights and liberties, or with restrictions of a scope lesser than that demanded.

Functionally, the person competent for issuing such decisions in the investigation stage is the judge for the preliminary proceedings, who, acting on a substantiated motion of the prosecutor or authorised public officials, may issue: orders for searching dwellings, premises and persons,¹⁹ orders to seize objects and property,²⁰ exhumation orders,²¹ orders for conducting special investigatory actions²², orders to bring in or punish witnesses for failing to respond to summons or refusing to testify²³, orders to bring in the suspect,²⁴ rulings on prohibitive measures aimed at securing the presence of the suspect and the unobstructed conduct of criminal proceedings²⁵, rulings ordering or extending detention²⁶; the only case in which the court can adduce evidence in the investigation is securing evidence by the court, i.e., a situation in which there is a danger that it will not be possible to adduce certain evidence at the trial²⁷.

What this means is that the court no longer has any direct powers in respect of assessing whether an investigation is justified, and in some investigations it is possible, if there arises no need for an intervention of the court in respect of the aforementioned situations, that the court will have no knowledge of the case until an indictment is filed. It is nevertheless possible for the court to assess indirectly whether an investigation is justified, if the need arises to undertake those investigatory measures and actions which require the issuance of a court order, which is especially present in practice in connection with deciding on ordering special investigatory actions, and in deciding to order or to extend detention. In such situations, as a general precondition for implementing these action and/or measures, the court first finds whether there exist grounds for suspicion (when assessing whether a prosecutorial motion for ordering special investigatory actions is justified), or reasonable suspicion (when assessing whether a prosecutorial motion for ordering or extending detention is justified), and if it finds that the former or latter degrees of probability of a person having committed a criminal offence does not exist, the court will refuse such motions. However, such a decision has no effect on the existence of the investigation, whose institution, course and suspension are entirely within the power of the prosecutor, but only on limiting the implementation of investigatory mechanisms which the prosecutor had an intention of using in a certain stage of the investigation, and whose implementation the prosecutor will be able to request again, if he obtains in another lawful manner data and evidence supporting the existence of grounds for suspicion, or reasonable suspicion, that a person has committed a criminal offence. But what causes dilemmas in practice is the question of the manner in which the

19 Articles 51 to 64 of the CPC BiH.

20 Articles 65 to 74 of the CPC BiH.

21 Article 222 of the CPC BiH.

22 Articles 116 to 122 of the CPC BiH.

23 Article 81 paras 5, 6 and 7 of the CPC BiH.

24 Article 125 of the CPC BiH.

25 Articles 126 to 130 CPC BiH.

26 Articles 131 to 136 of the CPC BiH.

27 Article 223 of the CPC BiH. In practice such evidence is usually adduced by questioning a witness for whom there is a possibility of not being available during the trial (due to advanced age, poor health or other reasons). Such questioning is carried out in accordance with the provisions of Article 262 of the CPC BiH, i.e., in accordance with the rules of examining witnesses at the trial.

court will secure observance of the rights of suspects, including that to defence, in those investigations that has no knowledge of, and whether the court should intervene at all outside the set of situations regulated by law, even if it does learn that violations of the rights of suspects have taken place in the investigation? This issue is raised most often in connection with the prosecutor's power to deny a suspect or defender the right to inspect case files and examine objects which support the suspect's case, if he (the prosecutor) believes he would thereby jeopardise the objective of the investigation.²⁸ Dilemmas concerning the questions of what supports the suspect's case and what is detrimental to it, and what should be regarded as the objective of the investigation, will be covered later, but a question which is justified here is what the court should do if approached by the suspect/defender with a request for the issuance of an order to the prosecutor to allow the defence inspection of documents and evidence which support their case? In practice a dual approach has been noted – the view of some courts is that the law has granted the prosecutor discretionary powers to decide on this issue, even if the prosecutor has unjustifiably rejected a request of the defence, the judge for the preliminary proceedings is not empowered to 'interfere' in that stage of the proceedings, for which reason the court will reject a request for insight into the prosecutor's files. In contrast, other courts proceed from a position that for the duration of the criminal proceedings, including the investigation stage, the court is required to look after the right to a defence, and in situations of this type they ask the prosecutor to forward to them the case files and an opinion on the defence's request, following which the judge for the preliminary proceedings assesses whether or not the prosecutor's decision was justified. Arguments exist in favour of both of the approaches, and it is difficult to gauge which is more valid than the other; in any case differences between courts in acting in these situations are certainly not in the interest of legal certainty, making this one of the questions which should be tackled both by those dealing with theoretical matters and those dealing with practical ones.

3. The suspect and the defender

Compared with earlier legislation, the role of the suspect and the defender in the investigation stage is in many respects more passive. As we have said, the emphasis in the new legislation is laid on the protection of the human rights and fundamental freedoms of suspects, while the extent of their participation in the investigation has been considerably reduced. The order to institute an investigation is an internal prosecutorial act which is not served to anyone, even the suspect, who has at his disposal no legal remedy to challenge the order, in contrast to the earlier right to appeal against a ruling ordering the investigation. The prosecutor is the one deciding at what time during the investigation to interrogate the suspect, but in any case that must happen before an indictment is filed.²⁹ Furthermore, it is possible for an investigation to be initiated, conducted and concluded without the suspect ever learning about it, if the prosecutor finds that based on the collected data and evidence, and without questioning the suspect, he can issue an order discontinuing the investigation. The suspect, therefore also the defender, can no longer participate in the performance of investigatory actions, or even attend them, except for a few exceptions prescribed by law.³⁰ What this means is that until the prosecutor decides to interrogate the suspect, or order a forcible measure implemented against him, either with the aim of collect-

28 Article 47 para 1 of the CPC BiH.

29 Article 225 para 3 of the CPC BiH.

30 For example, it proceeds from Article 58 para 1.j) of the CPC BiH that suspects have a right to inform their defenders about searches of dwellings, but also that searches may be conducted without the defender being present, if exceptional circumstances so demand.

ing evidence or securing the presence of the suspect in criminal proceedings, the suspect has no possibility of influencing the course of the investigation in any manner. However, from the time the suspect is first interrogated, he must be informed about the offence of which he is suspected and the grounds for suspicion against him, and must be allowed to have his say on all facts and evidence against him, and to present all facts and evidence in his favour, and must be instructed of his right not to present a defence and not to answer questions.³¹

The suspect may have a defender for the duration of the criminal proceedings, one of his own choosing or one appointed *ex officio* (for example due to indigence), and in cases prescribed explicitly by law, suspects must have defenders during their first interrogations, while in cases where detention has been ordered, suspects must have defenders during the first declaration in connection with the motion to order detention, and for the duration of the detention.³² There is therefore no doubt that provisions of the Criminal Procedure Code have been harmonised with the highest international standards and that suspects are guaranteed a high degree of protection of their rights and fundamental freedoms, but dilemmas continue to exist in practice in connection with the application of certain provisions concerning suspects' rights, thereby also defenders' rights. We have already mentioned dilemmas in connection with the right to inspect documents and examine objects – during the investigation, defenders do enjoy this right, but only in respect of rights or objects in favour of the suspect's case, with the proviso that even this right may be withheld if documents and objects whose disclosure would jeopardise the objective of the investigation are involved.³³ The first question appearing here is: when can the defender exercise this right? Given that as rule the suspect learns about the investigation only when he is served a summons for being questioned, or when certain forcible measures are applied to him (deprivation of liberty, placement in detention, searches, etc.), it is logical that the defender can only exercise his right at that time. For this reason many defenders have complained that irrespective of the fact that after the indictment is filed the defence is entitled to inspect all case files, prosecutors often interrogate suspects in the final phase of the investigation (only then allowing them inspection of case files), thereby considerably reducing for the defence the time it has to prepare its defence for the trial. But the key problem here is the following: from the fact that the law is explicit in stipulating that only the defender, and not the suspect, may examine evidence proceeds a conclusion that suspects who have no defender (for example in cases where a defence is not mandatory and when the requirements for appointing an *ex officio* defender due to indigence are not fulfilled) cannot exercise that right at all. Such a solution can certainly not be deemed justified or complying with international human rights protection standards³⁴, which means that legislators should also intervene in respect of this question. Until such time, the practice in the country will continue to differ, with more or less justice and fairness being exercised, and in some cases such requests of suspects will be upheld, and in others denied.

31 Article 6 of the CPC BiH.

32 Article 45 of the CPC BiH.

33 Article 47 para 1 of the CPC BiH.

34 For example, in the case *Foucherv. Frane*, 18 March 1977 (No. 22209/93, para 35), the European Court of Human Rights assumed the position that denying insight into case files to a defendant who had no defender represented a violation of the rights guaranteed by Article 6 paras 1 and 3 of the ECHR. The decision led to changes in criminal procedural regulations in other countries; for example in Germany, where suspects had earlier also had no right of access to case files, under a 1999 revision of the CPC defendants with no defenders can be provided information and copies of parts of the case files if it would not jeopardise the purpose of the investigation and if it would not run contrary to the interests of third parties whom it is necessary to protect.

The provision causes even more dilemmas in connection with the interpretation of the concepts of ‘in favour of the suspect’, ‘the objective of the investigation’ and ‘jeopardising the objective of the investigation.’ There is no doubt that the law leaves it up to the prosecutor to assess those concepts, in each case individually taking into consideration its circumstances. In this the prosecutor should proceed objectively and impartially, and assess with equal care both facts detrimental to the suspect and those in his favour.³⁵ But do prosecutors really act in this way in actual practice?. One important case is that in which the prosecutor will often have no possibility of collecting evidence in favour of the suspect – most often the situation which the suspect is using his right to remain silent, so that the prosecutor does not have any data to check from which might yield evidence either exonerating or aggravating for the suspect, and could run into such evidence only by accident, i.e., if it results from an investigatory action. Furthermore, where there exists evidence that is not obviously in favour of the suspect, it will be very difficult for the prosecutor to assess realistically whether such evidence benefits the suspect, harms the suspect, or is irrelevant. Faced with such doubt, most prosecutors opt for not disclosing such evidence to the defence in the investigation stage, which sometimes results in the trial stage in an objection by the defence that the prosecutor ‘concealed’ evidence that could have been of benefit for preparing the defence, so that such a situation is used for drawing out proceedings, in that the defence demands additional time to prepare its case better. In respect of defining the objective of the investigation, and situations in which that objective is threatened, there are also no guidelines or criteria to help prosecutors decide whether it would be opportune to deny the defence insight into evidence benefiting the suspect. Commentaries to the CPC are of no great help here, as quite indistinct concepts are linked to the concept of interests of the investigation, for example, ‘the gravity of the criminal offence, the number of suspects, detection/disclosure of evidence for which there exists a danger of delays, the interests of preserving secrets, the interests of public order and morality’.³⁶ All of the aforementioned leads in practice to a certain degree of arbitrariness in prosecutorial decisions on these questions, while there is no efficient mechanism available to the defence to test whether such decisions are justified. It is therefore not disputable that the provision itself is justified, as it was introduced in order to protect the fundamental rights of other persons or to secure an important public interest, as prescribed by the laws of most other European countries, but the impossibility of reviewing a prosecutor’s decision that insight into evidence, including that favouring the suspect, would threaten the objective of the investigation, could lead to arbitrariness in actual practice. It would therefore be useful to utilise the benefits of comparative law in connection with the establishment of mechanisms introducing at least a reasonable balance between the opposed parties in this stage of the criminal proceedings.³⁷

35 This obligation of the prosecutor proceeds from the principle of equality of arms prescribed by Article 14 para 2 of the CPC BiH.

36 Group of authors – *Komentari Zakona o krivičnom/kaznenom postupku u BiH*, 2005, p. 167.

37 Under German law, certain parts of the case files must be accessible to the defence in every phase of criminal proceedings, irrespective of whether a ban has been imposed on insight into the files because of jeopardising the objective of the investigation. This concerns inspection of minutes of the suspect’s interrogation, insight into records made during the performance of those investigatory actions where the law allows the suspect/defender to be present, and insight into the findings and opinions of expert witnesses (the assumption is that insight into these parts of the case files cannot jeopardise the objective of the investigation). Furthermore, the law also provides for judicial control of cases where the defence was denied insight, in contravention of the aforementioned provisions, as well as judicial control in the case where the prosecutor designated the investigation as complete in the files, and thereafter denied the defence insight into the files (period between concluding the investigation and filing an indictment). According to the practice of the ECofHR, the final moment until which it is possible to deny or restrict the defence’s right to inspect files is the conclusion of the inquiries, and the relevant provisions of the CPC BiH should also be reviewed (Under Article 47 para 3 of the CPC BiH, the defence is entitled to inspect case files from the moment of the filing of the indictment, which means that the period from the conclusion of the investigation and the filing of the indictment remains ‘uncovered’).

4. The injured party

In the new CPC in Bosnia and Herzegovina the rights of injured parties have been considerably limited. There is no longer any possibility of a person who suffered damage from a criminal offence taking over criminal prosecution in cases where the competent prosecutor decides not to prosecute, or discontinues prosecution, or a possibility of that person appearing as a private prosecutor in criminal proceedings, given that all criminal offences are now prosecuted solely *ex officio*.³⁸ According to the definition given in the Criminal Procedure Code, an injured party is a person whose personal or property right was breached or threatened by the criminal offence³⁹, and the injured party's rights in the investigation stage are: a right to file a report about the commission of a criminal offence⁴⁰, a right to submit a claim for restitution⁴¹, a right to be informed that an investigation will not be instituted or that one has been discontinued, and the right to appeal against such a decision⁴², and a right to be heard as witness (both in the investigation and the trial).⁴³ Very often the injured party is an important source of information for the prosecutor about the criminal offence and the offender, and the law provides for a special procedure when certain specific categories of injured parties appear as witnesses. Interviews of minors, especially injured parties from a criminal offence, must be conducted with due care, with the help of a psychologist, pedagogue or other professionals⁴⁴, and interviews of injured parties aged under 16 must be audio or video recorded⁴⁵, in the case of sexual offences it is not permitted to question injured parties about the sex lives they led before the commission of the criminal offence, nor is evidence relating to injured parties' earlier sexual experiences, conduct or orientation admissible⁴⁶. The position of injured parties in cases of criminal offences against humanity and values protected by international law is also special, because a victim's consent cannot be used to support the defence of the defendant.⁴⁷

In spite of the aforementioned, the degree of criminal law protection of injured parties appears low, and in actual practice quite often injured parties are unable to exercise even a minimum of the rights which they are guaranteed by law. This is particularly so in the case of realising claims for indemnification, because those injured parties who had not been instructed of that right in the investigation stage, and the prosecutor failed to propose them as witnesses in the indictment, will not even be summoned to the trial, and will therefore not even be able to exercise their right. The sources of omissions of this sort are mainly practical everyday problems of prosecutors in Bosnia and Herzegovina. There is no doubt that the prosecutor has a duty to collect among other

38 Under earlier legislation an injured party acting as a private prosecutor could assume prosecution for less serious criminal offences like light bodily injuries, defamation, insults, publication of personal and family data, discrediting a person by claiming he was a criminal offender, etc. Most of those unlawful actions are no longer criminal offences, and are now subject to civil litigation legislation (defamation, insults, etc.), while criminal prosecution takes place *ex officio* for all other criminal offences covered by criminal law (for example light bodily injuries).

39 Article 20.h of the CPC BiH.

40 Article 214 of the CPC BiH. This is a right that belongs to every citizen, not just injured parties.

41 Articles 194 and 195 of the CPC BiH.

42 Articles 216 para 4 and 224 para 2 of the CPC BiH.

43 This right, or duty, is exercised when there is a possibility that by their testimony injured parties could provide information about the criminal offence, the offender, and other important circumstances (Article 81 para 1 of the CPC BiH), as well as when it is necessary for injured parties to provide necessary information in connection with the realisation of a claim for indemnification (Article 193 of the CPC BiH).

44 Article 86 para 4 of the CPC BiH.

45 Article 90 of the CPC BiH.

46 Articles 86 para 5 and 264 of the CPC BiH.

47 Article 264 para 3 of the CPC BiH. This is also the only place in the entire Code where the term 'victim' is used instead of 'injured party', and it is possible that this happened owing to a translation from the English language, because unlike some other procedural statutes in the region the CPC of Bosnia and Herzegovina makes no distinction between the status of a victim and an injured party.

evidence also that relating to claims for indemnification in connection with the criminal offence⁴⁸, (to do so in investigation stage), which is an additional burden for the prosecutor, who is focused on collecting evidence about the criminal offence and the perpetrator, and if strict deadlines also restrict the prosecutor (detention cases, deadlines for concluding the investigation), it is possible that the prosecutor fails to collect this evidence. Furthermore, guided by the principle of efficiency in criminal proceedings, the prosecutor tends to propose in the indictment the examination only of those injured parties who are also witnesses of the circumstances of the commission of the criminal offence, which means that the court will not even be aware of the existence of other injured parties who should be summoned to allow them to submit claims for indemnification. However, there will thereby be no breach of the law, as Article 195 of the CPC BiH does not stipulate explicitly that injured parties (including injured parties who are not witnesses) are to be summoned to a hearing and informed about their right to submit a claim for indemnification; such a solution, however, does not seem justified or fair. It should also be pointed out that the impossibility of realising indemnification claims is particularly evident in large and complex war crimes cases, where in certain cases a huge number of people could be deemed injured parties⁴⁹. On the one hand, it is effectively impossible for the prosecutor to collect data on all the injured parties so long after the commission of the criminal offence, and the prosecutor cannot even summon all those about whom information exists and question them about facts in connection with the indemnification claims, because he would thereby significantly jeopardise the principles of effectiveness and efficiency of criminal proceedings.⁵⁰ On the other hand, denying injured parties an opportunity to realise their rights in criminal proceedings represents an obvious injustice, and the need for identifying efficient mechanisms for eliminating, or at least easing, the negative effects of this problem appear inevitable. In that context, it seems useful to point to comparative law solutions. One example is the treatment of injured parties, or victims, in the Criminal Procedure Code of the Republic of Croatia,⁵¹ which makes a difference between victims and injured parties, defining a victim as a 'person who owing to a criminal offence suffers physical and mental consequences, property damage or a serious violation of fundamental rights and liberties'⁵², and saying that an injured party is 'besides a victim, also another person whose personal or property right has been violated or jeopardised by a criminal offence, and is taking part in criminal proceedings in the capacity of an injured party'⁵³. Although it is obvious that injured parties are also victims of criminal offences, it does not necessarily mean that every victim will participate in criminal proceedings, *but every victim of a serious violent criminal offence shall be entitled to indemnification from the state budget*, from a special fund created from fines and confiscated proceeds from crime.⁵⁴ It is important to stress that in contrast to that of Bosnia and Herzegovina, the Croatian CPC also guarantees to victims/injured parties several other rights, like that to efficient psychological and other professional assistance and the support

48 Article 197 of the CPC BiH.

49 For example, in command responsibility cases; in the event of persecution when all the inhabitants of a certain village, town or region who were expelled suffered damage from the criminal offence; or all persons unlawfully imprisoned in a prison camp, etc.

50 A large number of persons who suffered from these types of criminal offences live outside Bosnia and Herzegovina and are extremely difficult to locate, and bringing them to Bosnia and Herzegovina to attend criminal proceedings would be enormously costly. Due to the duration and complexity of the proceedings, implementation of the institution of international legal assistance would also not help much.

51 Criminal Procedure Code of the Republic of Croatia, Official Gazette of the RH No.152/08, 76/09, 121/11.

52 *Idem*, Article 202 para 10.

53 *Idem*, Article 202 para 11.

54 *Idem*, Article 16 para 4. If the victim had previously realised an indemnification claim in criminal proceedings, its amount shall be taken into consideration, and the court shall act likewise if the victim had previously realised compensation of damages from the special fund (Article 43 para 2.2)

of a body, organisation or institution for helping the victims of criminal offences⁵⁵, the right to a free advisor before giving evidence in criminal proceedings, and before submitting an indemnification claim (if a victim suffering serious psychological and physical damage or other serious consequences of the criminal offence is concerned)⁵⁶, and in the case of criminal offences against sexual freedom, every victim is entitled to free assistance of an advisor before being questioned, as well as to be questioned by a person of the same sex in the police or the public prosecution.⁵⁷

III. Interaction between the prosecutor and authorised public officials in the investigation

The prosecutor's new role in criminal proceedings has also caused changes in the status of authorised public officials and their actions during the investigation. Authorised public officials, under criminal procedural legislation in effect in Bosnia and Herzegovina, have much broader powers, and the evidence they collect during investigations now have valid evidentiary character, provided they are collected in accordance with the provisions of criminal procedural legislation. It should be stressed that authorised public officials include not just police personnel, but also members of the judicial and financial police forces, members of the customs and tax authorities, members of the military police, and professional associates and investigators working under the authority of the prosecutor.⁵⁸

But the prosecutor is indubitably still the person directing the investigation, having the following rights and duties: 'to immediately upon learning of the grounds of suspicion that a criminal offence has been committed undertake requisite measures to detect it, conduct an investigation, locate a suspect, manage and supervise the investigation, and direct the activities of authorised public officials in connection with locating the suspect and collecting statements and evidence'⁵⁹. A number of other regulations define the framework of the prosecutor's co-operation with authorised public officials.

However, in actual practice the relationship between the prosecutor and authorised public officials, even after years working together in conducting investigations is still marked by numerous difficulties, dilemmas, and even a lack of mutual understanding, which necessarily impacts efficiency in investigating criminal offence. It appears that most of the practical problems are a result of a lack of communication, i.e., opposing expectations of the side and the other, as a consequence of different interpretations of the roles, rights and duties which the prosecutor and authorised public officials have in the conduct of the investigation. The results of analyses in this field point to a series of problems in the interaction between prosecutors and authorised public officials, the following being the most frequent:⁶⁰

*Notification of the prosecutor by authorised public officials that there exist grounds for suspicion that a criminal offence has been committed.*⁶¹ Quite often authorised public officials submit to

55 *Idem*, Article 43 para 1.1.

56 *Idem*, Article 43 para 2.1.

57 *Idem*, Article 45 paras 1.1 and 1.2).

58 Article 20 item g of the CPC BiH.

59 Article 35 para 2 item a of the CPC BiH.

60 Buzaković, B./Karadinović N.: *Pravna, institucionalna i organizaciona analiza suradnje policije i tužitelja u krivičnim istragama*, pp. 41 – 48.

61 Articles 213 para 1 and 218 of the CPC BiH.

prosecutors official notes about various events which contain no evidence that a criminal offence is concerned, which is an unnecessary burden for prosecutions; conversely, in some cases no notification is made to the prosecutor, although a criminal offence could be concerned.⁶²

Difficulties in legally qualifying the criminal offence. At the moment of learning of a criminal offence, further action depends on its legal qualification; where criminal offences punishable by terms of imprisonment of five years or more are concerned, authorised public officials are required to notify the prosecutor thereof immediately, and then to act under his supervision, while in the case of the commission of a criminal offence punishable by a term of imprisonment of below five years, authorised public officials may conduct investigatory actions independently, and are required to inform the prosecutor thereof within seven days.

Poor quality of reports of criminal offences and collected evidence. Prosecutors often complain that authorised public officials questioned witnesses only superficially and insufficiently, failing to obtain important evidence and leading to the necessity of re-interviewing witnesses, that after a suspect confesses authorised public officials no longer bother to collect other evidence, that suspect's alibis are not checked, that authorised public officials do not talk to injured parties in connection with indemnification claims, etc. Omissions of this type call for repeating and amending investigatory actions, wasting time and making the investigation less effective. On the other hand, prosecutors rarely return poorly drafted reports and ask for them to be amended, but do the amending themselves, thereby missing out on informing and educating their colleagues.

A lack of initiative in authorised public officials. After handing in their reports, most authorised public officials see their job as having been completed, and any further action on their part involves actions ordered by the prosecutor, in which process no initiative of creativity is shown, even when it is obvious that the results of an action ordered by the prosecutor indicate an obvious need to conduct a follow-up action (e.g., in his testimony a witnesses points to other persons who might have information about the criminal offence/perpetrator, but the authorised public officials fail to follow up on that lead, instead simply handing in their reports and once again wasting valuable time).

Legality of evidence. In situations in which the prosecutor and authorised public officials are not in constant communication in connection with important issues, including, in particular, making sure that evidence of lawfully gathered, there are cases that due to procedural omissions important evidence is not admissible at the trials. Most often this concerns searches, due to failures to secure the presence of two witnesses⁶³ and during identification procedures, due to failures to show a witness persons (or photographs of persons) with similar physical characteristics.⁶⁴

Shortcomings of orders for conducting investigatory actions issued by the prosecutor to authorised public officials. Often prosecutorial orders for conducting investigatory actions are insufficiently precisely worded, inadequate or unclear, making it more difficult for authorised public officials to act on them; absence of intensive intercommunication will obviously lead to a loss of efficiency and poor results of evidentiary actions.

62 For example, sometimes violent crime in the family is wrongly treated by authorised officials as misdemeanors (obstructing the public order and peace), although in such situations there very often there exist elements of a criminal offence.

63 Article 60 para 4 of the CPC BiH.

64 Article 85 paras 3 and 4 of the CPC BiH.

Efforts to resolve the problems listed above are mounted mainly by organising joint training for prosecutors and authorised public officials, but they continue to exist everywhere, to a lesser or smaller degree. It appears that the most efficient mechanism for establishing good interaction in this relationship is constant and intensive communication in every concrete investigation, together with a build-up of trust, mutual respect and teamwork, leading to the best possible results.

There are other aspects creating difficulties in the relations between prosecutors and authorised public officials which concern the organisation and character of the authorities involved in the investigation.

All police organisations are administrative organisations within their respective ministries (state, entity, cantonal, district), while prosecutors are separate and independent state bodies, once again at various levels, according to the constitutional administrative and territorial division of the state into entities (the Federation of Bosnia and Herzegovina, a complex entity made up of ten cantons, the Republika Srpska, and the District of Brčko). There is no hierarchical relationship between the institutions. In actual practice, the prosecutor issues an order asking for certain evidentiary actions to the competent police agency, which is under the CPC required to act on the order. The problem lies in the prosecutor's lack of ability to fully administer the further conduct of investigatory actions after dispatching the order, because the management function is now assumed by the police agency's senior officers, in accordance with their internal regulations, in respect of organisation of work, deployment of human and material resources, manner of and deadlines for completing tasks (except for those deadlines prescribed by the CPC of BiH). In other words, there exists a collision of management functions, and prosecutors can no longer fully realise their legally-prescribed powers to manage and supervise investigations, which will to a considerable extent depend on internal allocation of jobs in the respective police agency.

Furthermore, the aforementioned fragmentation of responsibilities between police agencies at different levels, caused by the complex constitutional organisation of the state, leads to difficulties in prosecuting criminal offences with enter-entity and inter-cantonal elements (criminal offence committed in one canton or entity - consequences occurred in another; criminal offences committed successively in several cantons or entities; criminal offences committed in one canton/entity - offender flees to another, etc.). In such situations, which occur on an almost daily basis, one can well ask whether the mechanisms that exist under the law⁶⁵ concerning inter-entity co-operation are sufficient for expeditious and efficient action in fighting crime, especially its serious and organised forms, or whether better results would be achieved by a proper institutional reform of the police system?

IV Dilemmas in respect of application of the provision on the immunity of witnesses from prosecution (Article 84 of the CPC BiH)

Although dilemmas in the application of this institution in actual practice may appear, and do appear, in different stages of criminal proceedings, most often requests to grant immunity are

65 A decision of the High Representative adopting the Law on Legal Assistance and Official Co-operation in Criminal Matters between the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brčko District, dated 23 May 2002, http://www.ohr.int/decision/judicialdec/default.asp?content_id=8574 (accessed 3 August 2012)

discussed in the investigation stage, the intention here is to point to the main problems faced by prosecutors in this area.

One of the ways to prevent and fight serious crime is the creation of mechanisms that allow certain deviations from the principle of legality, under certain conditions, i.e., not to criminally prosecute persons involved in a certain way in the commission of a criminal offence if they agree to co-operate with the judiciary in providing data, information and evidence which may lead to the detection of serious criminal offences and the prosecution of their perpetrators and/or organisers. Making such a decision is perhaps the prosecutor's greatest responsibility, because what it entails is that a person who had participated in a certain way in the commission of a criminal offence is not prosecuted for his/her actions, which may appear to the public, especially parties who suffered damage from the criminal offence, as an extremely unfair and unjust decision.

What creates a lot of difficulties in the implementation of this institution in Bosnia and Herzegovina are the inadequacies and insufficient clarity of the provision which regulates it: Article 84 of the CPC BiH says only that a witness has a right not to answer questions if telling the truth would expose him/her to criminal prosecution, and when he/she is granted immunity by a decision of the Chief Prosecutor, he/she shall answer those questions. Such witnesses shall not be criminally prosecuted, except if they perjure themselves.⁶⁶ Major inadequacies of the provision are patently obvious:

- Application of this institution in Bosnia and Herzegovina is not limited to criminal proceedings in connection with the most serious forms of crime, and immunity can be granted in any proceedings, in connection with any criminal offence, while in most other countries, including those of the region, immunity can be given only to those witnesses participating/co-operating in the prosecution of serious criminal offences of organised crime, terrorism and similar offences⁶⁷;
- There is no precise provision in respect of the scope of the immunity which may be granted to a witness, as the following wording: '*Witnesses who have been granted immunity and have given testimony shall not be criminally prosecuted, except if they had perjured themselves*', leads to a conclusion that what is involved is full immunity from prosecution, except if the intention of the legislator had been to leave discretionary powers to the prosecutor in respect of the type and scope of the immunity?
- There is no mechanism under which witnesses granted immunity but not fulfilling their undertaking to co-operate can be prosecuted for the criminal offence in connection with which they were granted immunity from prosecution. As we have said, such witnesses can be prosecuted only if they perjured themselves. By applying the *argumentum a contrario* principle to the provision that "witnesses who have been granted immunity *and given testimony* shall not be criminally prosecuted" one could conclude that criminal prosecution of such witnesses is

66 Article 84 paras 1, 2, 3 and 4. It should be noted that under the CPCs of Bosnia and Herzegovina, the Bosnia and Herzegovina Federation, and the Brčko District, immunity is granted by the Chief Prosecutor, the exception being the CPC of the Republika Srpska, under whose Article 149 para 3, immunity is granted by a decision issued by a prosecutor.

67 Compare: CPC of the Republic of Croatia, Official Gazette of the RH No. 152/08, 76/09, 121/11; Law on the Office for the Suppression of Corruption and Organised Crime of the Republic of Croatia, Official Gazette of the RH broj 76/09, 116/10, 145/10, 57/11; Criminal Procedure Code of the Republic of Serbia, Official Gazette of the RS, Nos. 72/11, 101/11.

possible if they had not given evidence at all, but such an interpretation is of no great help in the absence of precise provisions about the details of when and under what circumstances such prosecution is to be undertaken.

It should be noted that even where plea bargaining is regulated in a much more exact manner than in Bosnia and Herzegovina, it is applied very carefully, and only when strictly necessary. In other words, if there exists or if there can be obtained other evidence sufficient to ensure a conviction, or if there exist other legal mechanisms capable of achieving the same objective⁶⁸, prosecutors should not consider the possibility of granting immunity, the reason being that, as we have already said, according to the principle of legality, all persons for whom there exists proof that they committed a criminal offence should be prosecuted and punished for that offence in accordance with the law, and any deviation from that principle must be an extremely justified exception. Furthermore, achieving the purpose of punishment is also of particular significance in conducting criminal proceedings: to express society's condemnation of the criminal offence, to deter the offender from crime, to stimulate re-education, to deter others from committing criminal offences, and to influence general perceptions about the adverse social effects of criminal offences and the justifiedness of punishing offenders,⁶⁹ which means that if there is no prosecution, these aims will not be achieved.

Nevertheless, this does not mean that the institution of immunity should be avoided altogether, because in some cases it is the only means of obtaining important information and evidence, especially in complex investigations of criminal offences of organised crime. Be it as it may, it will not be able to eliminate some of the most important dilemmas in legal practice in Bosnia and Herzegovina which continue to hinder the application of this useful mechanism in the prosecution of serious criminal offences without adequate legislative intervention, concerning in particular the inadequate or insufficiently precise regulation of the following questions:

Under the existing legislation, immunity can be granted to witnesses, but not to suspects. But what most often happens in practice is that co-offenders, each being a suspect in his own right, request immunity in return for testifying against the other co-offenders, or such an initiative comes from their defenders, in some cases even from the prosecutor in the case. In organised crime cases, this concerns mainly lower-ranked members of the group, in war crimes cases perpetrators who acted on orders of their superiors, and in other cases aiders, abettors or co-offenders whose contributions to the commission of the crime are smaller than those of the 'principal' offenders.

The prosecutor is then forced to go in a roundabout way and alter the status of the person participating in criminal proceedings. Most prosecutors do so by separating cases, instituting separate investigations against the offender who is to be prosecuted and against the offender who is to be granted immunity and is to testify against the former. The co-offender who is to testify and be granted immunity is then summoned as a witness in the case against the 'main' offender to present everything he knows about the criminal offence and the perpetrator, and after being informed about the rights he enjoys as a witness, he requests immunity from prosecution for the

68 For example, co-operation with suspects/defendants in respect of providing useful information and data for current or other investigations may also be realised by way of concluding an agreement on admitting guilt (a plea agreement).

69 Article 39 of the Criminal Code of BiH.

criminal acts he had committed as a co-offender, about which a separate investigation is now being conducted. If he is granted immunity for those actions, the investigation in that case is discontinued, and if he is granted immunity for some but not all of the offences committed, the investigation is discontinued in respect of those offences. The basis for discontinuing investigation in this case is Article 224 para 1.d of the CPC BiH: ‘...there exist other obstacles which exclude criminal prosecution.’

The question that can be raised here is exactly when the order discontinuing/not conducting an investigation should be issued? Given that there exists no mechanism protecting the prosecution from being tricked by a witness who has been granted immunity, is it advisable to discontinue an investigation before a witness fulfils his obligation to testify at the trial? Conversely, if the investigation is not discontinued, has the formal requirement of the CPC been fulfilled that only witnesses may be granted immunity, because every person against whom an investigation is pending (even if only formally) continues to have the status of a suspect?

Some analysis in the professional community have voiced the view that the ‘transformation’ of a suspect into a witness by separating cases in fact represents ‘circumventing’ the CPC. Nevertheless, lacking a better legal solution, one should proceed from the fact that as a procedural law the CPC insists on strict formality for the purpose of protecting human rights and fundamental freedoms. For this reason its form is not violated by changing the status of a person taking part in proceedings as a witness, or suspect, as each of the categories has its own clearly-prescribed rights and obligations. However, viewed from the aspect of the substantive concept of suspect, it is clear that acting in the manner described represents ‘walking on thin ice’, further emphasising the need for an exact and comprehensive regulation of this institution in the law.

Another pressing problem for prosecutors is how to establish before a witness is granted immunity what he/she actually knows about the commission of the criminal offence and its perpetrator, because this question is also not regulated. Prosecutors have different approaches, but in most cases they conduct preliminary informal talks with potential witnesses in order to estimate whether it is necessary or justified to grant them immunity, and also in order to be able to conduct preliminary checks of the truthfulness of their statements. An official note about the conversation can be made for the case files, or an informal statement can be taken from the witness which the witness signs but which cannot be used against him/her. A similar solution exists in the Republic of Croatia, and it is certain that placement of similar provisions in criminal procedure legislation in use in Bosnia and Herzegovina would eliminate all controversies and also serve to harmonise actual practice.

Prosecutors in Bosnia and Herzegovina also have different approaches in respect of the question of whether a decision granting immunity should be made in writing, or if it is enough to compose an official note for the case file?

It seems appropriate that decisions on immunity should be made in writing and should include data about the person being granted immunity, an exact description of the offences in connection with which immunity is being granted (a brief description of the facts), any immunity limitations (for which actions immunity is not granted), the criteria the prosecutor applied in issuing the decision, and clear reasons for deciding to grant immunity, i.e., a description of the objective it is hoped to achieve in that way in criminal proceedings, after which the decision should be

placed in the prosecutor's files. Although there is no doubt that an internal prosecutorial decision is involved, at a certain stage in the criminal proceedings it is to be submitted both to the court and to the defence. This concerns in particular situations where a witness is for the first time ever requesting immunity during the trial itself or a trial before a court of second-instance – in such cases the court cannot continue examination of the witness until it is informed whether the witness has been granted immunity, and, if that is the case, to what extent and in connection with which criminal-law actions, in order to guide the further examination of the witness in a desirable direction and also ensure that the scope of the examination does not step outside the limits for which immunity was granted.

Furthermore, some prosecution have introduced a practice of concluding a special agreement on co-operation with the witness who was granted immunity whereby the witness undertakes to accurately present all information, facts and evidence about the criminal offence being prosecuted, and/or the offender, and undertakes to appear at the trial and testify in conformity with his/her statements given in the investigation, after which the witness confirms that he/she is aware that in the event of a breach of the agreement all the evidence given by him/her may be used against him/her. The reason for concluding such an agreement is protection from the possibility of the prosecutor being tricked at the trial by the witness granted immunity who either changes his/her testimony substantially, or refuses to testify. It nevertheless appears that efficient protection does not yet exist, even in cases where it is allowed to criminally prosecute such witnesses,⁷⁰ as the CPC has no provisions regulating such situations – what happens with the decision on immunity, i.e., how it is annulled/revoked/withdrawn, and, in particular, what would be the status of a negative prosecutorial decision (order to discontinue or not to conduct an investigation) when that decision, based on the decision to grant immunity, has been issued before the witness has fulfilled his/her obligation? But if like the provisions on agreements admitting guilt (plea agreements)⁷¹, criminal procedure codes were to be revised so that agreements on co-operation with witnesses granted immunity were verified by the court in a similar manner, and if provisions on the procedure to be conducted to criminally prosecute witnesses granted immunity but failing to fulfil their obligations to testify were to be added, we would have an efficient mechanism protecting the judiciary from this type of abuse. It would be beneficial here to use some of the solutions embraced by legislations in force in some of the neighbouring countries.

Furthermore, and in connection with the preceding analysis of the status of injured parties in CPCs in use in Bosnia and Herzegovina, another dilemma which appears is whether injured parties need to be notified about immunity being granted?

The law clearly envisions no such possibility, but the pertinent question here is how persons suffering damage from criminal offences in whose commission participated persons granted immunity from prosecution for those criminal offences can realise the rights they are guaranteed by law? Possibly, if we have a situation where a witness granted immunity testifies about the commission of a criminal offence in which he/she took part in some way, but testifies against an offender with a far greater degree of responsibility, persons suffering damage from that criminal offence will be able to realise their rights in proceedings against the 'higher-ranking' offender,

70 A witness who has been granted immunity and who has testified shall not be criminally prosecuted, unless he has perjured himself (Article 84 para 3 of the CPC BiH).

71 Article 231 of the CPC BiH.

but even in that situation from the point of view of the injured party it does not appear that justice has been served in full, because the injured party is entitled to demand the criminal prosecution of all of those who in any way whatsoever participated in or contributed to the commission of the criminal offence from which he/she suffered damage. There do not therefore exist statutory mechanisms in Bosnia and Herzegovina providing for such injured parties to obtain any form of pecuniary satisfaction, as is the case in some other countries, so that for the time being in such cases injured parties are deprived of all of their rights. It therefore appears appropriate and justified, even if such an obligation does not exist under the law, to inform injured parties about the granting of immunity and explain to them why a person involved in the commission of a criminal offence from which they suffered damage is being granted immunity from criminal prosecution.

Conclusion

Although since the reform of criminal law in Bosnia and Herzegovina and years of application of new criminal procedure codes in criminal proceedings, both the professional public and the public as a whole have got used to prosecutorial investigations, and prosecutors are showing on a daily basis that they are able to respond to the difficult and complex demands of managing and administering investigations, it is evident that difficulties and dilemmas remain in actual practice in the application of certain provisions and institutions of the law which cannot be rectified without further reforms.

In order to provide better and more efficient law mechanisms, which also comply with international human rights and fundamental freedoms protection standards, a special professional body has been formed in the Ministry of Justice of Bosnia and Herzegovina named the *Criminal Codes Implementation Assessment Team*⁷² and made up of experts in criminal law and criminal procedural law – representatives of the academic community, courts, prosecutions and the bar association. Endeavouring to adapt criminal law in Bosnia and Herzegovina as far as possible to the requirements of everyday practice, as well as to the obligations undertaken by the state when it acceded to international conventions, the Team has been issuing concrete recommendations and legal and regulatory proposals, offering legislators solutions making possible more efficient prosecution of criminal offences, including mechanisms which have yielded good results in the practices of other countries.

Nevertheless, it should be noted that although the Team is an efficient mechanism for the further development of criminal legislation in Bosnia and Herzegovina, its activities are limited by the will of the legislators to accept proposed revisions of the law. Furthermore, the Team cannot act in the direction of institutional reforms, from which proceeds that comprehensive resolution of all of the problems and difficulties negatively affecting the efficiency of investigations, especially in the case of prosecuting serious criminal offences of organised crime and war crimes, requires the joint and coordinated activities of all branches of government, at all levels of state organisation.

72 The body was founded in March 2003 by decision No. 01/1-46/03 of the Ministry of Justice of Bosnia and Herzegovina, and is sometimes called the Criminal Codes Implementation Assessment Team (CCIAT).

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The Principle of Prosecutorial Discretion (opportunism) Legislative - Solutions and Application

Summary

This paper discusses legal solutions in connection with the application of the principle of prosecutorial discretion in the Republic of Croatia and neighbouring countries. With respect to the legislation of the Republic of Croatia, the provisions of Articles 521 and 522 of the new Criminal Procedure Code are analysed in particular. In addition to this, based on statistical indicators, an overview of the application of expediency in the practice of state attorneys is given, as well as a brief comparative overview of legal solutions in the neighbouring countries (Serbia, BiH, Slovenia, Montenegro and Macedonia).

In addition to the overview of basic legal solutions of this principle in the legislation of the observed countries, the author also provides a summary of their similarities and differences regarding the principle analysed. Finally, the author presents a conclusion in which he summarises his opinion in connection with the issues at hand.

Keywords: principle, prosecutorial discretion, Criminal Procedure Code, Croatia, Serbia, Slovenia, BiH, Montenegro, Macedonia, application, criminal offence, suspect

I Introduction

In the legal tradition of the Republic of Croatia and, indeed, all countries in the territory of former Yugoslavia, the principle of legality was the basic principle in criminal prosecution. There

1 Deputy State Attorney General of the Republic of Croatia.

were departures from this principle in the former SFRY only when it came to juvenile perpetrators of criminal offences.

According to the 1977 Criminal Procedure Code (Official Gazette of the SFRY, Nos. 4/77, 13/85, 36/77, 26/86, 74/87, 57/89 and 3/90), which was inherited as the Criminal Procedure Code and applied in the Republic of Croatia until 1998, the principle of legality applied to adult perpetrators. There were almost no exceptions, other than the exceptions related to ceding of prosecution to another country. Article 18 of the Criminal Procedure Code stipulated that the state prosecutor was obliged to undertake criminal prosecution if there was evidence that a criminal offence that should be prosecuted *ex officio* had been perpetrated.

There were no procedural exceptions, either, from the principle of legality regarding the criminal offences that were inconsequential considering their insignificance or absence of detrimental consequences and guilt. There was only the exception prescribed by Article 8 Paragraph 2 of the Criminal Code. According to this provision, the state prosecutor could dismiss the criminal complaint although the offence included all the essential characteristics of a criminal offence stipulated by the law, if it was of insignificant danger to society due to its minor significance and due to insignificance or absence of detrimental consequences. (This so-called insignificant offence still exists in the Criminal Code of the Republic of Croatia).

In contrast to adults, prosecutorial discretion was applied to juvenile perpetrators of criminal offences. Article 468 of the Criminal Procedure Code stipulated that the state prosecutor might decide not to request the initiation of criminal procedure for criminal offences punishable by a term of imprisonment of up to three years or by a fine, although there was evidence that the juvenile had perpetrated a criminal offence if he/she deemed that it would not be opportune to conduct the proceedings against a juvenile considering the nature of the criminal offence and the circumstances in which it had been perpetrated, the juvenile's earlier life and his/her personal qualities. Thus, it is an application of prosecutorial discretion without any further conditions for the suspect, which the state prosecutor could apply to juvenile perpetrators.² The state prosecutor also had the right to apply the principle of prosecutorial discretion regarding the execution of penal sanctions or correctional measures against a juvenile. In this case, he/she could decide not to request the initiation of criminal procedure for another criminal offence if, considering the severity of this criminal offence and the penal sanction or correctional measure being executed, it would not be opportune to conduct proceedings by pronouncing a sanction for this offence. In accordance with Article 469 Paragraph 2 of the Criminal Procedure Code, the Panel for Juveniles could decide not to initiate proceedings for the above offences.

After the completion of preparatory proceedings before the judge for juveniles, and in accordance with Article 477 of the Criminal Procedure Code, if he/she determined that there were reasons referred to in Article 468 Paragraph 3 of the Criminal Procedure Code (if he/she deemed that it would not be opportune to conduct the proceedings against a juvenile considering the nature of the criminal offence and the circumstances in which it had been perpetrated, the juvenile's earlier life and his/her personal qualities) the state prosecutor could put the motion for

2 For the sake of clarity, in this paper the term "conditional expediency" will be used for legal solutions under which the prosecutor defers prosecution and makes the dismissal of complaints conditional upon the fulfilment of one or more obligations and the term "unconditional expediency" for the cases where the prosecutor is legally entitled to dismiss the complaints without prosecution deferral and any further conditions for the suspect.

discontinuation of proceedings, which was to be decided by the judge for juveniles. Thus, the principle of legality in the proceedings, as regulated in the former Yugoslavia, as well as in the Republic of Croatia until 1998, was a fundamental principle. There were no procedural exceptions except in the proceedings against juveniles and the option of ceding the prosecution to another country. Therefore, in the cases in which the undertaking of criminal prosecution made no sense, Article 8 Paragraph 2 of the Criminal Code was applied and complaints were dismissed with an explanation that it was a matter of insignificant danger to society. Today, we have an almost identical provision in the Criminal Code of the Republic of Croatia, but today the legislator prescribes that there is no offence in this case. Article 28 prescribes that there is no criminal offence, although its legal characteristics are present, if the offence is evidently insignificant considering the way the perpetrator acted, his/her guilt and the consequence for the protected welfare and legal system.

The legal nature of insignificant offence continues to be controversial and, in the process of adoption of the new Criminal Code of the Republic of Croatia, some of the legal theoreticians were advocating its omission from the Criminal Code, because it was essentially a procedural rule by which the strict principle of legality, as prescribed in former legislation, was avoided in a certain way. However, the requirements of the practice, as will be seen later on, still impose the need for the existence of insignificant criminal offence in those situations where the principle of prosecutorial discretion, as prescribed by the law today, cannot be applied.

Considering that the principle of legality was applied practically with no exception because the provisions on insignificant offence were rarely applied, it may be said that the former prosecutors were unfamiliar with the principle of prosecutorial discretion; it was admittedly applied in the proceedings against juvenile perpetrators due to the very purpose of these proceedings.

Even today, we rarely apply the principle of prosecutorial discretion to adult perpetrators of criminal offences. Only recently, bolder considerations of the need for greater application of the principle of prosecutorial discretion have slowly began, all the more so because the new Criminal Procedure Code prescribes a wider application of prosecutorial discretion than the one we previously had in the Code.

II. Legal solutions regarding the application of prosecutorial discretion in the Republic of Croatia

The principle of prosecutorial discretion is contrary to the principle of legality; the state attorney is not obliged to undertake criminal prosecution although there is evidence that a criminal offence that should be prosecuted *ex officio* was committed. Today, the procedural law stipulates an option of applying the principle of prosecutorial discretion to adults as well. However, in contrast to some other legal systems, in which the state attorney has an extensive discretionary right in the application of the principle of prosecutorial discretion, this application is strictly limited and subject to special supervision in our legislation.

The Criminal Procedure Code, which repealed the inherited Criminal Procedure Code, was passed in the Republic of Croatia in 1997 and started to apply as of 1 January 1998. Simultaneously with the new Criminal Procedure Code, a special Law on Juvenile Courts was passed for the first

time in the Republic of Croatia, which, following the Austrian and German models, fully prescribes the proceedings against juvenile perpetrators of criminal offences and younger adult perpetrators of criminal offences. Some substantive provisions regarding sanctions against juvenile perpetrators of criminal offences were introduced in that Law as well.

a) The principle of prosecutorial discretion regarding juveniles and younger adults

The principle of prosecutorial discretion has been considerably expanded under the new provisions of the Law on Juvenile Courts, but since the application of the principle of prosecutorial discretion regarding younger population is not the subject of this paper, it can only be noted that a large number of complaints are dismissed in the Republic of Croatia by applying prosecutorial discretion to juvenile perpetrators. Thus, for example, in 2011, decisions were made on 3700 complaints regarding juvenile perpetrators, of which 2551 complaints were dismissed, or 69% of the criminal complaints decided upon. Of these 2551 complaints dismissed, 1944 or 76% were dismissed by applying one of the modes of prosecutorial discretion prescribed by that Law. At the same time, regarding the young adults (aged over 18 and up to 21) to which the provisions of prosecutorial discretion prescribed by the Law on Juvenile Courts may also apply, of the 3911 complaints decided upon, 1860 complaints were dismissed, or 48%. Of these 1860 complaints, 728 complaints or 39% were dismissed applying the principle prosecutorial discretion.

It may be said that the principle of prosecutorial discretion is widely accepted in the Croatian juvenile criminal law and practice. Traditionally, in that part of criminal proceedings that is primarily focused on the juvenile or younger adult, attempts are made to steer the juvenile away from perpetrating criminal offences, through various forms of applying the principle of prosecutorial discretion, special obligations and supervision.

b) The principle of prosecutorial discretion under the 1997 Criminal Procedure Code

As stated previously, until the adoption of the 1997 Criminal Procedure Code there were no provisions regarding adults that would enable the state attorney to decide on a criminal complaint by applying the principle of prosecutorial discretion. The 1997 Criminal Procedure Code, in its Article 175, regulates the application of prosecutorial discretion through conditional deferral of criminal prosecution, as well as through the application of prosecutorial discretion for criminal offences punishable by a term of imprisonment of up to one year.

In the section of the Code entitled “Decision on Criminal Prosecution According to the Principle of Prosecutorial Discretion”, Article 175 Paragraphs 1 to 3 prescribe the proceedings in application of conditional deferral of criminal prosecution. Paragraph 1 stipulates that, in addition to where allowed by the Code³, the state attorney may decide to defer the start of initiating criminal prosecution if the criminal complaint is submitted for an offence of lower degree of guilt, in which the absence or insignificance of detrimental consequences does not justify the public interest in criminal prosecution.

3 This primarily refers to the application of the provision on “Crown witness” (penitent) and ceding of criminal prosecution.

The state attorney could make the decision on deferral of the initiation of criminal prosecution only upon the consent of the suspect and his/her readiness to fulfil one or more of the following obligations:

- 1) execution of an action for the purpose of repairing or compensating for the damage caused by the criminal offence,
- 2) payment of a specific amount in favour of a public institution, for humanitarian or charitable purposes, or to the fund for compensating the victims of criminal offences,
- 3) fulfilment of an obligation of statutory support,
- 4) doing community service at liberty,
- 5) undergoing treatment for rehabilitation from drugs or other addictions in accordance with specific regulations.

Article 175 Paragraph 1 of the Criminal Procedure Code prescribed the so-called conditional prosecutorial discretion. According to Paragraph 2 of this Article, the state attorney makes the decision referred to in Paragraph 1 by a ruling, which he/she submits to the panel of the competent court, which will decide on approving that ruling within fifteen days. Since Paragraph 3 stipulates that the court will inform the state attorney on its refusal to approve a specific obligation, in which case the state attorney continues the proceedings, this means that a tacit approval is given if the court has not informed the state attorney that it deems that it is not appropriate to apply conditional prosecutorial discretion.

According to Paragraph 5, if, following a court approval, the suspect has fulfilled the obligation imposed, the state attorney would make a ruling dismissing the criminal complaint. The ruling is delivered to the injured party and the complainant, and the injured party is informed that he/she may pursue his/her claim for restitution in civil litigation. Thus, the ruling was not delivered to the suspect although he/she was informed that the complaint will be dismissed in the event of completion of the action imposed.

This provision failed to be commonly used in practice for a number of reasons, primarily given its complexity. The state attorney first has to obtain the suspect's consent and then has to make a ruling imposing one or more obligations on the suspect, which the state attorney submits to the court for decision. Not all controversial questions were resolved, either, such as the question as to who supervises the performance of community service at liberty and similar, which should have been resolved by specific regulations that should have been issued by the Minister of Justice.

In addition to the above, the practice also failed to answer the question as to when it is a case of "lower degree of guilt", and for which offences conditional deferral of prosecution should apply when there is such lower degree of guilt. The State Attorney's Office of the Republic of Croatia did not provide instructions along those lines, in order to encourage state attorneys to apply this provision. The provision itself indicates that the application was possible for all offences within municipal, as well as county jurisdiction, provided that it is a case of a lower degree of guilt. Since there was no application in practice, it is difficult to answer as to when there would be a lower

degree of guilt and to what offences Article 174 Paragraph 1 of the Criminal Procedure Code would apply. Given the current application of insignificant offence, those would quite certainly be not only the offences within municipal jurisdiction, but also some offences within county jurisdiction, for example, the criminal offence referred to in Article 173 Paragraph 2 of the Criminal Code regarding planting several marijuana plants for personal use and similar.

The provision on conditional deferral of prosecution, as prescribed in the 1997 Criminal Procedure Code, was substantially different from the subsequent solutions. As mentioned, its application was not limited only to criminal offences carrying a sentence of up to five years. Conditional deferral of prosecution according to Paragraph 1 could also be applied to other criminal offences in the event of “lower degree of guilt” and “absence or insignificance of detrimental consequences”, and this was precisely the reason for which the legislator decided that the ruling of the state attorney had to be subject to court review and approval.

The form in which the court decision should be is a far more complex question. If the court agreed, it did not have to answer anything, but if it did not agree, it was not clear from the Code if in such case the panel had to make that decision in the form of a ruling, or just a letter by which it would inform the state attorney of its disagreement. Since it is a court decision after all, the prevailing opinion is that it was supposed to be a ruling. To the best of my knowledge, there was no practice; there were no disagreements in those few cases in which Article 175 Paragraph 1 of the Criminal Procedure Code was applied. According to some theoreticians, in making its decision, the court should only limit itself to the evaluation of the permissibility of the action imposed on the suspect and not get into the merits of the matter. All of the above dilemmas, in addition to the complexity of the proceedings, were precisely the reason why there was practically no application of Paragraph 1 in practice.

The provision of Article 174 Paragraph 1 of the Criminal Code was a great step forward and it is a pity that, because of its complexity in application, it was not commonly used in practice. In contrast to Paragraph 1, the provision of Paragraph 4 of this Article, according to which the state attorney could decide not to initiate criminal prosecution for criminal offences punishable by a term of imprisonment of up to one year or a fine if, based on the collected information, he/she deemed that the conditions referred to in Paragraph 1 were met⁴, was applied slightly more often.

Although there were opinions in theory that the condition for the application of Paragraph 4 as well was the consent of the suspect to fulfil a specific obligation, a view which prevailed in practice, and which was supported by most theoreticians as well, was that the consent was not necessary because the condition for the application was not the imposition of the obligations specified in Paragraph 2 of Article 175 of the Code. Thus, the provision of Paragraph 4 of Article 175 of the Criminal Procedure Code allowed the application of prosecutorial discretion without any conditions for the suspect and without his consent, for criminal offences punishable by a term of imprisonment of up to one year or a fine. Thus, Paragraph 4 allowed for the application of unconditional prosecutorial discretion, even for criminal offences punishable by a term of imprisonment of up to one year, where the absence or insignificance of detrimental consequences did not justify public interest in criminal prosecution. Since the application was possible for criminal

4 i.e. that it is a lower degree of guilt and where the absence or insignificance of detrimental consequences does not justify public interest in criminal prosecution.

offences where the absence or insignificance of detrimental consequences did not justify public interest in criminal prosecution, it is not surprising that at first there was inconsistency in the application of this provision, and the provision on insignificant offence referred to in Article 28 of the Criminal Code. Namely, the Criminal Code still included the provision on insignificant offence. Given the similarity⁵ of that provision and the provision of Article 175 Paragraph 4 of the Criminal Procedure Code, state attorneys faced a dilemma as to what provision they should apply, whether substantive or procedural, in dismissing the criminal complaint for criminal offences punishable by a term of imprisonment of up to one year or a fine.

It is interesting that some state attorney's offices switched to the application of procedural provisions and dismissed complaints of minor significance by applying the unconditional prosecutorial discretion referred to in Article 175 Paragraph 4 of the CPC, whereas most of the state attorney's offices continued to apply the provisions on insignificant offence in such cases and dismissed these criminal complaints in this way.

The table below provides data on five state attorney's offices that had in their structure of reported criminal offences a significant number of complaints regarding the possession of drugs, referred to in Article 173 Paragraph 1 of the CC. While Dubrovnik, Rijeka, Zadar and Zagreb dismissed most complaints for offences of a lower degree of guilt and small or no detrimental consequences, by applying Article 28 of the CC (insignificant offence), Pula mostly applied prosecutorial discretion, whereas Split applied partly prosecutorial discretion with or without deferral of prosecution and partly Article 28 of the CC.

	DUBROVNIK	RIJEKA	PULA	SPLIT	ZADAR	ZAGREB
Total complaints dismissed	604	839	820	1331	404	2954
Article 28 of the CC	64	86	8	68	4	24
Percentage of the total dismissed	10.6%	10.3%	1.0%	5.1%	1.0%	0.8%
Article 175 of the CC	23	18	212	84		126
Percentage of the total dismissed	3.8%	2.1%	25.9%	6.3%	0.0%	4.3%

As for the application of the provision of Article 175 Paragraph 1 of the Criminal Procedure Code to adult perpetrators, the application was negligible given the prescribed conditions and actions that were to be undertaken, as stated above.

5 The provision of Article 28 of the Criminal Code stipulates that there is no criminal offence, although its legal characteristics were present, if the offence is evidently insignificant considering the way the perpetrator acted, his/her guilt and the consequence for the protected good and legal system.

c) Amendment to the 2002 Criminal Procedure Code

The amendment to the 2002 Criminal Procedure Code significantly changed the provision of Article 175 of the Criminal Procedure Code.

The amended Article 175 of the Criminal Procedure Code reads as follows:

“(1) In addition to where allowed by the law, the state attorney may decide to defer the start of initiating criminal prosecution if the criminal complaint is submitted for a criminal offence punishable by a fine or a term of imprisonment of up to three years and the offence is of a lower degree of guilt where the extent of detrimental consequences does not require public interest in criminal prosecution. The state attorney may make the decision on deferral of the initiation of criminal prosecution only with the prior consent of the injured party and of the suspect and the suspect’s readiness to fulfil one or more of the following obligations:

- 1) executing an action for the purpose of repairing or compensating for the damage caused by the criminal offence,
 - 2) paying a specific amount in favour of a public institution, for humanitarian or charitable purposes, or to the fund for compensating the victims of criminal offences,
 - 3) fulfilling an obligation of statutory support,
 - 4) doing community service at liberty,
 - 5) undergoing treatment for rehabilitation from drugs or other addictions in accordance with specific regulations,
 - 6) undergoing psychosocial therapy in order to eliminate violent behaviour with the consent of the suspect to be away from his/her family for the duration of therapy.
- (2) The state attorney shall warn the injured party before the injured party gives his/her consent that if he/she gives his/her consent to the deferral of initiation of criminal prosecution and a decision is made on the dismissal of the criminal complaint, he/she will lose the rights referred to in Article 55 Paragraph 2 of this Code.
- (3) In the case where the suspect has fulfilled the obligation imposed according to Paragraph 1 of this Article, the state attorney shall make a ruling dismissing the complaint.
- (4) The state attorney shall deliver the ruling referred to in Paragraphs 1 and 2 of this Article to the injured party and the complainant and inform the injured party that he/she may pursue his/her claim for restitution in civil litigation.”

Because of inconsistency in practice, this amendment to the Criminal Procedure Code deleted the provision of former Paragraph 4 of Article 175 of the Criminal Procedure Code, namely, the unconditional prosecutorial discretion for criminal offences punishable by a term of imprisonment of up to one year.

The explanation for such a solution was the inconsistency and confusion in state attorney's offices because, as stated and clarified by figures above, when dismissing complaints for criminal offences punishable by a term of imprisonment of up to one year, some state attorney's offices applied expediency, while, under the same conditions, others applied Article 28 of the Criminal Code. Instead of deleting Paragraph 4 of the former Article 175 of the Criminal Procedure Code, a better solution would be to delete insignificant offence from the Criminal Code and prescribe unconditional prosecutorial discretion in similar conditions in which the provisions on insignificant offence are applied today. However, the practice, before all, but also some theoreticians were not ready for this solution, for they expressed reservation about the solution that would allow the state attorney to apply unconditional prosecutorial discretion for criminal offences punishable by a term of imprisonment of more than one year.

The reduction of application of the principle of prosecutorial discretion to criminal offences punishable by a term of imprisonment of up to three years,⁶ caused the state attorneys, but also judges, when the new 2011 Criminal Code was being adopted, to insist on keeping in the Criminal Code the provision on insignificant offence, considering the restriction of application and the conditions to be met in applying the principle of prosecutorial discretion.

In accordance with Article 175 Paragraph 1 of the Criminal Procedure Code, as amended, the state attorney may decide to defer the start of initiating criminal prosecution if:

- the criminal complaint is submitted for a criminal offence punishable by a fine or a term of imprisonment of up to three years,
- the offence is of a lower degree of guilt where the extent of detrimental consequences does not require public interest in criminal prosecution.

Instead of the phrase “the absence or insignificance of detrimental consequences does not justify public interest in criminal prosecution”, which was quite similar to the definition of insignificant offence, the phrase “the extent of detrimental consequences does not require public interest in criminal prosecution” was used in the amended Paragraph 1 and in this way a certain distinction was made in relation to the description of insignificant offence. Thus, the novelty is the restriction of application of the principle of prosecutorial discretion only to criminal offences punishable by a fine, or a term of imprisonment of up to three years, with the state attorney being able to make this decision only with the prior consent of the injured party and the suspect, and the suspect's readiness to fulfil one or more of the above mentioned obligations.

If we compare the old Paragraph 2 and the new one, we see that a new obligation “undergoing psychosocial therapy in order to eliminate violent behaviour with the consent of the suspect to be away from his/her family for the duration of therapy” was added, which is primarily intended for the prevention of domestic violence.

In the event of the suspect fulfilling the obligation imposed, the state attorney must dismiss the criminal complaint, which is where the solution remained unchanged.

6 Up to five years of imprisonment according to the 2008 Criminal Procedure Code.

Therefore, we may say that in 1997 the legislator in the Republic of Croatia, quite boldly, prescribed the application of the principle of prosecutorial discretion, but that this was not simultaneously followed by adequate practical training and state attorneys did not fully recognise the possibilities afforded to them by the provision of Article 175 Paragraph 1 of the Criminal Procedure Code. In addition to the above mentioned, there were warnings that this provision was unclear, especially given the nature of possible negative court decision, and therefore, by the 2002 amendment, the legislator restricted the application of prosecutorial discretion only to conditional prosecutorial discretion for criminal offences punishable by a term of imprisonment of up to three years or a fine and with an additional condition that the consent of the injured party is required, in addition to the consent of the suspect. As will be seen later on, all this led to a situation that the application of insignificant offence still remained very much present and predominant in practice.

d) The 2008 Criminal Procedure Code

The adoption of the 2008 Criminal Procedure Code marked the first major reform of the Croatian criminal procedure legislation after more than 130 years of existence of mixed criminal procedure type. The legislator separated investigation from criminal procedure, and moved it to preliminary proceedings and, within them, merged the roles of criminal prosecution and investigation in the hands of the state attorney. Amendments are significant in other parts of the Code as well. Different modes of application of the principle of prosecutorial discretion or similar institutes are prescribed.

It is worth noting that, in addition to the Criminal Procedure Code, the Law on State Attorney's Office also contains procedural provisions on actions of the state attorney in preliminary proceedings, so it also contains certain implementing provisions on the application of prosecutorial discretion.

a. Application of prosecutorial discretion referred to in Article 521 of the Code

In addition to the conditional prosecutorial discretion referred to in Article 522 of the Code, with solutions similar to the 2002 novelty, a novelty is the provision of Article 521 of the Criminal Procedure Code that allows, under the conditions prescribed in that Article, the application of prosecutorial discretion for criminal offences punishable by a term of imprisonment of up to five years.

Article 521 of the Criminal Procedure Code stipulates that, in addition to where allowed by a special law, the state attorney may dismiss a criminal complaint by a ruling or desist from criminal prosecution although there is grounded suspicion that a criminal offence that should be prosecuted ex officio was perpetrated and that is punishable by a fine or a term of imprisonment of up to five years if:

- 1) considering the circumstances, it is likely that remission of penalty will be applied in criminal proceedings against the defendant (Article 58 of the Criminal Code),

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- 2) an execution of penalty or security measure is under way against the defendant and an initiation of criminal procedure for another criminal offence is not opportune, considering the severity and nature of the offence and its underlying motives, as well as the effects of the penal sanction on the perpetrator in terms of not perpetrating criminal offences in the future,
 - 3) the defendant was extradited or transferred to a foreign country or an international criminal court for conducting proceedings for another criminal offence,
 - 4) the defendant was reported for several offences by which he/she essentially committed two or more criminal offences, but it is opportune to convict the perpetrator only for one, because an initiation of criminal procedure for other criminal offences would not have a significant impact on the pronouncement of penalty or other sanctions against the perpetrator.

The provision of Article 521 of the Code started to be used in practice immediately after the Code came into effect. A ruling on the dismissal of complaint according to Article 521 is made on two grounds, referred to in this Article, namely Items 2 and 4. I have no information about the application of Items 1 and 3 of Article 521 of the Code.

According to Item 2, prosecutorial discretion is applied if serving a prison sentence is in progress, and initiation of criminal procedure for another criminal offence is not opportune considering the severity and nature of the offence and its underlying motives, as well as the effects of the penal sanction on the perpetrator. However, Item 4 of Article 521 of the Criminal Procedure Code is most often applied. Often a suspect is reported for several criminal offences, some of which are severe, as well as for a series of minor criminal offences. Most frequently they are property-related offences, especially the cases where the perpetrator, who is a special recidivist, was reported for aggravated robbery and several larcenies. In such a case, it is sufficient to convict him/her for that serious offence, because the initiation of criminal procedure for the criminal offences of larceny would not have a significant impact on the pronouncement of penalty or other sanctions. This resolved the question as to what to do in the case of a larger number of reports against a suspect who perpetrated one or more serious criminal offences, where the conduct of proceedings and the penalty for criminal offences punishable, for example, with a term of imprisonment of up to three years, given the penal policy, would not affect the penalty but would significantly slow down the actual proceedings.

b. Application of prosecutorial discretion referred to in Article 522 of the Code

The 2008 Criminal Procedure Code kept conditional expediency in Article 522. According to Paragraph 1 of this Article, the state attorney may, after previously obtaining the consent of the victim or injured party, dismiss a criminal complaint by a ruling or desist from criminal prosecution, although there is grounded suspicion that a criminal offence was perpetrated that should be prosecuted *ex officio* and that is punishable by a fine or a term of imprisonment of up to five years, if the suspect accepts the obligation of:

- “1) executing an action for the purpose of repairing or compensating for the damage caused by the criminal offence,

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- 2) paying a specific amount in favour of a public institution, for humanitarian or charitable purposes, or to the fund for compensating the victims of criminal offences,
 - 3) fulfilling an obligation of statutory support and regular payment of due obligations,
 - 4) doing community service at liberty,
 - 5) undergoing treatment for rehabilitation from drugs or other addictions in accordance with specific regulations,
 - 6) undergoing psychosocial therapy in order to eliminate violent behaviour with the consent of the suspect to be away from his/her family for the duration of therapy.”

There is a difference in comparison to the 2002 solution. The ruling on the dismissal of complaint according to Article 175 Paragraph 1 of the Criminal Procedure Code, as amended in 2002, could be made only for criminal offences punishable by a term of imprisonment of up to three years, and now this limit is increased to five years. Furthermore, while the second condition according to the 2002 novelty was that it had to be an offence of lower degree of guilt, where the extent of detrimental consequences does not require public interest in criminal prosecution, now there is no such restriction and the state attorney may apply conditional prosecutorial discretion if the defendant states that he/she is ready to accept one or more obligations specified in the Code, and if there is a consent of the victim or injured party.

A novelty is also the provision that the state attorney is obliged to deliver the ruling on the dismissal of complaint to the suspect, in addition to the injured party and the complainant. Although, in practice, the ruling on dismissal by applying conditional prosecutorial discretion was delivered to the suspect before as well, there were no grounds for this in the Code and now, by the delivery of the ruling on dismissal, the suspect is informed formally, as well, that the complaint has been dismissed because he/she fulfilled the obligation imposed. The ruling on the dismissal of complaint is delivered to the injured party with an instruction that he/she may pursue his/her claim for restitution in civil litigation.

Article 523 of the Code specifies that the state attorney may conditionally desist from criminal prosecution during the trial as well. If the state attorney states that he/she conditionally desists from criminal prosecution, the judge will adjourn the criminal proceedings by a ruling, until receiving the state attorney's notice that the obligation has been fulfilled and that he/she desists from prosecution.

In addition to the application of prosecutorial discretion according to Articles 521 and 522 of the Criminal Procedure Code and the provisions on “Crown witness” (penitent), Article 286 of the Criminal Procedure Code introduced the institute of partial witness immunity. Namely, if a witness states that he/she does not wish to give a statement so as not to incriminate himself/herself or any person close to him/her, under the conditions determined by the Code, the state attorney may give a statement to the witness that he/she will not initiate prosecution if the witness testifies. The solution is similar to the solution from the Criminal Procedure Code of Bosnia and Herzegovina and is very rarely applied in Croatia. The above provision was repealed by a decision

of the Constitutional Court of the Republic of Croatia, with an explanation that it was necessary to restrict any possible application to the most serious cases of terrorism and organised crime.

The Law on State Attorney's Office introduced conciliation or out-of-court settlement, but only for criminal offences of domestic violence punishable by a term of imprisonment of up to five years. The intention was to solve, by this provision, the cases of one-off domestic violence in those cases where the victims and injured parties, who are close relatives and are entitled to the privilege not to testify, ask for the proceedings not to be conducted. Since in these cases the relatives use this privilege later in the proceedings, before the court and the state attorney must desist from prosecution, the intention was to confront the suspect with the victims and the offence perpetrated through conciliation, with the mediation of the Social Care Centre. Only if conciliation is reached, the state attorney dismisses the complaint by applying expediency. The provision is not applied because immediately following its adoption it faced strong opposition from non-governmental organisations and certain theoreticians, and state attorneys are reluctant to apply it, either, because, if the violence subsequently escalated, the state attorney would be reproached by everyone for protecting the abuser.

III. Comparative overview of the solutions in some countries

As said in the Introduction, the application of the principle of prosecutorial discretion in the former Socialist Federal Republic of Yugoslavia was only possible for juvenile perpetrators. Some countries in the region took different ways in the laws they passed after 1990, and the provisions differ depending on to what extent the countries followed the tradition of the former Criminal Code of the Socialist Federal Republic of Yugoslavia or the General Criminal Code, as it was called when inherited as a law in the Republic of Croatia.

a) Bosnia and Herzegovina

The great majority of countries recognise the institute of deferral of criminal prosecution under more or less similar conditions, because they followed, in a certain way, the previous common solutions that existed regarding juvenile perpetrators. Bosnia and Herzegovina is an exception. According to Article 216 Paragraph 2 of the Criminal Procedure Code of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, Nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/055, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09 and 93/09) there is no dismissal of criminal complaint, the institute recognised by all other codes. According to this provision, the prosecutor issues an order that the investigation will not be conducted, if it is evident from the complaint and the supporting documents that the reported act is not a criminal offence, if there are no grounds for suspicion that the reported person perpetrated a criminal offence, if the statute of limitations has expired, or if the offence is covered by amnesty or pardon or if there are other circumstances that preclude criminal prosecution. In the Code itself,⁷ I did not find provisions on either prosecutorial discretion or conditional prosecutorial discretion (deferral of prosecution). Other procedural laws in Bosnia and Herzegovina are similar to

7 Still, I have to mention that I used only the sources that were available to me because, due to the shortness of time, I was unable to dedicate more time to the study of certain laws. Therefore, it is possible that I overlooked something.

this in that they keep the solution of applying prosecutorial discretion for juvenile perpetrators of criminal offences.

b) Republic of Montenegro

According to the Criminal Procedure Code of the Republic of Montenegro, the state prosecutor may defer criminal prosecution for criminal offences punishable by a fine or a term of imprisonment of up to five years, when he/she determines that it would not be opportune to conduct the proceedings considering the nature of the offence and the circumstances in which it was perpetrated, the earlier life of the perpetrator and his/her personal qualities, if the suspect accepts to fulfil one or more of the following obligations:

1. to remedy the detrimental consequence caused by the criminal offence or to compensate for the damage caused.
2. to fulfil due obligations of support or other obligations determined by a final court decision,
3. to pay a specific amount for humanitarian purposes,
4. to perform specific community service.

The actual procedure of applying Article 272 of the Criminal Procedure Code of the Republic of Montenegro is similar to the procedures in other countries. Namely, first the prosecutor makes a ruling determining the obligation that the suspect should fulfil and giving him/her a deadline for fulfilling it. If the suspect has fulfilled the imposed obligation, then the state prosecutor makes a ruling on the criminal complaint dismissal.

The Criminal Procedure Code of the Republic of Montenegro recognises unconditional prosecutorial discretion for criminal offences punishable by a term of imprisonment of up to three years. The provision of Article 273 of the Criminal Procedure Code stipulates that the state prosecutor may dismiss a criminal complaint for criminal offences punishable by a fine or a term of imprisonment of up to three years if the suspect has, due to genuine remorse, prevented the damage or already fully compensated for the damage and the state prosecutor assesses, based on the circumstances of the case, that the pronouncement of a criminal sanction would not be just. Since it is a matter of prosecutorial discretion, the provision on assumption of criminal prosecution is not applied.

The 2005 State Prosecutor's Instruction introduced conciliation procedure. Namely, according to the Instruction for the Conduct of State Prosecutors in connection with the application of the provision of Article 244 of the Criminal Procedure Code (now Article 272), the state prosecutor is obliged to conduct settlement procedure between the injured party and the suspect, for the obligations referred to in Items 1 to 4, or to obtain consent to the obligations referred to in Items 2 and 3 of Paragraph 1 of Article 272 of the Criminal Procedure Code. The Instruction prescribes in detail for which offences conditional prosecutorial discretion may be applied. It follows from the Instruction, that the provision on conditional prosecutorial discretion is only applied if a settlement is reached, by the injured party stating that the agreed action has been performed, and if

no settlement is reached, it follows from the Instruction that if there is a consent of the suspect, the state attorney may apply conditional prosecutorial discretion for the obligations referred to in Items 2 and 3, i.e. if it is a matter of paying due support or paying a specific amount for humanitarian purposes. Such a solution is possible because the procedural code of the Republic of Montenegro does not require consent of the injured party for the application of conditional prosecutorial discretion.

According to this Instruction, if the detrimental consequence caused by the perpetration of criminal offence is insignificant and if the basic conditions referred to in Article 9 of the Criminal Code (offence of minor significance) are met, the institute of deferral of criminal prosecution is not applied; instead, the complaint is dismissed because there is no criminal offence.

c) Republic of Croatia

The Criminal Procedure Code distinguishes between the conditional prosecutorial discretion referred to in Article 522 of the Criminal Procedure Code and the cases where it is possible to apply the provisions on unconditional prosecutorial discretion referred to in Article 521 of the Code. Part II of this paper presents legal solutions in the Republic of Croatia.

d) Republic of Macedonia

According to the provision of the amended Criminal Procedure Code of the Republic of Macedonia, when the legal conditions for conditional suspension of criminal proceedings, referred to in Article 58 of the Criminal Code, are met, upon the motion of the authorised prosecutor and after obtaining a consent of the injured party, the court makes a ruling on the deferral of prosecution in which it orders alternative measures (community service, conditional suspension of criminal proceedings and house arrest) and, if the defendant agrees, the court makes a ruling on the discontinuation of the proceedings after the expiry of the deadline for the fulfilment of the obligation, if the obligation has been fulfilled.

Thus, it is the court that decides on the application of conditional prosecutorial discretion upon the motion of the prosecutor, and not the state attorney himself/herself like in the other countries that are the subject of this analysis.

d) Republic of Slovenia

The solution in the Republic of Slovenia presents a novelty and, in my opinion, deserves attention. The 2008 Criminal Code of the Republic of Slovenia no longer recognises the institute of insignificant offence. Namely, the amendments to the Criminal Code in Slovenia repealed insignificant offence and, similarly to the German Criminal Procedure Code, the latest amendment to the Criminal Procedure Code revised the provision of Article 161 Paragraph 1, so that now the prosecutor may dismiss a criminal complaint if there is disproportion between the small significance of the criminal offence because of the nature or severity of the offence, or because the detrimental consequences are insignificant or because of other circumstances, due to which the

criminal offence was perpetrated, or because of a low degree of the perpetrator's guilt or his/her personal qualities, and the consequences that would be caused by criminal prosecution. I believe that the solution of the Republic of Slovenia is good, and that the introduction of this solution in the Criminal Procedure Code of the Republic of Croatia would avoid all controversies of theoretical as well as practical nature regarding the application of insignificant offence as it is regulated by substantive law. This amendment would practically move prosecutorial discretion entirely to the field of procedural law.

In contrast to the Republic of Montenegro, which introduced settlement by the State Prosecutor's Instruction, Article 161 of the Criminal Procedure Code of the Republic of Slovenia prescribes settlement for precisely listed criminal offences punishable by a term of imprisonment of up to three years. The state attorney may decide to initiate settlement procedure in such case, but with the obligation of assessing the type and nature of the criminal offence, the circumstances under which it was perpetrated, the perpetrator's personal qualities and his/her previous convictions for the same or other criminal offences. This settlement is conducted by an independent person, therefore not the state prosecutor, and if a settlement is reached the state prosecutor will dismiss the criminal complaint.

The Criminal Procedure Code of the Republic of Slovenia also recognises conditional prosecutorial discretion and, essentially, the provision of Article 162 of the Criminal Procedure Code of the Republic of Slovenia is similar to the provisions of Article 522 of the Criminal Procedure Code of the Republic of Croatia. The state prosecutor may dismiss a criminal complaint with the consent of the injured party and the readiness of the suspect to fulfil certain orders by which the detrimental consequences are reduced or remedied. As in other codes, the first obligation is compensation for the damage, then the payment of due amounts for support, performance of community service, addiction treatment, participation in psychological or other counselling, and a unique obligation that is not present in the Code of the Republic of Croatia – compliance with the prohibition of approaching the victim or other person. Paragraph 2 prescribes a list of offences for which it is possible to apply conditional prosecutorial discretion and, if the suspect fulfils the obligations, the criminal complaint will be dismissed.

In accordance with Article 163 of the Criminal Procedure Code of the Republic of Slovenia, the state prosecutor is not obliged to initiate criminal prosecution in the following cases:

- if remission of penalty is possible,
- if the criminal offence is punishable by a fine or a term of imprisonment of up to one year and the suspect has prevented detrimental consequences or compensated for the damage and the state prosecutor assesses that the criminal sanction would not be just. The latter solution is similar to the solution in the Montenegrin Code, but also to the solution in the Republic of Serbia.

e) Republic of Serbia

In the 2011 Criminal Procedure Code of the Republic of Serbia,⁸ similarly as in the codes of the Republic of Montenegro and Slovenia, Article 284 Paragraph 3 prescribes the application of unconditional prosecutorial discretion. Prosecutorial discretion is applied where the pronouncement of a criminal sanction would not be just. According to this provision, the public prosecutor may dismiss a complaint for criminal offences punishable by a term of imprisonment of up to three years if the suspect has, due to genuine remorse, prevented the damage or already fully compensated for the damage and the state prosecutor assesses, based on the circumstances of the case, that the pronouncement of a criminal sanction would not be just.

Article 283 of the Criminal Procedure Code of the Republic of Serbia stipulates that the public prosecutor may defer criminal prosecution for criminal offences punishable by a fine or a term of imprisonment of up to five years if the suspect accepts one or more obligations imposed.

Similarly as in the codes of other countries, it is the repairing of the damage, payment of a specific amount in favour of a humanitarian organisation, performance of specific community service or humanitarian work, fulfilment of due obligations of support, alcohol or drug rehabilitation, undergoing psychosocial treatment in order to eliminate the causes of violent behaviour and, which is unique compared to other codes, fulfilment of an obligation determined by a final court decision or compliance with the restraint determined by a final court decision.

As elsewhere, the public prosecutor makes a ruling on the deferral of prosecution, specifying the obligations that the suspect should fulfil and a deadline for fulfilling them. The supervision of the fulfilment of obligations is conducted by the supervisor of the execution of criminal sanction, in accordance with the regulation issued by the Minister of Justice.

If the suspect fulfils the obligation, the state prosecutor will dismiss the criminal complaint by a ruling and inform thereof the injured party, who does not have the right to assume the prosecution.

f) Similarities and differences

All of the above provides the grounds for arguing that almost all of the countries under observation have regulated the matter of conditional deferral of prosecution in a more or less similar manner in their procedural codes. The exception is Bosnia and Herzegovina, at least according to the sources available to me for writing this paper.

The application of conditional prosecutorial discretion is resolved in a similar way in the Republic of Slovenia, the Republic of Montenegro, the Republic of Croatia and the Republic of Serbia. In Macedonia, the application of conditional prosecutorial discretion is essentially decided on by the court.

8 Official Gazette of RS, No.72/2011

As far as the application of unconditional prosecutorial discretion is concerned, the Republic of Serbia, the Republic of Montenegro and Slovenia have similar solutions. In all three countries, the prosecutor may dismiss a criminal complaint under the conditions determined by the law if he/she assesses that the pronouncement of a criminal sanction would not be appropriate. The Republic of Croatia does not have this solution. I believe that this is a good solution for the cases in which no sanction should be pronounced and which we resolve in the Republic of Croatia by applying insignificant offence, which is questionable in some cases.⁹ However, the prescribed limit of up to three years of imprisonment limits the application to a great extent.

As stated previously, the Republic of Croatia has stipulated the application of unconditional prosecutorial discretion in Article 521 for precisely specified cases. Similarly to this solution, Article 163 Item 1 of the Criminal Procedure Code of the Republic of Slovenia stipulates the application of unconditional prosecutorial discretion in the cases where remission of penalty is possible.

I believe that Article 521 of the Criminal Procedure Code of the Republic of Croatia provides considerable opportunities to the prosecutor not to conduct criminal proceedings in the cases determined by the law where it really is not opportune, and essentially just makes it harder to conduct criminal proceedings for serious criminal offences. The application of this form of prosecutorial discretion is also possible according to the Criminal Procedure Code of the Republic of Slovenia in cases where the application of provisions on remission of penalty is possible. Other countries do not have such a solution.

It may be said that there are different solutions in procedural codes regarding the application of unconditional prosecutorial discretion, while the solutions regarding the application of conditional prosecutorial discretion are more similar.

IV. Application of prosecutorial discretion in the practice of the State Attorney's Office of the Republic of Croatia

As stated in the Introduction, prosecutorial discretion began to be widely applied in the practice of state attorneys for juveniles. The relatively low rate of recidivism indicates that this orientation is justified.

a) In respect of juveniles and younger adults

Prosecutorial discretion is applied in most complaints in respect of juveniles and younger perpetrators of criminal offences. First instructions on the conduct were issued long ago, while in 2004 a detailed instruction of the State Attorney General of the Republic of Croatia was issued fully regulating the manner of conduct of the state attorney for juveniles in the application of prosecutorial discretion.

9 Thus, for example, the Supreme Court of the Republic of Croatia applies the institute of insignificant offence in respect of younger adults for planting several marijuana plants where they are planted for personal use. This is not quite an insignificant offence, but since it involves young persons and it is only possible to pronounce a prison sentence, therefore the court deems that the pronouncement of a prison sentence would not be just and, on the basis of Article 28 of the Criminal Code, renders a judgement of acquittal.

Departments for juveniles of state attorney's offices have technical staff who obtain consents, and in social care centres there are special departments supervising the fulfilment of special obligations. Thus, it can be said that we have a well-established manner of conduct of the state attorney for juveniles but, what is equally, if not more important, also the manner of supervision of the execution of specific obligations imposed, which a juvenile must fulfil in the event of conditional prosecutorial discretion. The fulfilment of these two conditions, namely, the technical staff who conduct interviews and record statements of consent, and the existence of a specifically designated body that supervises the execution is the key factor for the application of prosecutorial discretion in respect of this population. The table below provides the data for the last five years. It is evident from the table that around 59% of complaints are resolved by dismissal with the application of prosecutorial discretion.

Year	2007	2008	2009	2010	2011
Total decisions on complaints	3877	3855	3659	3624	3700
Number of dismissals	2267	2279	2189	2328	2551
Percentage of dismissals compared to the number of decisions	58%	59%	60%	64%	69%
Number of dismissals by applying prosecutorial discretion	1975	1925	1837	1780	1944
Number of dismissals by applying prosecutorial discretion compared to the number of decisions	51%	50%	50%	49%	53%

It is mostly the application of unconditional prosecutorial discretion as prescribed by Article 71 of the 2011 Law on Juvenile Courts.

b) In respect of adults

As stated above, the application of prosecutorial discretion in respect of adults is much less frequent than in respect of younger adults and juveniles.

The application of prosecutorial discretion was more predominant in the period from 1999 to 2002 because some state attorney's offices, when it was a matter of offences of small significance, applied the provision of Article 175 Paragraph 4 of the Criminal Procedure Code. According to this provision, the state attorney could apply prosecutorial discretion for criminal offences punishable by a fine or a term of imprisonment of up to one year without any conditions.

As stated in point 2, some state attorney's offices applied this provision and some of them applied the provision of insignificant offence.

The table below provides a summary of the application of prosecutorial discretion over ten years in respect of known adult¹⁰ perpetrators in the Republic of Croatia. The number of dismissals by applying prosecutorial discretion and insignificant offence is compared to the total number of dismissals of criminal complaints.

Year	1998	1999	2000	2001	2002	2003	2004	2005
Total complaints dismissed	13115	10849	9893	11939	15513	15551	14341	13874
Article 28 of the CC	552	554	403	423	597	565	673	694
Percentage of the total dismissed	4.2%	5.1%	4.1%	3.5%	3.8%	3.6%	4.7%	5.0%
Article 175 of the CPC	10	380	487	526	356	83	83	131
Percentage of the total dismissed	0.1%	3.5%	4.9%	4.4%	2.3%	0.5%	0.6%	0.9%

Year	2006	2007	2008	2009	2010	2011
Total complaints dismissed	15950	15734	15851	17816	17526	19550
Article 28 of the CC	1249	1513	2404	2776	2580	2526
Percentage of the total dismissed	7.8%	9.6%	15.2%	15.6%	14.7%	12.9%
Article 175 of the CPC	131	157	234	278	264	385
Percentage of the total dismissed	0.8%	1.0%	1.5%	1.6%	1.5%	2.0%

The above data show that prosecutorial discretion is rarely applied in respect of adult perpetrators. In essence, the application of prosecutorial discretion in respect of adult perpetrators is more an exception rather than a rule. The reason is complexity of the proceedings and so the provisions on insignificant offence are applied more frequently.

As regards the obligations that may be imposed on a perpetrator, it is primarily the execution of an action for the purpose of repairing or compensating for the damage caused by the criminal offence, then the obligation of paying a specific amount in favour of a public institution, for humanitarian or charitable purposes is applied very often, as well as the obligation of payment of due statutory support and regular payment of due obligations. Other obligations are rarely applied.

Namely, in respect of all three obligations that are applied more frequently, it is easy to determine if the suspect has fulfilled them. If it is a matter of compensation for the damage or payment of support, the fulfilment is generally checked through the injured party, and if the payment of a specific amount for humanitarian purposes was imposed, the suspect is requested to present the proof of payment. Supervision of the fulfilment of obligation is a big obstacle in all other cases.

10 Adults include persons over 21 years of age.

The adoption of the Probation Law resolved the issue of supervision of execution of measures, at least from the legislator's viewpoint. Namely, Article 13 Paragraph 1 Item 3 of the Probation Law stipulates that one of the probation activities is the supervision of fulfilment of obligations under the ruling of the state attorney, when he/she decides on criminal prosecution according to the principle of prosecutorial discretion. The establishment of probation offices facilitated the application of conditional prosecutorial discretion and a greater application of conditional prosecutorial discretion in respect of adults may be expected, because early studies already show that a bolder application of prosecutorial discretion referred to in Article 522 of the Criminal Procedure Code began after the adoption of the Probation Law.

In addition to the fact that a body for supervising the fulfilment of obligations was not designated until the adoption of the Probation Law, the reason for infrequent application of conditional prosecutorial discretion is the complexity of the proceedings themselves. First of all, the state attorney must have the suspect's consent. Then he/she contacts the injured party to whom he/she should clarify what prosecutorial discretion means and from whom consent must be obtained. Practical experience shows that the injured parties are often suspicious of such a manner of dispute resolution, and most often give their consent in the cases where the state attorney can confirm to them in advance that they will be compensated for the damage.

There are no such difficulties in the application of unconditional prosecutorial discretion. Early experience and studies already show that some modes of unconditional prosecutorial discretion referred to in Article 521 of the Criminal Procedure Code will be frequently used in practice.

This especially refers to the cases referred to in Article 521 Paragraph 1 Items 2 and 4.

Namely, according to Item 2, the state attorney may apply prosecutorial discretion if an execution of penalty or security measure is underway against the defendant and initiation of criminal procedure for another criminal offence is not opportune, considering the severity and nature of the offence and its underlying motives, as well as the effects of the penal sanction on the perpetrator in terms of not perpetrating criminal offences in the future. Application of this provision may solve the cases in which we have so far been forced to conduct proceedings that required considerable funds (bringing a defendant in, etc), although we knew that the conduct of the proceedings was not opportune.

However, Item 4 of Article 521 of the Criminal Procedure Code is most frequently applied, according to which the state attorney may apply prosecutorial discretion if a suspect was reported for several offences by which he/she essentially committed two or more criminal offences, but it is opportune to convict the perpetrator only for one, because the initiation of criminal proceedings for other criminal offences would not have a significant impact on the pronouncement of penalty or other sanctions against the perpetrator. In practice, we all know cases of aggravated robbery or murders for gain, in addition to which the perpetrator is reported for a series of criminal offences of larceny, and the conduct of proceedings for these offences does not have an impact in any way on the length of prison sentence, but significantly slows down the proceedings.

As for other forms of expediency, they are applied rarely or not at all.

The State Attorney's Office has not yet applied in practice the conciliation procedure prescribed in the Law on State Attorney's Office. The reasons are many. Theoreticians, but also some non-governmental organisations, received that provision with hostility, believing that it was made *in favorem* of domestic abusers. All this, as well as the fear that a domestic abuser could afterwards repeat the offence or perpetrate a more serious criminal offence, indicates that caution is necessary because in the case of new severe violence the state attorney would quite certainly be reproached and declared guilty for failing to stop the abuser. It is an institute that we are yet to understand and accept, and it still seems to me that we are not ready for conciliation, unlike the prosecutors in the Republic of Slovenia, who regularly apply this institute.

Partial witness immunity is rarely applied in practice. It has been applied in as few as three cases since the start of application of the new Criminal Procedure Code.¹¹ The provisions on "Crown witness" are also very rarely applied because we rarely have complaints against members of classic criminal organisations; they are mostly organised groups, in which case the application of this provision is not possible, and we also rarely have persons from that milieu who are willing to cooperate with judicial authorities.

V. Concluding remarks

The application of prosecutorial discretion in the practice of state attorneys in the Republic of Croatia became commonplace within the area of jurisdiction of state attorneys for juveniles. As for adults, although the state attorney plays the role of "judge" in the application of prosecutorial discretion, especially conditional prosecutorial discretion, because in this case he/she "metes out the penalty" to the suspect by imposing an obligation, state attorneys avoid the application of this institute due to the complexity of the proceedings. It was also rarely applied because the issue of supervision of the measures imposed was not regulated. The establishment of probation offices will change this situation and a greater application of prosecutorial discretion in respect of adults is expected.

As for the prosecutorial discretion referred to in Article 521 of the Criminal Procedure Code, already according to early indicators the application is not questionable; however, analysing the structure of criminal offences and particularly analysing when the prosecutorial discretion may be applied, as well as all the circumstances under which it may be applied, there is a limited number of cases where the application is possible. As for other institutes, considering the caution in their application and the reaction of the practitioners as well as theoreticians, no major scale application should be expected, and it may be assumed that this application will be rare and negligible compared to the total number of decisions made by a state attorney.

Finally, comparing the solutions in the neighbouring countries, it can be concluded that conditional prosecutorial discretion and deferral of prosecution with an obligation of the perpetrator to fulfil one or more obligations is the most frequent solution. The application of conditional prosecutorial discretion is resolved in a similar way in the Republic of Slovenia, the Republic of

11 The Criminal Procedure Code came into effect on 1 July 2009 for criminal offences within the jurisdiction of the Office for the Prevention of Corruption and Organised Crime.

Montenegro, the Republic of Croatia and the Republic of Serbia. In Macedonia, the application of conditional prosecutorial discretion is essentially decided on by the court.

As far as the application of unconditional prosecutorial discretion is concerned, the Republic of Serbia, the Republic of Montenegro and Slovenia have similar solutions. In all three countries, the prosecutor may dismiss a criminal complaint under the conditions determined by the law if he/she assesses that the pronouncement of a criminal sanction would not be appropriate. The Republic of Croatia does not have this solution. I believe that this is a good solution. However, the prescribed limit of up to three years of imprisonment limits the application to a great extent. Such cases, where the pronouncement of a criminal sanction would not be just are resolved in the Republic of Croatia by applying insignificant offence, which is questionable in some cases¹².

In conclusion, it is worth reiterating what has already been said above - the application of prosecutorial discretion in the practice of state attorneys in the Republic of Croatia became commonplace within the area of jurisdiction of state attorneys for juveniles, whereas prosecutorial discretion is rarely applied in respect of adults.

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12 Thus, for example, the Supreme Court of the Republic of Croatia applies the institute of insignificant offence in respect to younger adults for planting several marijuana plants where they are planted for personal use. This is not quite an insignificant offence, but since it involves young persons and it is only possible to pronounce a prison sentence, therefore the court deems that the pronouncement of a prison sentence would not be just and, on the basis of Article 28 of the Criminal Code, renders a judgement of acquittal.

Position of the Public Prosecutor According to the New Serbian Criminal Procedure Code

Summary

This paper contains a critical analysis of the procedural position of the Public Prosecutor as is laid down in the New Criminal Procedure Code of the Republic of Serbia (RS CPC), divided into several sets of issues organised according to how universal in scope they are. Accordingly, the author points out, already in the introduction to the paper, quite a few provisions of the new RS CPC that are debatable (from a nomothetic point of view as well as an expert one) related to the Public Prosecutor as a participant in the discovery of criminal offences which are prosecuted *ex officio* and evidentiary proceedings relating thereto. The relevance of the analysed issues, according to the author, is especially underlined by the fact that the new RS CPC provides the Prosecutor with a considerably broader scope of authority when compared to our previous criminal procedure legislation which is still in force (first of all, the CPC text which is in force).

Among quite a few issues analysed in the paper within the said context, special attention is paid to the issues dealing with the public prosecutor-led investigation as a part of its new concept, with the procedural position of the party injured by the committed criminal offence, and the issues dealing with the relationship between the organisation of the public prosecutor's service of the Republic of Serbia and the procedural position of the public prosecutor according to the new CPC.

Key words: CPC, Public Prosecutor, investigation, the injured party, organisation, criminal prosecution, prosecutorial associate, Deputy Public Prosecutor, Republic Public Prosecutor, objection

1 Deputy Republic Public Prosecutor of the Republic of Serbia.

I Introduction

The recently enacted Criminal Procedure Code² regulates the role of the public prosecutor in criminal proceedings in a completely new fashion. His rights and duties have been considerably broadened, primarily by granting him the power to conduct investigation and by the takeover of the primary evidentiary initiative.³ Despite the effort of the lawmakers to regulate in detail in this Code the procedural position of the public prosecutor and his relationship with the other participants in the proceedings and other state authorities, certain rules which refer to the public prosecution could be described as incomplete, others as contradictory, while a set of certain rules is not easily applicable in practice.

In addition, the Criminal Procedure Code has not taken into account the risks that the constitutional and legal position of the public prosecutor's office implies. The lawmakers have not taken into consideration that the independence of the prosecutor's office is vitally impaired by the constitutional solution according to which the National Assembly should elect prosecutors at the Government's proposal, as well as by the fact that members of the State Prosecutor's Council are elected by the National Assembly. Therefore, we are witnessing a process that stands in stark contradiction to itself, on the one hand, prosecutor's offices are subordinated to the executive power according to the Constitution, on the other, the competencies of an independent judicial authority, the investigating judge, are transferred to prosecutor's offices in the criminal proceedings. By doing this, we are convinced, the objectivity of the entire criminal proceedings is jeopardised, especially of the investigation in which the prosecutor occupies a central place.

In addition to not taking into account the constitutional position of public prosecutor's offices, the lawmakers have not taken into consideration the fact that a prosecutor's office is organised according to a traditional model, which is overly centralised and implies virtually unrestrained hierarchy, which considerably impairs its ability to adapt to the new procedural role and diminishes its ability to fully complete the assigned tasks.

The last, but possibly the most important, objection that should be raised in the introduction, refers to the incompatibility of the new CPC with Article 32, para. 1 of the Constitution of the Republic of Serbia.⁴ The Constitution, in the said provision, states that "everyone shall have the right to a public hearing before an independent and impartial tribunal established by the law within reasonable time, which shall pronounce judgement on their rights and obligations, grounds for suspicion resulting in initiated procedure and accusations brought against them." According to the new Criminal Procedure Code, Art. 2, para. 2, item 14, the "proceedings" refers to both preliminary investigation and criminal proceedings. If preliminary investigation has the character of criminal proceedings, then definitely the investigation that follows the preliminary investigation represents criminal proceedings. The investigation is instituted by the order to conduct the investigation and it is suspended by the abandonment of prosecution by the public prosecutor who is the authority in charge of the proceedings at the investigation stage (Articles 296 and 308 of the CPC). Therefore, the public prosecutor, during the investigation, independently hears and decides on the suspicion that caused the investigation, which is not in compliance with

2 Official Gazette of the Republic of Serbia, no. 72/ 2011. Hereinafter referred to as the new, newly enacted, newly passed... etc. CPC.

3 Beljanski, S., Ilić, G., and Majić, M., *Zakonik o krivičnom postupku-predgovor* (Criminal Procedure Code – Preface), Belgrade, 2011, p. 16.

4 Official Gazette of RS, no. 98/ 2006.

the constitutional provision which stipulates that the court hears whether the suspicion which had caused the investigation to be instituted was well-founded. In addition to all this, we should note that there is absolutely no judicial review of the prosecutor's decision to institute or abandon the investigation. So, the conclusion that the concept of the investigation, according to which the prosecutor decides whether the suspicion which had caused the proceedings to be instituted was well-founded, does not comply with the cited constitutional norm is undisputedly accurate.

II. A Critical Overview of Certain Provisions of the CPC

We shall commence the analysis of the Criminal Procedure Code with the Article 2. Under Article 2 the list of the definitions of the terms used in the Code is provided and under item 6 the meaning of the term 'public prosecutor' is specified. The term 'public prosecutor' is understood to mean all public prosecutors of all types of public prosecutor's offices, all deputy public prosecutors, as well as the persons authorised to act on their behalf. The Article 48 elaborates on Article 2, item 6 by listing the persons authorised to act on the public prosecutor's behalf. In addition to deputy public prosecutors, actions in criminal proceedings may be undertaken on behalf of the public prosecutor by senior prosecutorial associates and prosecutorial associates for criminal offences which carry a sentence of up to 8 years in prison and criminal offences which carry a sentence of up to 5 years in prison, respectively. This implies that the Code provides these associates a status of an *ex lege* proxy of the public prosecutor for the criminal proceedings in question. The rule contained by the Article 48, however, is in direct contradiction to Article 159, para. 4 of the Constitution. Article 159 of the Constitution deals with the internal organisation of the public prosecutor's office, and under para. 4 specifies that the public prosecutor's function may be performed by the deputy public prosecutors as well. Therefore, the Constitution restricts the circle of those who may perform the public prosecutor's function to public prosecutors and their deputies. Therefore, the introduction of the prosecutorial associates into the circle of those who may perform the public prosecutor's function in criminal proceedings goes directly against the Article 159, para. 4 of the Constitution.

The introduction of prosecutorial associates into the circle of those who may act in criminal proceedings is also contrary to the Law on Public Prosecutor's Office. Under Article 11 of the Law, which defines the terms used in the said Law, it is stipulated that "the prosecutorial function is the function of the Public Prosecutor and the Deputy Public Prosecutor."⁵ Considering that according to the Law on Public Prosecutor's Office prosecutorial associates are not holders of public prosecutorial functions they therefore do not have the authority of public prosecutors whose authority is vested in them by virtue of the function. In situations where two regulations rival each other and it is the Criminal Procedure Code and the Law on Public Prosecutor's Office, the latter is applied, as it is in terms of the organisation of the public prosecutor's office *lex specialis* and it takes precedence over CPC.

With regard to this topic, it should be said that assigning authority to prosecutorial associates in criminal proceedings creates a discrepancy. The analysis of regulations on the prosecution service and those that control the position of prosecutorial associates leads to that conclusion. For

5 Incidentally, Article 18 of the Rules of Administration of Public Prosecutor's Office (Official Gazette of the RS, no.110/ 2009, and 87/ 2010) in dealing with the incumbents of prosecutorial functions, lists solely public prosecutors and their deputies.

instance, if a public prosecutor should want to intervene as an associate's superior in the criminal case assigned to a prosecutorial associate, it could not be done according to the procedure stipulated by the Law on Public Prosecutor's Office, since the Law does not recognise a mandatory instruction to a prosecutorial associate, only to a lower-ranking prosecutor or a deputy public prosecutor. Secondary legislation of the public prosecution service does not regulate either how the public prosecutor, the deputy public prosecutor, and the prosecutorial associate are subordinated, when the said associate is undertaking actions in criminal proceedings. In such a situation, the prosecutor would only be able to apply the regulations that govern the position and authority of civil servants.

Under Article 51 of the CPC, the right to an objection by the injured party is regulated in situations in which the public prosecutor dismisses criminal charges, suspends the investigation or abandons criminal prosecution before the indictment is confirmed. The injured party may file an objection on which a higher-ranking prosecutor shall directly decide. The higher-ranking prosecutor shall decide on the said objection, in a decision against which no appeal or objection is allowed. If the objection of the injured party is upheld, the higher-ranking prosecutor shall issue a mandatory instruction to the competent public prosecutor to institute or proceed with the criminal prosecution. To clarify, it should be said that the objection is a new instrument which has been created as a sort of substitute for the abolished right of the injured party to undertake prosecution before the indictment is confirmed.⁶

The position of the injured party in the investigation is similar to the position of the injured party according to the CPC in BiH,⁷ according to which, if the prosecutor decides not to conduct the investigation, the injured party is notified of the decision and may file an objection within eight days to the "prosecutor's office". The injured party is entitled to the same rights when the prosecutor renders a decision to suspend the investigation. Certain authors hold, and rightly so, that the BiH CPC has neglected the interests of the injured party and marginalised the position of the said party, although many other criminal procedure systems are undergoing the opposite process of strengthening the victim's position.⁸ Bearing in mind that the new CPC of Serbia regulates in a very similar fashion the position of the injured party in the investigation, the conclusion about the neglected interests of the injured party and the marginalisation of the said party in the proceedings, could very well apply to the injured party according to the new CPC of Serbia.

It is not the best solution not to have an external review of public prosecutors' decisions against initiating or proceeding with criminal prosecution. This is our contention, given the nature of public prosecution's internal structure. The rigid hierarchical structure of the Serbian Public Prosecution Service, in addition to the fact that all public prosecutors and all public prosecutor's offices are part of a single undivided system, makes it virtually impossible to objectively reconsider decisions of lower-ranking prosecutors. Higher-ranking public prosecutors decide on objections from injured parties, while constantly being in a superior position of authority, which

6 It should be mentioned that some states that used to be a part of former Yugoslavia have not changed the position of an injured party in criminal proceedings, despite changing the concept of the investigation. (See: Bubalović, T., *Novi koncept i nova zakonska rešenja u Zakonu o kaznenom postupku Hrvatske of 15th Dec. 2008*, Annals of the Faculty of Law at the University of Zenica, no. 6. year 3, Zenica, 2010, p.19.

7 Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette of BiH, no. 3/03, 32/03,36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09.

8 Dautbegović, A., and Pivić, N., *Položaj oštećenog u krivičnom postupku Bosne i Hercegovine*, Annals of the Faculty of Law at the University of Zenica, no. 5. year 3, Zenica, 2010, p. 11.

gives them complete control over the work of lower-ranking public prosecutors, even before they decide not to initiate or continue with criminal prosecution. If this is the case, it is highly unlikely that a higher-ranking public prosecutor will impartially review decisions of a lower-ranking prosecutor, when in doing so he would indirectly acknowledge his own failure to exercise control as his superior.

Introduction of objections by injured parties should bring about changes in how public prosecution functions internally and cause amendments to be made to the Rules of Administration of Public Prosecutor's Office.⁹ The right of a prosecutor assigned to a case, referred to in Article 51 of the Rules, to request from his directly higher-ranking prosecutor to provide him with clarification of legal and other issues and with opinions and instructions on how to proceed in the particular case, ought to be harmonized with the power of that specific prosecutor to decide on an objection of an injured party referred to in Article 51 of the CPC. Namely, should a lower-ranking prosecutor consult with a directly higher-ranking prosecutor before deciding against initiating or proceeding with criminal prosecution, then, it is meaningless for the injured party to file an objection with the same prosecutor who approved such a decision.

Article 51 of the CPC introduces into the system of public prosecution a special kind of mandatory instruction, namely an instruction of a higher-ranking public prosecutor to initiate or proceed with criminal prosecution. Law on Public Prosecutor's Office does not provide for any such mandatory instruction, so it would make sense to specifically provide for it, by making amendments to the said Law.

Article 117, para. 3 of the newly passed Code governs the right of defendants and their defence attorneys to appeal against decisions of public prosecutors not to grant motions to have expert witness evaluation carried out during investigation. A judge for preliminary proceedings rules on the appeal within 48 hours. Before comparing this provision to provisions of the Code governing launching of the investigation, it may be said with certainty that it relates to protection of defendant's rights during an investigation, which is to be expected. However, if judicial protection in cases when motions to have expert witness evaluation carried out are rejected is compared with a defendant's position during the investigation, a lack of logic can be perceived. On the one hand, no legal remedy against a decision to launch an investigation is available to a defendant, but on the other, he is entitled to demand judicial protection during an investigation in case his motion to have expert witness evaluation carried out is denied. If we add to this that defendants and the defence are entitled to object to irregularities occurring in the course of an investigation, it does not seem natural that there is a lack of any legal remedy against the decision to launch an investigation.¹⁰ With regard to legal remedies against a decision by which public prosecutors launch investigations, it should be mentioned that some foreign codes do not allow any particular legal remedy against such a decision. There is no legal remedy provided for in the new Criminal Procedure Code of the Republic of Croatia.¹¹ A similar solution is contained in Article 98 of the Austrian CPC and in Article 160 of the German CPC, which stipulate that preliminary proceedings are conducted as "police inquiries" or as "prosecutorial investigation" which commences when a public prosecutor issues an order against which no legal remedy is allowed.

9 Rules of Administration of Public Prosecutor's Office, no. 110/2009 and 87/2010.

10 In considering this issue, we have not dealt with whether it is justifiable or not to have both investigation and preliminary investigation at the same time or two stages in the proceedings with the same level of doubt – reasonable doubt.

11 Official Gazette, /no./ 152/08 and 76/09.

Nevertheless, when it comes to an important issue as this one, which greatly affects the position of a person being investigated, legislative solutions from other countries should not be adopted at their face value only based on an argument from authority, namely that they are so defined in comparative law.¹²

Authority of the public prosecutor is governed by Article 285 of the recently enacted Criminal Procedure Code. The content of the article is rather ambiguous and authority of the public prosecutor has been ill-defined. Here is an example. Paragraph 1 of the Article stipulates that a public prosecutor shall lead preliminary investigation and in paragraph 2 it is stipulated that for the purpose of leading preliminary investigation, a public prosecutor shall take necessary actions to prosecute perpetrators of criminal offences. It can be inferred from the contents of para. 1 and 2 of Article 285, that public prosecutors prosecute offenders in order to lead preliminary investigation. When in reality, if we follow logic, it is the other way around, a public prosecutor is charged with leading preliminary investigation in order to be able to fulfil his function which is to prosecute offenders.¹³

Article 296, para. 2 stipulates that an order to conduct investigation is issued “before or immediately after the public prosecutor has or the police have undertaken their first evidentiary action in preliminary investigation, but not later than 30 days after the date on which the public prosecutor is notified about the first evidentiary action of the police.” According to this, by taking any kind of evidentiary action (e.g. search of residence) the police may “force” a public prosecutor to open an investigation regardless of his attitude towards it. In addition, if we consider that public prosecution service is not an operating authority and that the police, on the other hand, have enormous operating capacities, it can be expected that such “forcing” will be used as common practice.

The fact that it is possible that the police, by undertaking an action in preliminary investigation, can “force” any public prosecutor to launch an investigation calls into question the independence of the public prosecution service as a state authority, and of public prosecutors and deputy public prosecutors to exercise their powers, which is guaranteed by the Constitution and the Law on Public Prosecutor’s Office (Article 158, para. of the Constitution, Article 5, para. 1 of the LPPO). May public prosecutors exercise their authority independently, if they are bound to open investigations within thirty days after the date on which they are informed that the police have taken their first action in the preliminary investigation? Quite certainly they can not, and the police are thereby given a chance to influence the work of the prosecution service, which is contrary even to Article 5, para. 2 of the Law on Public Prosecutor’s Office, which lays down that it is prohibited to exert “any form of influence on the work of the public prosecution service and their proceeding in matters by either executive or legislative authority”.

III. The New CPC and Structure of Prosecution Service

Finally, we should state that the changed model of criminal procedure and significantly broadened scope of authority of public prosecutors from the new CPC, will necessarily lead to making

12 Bupalović, T., *Novi koncept i nova zakonska rešenja u Zakonu o kaznenom postupku Hrvatske od 15.12.2008. godine*, Anali Pravnog fakulteta Univerziteta u Zenici, br. 6. god. 3, Zenica, 2010, p.22.

13 The last paragraph stipulates that a public prosecutor is authorised to “take control over” an action “which has already been taken independently by the police pursuant to the law”. And therefore, to take charge of the action that has already been taken.

essential changes to the structure of public prosecution service. Greatest interventions ought to be made with regard to the monocratic system of the public prosecution and powers of the Republic Public Prosecutor. The fact that the monocratic principle underpinning the Law on Public Prosecutor's Office has been adopted from the Constitution of the Republic of Serbia, may by no means provide justification for not criticizing the wrong way in which this issue has been laid down in the Constitution and other legislation. At the core of any monocratic system is that all the duties that fall within the competence of public prosecution service are performed by one person – the public prosecutor. This principle took shape for the first time in the 1946 Law on Public Prosecution Service¹⁴ and it has survived until today, without being modified. Perhaps it was justifiable to introduce a monocratic system into the prosecution service at the time, when the first post-war law on prosecution was passed. Above all, since the public prosecution service, as regulated under the 1946 Law was an omnipotent authority of general state control over numerous and diversified competencies. Since then, the controlling role of a public prosecutor has completely disappeared, as well as other various competencies of the prosecution service that went beyond criminal proceedings. The monocratic principle has been maintained in its original, in spite of the transformation of its competencies. Thus laid down monocratic principle has had negative effects with regard to prosecutorial practice. Namely, a too broadly formulated monocratic principle implies that public prosecutors are exclusively responsible for the work of respective prosecutor's offices, which is at the same time accompanied by a "weakening" responsibility of deputy public prosecutors. This is particularly prominent in prosecutor's offices in which there are a lot of deputies, and the public prosecutor bears responsibility for the actions of his deputies whose decisions he cannot actually access or control.¹⁵ Consistently applying the monolithic principle to the concept of prosecutorial investigation means that investigations will be conducted by deputy public prosecutors, who virtually have no professional responsibility for the course and outcome of their investigations, given the fact that it is the public prosecutor who will be held accountable for the work of his office.

In addition, the monocratic principle, as defined by the Law, causes yet another problem. Article 5, para. 1 of the Law on Public Prosecutor's Office provides that deputy public prosecutors are independent in the performance of their duties. How can deputy public prosecutors act independently when they have no autonomous authority, but they solely act as authorised by the public prosecutor? How is it even possible to discuss the independence of deputy public prosecutors when they may only work on what they are assigned to, and when their superiors may revoke their assignments without any limitations? Therefore, a contradiction can be observed here: on the one hand, a deputy public prosecutor is assigned authority to decide on initiating and abandoning of investigations and many other competences, while on the other hand, they perform all of those assignments as authorised by public prosecutors.

Another issue with regard to how the public prosecution service is set up, is the position of the Republic Public Prosecutor. According to Article 29 of the Law on Public Prosecutor's Office, his competencies are numerous, in a way that the Law equates the authority of public prosecution with the person of the Republic Prosecutor to a considerable degree. The scope of powers granted to the Republic Public Prosecutor has been subject to convincing objection from experts with

14 Official Gazette of the FNRJ, no. 60/1946.

15 There are some 80 deputy public prosecutors working at the First Basic Public Prosecutor's Office in Belgrade. Is it possible for a superior official in charge of an office with so many employees to have complete control of the work and decisions of deputy public prosecutors?

the Council of Europe as well. They have concluded that certain powers of the Republic Public Prosecutor may result in “excessive powers, not particularly compatible with the distribution of power in a democratic society.”¹⁶ A question arises with regard to this: should a prosecution service set up in a way that actions of all the prosecutors and their deputies are controlled by the Republic Prosecutor, be granted all those numerous powers, as does the new CPC, and thus let one person have the control over all criminal proceedings at their investigation stages?

16 Pierru Cornu, Prosecutor Canton of Neuchatel, *Komentari na nacrt Zakona o Državnom veću tužilaca i nacrt Zakona o javnom tužilaštvu*, Neuchatel, 2007, p.18.

Grounds For Ordering Detention Under the New Serbian Criminal Procedure Code

Summary

This paper contains an analysis of the procedural reasons for ordering detention under the new Criminal Procedure Code (CPC) of the Republic of Serbia (RS). Viewed from the aspect of the structure of the content, the subject matter is analysed in three introductory notes, three separate sections, and a concluding discussion. In the introductory notes the author presents a general position on the measure of detention in the new CPC, reflected in the view: “In respect of detention, besides taking some of the satisfactory provisions existing in the preceding CPC, the new CPC introduces a completely new ground for ordering detention, more precisely defines the other grounds, and leaves out two existing grounds ... a broader range of measures for securing the presence of the defendant and unobstructed conduct of criminal proceedings has been placed at the disposal of courts, who are thereby no longer compelled to order detention indiscriminately, as the strictest available measure.”

The work's first part is an analysis of the reasons for and possibilities of ordering detention in the new CPC, in regular criminal proceedings. The analysis was made according to their sequence in the CPC: grounded suspicion, a flight risk, a risk of collusion, a risk of repeating the offence, and disturbing the public. The two other sections deal with possibilities of ordering detention in summary proceedings, and the proceeding for ordering the security measure of compulsory psychiatric treatment.

In his concluding discussion the author presents a summary of the results obtained in studying the subject matter of the paper. The main is that the “New CPC regulates the reasons for ordering detention in a more modern and precise manner.”

1 Judge of the Special Department for Organised Crime of the High Court in Belgrade.

Keywords: detention, the new CPC, reasons, grounded suspicion, flight risk, risk of collusion, risk of repeating the offence, disturbing the public, summary criminal proceedings, security measures, the court

Introduction

The need for developing procedural legislation, as well as the fact that the Republic of Serbia has ratified numerous international conventions and thereby undertaken to harmonise its law with standing international standards, have resulted in the adoption of a new and modern code of criminal procedure, which means that contemporary trends in the development of criminal procedural legislation have not bypassed the Republic of Serbia. The Criminal Procedure Code (CPC) was adopted on 28 September 2011,² with various dates of taking effect: in proceedings for criminal offences of organised crime and war crimes it has been applied since 15 January 2012, and in all other proceedings the CPC will become effective from 15 January 2013. Among its numerous novel features, the CPC focuses on measures to secure the presence of the defendant and unobstructed conduct of criminal proceedings, which is shown by the fact that in contrast to the preceding CPC's five measures, there are seven in the new CPC.

As regards detention, besides retaining some of the satisfactory solutions found in the preceding Criminal Procedure Code (CPC/01),³ the new CPC introduces a completely new ground for ordering detention, defines the other grounds in more detail, and also leaves out two former grounds. Furthermore, all the grounds for ordering detention should also be viewed in a new context, proceeding from the fact that there are more measures for securing the presence of the defendant and unobstructed conduct of criminal proceedings, which in fact points to a different, more limited, application of detention, by reason that the courts now have at their disposal a wider range of measures for securing the presence of the defendant and unobstructed conduct of criminal proceedings, and are therefore no longer compelled to order detention indiscriminately, as the severest measure available.

Detention is one of the harshest measures available for securing the presence of the defendant and unobstructed conduct of criminal proceedings. It consists of a deprivation of liberty based on the decision of a court, when legal requirements have been fulfilled.⁴ The measure, besides representing preventive restriction of liberty, also represents enforcing on the detainee regulated conditions of life for a certain period of time.⁵ Proceeding from the fact that detention is a measure infringing in the most profound way on the constitutionally guaranteed freedoms and rights of citizens, it has been elevated to a constitutional level.⁶ For that reason legality of action in ordering and extending detention represents one of the main preconditions for proper implementation of constitutional provisions.⁷ The Constitution⁸ defines the conditions under which detention can be ordered, and its duration.⁹ The institution of mandatory detention has been present

2 Criminal Procedure Code, Official Gazette of the RS, No. 72/11

3 Criminal Procedure Code, Official Gazette of the FRY, No. 70/01 and 68/02 and Official Gazette of the RS, Nos. 58/04...76/10.

4 Proevski, V. – Krckovski, M., *Zakon za krivičnata postapka, objasnuvanja i obrasci za praktična primena*, Skopje, 1980, p. 301.

5 Dimitrijević, D., *Krivično procesno pravo*, Belgrade, 1981, p. 215.

6 Bejatović, S., *Krivično procesno pravo*, Belgrade, 2003, p. 253.

7 Pavlica, J. – Lutovac, M., *Zakon o krivičnom postupku u praktičnoj primeni*, Belgrade, 1985, p. 294.

8 Constitution of the Republic of Serbia, Official Gazette of the RS, No. 98/06.

9 See Articles 30 and 31 of the Constitution.

in law for a long time, but it no longer exists in the CPC, as well as in the CPC/01. Here, the CPC retains a standard properly established in the CPC/01.

For detention to be ordered statutory grounds for detention need to be fulfilled. There are several such grounds, and all are explicitly listed in the CPC. Besides founded suspicion/probable cause/, as the main condition, ordering detention requires the existence of another of alternatively set conditions: a flight risk, a risk of collusion, a risk of repeating the offence, and disturbing the public.¹⁰ There are also special conditions for ordering detention in summary proceedings, and in proceedings for ordering a security measure of compulsory psychiatric treatment.

I Reasons of possibilities of ordering detention

1. Well-founded suspicion

The first and main condition for ordering detention is the existence of well-founded suspicion that the defendant has committed the criminal offence with which he is charged. Although this is a necessary requirement, it is not enough on its own; at least one of the other conditions also needs to be fulfilled.¹¹

The CPC defines well-founded suspicion/probable cause/ as a set of facts that directly show that certain person committed a criminal offence.¹² Suspicion in the CPC exists in different degrees: reasonable grounds to suspect, probable cause, justified suspicion, and certainty. A higher degree of suspicion is required for ordering detention than that needed for conducting an investigation, which requires only the existence of reasonable grounds to suspect. In respect of the investigation, we should keep in mind that this is the first opportunity for the court to assess the quality of the suspicion – in the process of ordering detention. This is for the reason that the prosecutor is the person deciding whether on not to launch an investigation and the court has no possibility of reviewing whether the order to conduct an investigation is justified or not. There exists a different situation in respect of ordering or extending detention after the indictment is confirmed. The Special Department for Organised Crime and the Special Department for War Crimes of the High Court in Belgrade assumed a legal position that the substantiation of a ruling extending detention after the indictment is confirmed should state that justified suspicion is concerned (which, under Article 2 para 1.19, also contains grounded suspicion regulated by Article 211 para 1), because after the confirmation of the indictment, well-founded suspicion (the minimum for detention to be ordered at all) has turned into justified suspicion (legal opinion assumed at a session of the Special Department for Organised Crime and the Special Department for War Crimes of the High Court in Belgrade held on 6 March 2012).

The new CPC treats the existence of well-founded suspicion fully as a condition for ordering detention, in contrast to earlier legislation, where while deciding on detention establishment of well-founded suspicion was more or less declarative in character and generally boiled down to

10 Art. 211 of the CPC.

11 Vasiljević, T. - Grubač, M., *Komentar Zakonika o krivičnom postupku*, Belgrade, 2011, p. 328

12 Art. 2 para 1.18 of the CPC

the determination of the existence of a certain legal act which represents the basis for the proceedings. In that context, it is noted in a court decision extending detention that the decision on detention could not be challenged successfully by an appeal rebutting the existence of well-founded suspicion that the defendant had committed the criminal offence, by stating that the indictment is not legally effective since the well-founded suspicion proceeds from the very facts that a ruling instituting an investigation against the defendant had been issued and that the investigation had yielded sufficient evidence for filing an indictment (ASB, Kž. No. 2548/10 dated 25 June 2010). In contrast to this view, under the new CPC the court is not only required to establish the existence of well-founded suspicion when deciding on detention, but also if in controlling detention, after the indictment is confirmed, the court determines that there is no well-founded suspicion and therefore repeals detention, it is also authorised to examine the indictment in respect of the existence of grounded suspicion.¹³

2. Flight risk

Grounds for ordering detention defined in para 1.1 essentially concern the risk that the defendant could abscond.¹⁴ Examples of the flight risk listed include: when the defendant is hiding, when his identity cannot be established, when in a capacity of defendant he is clearly avoiding appearing at the main hearing, or if there exist other circumstances indicating a flight risk,¹⁵ which covers other unspecified circumstances that might indicate a flight risk. In contrast to earlier legislation, where avoidance of appearing at the trial was a distinct condition for ordering detention, the CPC rightly treats this as a flight risk.

Viewed abstractly, a risk of flight exists in all cases when a person commits a criminal offence and criminal proceedings are instituted against that person, because everyone is keen on avoiding a potential penalty.¹⁶ However, neither theory nor practice accept the position that an abstract risk of flight is enough to order detention. In such a case, the requirement for ordering detention would effectively be an assessment of the well-founded suspicion that the defendant has committed the criminal offence, because a flight risk would always be present. Ordering detention on these grounds requires the existence of concrete circumstances indicating a flight risk. Such circumstances might include the defendant's conduct before or after the commission of the criminal offence, or after criminal proceedings are instituted.¹⁷ They can be very different, and jurisprudence offers numerous different examples.

Given that this reason for ordering detention has not been revised to any great extent in the CPC compared to earlier legislation, the existing wealth of case law can be used in interpreting this provision of the Code, providing a response to the question of what flight risk is, as well as what is not flight risk.

13 Art. 216 para 4 of the CPC

14 Art. 211 para 1.1 of the CPC

15 Vasiljević, T. – Grubač, M., *Komentar Zakonika o krivičnom postupku*, Beograd, 2011. god., p. 329

16 Petrić, B., *Komentar Zakona o krivičnom postupku*, Šid, 1982, p. 462

17 Sjerčić – Čolić, H. – Hadžiomeragić, M. – Jurčević, M. – Kaurinović, D. – Simović, M., *Komentari zakona o krivičnom/kaznenom postupku u Bosni i Hercegovini*, Sarajevo, 2005, p. 417

Given the wealth of case law, we can list here a few characteristic decisions. Courts recognised a flight risk situations where a foreign national with no permanent or temporary residence in the Republic of Serbia was concerned, especially if that person is a citizen of a state with which Serbia has no mutual legal assistance agreement (OSS, Kv. No. 212/07 dated 19 October 2007), a foreign citizen illegally staying in the Republic of Serbia in a hut with no street name and number (OSB, Kž. No. 4689/2009 dated 30 December 2009); a person without permanent work, with several previous convictions and escaped from prison, and is also subject to criminal proceedings in connection with a criminal offence punishable by a term of imprisonment exceeding ten years in duration (VSS, Kž2. No. 1228/05 dated 25 July 2005); a person with a registered temporary residence at the address of a flat which he had sold, who has not registered his new residence, and is illegally staying at other locations, and had been in flight after the commission of the offence (OSB, Kž. No. 2440/96 dated 24 December 1996); the defendant lived with a friend in Novi Sad without registering with the authorities, his mother lives in Romania, and his brother in Lebanon, where he had also stayed (VSS, Kž2. No. 1333/05 dated 11 August 2005); a foreign national with forged personal documents (VSS, Kž2. No. 13/05, dated 6 January 2005); a person for whom case files contain four different addresses (OSB, Kž. No. 2289/00 dated 28 December 2000), a person who had given the court three temporary addresses during the proceedings but could not be found at any of them (VSS, Kž. No. 1938/03 dated 25 November 2003); a defendant stayed in the Netherlands for a number of years, for which reason owing to the expiry of the statute of limitation he never served earlier prison sentences for criminal offences of the same type, and in the process started a family with a foreign national (OSB, Kž. No. 870/05 dated 30 March 2005); at the time of deprivation of liberty a person used a forged ID of another person with his own photograph inserted (OSB, Kv. No. 1330/06 dated 23 March 2006); a person according to police records prone to vagrancy (OSB, Kž. No. 244/02 dated 18 February 2002); a person subject to a 17-year search based on a search warrant (OSB, Kž. No. 1871/03 dated 18 June 2003); a foreign national who fled to Serbia with the intent of illegally entering a European Union country (VSS, Kž2. No. 430/09 dated 23 February 2009); a person fleeing from serving a prison term in connection with another conviction (OSB, Kž. No. 2568/02 dated 17 December 2002).

There are also many cases where courts did not determine a flight risk: the court is aware of the address at which a person is staying without registering, irrespective of the fact that the defendant is not resident at the address where he has permanent residence (ASB, Kž2. No. 1411/11 dated 29 April 2011); there is a possibility of crossing the border between the Republic of Serbia and the Republic of Montenegro without a passport and presenting only a personal ID, having in mind the fact that this privilege is a consequence of the decision of the authorities and can be used by all citizens of the Republic of Serbia, including the defendant, and as such is not a personal right or the capacity of defendant which would in itself indicate a flight risk (ASB, Kž2. No. 2673/10 dated 2 July 2010); after committing a criminal offence of attempted murder, leaving the scene of the crime and staying with friends overnight, the defendant turned himself in and confessed to the crime and showed to the police the knife he used to wound the injured party (VSS, Kž2. No. 1667/03 dated 10 October 2003); a flight risk is justified exclusively by stating an abstract possibility that a person could obtain a right (a passport of the Republic of Macedonia) which, objectively, that person could use to obstruct criminal proceedings (ASB, Kž2. Po1 No. 140/10 dated 9 June 2010).

In spite of being rare, there is also the situation where detention should be ordered because the identity of the defendant cannot be determined; in one case the defendant sent a submission

from detention notifying the court that his name and surname were not those listed in the ruling ordering detention (OSB, Kž. No. 98/04 dated 20 January 2004).

Obvious avoidance of attending the main hearing was deemed to exist: when the court of first instance postponed eight scheduled hearings at the request of the defendant, and did not hold another seven because the defendant had failed to show up (OSS, Kž. No. 468/07, dated 29 November 2007); when the defendant, after being released from detention and promising that he would respond duly to all summons, broke his promise and failed to respond to a duly received summons for the main hearing (OSB, Kž. No. 3682/03 dated 8 December 2003); when on several occasions immediately before the main hearing the defendant engaged the services of a new defence counsel, and thereafter, after the defence counsel arrived and asked for adjournment for reasons of the defendant's poor health, and the court instructed the defence counsel to bring medical documentation, the defendant revoked the power of attorney of the defence counsel and engaged the services of a new one (OSS, Kž. No. 266/07 dated 6 February 2007).

3. Risk of collusion

The risk of collusion is a specific ground for ordering detention. It exists when there are circumstances indicating that the defendant could destroy, conceal, alter or falsify evidence or traces of a criminal offence, or if particular circumstances indicate that he will obstruct the proceedings by exerting influence on witnesses, accomplices or concealers.¹⁸ The aim of this ground for ordering detention is to protect the authenticity of evidence.¹⁹ The new CPC retains the existing legislation's definition of the collusion risk.

The duration of the detention ordered on this ground is determined by the CPC – until the evidence is secured. In actual practice this ground for detention usually terminates when the investigation is completed, given that by the end of the investigation most of the evidence will have been collected. However, a danger of influencing witnesses can also exist subsequently, in situations where a witness may not yet have been examined (VSS, Kž 2. No. 781/06 dated 4 May 2006) or when it is obvious that pressure is being exerted on a witness who testified earlier to change his testimony, or where accomplices who are also under investigation are at large, and have not yet been questioned before the court (OSB, Kž. No. 884/06 dated 29 March 2006). Detention based on this ground may under no circumstances extend beyond the pronouncement of the judgement by the court of first instance.²⁰

There are numerous court decisions which indicate the existence of a threat of collusion. Examples include when defendants who are questioned give differing testimony on the participation and roles of defendants in the commission of criminal offences, and they all have good relations with a co-defendant who has not yet been questioned because he is at large (VSS, Kž. No. 2870/08, dated 19 November 2008); when an accomplice in the act, notwithstanding the fact that the investigation has been completed, is at large (VSS, Kž2. No. 1447/08 dated 10 June 2008); when the father of a defendant visited injured parties trying to convince them to change their

18 Art. 211 para 1.2 of the CPC

19 Jekić, Z., *Krivično procesno pravo*, Belgrade, 2001, p. 15.

20 Art. 211 para 3 of the CPC

testimony blaming the defendant, indicating to them that if they complied a motor vehicle taken from them would be returned (OSB, Kž. No. 3375/03 dated 18 November 2003).

Besides identifying the existence of a threat of collusion, case law offers cases where courts conclude that such a threat does not exist. For example, in a situation where all co-defendants and other witnesses have been examined the fact that a defendant refuses to give a testimony does not represent a circumstance indicating that, if released, defendant could influence witnesses and co-defendants (OSB, Kž. No. 2075/06 dated 25 July 2006). No threat exists either in a situation where the defendant has confessed to the commission of the criminal offences of which he is accused (VSS, Kž2. No. 44/92 dated 24 January 1993); there is no threat when there are no specific circumstances indicating that the defendant will influence witnesses, who are law enforcement officers who are to testify about finding firearms and narcotics on the defendant (OSB, Kv. No. 2619/03 dated 17 October 2003), or in a situation where a defendant's accomplice is in detention, with no possibility of being reached there, as he is in isolation, and there exist no requests for conducting an investigation into other accomplices and witnesses in connection with the offence of which the defendant is reasonably suspected (VSK, Kv. No. 266/10 dated 30 August 2010).

4. Risk of repeating the offence

The reason for ordering detention most often disputed in legal theory is a risk of repeating the criminal offence. Detention may be ordered for this reason if particular circumstances indicate that in a short period of time the defendant will repeat the criminal offence, or complete an attempted criminal offence, or commit a criminal offence he is threatening to commit.²¹ Besides being colloquially named a risk of repeating the offence, this reason for ordering detention also includes a risk of completing a criminal offence already attempted.

In order for detention to be ordered on these grounds one of the following three circumstances needs to exist: a) indication that the defendant will repeat the criminal offence, b) complete an attempted criminal offence, or c) commit a criminal offence he is threatening to commit.²² What is new to the CPC is the provision for all of the said circumstances to be of such nature as to indicate that the defendant will repeat or complete the criminal offence within a short period of time. By introducing this additional condition for ordering detention on these grounds, the legislator has effectively restricted the scope of its application. Besides establishing the presence of a threat that the defendant will repeat or complete the offence, court now also needs to determine whether the said circumstances indicate the existence of a threat that it will happen within a short period of time.

A short period of time is a legal standard, and should be assessed as such in each concrete case. It depends primarily on the type and nature of the criminal offence for which there exists a threat of being repeated. There are different criminal offences and therefore also different situations in which they could be repeated: some are permanent, others are momentary, certain criminal offences can be committed only in certain situations, for example in wars, others only while the perpetrator has a certain status, for example that of an official, etc. In any case this determinant

21 Art. 211 para 1.3 of the CPC

22 Radulović, D., *Komentar Zakonika o krivičnom postupku Crne Gore*, Podgorica, 2009, p. 222

should be interpreted as a very brief period of time. It indicates not a threat of the defendant repeating the criminal offence in the distant future, but immediately, as soon as he/she is able. Another problem which needs to be solved is defining the beginning of a short period of time, i.e., the moment from which should be gauged the threat that the defendant could repeat the criminal offence: whether it is a situation where there is a risk of the defendant committing the criminal offence immediately after the offence for which he is being tried, or should the beginning of the period of time be tied to another circumstance. This question has practical significance, because if we tie the short period of time to the moment of commission of the offence which is being prosecuted, by the passage of time since the offence was committed also lapses the threat that the defendant could commit or complete the offence in a short period of time. It would be better to interpret the provision to mean that the short period of time should be gauged in relation to the moment when there appears an opportunity for the defendant to repeat or complete the offence. This means that the concept of short period of time during which the defendant could repeat the offence should not be considered for the duration of the time when the defendant is not able to do so, for example because he/she is in detention, or while the injured party is abroad, etc. Such an interpretation has a special significance in respect of crimes of violence committed against persons close to the defendant, when there exist considerably troubled relations between those persons and the defendant. If in situations of these kind circumstances indicating a risk of repeating or completing the offence, it is clear that those circumstances should be assessed from the moment the defendant has an opportunity to repeat or complete the offence, not from the moment the offence was committed. However, this should not be confused with the fact that like all grounds for ordering detention, this one loses significance with the passage of time and should be viewed in that light when reviewing the need for detention.

The main objection voiced about this ground for ordering detention is that a risk of repeating or completing the offence is not of any significance for securing the presence of the defendant and the unimpeded conduct of criminal proceedings, so that it is not clear at all why this should be a reason for ordering detention. Practice has provided an answer to this question: ordering detention on these grounds cannot be done solely for the purpose of preventing the defendant from committing new criminal offences, but that it is also necessary to accomplish the objective defined in the CPC of securing unobstructed conduct of criminal proceedings (ASKr, Kr. No. 75/10 dated 24 September 2010).

Another objection voiced about this ground for ordering detention is that detention is ordered because of a risk of the defendant repeating or completing the offence. Critics ask how one could talk about a risk of repeating an offence in a situation where it is not even known whether the defendant committed the criminal offence for which he is on trial. Without embarking on a more profound theoretical analysis, we can note that this objection is not characteristic only of this reason for ordering detention, but that it can be voiced in the same manner in connection with all the other reasons, i.e., how can we know if there exists a risk that a person will go into hiding or influence witnesses if we do not even know whether he committed the offence for which he is being tried. In any case, this ground for ordering detention may not be interpreted in a manner violating the presumption of innocence.

The practice of courts in this area is quite extensive. Although it is a factual question, case law has built up criteria which may help to assess properly particular circumstances indicating that an offence could be repeated or completed, or if an offence being threatened will in fact be

committed.²³ We shall cite a few characteristic cases here: a defendant is reasonably suspected of committing the same criminal offences in a short period of time and has a long criminal record, which includes criminal offences of the same type of which he is now suspected (OSB, Kž. No. 3464/09 dated 5 October 2009); expert testimony has established addiction to narcotics (VSS, Kž2. No. 268/08 dated 1 February 2008); a criminal offence was committed during the probation period of a conditional sentence (VSS, Kž. No. 1094/03 dated 14 July 2003); the defendant committed a criminal offence while under the influence of alcohol; psychiatric expert testimony indicates that the defendant is addicted to alcohol and there exists a risk that he could commit the same or a similar criminal offence (OSB, Kž. No. 1348/03 dated 7 May 2003); the defendant committed a criminal offence defined in Article 246 para 1 of the Criminal Code for which he was convicted by a non-binding judgement at a time he was allowed a privilege of going on a vacation outside the prison where he had been serving his sentence (ASKr, Kž. No. 375/10, dated 10 March 2010); in a period between 2004 and 21 June 2005 the police intervened a total of six times in connection with conflicts between the defendant and his wife, acting on the spouse's reports that her husband was beating her (OSB, Kž. No. 1824/2005 dated 11 July 2005); the defendant, who lives in the same household as his granddaughter and is an alcohol addict, was convicted of charges of having sexual intercourse with the girl, then aged under 14 (VSS, Kž. No. 1888/03 dated 14 November 2003), a defendant was indicted in connection with the criminal offence of rape and incest, the injured party being the defendant's juvenile daughter (VSS, Kž2. No. 425/06 dated 7 March 2006). Circumstances indicating a possibility of the defendant repeating a criminal offence do not have to relate to a criminal offence of the same type as that for which the defendant is being prosecuted (OSB, Kž. No. 1863/05 dated 13 July 2005): in fleeing from the injured party the defendant fires a bullet in the air, and the next day comes back and fires two bullets at the injured party, there is a justified fear that he could complete the offence he had started (OSB, Kž2. No. 307/90 dated 22 March 1990); the defendant is threatening to commit a criminal offence irrespective of the fact that criminal proceedings are being conducted in connection with that offence (OSB, Kž. No. 3336/03 dated 13 November 2003).

Courts also provide an answer to the question of when there is no risk of an offence being repeated or completed. In the practice of courts, for ordering detention of the defendant for the aforementioned reasons it is not sufficient that the defendant has previous convictions, but other circumstances indicating a risk of the defendant repeating the criminal offence must also exist (VSS, Kž2. No. 1818/09 dated 9 July 2009). The reasons also do not exist if the defendant, who is in detention, begins voluntary treatment for drug addiction, and a neuropsychologist and a clinical psychologist propose compulsory treatment at liberty (VSS, Kž2. No. 862/08 dated 4 April 2008). In the case of an investigation against a defendant in connection with well-founded suspicion that she has committed a criminal offence defined in Article 246 para 1 of the CC, and the defendant has admitted being a drug addict and that she has begun medical treatment, and has no previous convictions, there exist no specific circumstances that would indicate that if released the defendant would repeat the criminal offence (VSS, Kž. No. 850/06 dated 16 May 2006).

23 Cvijović, O. – Popović, D., *Zakon o krivičnom postupku, sa komentarom, objašnjenjima i uputstvima za praktičnu primenu*, Belgrade, 1977, p. 150

5. Disturbing the public

Another ground for ordering detention is disturbing the public. Detention can be ordered based on this ground when the criminal offence with which the defendant is charged is punishable by a term of imprisonment of more than ten years, or a term of imprisonment of more than five years for a criminal offence with elements of violence, or a court of first instance has pronounced against the defendant a prison sentence of five or more years, and the way of commission or the gravity of consequences of the criminal offence have disturbed the public to such an extent that this may threaten the unobstructed and fair conduct of criminal proceedings.²⁴

The first question that may be asked is if the CPC prescribes by this provision a new reason for ordering detention, or if a revised item 5 of para 1 of Article 142 of the CPC/01 is concerned. To answer the question we first need to compare the two provisions. Under item 5 detention can be ordered for a defendant if the criminal offence with which the defendant is charged is punishable by a term of imprisonment of more than ten years, or a term of imprisonment of more than five years for a criminal offence with elements of violence, and if it is justified by the especially grave circumstances of the criminal offence. A cursory comparison shows that apart from the identity of the prescribed sanctions there are no elements common to the two provisions. True, disturbing the public and particularly grave circumstances of a criminal offence may coincide in certain situations, but not always, so that we can rightly conclude that the two provisions concern completely different grounds for ordering detention. That is also the position of the courts. The Special Department for Organised Crime and the Special Department for War Crimes of the High Court in Belgrade have assumed a legal position that if a defendant is in detention, solely for the reasons listed in Article 142 para 1.5 of the old CPC (no longer in force for organised crimes and war crimes cases), the court should promptly and ex officio examine whether there exist the grounds for ordering detention listed in Article 211 para 1 items 1–4 of the new CPC, especially para 1.4. The court should therefore not wait for the next regular control, which may take place as late as 60 days thereafter, as the aforesaid 'old' reason for detention has ceased to exist ex lege (legal position assumed at a joint session of the Special Department for Organised Crime and the Special Department for War Crimes of the High Court in Belgrade on 31 January 2012).

It should be noted that the 1977 CPC²⁵ (CPC/77) had a similar determinant as a ground for ordering detention, under which detention could be ordered if the criminal offence was punishable by a term of imprisonment of ten years or more, and due to the manner of commission, the consequences or other circumstances of the offence there had happened or could have happened a disturbance of the public of such magnitude that it would be necessary to order detention for the purpose of unobstructed conduct of criminal proceedings, or public security. The provision was declared unconstitutional by the Constitutional Court, together with item 3 of the same paragraph (Federal Constitutional Court, No. 116/00, dated 7 December 2000).²⁶ The Federal Constitutional Court found that the reasons were extra-procedural in character and were not in accordance with the principle that detention could solely be a measure necessary for securing unimpeded conduct of criminal proceedings. Although by their definitions the two grounds for ordering detention are quite alike, the new definition is much more restrictive, providing for

24 Art. 211 para 1.4 of the CPC

25 Criminal Procedure Code of the SFRY, Official Gazette of the SFRY, Nos. 4/77...3/90 and Official Gazette of the FR, Nos. 27/92...13/01

26 Decision of the Federal Constitutional Court, No. 116/00, dated 7 December 2000, Official Gazette of the FR, No. 71/00, dated 22 December 2000

ordering detention only when the public has already been disturbed, but not in situations where a disturbance ‘could take place.’

Three cumulative conditions need to be fulfilled for ordering detention on this ground. Firstly, that the criminal offence with which defendants are charged is punishable by a term of imprisonment of more than ten years (or a term of imprisonment of more than five years for criminal offences with elements of violence) or that defendant has been sentenced by a court of first instance to a term of imprisonment of five years or more. Secondly, that the manner of commission of the criminal offence or the gravity of its consequences has led to disturbing of public, and thirdly, that the disturbing of the public is such that it could jeopardise the unobstructed and fair conduct of criminal proceedings (ASB, Kž2. Po1 No. 55/12 dated 24 February 2012).

The first condition for ordering detention given above is quite clear, is objective in character and needs no further comment.

The concept of disturbing the public has from the very start provoked much interest in the judiciary. Courts have rightly said that a disturbance of the public must exist at the moment the decision is taken whether or not to remand the defendant in detention (ASB, Kž2. Po1 No. 63/12 dated 21 February 2012). The next decision goes a step further and discusses the issue of disturbing the public not only in respect of ordering detention, but also extending it, and it is noted that it is not enough for extending detention that the disturbance of the public happened at a certain moment in time, but it is necessary that it continuing and is present at the moment the decision to extend detention is taken (ASB, Kž2. Po1 No. 56/12 dated 14 February 2012). Disturbing injured parties cannot be deemed to be disturbing the public, regardless of the number of injured parties (ASB, Kž2. Po1 No. 56/12 dated 14 February 2012). These decisions indicate that courts do not lightly take the step of ordering detention in the case of disturbing the public.

The third cumulatively set condition for ordering detention based on this ground is that the disturbance of the public is such that it could jeopardise the unimpeded and fair conduct of criminal proceedings. When disturbing the public will be such in its magnitude is a question of fact that the courts must resolve. One court decision notes that in accepting the existence of such grounds for ordering detention the court is required to state accurately and specifically in what manner disturbing the public could jeopardise the unimpeded and fair conduct of criminal proceedings (ASB, Kž2. Po1 No. 55/12 dated 24 February 2012). This determinant should also be interpreted as the legislator’s intention to restrict as much as possible the scope of application of this reason for ordering detention.

In essence, one of the main problems in connection with ordering detention on this ground is that the definitions of earlier codes were too broad, both that of Article 142 para 1.5 of the CPC/01 and that of Article 191 para 1.4 of the CPC/77, leading to a situation in which courts ordered detention on these grounds quite lightly. Practice has recognised the significance of differentiating between this reason for ordering detention from those provided for by CPC/01 and CPC/77, and that what is involved is essentially a new reason for ordering detention, not one whose roots lie in earlier legislation, so that in the practice of the courts recorded thus far, detention is ordered only exceptionally for this reason, with observance of the strict requirements for ordering it.

II Detention in summary proceedings

In summary proceedings, detention may be ordered for persons reasonably suspected of having committed a criminal offence if there exists any of the reasons listed in Article 211 para 1.1 – 1.3 of the CPC, or if the defendant has been sentenced to term of imprisonment of five years or more, and if it is justified by the particularly grave circumstances of the criminal offence,²⁷ so that besides the existing reasons for ordering detention another has been prescribed for summary proceedings. To order detention on these grounds, besides well-founded suspicion two other cumulatively set conditions have to be met: one that the defendant has been sentenced to a term of imprisonment of five years or more, and the other that ordering detention is required by the particularly grave circumstances of the criminal offence.

Given that the first condition is a prison sentence that has been pronounced it is clear that detention may be ordered on these grounds only after a first-instance judgement has been issued. It should be noted that this reason for ordering detention is likely to be rare in practice, given that summary proceedings are conducted in connection with criminal offences punishable by terms of imprisonment of up to eight years, indicating that situations where a court will pronounce a penalty of five years or more in connection with these criminal offences are rare.

The second condition for ordering detention is that it is justified by the particularly grave circumstances of the criminal offence. Unlike regular procedure where Article 211 para 1.4 of the CPC, which should be a counterpart for these grounds for ordering detention, stipulates disturbing the public as a condition, in summary proceedings a new standard is introduced: particularly grave circumstances of the offence; this standard is identical with one of the conditions for ordering detention under Article 142 para 1.5 of the CPC/01, and in that respect no differentiation between them should be made.

There are numerous examples of particularly grave circumstances of the offence in the case law. Here are several examples concerning summary proceedings: when the defendants are police personnel, given the increased danger to society represented by the criminal offence, as it is the duty of police personnel to prevent the commission of criminal offences (ASB, Kž. No. 2842/10 dated 15 July 2010), when there exists grounded suspicion that the defendant has committed a criminal offence in his capacity as a senior public official, unlawfully disposing of budget funds, while it was his duty to protect the public interest (VSS, Kž. No. 1306/09 dated 25 May 2009); when sexual intercourse and unnatural fornication are committed against juvenile and infirm persons (VSS, Kž2. No. 84/06 dated 19 January 2006); when the defendant is charged with a criminal offence committed in a catering facility where several persons were present and thereby the lives of several persons were threatened (VSS, Kž2. No. 82/06 dated 19 January 2006); when the criminal offence was committed in a public place in the presence of 200–300 people and where by the commission of a dangerous act – discharging a firearm – threatened the lives of an unspecified number of people – guests in a café (ASKr, Kž. No. 599/10, dated 20 April 2010).

It should also be noted that the grounds for ordering detention concern particularly grave circumstances of the offence, therefore not just grave circumstances, but a rather higher standard - particularly grave circumstances of the offence.

27 Art. 498 para 1 of the CPC.

III Detention in the procedure of pronouncing a security measure of compulsory psychiatric treatment

In the procedure of pronouncing a security measure of compulsory psychiatric treatment the CPC prescribes a special ground for ordering detention. The detention regime is also specially suited to the needs of persons who are of unsound mind. In his motion for the imposition of a security measure of compulsory psychiatric treatment the public prosecutor may request that a defendant who is at liberty be placed in detention, in addition to the grounds referred to in Article 211 of this Code, if there exists a justifiable danger that he might commit a criminal offence as a result of mental incompetency. Before deciding on detention the court obtains the opinion of an expert witness. After the issuance of a ruling ordering detention the defendant shall be placed in an appropriate medical institution or premises suitable for his medical condition, until the conclusion of proceedings before a first instance court.²⁸

CPC/01 treated this group of defendants differently from those in the regular criminal procedure - this group was not subject to detention. This is also shown by the practice of the courts: it is stated in one decision that provisions on detention are not applied in the procedure for applying a security measure of compulsory psychiatric treatment and confinement in a medical institution, so that the court cannot extend the detention ordered by a ruling of the investigative judge, but instead issues a ruling on the temporary confinement of the defendant, until the completion of the procedure for the pronouncement of the aforementioned security measure, in an appropriate health-care institution (OSV, Kv. No. 29/2003 dated 3 February 2003). In this way, defendants undergoing a procedure for the application of a security measure of compulsory psychiatric treatment had been placed in a position less favourable than that of defendants in a regular criminal procedure because they were not under a detention regime and subject to regular control of the detention, and were therefore unable to appeal against rulings extending detention, could not make motions to revoke detention, etc. The new CPC corrects this by making this group of defendants equal to all other defendants in respect of the detention regime; all provisions on detention are applied accordingly, including control of the detention. The only difference lies in the fact that defendants undergoing a procedure for the application of a security measure of compulsory psychiatric treatment are placed in an appropriate health-care institution or premises suitable for their mental condition, which is understandable.

Before deciding on ordering detention the court obtains the opinion of an expert witness, possibly one from the health-care institution that had been entrusted with the task of testing the competency of the defendant, but not necessarily. The expert witness cannot express any opinion on whether the defendant should be placed in detention, but only on the mental incompetency, the danger that the offence could be repeated, and the conditions and manner of treatment of the defendant. The participation of the expert witness in the procedure of ordering detention depends on the state of mental health of the defendant, not on the conditions for ordering detention.

Besides the existing conditions for ordering detention the CPC defines another, the existence of a justifiable danger that the defendant might commit a criminal offence as a result of mental incompetency. This is an independent reason for detention, which means that the court may order detention for the defendant on any of the grounds listed in Article 211 of the CPC, and also

²⁸ Art. 524 paras 1–3 of the CPC.

because there is a justifiable danger that the defendant might commit a criminal offence as a result of mental incompetency. Detention may be ordered for this reason alone, or on several grounds. It is not an additional condition for ordering or extending detention, but an independent reason for detention. The only common determinant with Article 211 of the CPC is that ordering detention requires the existence of a certain degree of suspicion that the defendant committed an unlawful act defined by law as a criminal offence.

Conclusion

The new CPC regulates in a more modern and exact manner the reasons for ordering detention. A number of satisfactory existing solutions have been retained, and certain reasons for ordering detention are defined more precisely. Two controversial reasons for ordering detention have been removed, and one completely new reason introduced. The courts have been granted a bigger range of measures for securing the presence of defendants and unimpeded conduct of criminal proceedings, which will inevitably lead to more restrictive application of detention as the harshest measure.

The CPC awards especial significance to the existence of well-founded suspicion as a condition for ordering detention, in contrast to preceding legislation, where establishment of well-founded suspicion in deciding on detention was more or less declarative in character and generally involved simple determination of the existence of a certain offence which is being prosecuted. Besides well-founded suspicion as the main condition for detention to be ordered, one more of the following conditions must also exist: a flight risk, a risk of collusion, a risk of repeating the offence, or disturbing the public.

In the procedure of pronouncing a security measure of compulsory psychiatric treatment defendants have been placed in a position equal to that of all other defendants in respect of detention, which was not the case before, when their rights were considerably more restricted.

It may be concluded that as regards the grounds for ordering detention, the new CPC rounds off the legal institution in a comprehensive manner, defining for it its rightful place in the system of measures for securing the presence of the defendant and unobstructed conduct of criminal proceedings.

Measures to Secure the Presence of Defendant and for Unobstructed Conduct of Criminal Proceeding:² New Serbian CPC and Regional Comparative Analysis

Summary

The subject of this paper are criminal procedure issues relating to securing the presence of defendant and unobstructed conduct of proceedings. From its structural aspect the subject issue has been addressed through two groups of questions and deliberations in conclusion. The first group relates to general observations concerning these measures where particular attention was dedicated to presentation of the issue of: concept, type and nature of measures; general rules on application thereof, and similarities and disparity in normative amplification in the new Serbian CPC on one hand, and in its previous criminal procedure legislation and legislation of three countries of the region (Croatia, BiH and Montenegro) on the other.

The second – central group of issues – is dedicated, but not limited to individual normative analysis of six of the seven of such possible measures provided under the new Serbian CPC (summons, order to bring[a defendant in], ban to approach, meet and communicate in respect to particular individual, ban to leave temporary residence; bail, and ban to leave abode). Among the number of issues analyzed in this part of the paper the following particularly stand out: requirements for application, duration and manner of decision-taking regarding each of these measures. Moreover, as in the case of the first group of issues, the issues in this part of the paper are analyzed both from the aspect of the new Serbian CPC and from the aspect of previous criminal procedure legislation and the legislation of the countries in the region (Croatia, BiH and Montenegro).

1 National Legal Officers in the Human Rights and Rule of Law Department of the OSCE Mission in Serbia. Views expressed in the paper are those of the authors and do not necessarily reflect the views and policy of the OSCE Mission to Serbia.

2 The paper does not analyse detention on remand as a special measure of this character.

The paper concludes with deliberations where authors give a summarized presentation of the results they have arrived at in analyzing the subject topic.

Key words: measures to secure presence, defendant, criminal procedure, court, public prosecutor, bail, order to bring, summons, ban to leave, abode, detention, legislation, Serbia, region

I. General observations on the measures

The new Criminal Procedure Code, adopted in 2011 and applied in Serbia as of 15 January 2011 in cases prosecuted by bodies with special jurisdiction for organised crime and war crimes, has in numerous essential elements recast and reformed the entire criminal procedure in Serbia.³ Changes also affected the measures for securing presence of defendant and unobstructed conduct of proceedings (hereinafter also intermittently referred to as - security measures),⁴ where absence of adequate stipulation would inhibit efficiency of proceedings and, often, fail to provide the fundamental prerequisites for its conduct, or protection of the rights of the defendant and other participants in the proceedings.

The subject of this paper are measures the new Code (hereinafter – new CPC, or 2011 Code, or 2011 CPC) enacts and regulates, analysis thereof and comparison with the 2001 CPC, which once the new CPC comes into force for all criminal proceedings, will cease to be applied, as well as their analysis in respect to corresponding criminal procedure laws or codes of three countries in the region – Bosnia and Herzegovina, Croatia and Montenegro.

Measures that may be applied against the defendant to secure his/her presence and unobstructed conduct of proceedings provided under the new CPC (Article 188)⁵ are:

- 1) summons,
- 2) order to bring [a defendant in],
- 3) ban to approach, meet and communicate in respect to particular person,
- 4) ban to leave temporary residence,
- 5) bail,
- 6) ban to leave abode,
- 7) detention on remand.

The new CPC provides seven types of measures, unlike the five provided under the 2001 CPC. Two or more measures may be ordered concurrently (Article 189, para 2). The novelty is that in the 2001 Code these measures were grouped together under the heading “Ban to leave abode or place of residence“ in Article 136 thereof (which provided for and regulated, under its 11

3 “Official Gazette of the RS”, no. 72 /11 and 101/11, (hereinafter – new CPC). The Code sets forth in art. 608 that the it shall apply to all other cases as of 15 January 2013.

4 “Security measure” will be used throughout the text as an English translation for the original term in Serbian - *“mere obezbeđenja”*. It should be noted that the term security measure is also used to refer to measures belonging to substantive criminal law, which in Serbian read as *“mere bezbednosti”* Security measure in the latter sense of substantive criminal law, set forth by the Criminal Code, not Criminal Procedure Code, are measures that belong to the realm of criminal sanctions, as opposed to security measure under a criminal procedure code referred to in this text, and their purpose is to eliminate circumstances or conditions that may have influence on an offender to commit criminal offences in future (defined in Article 78 of the 2006 Serbian Criminal Code).

5 Article without title of the legal text refers to the new Serbian CPC.

paragraphs, a number of measures that were similar to each other, however with crucial differences in their nature, requirements and application), whilst now they are split into three autonomous types of measures: ban to approach, meet and communicate in respect to particular person, prohibition to leave temporary residence, and ban to leave abode. The last measure was contained also in the above mentioned Article 136, but is now more amplified in detail, with augmented requirements for its order and amplified judicial control over ordering and expanded domain of applicable instruments (such as ban on use of telephone or internet). Another novelty is in the possibility to order bail in situations where grounds for detention exist pursuant to point 4 of Article 211 of the new CPC (in case of offences punishable by a term of imprisonment of more than ten years, or more than five years if the committed offence is with elements of violence, or if the pronounced sentence is five years or more and the manner of commission of the offence and gravity of consequences resulted in disturbance of the public).

The list of possible measures is very much alike the catalogue of measures provided in the codes of the region with which the new CPC will be compared to, with one key difference that in these codes, similar to Article 136 of the 2001 CPC, the mentioned bans are mainly stipulated within the same article, which will be elaborated in further text. One should mention that both BiH and Croatian codes provide also for the measure prohibiting certain business activities or official duties that the Serbian and Montenegrin codes do not have.⁶ Without going into deeper analysis of this measure stipulated in the above codes in the region, it does appear that, in certain situations, it could be an effective measure to, for example, deter the defendant from repeating or completing the felony when such felony is coupled with undertaking of certain activities or discharge of duties without having to resort to harsher measures. Hence, it remains unclear why this measure has not been included previously, nor now into the measures in Serbia.

As the new CPC introduces prosecutorial investigation, i.e. an altered role of the prosecutor and, to some extent, of the defense in the proceedings, these changes impacted – as elsewhere in the region – also on competencies and procedure to order security measure. Thus, in addition to the court, now also the prosecutor has powers to decide on security measures and to order them, which is common (with certain specific requirements) to all national systems – which will be elaborated in further text in respect to all countries of the region being compared herein.⁷

As in any legal system, stipulating measures to secure unobstructed conduct of proceedings and presence of the defendant, and subsequent enforcement thereof, must constantly balance between two often conflicting requirements. One being the duty of the State to ensure efficient judicial proceedings, protect the integrity of proceedings and rights of all participants therein, as well as the public interest, and the other being the duty of the State to protect the rights of the defendant, in this context primarily relating to right to liberty and right to a fair trial.

6 Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette of BiH, no. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 (hereinafter - BiH CPC), article 126a. Codes of entities and Brcko District provide the same measure.

See also Criminal Procedure Code, NN 152/08, 76/09 (hereinafter - Croatian CPC), art. 98, providing prohibition to perform certain activity. In Serbia there is only the measure to prohibit discharge of vocation, activity and duty provided as a security measure (in the sense of substantive criminal law, as explained in footnote 4 *supra*) under Article 85 of the Criminal Code.

7 Certain countries have bodies and services specific to such countries that are empowered to summon and services specific to such countries that are empowered to summon and enforce other measures, such as a court secretary in Croatia or court police in BiH.

Some of the fundamental principles deriving from human rights standards, particularly the right to liberty set forth in Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, require non-imposition of a stricter measure if the same purpose may be achieved with a more lenient measure. The former has been explicitly attested by the case law of the European Court of Human Rights, particularly in respect to detention as courts should always consider pronouncing of less severe measures when deliberating detention.⁸ Justification of the measure needs to be first determined by existence of statutory requirements for its ordering. The measure is revoked *ex officio* when reasons for its ordering cease, and must be replaced by another, more lenient measure whenever conditions to do so exist. Any decision ordering detention on remand or alternative measures must be reasoned.⁹ The new CPC embodies all these principles, in Article 189, and further on in articles for each individual measure, in the same way as the 2001 CPC and the codes in the region.¹⁰

In the context of general observations on measures in light of the new CPC, joint provisions on deciding on measures deserve attention. These relate to competence and procedure for deciding on and duration of the ban to approach, meet and communicate with a particular person, ban to leave place of residence, ban to leave abode, and bail. The issues have been resolved, with certain alterations identically. Their foremost characteristics are reflected below.

- Decision on ordering any of these measures is taken by the court at the motion of the public prosecutor, and after confirmation of indictment it can also be taken *ex officio*. During investigation the reasoned decision ordering, extending or revoking measures is taken by the judge for preliminary proceedings, after preferring of indictment by the presiding judge, and at trial by the chamber. An exception, as it will be explained further in the text, is the ban to leave abode as this measure is decided by the panel after preferring of indictment and not by the president of the panel (Article 209 para 2).
- As in the 2001 CPC, if the measure is proposed not by the prosecutor but by the defense, and the proceedings are conducted for a criminal offense prosecuted *ex officio*, an opinion of the public prosecutor shall be sought prior to taking of decision. Parties and defense counsel may appeal the decision ordering, extending or revoking the measure. A public prosecutor may also appeal the decision rejecting the motion to order a measure. In case of bail, the decision to set, collect or revoke bail, as well as the decision rejecting the motion for this measure may be appealed by the parties, defense counsel or person giving the bail (Article 205, para 3). The appeal shall not stay enforcement of any of the measures.
- All measures may last as long as there is a need for them. This is provided by the Code explicitly under each of the measures, except for bail, however this derives also from the general provision on basic principles for determination of measures referred in Article 189. The new CPC adds to each of the measures that it may last until judgment becomes final and/or until remand

8 Judgement of the European Court of Human Rights (hereinafter - ECtHR), Witold *Litwa v. Poland*, 26629/95, 4 April 2000, para.78, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58537>, *Jabłoński v. Poland*, ECHR, 33492/96, 21 December 2000, para 83, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59096>.

9 Recommendation (2006) 13 of the Committee of Ministers of the Council of Europe, Section II.14.1.

10 Criminal Procedure Code, Official Gazette of the FRY, no. 70/2001 and 68/2002 and Official Gazette of the RS, no. 58/2004, 85/2005, 115/2005, 85/2005, 49/2007, 20/2009, 72/2009 and 76/2010 (hereinafter - 2001 Serbian CPC) article 133, Article 95 of the Croatian CPC, Article 123 of the BiH CPC. Criminal Procedure Code, Official Gazette of Montenegro no. 57/2009 and 49/2010 (hereinafter -Montenegrin CPC) article 163.

of the defendant to serve a criminal sanction comprising of deprivation of liberty, and in case of bail, until commencement of serving of sentence (Article 207, para 3).

- The Code sets the timeframe wherein the court is required to periodically re-examine the justification of duration of the measure. As compared to the 2001 CPC where this timeframe was every two months,¹¹ in the new CPC it is extended to three months and is valid for all measures, except bail – for which the timeframe is not defined. The two-month timeframe is set forth also in criminal procedure codes of BiH, Montenegro and Croatia.¹² It seems that the three-month timeframe is unjustifiably long especially for re-examining the ban to leave abode, the measure that will be elaborated further in the text, but it may also be said that there is no principled justification in respect to other measures either to make this timeframe longer than before or longer than recognised by comparative legislation in the region. Although these other measures are less restrictive than ban to leave abode (“house arrest”) or, certainly, detention, they may certainly to significant extent restrict freedom of movement and communication. Consequently, the need for economic management and efficiency of procedure in this case should not outweigh the protection of the rights of the defendant who is already subjected to a security measure.

II. Specific measures and the new CPC

a) Summons

Summons represents the basic and least severe measure to secure presence of the defendant in the proceedings and/or to ensure conduct of proceedings. It is executed, as in all legal systems in the region, by sending, by the court or prosecution,¹³ and delivery of sealed written summons (or electronic format) to the defendant ordering him/her to appear before that body. The summons *per se* does not restrict freedom of movement or other rights of defendants and participants in the proceedings, however avoiding accepting the summons or failure to comply with the summons carries a penalty and restriction of freedom through application of stricter measures to secure compliance, commencing with the order to bring in the defendant.

Provisions on summoning of witness, expert witness or other participants in proceedings have been set apart in the new CPC in a specific provision within the Chapter regulating security measures (in Article 193), a divergence from the 2001 CPC or laws in the region.¹⁴ Regardless of the absence of a particular provision on summoning other participants in criminal proceedings in the section governing summoning, it is self-evident that in these systems too this measure also ensures presence of other participants in criminal proceedings – witnesses, injured party, expert witnesses, expert professionals, interpreters, legal representative, proxy, citizens from

11 Art.136 (7) of the 2001 CPC.

12 Art. 126b (6) BiH CPC, art. 166 (8) of the Montenegrin CPC, art. 98(6) of the Croatian CPC.

13 In Croatia the secretary of the court is the person who, based on court order, sends the summons to the defendant for evidentiary hearing, hearing of the evidentiary panel, pre-trial hearing and trial (art. 175, para 4 of the Croatian CPC).

14 In Croatia, the summons of a defendant as a measure to secure presence in proceedings is merely referred to in the chapter on such measures, while it is regulated in detail in the section on serving of case files (art. 96, referring to art. 175 of the Croatian CPC).

whom information is obtained during investigation.¹⁵ Therefore, according to the new CPC, a witness, expert witness or other participant in proceedings is summoned during the phase preceding raising of indictment by the public prosecutor or, if the prosecutor fails to do so, by the pre-trial judge at the motion of the defendant or his defense counsel (Article 193 para 1). After raising of indictment, participants are summoned by the court, if decided to question them or – introduced as a novelty – by the parties or defense counsel if they undertake the obligation to do so (Article 193 para 2). This new possibility – for the parties and defense counsel to summon witnesses, expert witnesses and other participants in proceedings after raising of indictment – clearly reflects one of the foremost intentions of the lawmaker and the spirit of the new CPC directed at enhancing responsibility and involvement of parties in proceedings. This provision may facilitate condensing of the time necessary for summoning and increase efficiency of proceedings.¹⁶

The new CPC has retained the provision whereby the defendant, if unable to respond to the summons due to illness or other compelling reason, shall be questioned in place of residence, or transport shall be provided to the building where the body conducting the proceedings is located or other location where the activity is undertaken (Article 192 para 2). Criminal procedure codes of Bosnia and Herzegovina and Montenegro also contain such provision, whilst the 2008 Croatian CPC does not (unlike the previous Croatian CPC from 1997).¹⁷

The new Serbian CPC stipulates within this Chapter, unlike the 2001 CPC where this was done in the section relating to summoning of witnesses in the chapter dedicated to evidentiary actions (in Article 101), a special form of summoning of persons under the age of 16 as witnesses by setting forth that serving of summons to be done through parents or legal guardians of that person, except when not possible due to exigencies of proceeding or other justifiable reasons (Article 193 para 3). Such provision is found also in codes of the region.¹⁸

A participant in proceedings avoiding receipt of summons may be fined up to 150,000 RSD, with the proviso that this provision is not applicable in case of juveniles (Article 193 paras 4 and 6). The ruling on the fine is passed by the court.

A novelty within this measure is also the possibility to serve summons through public notice. The authority in charge of proceedings, i.e. police or prosecution, if having reasonable grounds to suspect a criminal offence, may by posting a public notice in media summon persons having knowledge of perpetrator and circumstances of the event to respond (Article 194). This possibility is not provided in criminal procedure codes of countries in the region.

15 Commentary to the criminal procedure codes in Bosnia and Herzegovina, Council of Europe and European Commission, Sarajevo 2005, p. 383.

16 Radmila Dragičević-Dičić, *Mere za obezbeđenje prisustva okrivljenog i za nesmetano vođenje krivičnog postupka u novom Zakoniku o krivičnom postupku*, Zbornik "Nova rešenja u krivičnom procesnom zakonodavstvu – teoretski i praktini aspekt" Serbian Association for Criminal Law Theory and Practise, Belgrade 2011, p. 40.

17 Art. 124(5) of the BiH CPC and art. 164(6) of the Montenegrin CPC. Compare articles 96 and 175 of the Croatian CPC from 2008 with art. 88, para. 5 and 6 of the previous CPC from 1997 (Criminal Procedure Code, NN 110/97, 27/98, 58/99, 112/99, 58/02, 143/02).

18 Art. 173 Croatian CPC, art. 173, art. 81 BiH CPC and art. 112 of the Montenegrin CPC.

b) Order to bring [a defendant in]

Bringing of the defendant, as the next measure to secure his presence in proceedings that is ordered by the court and public prosecutor, is regulated by the new CPC (in Articles 195 and 196) in a way that does not essentially differ from the 2001 CPC or from the codes of the countries in the region. The order to bring is issued in three cases: if a duly summoned defendant does not appear and fails to justify his absence, if proper serving of the summons could not be performed and it evidently ensues from the circumstances that the defendant is avoiding receipt of the summons, and if an order to remand in detention is issued. Thus, except in case when detention has been ordered for the defendant, this measure must be preceded by the measure of summoning of the defendant, followed by a determination that the defendant is avoiding to respond. The Croatian code recognizes another situation where this measure is ordered, namely bringing of the defendant to the hearing always when deciding on ordering, revoking or extending detention during investigation, unless he is unavailable or lacks legal capacity.¹⁹

In Croatia, the order to bring (a defendant in) is issued by the court, and only exceptionally by the prosecutor or police. The latter may bring the defendant coercively only if he previously fails to respond to the summons in which he was cautioned on coercive bringing or if circumstances evidently indicate that he is refusing to receive the summons.²⁰ In Bosnia and Herzegovina, the order to bring may be issued by a prosecutor only exceptionally, in exigent circumstances, if the duly summoned person fails to respond and does not justify his absence, and this order must be approved by the judge for preliminary proceedings within 24 hours from time of issuance;²¹ however the CPC of Republika Srpska does not contain such requirement to submit the order for approval by the judge for preliminary proceedings.²² In BiH the order to bring is executed by the judicial police.

In Serbia, the order is executed by the police. Regarding exceptions to enforcement of the order to bring with respect to members of certain government bodies as defendants, one notices more precise defining in the new CPC. In addition to the stipulation that bringing in of police officers, military personnel and prison guards is executed by their command or institution – as provided in the 2001 Serbian CPC, or in the Montenegrin CPC,²³ now there is an explicit addition that this manner of enforcement of this measure is applied also to members of the Security and Information Agency, Military Security Agency and Military Intelligence Agency (Article 196 para 3). This eliminates a potential dilemma regarding action against personnel of these security/intelligence agencies that do not have status of military or police personnel.²⁴

19 Art.97(1) referring to art. 129(2) of the Croatian CPC.

20 Art. 97(3) referring to art. 208(3) of the Croatian CPC.

21 Art. 125(2) BiH CPC, art. 125(2) Brcko District CPC (Criminal Procedure Code of Brcko District, Official Gazette of BD no. 10/03), art. 139(2) BiH Federation CPC (Criminal Procedure Code of BiH Federation, Official Gazette of F BiH no. 35/03).

22 Art. 182 of the Republika Srpska CPC (Criminal Procedure Code of of Republika Srpska, Official Gazette of RS no. 50/03).

23 Art. 165(5) of the Montenegrin CPC.

Insofar as Croatia is concerned, the previous Croatian Criminal Procedure Code contained a proviso, in article 89(5), that no order to bring shall be issued against military, police and judicial guard personnel, and that their command or institution will be notified to bring them in. The current Croatian 2008 CPC does not contain such provision, hence such personnel may be brought based on the order to bring. See Z. Konjić, A. Pavičić, *Prisilne radnje i mjere - mjere osiguranja i dostava*, Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), vol. 15, no. 2/2008, p. 893.

24 Military Security Agency and Military Intelligence Agency Act, Official Gazette of the RS, no. 88 dt 28 October 2009, 55/12., article 40: "Members of the MSA and MIA are professional personnel of the Army of Serbia, civil servants and employees."

As in summons, the measure of coercive bringing may also be ordered by the competent authority in the proceeding in respect to other participants in the proceeding (witness, expert witness) in order to ensure their presence in case of their unjustified absence or refusal to appear in the proceedings, although the application of this measure against the above participants is regulated in other provisions of the CPC.

Ban to approach, meet and communicate with particular individual

The ban to approach, meet or communicate with particular individual is set forth under the new CPC as a separate measure. In the 2001 CPC it was provided within the catalogue of measures under the article on measures prohibiting leaving of abode or place of residence and could have been ordered, pursuant to that Code, also as an additional measure to the measure prohibiting leaving of abode or residence,²⁵ and as an autonomous measure when requirements for it have been met.²⁶

The reasons for ordering of this measure is the existence of circumstances indicating that a defendant could disrupt the proceedings by exerting influence on an injured party, witnesses, accomplices or concealers or could repeat a criminal offence, complete it or commit a criminal offence he is threatening to commit (Article 197). The reasons remain the same as in Article 136 para 11 of the 2001 CPC for ordering this measure as an autonomous one.²⁷ The legislative provisions no longer contain the risk of absconding and hiding as grounds for this measure, which were present in the 2001 CPC for ordering this measure as supplementary to prohibition to leave abode or residence (in Article 136 para 2 of the 2001 CPC). These circumstances are still present as grounds for this measure in Croatian, BiH and Montenegrin codes.²⁸

The solution detaching this measure in normative terms as a separate one differentiates the new CPC not only from its 2001 predecessor, but also from the codes in the region, where manner and requirements for its ordering are not separately stipulated but it continues to exist within the framework of other measures of supervision (Montenegro), precautionary measures (Croatia) and measures of interdiction (BiH). Thus, for example, in Croatia “precautionary measures“ (in Croatian - *mjere opreza*), as is the statutory term for this category of measures to ensure presence of the defendant and unobstructed conduct of proceedings, are grouped in one article of the code and encompass the ban to leave residence, restraint to approach a particular person, ban to visit a certain place or area, duty to report to a certain person or government authority, prohibition to engage in certain business activity, seizure of travel document (passport) or driving license.²⁹ The reason to detach this measure into separate norms in the new CPC may be found in that this measure both by reasons, where there are no grounds for risk of absconding or hiding, by its purpose, concept and by manner of enforcement is different from the prohibition to leave abode or residence, or seizure of driving license with which it was also joined in the 2001 Code.³⁰

25 Art. 136, (2) of the 2001 CPC.

26 *Idem.* para 11

27 *Idem.*

28 Article 98 and 123 of the Croatian CPC, article 126, 126a and 126b of the BiH CPC, and article 166 of the Montenegrin CPC .

29 Art. 98 of the Croatian CPC.

30 Some of the reasons for separating these measures are also given by the authors of the preface to the new Criminal Procedure Code, who were also members of the working group for drafting the the new Code. See: Criminal Procedure Code, with preface by Slobodan Beljanski, Goran P. Ilić, Miodrag Majić, Official Gazette, 2012, Second amended edition, pp.24-25.

Alongside this measure the new CPC provides that the court may order the defendant to periodically report to the police, an officer of the administration for enforcement of criminal sanctions or other public authority defined by law (art. 197 para. 2).

A stricter measure may be ordered against the defendant if in breach of the pronounced ban to approach, meet or communicate with a particular person, and the defendant is so cautioned in the ruling ordering the measure. The ruling is also delivered to the person in relation to whom the measure against the defendant was ordered (Article 198 para. 3).³¹

Control of enforcement of the measure is done by the police. Montenegrin and Croatian CPCs require that in issuing the ban to approach or meet certain persons the court, and – in Croatia – other body with competent jurisdiction, define also the distance under which the defendant may not approach these persons.

If failing to adhere to the barring measure, or comply with the pronounced measure, in BiH an additional measure or detention is ordered, and in Croatia investigative detention as mandatory.³² In Montenegro an additional measure may be ordered or detention.³³ An interesting solution is provided under Croatian law, which has been present also before, that the court - or more precisely “investigating magistrate“ according to the terminology of the Croatian law (*sudac istrage* - in Croatian) - may prohibit activities to a person other than the defendant that infract upon security measures against the defendant and fine such person if he/she acts contrary to such prohibition.³⁴

Although no longer explicitly with this measure, it should be implicit, having in mind the right of access to defense counsel, that the measure may not restrict the right of defendant to communicate with his attorney. Although this measure should not be ordered in a way restricting communication with close relatives, unless in the interest of their protection, it would be worthwhile to precisely define, as in Croatia, that in respect to this and other measures communication may not be restricted in respect to spouse, common law spouse, children, parents, adopted children or adoptees, unless proceeding are conducted for act committed to the detriment of these persons.³⁵

Separating this measure and requirements for ordering from the ban to leave abode or residence expands the range of possible application of more lenient measures in criminal proceedings in Serbia. This measure, now in use to enable unobstructed conduct of proceedings, and not to ensure presence of defendant, augments the options replacing detention. When risks giving grounds for ordering detention and which coincide with reasons for ordering of this measure are not so high and when considered that the purpose may be achieved also through a more lenient measure, then this measure should be ordered. Thus this measure could be applied if circumstances indicate risk of obstruction of proceedings or influencing witnesses, or danger that the person will complete, repeat or commit the criminal offence he is threatening are not so dis-

31 Art. 167 of the Montenegrin CPC, art. 99(4) of the Croatian CPC.

32 Art.126f of the BiH CPC. Art. 98 (1) Croatian CPC. Duty to replace security measure (precautionary measures) with detention in case of failure to comply was introduced by the new Croatian CPC in 2008, while the previous CPC of Croatia contained an optional possibility to order other security measures or detention. See also Konjić, Pavičić, *op.cit.*, p. 894.

33 Art.166 (6) of the Montenegrin CPC.

34 Art 101 (3) of the Croatian CPC.

35 Art. 98 (3) of the Croatian CPC.

tinct to, as the law stipulates, order detention.³⁶ This measure is advisable for ordering in criminal offences with elements of violence or threat of violence where the victim or endangered person may be targeted for continuing assault by the perpetrator; it may effectively deter conspiracy with other person to commit crimes or prevent influence on witnesses, without having to resort to detention. It effectiveness may be augmented in part by the provided possibility to order the defendant to periodically report to the police or other public authority, as set forth in Article 197 para 2.

d) Ban to leave temporary residence

The above measure provided under Article 199 of the new Code comprises a ban for the defendant to leave temporary place of residence or the territory of the Republic of Serbia. This measure may be augmented with barring the defendant to visit certain places or he may be ordered to periodically report to certain state authority. His travel document or driving license may also be temporarily seized. If violating the ordered ban a harsher measure may be pronounced against the defendant (Article 200 para 3).

This measure, together with the ban to approach, meet or communicate with a particular person and ban to leave abode, was provided under Article 136 of the 2001 Code, whilst now being detached, as the other two above measures, into a separate article. It is now amplified with the inclusion of ban to leave the territory of Serbia. A similar measure that in practice means ban to leave the territory of Bosnia and Herzegovina is recognized, after amendments in 2007, also in the Code of this country and is separated from other measures.³⁷ This novelty provides wider possibilities both in selecting measures alternative to detention, as well as in respect to effective prevention of absconding of defendant. In order to be effective, it would be indispensable that this measure is applied together with seizure of passport. In principle, this measure by reach is more extensive than seizure of passport, which existed also before, as the state border may sometimes be crossed also with other document and not only with a passport.

The measure barring leaving of temporary resident may be ordered, as in the 2001 Code, if circumstances exist indicating that the defendant could abscond, hide, depart for unknown destination or abroad. The same catalogue of reasons exists also in criminal procedure codes in BiH and Montenegro, while this measure is applied in Croatia, as are all other measures embraced by the measures of caution and contained in the same article of the code,³⁸ if reasons exist to order investigative detention or if the latter has already been ordered, which is certainly a more comprehensive range of grounds.³⁹ A moot point is why this measure should not be applied in Serbia, as in BiH and Montenegro, also when there is risk of obstructing proceedings by destruction or

36 Grounds for custody in art. 211 (1) points 2 and 3 of the new Serbian CPC

37 Art. 126 BiH CPC, particularly regulating the ban to leave residence and ban on travel. Other "barring measures", as is the statutory title in BiH, are encompassed by article 126a, and are similar in Croatia and Montenegro: ban to undertake certain business activities or duties, ban to visit particular places or areas, restraint to meet certain individuals, duty to periodically report to particular government authority and temporary revocation of driver's license. Article 126g of the BiH CPC provides temporary seizure of travel documents and personal ID with ban on issuing new documents by order of the prosecutor, only exceptionally and in exigent circumstances, particularly in case of offences carrying a sentence of 10 years of imprisonment or more.

38 Art. 98 of the Croatian CPC (ban to leave residence, restraint to approach a certain person, ban to visit particular places or areas, ban to undertake certain business activities, seizure of travel document or driver's license, duty to report to particular person or public authority).

39 See art. 123 of the Croatian CPC on grounds for ordering investigative detention.

concealing evidence, influencing witnesses or accomplices, or if there is risk of repeating or completing the crime.⁴⁰ Obligation of the state to provide for and consider application of more lenient measures prior to resorting to restrictive ones justifies statutory enabling of such an option. Ban on leaving residence and country, as well as the ban to visit certain places, duty to report to state authority and seizure of passport and driver's license, could prove sufficient and adequate – naturally, depending on the offence in question and circumstances of each and every particular case – to prevent, in certain situations, influence on witnesses or repetition or completion of the offence and similar risks.

The new CPC has retained the provision, found in other countries of the region, whereby the ban to leave residence cannot restrict a defendant's right to live in his abode, to meet family members, close relatives and defense counsel without hindrance (Article 199 para 3).

In a similar way a provision was carried over from the 2001 CPC whereby the court may return a travel document to a defendant with urgent need to travel abroad if the defendant appoints a proxy to receive correspondence in Serbia, or gives bail (Article 200 para 4). Still, a difference exists as the text of the 2001 CPC addresses bail in this situation cumulatively (“*and* gives bail”) with the other two guarantees, while the new CPC gives this alternatively (“*or* gives bail”). This provision creates a framework granting flexibility to the regime of the measure in respect to the defendant, while retaining certain warranties that he will not avoid summons from the court or use his travel abroad to abscond.⁴¹

Insofar as temporary seizure of driver's license is concerned, which now has a dedicated article (Art. 201) within the measure of prohibition to leave residence, the possibility of ordering the latter as an autonomous measure has been retained.⁴² The provision whereby the period of seizure of driver's license from the defendant shall be calculated in the duration of the penalty of seizure of driver's license or security measure of ban to drive a motor vehicle (Article 201 para 2) also remains. This autonomous measure now has two own requirements for ordering and differs from the 2001 CPC in the following. First, according to the new CPC, it is no longer required that the malicious action of endangerment of public traffic, which remains as a requirement for ordering of this measure, has resulted in serious consequences. The other difference is that a new ground for ordering this measure as an autonomous one is now introduced: if proceedings are being conducted for a criminal offence in whose commission or preparation a motor vehicle was used (art. 201 para 1, point 1). Both autonomous requirements are specific to the Serbian CPC in respect to Croatia, BiH and Montenegro whose codes do not provide it.

What gives rise to concern is the introduction of the aforementioned new grounds for temporary revocation of driver's license – circumstances that proceedings are conducted for felony in whose commission or preparation a motor vehicle was used. Not only has this provision been set up too broadly, but its link with the need for unobstructed conduct of criminal proceedings is difficult to perceive. The very fact that a motor vehicle was used in commission of the crime (the Code does not even specify that it was the defendant using it), should not be the reason to temporarily seize

40 For critical commentary of the same solution in the BiH CPC, see OSCE Report “The Law and Practice of Restrictive Measures: Justification of Detention Bosnia and Herzegovina”, Organization for Security and Cooperation in Europe, Mission to Bosnia and Herzegovina, August 2008, p. 14.

41 See R. Dragičević-Dičić, *op.cit.*, p. 42.

42 Art. 136, (9) of the 2001 Serbian CPC.

someone's driving license, i.e. deprive him/her possibility to drive a motor vehicle. Considerable discretion is left in interpreting to what extent was the use of vehicle itself of significance or vital impact on the offence and consequences thereof, hence it could be ordered any time when in some phase of an offence a vehicle was used. Even when a specific vehicle was a significant means, i.e. if the vehicle may be used in evidence in the proceedings, it may be, in any case, seized temporarily for that purpose (Article 147). Therefore, it is difficult to find reasons why freedom of movement should be restricted and the possibility to drive as such. Consequently, it resembles punishment for use of vehicle in commission of felony, which of course should not be the purpose of application of any of the measures. If restriction of movement of the defendant is necessary due to likelihood that he leaves the country, absconds or hides, then there is no justification, nor practical need to distinguish such a situation, in case of felony committed with use of vehicle, from the same risk in case of any other felony.

e) Ban to leave abode

This is the third measure that was bunched up in the 2001 CPC with other security measures in Article 136, and is now, in the new CPC, detached as a separate measure, expanded particularly in respect to statutory grounds for its application, and is regulated in more detail. The measure comprises a ban by the court on the defendant to leave the abode wherein he lives without permission. It may be augmented by stipulating requirements under which the defendant may reside in the apartment, such as barring the defendant to use a telephone and internet or to receive other persons in the abode (Article 208).

The new Code provides that the ban to leave abode may be ordered if circumstances exist indicating that the defendant may abscond, or "circumstances provided under article 211, para 1, point 1, 3 and 4 hereof". A part of the requirements for ordering of this measure has, therefore, to be sought among some of the grounds for detention found in the above Article 211 referred to in the provision on this measure, namely:

- a) if the defendant is in hiding or his identity cannot be established or in the capacity of defendant he is clearly avoiding appearing at the trial or if there exist other circumstances indicating a flight risk (point 1, article 211 para 3);
- b) if particular circumstances indicate that in a short period of time he will repeat the criminal offence, or complete an attempted criminal offence, or commit a criminal offence he is threatening to commit (point 3);
- c) if the criminal offence with which he is charged is punishable by a term of imprisonment of more than ten years, or a term of imprisonment of more than five years for a criminal offence with elements of violence, or he has been sentenced by a court of first instance to a term of imprisonment of five years or more, and the way of commission or the gravity of consequences of the criminal offense have disturbed the public to such an extent that this may threaten the unimpeded and fair conduct of criminal proceedings (point 4).

The requirements for ordering this measure coincide with the requirements in Article 136 of the 2001 CPC in respect to risk of flight and hiding. Now these are in part explicitly extended to

cover a similar requirement – avoidance to appear at trial. The key novelty is that now this measure is amplified to include risk of repeating, completion or commission of criminal offense, as well as manner of commission or gravity of consequences of the crime carrying a statutory high penalty that have led to disturbance of the public. The last requirement given under c), specified in point 4 of Article 211 para 3 of the new CPC, represents in itself one of the foremost novelties of the 2011 CPC in respect to detention as it introduces a number of cumulative reasons among which is the one that the manner of commission and gravity of consequences have already led to disturbance of the public that may threaten unobstructed and fair conduct of the trial. The benchmark for determination of this reason has now been set higher than in the 2001 CPC, or the previous 1977 CPC, that also contained the element of disturbance of the public.⁴³ As one of the papers in this publication is specifically dedicated to grounds for detention, we shall not analyze this issue here.

Evidently, the measure may not be ordered if circumstances exist indicating that the defendant will destroy, conceal, alter or falsify evidence or traces of the criminal offense, or if particular circumstances indicate that he will obstruct proceedings through influencing witnesses, accomplices or concealers, as this ground for detention (specified in point 2, Article 211) is not found among the grounds for ordering this measure in Article 208 of the new CPC. We are of the opinion that there are no reasons why these circumstances (known also as risk of collusion) should not also imply ordering of this measure, as is the case in Croatia and Montenegro. Reducing freedom of movement only to abode, amplified by bar to use telephone, internet as well as to receive other persons in the abode, in addition to other conditions permissible under this measure, may in many cases adequately preclude interference with witnesses or destroying of evidence and traces.

Ban to leave abode is not provided in BiH laws, neither as a separate measure nor within the framework of other security measures, but is stipulated in Montenegro and Croatia. Thus, in Montenegro, the court may order ban to leave abode if circumstances exist that the defendant could flee, hide, depart to another country or unknown place or obstruct conduct of proceedings.⁴⁴ This is a narrower sphere of reasons for this measure than in the new Serbian CPC. These reasons may also be deemed less strict in comparison to reasons for ordering detention pursuant to the new Serbian CPC, as it suffices to have only indications that the defendant might hide or flee, and not to be already in hiding as it is provided for the grounds for detention in Serbia.⁴⁵ In Croatia this measure is called “house pre-trial detention“ (*istražni zatvor u domu* – in Croatian). The latter, as the closest alternative to detention, may be ordered if grounds exist for detention that, unlike the Serbian CPC, include also the risk of destroying or concealing evidence and interfering with witnesses.⁴⁶ Another reason for this measure and grounds for detention that remains broadly defined in Croatia, as was the case in Serbia prior to enactment of the new CPC, are particularly aggravating circumstances of the offense punishable by long-term imprisonment. The particularity of the Croatian solution is reflected, inter alia, also in the duty of the court to request from the defendant, prior to ordering of the measure, written consent of persons

43 Criminal Procedure Code, Official Gazette of the SFRY no. 4/77, 36/77, 14/85, 26/86, 74/87, 57/89, 3/90 and Official Gazette of the FRY no. 27/92, 24/94, 13/01, art. 191 (4).

44 Art. 166, (2)(1), CPC Montenegro.

45 Art. 166 of the Montenegrin CPC. Drago Radulović, Commentary to the Criminal Procedure Code of Montenegro, Podgorica Law Faculty, p. 209, indicating that there are also views, without attribution, that grounds for ordering of this measure and grounds for remand in custody pursuant to the Montenegrin CPC are almost the same.

46 Art. 119 (1), referring to Article 123(1), points 1-4 of the Croatian CPC.

of age who reside in the defendant's abode on technical devices used for purposes of monitoring application of this measure.⁴⁷

After raising of indictment the ban to leave abode is decided by the trial chamber, out of trial or at trial, and not by the presiding judge (Article 209 para 2), as is the case with the other two security measures (ban to approach and ban to leave residence). The lawmakers have opted to raise the decision-making threshold to the level of trial chamber due to severity of the measure.⁴⁸

Detention may be ordered to the defendant if in violation of this ban (Article 206 para 3). The defendant may leave his abode without permission if so necessary due to urgent medical intervention for him or person residing with him, or to avoid or prevent serious danger to life or health, or property of greater value (Article 208 para 2). In this case the defendant is obligated to notify without delay an officer from the administration for enforcement of criminal sanctions about leaving his abode, reasons and place where currently located.

A key novelty of the 2011 CPC in this area is the introduction of electronic monitoring of compliance with the ban to leave abode. The court may order electronic surveillance of the defendant to control compliance with ordered restrictions, which is set forth under Article 190. The possibility of electronic surveillance is now restricted to this measure only, and may no longer be ordered to control enforcement of ban and ban to leave residence, as was provided in the 2001 CPC.

Electronic monitoring is done by placing a locating device, i.e. a transmitter (so-called bracelet) onto the wrist or ankle of the defendant. The defendant must be given detailed instructions pursuant to provisions of Article 190 on the manner of operation of the device. Electronic monitoring is done by a government administration body with competence for enforcement of criminal sanctions or other government authority defined by law, and a professional officer monitors movement of the defendant and his location via a receiver. Of the other analyzed codes in the region only the Montenegrin CPC, in addition to the new Serbian CPC, provides surveillance through electronic monitoring not only over enforcement of the ban to leave abode but also over other measures.⁴⁹

By its content this measure is akin to detention, both by its extent and imposed restrictions, and by grounds for its determination. Hence its colloquial name "house arrest" or „home detention“. A point of debate is to what extent it, by nature of its restrictiveness, can be equated with detention. As it imposes very strict restrictions of freedom, limiting it only to the abode of the defendant, the European Court of Human Rights ruled in several of its cases that it must be considered deprivation of freedom, the same as detention.⁵⁰ Consequently, the court should apply this measure whenever it is possible in replacement of detention. On the other hand, due to its restrictiveness and nature that is deemed deprivation of freedom, courts should in practice afford regard and continuously re-examine the reasons for duration of this measure and to replace it by a more lenient one whenever possible. To this end, as already mentioned in the general observations

47 *Idem*. art. 119 (3)

48 R.Dragičević-Dičić, *op.cit*, p.46.

49 Art. 166, para 3 of the Montenegrin CPC. Electronic monitoring is also applied in enforcement of the measure of ban to leave residence, visiting a certain place or area or meeting with particular person, or the duty to periodically report to specified government authority.

50 Judgement of the ECtHR Lavents c. Lettonie, ECHR, Requête no 58442/00, 28 novembre 2002, para. 63, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-6536>; ECHR judgement Vachev v. Bulgarie, ECHR, 8 July 2004, para.64, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61877>.

at the beginning of the text, the authors are of the opinion that the provision of the new CPC whereby the court is required to examine every three months whether this measure is still justified (Article 209 para. 4), grants the court a timeframe which is disproportionately long having in mind the restrictiveness of this measure. The timeframe for re-examination of its justifiability should be shorter and similar to time intervals for re-examining detention.

f) Bail

The new Serbian CPC introduces novelties also in regard to bail as a measure to ensure presence of the defendant, both in expanding possibilities to order bail and in respect to the procedure for its ordering. Namely, Article 202 of the new CPC provides that detention may be replaced with bail if remand in detention is ordered on two statutory grounds provided in Article 211: 1) if the defendant is in hiding and or his identity cannot be established or if he is clearly avoiding appearing at the trial or if there exist other circumstances indicating a flight risk; 2) if the defendant is charged with a criminal offense punishable by a term of imprisonment of more than ten years or a term of imprisonment of more than five years for a criminal offense with elements of violence, or he has been sentenced to a term of imprisonment of five years or more, and the way of commission or the gravity of consequences of the criminal offense have disturbed the public to such an extent that this may threaten the unimpeded and fair conduct of criminal proceedings. If in the deliberation of the court the purpose of detention could in such cases be achieved with bail, as a more lenient measure, it shall leave the defendant at liberty, i.e. release him if in custody, if the defendant personally or someone for him posts bail that he will not flee before conclusion of proceedings and the defendant himself promises not to go in hiding or leave place of residence without permission of the court.

Thus, in respect to the 2001 CPC, which restricts the possibility of bail as an autonomous measure only to situations when risk of flight or evading appearance at trial exists, the new CPC expands application of this institute also to situations of hiding of the defendant, impossibility to determine his identity or offenses carrying a stipulated penalty of ten or more years of imprisonment, and/or five years where the manner of commission or gravity of consequences led to disturbance of the public that may threaten unobstructed and fair conduct of trial. This novelty is particularly important as it eliminates the possibility of exclusion of bail only on grounds of seriousness of offence and/or circumstance of perpetration of offense and brings the new CPC in line with the case law of the European Court of Human Rights (ECrHR). Pursuant to the 2001 CPC the possibility of bail was excluded, *inter alia*, in respect to a person under reasonable suspicion of committing a criminal offense punishable by more than ten years imprisonment, or over five years for a criminal offense with elements of violence and if so justified due to particularly aggravating circumstance of the criminal offense.⁵¹ Although this solution does not negate the possibility of bail only on grounds of severity of stipulated penalty, which would in terms of ECrHR case law be deemed unacceptable discrimination of a particular category of persons,⁵² and requires also the existence of particularly aggravating circumstances of the criminal offence, even the cumulative meeting of these requirements is not enough to permanently exclude bail.

51 Art. 137 (1) of the 2001 CPC Serbia.

52 Judgement of the ECrHR, *Boicenco v. Moldova*, ECHR, 41088/05, of 11 October 2006, para. 134-138, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-76295>.

Namely, in summation of its earlier case law the ECtHR clearly underscored in the case of *Kislitis v. Russia* “as regards the courts’ reliance on the gravity of the charges as the decisive element [...] this reason cannot by itself serve to justify long periods of detention. Although the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or reoffending, the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the gravity of the offence”.⁵³

As the new CPC also introduces a general provision contained in Article 189 para 2 whereby two or more measures may be cumulatively ordered, where necessary, bail may be ordered also with other measures. Here the new CPC contains, as did the 2001 CPC,⁵⁴ also an explicit provision setting forth that bail may be ordered if a travel document is returned to a defendant under the measure of ban to leave residence for the purpose of urgent travel abroad.

The second important novelty relating to bail is granting the possibility to the court to ex officio and independently of motions by parties determine a pecuniary amount to be posted as bail (Article 204 para 2). Motions for determination of bail may be made by the defendant and his counsel, the prosecutor, and person posting bail and in absence of such motion bail may be determined by the court following opinion obtained from the parties. It is regarded that such solution affirming a more active role of the court and granting the court the possibility to determine by itself a pecuniary amount to be posted as bail will have a positive effect in practice and resolve many dilemmas and incontinences that have been present to date.⁵⁵

The ruling on bail must be issued in form of reasoned decision that may be appealed by all persons who are entitled to file a motion for bail, however such appeal shall not have suspensive action.

Insofar as lifting and forfeiting bail as well as content of bail is concerned, the new CPC brings no significant changes, with the exception that in defining the amount of bail the court shall no longer be guided by severity of offense but by the degree of flight risk that the bail is set to avert (Article 202 para 3). The other two circumstances taken under consideration by the court, and which remain unchanged from the 2001 CPC, are personal and family circumstances of the defendant and the financial circumstances of the person posting bail. It must be underscored that in determination of the amount of bail in practise the court must take under consideration that the purpose of bail is not nor can be providing of funds for damage compensation that he caused through commission of the offense, but ensuring his presence during the trial. It is for this very reason why the amount of bail must be proportionate to its purpose and must be defined in relation to the defendant, his property and his relationship with persons standing for bail,⁵⁶ and not in respect to obtained gain or caused damages. In the case of *Toshev v. Bulgaria* the ECtHR underscored that the amount of guarantee must be adequately reasoned and that the court in determining bail must take into account the assets of the defendant. The omission by the court to

53 Judgement of the ECtHR, *Kislitsa v. Russia*, ECHR, 29985/05, 19 June 2012, para 36, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111523>

54 Art. 137 (2) of the 2001 Serbian CPC provides that bail may be ordered also as a security measure for compliance with restrictions in Art. 136, para 2 and 10; art. 136 (5).

55 See R.Dragičević-Dičić, *op.cit.*, p. 44.

56 Judgement of the ECtHR *Neumeister v. Austria*, ECHR, 1936/63, 27 June 1968, As to the Law para. 14, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57544>; *Mangouras v. Spain*, ECHR, 12050/04, 28 September 2010, para 78, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100686>

assess, in determining the amount of bail, the capacity of the defendant to pay a certain amount represents a violation of the Convention.⁵⁷ On the other hand, ECtHR is establishing through its case law the existence of an obligation of the defendant to submit to the court all information that are verifiable and necessary for determination of the adequate amount of bail.⁵⁸

However, the ECtHR allows exceptionally the possibility to still take under consideration the amount of caused material damages in setting the amount of bail, as long as it does not constitute the deciding factor. Namely, in the case of *Mangouras v. Spain* from 2010 the ECtHR, recalling its earlier decisions, found that “while the amount of the guarantee provided for by Article 5 § 3 [of the Convention] must be assessed principally by reference to the accused and his assets it does not seem unreasonable, in certain circumstances, to take into account also the amount of the loss imputed to him”.⁵⁹ Still, the decision of the court in this case should be viewed in light of the exceptional circumstances and accordingly value its precedential power and import with constraint.

In regard to duration of bail, it needs to be underscored that bail, and any other measure stipulating release of defendant, may be ordered only if justifiable grounds for detention exist, rationale for bail must be subject to same judicial control as in the case of detention.⁶⁰ Consequently, it should be noted that the new CPC does not contain, with the exception of a general provision setting out that any measure to secure presence of defendant shall be revoked *ex officio* or replaced with more lenient measure when conditions to do so materialize, does not contain any particular provision requiring the court to periodically re-examine justification of bail or amount thereof. On the other hand, in case of other measures to secure presence of the defendant, dedicated provisions regulate the duty of the court to periodically re-examine the justification of such measures (a more detailed explanation is given in other sections of this paper).

In regard to forfeiture of bail, the new CPC differs from the 2001 CPC (which provides forfeiture of bail in case of absconding of defendant) in that it now provides forfeiture of bail if the defendant violates the promise given at setting of bail i.e. if he is in hiding or leaves residence without permission. It remains unclear from the text of the law as to what is the fate of the bail if it has been ordered cumulatively with another measure to ensure presence of defendant or unobstructed conduct of criminal proceedings. The same dilemma is present also in respect to the 2001 CPC which provides ordering bail as a security measure for compliance with the ban to visit certain places, meet or approach particular persons.⁶¹

Insofar as lifting of bail is concerned the new CPC provides, as did the 2001 CPC, that in case the defendant fails to comply with duly served summons or if in duration of bail grounds for detention occur different from those for initial setting of bail, bail shall be lifted and detention ordered (Article 207 para 1).⁶² It is our view in respect to this situation, and in line of harmonisation with the European Convention on Human Rights, that a much better solution may be found in the

57 Judgement of the ECtHR *Toshev v. Bulgaria*, ECHR, 56308/00, 10 November 2006, para. 68 et seq, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-76687>.

58 Judgement of the ECtHR *Iwańczuk v. Poland*, ECHR, 25196/94, 15 November 2001, para. 66, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59884>.

59 See, *Mangouras v. Spain*, cited judgment, para.81.

60 Judgment of the ECtHR, *Musuc v. Moldova*, ECHR, 42440/06, 6 November 2007, para. 42, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83081>; *Aleksandr Makarov v. Russia*, ECHR, 15217/07, 14 September 2009, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91758>

61 Art. 137 (2) of the 2001 CPC.

62 Compare with art. 139 (1) i (2) of the 2001 CPC

Croatian CPC which provides that in case of occurrence of new grounds for custody allowing bail, a new amount of bail, appropriate to new circumstances, will be set.⁶³

In respect to regulation of bail in countries of the region it may be concluded that solutions adopted in Montenegro and BiH are by far more restrictive in comparison to those in the new Serbian CPC or Croatian CPC. The Montenegrin CPC regulates bail in entirety like the Serbian 2001 CPC in force, both in terms of grounds for setting bail (i.e. contracting the possibility to order bail only to risk of flight and failure to comply with summons), and in regard to its content and procedure for ordering.⁶⁴ On the other hand, the BiH CPC is even more restrictive in that bail may be ordered only on grounds of risk of absconding.⁶⁵ In all other segments it does not differ from the Montenegrin CPC or the 2001 Serbian CPC.

According to the Croatian solution the possibility to set bail is provided in respect to a defendant against whom remand in custody is ordered (the term used in the Croatian CPC is investigative detention) not only in case of risk of absconding but also when there is risk that the defendant will impede unobstructed conduct of criminal proceedings by destroying, altering or concealing evidence or influencing witnesses and expert witnesses,⁶⁶ or if there is risk of repeating, completing or committing a new criminal offense.⁶⁷ This amplification of grounds for setting bail to situations of “collusive and interactive” risk⁶⁸ is the result of the intention of the Croatian lawmaker to resolve the problem of “overcrowding of the prison system” and to ensure respect the right to liberty as an ultimate human right, which implies use of custody only as “a last resort”.⁶⁹ In a recent decision the Constitutional Court of Croatia, on the motion to assess constitutionality of certain provisions of the Croatian CPC, has found that this restriction of grounds for replacing custody with bail is contrary to the Constitution of the Republic of Croatia and to the European Convention on Human Rights. Namely, in the deliberation of the Croatian Constitutional Court, exclusion of possibility to set bail in situations where investigative detention is necessary for unobstructed conduct of proceedings due to particularly aggravating circumstances of commission of the offense punishable by long-term imprisonment, is unconstitutional as the lawmaker was “most probably guided by the seriousness of the criminal offense... [that] in itself is not a constitutionally viable reason for statutory exclusion of bail”.⁷⁰ In the obiter dictum of the decision the Constitutional Court also concludes that the possibility to set bail in situations when a duly summoned defendant avoids to attend the trial (this possibility is not provided under Croatian CPC but is in Serbia and Montenegro) would be contradictory to the very purpose of granting bail as a guarantee that the person will be present at trial.⁷¹

In addition to situations where bail may be set, the dissimilarity is visible also in the content of the pledge given by the defendant to the court. Whilst the Serbian solution (both CPCs) require the defendant not to go in hiding and not to leave residence without permission of the court,

63 Art. 105 (2) of the Croatian.

64 Art. 170 – 173 of the Montenegrin CPC.

65 Art. 127 of the BiH CPC.

66 Art. 123 (2) of the Croatian CPC.

67 *Idem*, para 3.

68 See Z. Konjić, A. Pavičić, *op.cit.*, p. 896.

69 *Idem*.

70 Constitutional Court of the Republic of Croatia, Number: U-I-448/2009, U-I-602/2009, U-I-1710/2009, U-I-18153/2009, U-I-5813/2010, U-I-2871/2011, Zagreb, 19 July 2012 p. 60 para 79.

71 *Idem*.

the Croatian also adds a pledge from the defendant “that he will not interfere with criminal proceedings and that he will not commit a new criminal offence”.⁷²

A further important difference between the Croatian and the Serbian CPC is reflected in situations where bail is forfeited. The Croatian CPC is considerably stricter as it provides the possibility for the court to order with the bail “one or more precautionary measures as terms of bail”, compliance with which is monitored by the police and in case of violation bail is forfeited. The Croatian lawmaker went a step further by providing for collection of bail “also if there is a serious possibility that the defendant will act contrary to the terms of the ruling on bail”.⁷³ This provision was also under deliberation of the Constitutional Court of Croatia as the petitioners deemed that “ordering investigative detention requires reasonable suspicion that a certain person has committed a criminal offence and, therefore, same legal standard would be also required for determination of the fact that the defendant has acted contrary to terms of bail”.⁷⁴ Quoting the case law of the ECtHR, the Constitutional Court ruled that the possibility to collect bail also when there is probable cause that terms of bail shall be violated is unconstitutional because by doing so “forfeiture of bail is transformed into an additional penalty as the person, in addition to deprivation of liberty, is further financially penalised whilst requirements for doing so have not been met”.⁷⁵

A further difference exists also in respect to circumstances taken under advisement in determination of the amount of bail since the Croatian law does not provide for the financial status of the person standing for bail as one of the determining factors for the amount of bail. Furthermore, the possibility of personal recognizance of one or more persons to pay the set amount of bail is excluded.

It may be concluded that the Croatian CPC is more precise as it specifically regulates the moment when the defendant whose detention is replaced by bail is released.⁷⁶ The 2011 Serbian Code remains in these terms incomplete with a further imprecision reflected in the absence of a provision that would regulate the “fate” of detention after passing of the ruling on bail. Namely, unlike the Croatian solution which explicitly states that after the decision on bail becomes final and the amount of bail is posted, a separate decision is issued on revocation of detention, the new Serbian CPC does not give a precise answer whether detention is revoked by separate decision or by the one setting bail.

Conclusion

Measures to ensure presence of the defendant and unobstructed conduct of proceedings from the new Serbian Criminal Procedure Code that have been analysed in this paper have been set forth so to consistently reflect some of the basic conceptual precepts of the lawmaker in respect to transition to prosecutorial investigation and adversarial trial. In this they are similar to solutions in the region where this transition has been effected to higher or lesser degree. Certain solutions, such as the possibility for the parties and defence counsel to summon witnesses, expert witnesses and other participants in proceedings after raising of the indictment – which is beneficial in

72 Art. 102 (1) of the Croatian CPC.

73 Art.104 (2) *in fine* of the Croatian CPC.

74 See Constitutional Court of Croatia, decision of 19 July 2012 p. 61, para 81.

75 *Idem*, p. 62.

76 Art. 103 (2) of the Croatian CPC.

terms of efficiency of proceedings – are a result of this reform process. What the court and parties will have to take under advisement is that security measures do not compromise the possibility and right of the defence to conduct their own investigation and collect evidence, including questioning of witnesses, and to participate in other ways more actively in the proceedings than was the case to date and thus meet the expectations placed before the parties by the new CPC.

The changes introduced by the new CPC through regulation of security measures are a step forward in finding the balance between the need for more efficient criminal proceedings on one hand, and the right to liberty and other rights of the defendant, on the other. The balance must be founded on the standards established by the European Convention on Human Rights, but has to also rely on the most appropriate solutions from domestic and comparative legislation and jurisprudence. In view of elaboration of particular measures and requirements for their ordering, this Code somewhere follows the existing well-established rules and solutions proven in practise that are concurrently, and most often with unbroken legal heritage, present in other countries of the former Yugoslavia, and in some instances enacts new ones or elaborates them in detail in a way distinguishing it from its neighbours. Some solutions deserve praise whilst some criticism in terms of a need to consider, re-examine or afford additional attention in practise. As the provisions governing measures have been analysed and compared in detail, we would now, summarise below some of the key observations.

The time frame for re-examining justification of further application of measures is increased from two to three months, the longest in the region, appears an unjustifiable constriction of protection of the defendant who is subjected to measures. This time frame should be particularly reconsidered and shortened in respect to the measure of ban to leave abode, which is most similar to detention.

There is no reason to introduce temporary revocation of driver's license as a measure if the vehicle was used for commission or preparation of offense. These are excessively broad grounds and they foster arbitrariness, and – most importantly – are not in correlation with the risk of obstructing proceedings or non-appearance of defendant.

A positive element in the new CPC is the provision of a broader spectrum of measures that may be ordered cumulatively and that some of the measures are now provided as separate, with detailed stipulation of requirements and manner of their application, including also remote electronic monitoring and duty to report to the police or other public authority. Grounds for ordering some of the measures have been augmented, and consequently the field of their application. Of particular importance is the broadening of the field of application of bail. All of the above provides a broader alternative to detention as the strictest measure that should also be ordered only exceptionally, and also grants a general possibility to replace restrictive measure with ones that are less restrictive. This improves the status of defendants and provides a stronger guarantee for respect of their rights, particularly the right to liberty. With the exception of bail, and ban to leave abode in most of its requirements, the other measures do not require the same grounds for application as in case of remand on detention, and may hence be also applied when there is lesser risk, i.e. in absence of those particular circumstances that are stipulated for detention.

On the other hand, in might be proven beneficial in practise and even more broaden the choice of effective measures if the ban to engage in certain activities was introduced, as recognised in Croatian and BiH laws. Furthermore, a question may be raised why is the risk of concealing and

destroying traces and influence on witnesses recognised as a requirement, in addition to custody, only in the measure of ban to approach, meet and communicate (and even here only in respect to influence on witnesses). Why should not the ban to leave residence, particular “house arrest” with potential associated restrictions for the defendant, be one of the options, even a more effective one, in case of so called “collusion risk” (interference with evidence and witnesses) prior to resorting to detention? Remand on detention in any case remains an almost automatic option when such risk is present in practise, and this does occur in a large number of cases.

Increasing the options for ordering various security measures should lead to reduction of cases with detention ordered and the number of detainees, which was one of the intentions of the law-maker and the Ministry of Justice of Serbia. Not only is the replacing of detention with less restrictive measures, whenever there are grounds to do so and an adequate alternative, a tendency prescribed by the case law of the European Court of Human Rights, but it has also become, *inter alia*, one of the ways to resolve the issue of prison overcrowding in Serbia. Thus the 2010 Strategy of the Government of Serbia for reduction of overcrowding of prisons in Serbia (concluding that frequent ordering of detention is one of the key reasons for overcrowding in penal institutions) recognises that one of the ways to resolve this issue lies in broadening the grounds for ordering bail, more precise statutory requirements for ordering ban to leave abode or residence, as well as in regulation of the system of electronic monitoring of the defendant under a security measure.⁷⁷ The Strategy includes among the solutions also professional training of judges and prosecutors.⁷⁸

The duty of the courts to consider ordering more lenient measures when deliberating detention is not, however, a novelty introduced only by the new CPC. It has existed from before. Thus, it was an issue of courts’ jurisprudence if, how and when these alternatives were taken in consideration. There are expectations that solutions in the new CPC will be more articulate and enhance court practise and, thus, status of the defendant, and that Article 136 of the 2001 CPC was creating certain vagueness and ambiguities and causing problems in court practise.⁷⁹ In any case, it remains for case law, and also initiatives of the parties in proceedings, to demonstrate whether normative advances in terms of various options for security measures will be followed by application of these very norms in the spirit in which these were enacted. Certain experiences from countries of the region, such as Bosnia and Herzegovina, indicate that after amending of the criminal procedure codes a part of court practise displayed a tendency to apply the broader spectrum of security measures, while the other remained more reticent.⁸⁰ Hence, one should have moderate expectations from the text of the law itself and wait for what jurisprudence is going to demonstrate. At the same time, the guidelines of superior courts and prosecutions to lower-instances, proactive proposals of defence, and also training of judges, prosecutors and attorneys should direct the practise towards genuine embracing of all measures provided in the CPC, particularly those that are a replacement for detention.

77 The Strategy of the Government of Serbia to reduce overcrowding in institutions for enforcement of penal sanctions in the Republic of Serbia from 2010 to 2015, Official Gazette of Republic of Serbia, no. 53/2010, pp. 9-10.

The Strategy presents the fact that of the overall number of persons sentenced to imprisonment up to 3 years and who commenced serving their sentences in 2008, 34% were in detention during proceedings. *Idem*, p.5.

78 *Idem*, p.11

79 R.Dragičević-Dičić, p.39.

80 Research conducted by the OSCE Mission to Bosnia and Herzegovina showed that prosecutors and judges of the Court of BiH, after enactment of amendments to the BiH CPC, used measures alternative to detention more frequently, while in both entities and Brčko District the positions was mainly that bail and other security measures and/or bans should be applied only if the risk of flight was the reason for custody. The OSCE Report concludes that use of more lenient measures is rare and would not even be taken under consideration if defense counsel did not insist upon it. Report of the OSCE Mission in Bosnia and Herzegovina, *op.cit*, p.14

Plea Agreement: New Serbian Criminal Procedure Code and Regional Comparative Analysis

Summary

This paper focuses on expert and critical analysis of issues related to the plea agreement as one of the most representative forms of simplified proceedings in criminal matters in the new criminal procedure codes of the Republic of Serbia and other countries in the region (Bosnia and Herzegovina, Montenegro and Croatia). The content of this paper includes three groups of issues. The first group of issues refers to general remarks concerning the reform of criminal procedure legislation in Serbia and other countries in the region over the past ten years and results thereof. The second group of issues focuses on an analysis of the role and place of the plea agreement in the reform of criminal procedure legislation in the countries observed. Following the analysis, two key conclusions may be drawn. One, there is a full criminal policy justification for legitimisation of the institution of plea agreement in the process of reforming the criminal procedure legislation in Serbia and other countries in the region. Two, the author's position is that, in principle, issues pertaining to the normative elaboration of this agreement in the new Criminal Procedure Code /hereinafter: the CPC/ of the Republic of Serbia are in line with the majority opinion of the expert public not only here in Serbia, but also elsewhere, and that, as such, they are in line with the main point of the agreement and main criminal policy reasons that have led to its well-known position in modern criminal procedure legislation in general. However, the author is of the opinion that the normative elaboration of a number of issues is still below expectations. Some of these issues refer particularly to the possible scope of application of certain forms of the agreement, the text of the agreement, the type and amount of criminal sanction provided in the concluded agreement, the place and role of the injured party in the process of concluding the agreement, the role of the defence counsel in the negotiations and the

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court's decision-making process, the time of procedural activation of the court, possibilities and grounds for using a legal remedy in such proceedings, etc. Nevertheless, the author believes that justification of the existence of the institution of plea agreement should not be brought into question under any circumstances. Despite remarks concerning the method of normative elaboration of some of its issues, this concept is still expected to assume an even more significant position in the fight against crime both in Serbia and in other countries of the region. It is practically expected to become one of the most important and most effective tools for fighting crime. The third group of issues focuses on an analysis of two other possible ways of reaching an agreement between the public prosecutor and the defendant (agreement on testifying of defendant and agreement on a convicted person's testifying).

Key words: Criminal Procedure Code, Serbia, Bosnia and Herzegovina, Montenegro, Croatia, plea agreement, public prosecutor, simplified forms of proceedings, criminal matter, main hearing, reform of criminal procedure legislation, injured party, cooperating defendant, cooperating convicted person, criminal sanction

1. Agreements between the public prosecutor and the defendant and reform of criminal procedure legislation in Serbia and other countries in the region²

What Serbia and other countries in the region have in common in relation to their respective criminal procedure legislation are extensive efforts towards reforming that legislation over the past decade. As a result of the reform, these countries have all got new CPCs.³ Prior to their adoption, there had been shorter or longer periods of searching for solutions by which the lawmakers in each of these countries intended to achieve reform goals. Irrespective of the text of the code itself, one of the key goals of reform was to create a normative basis for more efficient criminal proceedings not only by legitimising simplified forms of proceedings in criminal matters, but also by continuously broadening their field of application. Using as a point of departure the inefficiency of criminal proceedings not only in the countries of the region, but also elsewhere, in the past few decades criminal procedure legislation was subjected to major interventions also in terms of simplifying certain forms of proceedings. Their common denominator was the creation of a normative basis for making the criminal procedure as efficient as possible through standardisation of simplified forms of proceedings⁴ in cases where a specific criminal matter so justified given the gravity of a criminal offence, the volume of exhibits and attitude of a defendant charged with that criminal offence. The main reason that justifies this standardisation is an indisputable fact that, even though the major causes of lack of efficiency of criminal proceedings

² This refers to the reform of criminal procedure legislation in Bosnia and Herzegovina, Montenegro and Croatia.

³ Serbia got a new CPC in 2011 ("The Official Gazette of the RS", No.72/2011), Montenegro in 2009 ("The Official Herald of Montenegro", No. 57/09), Croatia in 2009 ("The Official Gazette"/of the Republic of Croatia/, Nos.76/09 and 80/2011), and Bosnia and Herzegovina in 2003, while four relevant codes in Bosnia and Herzegovina - the Criminal Procedure Codes of Bosnia and Herzegovina, Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District, respectively, have been amended several times in the meantime (See: Simović, M., et als., "Krivični postupak Bosne i Hercegovine, Federacije BiH i Republike Srpske"/Criminal procedure of Bosnia and Herzegovina, Federation of Bosnia and Herzegovina and Republic of Srpska/, Sarajevo, 2009)

⁴ See: Bejatović, S., "Mere za povećanje efikasnosti i pojednostavljenje krivičnog postupka"/Measures of enhancing efficiency and simplifying criminal proceedings/, Proceedings: "Osnovne karakteristike Predloga novog jugoslovenskog krivičnog zakonodavstva"/The main characteristics of the new Yugoslav draft criminal legislation/, the Association for Criminal Law and Criminology of Yugoslavia, Belgrade, 2000; Brkić, S., "Racionalizacija krivičnog postupka i uprošćene procesne forme"/Rationalisation of criminal proceedings and simplified forms of proceedings/, the Faculty of Law in Novi Sad, Novi Sad, 2004

are outside the scope of criminal procedure legislation⁵, indeed the normative basis is among the most important factors of efficient criminal proceedings in general.⁶ With that in mind, one of the most important features of modern criminal procedure legislation in general is simultaneous and parallel existence of regular criminal proceedings one hand and increasing emergence of simplified forms of proceedings in criminal matters⁷, on the other. Moreover, justification for this parallel existence of several types of criminal proceedings is based on the heterogeneous structure of criminality, i.e. heterogeneous structure of criminal offences and their perpetrators. Proceedings that might be suitable for one type of criminal offences and their perpetrators might not necessarily be suitable or rational for another type of criminal offences and their perpetrators. Furthermore, uniform criminal proceedings are not in compliance with relevant international documents that guarantee the right to a trial within a reasonable time.⁸ In other words, this is neither in the interest of the defendant, who is entitled to a speedy and adequate trial, nor in the general interest of the society as a whole, whose goal is to fight crime efficiently. In that context, one should recall Beccaria who highlighted the need for a quick trial, and he was not alone in his belief that only an immediate punishment of the perpetrator can be just and useful. Even the Old Testament says that “when the sentence for a crime is not quickly carried out, people’s hearts are filled with schemes to do wrong”. Therefore, from the normative point of view, in modern comparative criminal procedure legislation efforts are also being exerted towards finding a way to boost the efficiency of criminal proceedings by introducing, inter alia, special, summary proceedings as simplified forms of proceedings for certain categories of criminal offences.⁹ Today one may say with certainty that streamlined or simplified forms of proceedings in criminal matters constitute one of extremely important tools of efficient criminal proceedings. As such, they are intended for easier criminal cases (lesser or medium-gravity criminal offences). When coupled with the fact that this category of criminal offences has a significant share in the overall structure of criminality, the importance of such proceedings is increasing. Furthermore, discussion on criminal and political justification of such proceedings also needs to include the fact that their practical application will help disburden the courts and directly contribute to enhancing the quality of trials for more serious criminal offences, which, in turn, will leave more room for the courts to deal with more difficult and more complex cases. Hence, it is no wonder that criminal procedure legislation as a whole (not only individual criminal legislation of one country) has for many years been characterised by multiple simplified forms of proceedings in criminal matters. Nowadays, for the category of adult defendants, for instance, apart from two traditional and relatively well-known forms of simplified criminal proceedings (summary criminal proceedings

5 See Proceedings: “Krivično zakonodavstvo, organizacija pravosuđa i efikasnost postupanja u krivičnim stvarima” /Criminal legislation, judicial organisation and efficiency of proceedings in criminal matters/, the Serbian Association for Criminal Law Theory and Practice, Belgrade, 2008

6 Lowe-Rosenberg-Die Strafprozessordnung und das Gerichtsverfassungsgesetz, Grosskommentar, 23. , neuberbeitete Auflage, Zweiter Band, Berlin,1987, seit. 68-92; Larguier, J., Procedure penale, Paris, 2001; Radulović, D., ‘Efikasnost krivičnog postupka i njen uticaj na suzbijanje kriminaliteta’ /The efficiency of criminal proceedings and its impact on suppression of crime/, Proceedings: “Realne mogućnosti krivičnog zakonodavstva u suzbijanju kriminaliteta” /True capabilities of criminal legislation to suppress crime/, Belgrade, 1997

7 Brkić, S., “Racionalizacija krivičnog postupka i uprošćene procesne forme”, the Faculty of Law in Novi Sad, Novi Sad, 2004

8 See Article 6, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 14, paragraph 3c of the International Covenant on Civil and Political Rights

9 See: Roxin, C., Strafverfahrensrecht, 22.Auflage, Munchen, 2002, seit. 256-268; Lutz Meyer-Gossner, *Strafprozessordnung*, 46. Auflage,Verlag C.H. Beck, Munchen, 2003, seit. 194-198; Lowe-Rosenberg, *Die Strafprozessordnung und das Gerichtsverfassungsgesetz*, Groskommentar, 23.Auflage, Zweiter Band, Berlin, 1988, seit. 456-468; Bejatović, S., ‘Mere za povećanje efikasnosti i pojednostavljenje krivičnog postupka’, Proceedings: “Osnovne karakteristike Predloga novog jugoslovenskog krivičnog zakonodavstva”, the Association for Criminal Law and Criminology of Yugoslavia, Belgrade, 2000, p. 145; Đurđić, V., ‘Krivičnoprocesno zakonodavstvo kao normativna pretpostavka efikasnosti postupanja u krivičnim stvarima’ /Criminal procedure legislation as a normative prerequisite of efficient proceedings in criminal matters/, Proceedings: “Krivično zakonodavstvo, organizacija pravosuđa i efikasnost postupanja u krivičnim stvarima”, the Serbian Association for Criminal Law Theory and Practice, Belgrade, 2008

and proceedings for imposing judicial admonition), other forms of simplified criminal proceedings have emerged. They include, for example, cases involving a plea agreement, penal order, witness immunity, etc.¹⁰ All of them are based on elements which are related to a criminal matter, the state of the evidence and conduct or attitude of subjects of criminal proceedings, and they feature a lower level of procedural complexity as compared to the general form of criminal proceedings. Instruments of simplification of procedural forms are threefold and they manifest in the following: omission of certain procedural stages, depending on the specific form of simplification; shortening of procedural deadlines; and deformalisation of the proceedings (omission of certain formalities and safeguards)¹¹.

Modern scientific trends in procedural criminal law and solutions found in modern criminal procedure legislation, dealing with agreements between the parties to the criminal proceedings and other simplified forms of proceedings in criminal matters, have found their proper place also in the criminal procedure legislation in Serbia (as well as in other countries of the region). Reasons for this are the same as those that have brought about such a trend in comparative criminal procedure legislation. They also share the same goal - to create a normative basis for boosting the efficiency of criminal proceedings.¹² Hence, as early as in its CPC of 2001¹³, the Republic of Serbia introduced new simplified forms of proceedings in criminal matters as the first step towards reforming its criminal procedure legislation. For instance, it legitimised the procedure for punishment before the main hearing. This trend of introducing new solutions into the Serbian criminal procedure legislation, which started with the adoption of the Criminal Procedure Code of 2001 in a bid to create the normative basis for enhancing the efficiency of criminal proceedings by means of simplified forms of proceedings in criminal matters, and continued with amendments to the CPC in May 2004¹⁴ and in August 2009¹⁵, respectively, which introduced very important novelties through legitimisation of plea agreement.¹⁶ But efforts to boost the efficiency of criminal proceedings did not stop there. The new Serbian CPC of 2011 introduced more novelties.¹⁷ Their goal was identical to that of previous endeavours within the reform process - to create the normative basis for more efficient criminal proceedings. With all that in mind, in spite of doubtless importance of this standard of practical efficiency of criminal proceedings,

10 See: Schunemann, B., *Ein deutsches Reguien auf Strafprozess des liberalen rechtssaats*, *Zeitschrift fur ewchtspolitik*, vol. , 2009; Proceedings: "Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije" /Simplified forms of proceedings in criminal matters and alternative criminal sanctions/, the Serbian Association for Criminal Law Theory and Practice, Belgrade, 2009

11 For further details, see: Simović, M., "Pojednostavljene forme postupanja u krivičnom procesnom pravu BiH" /Simplified forms of proceedings in the procedural criminal law of Bosnia and Herzegovina/, Proceedings: "Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije", the Serbian Association for Criminal Law Theory and Practice, Belgrade, 2009; Nikolić, D., "Sporazum o priznanju krivice" /Plea agreement/, Belgrade, 2009; Bejatović, S., "Sporazum o priznanju krivice i druge pojednostavljene forme postupanja u krivičnom procesnom zakonodavstvu Srbije kao instrumenat normative efikasnosti krivičnog postupka" /Plea agreement and other simplified forms of proceedings in the Serbian criminal procedure legislation as an instrument of normative efficiency of criminal proceedings/, Proceedings: "Pravni sistem Srbije i standardi Evropske unije i Saveta Evrope" /The Serbian legal system and EU and Council of Europe standards/, the Faculty of Law in Kragujevac, 2009, Book IV; Brkić, S., "Pojednostavljene forme postupanja i postupak njihovog ozakonjenja u Republici Srbiji" /Simplified forms of proceedings and their legitimisation in the Republic of Serbia/, Proceedings: "Zakonodavni postupak i kazneno zakonodavstvo" /Legislative procedure and criminal legislation/, the Serbian Association for Criminal Law Theory and Practice, Belgrade, 2009; Đurđić, V., "Presuđenje na osnovu sporazuma o priznanju krivice" /Adjudication based on plea agreement/, *Pristup pravosuđu*, Niš, 2007

12 Brkić, S., "Racionalizacija krivičnog postupka i uprošćene procesne forme", the Faculty of Law in Novi Sad, Novi Sad, 2004

13 "The Official Herald of the SFRY", Nos.70/01 and 68/02, and "The Official Gazette of the RS", Nos. 58/04, 85/05, 115/05, 49/07, 20/09, 72/09 and 76/2010

14 "The Official Gazette of the RS", No. 58/2004

15 "The Official Gazette of the RS", No. 72/09

16 Bejatović, S., "Izmene i dopune ZKP i pojednostavljene forme postupanja u krivičnim stvarima" /Amendments to the CPC and simplified forms of proceedings in criminal matters/, *Revija za kriminologiju i krivično pravo*, No. 2/09, pp. 21-40

17 See: Proceedings: "Nova rešenja u krivičnom procesnom zakonodavstvu - Teoretski i praktični aspekt" /Theoretical and practical aspects of new solutions in the criminal procedure legislation/, the Serbian Association for Criminal Law Theory and Practice, Belgrade, 2011

the following question arises: To what extent did the relevant normative elaboration of the new Serbian CPC take into consideration requests of the local expert public, solutions of comparative criminal procedure related legislation and the latest legal science trends in the procedural criminal law referring to agreements between parties to the criminal proceedings and other simplified forms of proceedings in criminal matters?¹⁸ This becomes especially important given the fact that quite a few solutions not only to this issue, but to other issues as well, have been questioned by the national professional establishment and apparently for a good reason. Thus, even the official position of the proponent of the draft law to the effect that the adoption of the code has put an end to the reform of Serbian criminal procedure legislation is disputable. This issue is even more topical because of the fact that one of the elements of the Coalition Agreement of the new Government of the Republic of Serbia of July 10, 2012 focuses on the text of the code. The Coalition Agreement in paragraph 3 expressly provides that forthcoming activities of the new Government should also include “review of the Criminal Procedure Code, which has been seriously criticised by the expert public”. Wishing to further contribute to the process of reforming Serbia’s criminal procedure legislation, the author offers his own view of the answer to this question from the perspective of agreement between the public prosecutor and the defendant.

2. Plea agreement (The new Serbian CPC and regional comparative analysis)

An important feature that the reform of criminal procedure legislation in Serbia and other countries in the region has brought is the legitimisation of plea agreement. Using as a point of departure the indisputable importance of this institution as a tool for boosting the efficiency of criminal proceedings, the 2009 Law on the Amendments to the CPC introduces the legitimisation of plea agreement into the Serbian criminal procedure legislation as one of predominant forms of proceedings in criminal matters in general.¹⁹ The main point of this institution is reflected in the previous concept of plea bargaining between the prosecutor and the defendant and his defense counsel and in subsequent acceptance or rejection of the agreement by the court. The legitimisation of plea agreement in the CPC of Serbia and other countries in the region is the result of an almost uniform position of the professional establishment in these countries that the plea agreement is a very important and highly useful tool for boosting the efficiency of fight against criminality in general.²⁰ Hence, its legitimisation in the Serbian criminal procedure legislation is fully justified. However, before its legitimisation (immediately upon the adoption of the CPC of 2006, which was characterised, among other things, by legitimisation of the agreement²¹) or even during subsequent stages of working on the reform of criminal procedure legislation in Serbia, apparently well-founded criticism had been voiced in relation to some issues concerning its normative elaboration.²² In the course of drafting the final version of the new CPC this concept was rightfully retained and special attention was paid to standardisation of the agreement between the public prosecutor and the defendant. There have been many debates in the Serbian expert

18 See Proceedings: “Nova rešenja u krivičnom procesnom zakonodavstvu - Teoretski i praktični aspekt”, the Serbian Association for Criminal Law Theory and Practice, Belgrade, 2011

19 Nikolić, D., “Sporazum o priznanju krivice”, Belgrade, 2009

20 See Conclusions of the 47th annual convention of the Serbian Association for Criminal Law Theory and Practice, Mt. Zlatibor, September 26, 2010

21 Bejatović, S., “Sporazum o priznanju krivice i druge pojednostavljene forme postupanja u krivičnom procesnom zakonodavstvu Srbije kao instrumenat normativne efikasnosti krivičnog postupka”, Proceedings: “Pravni sistem Srbije i standardi Evropske unije i Saveta Evrope”, the Faculty of Law in Kragujevac, 2009, Book IV, pp. 85-106

22 See journal “Revija za kriminologiju i krivično pravo”, No. 2/2006 (entirely focusing on these issues).

public on how to address a number of issues that remained outstanding. These issues primarily included the forms of agreement between the subjects of criminal proceedings and a possible scope of their application (Whether these agreements could apply to all criminal offences or only to some of them – i.e. lesser offences?), the contents of the agreement, the type and amount of criminal sanction provided in the concluded agreement, the role and place of the injured party in the process of concluding the agreement, the role of the defence counsel in the negotiations and the court's decision-making process, the time of procedural activation of the court, and possibilities and grounds for using a legal remedy in such proceedings, etc.)²³. However, before giving an overview of the main characteristics of the latest solutions that are provided in the 2011 CPC, the following four points should be highlighted as part of general remarks. First, one should recall that no expert debate conducted in Serbia or in other countries observed has ever brought into question the criminal policy justification of these solutions. On the contrary, during the short period of time of their existence, they have fully demonstrated their criminal policy justification and all interventions and advocacy to that effect have been aimed at finding solutions for their proper implementation and for providing mechanisms to prevent possible abuse. Second, the acceptance of the expert public advocacy towards justification of the plea agreement has been growing on a daily basis. The best example of this can be found in the official data on the application of the plea agreement in the Republic of Serbia. According to the data, there is a growing acceptance of the plea agreement by public prosecutors, defendants and their defence counsels alike. Official statistics show that basic and high prosecutors' offices, the Prosecutor's Office for Organised Crime and the Prosecutor's Office for War Crimes concluded plea agreements with a total of 441 defendants in 2011, which is an increase of 530% as compared to the previous reporting period. Of the total number of plea agreements concluded, the court accepted 364 agreements in the first instance proceedings, which is an increase of 420% as compared to the previous reporting period. On the basis of concluded plea agreements, 191 persons were convicted to prison sentences, 37 persons were fined, 144 persons received probation sentences, security measures were imposed on 71 persons and 29 persons had to fulfill obligations set forth in Article 236, paragraph 1 of the CPC, while 11 persons were obliged to return pecuniary benefits. Other relevant decisions were rendered against 21 persons. The court dismissed by ruling two concluded plea agreements and rejected another 14. A total of 7 appeals were lodged against court decisions, of which 5 were rejected and 2 were pending. At the end of the reporting period, proceedings against 144 persons were still pending. When these figures are compared with those from 2010, their importance becomes even more evident. According to the 2010 statistics, basic and high prosecutors' offices in the territory of the Republic of Serbia concluded plea agreements with a total of 70 defendants. A total of 25 plea agreements were concluded in the territory of the Appellate Public Prosecutor's Office in Belgrade, 24 in the territory of the Appellate Public Prosecutor's Office in Novi Sad, 12 in the territory of the Appellate Public Prosecutor's Office in

23 See: Simović, M., 'Pojednostavljene forme postupanja u krivičnom procesnom pravu BiH', Proceedings: "Pojednostavljene forme postupanja u krivičnim svatima i alternativne krivične sankcije", the Serbian Association for Criminal Law Theory and Practice, Belgrade, 2009; Nikolić, D., "Sporazum o priznanju krivice", Belgrade, 2009; Bejatović, S., "Sporazum o priznanju krivice i druge pojednostavljene forme postupanja u krivičnom procesnom zakonodavstvu Srbije kao instrumenat normative efikasnosti krivičnog postupka", Proceedings: "Pravni sistem Srbije i standardi Evropske unije i Saveta Evrope", the Faculty of Law in Kragujevac, 2009, Book IV, pp. 85-106; Đurđić, V., "Stranački sporazum o priznanju krivice u krivičnom postupku" / Agreement of parties on admission of guilt in criminal proceedings/, *Revija za kriminologiju i krivično pravo*, No. 3/2009; Skulić, M., "Sporazum o priznanju krivice" / Plea agreement/, the Faculty of Law in Belgrade, Belgrade, 2009

Niš and 9 in the territory of the Appellate Public Prosecutor's Office in Kragujevac.²⁴ Third, as different from the current Serbian CPC and solutions offered by the criminal procedure legislation of other countries in the region, the new CPC provides for three types of agreement between the public prosecutor and the defendant. These are: the plea agreement, agreement on testifying of defendant and agreement on a convicted person's testifying. However, these forms of agreement between the public prosecutor and the defendant seem new only at first glance, but in essence they are not. The first type of agreement (plea agreement) is just a variation of the plea agreement from the current CPC which is still in force. The other two agreements are merely variations of "becoming a cooperating witness." They serve as a basis for using a statement of the defendant or convicted person as evidence of the prosecution against other defendants. They are merely a different normative and technical way of regulating the concept of cooperating witness.²⁵ Fourth, the author of this paper believes that the normative elaboration of these agreements has failed to sufficiently take into consideration the views of the professional establishment and solutions offered by the relevant comparative criminal procedure legislation. The newly adopted CPC has retained this form of simplified proceedings, not only its amended name, but also the amended content of its normative elaboration, as compared to the solutions that are present in the current CPC which is still in force²⁶, in terms of crucial issues relating to their characteristics. As for the text of the new CPC, the main characteristics of this simplified form of proceedings in criminal matters are reflected in the following:

One, the term for this form of simplified proceedings was amended /translator's note: amended in the Serbian language/. "Sporazum o priznanju krivice" is renamed as "Sporazum o priznanju krivičnog dela"²⁷ /translator's note: the former is an agreement on the admission of guilt and the latter is an agreement on the admission of criminal offence, whereas the English translation of both terms - 'plea agreement' - remains the same/. This appears to be a more appropriate solution /translator's note: in the Serbian language/ and more in line with the concept of criminal offence referred to in Article 14, paragraph 1 of the Criminal Code of the Republic of Serbia, where culpability is an essential element of a criminal offence.²⁸

Two, in lieu of normative restriction of a possibility to apply a plea agreement (to one or more concurrent criminal offences punishable by imprisonment of up to 12 years), it is now possible to apply it to all criminal offences, even the most serious ones.²⁹

Three, the lack of prescribing a minimum criminal sanction which may be proposed in a plea agreement. Instead of this, the code prescribes "that the penalty or other criminal sanction or

24 The Republic Public Prosecutor's Office: "Rad javnih tužilaštava na suzbijanju kriminaliteta i zaštiti ustavnosti i zakonitosti u 2011. i 2010. godini" /Activities of the public prosecutors' offices in suppressing crime and protecting constitutionality and legality/ (Quotations from Kiurski, J., "Sporazum o priznanju krivice (krivičnog dela)"/Plea agreement (agreement on the admission of guilt)/, Proceedings: "Aktuelna pitanja krivičnog zakonodavstva (Normativni i praktični aspekt)" /Current issues of criminal legislation (Normative and practical aspects)/, the Serbian Association for Criminal Law Theory and Practice, Belgrade, 2012

25 Cf. provisions of Articles 504o - 504č of the Serbian CPC of 2009 and provisions of Articles 320-330 of the new CPC.

26 Cf. provisions of Articles 282a-282d of the current CPC and provisions of Articles 313-319 of the new CPC

27 Unlike the Serbian CPC, in the codes of other countries observed the term "plea agreement" is adapted to specific linguistic characteristics of each of these countries (e.g. "negotiating on the conditions of pleading guilty", "negotiation on sanctions").

28 Stojanović, Z., "Krivično pravo - Opšti deo" /Criminal law - General aspects/, Belgrade, 2008

29 Cf. Article 282a of the current CPC and Article 313, paragraph 1 of the new CPC (when this particular feature of the plea agreement is compared with solutions in other countries that were analysed, it is evident that these countries have different approaches to what in the author's mind are crucial issues. Under the Montenegrin CPC, a plea agreement may be concluded only if a criminal offence is punishable by imprisonment of up to ten years. However, such restrictions do not exist in other codes that were analysed (See: Sijerčić Čolić, H., "Krivično procesno pravo" /Procedural criminal law/, Book II, the Faculty of Law in Sarajevo, 2008, p.73).

other measure in respect of which the public prosecutor and the defendant concluded the agreement was proposed in accordance with criminal and other law.”³⁰ Such a solution is contrary to the solution from the CPC of 2009, which provides that “a sentence, as a rule, cannot be lower than the legally defined minimum sentence for the criminal offence defendant was charged with.”³¹ As for the solutions in other codes that were analysed, it is possible to agree upon the sentence and other criminal sanctions “in accordance with provisions of the Criminal Code.”³²

Four, as for the sanction, the plea agreement must contain “an agreement on the type, extent or scope of the penalty or other criminal sanction.”³³

Five, the Code specifies when the plea agreement may be concluded (A plea agreement may be concluded by the public prosecutor and the defendant from the moment of issuance of an order to conduct an investigation until defendant’s plea about the charges at the trial).³⁴

Six, the public prosecutor and the defendant or his defence counsel are the only ones who are entitled to propose the conclusion of a plea agreement. The public prosecutor may propose to the defendant and his defence counsel to conclude a plea agreement or vice versa. Following such a proposal, the public prosecutor, the defendant and his defence counsel may negotiate the conditions of pleading guilty for the criminal offence that the defendant is charged with. The court has no right of initiative neither in regard to the negotiations nor in regard to the conclusion of the plea agreement.³⁵

Seven, the decision on the plea agreement is rendered at a hearing to which the public prosecutor, the defendant and his defence counsel are summoned.³⁶ The injured party is not even informed about this hearing. The functional jurisdiction of the court to decide upon the plea agreement depends on the moment in time when the agreement was submitted to the court. Therefore: “The judge for the preliminary proceedings decides on plea agreement, and if the agreement was submitted to the court after the confirmation of the indictment – the president of the panel” (Article 315, paragraph 1 of the new Serbian CPC).³⁷

30 Article 317, paragraph 1, item 4 of the new CPC

31 For exceptions to this rule, i.e. the possibility of pronouncing a lesser penalty, see Article 282b, paragraph 3 of the 2009 Code.

32 See, for instance, Article 301, paragraph 1, item 3 of the Montenegrin CPC

33 This is a mandatory element of the agreement, irrespective of the text of the code.

34 The time in the proceedings when the agreement may be submitted to the court is also prescribed in other codes that were analysed and even in those that were not analysed, although their solutions are not identical. Thus, for example, Article 300, paragraph 3 of the Montenegrin CPC only determines the final deadline by which the agreement may be submitted. According to that Code, the agreement may be submitted “not later than the first hearing for the main hearing before the first instance court.” The CPC of Bosnia and Herzegovina gives more room for negotiations on conditions of pleading guilty. For example, under Article 231, paragraph 1 of the CPC of Bosnia and Herzegovina: “The suspect or the accused and the defense attorney may negotiate with the Prosecutor about the conditions of admitting guilt for the criminal offence with which the suspect or the accused is charged until the completion of the main trial or the appellate proceedings.” However, a plea agreement shall not be entered into if the accused pleaded guilty at the plea hearing. In Croatia, however, the agreement shall be submitted at the plea hearing, but the “panel may postpone a session for fifteen days at the most in order for the parties to complete negotiations” – Article 360, paragraph 2 of the Croatian CPC.

35 An exception to this rule is provided in the Croatian CPC where the court may postpone a session for fifteen days at the most in order for the parties to complete negotiations on a sanction.

36 Article 315, paragraph 2 of the new CPC

37 As with most issues arising from the analysed legislation, there are no identical solutions to this particular issue. For example, according to the Montenegrin CPC, a decision on the agreement shall be rendered by the president of the interlocutory chamber or president of the trial chamber, depending on the stage of the proceedings. A similar solution exists in the legislation of Bosnia and Herzegovina, where the functional jurisdiction of the court to decide upon such agreements depends on the stage of the proceedings in which the agreement is submitted (Judge for the preliminary hearing, trial judge, i.e. the trial chamber). In the Croatian CPC, the panel before which the defendant enters his plea shall have the functional jurisdiction to render a decision on the agreement.

Seven, there are three possible decisions that the court may take in relation to the agreement: dismissal, acceptance or rejection of the agreement. A hearing where such a decision is to be rendered shall be closed to the public.³⁸

Eight, the court shall accept a plea agreement by a judgment and find the defendant guilty if it establishes: that the defendant has knowingly and voluntarily confessed to the criminal offence or criminal offences which are the subject-matter of the charges; that the defendant is aware of all the consequences of the agreement concluded, and especially that he has waived the right to a trial and that he accepts a restriction of his right to file an appeal against the decision of the court based on the agreement; that other evidence exists that does not run contrary to the defendant's confession of having committed the criminal offence; that the penalty or other criminal sanction or other measure in respect of which the public prosecutor and the defendant concluded the agreement was proposed in accordance with criminal and other law. The judgment must contain the reasons because of which the court accepted the agreement. The court shall reject a plea agreement by a reasoned ruling if it establishes that one or more of the conditions have not been fulfilled and if there are reasons to discontinue the proceedings. In that case, the defendant's confession made in the plea agreement may not be used as evidence in criminal proceedings. When the ruling becomes final, the plea agreement and all files in connection with it are destroyed in the presence of the judge who issued the ruling and a transcript is made thereof, and the judge who issued the ruling may not participate in the further course of the proceedings. The court shall dismiss the agreement by ruling in the following two cases: if it establishes that the agreement does not contain the data specified in the Code; and if a duly summoned defendant has not appeared at the hearing and failed to justify his absence (Articles 316, 317 and 318 of the new CPC).³⁹

Nine, the defendant may undertake by means of the plea agreement to fulfill the obligations due to which the prosecutor is entitled to defer criminal prosecution, according to the principle of prosecutorial opportunity, provided that the nature of the obligations is such that it allows the defendant to start fulfilling them before the submission of the plea agreement to the court⁴⁰.

38 As for the type of court decisions on the agreement, Croatian solution is noteworthy as its CPC expressly provides for a possibility to desist from the agreement proposal. According to its Article 362: "The parties may desist from the agreement proposal before the judgment is passed."

39 In principle, court decisions on the plea agreement and consequences of its rejection are identical in other codes that were analysed. The only difference is in concretisation (or lack of concretisation) of the grounds for rendering the three possible types of decision, as well as in the manner of providing for consequences of rejection of the agreement. Thus, for example, if the plea agreement is rejected, the panel shall continue the examination of the indictment and deliver the indictment and the case file to the court clerk's office for scheduling the hearing. The only exception to this rule is when there are grounds for discontinuing the proceedings (Article 361, paragraphs 3 and 4 of the Croatian CPC). According to the Montenegrin CPC: "When the ruling on accepting an agreement on the admission of guilt becomes final, the Chair of the Panel shall, without delay, and not later than within three days, render a decision to the effect that the defendant is found guilty in accordance with the accepted agreement" (Article 303, paragraph 1 of the Montenegrin CPC). Similar solutions also exist in Bosnia and Herzegovina. For example, pursuant to Article 231 of its CPC: "If the Court rejects the plea agreement, the Court shall accordingly inform the parties to the proceedings and the defense attorney and enter for the record that the plea was rejected. At the same time, the date of the main trial shall be determined. The main trial shall be scheduled within 30 days."

40 This is a specific feature of the plea agreement, which is not common to all criminal procedure codes that were analysed. Apart from the Serbian CPC, a similar feature exists only in the Montenegrin CPC. According to Article 301, paragraph 3 of the Montenegrin CPC: "The accused person may undertake by means of the agreement on the admission of guilt to perform the obligations referred to in Article 272, paragraph 1 of the present Code, provided that the nature of the obligations is such that it allows the accused person to perform or start performing them before the submission of an agreement on the admission of guilt." However, according to Article 363, paragraph 3 of the Croatian CPC, apart from the sentence of imprisonment and a precautionary measure, the court may also impose a security measure and a measure of confiscating pecuniary benefits.

Ten, a judgment accepting the plea agreement is appealable. Pursuant to Article 319, paragraph 3 of the Code, the public prosecutor, the defendant and his defence counsel may within eight days of the date of delivery of the judgment appeal against the judgment accepting the plea agreement for the existence of the reasons for which the proceedings are discontinued following examination of the indictment within the meaning of Article 338, paragraph 1⁴¹ or if the judgment does not relate to the subject-matter of the agreement. On the other hand, a ruling dismissing or rejecting the plea agreement is not appealable.⁴²

Eleven, unlike the current CPC which is still in force, the new CPC expressly provides that the defendant must have a defence counsel from the beginning of negotiations with the public prosecutor until a decision on the agreement is rendered. Such a solution is most welcome and it also exists in other codes that were analysed.⁴³

Without giving a detailed overview of other provisions of the CPC referring to the plea agreement, it appears that not only these provisions, but also some others, which were used for the purpose of normative elaboration of the plea agreement, may be seriously questioned. This may almost lead to a conclusion that the normative elaboration of the plea agreement has failed to sufficiently take into consideration predominant views of the expert public not only in Serbia, but also elsewhere. One should recall that these issues are the most topical ones in the eyes of the professional establishment in regard to the plea agreement in general.⁴⁴ The author believes that the legitimisation of a possibility of concluding a plea agreement is fully justified from criminal policy point of view. However, it would be quite reasonable to put a question mark to a number of solutions that are offered in the normative elaboration of plea agreement in the new CPC. The most disputable issues are as follows:

41 These reasons are the following: that the offence which is the subject-matter of the charges is not a criminal offence, and the conditions for applying a security measure do not exist; that the statute of limitation for criminal prosecution has expired, or that the offence is encompassed by an amnesty or pardon, or that other circumstances exist which permanently exclude criminal prosecution; that there is insufficient evidence for justified suspicion that the defendant committed the offence which is the subject-matter of the charges.

42 Other codes that were analysed offer slightly different solutions to the issue of possibility of appeal against a court decision on the plea agreement. According to the Croatian CPC, the possibility of appeal depends on the type of the decision on the plea agreement and the grounds for challenging it. Hence, a court ruling rejecting the plea agreement is not appealable. Similarly, a judgment rendered on the basis of acceptance of the plea agreement may not be challenged by an appeal against the decision on the criminal sanction, confiscation of pecuniary benefits, costs of criminal proceedings and claims on indemnification, nor on the grounds of erroneous or incomplete finding of fact, except if the evidence on the exclusion of illegality and guilt came to the defendant's attention after adjudication (Article 361, paragraph 3, and Article 364, paragraphs 1 and 2 of the Croatian CPC). According to the Montenegrin CPC, the decision accepting the agreement on the admission of guilt may be appealed by the injured party, whereas the decision dismissing the agreement may be appealed by the State Prosecutor and by the defendant. A judgment rendered on the basis of a plea agreement shall be appealable insofar as it is not in accordance with the concluded agreement (Article 301, paragraph 10, and Article 303, paragraph 2 of the Montenegrin CPC). The criminal procedure legislation of Bosnia and Herzegovina rules out the possibility of challenging a court decision on a plea agreement. The effects of the court decision are twofold. First, if the court accepts the plea agreement, the defendant's statement will be entered into the record and the hearing will continue where the court will pronounce a criminal sanction which is stipulated in the plea agreement. Second, if the court rejects the plea agreement, the court will inform the parties and the defence counsel about its decision and will set a date for the main hearing. The court will also inform the injured party about the results of the negotiations on conditions of pleading guilty (Article 238, paragraphs 7, 8 and 9 of the Criminal Procedure Code of the Republic of Srpska).

43 See Article 360, paragraph 1 of the Croatian CPC, Article 300, paragraph 3 of the Montenegrin CPC, and Article 231, paragraph 1 of the CPC of Bosnia and Herzegovina

44 See: Löffler, J., Die Absprache in strafprozess, Tubingen, 2010; Budimilić, M., "Sporazumi i potvrda izjašnjenja o krivici – praksa pred Tribunalom za bivšu Jugoslaviju i nacionalnim pravosuđima"/Plea agreements and confirmation thereof - The practice of the International Criminal Tribunal for the Former Yugoslavia and national judiciaries/, *Kriminalističke teme*, Sarajevo, Nos. 1-2/2004; Nikolić, D., "Sporazum o priznanju krivice", Niš, 2006; Bejatović, S., "Sporazum o priznanju krivice i druge pojednostavljene forme postupanja u krivičnom procesnom zakonodavstvu Srbije kao instrumenat normative efikasnosti krivičnog postupka", *Proceedings: "Pravni sistem Srbije i standardi Evropske unije i Saveta Evrope"*, the Faculty of Law in Kragujevac, 2009, Book IV, pp. 85-106

One, a serious analysis of papers addressing the problems of plea agreement shows that a well-justified opinion prevails that the plea agreement should be a simplified form of proceedings, which should mainly apply to a category of so-called lesser or medium-gravity criminal offences. After all, the same goes for other forms of simplified proceedings in criminal matters. In modern criminal procedure legislation, simplified forms of proceedings in criminal matters are intended to deal with lesser criminal offences, including those that are less threatening to the society, which naturally calls for lower investment of time and material resources than serious or most serious criminal offences.⁴⁵ The simplified forms of proceedings in criminal matters should be based on the principle of proportionality between the procedural form and the subject-matter of a trial, so that in such a differentiation the fundamental rights of subjects of criminal proceedings should serve as a threshold below which procedural forms may not be simplified. However, it seems incompatible with the nature of the plea agreement to allow its application to the most serious criminal offences. Such a solution would even raise unnecessary suspicion of possible abuse, something that must be taken into account during the standardisation process. When coupled with the fact that the Criminal Procedure Code, in principle, provides for two additional forms of agreement between the public prosecutor and the defendant (agreement on testifying of defendant and agreement on a convicted person's testifying) as instruments of uncovering and proving the most serious criminal offences, this view becomes even more justified.

Two, a solution which fails to expressly prescribe the minimum threshold below which a criminal sanction may not be proposed in a plea agreement should also be seriously questioned. Apart from the above arguments in favour of raising this issue, one should also bear in mind the general purpose of pronouncing a criminal sanction. It is indisputable that this purpose can be achieved, *inter alia*, only if an appropriate criminal sanction can be pronounced. The question is whether an appropriate criminal sanction is guaranteed by a solution whereby a lenient or even the lowest criminal sanction may be pronounced even for the most serious criminal offences, which might be presumed according to Article 321, paragraph 1, item 3 of the CPC? The author believes that this argument is self-explanatory.

Three, with all that in mind, one must ask whether the rights of the injured party are adequately protected in the process of negotiating a plea agreement. A detailed analysis of the position of the injured party in this process shows that with such a wording his position is further aggravated in comparison with the current CPC. There are two facts that may serve to illustrate this. First, the injured party is not even informed about the hearing where the plea agreement is to be decided upon. Second, the injured party is not entitled to appeal against a decision on the plea agreement. In a nutshell, the new Code does not offer any instruments whereby an injured party may successfully defend his own interests in the process of concluding a plea agreement. In that context, it is noteworthy that such a solution is not even in accordance with generally accepted solutions offered by comparative criminal procedure legislation that was analysed. There are two examples that illustrate this. First, pursuant to Article 301, paragraph 10 of the Montenegrin CPC: "The decision accepting the agreement on the admission of guilt may be appealed by the injured party". Second, according to the Criminal Procedure Code of Bosnia and Herzegovina, in the course of deliberation about the plea agreement the court must examine, *inter alia*, "whether the

45 See: Grubač, M., "Racionalizacija krivičnog postupka uprošćavanjem procesnih formi", Proceedings of the Faculty of Law in Novi Sad, Nos. 1-3/84, p. 290

injured party was given an opportunity before the Prosecutor to state his position regarding the claim under property law” (Article 231, paragraph 6e of the CPC of Bosnia and Herzegovina).

Four, the plea agreement must contain, *inter alia*, an agreement on the type, extent or scope of the penalty or other criminal sanction.⁴⁶ Such a wording might lead to a conclusion that parties may only agree upon the scope of the penalty within the sentencing range provided in the law (e.g. a prison sentence of three to five years), and that it is up to the court to determine the extent of a particular penalty or measure within the “agreed scope”. First of all, this is contrary to a provision of Article 317 whereby the court shall accept a plea agreement once it establishes that certain conditions have been fulfilled. Therefore, one might ask: How can the court accept an agreement in which the criminal sanction is agreed only in terms of its scope? Which penalty should then be imposed in case of conviction? Moreover, if it is accepted (which is possible according to Article 314, paragraph 1, item 3 of the new CPC) that in cases where only the scope of the penalty is agreed upon in the plea agreement the court is free to impose any penalty or measure within the “agreed scope”, then one must ask: How can the court pronounce any penalty, i.e. impose the extent of a certain type of penalty if it failed to present any evidence in relation to the prescribed circumstances that serve as sentencing parameters? Without making any comments to that effect, the author is of the opinion that such a possibility does not make any sense at all. If legislative solutions of some other countries⁴⁷ were used as a model in a bid to enable the parties to agree upon the scope of penalty alone and to leave it to the court upon accepting the plea agreement to impose a specific extent of the penalty within the agreed scope, then an obligation ought to have been provided for the court to present the evidence based on which it would establish the facts determining the specific extent of the penalty.⁴⁸

Five, one may also seriously question another solution offered in the new CPC in relation to the plea agreement, whereby the public prosecutor, the defendant and his defence counsel may appeal against the judgment accepting the plea agreement. There are several arguments opposing justification of this solution. Three of them are especially important. First, the concept of plea agreement should actually result in more efficient criminal proceedings. Is this solution helpful in achieving that? Certainly not. On the contrary, it contributes to unnecessary delays in the proceedings. Second, the reasons for which a party may appeal not only lack justification, but also indicate the lack of serious preparation of the parties to the negotiations and the decision-maker for the hearing where a decision on the plea agreement is to be made, which is unimaginable. For instance, one must ask: Is it possible for the court to accept a plea agreement by a judgment without having enough evidence proving reasonable suspicion that a criminal offence was

46 Article 314, paragraph 1, item 3 of the new CPC

47 This is mainly the case in the United States where, as a rule, upon confession of the defendant to having committed a criminal offence, the prosecutor will propose an appropriate criminal sanction, but the court is not formally bound to take heed of that proposal. The court may impose a harsher sentence than the one proposed, which often happens in practice. However, one must understand that in the United States it may be anticipated with a lot of precision which sentence is going to be pronounced in each particular case. This is because US courts apply quite accurate and almost mechanically formulated sentencing guidelines for particular criminal offences under specific circumstances (relapse, gravity of consequences of a criminal offence, etc.). Furthermore, US courts have no statutory obligation to present evidence which will determine the type of criminal sanction or the extent of the penalty. On the other hand, in Serbia, it is formally impossible for the court to pronounce a certain extent of the penalty (not even if the parties have agreed upon its scope in a plea agreement) without having presented the evidence establishing the facts that are relevant for sentencing within the meaning of Articles 54-63 of the Criminal Code of the Republic of Serbia (See: Brkić, S., “Dogovoreno priznanje (plea bargaining) u angloameričkom pravu” /Plea bargaining in the Anglo-American law/, Proceedings of the Faculty of Law in Novi Sad, XXXVII, 1-2/2003; Damaška, M., “Sudbina anglo-američkih procesnih ideja u Italiji” /The fate of Anglo-American procedural ideas in Italy/, Hrvatski ljetopis za kazneno pravo i praksu /Croatian Yearbook of Criminal Law and Practice/, vol.13, no. 1/2006, Zagreb).

48 See: “Reforma u stilu Jedan korak napred - dva koraka nazad” /Reform along the lines of ‘One step forward, two steps back’/, the Serbian Association of Public Prosecutors and Deputy Public Prosecutors, Belgrade, 2012, pp. 99-100

committed, that the subject-matter of the charges is not a criminal offence, that the statute of limitation for criminal prosecution has expired, etc.? In that case, would the court act in contravention of Article 324 of the Code? Is it even possible to imagine that a prosecutor will offer a plea agreement to a defendant without knowing whether the subject-matter of the charges is actually a criminal offence or whether the statute of limitation for criminal prosecution has expired, or whether there are some other circumstances that might appear later and serve as possible grounds for appeal? Furthermore, how can one even imagine that a party who is entitled to appeal is not aware of such circumstances at a hearing where the plea agreement is to be decided upon and then suddenly becomes aware of them shortly afterwards? Other questions may also be asked, but answers to all of them will always be the same and will always indicate the lack of justification for such a standard in relation to the right to appeal against a judgment accepting a plea agreement.

Six, a plea agreement may include a statement by which the defendant undertakes to fulfill certain obligations due to which the public prosecutor is entitled to defer criminal prosecution, according to the principle of opportunity of criminal prosecution, provided that the nature of the obligations is such that it allows the defendant to start fulfilling them before the submission of the plea agreement to the court. Although this may be quite justified in principle, still one must ask: What are the consequences of the defendant's failure to fulfill the said obligations? This question arises from the lawmaker's position that in order for the plea agreement to be accepted by the court the defendant only needs to start fulfilling the obligation(s) undertaken before the plea agreement is submitted to the court. Given the fact that the plea agreement containing such a provision does not even have to stipulate the final deadline by which the obligation(s) must be fulfilled – which is in fact mandatory in case of deferral of criminal prosecution as a key form of the principle of prosecutorial opportunity⁴⁹ - this issue becomes even more topical.

3. Other forms of agreement between the public prosecutor and the defendant or convicted person

Apart from the plea agreement, the new Serbian CPC provides another two seemingly new forms of agreement between the public prosecutor and the defendant: agreement on testifying of defendant (cooperating defendant) and agreement on a convicted person's testifying (cooperating convicted person). However, even a superficial analysis of these two forms of agreement between the parties to the criminal proceedings (public prosecutor on one side and the defendant or convicted person on the other) clearly shows that they are not new. They are just new ways of normative regulation of the concept of cooperating witness referred to in Articles 504o to 504ć of the CPC of 2009⁵⁰, with simultaneous modification of its content and certain provisions. With that in mind, what follows is an overview of only those provisions that are novel in terms of normative elaboration.

49 Article 283, paragraph 2 of the new CPC

50 Article 124 of the Law on the Amendments to the Criminal Procedure Code of 2009 ("The Official Gazette of the RS", No. 72/2009)

3.1. In relation to the agreement on testifying of defendant:

One, unlike the status of cooperating witness that could have been acquired only in the proceedings against perpetrators of organised crime or war crimes, the public prosecutor may now conclude an agreement on testifying of defendant not only with the defendants who are charged with the above crimes, but also with any other defendant. The agreement may be concluded with the defendant who has confessed in entirety to having committed the criminal offence he is charged with, provided that the significance of his testimony for uncovering, proving or preventing the criminal offence in respect of which special evidentiary actions may be ordered outweighs the consequences of the criminal offence he has committed.

Two, the plea agreement was used as a model for the outline and contents of this type of agreement between the prosecutor and the defendant. The agreement on testifying of defendant is again concluded between the public prosecutor and the defendant and although its contents are closely similar to those of the plea agreement, some of its provisions are adapted to the nature of the agreement. This mainly refers to a statement of the defendant “that he will testify to everything he knows about the criminal offence referred to in Article 162, paragraph 1, item 1 of this Code and will omit nothing”.

Three, the term denoting a defendant with whom the agreement is concluded was amended. Instead of “cooperating witness”, he is now called “cooperating defendant”.

Four, the new code prescribes the time in the proceedings when such an agreement may be concluded. An agreement on testifying of defendant may be concluded by the public prosecutor and the defendant from the moment of issuance of an order to conduct an investigation until the end of the trial.

Five, there is a different solution to the issue of criminal liability of the cooperating defendant. Pursuant to Article 321, paragraph 1, item 3 of the new Code, an agreement on a defendant testifying must contain “an agreement on the type and extent or scope of the penalty or other sanction which will be pronounced, on being relieved of a penalty, or on an obligation of the public prosecutor to desist from criminally prosecuting the defendant in the case of providing the testimony at the trial in accordance with the obligations”.

Six, there is a different solution to the issue of functional jurisdiction of the court to decide upon the agreement. A decision on an agreement on a defendant’s testifying is issued by the judge for the preliminary proceedings, and if the agreement was submitted to the court after the confirmation of the indictment, the decision is issued by the president of the panel.

Seven, again there are three types of decisions that the court may issue on the agreement, one of them being rejection. The grounds for rejection are identical to those for rejection of a plea agreement.⁵¹

Eight, an element of the accepted agreement on testifying of defendant is that the court is bound by a ruling on acceptance of the agreement. A court of first instance and a court of legal remedy

51 Cf. Article 324 and Article 318 of the new CPC

are bound by a ruling on acceptance of an agreement on a defendant's testifying in issuing a decision on a criminal sanction, the costs of the criminal proceedings, confiscation of the pecuniary benefit from crime, an indemnification claim and confiscation of proceeds deriving from a criminal offence, provided that the cooperating defendant has fully fulfilled the obligations specified in the agreement. Therefore, the court shall annul a ruling on acceptance of the agreement if the cooperating defendant has not fulfilled the obligations specified in the agreement and if the public prosecutor initiates an investigation against the cooperating defendant or learns about a prior conviction and files a motion with the court to annul the agreement.

Nine, the cooperating defendant is examined after questioning the defendants and is removed from the courtroom after the examination.⁵²

Without giving an overview of other provisions of the agreement because they match the provisions governing the status of cooperating witness referred to in the CPC of 2009, one must still note that the elaboration of this form of agreement between the public prosecutor and the defendant has failed to sufficiently take into account the views of the expert public. There are several examples of this, but just a few of them will be mentioned. One example is a provision of Article 321, paragraph 1, item 3, governing the type and extent of criminal sanction ("agreement on the scope of penalty"). The same arguments that were raised in relation to the plea agreement may apply here. Another example is a solution concerning the grounds for rejection of the agreement referred to in Article 324, paragraph 1, item 1 of the Code, which are identical to the grounds referred to in Article 318, paragraph 1, item 1 that were already commented upon. When coupled with an indisputable lack of precision of certain provisions, this issue becomes even more topical. For instance, Article 327, paragraph 4 prescribes that "the agreement on testifying is done in written form and submitted to the court no later than the conclusion of the trial". Hence, one must ask: Which trial - the trial of the cooperating defendant or the trial of his co-defendants? Another example is a provision of Article 318, paragraph 2, governing the issue of finality of a ruling rejecting the agreement.

3.2. Another possible form of agreement between the public prosecutor and the defendant is the agreement on a convicted person's testifying. The public prosecutor and a convicted person may conclude an agreement on testifying, i.e. the convicted person may acquire a status of cooperating convicted person only if the significance of his testimony for uncovering, proving or preventing the criminal offences in respect of which special evidentiary actions may be ordered outweighs the consequences of the criminal offence for which he (the cooperating convicted person) was convicted. Therefore, such an agreement may also be concluded with a person who is convicted for another criminal offence, not only for the offences in respect of which special evidentiary actions may be ordered. Quite reasonably, this broadens the list of persons who can acquire the status of cooperating convicted person and gives the public prosecutor more chances to obtain the evidence needed for the prosecution of perpetrators of serious crimes⁵³.

As for the specific elements of this type of agreement and the relevant decision-making process, first of all one should note that the elaboration of a number a few issues contained therein

52 For further details, see Articles 320-326 of the new CPC.

53 Radisavljević, M., 'Posebne dokazne radnje u novom Zakoniku o krivičnom postupku' /Special evidentiary techniques in the new Criminal Procedure Code/, Proceedings: "Nova rešenja u krivičnom procesnom zakonodavstvu –Teoretski i praktični aspekt", the Serbian Association for Criminal Law Theory and Practice, Belgrade, 2011

was modelled on the agreement on testifying of defendant. Of course, its elements were adapted to the status of the subject of this agreement. Therefore, instead of analysing individual provisions of the agreement, the following should be highlighted: the court is bound by a ruling on acceptance of an agreement on a convicted person's testifying in issuing a decision on a criminal sanction in repeated proceedings, provided that the cooperating convicted person has fulfilled the obligations specified in the agreement in full. The court which tried the convicted cooperating witness in the first instance decides on the request for the mitigation of the penalty, whereas the proceedings for the mitigation of a penalty are instituted at the request of the special prosecutor /Organized Crime Prosecutor or the War Crimes Prosecutor/ if the convicted cooperating witness testified in the proceedings concluded with a final judgment of conviction in accordance with the concluded agreement. Before making a decision the court shall take a statement from the convicted cooperating witness, and examine the ruling on accepting the convicted person's cooperation agreement. The court shall issue a judgment rejecting a motion for mitigating a penalty if it determines that the convicted cooperating witness did not fulfill completely all the obligations contained in the cooperation agreement. On the other hand, the court shall issue a judgment granting a motion for the mitigation of a penalty and reverse the final judgment of conviction in respect of the decision on the penalty and pronounce a penalty to the convicted cooperating witness in accordance with Article 330 of the CPC.⁵⁴

The above analysis of the plea agreement-related issues in the new CPC of the Republic of Serbia and other countries in the region shows that, in principle, quite a few solutions contained therein serve as a normative basis for enhancing the efficiency of criminal proceedings and that these solutions are in accordance with the latest legal science trends in procedural criminal law and solutions offered in relevant comparative criminal procedure legislation. However, as far as the new Serbian CPC is concerned, despite this general assessment, a detailed analysis of a large number of individual issues shows that their normative elaboration is below expectations. A number of solutions offered by the new Serbian CPC in relation to the agreement between the public prosecutor and the defendant (irrespective of the three possible types thereof) were not standardised in the manner that would be in keeping with the current trends of modern science of procedural criminal law, relevant comparative criminal procedure legislation and prevailing views of the local expert public. This applies, for instance, to the following issues: possible scope of application of the agreement, the contents of the agreement, the type and amount of criminal sanction provided in the concluded agreement, the role and place of the injured party in the process of concluding the agreement, the role of the defence counsel in the negotiations and the court's decision-making process, the time of procedural activation of the court and the issue of possibility and grounds for using a legal remedy in such proceedings, etc.⁵⁵ However, despite all this, justification of the existence of the agreement must not be brought into question under any

54 Articles 557-561 of the new CPC

55 See: Bejatović, S., 'Sporazum o priznanju krivice i druge pojednostavljene forme postupanja u krivičnom procesnom zakonodavstvu Srbije kao instrumenat normative efikasnosti krivičnog postupka', Proceedings "Pravni sistem Srbije i standardi Evropske unije i Saveta Evrope", the Faculty of Law in Kragujevac, 2009, Book IV, pp. 85-106; Đurđić, V., "Stranački sporazum o priznanju krivice u krivičnom postupku", Revija za kriminologiju i krivično pravo, No. 3/2009; Škulić, M., "Sporazum o priznanju krivice", the Faculty of Law in Belgrade, Belgrade, 2009; Simović, M., "Pojednostavljene forme postupanja u krivičnom procesnom pravu BiH", Proceedings: "Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije", the Serbian Association for Criminal Law Theory and Practice, Belgrade, 2009; Nikolić, D., "Sporazum o priznanju krivice", Belgrade, 2009; Brkić, S., "Dogovoreno priznanje (plea bargaining) u angloameričkom pravu", Proceedings of the Faculty of Law in Novi Sad, XXXVII, 1-2/2003; Đurđić, V., "Presuđenje na osnovu sporazuma o priznanju krivice", Pristup pravosuđu, Niš, 2007

circumstances. On the contrary, in the short period of its existence, this agreement has demonstrated its full criminal policy justification. It has proved to be one of the essential elements of efficient fight against crime in the region. Therefore, steps should be taken towards its application in accordance with its essential purpose and also in accordance with criminal and political reasons that have led to the legitimisation of this institution in general. Both in the Republic of Serbia and in other countries of the region, this agreement, together with other simplified forms of proceedings in criminal matters, should become an even more important tool for fighting crime.

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Plea Agreement in Judicial Practice of Montenegro

Summary

The subject matter of this paper is a critical expert analysis of the application of the institute of the plea agreement in the practice of Montenegrin judicial organs. The subject matter is discussed with reference to seven groups of questions as well as in the concluding considerations. The order of the question groups follows the order of the provisions of the Criminal Procedure Code of Montenegro (CPC) regulating the matter. Consequently, the introductory remarks dealing with the background and the reasons for signing this institute into the CPC is followed by an outline of the negotiation and plea agreement conclusion procedures. In line with this criterion, the requirements for concluding a plea agreement prescribed by law are given first and are followed by a description of the course of the negotiations between the parties to the agreement and of the procedure for deciding on the matter by the court.

In addition to presenting the statutory provisions concerning the normative aspect of the institute of the plea agreement in the CPC, this paper also analyses problems connected with its practical application. The author's basic conclusion from her analysis of this aspect of the subject matter is that recourse to the institute of the plea agreement by Montenegrin judicial organs in their practice is still insufficient. In order to encourage its wider application in Montenegro, the author makes specific recommendations to this effect.

Key words: Criminal Procedure Code, Montenegro, plea agreement, confession of guilt, state prosecutor, defendant, defence counsel, court

1 President of the Appellate Court of Montenegro.

I Introduction

The institute of the plea agreement was introduced into Montenegro's procedural legislation under the Criminal Procedure Code (Službeni list CG 57/09 of 18 August 2009) which entered into force on 26 August 2009. Initially, application of the CPC took place in five stages, with the provisions of Chapter XX, which concern the plea agreement, beginning to be applied six months following the entry into force of the CPC, i.e. as of 26 February 2010. Bearing in mind that the plea agreement had previously been absent from the criminal procedure in force in these regions, and given that its application was postponed for only six months following the entry into force of the CPC, one could conclude that, in the opinion of the legislator, the judges, prosecutors and attorneys did not need more time to prepare themselves for applying this institute.

During the first year of application, only one criminal proceeding, in a case before the Basic Court in Plav, ended in a judgment based on a plea agreement. One suspects that the only reason for delaying application of this institute was the initial unpreparedness, lack of confidence and wariness of the state prosecutor's office as well as the Bar's lack of relevant information. Such a conclusion follows from a case dealt with by the Basic Court in Podgorica (K.br. 10/426), with the defence counsel first proposing the conclusion of a plea agreement and then demanding, at the start of the trial on 7 October 2010 (the prerequisites for which having been – author's note), a postponement of the trial '...considering that the state prosecutor has only now taken actions in connection with the application of this institute'.

In 2011, only 14 criminal proceedings before basic courts and 5 criminal proceedings before higher courts ended in judgments based on final rulings approving plea agreements. In other words, a total of 19 plea agreements were concluded and as many judgments issued on their basis throughout Montenegro in 2011.

In view of the fact that in 2011 basic courts determined 6,034 criminal cases and higher courts 365 criminal cases, the percentage of cases in which criminal proceedings were concluded by applying this institute was negligible.

In the first half of 2012, criminal proceedings were concluded by applying plea agreements in only 3 cases falling within the jurisdiction of basic courts and in 6 cases falling within the jurisdiction of higher courts.

If this trend continues at the same rate until the end of 2012, the number of cases concluded by applying this institute will not exceed the number of such cases concluded in 2011, which is by all means negligible.

II Requirements for concluding a plea agreement under the CPC

Pursuant to the provisions of the CPC, a plea agreement may be concluded where a criminal proceeding is conducted in respect of one or more criminal offences punishable by a term of imprisonment up to 10 years. The initiative for concluding a plea agreement may come from the state prosecutor's office, the defendant and his defence counsel. Before the filing of the indictment, the decision on the plea agreement rests with the president of the non-trial panel referred to in

Article 24, paragraph 7 of the CPC; after the indictment is filed, the matter is decided by a single judge or the president of a panel in cases involving organized crime.

Judging by the practice so far in Montenegro, one may conclude that most initiatives for concluding plea agreements are filed by defendants and their defence counsels. In the past two and a half years, plea agreements have been concluded in 29 cases, with defendants or their defence counsels initiating plea agreements in 23 cases and the state prosecutor's office initiating plea agreements in only 6 cases. In other words, initiatives been submitted by defendants and their defence counsels in 79.3% of the cases.

While the CPC does not prescribe the form of the motion, Article 300, paragraph 2 of the ZKP has the words 'sending the motion', which indicates that written form is implied.

The CPC prescribes that a plea agreement may be submitted to a court not later than at the first hearing for the trial. This means that a plea agreement may be concluded prior to or after the filing of the indictment (indicting proposal) and no later than before the first hearing for the trial (for the holding of which the preconditions have been fulfilled). Because there is no provision stipulating that a plea agreement can be negotiated and concluded in parallel with the hearing, this practically means that the parties and the defence counsel must have a plea agreement ready by the start of the trial in order to have such an outcome of the criminal law case taken into consideration.

However, in a number of cases before Montenegrin courts so far, at the first hearing for the trial (for the holding of which the preconditions have been fulfilled) parties have informed the courts that they might conclude a plea agreement and requested a deferral of the trial. Out of their apparent need to dispose of cases more quickly and easily, the courts have granted such requests and deferred trials, thus unjustifiably putting efficiency before legality.

The practice so far shows that plea agreements have been concluded before the filing of charging documents in the majority of the cases (82.75%), with plea agreements and proceedings being concluded after the filing of indictments (indicting proposals) in 17.24% of the cases.

It should be noted that if the parties and the defence counsel conclude a plea agreement before the filing of the indictment (indicting proposal), the information contained in the indictment (the defendant's particulars, the facts of the case and the legal qualification of the criminal offence) must constitute a separate item in the plea agreement (Article 302, paragraph 2 of the CPC). In such cases no indictment (indicting proposal) will be filed; if the court approves the plea agreement it will issue a judgment declaring the defendant guilty and pronounce a penalty in accordance with the plea agreement although the state prosecutor's office has filed no charging document against the defendant. Such legal solution and practice appears rather debatable and is directly contrary to the principle of accusation. A criminal proceeding is initiated and conducted in accordance with the charges brought by an authorized prosecutor. There can be no judgment without charges. In introducing this institute into the criminal procedure, the legislator obviously failed to consistently comply with the principles of the domestic criminal process; as a result, adjudication can now take place even if the state prosecutor's office has filed no charging document against the defendant (where no direct indictment and indicting proposal have been filed, this can apply even to a suspect).

III Negotiations on conditions for confessing guilt

After a party or defence counsel proposes to the opposing party the conclusion of a plea agreement, the parties and the defence counsel may enter into negotiations on the conditions for the defendant's confession of guilt for the criminal offence or offences alleged against him. The CPC defines only the subject matter of the plea agreement and not the way in which the negotiations are conducted. Therefore, it follows logically that the subject matter of the negotiations should include all the items of the future plea agreement.

Article 301, paragraph 1 of the CPC provides that under a plea agreement the defendant has fully confessed to having committed the criminal offence or several concurrent criminal offences which are the subject matter of the charges, that the defendant and the state prosecutor have reached agreement on the amount of punishment and sanctions, etc. From this legal provision it follows that the factual and legal definition of the criminal offence to be admitted to by the defendant cannot be the subject matter of the negotiations; instead, the defendant should admit to the criminal offence or offences alleged against him in order to be able to negotiate on punishment and other sanctions as well as on the other elements of the plea agreement. In a summary proceeding, before the indicting proposal is filed or where the state prosecutor decides not to conduct an investigation and only files a direct indictment, one may well ask what criminal offence is the subject matter of the charges, given that none of the charging document contains its factual and legal definition. The contents of a criminal complaint and a police analysis of the crucial event and its legal qualification certainly cannot be compared to a charge. If in such cases negotiations are started before the filing of the indictment or indicting proposal – a situation which is both realistically conceivable and allowable by law – one wonders about the status of the defendant in the negotiation procedure. It would namely be necessary for the defendant to know, before entering into negotiations, the criminal offence alleged against him in terms of its factual and legal definition in order to be able to make a realistic assessment of his situation and of his chances in a regular procedure. Any other arrangement would put the defendant at a disadvantage during the negotiations on punishment and other sanctions, which is a crucial element of the plea agreement. The fact remains that the defendant will be interrogated before the filing of the indicting proposal and direct indictment and that he will then be told the criminal offence alleged against him. However, the interrogation is conducted by the state prosecutor in connection with the criminal complaint and has the form of a verbal presentation of the criminal offence which is the subject matter of the criminal complaint; this certainly is not the same as when a criminal offence is factually and legally defined in a formal charging document issued by the prosecutor (order to conduct an investigation, indicting proposal, indictment). During the negotiation stage the defendant is supposed to indicate that he is going to make a full confession to having committed the criminal offence or several concurrent criminal offences alleged against him which are the subject matter of the charges, after which negotiations are launched on the amount of punishment and criminal sanctions to be pronounced against the defendant. It goes without saying that in this sense the negotiations must stay within the framework of the law, so that the amount of punishment and other sanctions being put forward by the negotiators to be included as items in the plea agreement must be in conformity with the provisions of the Criminal Code.

The negotiators will define the defendant's obligation to pay the costs of the criminal proceedings as well as to indemnify the injured party if the criminal offence in question has infringed or

prejudiced any of the injured party's rights or property interests. If the injured party has filed a property claim, the state prosecutor's office should inform the defendant during the negotiations stage that at the plea agreement hearing the court will certainly consider whether the plea agreement will protect the interests of the injured party and that it may reject a plea agreement which does not settle the matter in a satisfactory manner, i.e. if the plea agreement infringes the injured party's rights. The defendant should also be informed that the injured party is entitled to appeal against the court's ruling approving the plea agreement, and that therefore the plea agreement should bring the matter of indemnifying the injured party to a satisfactory conclusion in order to prevent the ruling approving the plea agreement from being set aside.

The subject matter of the negotiations includes the obligation of the defendant to return the proceeds from the crime within a specified time limit, as well as to return the objects seizable under the Criminal Code.

Concerning the parties' and the defence counsel' waiver of their right to an appeal 'against the decision of the court based on the plea agreement, after the court has accepted the agreement in full' (Article 301, paragraph 1, item 1 of the CPC), there is practically no possibility to negotiate because the reference is to an explicit statutory provision without which there can be no plea agreement.

The state prosecutor's office makes a record of the negotiations. It has been noted that in the context of informing the defendant of his rights and of the consequences of the concluded plea agreement, the records of the negotiations invariably include the vague caution by the deputy state prosecutor that 'a plea agreement, if approved by the court, will serve as the basis for issuing a judgment against which there is no right of appeal'. Informing the defendant in this way about the consequences of concluding the plea agreement implies that his right to appeal against the judgment rendered on the basis of the plea agreement is ruled out by law and not influenced by his will; actually, however, the will of the defendant is crucial because his waiver of the right to an appeal rules out the possibility of filing an appeal and is a prerequisite for concluding the plea agreement. The state prosecutor would be well advised to inform the defendant that the state prosecutor's office too would waive its right of appeal against a judgment rendered on the basis of their plea agreement because it would be crucial for the defendant to enter into the negotiations with confidence and without fearing a more unfavourable outcome than that agreed upon.

While the practice so far has been for the state prosecutor's office not to advise the defendant, it should do so for the sake of the defendant's security and confidence in the institute and inform him that a waiver of the right to appeal against the judgment based on the plea agreement does not exclude the right to an appeal against a judgment which is not fully in line with the plea agreement.

Given that Article 272 of the CPC provides that a defendant may be required under a plea agreement to fulfil an obligation prescribed in the provision on deferring criminal prosecution (on condition that the nature of the obligation is such that he can fulfil it before the plea agreement is submitted to the court or at least to begin fulfilling it by that time), the obligation can also be subject to negotiations. An obligation may entail: performing certain community service or humanitarian work, paying a certain amount of money to the benefit of a humanitarian organization fund or institution, fulfilling a maintenance obligation or an obligation determined by a final

court decision and to rectify a detrimental consequence caused by the commission of the criminal offence.

An analysis of the practice so far of negotiations between parties and defence counsel leads to the following observations:

In all the cases in which a plea agreement is reached, the record of the negotiations made by the state prosecutor includes the following advice to the defendant:

‘The defendant has been advised that he is entitled to engage a defence counsel at any stage of the negotiations procedure; that the plea agreement must be done in writing; that consent given to the plea agreement must be full and must encompass all the elements of the plea agreement, because partial consent cannot bring about the conclusion of a plea agreement; that he understands the meaning of the confession; that the confession must be full, complete, voluntary and informed and may be made in respect of one or several criminal offences; that the confession is made solely for the purpose of the plea agreement and that it cannot be used for another purpose; that the plea agreement may be abandoned; that if approved by the court the plea agreement will be a basis for issuing a judgment against which there is no right of appeal; that he is aware of the possibility of paying the costs of the criminal proceedings, indemnification, return of objects or annulment of a legal transaction; that he is entitled to be present at the plea agreement hearing and that if he fails to appear at the hearing in spite of being duly summoned by a ruling the court will dismiss the plea agreement; that after the court ruling rejecting the plea agreement becomes final the plea agreement and all the related files will be destroyed before the court, that an official note will be composed thereon, that the judge who issued the ruling will be barred from further proceedings, and that the confession he made in the plea agreement cannot serve as evidence in the criminal proceedings; that the court ruling on the plea agreement will be served on him, the state prosecutor, the defence counsel, injured party and his proxy; that in the event of a plea agreement being concluded he will forfeit the right to a trial, the right to an appeal against the judgment issued on the basis of the plea agreement.’

This advice (or caution or brief to the defendant) is a verbatim copy of the form of the Record of the Negotiations published in the Handbook for Applying the Criminal Procedure Code of Montenegro. The extent of the perfunctoriness with which the prosecution’s representative taking part in the negotiations deals with individual cases is attested to by the fact that every record of the negotiations, including those taking place in the presence of the defendant’s defence counsel, includes the advice to the defendant that he ‘has the right to engage a defence council at any stage of the negotiations procedure’. Every record of the negotiations contains the state prosecutor’s caution to the defendant about the possibility of annulling a legal transaction (?) even in cases where the defendant is charged with a criminal offence against security of public traffic. The advice to the defendant “that the consent given to the plea agreement must be full and must encompass all the elements of the plea agreement” is incomprehensible because it implies the prior existence of an agreement to which the defendant is required to give his “full and complete” consent. The understanding is that in initiating or accepting the state prosecutor’s initiative to conclude a plea agreement the defendant has given consent to starting negotiations thereon. It remains unclear what full and complete consent to a plea agreement the defendant is required to make in addition to this. If in the course of the negotiations the parties and the defence counsel fail to reach agreement on all the necessary items to be included in the plea agreement, the

negotiations are deemed to have failed and the proceedings are returned to the track of a regular or summary criminal procedure. Every record of the negotiations contains, inter alia, the information to the defendant that he can confess to one or several criminal offences even where only one criminal offence is alleged against him. It remains unclear why the state prosecutor considers it necessary to inform the defendant of the fact that the court's ruling on the plea agreement will also be delivered to the state prosecutor.

From the foregoing it follows that in negotiating a plea agreement representatives of the state prosecutor do not take sufficient account of the peculiarity of each concrete case and prefer to rely on the contents of published forms without bothering to find out to what extent a form is applicable to the legal solution and case in question as well as to the substance of the negotiations.

In all the records of the negotiations inspected, the above-mentioned advice is followed by this identical statement reading: "the defendant was asked whether he understood the advice given, whether he understood his rights and obligations in connection with the conclusion of the plea agreement, which he confirms by his signature"; this being followed by the defendant's signature (in a number of cases there is only an empty dotted line with no defendant's signature). In any case it is implied that the defendant understood every advice including that the plea agreement can bring about the annulment of "a legal transaction" even where the proceedings against the defendant are in connection with a criminal offence against the security of public traffic.

Interestingly enough, although during the negotiations the initiative to conclude a plea agreement comes from the defendant and his defence counsel, the prosecutor is the first to propose the content of the plea agreement; he informs the defendant that if he admits his culpability in the criminal offence he will propose the following in respect of the criminal offence or offences in question: pronouncing or determining a sentence for a specific time, ordering the defendant to pay the costs of the proceedings and a lump sum, returning the proceeds from the crime and indemnifying the injured party or referring the injured party to litigation.

The injured party, if any, and his proxy, are invited and present at the negotiations. The injured party usually agrees to the prosecutor's proposal. After that, the defendant accepts the prosecutor's proposal and declares that he wishes to conclude a plea agreement under the conditions stipulated.

IV Admission of guilt

After the contents of the future plea agreement are determined during the negotiation procedure, the defendant makes a confession to the criminal offence or offences alleged against him on the record before the state prosecutor and in the presence of his defence counsel, if any. Since the confession will be reviewed by the court at the plea agreement hearing, its quality must be such that one can conclude on its basis whether in his uninterrupted statement on the criminal offence and his guilt the defendant referred to all the crucial elements of the criminal offence alleged against him, whether the confession indicates guilt on his part, and whether the confession is in agreement with the evidence contained in the case files. Since at the plea agreement hearing the court will (i.e. should) find out whether the defendant was mistaken regarding a fact which led him to confess to the commission of the criminal offence and guilt, his confession before the

prosecutor should be of such quality as to enable the court to rule out the possibility that the defendant was mistaken in making the confession.

A perusal of cases adjudicated on the basis of plea agreements and of defendants' confessions made on the record before the state prosecutor, shows that not all representatives of the state prosecutor's office have the same approach when making such records.

In a case before the Basic Court in Podgorica, the accused was charged under Article 240, paragraph 1, item 1 of the Criminal Code (CC) in connection with Article 49 of the CC with the criminal offence of continuing grand larceny, its construction encompassing 29 criminal offences, most of which involved picking locks and breaking into houses in the area of Podgorica and stealing money, mobile telephones, gold jewellery, etc. At the end of the negotiations, a confession was taken from the defendant in the presence of his defence counsel. The record of the confession consists of only three sentences. In the first sentence, the defendant admits to committing a number of thefts during November and December 2010 and during January, February and April 2011 with a view to obtaining material benefit. In the second sentence, he states that he was acquainted with the indictment and with all the 29 counts of the indictment (it should be noted that the case files contain no record of the defendant having been presented with the indictment, which suggests that he had no opportunity to read the indictment before making the confession), that every account in the indictment was true in its entirety, and that he is confessing to having committed all the actions alleged against him in the indictment. In the third sentence, the defendant states that he listened to the dictation of the record carefully, that he has no objections to it, and that he is signing it without having read it. Of particular interest is the fact that, according to the record of the questioning of the defendant, against whom was alleged the construction of the continuing criminal offence of grand larceny encompassing 29 acts, the hearing at which the state prosecutor made the record of the confession lasted exactly 5 minutes. The procedural action in question namely started at 13:10 and ended at 13:15. It goes without saying that a plea agreement cannot be concluded or approved by the court on the basis of such a confession because one cannot determine whether such a confession is in agreement with the evidence contained in the files, because the confession contains not a single concrete item of information about any of the actions encompassed by the construction of the continuing criminal offence (except for the approximate time of the act, although each offence is dated in the indictment). It should also be noted that the defendant made no confession before the investigative judge (the investigation having been conducted under the old CPC) in respect of the majority of the criminal offences alleged against him. However, such a confession did not prevent the conclusion of the plea agreement in respect of the criminal offence of grand larceny encompassing 29 individual offences under Article 240, paragraph 1, item 1 in connection with Article 49 of the CC, nor did it prevent the Basic Court in Podgorica from holding a hearing and issuing a ruling approving the plea agreement. At this hearing, the judge only obtained a statement from the accused and his defence counsel confirming that the plea agreement was theirs and that they adhered to it; the judge took no other statement nor tried to clarify the "allegedly made confession" in order to at least find out whether the confession (if the term can be applied to that which the defendant said on the record before the state prosecutor) is in agreement with the examined evidence and whether the possibility of the confession having been made in error could be ruled out. What is more, the court issued the ruling approving the plea agreement without even asking the defendant as to the circumstances of the conclusion of the plea agreement, nor did it pose any other questions which might help establish whether the defendant did make the confession

knowingly and voluntarily and whether any error on the part of the defendant regarding the facts which led him to conclude the plea agreement could be ruled out. The court hearing lasted from 13:00 to 13:15, during which time, according to the record, the court read out the injured parties' statements (a total of 16) and examined written evidence such as crime-scene reports (of which there were certainly 29). This testifies to the court's perfunctory attitude to its crucial duty as far as application of plea agreements is concerned, i.e. of establishing at the hearing whether the defendant made the confession to the criminal offence knowingly and voluntarily, whether the confession is in agreement with the evidence, and whether the possibility of a confession made in error is to be ruled out. In view of the large number of individual offences, the court was probably guided by the need to dispose of the case as quickly and easily as possible in order to avoid a lengthy proceeding. Nevertheless, the need for an effective conclusion of a criminal proceeding should not be put before lawfulness and fairness. Practices of this kind can result in loss of confidence in the institute of the plea agreement and its erroneous application to the detriment of the defendant, with defence counsels no doubt making a contribution to this through their inertness. One wonders in particular whether such plea agreements and consequent decisions fulfil the indispensable condition that a plea agreement should be consistent with the interests of fairness – Article 302, paragraph 8, item 5 of the CPC. Drawing on my long experience as a judge, I recognized this practice while working as a lower-court judge: when the police have grounds for suspicion that a person has committed one or two criminal offences of theft by breaking into vehicles or houses, they file a criminal complaint against that person in respect of all the hitherto unresolved crimes committed in that area in the same manner. This practice of 'clearing the drawers' of files on unidentified perpetrators was condoned by both state prosecutors, who were filing requests for investigations on the basis of such criminal complaints (while the old CPC was in force), and courts (which were issuing rulings on opening of investigation without checking whether there was grounded suspicion in respect of each offence alleged in the requests). Judgments concluding criminal proceedings started in this way often failed to include all the acts encompassed by the construction of the continuing criminal offences and occasionally a significant portion of such acts.

The possibility that one or several acts covered by the construction of the continuing criminal offence in the above-mentioned Podgorica Basic Court case was or were committed by a person other than the person sentenced for the crime raises two more issues besides resulting in an unlawful and unfair decision. First, since the criminal proceedings for the criminal offence whose perpetrator remains uncovered is deemed to have been concluded and the offence clarified, the police and the prosecution will discontinue all actions aimed at identifying the real perpetrator. Second, the real perpetrator can go on committing criminal offences in peace, encouraged by the fact that another person was punished for his deeds.

Also, a look at the record of a defendant's confession taken by deputy superior state prosecutors in Bijelo Polje reveals that the confession is practically a copy of the factual description of the criminal offence contained in the charging document, rendered in the first person singular. In his extempore confession the defendant clearly did not make a description of the event coinciding with the state prosecutor's account of it in the charging document; also, a "confession" of this kind, which often contains legal terms such as 'wrongful' and others, should not convince the court that it was made knowingly and voluntarily and that the defendant was not mistaken as to the facts causing him to confess to having committed the criminal offence.

However, not all confessions by defendants are taken in this way. For instance, in a case before the Higher Court in Podgorica (K.br. 92/11), the defendant was charged under the indictment with the criminal offence of illegal production, possession and trafficking in narcotics under Article 300, paragraph 1 of the CC. After negotiating and agreeing on all the items to be included in the future plea agreement, the deputy state prosecutor made a record of the defendant's confession containing a detailed description of the event and pointing not only to the crucial elements of the criminal offence but also to the motives and incentives for committing the act as well as to all the circumstances and facts making it possible to establish to what extent such a confession is in accordance with the evidence contained in the files. In other cases falling within the jurisdiction of the Higher Court in Podgorica too, deputies of the Higher state prosecutor first successfully concluded negotiations with defendants and their defence counsels and agreed on all the essential items of the future plea agreements, and then took defendants' detailed confessions.

V Concluding a plea agreement

Soon after signing the record of the negotiations and taking on record the defendant's confession, the state prosecutor, defendant and defence counsel proceed to concluding a plea agreement. In the majority of cases, the plea agreement is concluded on the same day of making the negotiation and confession records.

Concluded plea agreements are identical in their form in all cases irrespective of whether a plea agreement was concluded before or after the filing of the indictment or indicting proposal. For instance, Article 1 of every plea agreement states that the defendant has confessed to the criminal offence, this being followed by a factual description of the criminal offence and its legal qualification.

In view of the fact that in cases in which a charging document is filed the factual description and legal qualification of the criminal offence are contained in the charging document, I consider it unnecessary to again describe the criminal offence and state its legal qualification in the plea agreement. I consider it sufficient that in such cases Article 1 should note that the defendant has confessed to the criminal offence factually and legally presented in the indictment (indicting proposal) and that the record of his confession is appended to the plea agreement. On the other hand, in cases where plea agreements are concluded before the filing of the indictment or indicting proposal, in which case the criminal offence is described in the state prosecutor's order to conduct an investigation (which is contained in the case files kept by the state prosecutor's office), or is not described at all if such an order is not issued, it is necessary for the plea agreement itself to contain a factual and legal presentation of the criminal offence to which the defendant is confessing. After all, Article 302, paragraph 2 of the CPC provides that a separate item of the plea agreement, which was submitted to the court before the filing of the indictment (while there is no mention of an indicting proposal, this surely must also apply to a summary proceeding), will include the data referred to in Article 292, paragraph 1 of the CPC, i.e. the contents of the indictment (that is, only in that case – author's note).

It is logical that the data referred to in Article 292, paragraph 1, items 1, 2 and 3 of the CPC should be entered in a plea agreement concluded before the filing of the charging document, this information being: the first name and family name of the defendant with his personal data

(item 1), a description of the act on which the legal elements of the criminal offence are based, the time and place of the commission, the means by which and the object on which the criminal offence was committed, other circumstances needed to determine the criminal offence as precisely as possible (item 2) and the legal qualification of the criminal offence (item 3). However, it is not clear why the legislator thought it necessary to include items 4, 5 and 6 of paragraph 1 of Article 292 of the CPC in the plea agreement. Because there will be no trial in case a plea agreement is granted and a judgment issued, there is no need to indicate in the plea agreement the court before which the trial will take place (item 4). Likewise, a plea agreement should not include a proposal of the evidence to be examined at the trial (item 5). Evidence is not examined at the plea agreement hearing. The reasoning describing the state of the matter according to the results of the investigation, specifying the evidence that will serve to establish the facts which are to be proved, presenting the defence of the defendant and the prosecutor's position on the allegations of the defence (item 6) should by no means be a part of the plea agreement because the defendant's defence presented during the investigation stage (or during the questioning about the circumstances of the criminal complaint) is something quite different and can be, and most often practically is, different in terms of its content from the confession made by the defendant during the procedure for concluding the plea agreement.

In other words, apparently through oversight on the part of the legislator, a plea agreement that is submitted to a court before the filing of the indictment is required to include all the data referred to in Article 292, paragraph 1 of the CPC instead of merely that required under items 1, 2 and 3 of paragraph 1 of Article 292 of the CPC.

VI Plea agreement hearing

After concluding negotiations with the defendant and his defence counsel, the state prosecutor takes the defendant's confession on the record and concludes a plea agreement, and delivers the records and the plea agreement to the appropriate court in order to schedule a plea agreement hearing. A plea agreement concluded after the issuance of a charging document is attached to the file of the case which is already with the court and marked 'K'; it will be dealt with by a judge or the president of a panel charged with dealing with the 'K' case. A plea agreement concluded before the issuing of a charging document will be filed by the court in the register marked 'Kv' and entrusted to the president of a non-trial panel under Article 24, paragraph 7 of the CPC.

Because at a hearing the court is to find out, *inter alia*, whether the defendant's confession is in agreement with the evidence, in cases where a plea agreement is concluded before the filing of the charging document, a situation where the court is in possession of no files, the prosecutor should be required to deliver the evidence and other data in his possession along with the plea agreement, the record of the negotiations and the record of the defendant's confession.

The competent court will decide on the plea agreement without delay at a hearing scheduled without delay, i.e. at once, in the presence of the state prosecutor, defendant and his defence counsel. The injured party and his proxy will be informed about the hearing (Article 302, paragraph 5 of the CPC). Before scheduling the hearing, the president of the panel referred to in Article 24, paragraph 7 of the CPC, or the judge charged with the case or the president of the panel in the organized crime cases, establishes whether the plea agreement was submitted on time.

A plea agreement delivered to the court after the first hearing for the trial will be dismissed by the judge or the president of the panel. No appeal is permitted against such ruling.

At the plea agreement hearing, the court will find out whether all the requirements under Article 302, paragraph 8, items 1-5 of the CPC have been fulfilled, specifically whether the defendant knowingly and voluntarily confessed to the criminal offence which is the subject matter of the charges, whether the confession is in agreement with the evidence in the files and whether any possibility of the defendant having made a confession in error is to be ruled out, whether the plea agreement was concluded under Article 301 of the CPC, i.e. whether the state prosecutor and the defendant agreed on the amount of punishment and other sanctions and whether the plea agreement is in conformity with the provisions of the CPC, whether they agreed as to the costs of the criminal proceedings and the restitution claim, whether the parties and the defence counsel waived their right to appeal against the judgment to be issued on the basis of the plea agreement if the court approves the plea agreement, whether the plea agreement includes the obligation of the defendant to return within a specified time limit the proceeds from the crime and the objects which are to be confiscated under the CC. At the hearing, the court will also establish whether the defendant is aware of the consequences of the concluded plea agreement, in particular that under the plea agreement he has waived his right to a trial and to an appeal against a decision issued on the basis of the plea agreement. The court will also find out whether the plea agreement is in breach of any of the injured party's rights and, finally, whether the agreement is consistent with the interests of fairness and whether the negotiated measure of punishment and sanctions answers the purpose of imposing criminal sanctions. This is the task which the CPC puts before the court and which must be addressed at a hearing i.e. following the plea agreement hearing.

As already mentioned, the president of the panel, i.e. judge, summons to the hearing the state prosecutor, defendant and his defence counsel, if any, all of whom are required to attend. The failure to appear of a duly summoned defendant results in the dismissal of the proposal. The CPC does not state at all what happens if a duly summoned state prosecutor fails to appear. It is understood that in such a case the plea agreement will not be dismissed and that the hearing will be postponed. As regards the injured parties and their proxies, since the CPC provides that they should be informed about the hearing (without requiring them to appear), their failure to appear in spite of being duly summoned will have no effect on the court's decision. The court's duty is to find out whether the requirements for concluding the plea agreement are met; however, before doing that, it must first establish who is present, advise the defendant of his rights in the procedure, including the right to a defence counsel if the defendant has no defence counsel, and inform him about the contents of the plea agreement in detail, in particular about all the consequences of the concluded plea agreement and of its possible approval by the court. In this regard, the court should explain to the defendant, in a way comprehensible to a layman, that if the plea agreement he has signed is approved, it will serve as the basis for issuing a judgment without a trial, and that he will not be able to appeal against the judgment because he has waived his right of appeal under the plea agreement, and he should by all means be told that the state prosecutor too will have no right of appeal. The defendant should be told that if the plea agreement is granted the judgment will fully conform to it, as well as that it will become final practically at once (if it is fully in line with the plea agreement) and enforceable after being delivered to the defendant.

An analysis of the practice of Montenegrin courts regarding the contents of records of plea agreement hearings shows that the records are almost identical and represent copies from the

Handbook for Applying the Criminal Procedure Code of Montenegro. According to nearly all the records, the representative of the state prosecutor's office is given the floor as soon as the court establishes who is present. The prosecutor acquaints the court with the criminal offence alleged against the defendant by dictating for the record the factual description of the criminal offence and its legal qualification. The prosecutor next tells the court who initiated the conclusion of the plea agreement, enumerates the records that have been taken, i.e. the record of the negotiations, the record of the defendant's statement and the record of the confession (it is not clear why the record of the defendant's questioning should be highlighted at this stage because this obviously does not relate to the record in which the defendant presented his defence in the regular procedure; that record is not a record the court considers and is often in practice different from the record of the confession in terms of its contents), and announces that the plea agreement has been concluded. Also, the state prosecutor declares that the defendant was cautioned as to the consequences of concluding the plea agreement, in particular in respect of his waiver of the right to a trial and right to appeal against the court's decision based on the plea agreement. After the opening statement by the prosecutor, the court gives the floor to the defendant who "stresses" (the word used in all transcripts by all Montenegrin courts alike) that the claims of the deputy state prosecutor are on the whole correct and that he agrees to the reading of the collected evidence, the records of the negotiations and the plea agreement. The court next examines the evidence including reading the witness statements, certificates, experts' findings, etc. Occasionally, the court agrees to examine other evidence on the motion of the defence counsel.

This practice of Montenegrin courts is in conformity with the form published in the Handbook for Applying the Criminal Procedure Code of Montenegro. The judges literally copy the form and do not take an active part in the plea agreement hearings. Bearing in mind that the purpose of the plea agreement hearing is to enable the court to establish whether the plea agreement conforms to all the requirements in Article 302, paragraph 8, items 1-5 of the CPC, it is of the greatest importance to find out whether the defendant confessed to the criminal offence knowingly and voluntarily and whether the possibility of a confession made in error can be ruled out. After the hearing, the court should establish whether the confession accords with the evidence contained in the files by analysing the contents of the evidence in the files and correlating it with the facts disclosed by the defendant in his confession, including not only decisive facts but also non-decisive facts which only the person who participated in the commission of the act knows and which he discloses in order to convince the court that the confession is genuine. Unfortunately, with the exception of a case before the Basic Court in Ulcinj, it is not possible to find out from the records whether judges holding plea agreement hearings considered the quality of the confessions at all. Even the records of these hearings make no mention of the confessions at all.

The judge's duty at this hearing is to establish whether the defendant made the confession to the state prosecutor knowingly and voluntarily, i.e. whether it can be said of the defendant that he is a person with normal mental status, implying that he is capable of thinking, deciding and judging, i.e. that he possesses the necessary intellectual and voluntaristic properties enabling him to form judgements and control his actions, i.e. everything which in a regular criminal proceeding would be assessed as an element of mental competency implying that the person in question is capable of understanding his actions and of controlling himself. Since in criminal proceedings mental competency is implied and does not have to be demonstrated, the court's main task during the hearing seeking to determine whether the defendant made the confession knowingly should be to rule any doubt about possible mental incompetency on the part of the defendant. On the

basis of a conversation with the defendant and questions put to him, the court should have no doubts as to his consciousness considering that he is answering questions and thinking logically as well as behaving and communicating in a way which casts no doubt on his biological-mental status. The court should by all means ask questions designed to find out the existence of possible external factors which could have affected the defendant's mental competency at the time of making the confession.

Of the 29 cases ending in approving the plea agreement, the following is the only instance where the plea agreement hearing was pursued properly in order to establish whether the confession was made knowingly and voluntarily. According to the record, in dealing with the case Kv.br. 127/11, the judge of the Basic Court in Ulcinj acting as the president of the panel under Article 24, paragraph 7 of the CPC examined the elements of the confession by asking the defendant, who is a legal layman, a number of questions to satisfy herself that the defendant confessed to the criminal offence knowingly and voluntarily and that the possibility of making the confession in error could be ruled out. The judge asked the defendant, *inter alia*, whether he took drugs and alcohol; whether anything affected his capacity for clear thinking; whether he understood the criminal offence alleged against him; whether he had had enough time to discuss the charges with his defence counsel; whether any promise had been made to him in case he confessed, etc. The judge also informed the defendant about the rights he would waive under the plea agreement; she also informed him that under the Montenegrin Constitution he had the right to a trial, a right guaranteed by the CPC and Article 6 of the European Convention, that in case there was a trial the prosecutor would have to prove his guilt, that evidence would be examined in his presence, and that he would be allowed to hear the prosecution witness testimony, cross-examine the prosecution witnesses and propose witnesses on behalf of himself and other evidence. The defendant was next told that if he stood by the plea agreement he would waive his right to such trial and that if a plea agreement were approved by the court he would have no right to appeal against a judgment in conformity with such plea agreement. This is what the Ulcinj Basic Court judge did to impress on the defendant the consequences of the concluded plea agreement and of the judgment to be issued in accordance with it. She also posed a number of questions to make sure the defendant made the confession knowingly and voluntarily and was not in error. In the opinion of the author of this paper, however, there was no need for the Ulcinj Basic Court judge and the rest of the judges to examine evidence at this hearing, indicating that this judge too was under the influence of the form for the hearing published in the Handbook.

It is presumed that judges examine evidence at the plea agreement hearing not only under the influence of the form published in the Handbook, but also because they believe that they cannot assess evidence not examined before the court. What the judges overlook, however, is that this rule applies to the trial, i.e. to the decision which is issued after the trial, a decision in which no evidence other than that examined at the hearing can be assessed. The plea agreement hearing is something quite different from the trial. There is nothing to prevent the court, after holding the hearing, from looking into the contents of the evidence collected by the prosecutor and included in the case files in order to find out whether the defendant's confession is in accordance with the evidence. The same procedure is pursued by the non-trial panel referred to in Article 24, paragraph 7 of the CPC when deciding on confirming the indictment. Without examining any item of evidence whatsoever, this panel namely assesses the quality of the evidence and information collected in order to establish whether there are grounds for suspicion that the defendant committed the act which is the subject matter of the charges and whether to issue an appropriate

decision. I also think that this wrong practice is partly due to the provision of Article 302, paragraph 2 of the CPC which provides that a plea agreement submitted to a court before the filing of the indictment must contain all the data contained in the indictment. Article 292, paragraph 1, item 5 of the CPC provides that an indictment should contain a proposal of evidence to be examined at the trial. There is, however, no logic to proposing evidence in the plea agreement to be examined at the plea agreement hearing because in that case the hearing would not differ from a trial, in which case the institute of the plea agreement would lose its purpose and the procedure based on it would be reduced to a regular procedure.

In all the cases in which the proceedings are concluded by the application of the plea agreement, the judges issue the rulings approving the plea agreements at the hearing and proclaim them at the same time. The fact that a hearing is not interrupted before a ruling is issued and proclaimed indicates that judges either do not go out of their way to establish whether the defendant's confession is in agreement with the evidence or that they take a position thereon before the hearing. There are, however, more drastic instances than those where merely copying the contents of the form from the Handbook is all that the court does at the plea agreement hearing. The judge of the Basic Court in Cetinje dealing with the case K.br. 154/11, K.br. 183/11, K.br. 217/11 called the plea agreement hearing a main hearing, noted the presence of the deputy prosecutor, defence counsel and defendant and issued a ruling on holding a hearing in public. After that, the deputy state prosecutor took the floor "stressing" that a plea agreement had been concluded with the defendant in the presence of the defence counsel and proposing to the court to approve the plea agreement in whole and thus "put an end to this criminal matter". The judge next issued a ruling stating, *inter alia*: "After inspecting the plea agreement...as well as having inspected the record of the negotiations (...) approves the plea agreement (...)" The judge then noted that the parties had agreed to waive their right to appeal against the judgment about to be issued, issued the judgment, found the defendant guilty of the criminal offence alleged against him, pronounced a criminal sanction against him, ordered him to pay the costs of the criminal proceedings and noted that the judgment was final.

VII Ruling on approving a plea agreement

The court's ruling granting a plea agreement should note in detail that every requirement for concluding the plea agreement under Article 302, paragraph 8, items 1-5 of the CPC has been fulfilled. While the parties and the defence counsel have no right to appeal against the ruling, the injured party can do so if he is not satisfied with the way his restitution claim was dealt with, thus calling into question the plea agreement as a whole.

An analysis of the practice of Montenegrin courts so far regarding their rulings approving plea agreements shows the following:

The Basic Court in Cetinje does not draw up engrossments of rulings approving plea agreements even where the injured party has the right to appeal against the ruling and has not waived this right. In two out of three cases before the Basic Court in Cetinje the proceedings were concluded by issuing judgments on the basis of plea agreements; immediately after approving the plea agreements, the judge issued judgments finding the defendants guilty, pronounced criminal sanctions against them and announced that the judgments were final. It should be noted that the

CPC permits an appeal against a judgment issued on the basis of a final ruling approving a plea agreement (Article 300, paragraph 2 of the CPC) in cases where the a judgment is not in agreement with the plea agreement.

The Basic Court in Ulcinj draws up written communications of rulings approving plea agreements and gives advice of rights according to which the injured party may appeal to the panel referred to in Article 24, paragraph 7 of the CPC.

The judge of the Basic Court in Danilovgrad acted in the same way.

In connection with a ruling approving a plea agreement, the judge of the Basic Court in Plav gives advice of rights according to which the parties and the defence counsel have the right of appeal although they do not have this right once a plea agreement is approved. The same practice is in evidence in the Basic Court in Podgorica, where some judges issuing rulings approving plea agreements advise that a ruling may be appealed against to a non-trial panel without limiting this right to the injured party alone.

In cases before the Higher Court in Podgorica, in which the subject matter of plea agreements were criminal offences with no injured parties, the judges acted correctly by announcing that the rulings were not appealable instead of giving advice of rights.

The practice of the Higher Court in Bijelo Polje is of some interest. In their rulings approving plea agreements, some judges state that a ruling may be appealed against to a Higher Court panel within 3 days. This is stated in the enacting clause of the ruling, with the grounds section stating that the parties and the defence counsel waived their right to appeal against the ruling individually and by common consent. The judge is making a double mistake here. First, in the enacting clause of the ruling approving the plea agreement, the judge gives the parties and the defence counsel the right of appeal (although they do not have this right under the law); second, in the rationale the judge notes that the parties waived their right of appeal (something they did not have under the law).

VII Judgment issued on the basis of an approved plea agreement

The CPC provides that a judgment is issued without delay, after a ruling approving a plea agreement becomes final and not later than within 3 days.

This time limit was adhered to by judges of basic and higher courts in the majority of the cases. However, in some cases judges issued judgments, without justifiable reason, after 20 or more days after a ruling approving a plea agreement became final.

The reasons given for judgments issued on the basis of final rulings approving plea agreements were identical in all the cases, having apparently been copied from the judgment form published in the Handbook on the Practical Application of the CPC. The judges did not go out of their way to be creative and leave a personal imprint on their judgments. In their judgments, even the reasoned decisions on the sanctions contain passages copied from published forms such as: "In deciding on the amount of punishment and on the plea agreement, concluded between the parties

(in spite of the fact that the plea agreement was approved by a special ruling, nearly all judgments contain this stock phrase in their statement of reasons), the court found the motion of the parties acceptable". This is followed by an account of the circumstances the court had in view in each concrete case when deciding on the amount of punishment.

Where judgments issued on the basis of approved plea agreements differed was in the matter of the advice of rights. The CPC namely allows for the right of appeal against a judgment issued on the basis of a final ruling approving a plea agreement in cases where a judgment is not in accordance with a concluded plea agreement.

In spite of this, however, judges deal with such cases in a number of different ways. Thus, for instance, the Basic Court in Plav gives advice of rights of the following type: this judgement may be appealed against within 15 days, except in connection with the decision on the criminal sanction (?). Many of the judgments contain the statement "no appeal shall be permitted against this judgment". Some judgments, e.g. by the Basic Court in Nikšić, include advice of rights allowing an appeal against a judgment to be made within 8 days after the date of delivery, which implies that the court allows for the right of appeal against a judgment on all grounds in spite of the fact that this is not permitted under the law, given that the parties have waived their right of appeal and can challenge the judgment only if it is not in harmony with the plea agreement.

In connection with a judgment issued on the basis of an approved plea agreement, the Basic Court in Ulcinj gave a correct advice of rights, i.e. that the judgment could only be appealed against if not in accordance with the plea agreement.

The Basic Court in Kotor, in a judgment issued on the basis of a concluded plea agreement, gave advice of rights worth noting. Namely, the court stated that the judgment was not subject to an appeal because "the same is in conformity with the plea agreement"(?). It would be lawful and logical for conformity between a judgment and a plea agreement to be examined by a non-trial panel when deciding on an appeal rather than by the judge who issued the judgment. Such an advice of rights would be analogous to an advice of rights given in a regular procedure if a court of first instance were to state in the engrossment of the judgment that no appeal was permitted against the judgment because the judgment was not affected by a substantive violation of criminal procedure provisions, that the facts of the case were correctly and fully established, the Criminal Code correctly applied and the sentence pronounced on the basis of correctly and fully established and correctly assessed circumstances affecting the decision.

The Higher Court in Bijelo Polje gave an advice of rights stating that a judgment could be appealed against to an Appellate Court, although the law provides that a judgment incompatible with a plea agreement is to be decided upon by the non-trial panel referred to in Article 24, paragraph 7 of the CPC.

It was also observed that courts' practice varies when it comes to issuing judgments on the basis of approved plea agreements in cases where defendants are in detention at the time. While in all their cases save one the judges of the Basic Court in Podgorica and of the Higher Court in Podgorica issued no decision regarding detention, it could be said that their colleagues in the Higher Court in Bijelo Polje, after issuing judgments based on approved appeal agreements, regularly issued special rulings abolishing defendants' detention.

The powers of a judge who holds a plea agreement hearing and consequently issues a judgment upon the ruling becoming final are not the same as the powers of a judge in charge of a trial who issues a decision on the principal matter after the trial. In other words, a trial judge or a panel may decide on abolishing or ordering detention only during a main hearing or a procedure for issuing a decision after the main hearing. Away from a trial (not counting the investigation stage), detention can only be ordered, extended or abolished by decision of a non-trial panel. Therefore, a judge in charge of a plea agreement hearing and issuing a judgment on the basis of a final ruling approving the plea agreement has no authority to repeal a detention ruling. Besides, a defendant who is in detention when a judgment sentencing him to a term of imprisonment exceeding the time spent in detention becomes final is committed to serve the sentence of imprisonment rather than having his detention ruling repealed.

Conclusion

The small number of cases in which plea agreements have been concluded over the last two and a half years indicates that the institute has so far failed to live up to expectations of efficient resolution of criminal cases and of reducing courts' workload. This is to be regretted because, in view of the penalty prescribed, it is possible to conclude plea agreements on the majority of criminal offences under Montenegro's Criminal Code.

It appears that judges, deputy state prosecutors and members of the Bar involved in cases ending in judgments based on plea agreements do not fully appreciate the substance of this institute and are not sufficiently trained to apply it in practice. The Handbook of Forms for the Practical Application of the CPC (which contains standard forms for transcripts made by state prosecutors during negotiation and confession proceedings, transcripts of plea agreement hearings and transcripts of rulings approving plea agreements and issuing judgments) were more of a hindrance than a help in practical application of plea agreements. State prosecutors and judges adhered to the published forms without exploring the institute of the plea agreement and their role in it, which in most cases resulted in standardized transcripts and decisions done in a "copy-paste" manner.

Guided by the forms in the Handbook, judges unnecessarily examined evidence during plea agreement hearings without realizing that these hearings are not the same as the main hearing and that they differed from it substantially. At these hearings judges did not bother at all to assess the quality of defendants' confessions by finding out whether defendants confessed to criminal offences knowingly and voluntarily and whether the possibility of a confession being made in error could be ruled out.

Following hearings approving plea agreements and issuing judgments on their basis, judges of some courts overstepped their authority under the law and abolished defendants' detention.

The abovementioned mistakes in the application of this institute could be justified by the initial confusion on the part of deputy state prosecutors, judges and attorneys. If, however, this practice in applying plea agreements continues, the institute will not only lose credit but risk being wrongfully applied to the detriment of defendants. Of particular concern are courts' inadequate assessments of the quality of defendants' confessions and the inertness of defence counsels, who

play no active role when state prosecutor take defendants' confessions on the record and during plea agreement hearings. Judging by some courts' practice so far, one should also not rule out the possibility of incorrect application of the institute in favour of defendants (judges deciding on plea agreements are known to have abolished detention even for foreign nationals?).

I consider that application of the institute of the plea agreement should be given greater promotion in the forthcoming period in order to increase the number of cases in which criminal proceedings are concluded by applying this institute. With this end in view, practical training should be organized for representatives of the state prosecutor's office, judges and members of the Bar in order to bring to their attention the mistakes made in the early stages of implementation as well as to encourage them to apply the institute. An increase in the number of cases where criminal proceedings are ended by applying this institute would fulfil the purpose of the institute of relieving courts of lengthy criminal proceedings.

Role of the Court in Establishing Facts at Main Hearing – A Regional Comparative Analysis

Summary

The 2003 reform of the Bosnia and Herzegovina criminal procedure system brought about the implementation of many elements of the Anglo-American criminal procedure. This paper analyses legislative solutions pertaining to offering exhibits into evidence and deciding thereon, as stipulated in the Criminal Procedure Code of Bosnia and Herzegovina. The author advises that significant changes are caused both by new regulations governing the prosecution and investigation processes which are conducted by prosecutors and by a rule under which evidence at the main hearing is always presented by parties and the defence counsel. Naturally, it should be added that the bench has been made entirely passive regarding the presentation of evidence, thereby abandoning the role previously held by court in the Continental-European jurisprudence. Consistent application of such a rule imposes an obligation on the parties and the defence counsel to prepare well for arguing their cases before the court and makes them responsible not only for the outcome, but for the efficiency and speedy termination of criminal proceedings. Special attention is given to common rules for the examination of witnesses and expert witnesses, as well as to the right of bench not to admit questions or evidence.

For the most part, consideration is given to the case law of the Constitutional Court of Bosnia and Herzegovina and of the courts in Bosnia and Herzegovina. The paper also summarises innovations with regard to evidentiary procedure introduced by the new criminal procedure codes enacted in the Republic of Croatia and the Republic of Montenegro.

Key words: Criminal Procedure Code, criminal procedure, evidentiary procedure, cross-examination, main hearing

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I. Introductory Notes

Regular course of the main hearing is provided for in Articles 256–278 of the Criminal Procedure Code of Bosnia and Herzegovina.² However, a judge or a presiding judge may order a departure from the regular order of proceedings due to special circumstances,³ and especially if it concerns the number of the accused, the number of criminal offences and the amount of evidence (Article 240), establishing the most expedient manner of proceeding. Being thus authorised, the judge or the presiding judge may depart from the prescribed order of procedural actions, but he must, regardless of that, take all the necessary procedural actions in order to achieve the purpose of the main hearing. In juvenile proceedings even greater departures from the regular course of main hearing are possible (Article 356, paragraph 1 and Article 364, paragraph 1). A decision is passed on the departure from the regular order of procedural actions, which is then entered in the main hearing record and against which an appeal may not be brought.

Procedural actions concerning the verification of statutory presumptions for holding the main hearing are taken when the session is opened at the main hearing. Opening of a session stands for an announcement to the parties and the public that a judge or a panel are ready to proceed in the case which falls under their jurisdiction and for which the main hearing has been scheduled for that day, giving more details about the case.⁴ When the session is opened, subject matter of the case is addressed and participants in the proceedings are given an opportunity to commence the exercise of their statutory powers in an order as provided under the law. The main hearing has not yet commenced when the session is being opened.

A judge or a presiding judge opens a session in the presence of a judicial panel, persons summoned to the main hearing and the public. Upon opening the session, the judge or a presiding judge shall announce the subject matter of the main hearing (which entails the announcement of the names and surnames of the accused and of the prosecutor, as well as the stating of the criminal offence for which an indictment has been confirmed), and ascertain, by way of calling the roll, if all the summoned persons have appeared; if not, he shall verify if the summons were served on them and if they have justified their absence (Article 244). In addition, the judge or the presiding judge shall also announce the composition of the panel, specifically due to potential motions to recuse the judge. Then, the judge or the presiding judge shall decide whether the main hearing shall be held in the absence of persons who have been summoned but failed to appear, or the main hearing shall be adjourned or he shall reserve his decision on the adjournment for later. Thereupon, the judge or the presiding judge shall call the accused and take his personal data referred to in Article 78 (identification data) in order to verify his identity (Article 257)

Upon deciding to hold the main hearing, the judge or the presiding judge shall verify the identity of the accused by obtaining his personal data referred to in Article 78 (Article 258, paragraph 1),

2 Published in the BiH Official Gazette, No. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09 and 93/09). Articles referred to later in the text after which there is no mention of the name of the enactment pertain to the Criminal Procedure Code of Bosnia and Herzegovina. In addition to this Code, other codes which are in force in Bosnia and Herzegovina are the Criminal Procedure Code of the Republika Srpska (Official Gazette of the Republika Srpska, No. 53/12), Criminal Procedure Code of the Federation of Bosnia and Herzegovina, (Official Gazette of the Federation of Bosnia and Herzegovina, No. 35/03, 28/05, 55/06, 27/07 and 9/09) and Criminal Procedure Code of the Brčko District of Bosnia and Herzegovina – Consolidated Text (Official Gazette of the BiH Brčko District, No. 44/10).

3 Circumstances cited in Article 240 are given only as examples, meaning others may also emerge.

4 Vasiljević, 536.

which may have great importance for the future course of criminal proceedings (when deciding on the type and duration of a criminal sanction if the accused is found guilty or on the costs of criminal proceedings and restitution claims, etc). After verifying the identity of the accused, the judge or the presiding judge shall (1) ask the parties and the defence counsel whether they have any motions regarding the composition of the panel or jurisdiction of the court (Article 258, paragraph 2) and (2) he shall give specific instructions to the witnesses and expert witnesses (Article 258, paragraph 3).

Once the identity of the accused has been verified, the judge or the presiding judge shall direct the witnesses and expert witnesses to the space assigned to them outside the courtroom, where they are to wait until called to testify, and he shall warn them not discuss their testimonies with other witnesses while waiting (Article 258, paragraph 3). As regards expert witnesses, their non-attendance at the main hearing prior to giving evidence is not unconditional. Namely, upon motion of the prosecutor, the accused or the defence counsel, the judge or the presiding judge shall grant those expert witnesses referred to in the motion to be present in the courtroom during the hearing (Article 258, paragraph 3). The judge or the presiding judge shall take necessary measures to prevent witnesses, expert witnesses, and parties from communicating with each other (Article 258, paragraph 5), which is done by maintaining order in the courtroom during the trial.

The judge or the presiding judge is obliged to give certain instructions and advice. If the injured party is present, but has not yet filed a restitution claim, the judge or the presiding judge shall advise him that such a claim can be filed by the closing of the main hearing (Article 258, paragraph 4). The judge or the presiding judge is obliged to advise the injured party of the rights referred to in Articles 195 and 198 – that restitution claims may be filed not later than the end of the main hearing or sentencing hearing, and that he must state his claim specifically and submit evidence, etc.

Giving advice to the accused is particularly important, regardless of whether the accused has a defence counsel or not, thus making the exercise of his right to defence more effective. The judge or the presiding judge shall warn the accused to follow carefully the course of the trial and he shall advise him that he may present facts and offer evidence in his favour;⁵ that he may question his co-defendants, witnesses and expert witnesses, and that he may offer explanations regarding their testimony (Article 259, paragraph 1).

The judge or the presiding judge shall instruct the accused that he may give evidence as a witness during the course of the evidentiary procedure and that he shall, should he decide to give such evidence, be subject to direct examination and cross-examination as defined under Article 262, or cautioned and warned as defined under Article 86. If so, the accused as a witness shall not swear an oath or affirmation. The bench shall allow the accused to consult his defence counsel

5 A suspect is guaranteed this right in the investigation process as well (Article 78, paragraph 2, items a) and c) and paragraph 5).

about this right of his prior to taking the stand, and if he does not have a defence counsel – the bench will closely examine if he needs one (Article 259, paragraph 2).⁶

II. Commencement of the Main Hearing

The main hearing commences by reading the indictment (Article 260, paragraph 1). The prosecutor is entitled and obliged to read the indictment. Even though the parties and the judge or the presiding judge know its contents, the indictment is read because other members of the panel, participants in the proceedings and the public should become acquainted with its contents. When the indictment has been read, the prosecutor may no longer withdraw it (Article 232, paragraph 1), but he reserves the right to drop the charges before the end of the main hearing (Article 283, item c)). In addition, the prosecutor has the right to amend the indictment after the commencement of the main hearing, at the trial (Article 275). However, from the moment a session is opened and the subject matter of the trial announced (Article 244) until the commencement of the main hearing, the prosecutor has no right to amend the issued indictment.⁷

Upon reading the indictment, the prosecutor shall briefly state evidence which he believes sustains the charge(s) (Article 260, paragraph 2). This so-called preliminary statement is an obligation and a right of the prosecutor, which he may not waive. This prosecutor's right is his first chance to mention before the court hard and clear pieces of evidence, which he believes sustain the charge(s) and which will be presented at the main hearing.

After the indictment has been read, the judge or the presiding judge shall ask the accused if he has understood the charges (Article 260, paragraph 2). To explain an indictment to the accused "in a manner which he can understand" practically means to expound its legal elements in a

6 In a verdict passed by the District Court in Banja Luka number 11 0 K 003556 10 K of 23 May 2010, it is found that a court decision may not be based on evidence a witness gave as a suspect in another criminal proceedings. In this particular case, the accused V. O. was charged with committing as part of a group, together and upon previous agreement with persons: B. S. of Subotica, a citizen of the Republic of Serbia and the convicted V. D.J. and B. F. of Janja the crime of abduction under Article 165, paragraph 2, in conjunction with paragraph 1 of the Criminal Code of the Republika Srpska, in concurrence with the crime of aggravated murder under Article 149, paragraph 1, item 2) of the said Code. B. S. was tried on a criminal indictment before the District (later on Higher) Court in Subotica and he had been remanded in custody in the Subotica District Prison since 14 May 2009. Prosecution moved that B. S. be summoned and heard as a witness, so this Court turned to the Republic of Serbia, the Subotica District Court with a letter rogatory, asking this Court as the appropriate authority of the Republic of Serbia to transfer B.S. to Bosnia and Herzegovina ad interim in accordance with provisions contained in Articles 4, 5, 7, 8 and 34 of the Mutual Legal Assistance Treaty in Civil and Criminal Matters between Serbia, Montenegro and BiH (Official Gazette of the Republic of Serbia, No. 6/05) – so that he could be heard as a witness, provided that should the said person be transferred to Bosnia and Herzegovina, this Court would fully comply with the provisions of Article 34, paragraph 6 of the said Treaty and promptly upon having thus acted (having questioned B. S. as a witness at the main hearing on 12 April 2010) return B. S. to the Republic of Serbia and that he would be given protection on the territory of Bosnia and Herzegovina in accordance with provision 14 of the Treaty. Decision of the Subotica Higher Court number K-42/10 of 30 March 2010 rejects the ad interim transfer of the remanded B. S., while grounds for the decision state that on 30 March 2010 a statement was taken from the person on remand concerning his consent to the ad interim transfer – in order to be questioned as a witness. Nevertheless, he did not consent to the ad interim transfer, so the Court cited above refused to grant the Court's request under Article 93 of the Mutual Legal Assistance in Criminal Matters Act of the Republic of Serbia. Due to the above, the Prosecutor introduced evidence by reading a statement of B. S., which he gave as a suspect in the former case, namely to the Ministry of the Interior of the Republic of Serbia and to the Subotica District Court in the case number Kri. 149/09 of 15 May 2009. Consequently, since it was established based on evidence presented that B. S. had participated in the commission of the crimes of abduction and aggravated murder at the time and in the manner stated in the operative part of the indictment and since criminal proceedings against him were ongoing for the same offence before the Subotica Higher Court, therefore in Serbia, he could only have been questioned as a witness in this case since he did not have the status of the accused in this criminal case, so therefore it was not possible to utilise the statements he had given as a suspect because at the time he gave the statements, he was not cautioned as a witness. Consequently, transcripts of B. S. interrogation as a suspect could not be used as evidence in this criminal trial nor a decision could be based on them. Thus, since it was the case of evidence which had not been presented in the main hearing, the Court did not base its decision on the cited statements of B. S.

7 Sijerčić-Čolić, Hadžimeragić, Jurčević, Kaurinović, Simović, 666.

fashion more easily comprehended by someone who is a layman, without citing provisions, regulations, legal technical terms, while giving a general outline of the incident to which the indictment pertains.⁸ Full understanding of the charges and evidence which sustains them is condition sine qua non of defendant's possibility to present his defence in criminal proceedings, which is simultaneously a requirement for conducting a fair trial in criminal proceedings.⁹ Should the judge or a presiding judge find that the accused has not understood the charges, he shall summarise it briefly to the accused in a manner which he can understand (Article 260, paragraph 2). The contrary case constitutes a substantial violation of criminal procedure rules from Article 297, paragraph 2 in conjunction with Article 260, paragraph 3, because in the main hearing the court has failed to apply a statutory provision that might have affected the rendering of a lawful and proper verdict.

Now that the indictment has been presented and the Prosecutor has briefly stated the evidence sustaining the charges, the accused or his defence counsel are given an opportunity to present the defence and briefly state the evidence which they will offer in their defence (Article 260, paragraph 3). If the accused wishes to state evidence in his own defence, he shall be granted the right to give an opening statement for fear of violation of the right to defence and equality of arms.¹⁰

III. Evidentiary Procedure

During the evidentiary proceedings, which is a key and the most meaningful part of the main hearing, all necessary procedural actions are taken to resolve all the issues concerning substantive and procedural law in order to pass a decision in a criminal matter (a criminal offence, whether the accused is guilty or not, and sentencing). During the evidentiary procedure, protection of minimum rights of any person charged with a crime is fully manifested; those rights are guaranteed under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 14, paragraph 3, item g)) of the International Covenant on Civil and Political Rights which expands the catalogue of the cited rights so as to ensure that no person charged with a criminal offence may be forced to testify against themselves or to plead guilty. Characteristics of such a procedure are that the main hearing is conducted orally and directly in an open hearing following the adversary principle, provided that it is the guiding principle in the presentation of evidence at the main hearing because procedural actions pertaining to the examination of witnesses, expert witnesses, and other evidence are taken in accordance with the rules of direct and cross examinations, which is why this model of criminal procedure is also called adversarial.

Parties and the defence counsel are entitled to call witnesses and to present evidence (Article 261, paragraph 1). The parties and the defence counsels are entitled to call witnesses and expert witnesses, as well as to present their own evidence, which is inherent in the status they have in criminal proceedings. The court shall summon witnesses and expert witnesses to a main hearing, regardless of the fact who moved for such evidence to be presented (Article 168, paragraph 2).

8 Vasiljević, 539.

9 Jekić-Škulić, 336.

10 Sijerčić-Čolić, Hadžiomeragić, Jurčević, Kaurinović, Simović, 667. *Ibid.*

Evidence is presented in an order provided for under the law, which stems from the manner in which parties are divided according to their functions. Virtually, evidence may be divided into three basic groups: prosecution evidence, defence evidence and court evidence. The party performing the prosecutorial function is the first one to present evidence. Likewise, presentation of evidence is based on the adversary principle, according to which each party has the right to disprove evidence and positions of the opposing party. Nonetheless, a judge or a presiding judge may modify the statutory order in which evidence is presented, but only if that is in the interest of justice (Article 260, paragraph 2), thereby ensuring a fair trial. The interests of justice may refer to the complexity and volume of evidence, the number of defendants and witnesses, but, the interests of the injured party may also in the same manner have an impact on the course of a main hearing, particularly if caused by the enforcement of measures to protect witnesses under threat or vulnerable witnesses.¹¹

Evidence is presented in the following order at a main hearing: (a) prosecution evidence, (b) defence evidence, (c) prosecution evidence disproving allegations of the defence (rebuttal), (d) evidence in rejoinder to the prosecution's rebutting evidence, (e) evidence whose presentation was ordered by the judge or the panel, (f) all the pieces of evidence relevant to the pronouncement of sentence¹² (Article 261, paragraph 2). As a rule, witnesses summoned by the court shall first be examined by the bench and then they shall be cross-examined by the prosecutor and the defence counsel. The order was thus established to benefit the defence that is then given an opportunity to hear first which questions witnesses are asked by judges and the prosecution. Judges are then free to examine the witnesses once again, with a common limitation that questions that have not previously been addressed in direct or cross examinations may not be brought up on re-direct examination.

1. Hearing of Witnesses at Main Hearing

Every witness shall take an oath or affirmation in lieu of an oath before testifying (Article 266, paragraph 1). This legislative solution differs from the one when a witness swears an oath, which is not obligatory, prior to the main trial (Article 88). However, in both cases an oath may be taken only before the court of law. Persons who may not take oaths are minors, persons who due to their mental condition are unable to comprehend the meaning of an oath and persons for whom it has been proved that there are grounds to suspect that they have committed or participated in commission of an offence for which they are being examined (Article 89). The texts of the oath and affirmation are defined under Article 266, paragraph 2. They are read by the judge or the presiding judge and the witness who is being sworn in repeats the text verbatim or the text is given to the witness who shall read the formal statement aloud at the main hearing.

During the presentation of evidence, it is allowed to conduct (1) direct examination, (2) cross-examination and (3) redirect examination. The party that called a witness shall conduct direct examination, but the judge or the panel may at any time ask the witness a question (Article 261, paragraph 3).

¹¹ *Ibid.*, 671.

¹² This evidence usual pertains to the degree of criminal liability of the accused, his motives for perpetrating the offence, the degree of injury or danger to the protected object, his past conduct, personal situation, property, etc. (Article 48 of the BiH Criminal Code).

1.1. Direct Examination, Cross-examination, and Redirect Examination of Witnesses

Direct examination means that a witness is examined by the party or the defence counsel who offered and called the witness as his evidence. Direct examination is a dialogue between a witness and examiner (the Prosecutor, the accused, or the defence counsel) in which the witness talks about a subject determined by the examiner: questions may refer to a certain subject or they may be descriptive. Questions should be clear and understandable to all participants in the proceedings and witness testimony should be thorough, thereby excluding or limiting the scope of cross-examination.

Cross-examination is the examination of a witness by the opposing party or by the defence counsel, i.e. by the party that has not offered him as his evidence. Cross-examination is “limited to the issues addressed in the course of direct examination, to the issue of witness credibility, as well as to the evidence the witness may provide supporting the case of the party which conducts cross-examination.” Such examination is also known as hostile cross-examination since its goal is to prove that the witness has not been telling the truth. The ultimate goal of such examination is to eliminate or minimize factual or legal importance of direct examination and it is conducted only if a witness has caused damage to a theory of the case (the prosecution or the defence arguments).¹³ That would be the case of a damaging witness, who undermines the strategy of trying the case of one of the parties; unlike him, a constructive witness does not cause any damage because he tells the truth, so there is no need for cross-examination.¹⁴

Redirect examination of a witness is the so-called second round of direct examination of the witness, which is done after the witness has been cross-examined by the opposing party. During redirect examination, the party that called the witness may ask him to explain or clarify certain issues which have emerged during cross-examination and which have an adverse effect on their case. The goal of such an examination is to eliminate or mitigate the effects of cross-examination, or to put it more clearly, to rehabilitate or save the witness, while naturally limiting your questions to the questions and answers which were addressed on cross-examination.¹⁵ The other party must be given an opportunity to exercise their right to re-cross examination, within the limits of previously conducted additional redirect examination of the witness.¹⁶ This right is earned when new questions, relating to new circumstances, are asked on redirect examination and answers given are such that in a new manner jeopardize the position of a party (most often that of the defendant).

In principle, examination is adversarial in character, so that a witness is directly examined by the party who called him, but the judge or the presiding judge and members of the panel may at any stage of the examination ask the witness appropriate questions (Article 262, paragraph 1). Questions on cross-examination are limited and they relate to the questions asked during direct examination. The aim of thus limiting the subject on which a witness is questioned is twofold: on the one hand, proceedings are thus expedited and no time is lost on the questioning regarding irrelevant facts, while on the other hand, the adversarial character of direct examination is thus re-

¹³ Sijerčić-Čolić, Hadžiomeragić, Jurčević, Kaurinović, Simović, 675.

¹⁴ *Ibid.*, 675 and 676.

¹⁵ *Ibid.*, 678.

¹⁶ *Ibid.*, 678 and 679.

vealed.¹⁷ After examination of the witness, the judge or the presiding judge and members of the Panel may question the witness (Article 262, paragraph 1).

During direct examination, the Prosecutor or the defence shall refrain from asking suggestive questions, i.e. leading questions or those that already contain a sought-for answer. Leading questions may not be asked during direct examination, except if there is a need to clarify the witness's statement (Article 262, paragraph 2). As a rule, leading questions are allowed only on cross-examination (Article 262, paragraph 2) – so that the Prosecution or the Defence could present to the witness their own version of events and raise doubts about the veracity of the testimony or the credibility of the witness.

Also, the judge or the presiding judge may allow leading questions when a party calls a witness for the adversarial party or when a witness is hostile or refuses to cooperate (Article 262, paragraph 2). In this case, witness's conduct, or his conscious obstruction of proceedings, is what constitutes a substantive requirement for allowing suggestive questions, but in allowing such a line of questioning, the bench must as a principle exercise extreme caution since many witnesses may due to a normal factor known as forensic stress, or a specific type of stress experienced by any person who comes in contact with criminal proceedings, and in general in relation to any court action, appear confused, listless or even hostile, even though they otherwise honestly want to contribute by giving testimony to the ascertaining of truth and fair resolving of the criminal matter which is the subject of the proceedings.¹⁸

Even though the entities who perform the functions of prosecution and defence are principally entrusted with the questioning of witnesses in criminal proceedings, the bench does not only passively stand aside and observe the presentation of evidence by parties; on the contrary, the bench's role in the proceedings is a very active one, to a certain and necessary extent.¹⁹ The judge or the presiding judge shall exercise an appropriate control over the manner and order of the examination of witnesses and the presentation of evidence, so that (1) the examination of and presentation of evidence is effective to ascertain the truth, (2) to avoid loss of time and (3) to protect the witnesses from harassment and stress (Article 262, paragraph 3).

During the presentation of evidence ordered by the judge or the panel (Article 261, paragraph 2, item e)), the bench shall question the witness and then allow the parties and the defence counsel to pose questions to the witness (Article 262, paragraph 4). The presentation of evidence ordered by the court shall be conducted following the rules for direct examination, whereby the witness is first questioned by the judge or the presiding judge and the parties and the defence counsel may ask questions only with judge's permission – also following the rules for direct examination. Nevertheless, this does not mean that the parties and the defence counsel may not exercise their right to cross-examine the witness: if there is a need to clarify the witness's testimony, if the witness is hostile or refuses to cooperate (Article 262, paragraph 2).

17 Jekić-Škulić, 339.

18 *Ibid.*, 339.

19 *Ibid.*,

1.2. Protection of Witnesses from Insults, Threats and Attacks

Protection of witnesses in criminal proceedings is provided in various manners, in particular under the BiH *Law on Protection of Witnesses Under Threat and Vulnerable Witnesses*.²⁰ Special rules apply to witnesses who are exposed to insults, threats and attacks during the main hearing. The judge or a presiding judge is obliged to protect the witness from insults, threats and attacks (Article 267, paragraph 1). Not only the parties, but any participant in the proceedings, may be subject to court sanctions the aim of which is to ensure witness protection. This refers to the following activities and procedural options available to the court:

- (1) In case a person insults, threatens, or jeopardizes the safety of a witness before the court, but the threat is not a serious one, the judge or the presiding judge shall warn or fine the participant in the proceedings or any other person who thus acts towards a witness (Article 267, paragraph 2). In case of a fine, general provisions governing penalties for disruption of order shall be applied (Article 242, paragraph 3).
- (2) In case of a serious threat to a witness, the judge or the presiding judge shall notify the prosecutor accordingly for the purpose of undertaking criminal prosecution (Article 267, paragraph 3).
- (3) Police measures necessary for protecting a witness are taken at the petition of one of the parties or of the defence counsel, and the judge or the presiding judge shall order the type and scope of those measures (Article 267, paragraph 4). The purpose of those measures is to completely protect the witness while he is inside the Court prior to his testimony, while he is giving evidence in the courtroom, and after he has testified so that he could leave the court safely.

1.3. Sanctions for Refusing to Testify

If not excluded under the law, each citizen has a general duty to testify in criminal proceedings and to give oral answers to posed questions. If a witness refuses to testify, this carries a fine, namely of up to 30,000 BAM.²¹ Requirements for a fine to be imposed on a witness at a main hearing are set out cumulatively: (1) a witness has refused to testify without giving a justified reason and (2) he has done so after having been warned by the court of the consequences of such a refusal (Article 268, paragraph 1). Lack of justified reason for refusing to testify in the substantive requirement, while warning of the possibility of imposing a fine constitutes the formal requirement for sanctioning. It is a matter left to a discretionary judgement of the judge or the presiding judge, which depends on the importance of the witness's testimony, its probative value, witness's character and his conduct taken as a whole, etc.²² If a refusal to testify is exclusively an expression of the contempt of the court, then the witness ought to be punished.²³ A special decision on punishment is passed and it may be appealed, but the appeal does not stay the execution of the decision (Article 268, paragraph 2).

20 Official Gazette of Bosnia and Herzegovina No. 3/03, 21/03, 61/04 and 55/05.

21 A witness may be fined for refusing to testify even in the course of investigation proceedings (Article 81, paragraph 7).

22 Sijerčić-Čolić, Hadžimeragić, Jurčević, Kaurinović, Simović, 688.

23 *Ibid.*,

Should the witness refuse to testify thereafter, he may be sent to prison. His imprisonment shall last until he has agreed to testify or until his testimony is no longer needed, or until criminal proceedings are completed, but not longer than 30 days (Article 268, paragraph 2).

A panel of judges shall always rule on appeals against a decision imposing a fine or ordering imprisonment (Article 24, paragraph 7). An appeal against a decision imposing a fine or imprisonment does not stay the execution of the decision.

2. Engagement and Examination of Expert Witnesses

Parties, the defence counsel and the Court may call for expert witnesses at a main hearing (Article 269, paragraph 1). As a rule, expert witnesses are called for primarily by the parties and the defence counsel (as part of collecting evidence for the prosecution or the defence) and exceptionally by the Court (should it be so decided at the main hearing). The expenses of expert witness testimony at the main hearing are covered by the party who engaged the expert witness (Article 269, paragraph 2), and the final decision on the costs of criminal proceedings is made by the Court, depending on the results of the proceedings or the type of the court verdict upon which criminal proceedings are concluded (Article 185, paragraph 4).

Before an expert witness is examined, the judge or the presiding judge shall also remind him of his duty to present his findings and opinion to the best of his knowledge and in accordance with the ethics of his profession and shall warn him that presenting false findings and opinions in his testimony constitutes a criminal offence²⁴ (Article 270, paragraph 1).

Expert witnesses are sworn in or they take an affirmation prior to giving evidence (Article 270, paragraph 2). The oath or affirmation is sworn orally and its text is defined in Article 270, paragraphs 3 and 4.

Expert witnesses present their findings and opinions orally in the main hearing (Article 270, paragraph 5) – so that they could be questioned by both parties and the defence counsel in accordance with the rules for direct and cross examinations or redirect examination. Rules for witness examination are consistently applied with regard to this examination. In order for expert witnesses' written findings and opinion to be admitted into evidence, he must testify at the main hearing (Article 270, paragraph 5).

3. Common Rules for Examination of Witnesses and Expert Witnesses

Common rules for the examination of witnesses and expert witnesses are the result of the fact that they essentially fulfil the function of giving evidence in a criminal trial.

24 This refers to the criminal offence of giving false statements under Article 235 of the BiH Criminal Code.

3.1. Discharging Witnesses and Expert Witness

After having been questioned at the main hearing by parties and the defence counsel, or the Court, witnesses and expert witnesses may be partially or completely discharged. As a rule, witnesses and expert witnesses are discharged after having been questioned by the parties and the defence counsel and they wait outside the courtroom if the judge or the presiding judge decides not to discharge them completely (Article 271, paragraph 1) and excuse them from staying further in the court.

While they are waiting outside the courtroom in a room specially intended for already questioned witnesses, those witnesses may not discuss their testimony with witnesses who have not been questioned yet (Article 258, paragraph 3). However, the judge or the presiding judge may order either on the motion of the parties and the defence counsel or *ex officio* that questioned witnesses and expert witnesses leave the courtroom and be subsequently recalled and re-examined in the presence or absence of other witnesses or expert witnesses (Article 271, paragraph 2).

3.2. Hearing of Witnesses out of the Court

Rules stipulate that witnesses and expert witnesses shall be examined in a courtroom, but those rules may be departed from if all statutory requirements have been met. Witnesses and expert witnesses may be heard out of the Court if both substantive and formal requirements have been complied with. The material requirement is contained in two cumulative forms: the existence of certain difficulties which justify witness or expert witness examination out of the Court, and the formal one is the rendering of court decision.

If it is learned during the court proceedings that a witness or an expert witness is unable to appear before the Court or that his appearance would entail disproportionate difficulties, the judge or the presiding judge may order that such witness or expert witness be questioned out of the Court – should he deem his testimony important. The judge or the presiding judge, the parties and the defence counsel shall be present at the examination, and the examination shall be conducted in keeping with Article 262 (according to the rules for direct, cross and redirect examinations) – Article 272, paragraph 1.

If the judge or the presiding judge deems it necessary, witness examination may be carried out during a reconstruction of the incident out of the Court (Article 272, paragraph 2). The judge or the presiding judge, parties and the defence counsel shall be present at the reconstruction and the examination shall be carried out in accordance with Article 262. Practically, this procedural action is taken in a procedurally defined manner so that later on it could be presented at the main hearing and admitted into evidence, which means in keeping with the rules for direct, cross and redirect examination of witnesses.²⁵

Certain persons are always notified of such examinations of witnesses or expert witnesses, or of undertaking of reconstructions, providing that some persons are even obliged to attend them. Parties, the defence counsel, and the injured party are always summoned to be present when

25 Sijerčić-Čolić, Hadžiomerađić, Jurčević, Kaurinović, Simović. 692.

witnesses are examined or reconstructions carried out. Hearings are conducted as if being conducted at a main hearing, in accordance with Article 262 (Article 272, paragraph 3).

If a judge or a presiding judge deems it necessary, provisions contained in Articles 86, paragraph 6²⁶ and 90²⁷ shall consistently be applied to the examination of minors as witnesses (Article 272, paragraph 4).

3.3. Exemptions from Direct Presentation of Evidence

Statements given during the investigative phase shall be admissible as evidence at the main hearing and may be used in direct or cross examination or in rebuttal or in rejoinder, after which they are entered into evidence (Article 273, paragraph 1). This applies to the statements of witnesses, expert witnesses, or suspects who are directly questioned at the main hearing and who gave their statements earlier during investigation, mostly to authorised officials and the Prosecutor, or on the other hand to the defence counsel. Statements from the investigative phase may be presented only after oral evidence has been given at the main hearing or after direct examination.²⁸ Nevertheless, if a suspect gave a statement during the investigation, and the defendant refuses to raise a defence or he pleads his right to silence, his statement from the investigative phase may not be used as evidence

Notwithstanding the rules contained in Article 273, paragraph 1, should the judge or the panel rule so, records of statements given during investigation may be read and used as evidence at the main hearing only in case of some of the following alternatively stated circumstances: (1) if persons who gave statements are deceased, (2) mentally ill, or (3) cannot be found or (4) their appearance before the Court is impossible or made significantly difficult due to important reasons (Article 273, paragraph 2). In order for a judge or a panel to make such a ruling (to read recorded evidence), neither parties nor the defence counsel is obliged to file a motion or to consent thereto. Records of statements given during investigation are usually evidence of the prosecution or of the defence, so it should be made possible to the other party to cross-examine on such statements: with permission from the Court, it is allowed to pose questions that corroborate the argument of the prosecution or the defence and which would be asked if the witness was present at the main hearing.²⁹ Provision contained in Article 273, paragraph 2 means that records of witness statements may be read, thus excluding the statements of expert witnesses and suspects or of the accused, because if the accused is deceased or has become mentally ill or if he is not present at the main hearing, there can be no trial – criminal proceedings are terminated or adjourned, and trials *in absentia* are not allowed.³⁰

“Important reasons” imply that the court had, on several occasions, summoned the witness and then established that he was working on a special assignment,³¹ or that a domestic court has no statutory possibilities to ensure that a witness (a foreign national) shall appear at the main

26 In addition to other rules for such hearings, this one pertains to the hearing of minors using technical means for transferring image and sound so as to ensure that the parties and the defence counsel can ask him questions without being in the same room as the witness.

27 Rules pertaining the hearing of witnesses using audio-visual equipment.

28 Sijerčić-Čolić, Hadžiomeragić, Jurčević, Kaurinović, Simović, 693.

29 *Ibid.*,

30 *Ibid.*, 695.

31 Supreme Court of the Republic of Croatia, I Kž. 1066/99 of 3 February 1993

hearing,³² or that a witness is undergoing treatment at a hospital,³³ so his statement taken during the investigation may be read and used as evidence at the main hearing (in terms of Article 273, paragraph 2). However, the fact that at the time of holding the main hearing a witness is doing his military service³⁴ and the anticipated long procedure for serving the summons on an injured foreign national in a foreign state do not constitute an “important reason” due to which their appearance before the Court would be impossible or made significantly difficult.³⁵

If during the main hearing the accused invokes the right not to raise a defence or the right to silence, the judge or the presiding judge may rule that the record of statement he gave during the investigation be read and used as evidence at the main hearing only if the accused was informed of his rights in accordance with Article 78, paragraph 2, item c) when he was interrogated as part of the investigation.³⁶ In addition, decisive grounds for a verdict may not be based on evidence of witnesses whose statements are read at the main hearing because the defence is then denied their right to directly question such witnesses, which violates the principle of equality of arms in criminal procedure.

4. Right not to Allow Questions and Evidence

Even though the parties and the defence counsel are charged with the task of presenting evidence, the Court does not have a passive role in that regard. The role of the Court is reflected not only in the fact that it is possible for the judge or the panel to order that evidence be presented (Article 261, paragraph 2, item e)), but also in the position they have in the proceedings not to allow certain questions and answers to certain questions as well as certain evidence. The judge or the presiding judge shall forbid the question and an answer to a repeated question – if he finds that such a question is inadmissible or irrelevant to the case (Article 263, paragraph 1). A question is inadmissible if it pertains to a legally forbidden manner of obtaining evidence, to evidence the use of which is not allowed by the law or to the fact which may not be proven under the law. A question is irrelevant if the fact that should be ascertained by it has already been ascertained or if it is irrelevant to be ascertained, or if there is no connexion between the fact that needs to be ascertained and decisive facts, or if such connexion cannot be established due to legal reasons.³⁷ An order forbidding questions and answers may relate to any participant in the proceedings, the parties, the defence counsel and the judges. Judge’s or presiding judge’s decision to forbid a question or an answer is final, but the parties and the defence counsel are entitled to challenge this decision on appeal against the verdict if due to the forbidding of the question and answer, the facts have been erroneously or incompletely established (Article 299).³⁸

32 Supreme Court of the Republic of Croatia, I Kž. 415/95 of 22 April 1997

33 Verdict of the District Court in Belgrade, Kž. 460/03 of 27 February 2003.

34 Federal Court, Kps. 107/84 of 18 December 1984.

35 Supreme Court of the Republic of Croatia, Kž. 151/83 of 9 November 1983

36 This provision refers to the instructing of a suspect at the beginning of his questioning, inter alia, on his rights to comment on the charges against him and to present all the facts and evidence in his favour and if he should do so in the presence of his defence counsel – such statement of his shall be admissible as evidence at the main hearing and it may be read and used thereat without his approval.

37 Mrčela, 57.

38 *Ibid.*

If the judge or the presiding judge finds that the circumstances that a party and the defence counsel are trying to prove are irrelevant to the case or that the offered evidence is unnecessary, the judge or the presiding judge shall reject the presentation of such evidence (Article 263, paragraph 2). Circumstances and evidence are not important for the case or they are unnecessary if they are not relevant or if an offered piece of evidence does not pertain to the application of substantive or procedural norms.³⁹ Judge's or panel's refusal to introduce offered evidence when the facts because of which its introduction is sought have already been otherwise established falls within the full authority of the judge or the panel and does not constitute a breach of Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.⁴⁰

When the Court denies a motion to introduce a piece of evidence, the Court has not broken the law, but it can mean that it is a circumstance that indicates to the fact that the finding of fact has been correct and complete.⁴¹ To wit, there is no provision binding the Court to introduce every offered evidence, not even the one in which the principle of truth in the establishment of facts is contained, in the same manner as the lack of offered evidence does not relieve the Court of the duty to introduce the necessary evidence.⁴² Such a ruling of the judge or the presiding judge may be contested only by appealing the verdict passed in the first instance.

5. Special Rules of Evidence in Cases of Sexual Misconduct

It is not allowed to question any injured party about their sexual life prior to the commission of the offence for which proceedings are underway. No evidence offered to demonstrate the prior sexual experience, conduct, or orientation of the injured party shall be admissible (Article 264, paragraph 1). On the one hand, the purpose of such a ban is to prevent the possibility of presenting facts at a trial which do not have any direct relevance to the adjudication of a criminal case, while such facts, on the other hand, may be used as a means of substantial psychological pressure on the injured party and can come down to a new and additional humiliation of the victim, which is not only inhumane, but may lead to a fear of testifying, affect the quality of the testimony and as a whole, adversely affect the evidence.⁴³ In addition, no injured party may be questioned about their sexual life prior to the commission of the criminal offence (Article 86, paragraph 5). Therefore, the Court is obliged not to allow questions and answers if

39 Sijerčić-Čolić, Hadžiomeragić, Jurčević, Kaurinović, Simović, 681.

40 Decision of the Constitutional Court of BiH on the issue of Admissibility, No. AP 3014/07 of 12 January 2010.

41 Judgment of the Supreme Court of the Republic of Croatia, I Kž. 77/02 of 5 March 2002.

42 Judgment of the Supreme Court of Serbia, Kž. I 1867/98 of 27 May 1999.

43 Jekić-Škulić, 346 and 347.

their purpose is to prove prior sexual conduct or predisposition of the injured party, or to deny the presentation of evidence if motions to present evidence pertain to the said circumstances.⁴⁴

Notwithstanding Article 264, paragraph 1, evidence offered to prove that semen, medical documents on injuries or other physical evidence may stem from a person other than the accused, is admissible in court (Article 264, paragraph 2). This exception is an integral part of the right of the accused to have a defence, of his right to present evidence in favour of his defence, but in such a manner so as not to jeopardize the interests of the injured party while exercising his rights.⁴⁵ Jurisprudence of the European Court of Human Rights has been developing in such a direction.⁴⁶

In cases of criminal offences against humanity and values protected by international law, victim's consent may not be used in favour of the defence (Article 264, paragraph 3). This ban pertains to the crimes against humanity and values protected by international law (Chapter XVII of the BiH Criminal Code). The victim's consent refers to his or her behaviour during the commission of the said crimes, for instance, by way of being silent, not giving resistance, etc. since the threat of force or force itself are presumed because the time in which and the circumstances under which such crimes are perpetrated diminish the ability of a victim to give voluntary and true consent.⁴⁷

Before admitting into evidence and in accordance with special rules of evidence in cases of sexual misconduct, an appropriate hearing shall be conducted in camera (Article 264, paragraph 4), because what is at issue concerns the preservation of morality and protection of personal and intimate life (Article 235). The hearing of the injured party is conducted in camera at the main hearing closed to the public so that the record and supporting documents could be more easily removed from the record of the main hearing and kept sealed in a special envelope.⁴⁸

As a rule, the record of the hearing, along with the motion and all the supporting documents, is kept sealed in a special envelope, unless otherwise ordered by the Court (Article 264, paragraph 5). This relates to all the types of hearings: those conducted by the preliminary proceedings judge prior to the main hearing in the procedure for the preservation of evidence by the Court or by the preliminary hearing judge (Articles 223 and 226, paragraph 3), hearings out of the Court (Article 272), and the hearing or examination at the main hearing.⁴⁹

44 In a verdict passed by the District Court of Banja Luka number 11 0 K 000 1357 09 K of 10 March 2010, the Court denied a defence motion to present evidence by hearing a witness on the issue of her conduct and on the conduct of the parents of the injured party prior to and after the commission of the crime, as well as the hearing of an expert witness on the issues of hormonal imbalance in young people in puberty, sexual needs, and need to distinguish oneself and the influence of the environment and family on healthy development of adolescents. When the Court thus ruled, they had in mind Article 279, paragraph 1 of the Criminal Procedure Code of the Republika Srpska which provides that no evidence presented in order to show past sexual experience, conduct, or orientation of the injured party shall be admissible, so based on Article 278, paragraph 2 of the said Code, the motion to present evidence for the defence which would lead to proving past sexual experience and conduct of the injured party who was a minor, was denied as inadmissible and unnecessary for the finding of fact and finding of guilt of the accused. In addition, denied as unnecessary was the motion to hear proposed experts on the issues proposed by the defence. Therefore, when based on Article 278, paragraph 2, the judge or the panel find(s) that motions to present evidence are inadmissible and contrary to Article 279, paragraph 1, according to which facts that pertain to prior sexual conduct of the injured party and their sexual predispositions may not be used as evidence in the proceedings, and provides grounds for that, and also provides grounds for denying the offer of evidence of the defence as unnecessary and redundant, in the rationale for ruling to deny the motion to present new evidence at the trial, and then elaborates on those grounds in the verdict – denial of those motions does not affect the correct and complete finding of fact. In addition to the fact that the judge or the presiding judge has full authority to reject such evidence if he finds that the offered or proposed piece of evidence is unnecessary or inadmissible, provided that he is obliged to give grounds for such a ruling.

45 Sijerčić-Čolić, Hadžiomerađić, Jurčević, Kaurinović, Simović, 683.

46 Please refer to the decision in Van Mechelen et al. v. the Netherlands of 23 April 1997, Reports of Judgements and Decisions 1997-III.

47 Sijerčić-Čolić, Hadžiomerađić, Jurčević, Kaurinović, Simović, 683.

48 *Ibid.*

49 *Ibid.*, 683 and 684.

6. Consequences of a Guilty Plea

Pleading guilty by the defendant at the main hearing, if complete and in accordance with previously presented evidence, shall free the Court of its duty to introduce new evidence, save for evidence on which depends its decision on criminal sanction (Article 265). Consequently, the Court may not base its finding of fact solely on the defence – guilty plea by the defendants. In contrast to the former rule, if a guilty plea by the defendant is not manifestly false, incomplete, contradictory, or unclear, and if it is corroborated by other pieces of evidence, it shall free the Court of its duty to introduce other pieces of evidence, save for those on which depends the type and duration of the criminal sanction. Thus, those other pieces of evidence must be introduced by the Court to an extent necessary for finding that they do corroborate defendant's guilty plea and provide a basis for finding that his plea is complete, clear, uncontradictory, and true. When a defendant pleads guilty of committing a crime at the main hearing, then, a first-instance verdict does not need to include all the elements stipulated by the law.⁵⁰

7. Amending the Indictment

A prosecutor is given a possibility to amend an indictment and adapt it to the new state of the facts if he finds (based on the evidence presented thus far) that there has been a change in the factual state presented in the indictment (Article 275). Amendments to an indictment are an exception to the rule that an indictment is a document written by a prosecutor and that it may be brought only in writing. An indictment may not be amended in terms of Article 275 prior to the beginning of the main hearing or prior to establishing that there has been a change in the factual situation. A prosecutor may also amend an indictment at a hearing before a court of second instance (and at the main hearing before a court of first instance) in keeping with the rules of procedure, but only before the evidentiary procedure has been completed, and not before the closing of the main hearing.⁵¹

The prosecutor and the judge themselves evaluate if the factual situation has changed and if an indictment should be amended, i.e. the panel may not order them to take any such action. There is no need to amend an indictment if the factual situation has not changed, but only prosecutor's understanding of how an offence should be qualified, because the Court is not bound by prosecution motions regarding legal evaluation of an act (Article 280, paragraph 2). An indictment may be amended only if it pertains to the same person and in essence, to a substantially identical incident.

If a prosecutor has amended an indictment, the Court may postpone the main hearing in order that the defence could prepare themselves. The issue of postponing the main hearing is a factual one and it is considered on a case-by-case basis. Violation of this right constitutes a substantive violation of the rules of criminal procedure as provided for in Article 297, paragraph 1, item d).

If charges are amended, the amended indictment is not submitted for confirmation and the main hearing proceeds in the order set forth by the law or as ordered by the judge or the presiding

50 Judgement of the Supreme Court of Serbia, Kž. I 546/04 of 16 June 2004.

51 Judgement of the Supreme Court of the Federation of BiH, number 070-0-Kžk-09-000007 of 16 April 2009.

judge (Article 240). However, amendments must stay within the limits of the subjective and objective identity (Article 280, paragraph 1).

8. Closing of the Evidentiary Proceedings

After all the evidence has been presented, the judge or the presiding judge shall ask the parties and the defence counsel if they have any additional evidentiary motions (Article 276, paragraph 1). If they do, the bench shall decide whether to grant or deny the motion. If the motion is granted, the main hearing is postponed or adjourned – so that new evidence could be obtained and the prosecution or the defence could prepare. If the parties and the defence counsel do not have any new evidentiary motions (or if their motion is denied), the judge or the presiding judge shall announce that the evidentiary proceedings are completed (Article 276, paragraph 2) and following the closing arguments and having declared that the main hearing is closed, he is obliged to reach a verdict.

9. Closing Arguments and Closing of the Main Hearing

Closing arguments are the last part of the main hearing, after the evidentiary proceedings, in which parties give their closing statements, interpreting the facts and the law and presenting their view of the matter raised at the main hearing. The order in which arguments are delivered at this stage of the main hearing is defined under the law and the judge or the presiding judge, who gives the floor to the parties, is in charge of ensuring that the order is followed, by first giving the floor to the prosecutor, then to the injured party, the defence counsel, and then to the accused (Article 277, paragraph 1). The accused is the last one who argues, so that he could comment on what has previously been said, and so his words have the strongest impact. If the accused has a defence counsel, the closing argument is given by both of them.

A closing argument is prosecutor's final opportunity to argue before the Court that the accused is guilty of what he is charged with in the indictment by presenting facts, findings, and statutory interpretations. In his closing argument, a prosecutor presents his evaluation of the evidence presented at the main hearing, states his conclusions concerning the facts which are relevant to making a decision, and makes and argues his proposal concerning the guilt of the accused, the provisions of the criminal code which should be applied, as well as the mitigating and aggravating circumstances that should be considered in the process of meting out the punishment. At the end of his closing argument, the prosecutor may, in addition to the usual proposal that the accused should be found guilty, propose that an appropriate criminal sanction be pronounced. Likewise, the prosecutor may withdraw an indictment (because the main hearing has not yet been closed) and then the Court shall render a verdict rejecting the charge. Virtually, it is possible for a prosecutor to propose in his closing argument that the Court should render a verdict acquitting the accused, in which case the bench should grant the proposal, because otherwise, they would exceed the charge, thus committing substantive violation of the rules of criminal procedure (Article 297, paragraph 1, item j).⁵²

52 Sijerčić-Čolić, Hadžiomerađić, Jurčević, Kaurinović, Simović, 701.

In his closing argument, the injured party may, in view of his function in criminal proceedings, analyse the evidence in support of the grounds for a proposal to satisfy a restitution claim, which may concern damages, *rei vindicativo*, or invalidation of a certain legal transaction. Restitution claim may be awarded to the injured party only if the accused is found guilty (Article 198, paragraph 2).

If the accused has a defence counsel, both of them shall deliver closing arguments, providing that the defence counsel shall speak first. After the closing argument of the defence counsel, the accused is entitled to speak himself, to say if he accepts the defence of his counsel and to add something to his defence. In cases when the accused does not have a defence counsel, he may, if he wishes so, give his defence. Nonetheless, in cases when the accused has a defence counsel, the accused is always the one who argues last.

After the closing argument of the defence counsel and the accused, there may be a rebuttal by the prosecutor and the injured party. Such a situation may repeat several times, i.e. there may be a rejoinder, a surrejoinder, and alike, providing that in such situations the accused is the last one to reply. It is, actually, a case of discussion that may ensue after the closing statements of the parties, to which the rules for opening arguments apply.

Closing statements of the parties may not be limited to a definite period of time. Closing arguments may last as long as one deems necessary, providing that closings may not be repetitive (Article 277, paragraph 2).

Both the parties and the defence counsel are obliged to deliver closing arguments, but the accused is not obliged to make one if he does not wish to. However, denying the accused the right to make a closing argument is a violation of his right to a defence, which constitutes a serious violation of the rules of criminal procedure (Article 297, paragraph 1, item d).

After all closings have been completed, the judge or the presiding judge is obliged to declare that the main hearing is closed, after which the bench retires to deliberate and vote in order to reach a verdict (Article 278), because there are no more statutory possibilities left to reopen the main hearing.

IV. JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA AND ESTABLISHMENT OF RELEVANT FACTS

The Constitutional Court of Bosnia and Herzegovina⁵³ has addressed the issue of establishment of facts before ordinary courts as part of its appellate jurisdiction over the issues contained in the Constitution of Bosnia and Herzegovina when those issues become subject to disputes arising out of verdicts passed by any court in Bosnia and Herzegovina (Article VI/3.b) of the Constitution of Bosnia and Herzegovina). During the stage in which the Court examines the admissibility of an appeal, the Court must establish, *inter alia*, whether all the requirements for deciding upon the merits of the case cited in Article 16, paragraph 2 of the Rules of Constitutional

53 Hereinafter: Constitutional Court.

Court have been satisfied.⁵⁴ In this regard, the Constitutional Court mentions that according to its own jurisprudence and the caselaw of the European Court of Human Rights,⁵⁵ an appellant must cite the violation of his rights protected under the Constitution of Bosnia and Herzegovina and these violations must be deemed probable. An appeal is manifestly ill-founded if it lacks *prima facie* evidence which would with sufficient clarity prove that the mentioned violation of human rights and freedoms is plausible,⁵⁶ then if the facts in relation to which the appeal is brought evidently do not constitute the violation of rights alleged by the appellant i.e. if the appellant does not have an “arguable claim,”⁵⁷ as well as when it is found that the appellant has not been a “victim” of a violation of the rights protected under the Constitution of Bosnia and Herzegovina.

According to the jurisprudence of the European Court and the Constitutional Court, it is not the task of these Courts to review the findings of ordinary courts concerning the state of facts and application of substantive law.⁵⁸ To wit, the Constitutional Court is not competent to generally substitute its appraisal of facts and evidence for that of ordinary courts, but the general task of ordinary courts is to evaluate the presented facts and evidence.⁵⁹ Constitutional Court is entrusted with examining whether there has been a possible violation or neglect of constitutional rights (right to a fair trial, right to access to justice, right to an effective remedy, etc.) and whether the law was potentially applied in an arbitrary or discriminatory manner. Consequently, as part of its appellate jurisdiction, the Constitutional Court considers only issues of possible violations of constitutional rights or rights contained in the European Convention in proceedings conducted before ordinary courts, so the Constitutional Court shall in the case at hand examine whether the proceedings in their entirety were fair as defined by Article 6, paragraph 1 of the European Convention.⁶⁰

Furthermore, the Constitutional Court reminds that it shall not interfere with the manner in which ordinary courts have admitted exhibits into evidence. With regard to that, the Constitutional Court shall neither interfere in the issue of the reliance on particular evidence of the parties in a trial, by the ordinary courts based on judicial discretion.⁶¹

The principle of the equality of arms is an important element of a fair trial and it entails that both parties must be given a reasonable opportunity to present their case, including as well the presentation of evidence under the conditions that do not place them at a substantial disadvantage vis-à-vis their opponent.⁶² Consequently, it cannot be inferred that by refusing to adduce evidence by way of repeating expert psychiatric evaluation of the appellant the prosecution was favoured in the proceedings over the defence with regard to the opportunity to present evidence. The court of first instance, using its full authority in deciding which evidence to adduce and taking into con-

54 Official Gazette of Bosnia and Herzegovina, No. 60/05, 64/08 i 51/09.

55 Hereinafter: European Court.

56 See European Court, Vanek v. Slovakia, judgement of 31 May 2005, application no. 53363/99 and Constitutional Court, Decision no. AP 156/05 of 18 May 2005.

57 See European Court, Mezőtúr-Tiszazugi Vízgazdálkodási Társulat v. Hungary, judgement of 26 July 2005, Application no. 5503/02.

58 See European Court, Pronina v. Russia, Decision on Admissibility of 30 June 2005, Application no. 65167/01.

59 See European Court, Thomas v. the United Kingdom, judgement of 10 May 2005, Application no. 19354/02.

60 See Constitutional Court, Decision no. AP 20/05 of 18 May 2005, published in the Official Gazette of BiH No. 58/05.

61 See Constitutional Court, Decision no. AP 612/04 of 30 November 2004 and European Court, Doorson v. the Netherlands, judgement of 6 March 1996, published in the Reports, no. 1996-II, § 78.

62 See European Court, Dombó B.V. v. the Netherlands, judgement of 27 October 1993, series A, no. 274, p. 19.

sideration its relevance to the criminal case at hand, ruled by the said refusal that another psychiatric expertise was unnecessary in the case at hand.⁶³

In addition, the Constitutional Court mentions the fact that Article 6, paragraph 3d) of the European Convention contains two rights of the accused: 1) to examine or have examined witnesses against him and 2) to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. These two rights are independent of each other.⁶⁴ Nonetheless, this provision does not apply in absolutely every instance, i.e. these rights of the accused are not absolute. Actually, ordinary courts are left to assess if the statements of proposed witnesses or presentations of other offered pieces of evidence are relevant to making decisions in cases at hand. The Court which conducts the proceedings has to have a certain amount of discretion in these matters and it follows from Article 6, paragraph 3, item d) of the European Convention that no party in the proceedings may be favoured over the opposing party with regard to opportunity to present evidence.⁶⁵

The Constitutional Court mentions its jurisprudence in which a view has been taken that objections concerning violations of constitutional rights must be raised in the previous stages of the proceedings if there they are intended to be used successfully before the Constitutional Court.⁶⁶ Since the appellant has not appealed against the first-instance judgement, the Constitutional Court finds that the appellant raises the said objection for the first time in his appeal before the Constitutional Court. Consequently, these allegations of the appellant are also manifestly (*prima facie*) ill-founded.

According the interpretation of the Constitutional Court, the right to a fair trial referred to in Article II/3.e) of the Constitution of Bosnia and Herzegovina and Article 6, paragraph 1 of the European Convention is violated when a guilty verdict is based on evidence which does not, either directly or indirectly, point with certainty to the fact that the appellant did commit the crime with which he is charged and when the Court fails to provide a logical and plausible reasoning of its finding of the appellant's guilt, but instead, its appraisal of evidence appears to be arbitrary.⁶⁷ Such a violation also exists in situations when the Supreme Court, after having found that the evidence obtained through the violation of relevant provisions of the Code ought to have been suppressed as such, arbitrarily applied the law, namely relevant provisions of the *Criminal Procedure Code* which govern the procedure for illegally obtained evidence, and used it together with other evidence and based its verdict thereon, without explaining whether such evidence had or might have influenced if its verdict was reached lawfully or if the contested verdict could exist without the illegally obtained evidence.⁶⁸ The right to a fair trial is also violated when ordinary courts arbitrarily apply the provisions of substantive law that govern the issues of the statute of limitation on the enforcement of pronounced sentences, addressing the enforcement of a sentence even though the relative statute of limitation on its enforcement has run out.⁶⁹ Such a violation exists even if ordinary courts had used the found narcotics as evidence in criminal

63 Decision of the Constitutional Court, no. AP 1687/09 of 19 July 2012.

64 See European Court, *Unterperthinger v. Austria*, judgement of 24 November 1986, series A-110.

65 See Constitutional Court, Decision no. U 6/02, Official Gazette of Bosnia and Herzegovina no. 24/02.

66 See Constitutional Court, unpublished Decision no. AP 2424/06 of 18 October 2007.

67 Decision of the Constitutional Court on the Merits of the Case, no. AP 5/05 of 14 March 2006, published in the Official Gazette of Bosnia and Herzegovina no. 49/06.

68 Decision on Admissibility and Merits of the Case, no. AP 3225/07 of 14 April 2010, § 40.

69 Decision on Admissibility and Merits of the Case, no. AP 2402/08 of 25 March 2011.

proceedings, or more precisely, it was de facto the only direct piece of evidence which charged the appellant with the said criminal offence and the evidence in question was obtained through arbitrary application of Article 120, paragraph 3 of the Republika Srpska *Criminal Procedure Code*.⁷⁰ Consequently, the Constitutional Court held that the evidence (the narcotic) was not of adequate quality for a court to be able to found its decisions on it, as was done in that particular case, whereby the arbitrary decisions that violated the appellant's right to a fair trial were passed.

In its Decision on Admissibility and Merits of the Case no. AP 1603/05 of 21 December 2006,⁷¹ the Constitutional Court held that the lack of satisfactory reasoning of the finding of the appellant's guilt, as well as the failure to render impartial and without prejudice Court's subjective assessments through a comprehensive analysis and evaluation of the presented evidence, were not in accordance with the fair trial requirements contained in Article 6, paragraph 1 of the European Convention. In that specific case, even though the definitions of different types of guilt are mentioned, the District Court concludes in its rationale that the court of first instance has "erroneously stated that it was a matter of criminal intent," given the fact that it follows from the enacting part of the judgment and the entire rationale that "the court of first instance has found that when [the appellant] acted as a professional person he was negligent with regard to the possibility of damage, but he did not act with intent." Nonetheless, the Constitutional Court notices that such a statement and a finding are not followed by an explanation from which it would be clear on which basis it was possible to make only such a finding and on which assessment of evidence the finding was made.

Ordinary courts had arbitrarily applied procedural law because when they decided on the appeals, they had completely neglected the provision of the Article 141, paragraph 2 of the *Misdemeanours Act* which stipulates that hearing summons or summons for questioning are served on the person of the accused, which was the case in question. Consequently, the appellants were prevented from participating in the proceedings, from offering their evidence, as well as from confronting their arguments to the arguments of the adverse party.⁷²

On the other hand, no violation of the appellant's right to a fair trial was found in the following cases:

- When the court of second instance found that the court of first instance had not exceeded the indictment, but did err in its statement of the offence for the act cited in the indictment;⁷³
- The Constitutional Court recalled that the *Criminal Code* of SFRY was in force at the time of the offence and it ought to have been applied according to the time constraints regarding the applicability of criminal legislation due to the fact that the Criminal Code of the Republika Srpska was not more lenient to the appellant. The Supreme Court reasoned that they redressed the violation with regard to the application of the Criminal Code and stated that the acts of the appellant legally constituted the offence of war crime against civilian population referred to in Article 142, paragraph 1 in conjunction with Article 22 of the

70 Official Gazette of the Republika Srpska no. 50/03, 111/04, 115/04 and 29/07.

71 Published in the Official Gazette of Bosnia and Herzegovina, no. 34/07.

72 Decision on Admissibility and Merits of the Case, no. AP 1480/06 of 18 October 2007, published in the Official Gazette of Bosnia and Herzegovina no. 2/08.

73 Decision on Admissibility and Merits of the Case, no. AP 2367/08 of 7 April 2011.

Criminal Code of SFRY and the appellant was pronounced the sentence of 15 years imprisonment. Such a rationale for the judgement of the Supreme Court was not deemed arbitrary by the Constitutional Court;⁷⁴

- Court's rejection to adduce an offered piece of evidence when the facts for which the adducing of such evidence have otherwise been ascertained falls within the full authority of the Court and does not represent a violation of Article 6 of the European Convention. Appellant's allegations of the violation of the right to a defence are manifestly (*prima facie*) ill-founded since the court of first instance did summon the appellant to advise her of her rights to a defence, either to have an *ex officio* defence counsel or a defence counsel of her own choosing, or to a defence based on the right of the indigent, but she refused to act as instructed and stated that she would raise her defence without a defence counsel.⁷⁵

- Firstly, the Constitutional Court notices that those allegations have not been supported by any piece of evidence in the appeal itself; and from the rationale of the contested verdict of the court of first instance it cannot be inferred that the appellant did put forward any such motion before the court of first instance or that the motion was denied. Even if the appellant's contention that it was evidence on which the verdict ought not to have been founded was to be accepted, the Constitutional Court could not find in the contested verdict of the court of first instance that it was predominantly based on the read statements of four witnesses, to which the appellant points as constituting illegality. It follows from what has been presented to the Constitutional Court that in this particular case extensive evidentiary proceedings were conducted in which, in addition to four witnesses to which the appellant points, six more witnesses were heard, findings and opinions of three expert witnesses were taken into consideration, the report of crime scene investigation was examined, as well as the finding and opinion of a medical expert, etc. And the court of first instance evaluated each presented piece of evidence, individually and in correlation with each other, clearly and precisely explained each of them, and based its decision on the above-mentioned grounds. Having regard to the above-mentioned, the Constitutional Court has found that the appellant's allegations that the contested verdict was based on illegally obtained evidence were manifestly ill-founded.⁷⁶

- The Constitutional Court finds that based on the presented documents it can be inferred that the contested decisions were made based on evidence introduced and presented by the prosecution and the defence and heard at the main hearing. For each piece of evidence that was admitted or rejected, the Cantonal Court provided in its rationale for the first-instance verdict a logical and plausible explanation, no part of which appears either arbitrary or unacceptable in itself, nor does it contain any elements that would point to the fact that the Cantonal Court abused the evidentiary proceedings against the appellant. The Court clarified why the evidence of the injured party and witness G. V. was admitted and why the Court did not admit the evidence of witnesses for the defence, and having assessed the pieces of introduced and heard evidence, both individually and in correlation, the Court found that the appellant and the second defendant had committed the criminal offence in question in

74 Decision on Admissibility and Merits of the Case, no. AP 966/07 of 12 January 2010.

75 Decision on Admissibility, no. AP 3014/07 of 12 January 2010.

76 Decision on Admissibility, no. AP 3366/07 of 25 February 2010.

the manner cited in the enacting part of the verdict of the Cantonal Court. The Court also clarified why they had modified the statement of the offence from the indictment and found the appellant and the second defendant guilty of crime of extortion under Article 295, paragraph 1 of the Criminal Code of the Federation of BiH,⁷⁷ and not for the offence cited in paragraph 2 of the said Article, and then reasoned why they had partially modified the statement of facts from the bill of indictment. Furthermore, the Constitutional Court notices that the Supreme Court explained in detail why the appellant's objections from the appeal would not have made any difference with regard to the resolution of the legal matter at hand and that in rationales for their decisions, ordinary courts did provide detailed reasons for the way in which they applied substantive law, no part of which appeared either arbitrary or unacceptable in itself.⁷⁸

- The Constitutional Court holds that in the present case a comprehensive analysis of the presented evidence is not lacking, but that instead, the court of first instance gave in its verdict a complete description of the process of evaluation of individual pieces of evidence, how they were linked to each other and how it was found that the appellant did commit the crime and was criminally liable for its perpetration. Namely, the Constitutional Court has noticed that the court of first instance conducted very extensive evidentiary proceedings, in which a great number of witnesses and expert witnesses were heard, as proposed by both the prosecution and the defence. In addition, a great many pieces of physical evidence were analysed and assessed and the appellant was given an opportunity to give his defence personally, as well as to offer evidence to be presented, which he did. Consequently, all the pieces of evidence were presented at the main hearing and the appellant had the opportunity to examine all the pieces of evidence of the prosecution and to challenge them personally and with the help of his defence counsel. Based on thus conducted evidentiary proceedings, the Court found that the appellant did commit the criminal offence of fraud referred to in Article 288, paragraph 2 in conjunction with paragraph 1 of the *Criminal Code of the Brčko District*.⁷⁹ The Court provided a detailed and clear explanation for the above-mentioned finding, no part of which appears to be either arbitrary or unacceptable in itself, nor does it raise doubts about the conclusions concerning the perpetration of the crime of fraud.

With regard to the appellant's objection that the evidence which was later used in the drafting of the written finding and opinion of QSS Agency of Sarajevo was illegally obtained, the Court of Appeal has reasoned that the Internet access line, which the accused DJ. P. had leased from *Telekom Republika Srpska – Teol*, was surveilled and checked by *Telekom Republika Srpska* in order to find out if the leased line was used in accordance with the contract which P. DJ. had concluded with *Telekom Republika Srpska – Teol*, the Provider, i.e. in order to ascertain and be aware of the exchange of information and to establish from which number the call came and which number was dialled, as well as the duration of the exchange. In the case at hand, it was not a special investigative action stipulated under Article 116, paragraph 2, item a) of the *Brčko District Criminal Procedure Code*⁸⁰ taken by *Telekom Republika Srpska*, so the information and evidence obtained by *Telekom Republika Srpska* were not obtained illegally.⁸¹

77 Official Gazette of the Federation of Bosnia and Herzegovina no. 36/03, 37/03, 21/04, 69/04, 18/05 and 42/10.

78 Decision on Admissibility, no. AP 2846/07 of 11 March 2010.

79 Official Gazette of the Brčko District, no. 10/03, 6/05, 21/10, 47/11 and 52/11.

80 Official Gazette of the Brčko District – consolidated text, no. 44/10.

81 Decision on Admissibility, no. AP 3330/07 of 12 January 2010.

Having considered appellant's allegations concerning the erroneous finding of fact and erroneous application of substantive law, the Constitutional Court holds that the District Court conducted very extensive and detailed evidentiary proceedings in which it ascertained that the appellant had perpetrated the crime of illegal manufacture of and trade in firearms and/or explosives in the manner and at the time described in the verdict. Namely, the District Court assessed each presented piece of evidence systematically and carefully, evaluated them individually and as a whole, and found unequivocally that the appellant had perpetrated the criminal offence of which he had been convicted and for which he was sentenced to imprisonment. Also, the Supreme Court provided detailed explanations for all of the appellant's objections raised in relation to erroneous and incomplete finding of fact, and thus incorrect application of substantive law. In addition, the Supreme Court expounded in detail on the lack of foundation for the objections the appellant raised in his appeal, which concern the application of the provision contained in Article 1, paragraph 2 of the *Firearms and Ammunition Act*. The cited provision stipulates that provisions contained in the Act do not apply to the members of the armed forces, employees of the ministry of the interior, members of the guard, detention and correctional facilities, members of territorial defence and civil protection when they are in possession of or carrying firearms and ammunition in compliance with the regulations of their service. Since the appellant had failed to act according to the instruction of the Ministry of the Interior and the guidelines of the EUPM⁸² on how to carry, be in possession of, and store a firearm, consequently the regulations of the service to which he belonged, it was not possible to apply the cited statutory provision. The Constitutional Court holds that such explanations of the contested decisions are clear, detailed, and supported by arguments, and that there are no elements that would indicate that there was arbitrariness in the decision-making.⁸³

- Court's refusal to introduce and hear some of the offered pieces of evidences when the facts for which they were requested to be introduced had otherwise been ascertained falls within the full authority of the Court and does not constitute a violation of Article 6 of the European Convention. Article 6, paragraph 3 of the European Convention only requires a Court to enumerate the grounds for deciding not to call a witness whose hearing was explicitly requested.⁸⁴ In the present case, the ordinary court explained at full length and in detail that it was not necessary to present the proposed evidence when the factual situation had sufficiently been clarified by the testimonies of other witness who were heard and by the finding and opinion of the transportation engineering expert witness, who was questioned before the panel, as well as that the proposed pieces of evidence could not have contributed to the different finding of fact. To wit, the Cantonal Court stated that the licence plate number of the vehicle driven by the appellant which was overtaking an unknown vehicle had been ascertained based on the testimonies of heard witnesses, who were also proposed to be heard by the appellant, but that the expert analysis of the transportation engineering expert witness established that the speed of the vehicle driven by H. S. had not been in a causal relationship with the consequence that had ensued.⁸⁵

- With regard to appellant's allegations that the principle of equality of arms was violated due to the fact that the appellate panel cited his statement from the investigation in the rationale

82 European Union Police Mission in BiH.

83 Decision on Admissibility, no. AP 1305/08 of 13 May 2010.

84 See European Court, *Vidal v. Belgium*, judgement of 22 April 1992, Series A no. 235, § 34.

85 Decision on Admissibility, no. AP 416/08 of 13 May 2010.

of its second-instance judgement, the Constitutional Court notices that in delivering its decision on the appellant's guilt, the Court of BiH decided exclusively based on the evidence presented at the main hearing, on which occasion the appellant's statement mentioned above was not taken into consideration nor was his statement from the investigation cited in the rationale for the first-instance verdict. Moreover, /the Court/ notices that while considering the allegations contained in the appeal, the appellate panel did not take into consideration the appellant's statement in the context of his guilt, but in the context of clarifying the origin of cigarettes that were seized from the appellant during a search. Therefore, the Constitutional Court holds that the allegations of the violation of the principle of equality of arms as claimed by the appellant are manifestly (*prima facie*) ill-founded.⁸⁶

- Having regard to the fact that ordinary courts have established that based on evidence presented in the proceedings, the appellant committed a crime on 28 February 1998, as well as that such an establishment of the courts' does not appear to be arbitrary, nor do appear to be arbitrary the rationales provided by the courts for thus establishing the factual state, the Constitutional Court holds that there was no arbitrariness with regard to how the substantive law was applied when the time of the commission of the offence was established nor when the statute of limitation on prosecution was calculated, holding that the criminal offence was perpetrated on 28 February 1998 and not on the 3 January 1998 as the appellant believed it should have been. In view of the fact that it was found that the date of the commission of the crime by S. B. (the perpetrator of the main offence) was 28 February 1998, the date of commission of the acts of those who aided him, in this particular case of the appellant, regardless of the fact that they had been committed prior to it or not, are determined by the date of the commission of the main offence. Therefore, the Constitutional Court holds that both the Cantonal Court and the Supreme Court have provided a sufficient and clear rationale for their finding of fact and application of statutory legal regulations, i.e. it does not follow from such a rationale that there were any circumstances that would exclude prosecution or that the statute of limitation had run out on the prosecution at the time when the judgement of the Supreme Court was delivered.⁸⁷

- Concerning the allegations that the imposition of a custodial measure had deprived the appellant of his right to personally collect evidence and documents in his favour in order that his sentence would be as adequate as possible, which placed him at a disadvantage vis-à-vis the prosecution, the Constitutional Court notices that the appellant was appointed an *ex officio* defence counsel, who represented him before ordinary courts for the duration of the entire proceedings. The Constitutional Court also notices that the *ex officio* defence counsel was given an opportunity to collect on behalf of the appellant evidence and documents for which he believed would benefit him and so that the sentence would be as adequate as possible, as stated in the appeal. The Constitutional Court remains uncertain as to which evidence could have been collected personally by the appellant and not by his defence counsel on his behalf, so the Constitutional Court finds, since nothing more has been specified in the appeal concerning this issue, that those allegations are manifestly (*prima facie*) ill-founded.⁸⁸

86 Decision on Admissibility, no. AP 1288/08 of 27 October 2010.

87 Decision on Admissibility and Merits of the Case, no. AP 806/08 of 23 September 2011.

88 Decision on Admissibility, no. AP 2231/08 of 9 March 2011.

- The Constitutional Court notes that the appellant has reiterated the allegations which pertain to the assessment of the presented evidence, which have already been considered by the Constitutional Court, and the Court has found that the assessment was not arbitrary. The Constitutional Court emphasises that there are no objective pieces of evidence that would lead to a conclusion that the ordinary courts were partial. It is the position of the Constitutional Court that during the proceedings in question, the appellant enjoyed all the procedural guarantees referred to in Article 6 of the European Convention. Consequently, the Constitutional Court finds that, in this particular case, the appellant's allegations concerning Court's impartiality are manifestly (*prima facie*) ill-founded.⁸⁹
- The Constitutional Court notes that the ordinary courts, while deciding on the appellant's claim for the reimbursement of the costs of criminal proceedings, passed the contested decisions in which they clearly established what included necessary expenditures and remuneration for the appellant's defence counsel, the amount of the reimbursement for each action and the reasons for which not all of the amounts claimed were allowed. In addition to what has been said, the ordinary courts have clearly cited the provisions contained in Article 192 of the *Criminal Procedure Code*, which stipulate that, regarding the amount of expenditures for the reimbursement and remuneration for defence counsels, the amount of the reimbursement of costs of criminal proceedings before the Court of BiH shall be dependent upon special regulations issued by the Council of Ministers of Bosnia and Herzegovina. The Constitutional Court holds that in this particular case the grounds provided by the competent courts as to why they believed that costs of one part of the proceedings belonged to the appellants under the Tariff and costs of the other part of the proceedings under the Decision of the Council of Ministers are not arbitrary and that they fully comply with the standards referred to in Article 6, paragraph 1 of the European Convention.⁹⁰
- Consequently, the Courts that decided the appellants request for aggregation of final and binding prison sentences pronounced against him acted correctly and applied the relevant provisions of the law, since it was evident from the circumstances of this case that the appellant's request referred to legal and procedural issues that pertained to another proceedings and that could not be heard before the Courts that decided the appellants request for aggregation of final and binding prisons sentences, without actually reopening the proceedings.⁹¹

V. Proposing Evidence and Deciding on Presentation of Evidence in the Republic of Croatia

The most important element of the criminal procedure reform implemented through the new *Criminal Procedure Code of the Republic of Croatia*⁹² is the introduction of State Attorney investigation, which is conducted not by the Court, but by one of the parties in the proceedings.⁹³ Thus

89 Decision on Admissibility, no. AP 652/09 of 9 November 2011.

90 Decision on Admissibility, no. AP 209/09 of 25 October 2011.

91 Decision on Admissibility and Merits of the Case, no. U 85/03 of 29 September 2004, published in the Official Gazette of Bosnia and Herzegovina no. 10/05.

92 Official Gazette of the Republic of Croatia, no. 152/08, 76/09 and 80/11. Hereinafter: Code.

93 See Đurđević, 316-320.

defining the investigation has had important effects on the possibility of the other party – the accused – to influence the obtaining of evidence at that stage of the preliminary proceedings, but the rules governing later stages in the proceedings – the one before the indictment panel, then at the preliminary hearing and during the trial – also limit the right of the parties to evaluate their need for the presentation of evidence depending on the current position in the proceedings and adapt it thereto since the obligation to announce which pieces of evidence they intend to introduce has been moved to the beginning of the criminal trial.⁹⁴ For that reason, the loss (preclusion) of right to propose new evidence, in addition to cross-examination of witnesses and expert witnesses, is another important novelty which has been introduced into the preliminary hearing and trial by the 2008 *Criminal Procedure Code*.⁹⁵

The State Attorney no longer proposes to the Court that evidence be introduced and heard as part of criminal prosecution and investigation as he used to do under the former *Criminal Procedure Code*.⁹⁶ Since it is the State Attorney who is now in charge of both prosecution and investigation (Article 219, paragraph 1), he himself assesses which evidentiary actions should be taken in order to successfully try a case (Article 220, paragraph 1); and he takes those actions independently, but he may also commit the performance of those actions to an investigator by issuing an order to that effect (Article 219, paragraph 2 of the Code). While performing those actions, the State Attorney or the investigator to which they have been committed, shall also take, as necessary, other evidentiary actions to which they are connected or which follow from them (Article 220, paragraph 2 of the Code). In doing so, the State Attorney shall comply with the principles contained in Article 4, paragraphs 2 and 3 of the Code.

Nevertheless, the Code provides for situations in which the State Attorney proposes to the Court to hear evidence during the prosecution and investigation stages. This is done at an evidentiary hearing conducted by an investigating judge upon a motion from the State Attorney, the injured party as the plaintiff and the accused (Article 235, paragraph 1 of the Code). The Code strictly limits the authority of the Court to take evidentiary actions in the preliminary proceedings only to cases prescribed in Article 23. Those cases may be divided into two categories. The first category comprises cases in which there is a danger that a piece of evidence may not be presented at a trial or when it is exposed to an influence that questions the truthfulness of the testimony. The second one includes the examination of the so-called vulnerable witnesses, such as children, minors, older persons, the sick, or disabled persons (Article 292), or the provision of international legal aid in criminal matters in accordance with international treaties (Article 293). Reasons for which the State Attorney only proposes, but does not present evidence, are the principle of a fair trial and right to a defence, as well as the principle of efficiency of criminal proceedings.⁹⁷

For the duration of criminal prosecution and investigation, a suspect and his defence counsel may not present evidence, but they may only propose to the State Attorney and investigating judge to take certain evidentiary actions. The suspect may, under the same conditions as the State Attorney, file a motion to the investigating judge to hold an evidentiary hearing. The suspect is entitled to petition to the State Attorney to take evidentiary actions after having been advised of his rights (Article 213, paragraph 3). A suspect is advised of his rights in case of any investigative

94 Tripalo, D., Đurđević, Z., 471 i 472.

95 See Damaška (2020), 821-837.

96 Official Gazette of the Republic of Croatia no. 110/97, 27/98, 58/99, 112/99, 58/02, 143/02 and 115/06.

97 Tripalo, D., Đurđević, Z., 473.

action or coercive measure taken against him (Article 239, paragraph 2). The suspect earns the same right in the investigation when he receives an order for investigation to be conducted. Should the State Attorney accept suspect's petition, he shall take an adequate investigative action (Article 234, paragraph 1).

Evidentiary basis of an indictment is examined in the proceedings before the indictment panel. While the Court is considering whether there are grounds for confirmation of an indictment and "letting" the case go to trial, parties may not propose evidence for which they believe would be necessary for presentation at the trial because the indictment panel does not render decisions on which pieces of evidence may be presented at the trial. However, evidence is revealed before the indictment panel, in the first place the evidence for which the State Attorney believes sustains his indictment, and it is provided that the accused is obliged to announce his defence before the panel, either by providing an alibi or pleading insanity, as well as to notify the prosecutor of evidence which he intends to present in support of his defence.

Already after the first questioning, which is a condition for the termination of the investigation and issuing of the indictment, the suspect is entitled to inspect the file (Article 184, paragraph 2, item 1)). If the State Attorney refuses to question the suspect at his request, he shall be granted the right to inspect the case file long before, or within 30 days after the filing of the criminal report or taking of investigative action against him.

The State Attorney presents to the indictment panel the results of the preliminary investigation and evidence which he believes sustains the indictment and which justify its issuance (Article 350, paragraph 2), and thereby informs the accused of the evidence that charges him. Additionally, the defence is entitled to give notice before the panel of the evidence in favour of the accused (Article 350, paragraph 3).

The Code provides for strict procedural rules for the accused concerning disclosure of evidence, i.e. the informing of the opposing party of the evidence which he will present at the trial. For instance, Article 377 stipulates that at a preliminary hearing the presiding judge instructs the parties that evidence of which they are aware, but fail to propose without justifiable reason at the preliminary hearing, shall not be presented at the trial.⁹⁸ However, a justifiable reason for withholding evidence is provided for only for the State Attorney, namely in a rather broad clause contained in Article 353, paragraph 2, according to which the Court shall, at the stage of the proceedings conducted before the indictment panel, allow that notification of individual pieces of evidence which are relevant for the defence be postponed if damage could be caused to an investigation in another proceedings conducted against the same or other defendants. In such instances, the panel shall upon the motion of the State Attorney issue a decision granting the post-

98 Decision of the Constitutional Court of the Republic of Croatia no. U-I-448/2009, U-I-602/2009, U-I-1710/2009, U-I-18153/2009, U-I-5813/2010 and U-I-2871/2011 of 19 July 2012 insists on the right of the accused and his defence counsel to opt for a defence strategy for which they believe will prove his innocence or contest prosecution's allegations of his commission of the crime with which he is charged and the legislator is obliged to ensure in an effective manner that he enjoys that right. The Constitutional Court holds that Article 377, paragraph 1 and Article 421, paragraph 1, item 1) of the Criminal Procedure Code taken together limit excessively the said right of the accused. Thus, the Constitutional Court finds that the second sentence of Article 377, paragraph 1 of the Criminal Procedure Code, which reads, "In doing so, the presiding judge shall instruct the parties and the injured party that those pieces of evidence of which they are aware but fail to propose without justifiable reason at the preliminary hearing, shall not be presented at the trial," is not in accordance with Article 29 of the Constitution of the Republic of Croatia or Article 6 of the European Convention.

ponement of notification, which can last no less than until evidentiary proceedings have been concluded.

The accused is obliged to enter his plea, but not before the preliminary hearing (he can also enter his plea before the indictment panel). On that occasion, the Court shall endeavour to enter a plea as precisely as possible – exactly which charges are contested and on which grounds (Article 376, paragraph 2). In that respect, it should be emphasised that precision with which the plea was entered lead to certain consequence for the appeal procedure as well. Namely, Article 464, paragraph 8 provides that an appeal on grounds of incomplete finding of fact in relation to a particular fact may not be filed by a party that did not contest that very fact.

After the accused has entered his plea in detail, parties argue in favour of their evidentiary motions. While arguing in favour of their evidentiary motions, even though the Code does not directly stipulate so, the parties are obliged to specify which facts they intend to ascertain by each individual piece of evidence the presentation of which they are proposing. When the presiding judge at the preliminary hearing or the panel at the trial grant(s) an evidentiary motion of one of the parties, the judge/the panel shall define in the decision ordering the presentation of a piece of evidence the facts for the purpose of whose establishment that piece of evidence is being presented.

At the preliminary hearing, the presiding judge shall, setting the time and the venue for the trial, decide which witnesses and expert witnesses shall be summoned to the trial, as well as which other pieces of evidence shall be obtained (Article 381, paragraph 1). The scope of witness and expert witness examination is limited since Article 420, paragraph 4 provides that the party that called a witness or an expert witness shall question him (namely, the party that conducts direct examination) on the facts for which he has been called to give evidence or expert opinion. Consequently, it is prohibited to question a witness on the facts for the purpose of whose establishment he was not proposed.

Limitations concerning the subject of questioning on cross and redirect examinations are even greater – the party conducting cross-examination may pose only questions that pertain to the facts on which a witness or an expert witness gave testimony during direct examination. As an exception, the presiding judge may allow questions about facts on which the witness or the expert witness did not testify during direct examination if those facts are closely connected to the facts presented during direct examination or if the questions are directed towards ascertaining the credibility of the witness. Question on redirect examination may only relate to the questions posed during cross-examination (Article 420, paragraph 3).

According to Article 377, paragraph 1, the presiding judge shall at the preliminary hearing (or at the beginning of the trial if the preliminary hearing has not been held – Article 419, paragraph 2) call the parties and the injured party to give arguments for their motions to present evidence which they intent to present at the trial. In doing so, the presiding judge shall instruct the parties and the injured party that those pieces of evidence of which they are aware, but fail to propose without justifiable reason at the preliminary hearing, shall not be presented at the trial.

Each party must also give special attention to the establishment of facts for the purpose of which the opposing party proposes certain pieces of evidence. Namely, given the limitation of subjects

on which witnesses and expert witnesses may be questioned on cross-examination, the party that did not propose /the witness/ may not “broaden” the scope of his questioning to the facts for which the other party did not propose him.

It may happen that only during the examination of a witness or expert witness proposed by the opposing party, a party should learn that the witness or the expert witness also has information which benefits that party. Since, as a rule, it will be a witness or an expert witness proposed in favour of some other facts, the party in question may immediately move that he also be questioned on the newly learned pieces of information since it may not question him thereon on cross-examination due to the described limitations. It follows from Article 420, paragraph 5 that in such cases, namely when a party calls a witness or an expert witness who has already been questioned at the motion of the opposing party, the Court may allow leading questions even as early as during the new direct examination. In addition, according to Article 434, paragraph 1 of the Code, parties are entitled to propose evidence to amend the evidentiary procedure after the accused has been questioned if they were not aware of those pieces of evidence prior to the questioning of the accused.⁹⁹

VI. Evidentiary Proceedings in Montenegro

The central position among novelties in the latest *Criminal Code of Procedure of Montenegro*¹⁰⁰ is taken up by a modified concept of investigation – a substitution of prosecutorial investigation for judicial investigation, a change which involves other changes as well, in particular when it concerns the principles of criminal proceedings. Transforming judicial into prosecutorial investigation has become a European trend and, regardless of the fact that there are disagreements among theorists on the issue of whether investigation should be conducted by judges or prosecutors,¹⁰¹ the matter could no longer be postponed in Montenegro, so the legislator has opted for investigation to be conducted by prosecutors. The concept of prosecutorial investigation, as emphasized in literature, is a clearer solution from the procedural point of view, which has therefore been accepted by many modern and democratic countries, because prosecutorial evidence can subsequently be strengthened by the Court or, vice versa, weakened in criminal proceedings.¹⁰²

The main hearing is envisaged and structured as a logical sequence of actions in a criminal procedure taken in continuity in order to achieve the goal of the main hearing in the best manner and in the least possible time and with as least as possible resources – the clearing up and settling

99 Decision of the Constitutional Court of the Republic of Croatia no. U-I-448/2009, U-I-602/2009, U-I-1710/2009, U-I-18153/2009, U-I-5813/2010 and U-I-2871/2011 of 19 July 2012 has initiated a procedure for evaluating if the Criminal Procedure Code complies with the Constitution of the Republic of Croatia (Official Gazette no. 152/08, 76/09 and 80/11) and repealed certain provisions contained in the Code. The Constitutional Court points out that it is not within its jurisdiction to evaluate the compliance of the legislative model of criminal procedure the Croatian Parliament incorporated into the 2008 Criminal Procedure Code, into which he introduced changes by amending it in 2009 and 2011. Its task is to examine if the Criminal Procedure Code, within the normative model selected by the Croatian Parliament, fulfils both its functions viewed in the light of a dynamic interpretation of the Constitution of the Republic of Croatia in accordance with European legal standards: firstly, whether it provides for effective prosecution and punishment of those who perpetrate crimes, and secondly, whether it safeguards, at the same time and sufficiently, the constitutional and conventional rights of suspects, defendants, and the accused from unlawful and arbitrary actions of the competent state authorities.

100 Official Gazette of Montenegro, no. 57/09.

101 See Lazin, Đ. (2006), *Sudska istraga – dileme i problemi*, „Revija za krivično pravo i kriminologiju”, Beograd, 2, 73 i Đurđić, V. (2007), *Koncepcijska dosljednost tužilačke istrage prema novom Zakoniku o krivičnom postupku*, u publikaciji „Primjena novog zakonika o krivičnom postupku Srbije”, Kopaonik, 2007, 77.

102 Škulić, 71.

of a criminal matter.¹⁰³ The Code provides (Article 319) that the said actions shall be taken in an order prescribed by the Code. However, it is possible to depart from thus prescribed order of actions at the main hearing if the panel orders so – if special circumstances should thus require. Some of those circumstances are enumerated by the legislator, such as the number of defendants, the number of criminal offences, and the amount of evidence. In addition to these, other circumstances may also arise.

The main hearing commences by the reading of an indictment or a private prosecution (Article 338 of the Code). Since an indictment is a document of the prosecutor, it is as a rule, as well as a personal prosecution, read by the prosecutor; and when the prosecutorial function is performed by the State Prosecutor in regular criminal proceedings, this rule is not departed from. However, in cases of indictments of subsidiary prosecutors or in cases of private prosecutions, the presiding judge may present their contents orally, providing that the prosecutor shall be allowed to amend the presentation of the presiding judge. After an indictment or a private prosecution has been read or orally presented, the presiding judge shall ask the accused if he has understood the charges, and if the judge is satisfied that he has not understood them – he shall once again present them to him in a manner in which he can understand them most easily.

Upon the reading or oral presentation of the charges, the injured party may argue his restitution claim is legitimate if he is present, and if he is absent, his motion shall be read by the presiding judge. Now that charges have been read or orally stated, and after the accused has stated that he understands the charges against him – the main hearing moves to the hearing of the accused. The hearing of the accused commences when the presiding judge asks him to enter his plea (if he wishes to) to the charges and to present his defence. Pleading to the charges and presentation of a defence constitute a defendant's right, but not his duty.

It is provided (in Article 339 of the Code) that the accused shall be asked if he confesses to having committed a crime with which he is charged and if he pleads guilty to it, and to provide necessary clarifications if he pleads guilty or to present his defence if he denies guilt. If the accused refuses to answer altogether or if he refuses to answer certain questions, his previous statement or a part thereof shall be read. Also, if the accused pleads differently at the main hearing than he did before, the presiding judge shall warn him of that and ask him why he is entering a different plea, and if necessary, his previous statement or a part thereof may be read (Article 341, paragraph 3 of the Code). The defendant's plea and the fact that his previous statement has been read are entered into the record of the main hearing. The Code does not stipulate to which of these two, the plea or the statement, the Court shall attach greater value, but it is left to the discretion of the Court.¹⁰⁴

A defendant is heard according to the rules governing his hearing in the preliminary proceedings and his co-defendants who have not yet been heard may not attend his hearing. After he has been heard, the presiding judge shall ask him if he has anything more to add to his defence. However, this does not mean that his examination is final, because he is also questioned further into the trial; after the presentation of each piece of evidence, the presiding judge asks him if he has anything to comment on.

103 Radulović, (2009a), 309.

104 *Ibid.*, 311.

The accused may be questioned after he has presented his defence. He is first questioned by the prosecutor, and then by his defence counsel. After these two, the presiding judge and members of the panel may question the accused – this is done in order to remove any gaps, inconsistencies, and ambiguities from his testimony. The injured party, his legal representative or proxy, a co-defendant, and an expert witness may directly question the accused, with the permission from the presiding judge. The accused may be questioned several times following this order of questioning (Article 342 of the Code).

The presiding judge may not allow particular questions or answers. Only the parties (the prosecutor, co-defendants) are entitled to request from the panel to decide not to allow a certain question (Article 342 of the Code).

In the event of connexity (either co-perpetration or both co-perpetration and concurrence of offences), the hearing of other co-defendants shall commence after the first defendant has been questioned – in the order in which they are cited in the indictment). It does not need to be mentioned that other co-defendants are not present in the courtroom while one of them is being questioned – so that they could not adapt their testimonies. After each defendant has been heard, the presiding judge shall introduce him to the testimonies of previously questioned co-defendants and ask him if he has any comments. Also, the defendant who had previously been questioned shall be asked by the presiding judge if he has any comments to the testimony of the defendant who was heard afterwards. Each defendant is entitled to question other co-defendants who have already testified, and if testimonies of co-defendants differ in terms of one particular fact, they shall then be confronted with each other (Article 343 of the Code).

A co-defendant or a witness may be heard in the absence of a co-defendant temporarily removed from the courtroom by the panel due to the fact that that person refuses to give testimony in the presence of the defendant or if it can be inferred from the facts that he will not tell the truth in his presence. When the defendant has returned to the session, he shall be read co-defendant's or witness's testimony and he shall be entitled to question his co-defendant or the witness, and the presiding judge shall ask him if he wishes to comment on their testimony. As necessary, these persons may be confronted with each other (Article 344 of the Code). In addition, the accused is entitled to consult and confer with his defence counsel during the main hearing, with the permission from the presiding judge (Article 345 of the Code).

Evidentiary proceedings, the central part of the main hearing, follow after the accused has been heard. Which facts will be ascertained and which pieces of evidence shall be presented depends as well on the motions of the parties, who are entitled for as long as the main hearing is underway to move that new facts be investigated and new evidence presented, and they are also entitled to re-file their previous motions which they have abandoned or which have been denied by the presiding judge or the panel. In doing so, they are obliged to state grounds for not having filed those motions concerning facts and evidence earlier, at the preliminary hearing. The other party shall state its opinion on motions to establish facts or to present evidence. Independently of the motions of the parties, the Court may also initiate that facts be established or evidence presented since the process of adducing evidence includes all the facts for which the Court believes are relevant to the correct adjudication of a case.

If the accused has pleaded guilty to all the counts, the panel may, upon questioning the accused and after the prosecutor and the defence counsel present their positions on the matter, decide not to introduce pieces of evidence which pertain to the crime cited in the indictment and to the guilt of the accused, but only those pieces of evidence on which the decision on the criminal sanction depends on condition that the panel is satisfied that the plea is: 1) clear and complete and that the accused has unequivocally accounted for all the decisive facts that pertain to the offence and his guilt, 2) made knowingly and willingly and that the accused has understood all the potential repercussions of this guilty plea in their entirety, including those pertaining to the decision on the restitution claim and costs of the criminal proceedings, 3) in accordance with the evidence contained in the indictment and that there was no evidence which would indicate that his pleading was false.

The Code does not define the order in which evidence is to be presented, and it is left to the discretion of the presiding judge to rule on that issue. As a rule, evidence proposed by the prosecutor is first presented, then evidence proposed by the defence, and finally evidence the presentation of which is proposed by the Court by virtue of its office. It is only stipulated that when the injured party who should be heard as a witness is present, he/she shall be questioned immediately after the accused – so that he/she could attend for the duration of the entire main hearing (Article 346 of the Code).

In principle, the examination of witnesses and expert witnesses at the main hearing is conducted in keeping with the general rules for their hearing, providing there are also certain additional provisions which are applied at the main hearing. The basic rule for examining a witness is that witnesses who have not yet been heard may not attend his examination – so that they could not adapt their testimony to that of the witness who has been heard. Persons who have been relieved of duty to testify shall be informed of their right by the presiding judge, regardless of the fact that they have been thus informed in the preliminary proceedings, and the information is entered in the record of the main hearing. The presiding judge shall inform the witness of his duty to present to the Court everything that he knows about the case and he shall instruct him that giving false evidence /perjury/ constitutes an offence (Article 348 of the Code).

The Code pays special attention to children and minors, whether they appear as witnesses or injured parties, and therefore it prescribes that at the time when they are examined, members of the public shall be excluded or removed from the courtroom when their presence is no longer needed (Article 347 of the Code).

Prior to hearing an expert witness, the presiding judge shall inform him of his duty to give his finding and opinion to the best of his knowledge and instruct him that giving a false finding and opinion constitutes an offence, and he shall call him to be sworn in or remind him that he has already sworn an oath. An expert witness makes his statement orally at the main hearing. Direct examination of expert witnesses may be departed from if expertise is performed by an institution or a body, and then their findings and opinions are read at the main hearing, or if it cannot be expected that they will provide a more complete explanation of their findings and opinions (Article 349 of the Code). After a presiding judge has heard a witness or an expert witness, they may be questioned by members of the panel, the parties, and the presiding judge directly and also directly by other participants in the main hearing, granted they have been permitted so by the pre-

siding judge. With regard to inadmissible questions or not allowing answers, everything that has been said about the questioning of the accused applies thereto.

If it should happen that a witness or an expert witness cannot recall a fact he mentioned in the preliminary proceedings or if he should depart from his previous statement, he shall be presented with his previous statement or he shall be reminded of the departure and asked why he is now giving a different testimony, and if a need arises, he shall be read his previous statement or a part thereof (Article 351 of the Code)..

Witnesses and expert witnesses who have been heard remain present in the courtroom (in order to prevent them from conferring those who have not been questioned yet), but they may be released or temporarily removed from the courtroom by the presiding judge, after having been questioned by the parties. A presiding judge may, by virtue of his office or upon motions by the parties, re-call witnesses and expert witnesses removed from the courtroom and re-examine them in the presence or absence of other witnesses or expert witnesses.

At the main hearing, evidence may be presented directly (by questioning of witnesses, expert witnesses) and indirectly – by introducing an instrument. A verdict may be based upon evidence presented at the main hearing. Article 353 provides for presentation of evidence outside the main hearing that has already commenced, in which case the main hearing is adjourned. Namely, if during the main hearing it should be learned that a witness or an expert witness is unable to appear before the Court or that his arrival has been made significantly difficult, the panel may order, if they deem his testimony important, that he be questioned by the presiding judge or a judge who is a member of the panel or that his questioning should be conducted by an investigating judge who has jurisdiction over the territory in which the witness resides. The same applies if it is necessary to conduct an investigation of the scene or to carry out a reconstruction out of the main hearing. The parties, the defence counsel, and the injured party may be present during those activities or the presentation of evidence out of the main hearing. In this respect, the principle of directness is implemented out of the main hearing, so the actual departure from the principle of directness is contained in Article 356, which stipulates that instead of direct questioning at the main hearing, records of statements of witnesses, co-defendants, or already convicted perpetrators of the crime or records and other documents concerning the findings and opinions of expert witnesses may be read. As a result, records and documents may be read by order of the panel only in the following instances: (1) if persons who were questioned are deceased, mentally ill, or cannot be found or if their appearance before the Court is impossible or significantly difficult due to their old age, illness, or some other important reason; (2) if witness or expert witnesses refuse to testify at the main hearing without providing legal justification; (3) a panel may decide to read records of earlier questioning of witnesses or findings and opinions of expert witnesses, with consent from the parties. Exceptionally and without consent from the parties, but after hearing from them, a panel may decide that a record of witness or expert witness examination from the previous (adjourned) hearing be read even if the deadline of three months referred to in Article 329 of the Code has expired;¹⁰⁵ (4) if the accused is exercising his right not to present his defence at the main hearing or not to answer questions, a record of his statement made during the investigation may be read and used as evidence at the main hearing by order of the panel only

¹⁰⁵ A written finding and opinion of a professional institution or a state authority that carried out an expert evaluation may be read under the same conditions if a summoned expert witness from that institution has failed to appear at the main hearing.

on condition that when the accused was questioned he was informed in accordance with Article 100, paragraph 2 of the Code, but a verdict may not be based only on this piece of evidence.

After each witness or expert witness has been questioned, as well as after each record or document has been read, the presiding judge shall ask the parties and the injured party if they have any comments, and when the evidentiary proceedings have been completed, he shall ask them if they have any motions to amend evidentiary proceedings. If there are no motions to that end or if a motion is denied, the panel shall consider that the facts have been clarified and the presiding judge shall announce that evidentiary proceedings have been completed.

The parties, the injured party, and the defence counsel give their closing arguments after evidentiary proceedings, as the central part of the main hearing, have been completed. As opposed to the order of actions at the main hearing, which is not set forth but it is left to the discretion of the presiding judge to define it, the Code sets forth the order in which closing arguments are made. With regard to that, the prosecutor is the first one to address the Court, then the injured party, the defence counsel, and finally the accused.

After closing arguments, the presiding judge shall ask if anyone wants anything more to say. Thereupon, if presentation of some additional pieces of evidence is not deemed necessary by the panel, the presiding judge shall declare that evidentiary proceedings are closed. When the main hearing has been concluded, the trial panel shall retire to deliberate and vote in camera – in order to reach a verdict.

VII. Instead of a Conclusion

The introduction of new rules of evidentiary procedure at the main hearing into legislation that governs criminal procedure in Bosnia and Herzegovina, namely in the 2003 *Criminal Procedure Code*, has caused significant changes to the system that thus far was characteristic of continental legal systems. Even further departure has been made from the inquisitorial system into the direction of the adversarial principle, or the adversarial concept of trial procedure.¹⁰⁶ The Court takes on the role of the third subject in the proceedings, the neutral one. It has been shown that it is not possible to move over the weight of presentation of evidence from the Court to the parties and the defence counsel without bringing about in the process certain changes in the beliefs and work methods of parties in a trial.

The 2003 *Criminal Procedure Code* of Bosnia and Herzegovina has strengthened the adversary principle and made evidentiary procedure into an arena in which the prosecution and the defence directly confront each other, while casting the Court in the role of a passive and neutral arbiter.¹⁰⁷ In spite of the fact that the main hearing and evidentiary proceedings are governed by the code that has been in relation to the laws previously in force the least amended in terms of the number of amendments, their quality takes on immense importance.¹⁰⁸ Furthermore, introducing into the new Code the rule by which parties are obliged to present evidence, in conjunction

¹⁰⁶ Turudić, 879.

¹⁰⁷ *Ibid.*, 886.

¹⁰⁸ Kantoci, Baričić, 145.

with reducing the inquisitorial powers of the Court, places a demand on the parties and the defence counsel to be much more active at the main hearing and to prepare well for arguing their case before the Court; in addition, it makes them responsible not only for the outcome, but for the efficiency and expedient completion of criminal proceedings.

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Material Truth Doctrine in Criminal Proceedings

Summary

This paper focuses on two questions: has the doctrine of truth been abandoning the legislation governing criminal procedure in countries emerging after dissolution of the SFRY ceased to exist and has the inquisitorial maxim been „fading” more and more out of evidentiary proceedings at main hearings in those legal systems? The paper provides an analysis of a normative framework for certain procedural institutes which are linked to these two questions. The paper discusses the position of the doctrine of truth in the procedural law (the code), how the main hearing is conducted in the light of the duties of courts, the guilty plea, and the scope of the adversary principle and the inquisitorial maxim. The author considers procedural legislation in Bosnia and Herzegovina, Montenegro, Croatia, FYR Macedonia, Slovenia and Serbia. The paper is not a record of acquired knowledge of how truth is established in criminal proceedings, because no such thing is possible, which is why the scope of issues selected to be addresses has been defined within certain parameters. The conclusion outlines doctrinal remarks on the dangers coming from the passive position of courts in evidentiary proceedings at the main hearing and urges that the expansion of the adversarial principle should not take place at the expense of the principle of establishment of truth and reaching accurate and lawful decisions.

Key words: establishment of truth, adversarial principle, inquisitorial maxim, legislative reforms, Bosnia and Herzegovina, Montenegro, Croatia, FYR Macedonia, Slovenia and Serbia

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Introductory Remarks

In order for *something* to become a subject of interest in doctrinal and legislative sense or to lead to the fostering of certain beliefs in the reality of social processes, special qualities among other things, must exist, which encourage, or quite the opposite, obstruct or make impossible the application of general philosophical, logical, sociological, historical, legal, cultural, or even natural postulates and patterns. In view of its existential relevance, complexity of the matter, theoretical considerations, the amount of legal norms connected to it or the state and spirit of the case-law, we may safely say, without exaggeration, that the “material truth doctrine in criminal proceedings”² is that *something*. A set of opinions of one or more philosophical, sociological, or legal schools of thought, the body of legal regulations both national and international, comparative legal analyses, all of which, and many more, are discussed in various and numerous works on truth and its status in the criminal justice system. This paper follows this line of reasoning, but only to a certain extent, because it cannot include so many things that make discussions on truth so special.

Therefore, without intention to embark on a comprehensive critical appraisal of the “material truth doctrine in criminal proceedings,” for which we neither have the necessary time nor sufficient space, our attention will on this occasion be focused on characteristic aspects of the establishment of truth in criminal proceedings.

There are numerous views of the “material truth doctrine in criminal proceedings” at which we need to stop or for which it would be appropriate to cite opinions from literature, legal texts, or jurisprudence. Let us mention only some of them. For instance, is it necessary for the purpose of criminal proceedings to discuss the notion of truth and the paths which lead to it from the philosophical point of view? Since there is no universal agreement on how to define the notion of truth, could it be more important to look at different doctrinal presentations of the notion of truth and its types? Or should we turn to our everyday experience in the criminal justice system and look for answers to the question what constitutes “material” and what “formal” truth? Maybe our curiosity should lead us to these questions. Which tendencies on the part of the modern criminal justice system come into conflict with the principle of establishment of truth in criminal proceedings? Is the establishment of truth about a criminal incident the purpose of criminal proceedings and/or a procedural principle? If it is a procedural principle, how does the truth rank on the scale of principles of criminal procedure? Is it acceptable to write that there has been a decrease in importance of the principle of establishment of truth in criminal proceedings in European criminal procedures and that it is no longer at the top of the pyramid of procedural principles? How does the “material truth doctrine” relate to the principle of a fair trial, and is the latter principle more important than the former one? Do rules of procedure (directly and/or indirectly) attest to the “material truth doctrine”? What are the qualities of truth in criminal proceedings? Is it possible for us to grade our beliefs about the degree in which a reconstruction of a criminal incident in criminal proceedings is faithful, and how can we achieve this? Can we discuss the obstacles for uncovering the truth in criminal proceedings? Do procedural norms need to ensure an active role of the Court in learning the truth or is it sufficient to grant the parties a monopoly over the disposal and presentation of evidence needed for reaching a decision? What

2 In the pages that follow, until we have presented how the *material truth doctrine* is reflected in various ways (or *vice versa* its reflections that can account for the use of the notion of *material truth*), the title of the paper shall be written in italics.

is the effect of consensual forms of criminal proceedings (e.g. plea bargaining) on the establishment of truth about a crime and its perpetrator? A need for discipline and focus in presentation calls for the closing of a list of topics of the “material truth doctrine in criminal proceedings” and turning our attention towards some of them. We have learned from experience that it would be desirable to open a discussion on them by examining “the material truth doctrine” in criminal procedure law that has been fostered on the territory of the former SFRY for the last 20 years.

I. Procedural Features of “the material truth doctrine ” in Criminal Legislation of the Countries in the Region

1. Socially Acceptable Purposes of Criminal Proceedings

Professor Fletcher states that a conflict that arises when a crime is perpetrated may be viewed from several perspectives: on the national level (between: - a perpetrator and a victim, and – a suspect or the accused and the state) and on the international level (through international prosecution of certain crimes). One of the two dimensions of the conflict on the national level is realised on the level on which a perpetrator of the crime and a victim are confronted, in such a manner that a victim demands justice and wants to see that the accused is punished; contrary to that, the accused demands that a fair trial and procedural guarantees be protected when his guilt or innocence is at issue. The second dimension of the conflict arises out of the state’s right to punish (*ius puniendi*). Namely, the state, which represents the public interests as a whole, wishes to punish the person who has committed a crime, providing explanations for that in several ways, e.g. in the name of justice, solidarity with the victim, or prevention of future crimes. On the other hand, the accused demands that his freedom from punishment (which conflicts with the state’s right to punish) be protected or the restriction of the state’s right to punish in such a way that his criminal guilt must be: - established in a trial, - that is conducted according to the law and – while providing guarantees for the minimum standard of human rights and proper legal procedures. A third dimension of the conflict that has arisen out of a perpetrated crime can be seen through the international prosecution of criminal offences, and it pertains to the complementary jurisdiction of the International Criminal Court in relation to national courts.³

By adopting a viewpoint that criminal procedure law includes all that is stable in it and which cannot be absent, and relates to judicial establishment of whether there exists a cause for criminal action brought about by perpetration of a crime or not,⁴ we would like to emphasise that a socially acceptable goal of criminal proceedings would be to examine if a crime has been committed in the given case, if the person against whom a cause for criminal action is directed has committed the crime, if he is guilty or not guilty of the crime with which he is charged, and if criminal sanctions could be imposed in keeping with substantive law. In this respect, criminal procedure law in the countries that have emerged when the SFRY ceased to exist traditionally prescribes that *rules set forth in the criminal procedure act (or code) shall provide that no innocent person may be convicted of a crime and that a perpetrator of a criminal offence is pronounced a criminal sanction under the conditions provided by the criminal act (code) based on lawfully conducted proceedings,*

3 Fletcher, G. P., 2007, p. 3–9, 19–20. i sl.

4 Vasiljević, T., 1981, p. 23.

bearing in mind that a need for a *fair conduct of criminal proceedings* has been lately added in some of the procedural codes (e.g. in Montenegro and FYR Macedonia).⁵

Numerous articles from relevant literature confirm that the issue of truth should be discussed taking the goals of criminal proceedings as a starting point. For instance, while wondering about the status of truth among the purposes of the proceedings, professor Damaška states, “In order to protect the society against crime, we endeavour to separate the guilty from the innocent in criminal proceedings. It is a function connected with the question of truth: do we wish to learn who perpetrated the crime and who did not/ professor Damaška mentions three more functions: protection of human rights, stability of decisions, and rational control of the budget; author’s remark/... What does actually lie behind the first function of the proceedings, behind the protection of the society against crime? An endeavour is made to separate the guilty from the innocent. What does it concern? This actually concerns the basic driving, propulsive purpose of the process: if we have no wish at all to protect the society against crime, separate the guilty from the innocent, we will not conduct criminal proceedings at all...”⁶ While discussing reasons that make the process of establishing the truth about a crime and punishment more complex (e.g. on the part of the perpetrator and the victim), Professor Weigend underlines that a difficulty of determining the truth about a criminal incident stands in contrast with society’s strong interest in doing so. Namely, the state of peace in a community is disturbed when a crime is perpetrated, especially a serious one, and, if the incident is not cleared up, there is a danger that another crime may be committed. That is why, as a prerequisite for attempting to restore the state of peace in the community, it is necessary to ascertain what happened, who the culprit is, why he committed the crime. And that is not the only reason why. In view of the fact that a criminal sanction is also an expression of moral condemnation, it is imperative that only the culpable person be punished.⁷ A nexus established between the goals of criminal proceedings and the truth in view of the protection of society against crime and putting down social unrest sparked by doubts about the crime that has been committed can be made even more concrete by arguing that the discovery of truth is in the interest of the accused,⁸ as well as of the victim.

We can conclude that previous statements uphold what is known and constant, namely, that criminal proceedings are conducted in the public interest and that correct finding of legally relevant facts is also in the interest the public and that the Court is bound to establish the truth in

5 Texts of the laws that have been consulted: Bosnia and Herzegovina: Criminal Procedure Code of Bosnia and Herzegovina (Official Gazette of BiH, no. 3/2003, 36/2003, 26/2004, 63/2004, 13/2005, 48/2005, 46/2006, 76/2006, 29/2007, 32/2007, 53/2007, 76/2007, 15/2008 and 58/2008, 12/2009, 16/2009, 93/2009), hereinafter: BiH CPC, Criminal Procedure Code of the Brčko District of Bosnia and Herzegovina (Official Gazette of the Brčko District of BiH no. 10/2003, 48/2004, 6/2005, 12/2007, 14/2007, 21/2007, 2/2008, 17/2009; consolidated text 44/2010), hereinafter: BDBiH CPC, Criminal Procedure Code of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of BiH, no. 35/2003, 56/2003, 78/2004, 28/2005, 55/2006, 53/2007, 9/2009, 12/2010), hereinafter: FBiH CPC and Criminal Procedure Code of the Republika Srpska (Official Gazette of the RS, no. 50/2003, 111/2004, 115/2004, 29/2007, 68/2007, 119/2008, 55/2009, 80/2009, 88/2009, 92/2009, 100/2009; consolidated text 53/2012), hereinafter: RS CPC; Montenegro: Criminal Procedure Code (Official Gazette of Montenegro, number 57/2009 i 49/2010), hereinafter: CG CPC/2010; Croatia: Criminal Procedure Code (the consolidated text of the Criminal Procedure Code includes the Criminal Procedure Code (Official Gazette, no. 152/2008) and its amendments published in the Official Gazette, no. 76/2009 and 80/2011), hereinafter: C CPC/2011; FRY Macedonia: Criminal Procedure Code (Official Gazette of the Republic of Macedonia, no. 15/1997, 44/2002, 74/2004, 83/2008, 67/2009, 51/2011), hereinafter: M CPC/1997 and Criminal Procedure Code Official Gazette of the Republic of Macedonia, no. 150/2010), hereinafter: M CPC/2010; Slovenia: Criminal Procedure Code (Official Gazette of the RS, no. 32/2012), hereinafter: SI CPC/2012; Serbia: Criminal Procedure Code (Official Gazette of the FRY, no. 70/2001 and 68/2002 and Official Gazette of the RS, no. 58/2004, 85/2005, 115/2005, 85/2005 – second law, 49/2007, 20/2009 – second law, 72/2009 and 76/2010), hereinafter: Sr CPC/2010 and Criminal Procedure Code (Official Gazette of the RS, no. 72/2011 and 101/2011), hereinafter: Sr CPC/2011.

6 Damaška, M., *Dokazno pravo...*, 2001, p. 6–7.

7 Weigend, T., 2003, p. 157–158.

8 On the establishment of truth in the interest of both the society and the perpetrator, see v. Jekić, Z., 1989, p. 77.

criminal proceedings.⁹ We would not be in the wrong at all to make a connection between this and the exercise of the right to personal defence, since not only are persons who are suspects or against whom criminal proceedings are underway, or their nearest relatives entitled to this form of defence. In order for the right to personal defence to be exercised, it is the rules of procedure that are important according to which judicial authorities are obliged to establish accurately all the facts material to the making of a lawful decision,, which is precisely manifest in their duty to establish facts in favorem of the suspect or the accused, and not only in peius.¹⁰ It certainly needs to be mentioned that a process in which facts are ascertained must unfold under socially acceptable conditions and that all the procedural institutes or rules aimed at the resolution of the collision of interests in criminal proceedings (with regard to that, Professor Damaška mentions the preservation of human dignity, privacy, and human rights in general, as one of the fundamental functions of the proceedings) must be complied with.¹¹ Their existence confirms that the truth is not the sole or exclusive purpose of criminal proceedings and that the outcome of the proceedings is not only the result of the judicial view of the facts in the purely psychological sense of the word, but also of the way in which those facts are established, as well as of the compliance with all the statutory restrictions that pose an obstacle when facts are ascertained.¹²

II. 2. Normative Approaches to the Regulation of “material truth doctrine”

2. 1. Truth as a Procedural Principle, Conducting the Main Hearing and Guilty Plea

Croatia. For quite some time, criminal procedure laws of the countries located on the territories of the former SFRY have not contained regulations that oblige *the Court and other state authorities to truthfully and completely establish the facts essential for the rendering of a lawful decision*, which were adopted when they inherited the SFRY Criminal Procedure Code (Official Gazette of the SFRY, no. 26/1986 /consolidated text/, 74/1987, 57/1989 and 3/1990).

The Croatian legislator was among the first ones who took such a step by promulgating the Criminal Procedure Code in the autumn of 1997 (Official Gazette, no. 110/1997; entered into force on 1 January 1998). It is emphasized in the Explanatory Memorandum to the Draft Criminal Procedure Code that the Draft has “divested” itself of obligation on the Court and other state authorities to “truthfully and completely establish the facts” (as was stipulated under Art. 15 of the Criminal Procedure Code, no. 52/1991, 34/1993, 38/1993. and 28/1996) for the following reasons: - it is not necessary to provide for such an obligation, - the Court and other state authorities cannot have any other obligation in terms of the establishment of facts and – it is a matter of dispute in theory“...since the regulation in question followed from the theory of material truth in criminal proceedings which came into existence on the basis of philosophical, the so-called correspondence theories of truth, which, in the light of recent research and bad experiences undergone in the political past, have become unacceptable.”¹³ The 1997 Criminal Procedure Code kept the previous solution according to which the state authorities mentioned above “are bound to

9 Tomašević, G., 2011, p. 216.

10 *Ibidem*, p. 141–142, 216. Sijerčić-Čolić, H., *Krivično procesno pravo* (I), 2008, p. 223–224.

11 Damaška, M., *Dokazno pravo...*, op. cit., p. 6.

12 Dežman, Z., Erbežnik, A., 2003., p. 532. et al.

13 From the Explanatory Memorandum to the Draft Criminal Procedure Code, 1997, p. 23.

examine and establish with equal attention both incriminating and exculpatory facts,” and within the same article of the code affirmed the traditional right of the Court and other authorities participating in criminal proceedings that their assessment of whether certain facts exist or not is not bound or limited by any specific formal rules of evidence. A new Criminal Procedure Code was passed in Croatia in 2008 and it was judged “the first great reform of the Croatian legislation that governs criminal procedure or the first one since the 1875 rules of criminal procedure for Croatia and Slavonia had introduced the mixed model of criminal procedure in Croatia”¹⁴ Since then, this Code was amended twice – in 2009 and 2011, and owing to those amendments, some interesting measures were made public, *inter alia*, in connection with “the material truth doctrine in criminal proceedings,” a topic which will be discussed in more detail below. Also, we should remind ourselves of the Decision of the Constitutional Court of Croatia of 19 July 2012, which repealed as unconstitutional all the corresponding provisions of the C CPC/2011.¹⁵ To begin with, we should mention that the 2008 Criminal Procedure Code introduced a new Article 4, which has raised “the standard of equal attention to both types of facts”¹⁶ (*or the obligation of the Court and other state authorities to examine and establish with equal attention both incriminating and exculpatory facts*; para. 2) in the following manner. Firstly, it emphasized that “the obligation of the State Attorney’s Office, the investigator, and the police to explicate the suspicion of a criminal offence, which is prosecuted *ex officio*, independently and without bias” (para 3), and secondly, it included the principle of equality of parties and the defence counsel in the evidentiary procedure at the main hearing in accordance with the rules of procedure (para. 1).¹⁷ Considering the importance of thus described establishment of facts for criminal proceedings, the legislator then prescribes that it is “the duty of the presiding judge to take care of the thorough hearing of the matter and of the removal of any matter which delays the proceedings without contributing to the clarification of the case or establishing whether the facts important for regularity of the proceedings are removed” (Art. 393, para. 2 of the C CPC/2011). Both in theory and in practice, a question is raised: when and under which circumstances is it possible to claim that the established facts are true. With regard to that, a provision of a newly introduced Article 417a of the C CPC/2011¹⁸ could be helpful, since according to it, after the accused has made his statement in a free presentation and the defence counsel and the prosecutor have questioned him, “the presiding judge and members of the panel may question the accused in order to fill in the gaps, remove contradictions and ambiguities in his statements.” Furthermore, if the accused pleads guilty to all the counts of the indictment, it “does not exempt the Court of its duty to examine further evidence” (para. 4, in conjunction with Art. 417a, para. 1 of the C CPC/2011). Only if the defendant’s guilty plea at the main hearing is “complete and in accordance with the evidence already gathered, the Court shall, in the course of the presentation of evidence, examine only those pieces of evidence which are related to the decision on the sentence or other sanction.” It is highlighted in the Commentary to this statutory solution that the effects of the defendant’s confession are *suppletory* to the verdict itself and that the existence of the inquisitorial maxim should be acknowledged, since the defendant’s guilty plea does not release the Court from its duty to examine other pieces of evidence as well.¹⁹

14 Đurđević, Z., *Suvremeni razvoj...*, 2011, p. 311.

15 Article 377, para. 1 was, *inter alia*, repealed, *i.e.*/ the second sentence that reads, “In doing so, the presiding judge shall warn the parties and the injured party that those pieces of evidence of which they are aware but fail to propose without justifiable reason at the preliminary hearing, shall not be presented at the trial.”

16 Pavišić, B., *Komentar...*, 2011, p. 67.

17 Pavišić, B., *Novi hrvatski...*, 2008, p. 526; Bubalo, T., 2010, p. 16.

18 See Art. 36 of the Law on Amendments to the Criminal Procedure Code (Official Gazette, no. 80/2011).

19 Pavišić, B., *Komentar...*, op. cit., p. 756.

Bosnia and Herzegovina. In BiH, the provision according to which *the Court and other state authorities are obliged to truthfully and completely establish the facts material to reaching a lawful decision* was “excommunicated” by the enactment of the new criminal procedure code in 2003. Prior to it, there had been no serious debate on the “material truth doctrine in criminal proceedings,” apart from persistent warnings from a part of the professional community that the said legal wording was outdated and obsolete. Since advocates of such an opinion were more skilful (when compared to those who opposed them), the consequence was that the principle of establishment of truth in criminal proceedings in terms of its explicit mentioning in the code together with procedural principles – has lost “its footing” in the BiH CPC, BDBiH CPC, and FBiH CPC. This provision had been kept temporarily only in the RS CPC (until the 2008 Amendment). Even though the three Criminal Procedure Codes mentioned above no longer provided that judicial authorities were obliged to truthfully and completely establish the facts, yet all the four procedure codes did retain the provision according to which *the Court, the prosecutor, and other authorities participating in the proceedings were bound to examine and establish with equal attention both the facts incriminating and exculpating a suspect or the accused.*²⁰ Regardless of the fact that any direct mention of the “material truth doctrine” has been “excluded” from the text of the Code, it still does not mean that the BiH legislator has abandoned the truth and its establishment in criminal proceedings. Quite the opposite, bearing in mind the very idea of the principle of truth, it can be inferred that the aim of the said statutory solutions is to hear a criminal case thoroughly, to establish the facts *in peius* and *in favorem* of the suspect or the accused, to find the truth, and to favour a fair and just criminal proceedings and a trial, which is in accordance with the purpose of criminal proceedings: that no innocent person be convicted and that a criminal sanction be imposed on a perpetrator of the crime under the conditions stipulated by the substantive criminal law and in a lawfully conducted proceedings.²¹ The Law on Amendments to the RS CPC (Official Gazette of the Republika Srpska, no. 119/08) introduced certain modifications to Article 14. The “Doctrine of truth” was removed from the title of this statutory provision, and the “Equality of Arms” was introduced. The scope of harmonization with the other three procedural codes did not stop only at the title of Article 14, it was widened to include its text as well, so the above amendment “withdrew” the duty of truthful and complete finding of fact, but left the previously adopted standards of procedure concerning the establishment of fact *in favorem* and *in peius* of a suspect or the accused. The second important developmental feature of the “material truth doctrine” in the normative sense is reflected in the imposition of the *duty of the Court to treat the parties and the defence attorney equally and to give to each party equal opportunity to access the evidence and to present them at the main hearing* (Art. 14, para. 1 of the RS CPC). The principle of equality of arms in proceedings before courts and the Court’s duty to treat equally both the parties and the defence attorney during evidentiary proceedings extended to the other three procedural codes when they were amended in 2008 and 2009 (Art. 14, para. 1 of the BiH CPC, Art. 14, para. 1 of the BDBiH CPC, Art. 15, para. 1 of the FBiH CPC).²² Also, those amendments raised the question of the duties of a judge or a presiding judge at the main hearing. Previous *duty of a judge or a presiding judge to take care of the thorough hearing on the matter, of the establishment of truth, and of the removal of any matter which delays the proceedings without contributing to the*

20 This concerns procedural solutions for the issue of equality of arms (Art. 14. BiH CPC, Art. 14. BDBiH CPC, Art. 15. FBiH CPC, Art. 14. RS CPC). A relevant provision of Art. 14. BDBiH CPC includes as well in its title and text a view that rules of procedure should guarantee that a suspect or the accused shall have a fair trial.

21 Sijerčić-Čolić, H., Hadžiomeragić, M., Jurčević, M., Kaurinović, D., Simović, M., 2005, p. 74277, 1031–1032, 1439–1440.

22 Official Gazette of BiH, no. 15/2008, Official Gazette of the BiH Brčko District, no. 17/2009, Official Gazette of the Federation of BiH, no. 9/2009.

clarification of the case was amended by striking the words “establishment of truth” from the text of the Code (Art. 239, of the BiH CPC, Art. 239 of the BDBiH CPC, Art. 254 the FBiH CPC, Art. 239 of the RS CPC). However, this did not reduce the importance of this statutory solution in the context of the Court’s active role in evidentiary proceedings at the main hearing. On the contrary, the inquisitorial maxim was applied when it was required that the Court should take care of the thorough hearing of the matter and removal of anything that delays the procedure, but does not contribute to the clarification of the case. Thus, a judge or a presiding judge has to fulfil duties in accordance with statutory solutions that have been made more concrete by rules of procedure on the active role of the Court in the gathering and presentation of evidence at the main hearing, and which shall soon be discussed in more detail.²³ We cannot avoid the impression that it is only a matter of a “formal limitation” of the duties a judge or a presiding judge has at the main hearing in order to comply with “dramatic requests” according to which the concept of “truth” cannot be an integral part of a wording of any law or code. Let us focus as well on the defendant’s guilty plea at the main trial. According to effective statutory regulations, if the *guilty plea of the accused during the main hearing is complete and in accordance with previously presented evidence, then only such evidence which is related to the decision on criminal sanction shall be presented in the evidentiary proceedings* (Art. 265 of the BiH CPC, Art. 265 of the BDBiH CPC, Art. 280 of the FBiH CPC, Art. 280 of the RS CPC). This provision is considered to be “cumulative in character”; a plea is complete if it is entered voluntarily, knowingly and intelligently on the one hand, and in accordance with previously presented evidence which supports the accuracy of legal elements of the crime described in the accusatory instrument, on the other hand.²⁴ Accordingly, in an instance when the accused enters an incomplete plea at the main hearing, the Court is bound to continue with the evidentiary proceedings because the conditions for limiting the proceedings only to the presentation of such evidence which is necessary for reaching a decision on criminal sanction have not been met. For this reason, the acceptance of the defendant’s guilty plea at the main hearing is an “optional manner of rationalization of criminal proceedings contingent on how the accused acts in those proceedings and on a positive assessment of the Court concerning the consistency of the plea with the previously presented evidence.”²⁵

Montenegro. The principle of establishment of truth is proudly emphasized side by side with the principle of fairness in the criminal procedure law of Montenegro. According to Article 16 of the CG CPC/2010, which bears the title “Doctrine of Truth and Fairness,” “the Court, the State Prosecutor, and other state authorities participating in criminal proceedings shall truthfully and completely establish the facts which are relevant to rendering a lawful and fair decision and they shall also with equal attention examine and establish both the facts that incriminate and exculpate the accused” (para. 1). Likewise, the Court “shall provide equal conditions for the parties and the defence attorney for proposing and accessing evidence and for presenting it” (para. 2). The principle of truth has therefore been stated as a legal principle and it has its legal term.²⁶ The principle of establishment of truth applies for the entire duration of criminal proceedings, and at the stage of the main hearing it is emphasized by the duty of the presiding judge to “take care of the thorough hearing of the case, establishment of truth, and removal of any matter which delays the proceedings, but does not contribute to the clarification of the case” (Art. 318, para. 6). Since we will separately cover the specific qualities of evidentiary proceedings at the main hearing, as

23 Sijerčić-Čolić, H., Hadžiomerađić, M., Jurčević, M., Kaurinović, D., Simović, M., op. cit., p. 641.

24 *Ibidem*, 684–685.

25 *Ibidem*.

26 Radulović, D., 2009, p. 60–65.

well as the activities of the parties and the defence attorney and the position of the Court, here we shall only consider provisions governing the pleading of the accused at the main hearing. In accordance with the elements of inquisitorial procedure, if the accused has pleaded guilty to all the counts of the indictment, this complete pleading still does not release the Court of its duty to examine other evidence as well. Namely, a panel may, after the accused has been questioned and the prosecutor and the defence attorney have stated their positions, “decide not to examine evidence which pertains to the act which is the subject matter of the indictment or the guilt of the accused, but only those pieces of evidence on which depends the decision on the criminal sanction, if they find that the plea: 1) is clear and complete and that the accused has unequivocally explained all the decisive facts that relate to the offence and his guilt; 2) has been made knowingly and voluntarily, and that the accused has fully understood all the potential consequences of his guilty plea, including those that pertain to a decision on an indemnity claim and costs of the criminal proceedings; 3) is consistent with the evidence contained in the indictment and that there is no evidence which would indicate that the plea is false” (Art. 340).

FYR of Macedonia. Potential strategies for the modification of the normative feature of the “material truth doctrine in criminal proceedings” are recorded in the latest criminal procedure law of Macedonia. Thus, Article 15 of the M CPC/2010²⁷ provides for, under the title of the “Principle of Objectivity,” what is in other procedural codes regulated as the “doctrine of truth and fairness,” “equality of arms,” or the “equality of arms and a fair trial” and, on the other hand, adopted, partially, what is still in effect in this procedural system. Namely, the new procedural law also prescribes that *the Court and state authorities are bound to examine and establish with equal attention both the facts against and in favour of the accused.* Let us compare the cited regulation with Article 14 of the M CPC/1997²⁸ in order to notice the differences in statutory solutions. According to Article 14 of the M CPC/1997, *the Court and state authorities participating in criminal proceedings shall truthfully and completely establish the facts which are material to reaching a lawful decision* (para. 1), which is why they are obliged to *examine and establish with equal attention both the facts incriminating and exculpating the accused* (para. 2). It can be noticed immediately that the M CPC/2010 “has disburdened” the Court from its obligation to look for the truth. According to theoretical discussions on the new procedural code, such a measure was a result of endeavours to help “the Court, by abandoning judicial paternalism, to focus its attention on ensuring fairness and legality of the proceedings” and to “improve its capacity for impartiality”²⁹ Even though the parties are those who take initiative when it comes to the substantiation of evidence (which we will discuss when it is appropriate), it still cannot be concluded that “truth has been abandoned” in Macedonian criminal procedure. Therefore, the truth has not been given up, and what actually has changed is the concept of its establishment. In this regard, we should have a look at the duties of the Court in conducting the main hearing and how defendant’s guilty plea is viewed. A presiding judge is bound by both Codes to take care of the thorough hearing of the case and removal of anything that delays criminal proceedings but does not contribute to the clarification of the case (Art. 284, para. 2 of the M CPC/1997 and Art. 358, para. 2 of the M CPC/2010). What

27 If we consider the terms of Article 568 of the M CPC/2010, this Code entered into force in late November 2011 and its application should commence in late November 2012. At the time this text is being written, there is a discussion ongoing in the Assembly of the Republic of Macedonia concerning two possible options for its application: – should it since late November 2012 apply only to organized crime offences (consequently, a partial application, as was the case in Croatia or as is currently the case in Serbia), or – should its application to all criminal offences be postponed for another year.

28 The M CPC/1997 is an existing law, until the date on which the M CPC/2010 starts to apply (Art. 567 of the M CPC/2010). Ref. Art. 5 of the Law on Amendments to the M CPC/1997, Official Gazette of the RM, no. 51/2011.

29 Kalajdžiev, G., 2011, p. 345-362.

differs them in this segment is the pronounced role of the presiding judge under Article 284 of the M CPC/1997, which is inter alia reflected in the discovering of truth, the questioning of the accused, witnesses and expert witnesses. With regard to pleading of the accused, both Codes pay attention to this issue. According to Article 315 of the M CPC/1997, *pleading guilty by the accused at the main hearing, even when it is complete, does not release the Court of its duty to examine other evidence as well*. New regulations have introduced new relations with regard to the verification of the defendant's guilty plea. For instance, Article 381 of the M CPC/2010 stipulates that, regardless of the severity of the crime, the accused may plead guilty only in relation to the counts with which he is charged in the accusatory instrument. In such cases, *the Court shall examine if the plea is voluntarily, if the accused is aware of the consequences of his guilty plea as well as of those connected with the indemnification claim and costs of the criminal proceedings*. Thus, after the Court finds that all statutory requirements have been met, *only those items of evidence that relate to the pronouncement of the sentence shall be presented in evidentiary proceedings*.

Slovenia. To speak about the Slovenian criminal procedure and the “material truth doctrine” means to bring to the attention the specific points in the evolution of amendments to the procedural code as formulated by the well-known amendment CPC-K (Law on Amendments to Criminal Procedure Code, Official Gazette of the RS, no. 91/2011). The Amendments Bill to Criminal Procedure Code (of 2010) provided for the striking of Article 17 from the Criminal Procedure Code (Criminal Procedure Code, Official Gazette of the RS, no. 32/2007 – consolidated text; Official Gazette of the RS no. 102/2007 – ZSKZDČEU, no. 23/2008 – ZBPP-B, 68/2008, 118/2008 – Decision of the Constitutional Court, 77/2009, 88/2009 – Decision of the Constitutional Court and 29/2010 – Decision of the Constitutional Court), or departing from the “principle of the establishment of material truth,” as one of the most important principles of the Slovenian criminal procedure.³⁰ Discussions on the doctrine and stepping forward of members of the academic community (in particular those from the Faculty of Law, the University in Ljubljana) managed to keep this principle in the text of the Code in its “original form:” *the Court and state authorities participating in criminal proceedings shall truthfully and completely establish the facts material to reaching a lawful decision* (Art. 17, para. 1 of the SI CPC/2012). The duty to establish the truth, as we have already underlined on several occasions, requires the authorities mentioned above to investigate and establish with equal attention both the facts incriminating and exculpating the accused, and that duty is also emphasized in the cited rule (Para. 2, Art. 17 of the SI CPC/2012).

The above-mentioned Bill of 2010 announced the introduction of the plea agreement and verdicts based on guilty pleas. Both these institutes attracted the attention of the professional community. By linking the “encroachment” on the principle of establishment of truth and how the gathering of evidence was provided for on the one hand, and plea agreements and verdicts based on guilty pleas on the other, the professional community warned that the responsibility of judges to render correct verdicts could not be changed by amending the statutory procedural law. In addition, prior to passing a verdict and pronouncing a criminal sanction (which also applies to verdicts based on guilty pleas), the state is the one which is obliged to prove, beyond reasonable doubt, that the accused is the actual perpetrator of the offence. Given the importance of this debate for the development of the attitudes towards the principle of truth in the time when

30 It is cited only because the probative value of a plea of guilty by the accused has changed and a guilty verdict is pronounced only based on such a plea. See Amendments Bill to Criminal Procedure Code of the Republic of Slovenia, 2010, p. 4.

agreements between parties on the results of criminal proceedings have been more and more incorporated in the rules of criminal procedure, we would like to present here its main segments. According to the authors of the document „Commentary to the Amendments Bill to CPC-K“³¹ a verdict based on a guilty plea does not annul the doctrine of discovery of truth; it encroaches upon the inquisitorial maxim, and not the truth as a value. Consequently, a judge may accept a plea of guilty (by a ruling) only if he is personally satisfied that an incident did actually occur in the manner in which it will be described in the statement of facts in the operative part of a guilty verdict. Otherwise, the plea may not be accepted.³² An in-depth analysis of the alleged incompatibility between the doctrine of discovery of truth and a verdict based on a guilty plea demonstrates that two things need to be distinguished one from the other: the principles, which prove that truth is a value of criminal proceedings to which state authorities must aspire (in the proceedings) and the rules, which undermine this doctrine. The principles which strengthen the principle of truth are the principle of free assessment of evidence, the adversarial principle (because it sends a message to the parties that they themselves may contribute to procedural material and thus enable the Court to come closer to truth), and the inquisitorial maxim, as a rule that requires the Court to establish, by virtue of its office, the facts and to introduce and examine evidence which it believes is necessary, regardless of the motions by the parties or absence thereof. The following rules may be enumerated as the ones that undermine the doctrine of discovery of truth, e.g. the accusatory principle and the rule for the objective and subjective identity of the indictment and the verdict, evidentiary prohibitions and its sanctioning, the *reformatio in peius* prohibition, restrictions on reopening of proceedings only in favour of a convicted person.³³ May we conclude this astute analysis of the stability of the principle of truth in criminal procedure law by stating: - it cannot be disputed that parties need to be more active at the main hearing, - the expansion of the adversarial principle should not be achieved by removing the principle of truth, - rules governing how procedural material is formed need to be modified, especially rules for evidentiary motions, exclusion of evidence, the inquisitorial maxim, and amendments to the indictment.³⁴

Let us as well examine the duties of the Court at the main hearing and what has become of the guilty plea by the accused. A presiding judge shall conduct the main hearing and, *inter alia, question the accused, witnesses, and expert witnesses*. Also, he is bound to ensure that *the matter is thoroughly clarified and that everything which delays the proceedings, but does not contribute to the clarification of the matter, is removed* (Art. 299 of the SI CPC/2012). Even in the process of guilty pleas by defendants, the efficiency of evidentiary proceedings becomes prominent, under the conditions provided for by the law. Thus, should the accused plead guilty to what he is charged with in the indictment and the panel accepts his plea, the main hearing shall proceed in accordance with relevant statutory provisions (Art. 330 of the SI CPC /2012). And, accordingly applying some of the rules of procedure actually pertains to verifying the defendant's guilty plea following the usual points, for instance, if he understands the consequences of his plea, if his plea is voluntary, clear, complete, and substantiated by other pieces of evidence from the case file (Art. 285.c and 285.č of the SI CPC/2012).

31 Fišer, Z., Gorkič, P., Jelenič Novak, M., Šugman Stubbs, K., 2010, p. 1–16.

32 *Ibidem*, p. 6–7.

33 *Ibidem*.

34 *Ibidem*, p. 8–9.

Serbia. It would be interesting to examine how a situation concerning the “material truth doctrine” has been dealt with in the solutions of procedural issues in Serbia. To speak of this means to point out the still existing (at the time this text is being written) Article 17 of the Sr CPC /2010, pursuant to which, “the Court and state authorities participating in criminal proceedings are required to truthfully and completely establish the facts material to reaching a lawful decision,” and they are as well “required to examine and establish with equal attention both incriminating and exculpatory facts.” Literature confirms that “in this manner, the legislator is clearly paving the way towards the learning of truth.”³⁵ Legislator’s position on the principle of establishment of truth in criminal proceedings is also confirmed by provisions governing the duties of the Court at the main hearing, as well as by provisions governing guilty pleas by the accused at that stage of criminal proceedings. With regard to pleading guilty by the accused, actions that the Court takes in order to ascertain the truth are not ended by a guilty plea of the accused. Thus, the Court is obliged to obtain evidence on which depends the assessment of validity of the guilty plea and to ascertain if the plea meets statutory prerequisites. And those prerequisites are defined in such a way that: “when an accused person pleads guilty to committing a criminal offence, the authority conducting the proceedings shall continue with the further gathering of evidence about the criminal offence only if there is reasonable doubt about the veracity of his plea or if the plea is incomplete, contradictory or ambiguous, or not substantiated by other evidence” (Art. 94).³⁶ Accordingly, pleading guilty by the accused at the main hearing releases the Court of its duty to introduce and examine other evidence, but only if such a plea is valid in accordance with statutory requirements (Art. 327). Likewise, the duty to ascertain the truth requires from the presiding judge to “ensure that the case is examined thoroughly, that the truth is found out, and that anything that delays the proceedings without contributing to the clarification of the case is removed” (Art. 296). Passing of the new Criminal Procedure Code (Sr CPC/2011)³⁷ has provoked debates about the status of the truth in the procedural law of Serbia. Professor Škulić emphasises that this text has “expelled” the principle of truth from criminal proceedings in Serbia, and in addition to all the dangers it involves, he underlines that it is “immoral to eliminate the principle of truth from criminal proceedings because the purpose of criminal proceedings cannot be mechanically or artificially separated from the inherent connection that exists between criminal law and morality.”³⁸ In line with the new statutory solutions, “the Court shall make an impartial assessment of the examined evidence and based on it, establish with equal attention both the facts incriminating and those exculpating a defendant” (Art. 16). If we were to go back to theoretical considerations mentioned earlier of how the duty of the court to examine with equal attention both the facts incriminating and those exculpating the defendant reflects its active role in the “establishment of the factual basis for a decision on the fate of a criminal cause for action to punish the defendant,”³⁹ a question would arise about what constitutes a difference between identical requirements set before the court by the former and new regulations. It is evident already at the first sight that a difference lies in the fact that according to new regulations, such a duty on the part of the court exists only in relation to an impartial *assessment of examined evidence*. Taking into

35 Stevanović, Č., Đurđić, V., 2006, p. 77.

36 Knežević, S. S., 2012, p. 95.

37 By virtue of Art. 608 of the Sr CPC/2011, this Code shall apply as of 15 January 2013, except for proceedings initiated against criminal offences for which a special law provides that shall be prosecuted by a public prosecutor’s office with special jurisdiction, in which case it shall apply as of 15 January 2012.

38 Goran Ilić i Milan Škulić, *Politika* electronic publication of 21 May 2012. A comprehensive evaluation of the concept of new criminal proceedings, in Škulić, M., Ilić, G., 2012. Professor Škulić’s views of the principle of truth in the light of Continental-European procedural legislation and the classification of rules of procedure whose purpose is to lead to the establishment of truth can be presented in more detail in Škulić, M., 2007, p. 70–74.

39 Knežević, S. S., op. cit., p. 94.

account the specific role of the Court in evidentiary proceedings at the main hearing according to the Sr CPC/2011 (we will cover this issue more later in the text), we can already at this point underline that the scope of actions the Court can take in order to ascertain the truth has been reduced in comparison with the Sr CPC/2010. Proceeding further, two more questions arise: what has become of the duties of the Court to conduct the main hearing and how is the issue of guilty plea by the accused treated? Regardless of the fact that there is no mention of the principle of truth among fundamental principles of procedure, the new procedural law has kept the same relation to a guilty plea by the accused. Thus, it is prescribed that “if at the main hearing the accused pleads guilty to committing a crime, the only evidence that shall be examined is the evidence on which depends the assessment of whether his plea fulfils the prerequisites referred to in Article 88 herein, as well as evidence on which depends the decision on the type and extent of the criminal sanction” (Art. 394). When terms of Article 88 of this Code are compared with those contained in Article 94 of the Sr CPC/2010, it can be inferred that there are no essential differences between them since the Article 88 reads: “when a defendant pleads guilty to committing a crime, the authority conducting the proceedings shall continue with the further gathering of evidence about the perpetrator and the offence only if there is reasonable doubt about the veracity of his plea, or if his plea is incomplete, contradictory, or ambiguous, or if its is not consistent with other evidence.” As regards the duty of the Court to conduct the main hearing, new regulations prescribe that a presiding judge shall “ensure that proceedings run without delays and without examination of matters that do not contribute to a comprehensive consideration of the subject-matter that needs to be proved” (Art. 367).

II. 2. 2. Court’s Role in the Evidentiary Proceedings at the Main Hearing

Introduction. Apart from previously presented functions of rules of criminal procedure, we shall open in this paper /a discussion on/ the features of temporal and substantial limitations of actions that the Court may take in evidentiary proceedings at the main hearing. Therefore, we intend to review statutory rules of procedure in order to see the extent to which the Court is entitled and enabled to participate in the establishment of facts necessary for the reaching of a correct and lawful decision. Considering the importance of an answer to a separate question for criminal proceedings, namely: when can it be maintained that the established facts are truthful, what has been previously said should be actually connected with the discussion on who takes the initiative in the establishment of facts, or if the establishment of facts depends exclusively on the initiative taken by the parties, or does the Court takes part in that process. When considering the diversity of proceedings before courts in the countries that emerged after the dissolution of the SFRY, we should recall the adversary principle (or the adversarial principle), which allows the prosecutor and the accused to present their allegations and arguments in favour thereof before a court of law, as well as to respond to allegations of the opposing party before the court delivers a decision on each particular criminal incident; as well, we should recall an indispensable role of this principle in securing more complete implementation of the principle of truth.⁴⁰

Bosnia and Herzegovina. Normative framework for the implementation of basic principles of criminal procedure – the principle of truth and the adversary principle – in BiH indicates as follows. We can say that the existing criminal procedure law in BiH is a result of “reconciliation”

40 Sijerčić-Čolić, H., *Krivično procesno pravo (I)*, op. cit., p. 102–106.

of two legal cultures: the Continental or the European one and the Anglo-Saxon or the Anglo-American one, because it takes the forms and elements from both those systems of criminal procedure and attempts to fuse them into an integrated whole.⁴¹ This new combination of key institutes of criminal procedure at the main hearing demonstrates that at this stage of criminal proceedings, we can notice a trend toward the waning of the inquisitorial maxim and strengthening of the adversary principle. Such an ethos of the main hearing results from the new course of evidentiary proceedings⁴² and from giving greater preference to the adversary principle than it was the case when previous statutory solutions were in force. Evidence is presented and examined at the main hearing in the order in which the opposing parties are given initiative in the proceedings (evidence of the prosecution, evidence of the defence, rebuttal evidence of the prosecution, rejoinder evidence of the defence). We should mention one more change in favour of the adversary principle. Namely, in addition to judicial examination of witnesses and expert witnesses, adversarial questioning of those persons has also been adopted, in such a way that priority is given precisely to the adversarial questioning. When evidence is presented and examined, direct examination, cross-examination, and redirect examination are allowed.⁴³ This affirmation of the value of the adversary principle in our criminal proceedings ought to focus on the presentation of the active role of the Court in the presentation and examination of evidence and in the establishment of legally relevant facts. Namely, the inquisitorial maxim is implemented in the powers and procedural actions of judges sitting alone or panels of judges to collect evidence and ascertain the facts in order to achieve the correct and lawful hearing of a criminal cause in hand. Firstly, the Court is entitled *ex officio* to order that evidence which has not been offered by either the parties or the defence attorney be presented and examined, including evidence which the said persons decided not to call (Art. 261, para. 2, item e) BiH CPC, Art. 261, para. 2, item. e) BDBiH CPC, Art. 276, para. 2, item. e) FBiH CPC, Art. 276, para. 2, item. d) RS CPC).⁴⁴ Secondly, when evidence ordered by a judge or a panel is presented, the Court shall examine a witness or an expert witness, after which it will allow the parties and the defence attorney to question him (Art. 262, para. 4 of the BiH CPC, Art. 262, para. 4 of the BDBiH CPC, Art. 277, para. 4 of the FBiH CPC, Art. 277, para. 4 of the RS CPC). Thirdly, and notwithstanding the priority given to adversary questioning, the law also provides for judicial examination of witnesses and expert witnesses, since a judge or a presiding judge and members of a panel are entitled to ask them appropriate questions at any stage of examination (Art. 261, para. 3 of the BiH CPC, Art. 261, para. 3 of the BDBiH CPC, Art. 276, para. 3 of the FBiH CPC, Art. 276, para. 3 of the RS CPC). Fourthly, after a witness or an expert witness has been examined, a judge or a presiding judge and members of a panel may question him (Art. 262, para. 1 and Art. 270 of the BiH CPC, Art. 262, para. 1 and Art. 270 of the BDBiH CPC, Art. 277, para. 1 and Art. 285 of the FBiH CPC, Art. 277, para. 1 and Art. 285 of the BiH CPC). Fifthly, a judge or a presiding judge shall, to an appropriate degree, exercise control over the manner and order in which witnesses are examined or evidence is presented, making sure that examination and presentation are effective for the purpose of ascertaining the truth, that unnecessary loss of time is avoided, and that witnesses are protected from harassment and stress (Art. 262, para. 3 of the BiH CPC, Art. 262, para. 3 of the BDBiH CPC, Art. 277, para. 3 of the FBiH CPC, Art. 277, para. 3 of the RS CPC). Sixthly, the Court is entitled not

41 Sijerčić-Čolić, H., *Akuzatorske i.*, 2005, p. 181–213.

42 The manner in which the section titled “Evidentiary Proceedings” is structured proves that evidentiary proceedings, a the part of the main trial following immediately after the reading of the indictment and introductory statements by the parties or the defence attorney, encompasses those procedural actions which are taken to present and examine evidence required for the finding of legally relevant facts and proper adjudication of a particular criminal case. See Sijerčić-Čolić, H., *Krivično procesno pravo (II)*, 2008, p. 93–94.

43 For more details, see Sijerčić-Čolić, H., Hadžiomeragić, M., Jurčević, M., Kaurinović, D., Simović, M., *op. cit.*, p. 670–680.

44 Sijerčić-Čolić, H., *Krivično procesno pravo (II)*, *op. cit.*, p. 94.

to allow a question or evidence, i.e. to forbid repeating questions and answers to such questions – if it should deem such a question inadmissible or immaterial to the case (Art. 263, para. 1 of the BiH CPC, Art. 263, para. 1 of the BDBiH CPC, Art. 278, para. 1 of the FBiH CPC, Art. 278, para. 1 of the RS CPC). Seventhly, should a judge or a presiding judge find that facts which a party and the defence attorney are trying to prove are immaterial to the case, or that an offered piece of evidence is unnecessary, or that during an examination there has been a failure to question a witness on the facts for which he is again proposed to be questioned, the presentation of such evidence shall not be allowed (Art. 263, para. 2 of the BiH CPC, Art. 263, para. 2 of the BDBiH CPC, Art. 278, para. 2 of the FBiH CPC, Art. 278, para. 2 of the RS CPC).

Based on what has been presented above, we can conclude that the Court has an active role at the main hearing and that it is not either entitled or duty-bound to pass a verdict solely on the grounds of evidence presented on the motions of the parties and the defence attorney.⁴⁵ The essence and ethos of the principle of truth, along with respect for and fostering, in the right way, of the adversary principle in evidentiary proceedings at the main hearing, uphold the duty of the Court to establish truth about facts material to reaching its decision. Therefore, legislator's attitude towards the establishment of truth in criminal proceedings and values of the inquisitorial maxim at the main hearing is completely clear. Notwithstanding the above-mentioned procedural solutions and thus defined legal wording of and framework for the "material truth doctrine in criminal proceedings," still, our case-law has developed differently in some instances.⁴⁶

Montenegro. According to Explanatory Memorandum to the Criminal Procedure Code of Montenegro, in their procedural criminal law, "a mixture of accusatorial and inquisitorial system of criminal procedure" has been maintained "with predominant elements of the accusatorial system, which is otherwise typical of the countries of Continental Europe."⁴⁷ Legislator's principal attitude towards objective establishment of truth in criminal proceedings and the duty of the Court to ensure that the parties and the defence attorney shall under equal conditions propose evidence, access and present evidence are reflected in provisions governing evidentiary proceedings at the main hearing. We would like to single out the following steps among the important ones: 1) *after the accused has been questioned, proceedings shall continue with the presentation of evidence*, 2) *substantiation shall include all the facts deemed by the Court as material to proper adjudication of the case*, 3) *evidence is presented in the order defined by the presiding judge* (Art. 346). As a rule, evidence offered by the prosecutor shall be presented first, then evidence offered by the defence, and finally, evidence whose examination has been ordered by the Court acting *ex officio*. It can be noticed that by combining the adversary principle and actions taken by the Court *ex officio* in the light of the inquisitorial maxim, the legislator has aimed at complying with the both. Thus, for instance, the parties and the injured party are entitled to propose that new facts be clarified and new pieces of evidence be obtained until the main hearing has been completed, and they may also put forward again their motions which have already been rejected by the presiding judge or the panel. On the other hand, a panel may decide to examine evidence which has

45 Simović, M. N., Simović, V. M., 2011, p. 124–125; Sijerčić-Čolić, H., Hadžiomerađić, M., Jurčević, M., Kaurinović, D., Simović, M., op. cit., p. 669 and alike; Simović, M. N., 2009, p. 343, 344.

46 Thus, e.g. even this can be read in one of the press releases published on the occasion of certain judgements passed before the Court of BiH, "A first-instance panel does not make decisions based on evidence presented by the prosecutor and the defence at the main hearing. The first-instance panel does not establish the material truth, but it grounds its judgement in the evidence presented at the main hearing, which must be beyond any reasonable doubt in order for a guilty verdict to be reached." The cited press releases are available at the web page of the Court of BiH.

47 Explanatory Memorandum to the Criminal Procedure Code of Montenegro, 2009, p. 1.

not been proposed or which has been withdrawn by its proposing party and the presiding judge is entitled to order that new evidence be obtained for the main hearing, even if neither party has put forward a motion to that end (Art. 308 and 346). Special rules apply to motions to examine new evidence in cases when a preparatory hearing is held before a main hearing since every new motion to examine evidence at the main hearing must be substantiated in relation to the fact that such a motion was not proposed previously at the preparatory hearing (Art. 346, para. 6 in conjunction with Art. 305, para. 3). Actions that the Court takes in order to ascertain the truth may be observed in the procedure for hearing of witnesses and expert witnesses. After a witness or an expert witness has been heard, he may be questioned directly by the prosecutor, the accused, his defence counsel, the presiding judge and members of the panel, while the injured party, a legal representative, an attorney-in-fact, and expert witnesses may ask questions directly only with the permission from the presiding judge (Art. 350 in conjunction with Art. 342, para. 1).

Croatia. As regards the position of the inquisitorial maxim, legislation governing criminal procedure in Croatia has had an interesting journey from 2008 until now. Namely, Article 419 of the Criminal Procedure Bill (June 2008) used to read as follows: “(1) The parties shall be entitled to call witnesses and expert witnesses and present evidence. (2) Evidence shall be presented at the trial in the following order: 1) evidence of the prosecution, 2) evidence of the defence, 3) rebuttal evidence of the prosecution, 4) rejoinder evidence of the defence, 5) evidence about the facts decisive to the pronouncement of a criminal sanction.” An explanation of this provisions states that it “is not expressly forbidden” that “the Court may examine evidence which has not been proposed by the parties or which they decided not to call,” with an instruction that “there is no more provision for the inquisitorial maxim,” that “active involvement of the parties in presentation and examination of evidence and in general, the accusatory quality of the proceedings (*actore non probante, reus absolvitur*) is highlighted” and that “...parties are required, first and foremost the State Attorney, to increase substantially and purposefully their active involvement in the proceedings”.⁴⁸ Omitting the inquisitorial maxim was declared to be “the most important conceptual novelty, not only from the viewpoint of theory, but because of relevant practical applications”.⁴⁹ This proposal had provoked numerous debates about the right of the Court to order itself that evidence which it deemed necessary for its finding of legally relevant facts be examined. The result was that the proposed provision of Art. 419 was amended and the inquisitorial maxim was “brought back,” so today we can read that: 1) in addition to evidence of the parties, “evidence of the Court” shall be examined at the main hearing, 2) parties are entitled to call witnesses and expert witnesses and to examine evidence, 3) the panel may decide to present and examine evidence which has not been proposed or which has been withdrawn by the proposing party only if it deems such evidence indicates that there are reasons for the exclusion of illegality or guilt or that it concerns facts on which depends its decision on criminal sanctions, 4) when a panel decides to present and examine evidence which has not been tendered or which has been withdrawn by the proposing party, witnesses or expert witnesses shall be first questioned by the Court, then by the prosecutor, the injured party, and /finally/ by the accused (Art. 419, para. 1, 3 and 10 of the C CPC/2011).⁵⁰ Looking back at the Criminal Procedure Bill (June 2008), “a consistently regulated accusatorial hearing” called for a specific way of examining witnesses and expert witnesses and it was provided for in a way that the Court could not conduct such

48 Criminal Procedure Bill of the Republic of Croatia, 2008, p. 226.

49 Turudić, I. 2008, p. 884.

50 The inquisitorial maxim was maintained, i.e. introduced by the 2009 amendments. V. Pavišić, B., *Komentar..., op. cit.*, p. 758–759. See also: *Zbirka zakona iz kaznenog procesnog prava*, 2011, p. 162.

an examination; the process of examination belonged in full to the parties, including the well-known forms of direct, cross and redirect examination.⁵¹ Nonetheless, such an approach was not used in the final text of the Code. The adoption of actions that the Court takes in order to establish facts and examine evidence had an effect as well on the bill for an article of the Code which provided for entities which took part in examination of witnesses and expert witnesses and for the modes thereof. Namely, the passing of the 2009 and 2011 amendments led to a provision that allowed not only for adversary examination of witnesses and expert witnesses, but for the judicial one too. Thus, in accordance with Art. 420 of the C CPC/2011, substantial modifications established the right of the Court to “to pose questions to witnesses and expert witnesses in the course of direct, cross, and redirect examinations in order clarify any ambiguities, providing that those questions may not be leading questions.” Also, in the name of avoiding “substantial difficulties in the accurate and complete finding of fact,” it has been provided that a “presiding judge shall allow questions relating to the facts about which a witness or an experts witness did not testify during direct examination if those facts are tightly linked to the facts presented during direct examination or if they are aimed at assessing witness’s credibility” (Art. 420, para. 3 of the C CPC/2011).⁵² In conclusion, we would like to underline that, despite the fact that implementation of the principle of truth at the main hearing is limited in the ways presented above, standards for the criminal proceedings (from the viewpoint of the topic we are discussing) of the 21st century which were set out in the Principles underlying the drafting of the Criminal Procedure Code of the Republic of Croatia (February 2007) were essentially met: - “rules of criminal procedure provide... an effective mechanism for establishing if a person is guilty of a criminal offence... and passing of a lawful decision on criminal sanctions,” - criminal proceedings “...must guarantee that the truth is reliably established,” - rules governing jurisdiction, organization, and procedure of Courts “create a balance between the material truth doctrine and the principle of a fair trial”.⁵³

FRY Macedonia. Previous considerations of the “material truth doctrine” in that criminal procedure /system/ have shown directions in which it is developing. Now, we shall continue by covering issues concerning actions that parties and the Court take during evidentiary proceedings at the main hearing. It can be observed from the M CPC/2010 that inquisitorial elements have been eliminated from the main hearing and that the Court has been released of its duty to establish truth at the main hearing.⁵⁴ The order in which evidence is presented shows that the inquisitorial maxim has not been provided for, which means that the right of Court to present and examine its own evidence has not been laid down. Presentation of evidence is limited to evidence of the parties, in such a way that *first presented is evidence of the prosecution and evidence concerning restitution claims*, then, in the second round, *evidence of the defence*, followed by *rebuttal evidence of the prosecution*, and finally, *rejoinder evidence of the defence* (Art. 382). During the presentation of evidence, direct, cross, and redirect examinations are allowed, which, by the nature of things, belong to the parties and the defence attorney (Art. 382, para. 1–4). After the parties and the defence attorney have finished their examinations, the presiding judge and members of the panel may question witnesses, expert witnesses, and “technical advisors”⁵⁵ (Art. 382, para. 5 in conjunction with Art. 387). In addition, *the presiding judge shall exercise control over the manner and order in which witnesses and expert witnesses are examined and evidence presented, taking*

51 Pavišić, B., Komentar..., *op. cit.*, p. 884–885.

52 Đurđević, Z., *Suvremeni razvoj...*, p. 311.

53 Principles underlying the drafting of the Criminal Procedure Code of the Republic of Croatia, in particular p. 1 and 3.

54 Kalajdžiev, G., Bužarovska, G., *Ključne novine...*, 2009, p. 349–367.

55 This institute was introduced based on the model of the Italian procedural law.

into consideration the efficiency and expeditiousness of the proceedings and the need to establish the truth (Art. 385, para. 1). A presiding judge has other rights as well, within defined parameters, e.g. not to allow questions or to deny motions to present certain evidence if it is unnecessary or irrelevant to the given case (Art. 385, para. 2–8). An interesting solution, from the vantage point of the court in evidentiary proceedings, is a provision contained in Article 394, paragraph 2, which entitles the Court to order *ex officio* that additional review of expert findings be carried out if it is necessary to remove any inconsistencies in findings and opinions of expert witnesses and professionals. In conclusion, may we convey some reflections on how thus defined role of the Court can amount to the following three functions: - control, since it ensures that evidence is tendered and presented in a lawful manner, decides on (in)admissibility of questions, and hears objections of the parties, - decision-making, since it admits evidentiary motions of the parties and rules on their probative value, and – guarantee, since it ensures that fundamental rights and freedoms of the accused and other participants in the proceedings are respected.⁵⁶

Finally, let us consider procedural solutions to these questions that are still in force. According to the existing mixed model of the main hearing, the Court is the “main engine” and parties assist it by offering evidence and posing additional questions.⁵⁷ The Court decides if certain pieces of evidence are to be presented; it is within its rights to decide that evidence not proposed or withdrawn by the parties shall be presented; substantiation includes all the facts which the Court believes are relevant to proper adjudication; evidence is presented in the order defined by the presiding judge; hearing of witnesses and expert witnesses takes place according to rules from the investigation; the presiding judge is the first one to question witnesses and expert witnesses, then members of the panel, then the prosecutor, the accused, his defence counsel, while some other participants at the main hearing may pose questions if the presiding judge permits them so (e.g. 314, 316, para. 1, 319).

Slovenia. We resume by asking how is the main hearing or its central part – evidentiary proceedings organized in the light of previous presentations of criminal procedure in Slovenia and the status of the principle of truth. Given the adversary principle and framework for its implementation, as well as the status of inquisitorial elements at this stage of criminal proceedings, the following may be stated. The SI CPC/2012 stresses that *substantiation shall include all the facts deemed by the Court as material to proper adjudication* (Art. 329, para. 2). During evidentiary proceedings, *evidence proposed by the prosecutor is first presented, then evidence of the defence, and lastly, evidence ordered by the Court by virtue of its office.* In compliance with statutory requirements, the parties may by the end of the main hearing *propose that new facts be investigated and new evidence be gathered, and they may re-file their evidentiary motions which they withdrew or which were previously rejected by the Court.* Finally, *the panel may decide that evidence which has not been proposed or which has been withdrawn by the proposing party is presented and examined.* The CPC-K/2011 amendment did not introduce any various forms of witness and expert witness examination in terms of direct, cross, and redirect examinations, but the previous solution was maintained, according to which, when witnesses and expert witnesses /are/ examined at the main hearing, *provisions related to their interrogation during investigation shall be applied in a meaningful manner, unless otherwise defined in regulations governing the main hearing* (Art. 331). In the course of witness or expert witness examination, and after a witness has testified or

⁵⁶ For more details, see Kalajdziev, G., Bužarovska, G., *op.cit.*

⁵⁷ Kalajdziev, G., 2011, *op. cit.*, p. 345-362.

an expert witness has given his findings and opinion, he may be questioned. The order in which questions are posed is stipulated by the law. *Questions are first asked by the party that proposed the presentation of such evidence, then by the opposing party, then by persons specifically mentioned in Art. 324 of the Code* (e.g. the injured party), and finally, questions may be asked by the presiding judge and members of the panel (Art. 334).

It is emphasised in theoretical discussions on thus defined evidentiary proceedings that thus based evidentiary proceedings strengthen the accusatory elements at the main hearing and give a clear message: the prosecutor is the one who contests the presumption of innocence by its evidence and allegations contained in the indictment, while the role of the Court in the forming of evidence (the inquisitorial maxim) is subsidiary in nature, since the Court will decide to examine its own evidence only after it has found, based on evidence already presented and proposed by the parties, that it is not sufficient to reach an accurate and lawful decision. Thereby, the Court maintains its active role, while at the same time the significance of evidence offered by the parties and their activity is strengthened and it is ensured that evidentiary proceedings are more focused. A statement which is also important says that the Court should still continue to conduct the presentation of evidence, rule on the relevance, necessity, and usefulness of evidence for the discovery of truth.⁵⁸

Serbia. Previous presentations on the situation in Serbia have shown that two procedural codes are now in force. According to the Sr CPC/2010, legislator's principal attitude towards the establishment of truth in criminal proceedings has been reflected in the provisions governing the main hearing and evidentiary proceedings. Creation of a "faithful reflection of the criminal incident in the mind of a judge"⁵⁹ is made possible by those legal solutions according to which *substantiation shall include all the facts which the Court deems material to proper adjudication* (Art. 326, para. 2). In order to present the complete picture, we need to mention that parties have been given adequate room for their activities since by the end of the main hearing, they are entitled to propose that new facts be investigated and new evidence obtained, and they can also re-file those motions that have been denied by the presiding judge or the panel on an earlier occasion. Evidence is adduced in the order defined by the presiding judge. As a rule, *evidence proposed by the prosecutor shall be presented first, then evidence proposed by the defence, and finally evidence ordered to be presented by the panel acting ex officio* (and as proposed by the injured party). Where both parties have tendered an identical piece of evidence, the party which was the first to file an evidentiary motion shall have precedence in presenting it (Art. 328, para. 1). While witnesses and expert witnesses are being questioned at the main hearing, general provisions governing their questioning shall apply accordingly (Art. 328, para. 3). A witness and an expert witness are directly questioned by the parties, the presiding judge, and members of the panel. Unless the parties have agreed otherwise, *questions are first posed by the party that proposed a witness or an expert witness, then by the opposing party who is followed by the presiding judge and members of the panel, then by the injured party or his legal representative and attorney-in-fact, co-defendants, and expert witnesses.* Should the Court order that evidence be presented without motions from the parties, *questions are first posed by the presiding judge and members of the panel, then by the prosecutor, the accused and his defence attorney, the injured party or his legal representative and attorney-in-fact, and expert witnesses. The party that proposed a witness or an expert*

58 Fišer, Z., Gorkič, P., Jelenič Novak, M., Šugman Stubbs, K., op. cit., pp. 9 and 10.

59 Stevanović, Č., Đurđić, V., op. cit., p. 78.

witness may ask additional questions after all the others. The presiding judge may at any time ask questions that contribute to a more comprehensive or clearer response to a question posed by other participants in the proceedings (Art. 331, para. 1 and 4). Finally, the panel may decide that evidence be adduced which has not been proposed or which has been withdrawn by the proposing party (Art. 326, para. 4 and 5).

Creation of a “faithful reflection of a criminal incident in the mind of a judge” is defined under Sr CPC/2011 in the following manner. *Subject-matter of evidentiary proceedings shall include facts which constitute elements of a criminal offence or those on which depends application of another provision of the criminal code* (Art. 83, para. 1 in conjunction with Art. 394, para. 2). With regard to the order in which evidence is presented and examined, pursuant to Article 396, *evidence proposed by the prosecutor is first examined, followed by evidence proposed by the defence, followed by evidence whose examination was proposed by the panel ex officio and evidence proposed by the injured party, and finally evidence on facts on which depends a decision on the type and extent of criminal sanction.* Thus, the order of presentation and examination of evidence is identical to the one referred to in Article 328 of the Sr CPC/2010. However, what has changed is how evidence whose presentation may be ordered by the Court is treated, since Article 15 of the SR CPC/2011 clearly sends these messages: “the Court shall examine evidence upon motions by the parties” (para. 3) and “the Court may... by way of an exception order... evidence to be examined” (para. 4). Therefore, the inquisitorial maxim has been laid down by way of an exception. Returning to the Sr CPC/2011, we would like to remind that “the Court may order a party to propose additional evidence or, by way of an exception, order such evidence to be examined, if it finds that the evidence that has been examined is either contradictory or ambiguous and that taking such an action would be necessary in order for a matter that needs to be proved to be thoroughly heard” (Art. 15, para. 4). In that regard, the legislator has stipulated that in case a preparatory hearing is not held, “/and/ after the main hearing has been scheduled, the parties, the defence attorney, and the injured party are entitled to propose that new witnesses or expert witnesses be called to or that other pieces of evidence be examined at the main hearing, in which process they shall specify which facts need to be proven and by which proposed item of evidence, as well as that “the presiding judge is entitled to order that new evidence be obtained for the main hearing, even without a motion from the parties or the injured party” (Article 15, para. 4), of which he shall notify the parties prior the commencement of the main hearing (Art. 356, para. 1 and 3). Considering actions that are taken by the parties and possibilities the statute offers to that effect, Article 395 stipulates that *until the conclusion of the main hearing, the parties and the defence attorney shall be entitled to propose that new evidence be examined and to re-file motions that have been denied earlier* (para. 1), that the presiding judge rules on those motions and he may reject an evidentiary motion in compliance with statutory requirements (para. 2 and 4), as well as that “the presiding judge may in the course of the proceedings revoke the ruling referred to in paragraph 4 herein, but the panel may overturn the ruling on an objection and decide that the proposed item of evidence be examined” (para. 5). At a main hearing, *witnesses or professional consultants are questioned, to which Article 98 hereof is accordingly applied (rules for questioning of witnesses), and expert witnesses present their findings and opinions orally, but the panel may allow them to read their written findings and opinions, which shall then be enclosed to the record.* A witness, an expert witness, or a professional consultant are directly questioned by the parties and the defence attorney, the presiding judge and members of the panel, while the injured party or his legal representative and attorney-in-fact, and an expert witness or a professional consultant may directly question him only with permission from the presiding judge. Should the Court order that witnesses be questioned or

expert evaluation be carried out without a motion from the parties, *questions are first posed by the presiding judge and members of the panel, then by the prosecutor, the accused and his defence attorney, and an expert witness or a professional consultant.* The injured party or his legal representative and attorney-in-fact *are entitled to pose questions to a witness, an expert witness, or a professional consultant after the prosecutor and always when the prosecutor is entitled to conduct an examination.* Finally, *direct examination* is conducted first, followed by cross-examination, and additional questions may be posed with the permission from the presiding judge (Art. 402). Also, questioning of the accused is carried out in a particular order, so that when the accused has finished presenting his defence, he may be questioned by his *defence attorney, then by the prosecutor, who is followed by the presiding judge and members of the panel, then by the injured party or his legal representative and attorney-in-fact, the co-defendant and his defence attorney, the expert witness and the professional consultant.* The presiding judge may at any time ask the accused questions that contribute to a more comprehensive or clearer response to a question posed by other participants in the proceedings (Art. 398).

III. A Brief Outline of “Material Truth Doctrine in Criminal Proceedings”

The term “material truth” is used traditionally and its meaning is often under debate. This has urged us to present here some of those views and approaches. A number of theorist who deal with criminal procedure law seek to underline by using the concept of “material truth” that courts should arrive at the truth through free assessment of evidence and not through an assessment that has been previously defined by formal (or legal) rules. Therefore, the term material truth (as opposed to formal truth or any such finding of facts based on legal regulations governing the strength of individual items of evidence) denotes such a finding of facts at which a judge arrives freely, unrestrained by rules of evidence.⁶⁰ Other reasons for using the idea of material truth are also mentioned in literature: criminal procedure law dismisses those forms of procedure that might prevent or question the establishment of truth about facts on which charges are based or other legally relevant facts, as well as circumstantial evidence or some other facts on which depends application of legal norms to thus established factual situations.⁶¹ According to Professor Grubač, the term “material truth” points to a distinct quality of the factual basis for a verdict or to the truth established for the purpose of reaching a decision in criminal proceedings.⁶² Also, “material truth” may be described as a reflection, as objective and faithful as possible, of a criminal act from the past.⁶³ We would like to mention as well an approach to truth that says that truth is something that exists or used to exist, so there is no justification for discussing “material truth” because each individual truth is substantial and accordingly, “the word truth should suffice.”⁶⁴ Let us also cite a view of an independent idea of “objective truth,” where a nexus between truth and reality is underlined by emphasising the objective element.⁶⁵

A discussion about “material truth” and “formal or arbitrary truth” is interesting since it provides an opportunity to consider different processes and rules for establishment of truth in European

60 Pavišić, B., *Komentar Zakona ...*, 2003, p. 27; Ilić, M., 2001, p. 44.

61 Bayer, V., 1995, p. 114–117.

62 Grubač, M., 2006, p. 255–257; compare also Vasiljević, T., *op. cit.*, p. 319, see footnote: 69.

63 Jekić, Z., *op. cit.*, p. 65–73; Bajović, V., 2010, p. 659.

64 Tomašević, G., *op. cit.*, p. 217.

65 Jekić, Z., *op. cit.*, p. 69; Matovski, N., Lažetić-Bužaravska, G., Kalajdžijev, G., 2011, p. 50.

or Continental and Anglo-Saxon or Anglo-American criminal procedure systems. It would be impossible to present what has been written about this issue until today;⁶⁶ here, it must suffice to make a note of one sentence (by quoting what Professor Weigend said while looking for an answer to the question of how criminal proceedings are focused on the establishment of truth) namely, *that from the perspective of the inquisitorial principle, the gathering of facts is focused on establishing what they were in the past to the extent which is necessary for a credible judgement / to be made/, notwithstanding what the parties may aspire to, while what characterizes the adversary-oriented approach is that truth is defined as a version of the facts acceptable to all the parties in a dispute.*⁶⁷

Taking into account that we have omitted to quote some other explanations of the concept of “substantial and formal truth” in terms of its categories and to point out how they are distinct from one another, we would like to give some details about what we believe the title of this paper means. The “material truth doctrine in criminal proceedings” is accepted and used in the light of the fact that criminal procedure law dismisses all those forms of procedure which might prevent or question the establishment of truth about a criminal offence and that the legislator is charged with the task of “dismissing”, which means that he should avoid laying down such forms of procedure which might render more difficult the process of establishment of truth in criminal proceedings. At the same time, we are aware that the absolute truth understood in the spirit of philosophical discussions and arguments cannot be achieved by applying the material truth doctrine and that material truth, as the highest possible degree of gaining insight into the truthfulness of facts in criminal proceedings is nothing more than a relative truth at which we arrive on the basis of our experience and which does not exclude the possibility of gaining an opposite perception of how an incident which had elements of a crime took place in the past.⁶⁸ Finally, the establishment of truth in a socially acceptable manner is countered by the rules which are aimed at resolving the conflict of various interests in criminal proceedings. Their existence confirms that truth is not the only and exclusive goal of criminal proceedings and that every pursuit of truth has not only its natural but its legal boundaries as well.⁶⁹

IV. Concluding Considerations of Several Features of Material Truth Doctrine in Criminal Proceedings

We would like to add something to our previous considerations, so we begin our final comment by presenting qualities of truth that is ascertained in criminal proceedings. Namely, the truth established in criminal proceedings is subjective and relative since its establishment is always contingent on the personality of a judge, his beliefs, knowledge, or experiences, as well as on the media used in criminal proceedings to find out the truth, which do not always guarantee that truth

66 From extensive literature /on the subject/, we mention: Damaška, M., *The faces...*, 1986; Feeny, F., Herrmann, J. 2005.

67 In parallel with the notion of “substantive truth” Professor Weigend uses the term “procedural truth”, accounting for it by claiming that we arrive at such a truth in the process, it is limited by rules of procedure, and precedents for the purpose of protecting the rights. He links the idea of “procedural truth” to the Continental and adversarial system of criminal procedure. V. Weigend, T., op. cit., p. 170–171.

68 With regard to this, see Sijerčić-Čolić, H., *Krivično procesno pravo (I)*, op. cit., p. 106–116 and authors cited therein.

69 Munda, A., 1956, p. 123–124.

will be established, in other words, *media probandi* used most often to establish the truth in criminal proceedings are themselves subjective (e.g. witnesses, expert witnesses, defendants).⁷⁰

Secondly, many issues have not been explored in this paper for a number of reasons. We have thus omitted to draw attention to classical procedural institutes which contribute to the establishment of truth in criminal proceedings (e.g. free assessment of evidence, contesting verdicts by bringing appeals on grounds of erroneous or incomplete finding of facts, *beneficium novorum*). We have neither covered departures from the establishment of material truth in criminal proceedings, which we could understand, as Professor Damaška vividly explains, as “hurdles on an athletic track” (its function of safeguarding the society against crime is the athletic track; author’s remark)⁷¹ and which confirm that protecting human rights can run against the imperative of ascertaining truth in criminal proceedings (e.g. right to remain silent and possibility to give false statements on the part of the accused, *reformatio in peius*, *ne bis in idem*, suppression of illegally obtained evidence, privileged witnesses in a broad sense of the word). We set aside (today more often than not) discussion about what carries more weight in criminal proceedings: the principle of establishment of truth or the principle of a fair trial. In this paper we have not crossed the parameters of how the law defines “honest efforts” to gather evidence and ascertain facts on which a decision-maker (and it can only be the Court!) can base his verdict and rationally defend it.

While dwelling on its legal features, we have found that criminal procedure law in our region supports the principle of establishment of truth by quoting it in its Codes on several levels, from affirming its status as one of the fundamental procedural principles and linking it to the “standard of equal attention to both types of facts”, to establishing procedural institutes which affirm its existence. Thus, we would be at liberty to conclude that regardless of the trends for development of the truth doctrine and the adversary principle, with which it is connected, modifications of proposed and even adopted rules of procedure, results that have been achieved and shortcomings that have been noted, the procedural codes that we have analysed support, in their own way, the principle of establishment of truth in criminal proceedings. What they differ in are the patterns in which actions are taken in order to accomplish this extremely important task both for the society and the individual. One such pattern is the Court’s right to order *ex officio* that some evidence be presented and examined (the inquisitorial maxim). In the procedural laws of BiH, Montenegro, and Slovenia, the inquisitorial maxim is not conditioned either temporally or upon subject-matter, and the Court, in the process of deciding on the merits of a criminal case is bound to establish completely all the facts relevant to reaching a verdict. In Croatian legislation governing /criminal/ procedure, in M CPC/2010, and in Sr CPC/2011, the Court’s right to examine evidence *ex officio* is conditioned by certain circumstances. In keeping with C CPC/2011, *a panel may decide to present and examine evidence which has not been proposed or which has been withdrawn by the proposing party only if it deems such evidence indicates that there are reasons which exclude guilt or render the defendant’s conduct lawful, or that it concerns facts on which depends its decision on criminal sanctions*. The Sr CPC/2011 grants the Court two rights: “to order a party to propose additional evidence” or “by way of an exception, order such evidence to be examined, if it finds that the evidence that has been examined is either contradictory or ambiguous and that taking such an action would be necessary in order for a matter that needs to be

70 The qualities of relativity and subjectivity are not specific only to the truth ascertained in criminal proceedings. It is often stressed that the truth about past events or facts which are claimed to have happened in the past is also a relative one. For more details, see Sijerčić-Čolić H., *Krivično procesno pravo (I)*, *op. cit.*, p. 108–109 and authors cited therein.

71 Damaška, M., *Dokazno pravo...*, *op. cit.*, p. 7.

proved to be thoroughly heard.” Lastly, the inquisitorial maxim has been suppressed furthest in the M CPC/2010, because the Court is entitled only to order *ex officio that additional review of expert findings be carried out in order to clarify contradictions in the findings and opinions of expert witnesses.*

Has the principle of truth been abandoning the criminal procedures of countries in our region? And, has the inquisitorial maxim been “fading” more and more out of evidentiary proceedings at the main hearing? The answer to the former question is rather obvious – no; the principle of establishment of truth is present in the systems of criminal procedure of the countries in the region, regardless of how they are “laid down”.⁷² As regards the latter question, it would not be so easy to answer it, because the adversary principle and other accusatory features of the main hearing have been expanding, as have endeavours to suppress judicial presentation of evidence. Therefore, we would like to reiterate our position from the previous pages: the expansion of the adversary principle should not be fostered by removing the principle of truth,⁷³ and we should also bear in mind an observation that the adversary principle (or adversarial action) helps to bring about the truth, *but that it is not an entire truth or a complete truth and that it can also be fiction.*⁷⁴ Also, by linking already mentioned legal solutions in a normative-historical context, and taking into account the relevant literature, we adopt the view that “... a one-sided enquiry into truth, cannot lead to a complete truth”.⁷⁵ What has been said earlier is also supported by considerations according to which the strengthening of the adversary principle and along with it more active involvement of parties in taking procedural actions and the introduction of institutes from the accusatory system (e.g. plea bargaining) still have not challenged the position of the mixed model of criminal procedure, the establishment of truth in order that no innocent person is convicted and that criminal sanctions are imposed on perpetrators under conditions stipulated by the criminal code and based on lawfully conducted proceedings, nor has it questioned the opinion according to which the Court shall have control over the case and how parties conduct themselves in the proceedings, while they are disposing with the matter which is being addressed.⁷⁶

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72 And even to which legal culture they belong to. V. Dežman, Z., Erbežnik, A., *op. cit.*, p. 272-275.

73 See footnote no. 34.

74 Weigend, T., *op. cit.*, p. 172.

75 Vasiljević, T., Grubač, M., 2005, p. 51–53.

76 Krapac, D., 2007, p. 181–182; Also compare Satzger, mentioned in the cited work, p. 182.

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The Abandonment of an Inquisitorial Criminal Procedure Model as a Necessary Step Towards Creating an Impartial Criminal Court In Serbia

Summary

This paper provides a competent critical and analytical review of the reasons for the abandonment of the inquisitorial criminal procedure model in the new Criminal Procedure Code of the Republic of Serbia (CPC RS) and of the contribution to the impartial functioning of the courts in Serbia.

Viewed from a structural standpoint, the subject matter is analysed through: introductory observations which provide an overview of the basic features of the inquisitorial model of investigation and of the substantial truth doctrine as crucial characteristics of the criminal procedure legislation in Serbia until the enactment of its CPC from 2011; three sets of questions and concluding comments. Among a considerable number of issues considered in this paper in its second, third and fourth sections the most prominent ones deal with: the reasons for the switch from a judicial to a prosecutorial model of investigation and the characteristics of this model; the instruments of the criminal procedure which, according to the author, are supposed to contribute to reaching the desired level of impartiality; the new structure of the criminal proceedings and the procedural position of the courts, parties involved and the defence attorney in such proceedings.

At the end of the paper, in the concluding comments, the author offers his opinion on the difficulties in the full application of the new CPC provisions and proposes certain methods of overcoming these 'obstacles'.

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Key words: criminal proceedings, inquisitorial model, investigation, substantial truth doctrine, public prosecutor, court, to indict, main hearing, legal remedy, preliminary hearing judge, CPC

1. Introduction

In the previous period, criminal courts of Serbia were principally defined by the inquisitorial criminal procedure model and the substantial truth doctrine. Although the full impact of these characteristics has not always been duly noted in theory, it is certain that the local Criminal Courts have chiefly been defined by a dominant ‘investigative’ role at all stages of the proceedings, as well as by the duty to investigate criminal matters to the point it is, supposedly, possible to draw an accurate conclusion on what had transpired in the past (the so-called *substantial truth doctrine*). The claim that the aforementioned characteristics were the very foundation of the previous system, but also of the education and beliefs of generations upon generations of criminal law specialists, is supported by the fact that the most vehement criticism of the concepts in the new Criminal Procedure Code is coming from the said point of view. The new provisions are mostly criticised as being indifferent to ‘the truth’ and the duty of the court to establish it. Therefore, the creators of the new Code are being accused of rendering the criminal procedure inapplicable under the local circumstances and incompatible with the local tradition and customs due to the abandonment of a decades-long dogma.

However, the reality, as usual, is quite different. The decades-long experience in the practice of the courts of Serbia according to the said model, shows that the inquisitorial proceedings in combination with an authoritarian social foundation which was defined by the revolutionary model of ‘the unity of power’ has produced a criminal court which could hardly be called impartial. Instead of being an impartial authority, equidistant from both parties in the proceedings, the criminal courts in Serbia have evolved under the influence of the current political setting at the time as well as the legislation that was conducive to this, often turning them into an extension of the police and prosecutorial machinery. The courts have predominantly been seen and used as a punishment system in accordance with the archetypal inquisitorial model. The second, no less important function, dealing with the protection of rights and freedoms by an impartial arbiter, has been in the shadow of this dominant view.

The new Criminal Procedure Code, in addition to a whole array of new solutions, represents a very significant step towards the liberation of the courts and the creation of an impartial institution. Therefore, the break with the legacy of the inquisitorial approach and a switch to a prevalently adversarial procedure in Serbia is not just about changing the criminal procedure model. This paper points out the arguments in support of a hypothesis that says such a step in a post-communist society, which has not fully recovered from the traumas caused by the authoritarian regimes, is a necessary pre-requisite for the break with the legacy of dependant judiciary and the model of a judge acting as a police officer, which has been in existence for too long in this region.

1. Inquisitorial Role of the Court in the Serbian Criminal Procedure

The modern criminal procedure in Serbia has evolved under the dominant influence of the continental legal systems, which have been based on the ideas of the French Criminal Investigation

Code (*Code d'instruction criminelle*) from 1808.² It is this Code that represents a significant achievement of the French Revolution, which introduced at the time a whole series of progressive solutions in the European procedure legislation 'infected' until then by the inquisitorial investigation model of thinking and torture as a method of proof.³

Although, in theory, European type of procedural systems which are based on *Code d'instruction criminelle* are marked as mixed,⁴ i.e. as the systems that combine successful solutions of the dominantly inquisitorial as well as of its opposite, the accusatory model,⁵ it may still be concluded that the most distinct characteristic of the European model compared to its Anglo-Saxon counterpart is the inherited inquisitorial reflex, which is present in a whole array of institutes such as entrusting the court with the investigation, the duty of the court to present evidence *ex officio* and its managing role in the evidentiary proceedings, the passive conduct of the parties etc.⁶

Entrusting the court with the investigation which definitely came about in the aftermath of the war, undoubtedly represented a progressive solution in the post-revolutionary circumstances of that time. The judicial control of the police work in the initial stages of the procedure could mitigate the arbitrary actions of the police and avert the consequences in an authoritarian society. Nevertheless, the judicial management of the investigation instead of being a provisional solution has remained one of the dominant characteristics of the local courts to this day. Generations of criminal law specialists have been taught to believe that this is the only model that is right and possible.

Preliminary proceedings have consisted of the inquest and the investigation ever since the 1953 Criminal Procedure Code.⁷ The role of the court, in this model that would remain in application to a considerable extent in the following six decades, has been particularly visible at the investigation stage, while the police have retained most of their competencies when it comes to the inquest. The court, rather than the police or the prosecutor, have been entrusted with the conduct of the investigation of the criminal offences which the court has jurisdiction over during the main hearing as well. Thus, the jurisdiction of the court is considerably extended to the sphere that it should not cover by virtue of its position, so such an approach has inevitably had undesired effects.

Specifically, it was inevitable that the law should define in a certain way this procedural illogical solution since the court has already been 'dragged into' the activities of one of the parties to the proceedings. The illogical nature of such an approach is already visible in the provision of the CPC which stipulates that the investigation conducted by the investigating judge should primarily collect "the evidence and data necessary for the decision whether to bring the indictment or

2 G. Ilić, *Pojam, zadatak, subjekti i radnje prethodnog krivičnog postupka*, in: *Policija i prekrivični i prethodni krivični postupak* (a study), Viša škola unutrašnjih poslova (Internal Affairs College), Belgrade, 2005, p. 99.

3 V. Bayer, *Kazneno postupovno pravo*, Volume I, Zagreb, 1943, p. 133.

4 G. Ilić, *op. cit.*, p. 99.

5 The main improvements compared to the pure inquisitorial model are the separation of the indictment process (public prosecutor) and the introduction of the jury (see B. Marković, *Udžbenik srpskog krivičnog postupka s obzirom na Projekat krivičnog postupka za kraljevinu SHS*, Belgrade, 1926, p. 25.) However, in most of the continental systems a considerable number of the characteristics of the inquisitorial procedural model has remained to this day.

6 Unlike the continental Europe which completely accepted the inquisitorial principle, England had never gone down this road. Therefore, it is hardly surprising that the liberal thinkers from the time of the French Revolution should follow this model. Thus, shortly after the revolution, under these influences, France abolished the inquisitorial procedure and replaced it with the English role model (see V. Bajec, *op.cit.*, p. 133).

7 Official Gazette of PFRY 40/53, 43/53, 5/60, 30/62 and Official Gazette of SFRY 12/65).

to suspend the proceedings”⁸ Thus, the basic role of the investigating judge in Serbian criminal proceedings is clearly set out. The main task of the said judge is to perform the work for the public prosecutor. The investigating judge “for and on behalf of” the public prosecutor collects the evidence and data which will help the prosecutor decide on further prosecution. The court’s actions at the request and on behalf of the public prosecutor, even if it is at the investigation stage, have clearly and irreversibly dispensed with any notion or the possibility of defining the court as impartial. A concept which has defined the court’s role, has not offered any hope of the investigating judge’s positioning as anything else but just another part of the executive apparatus in the criminal proceedings.⁹

It is impossible to fully understand the nature of such a concept of the system without taking into account the circumstances that surrounded its beginnings. The main characteristic of the Serbian society in the second half of the 20th century when this procedural law finally developed, undisputedly is the authoritarian government of the Communist Party. The notion of the separation of powers was not accepted in the communist teachings. Instead, the concept of ‘unity of power’ was promoted, which supposedly ensured the supremacy of the legislator, the least bureaucratic of all according to the ideologists of those times (the supremacy of the people). The description of the times during which the modern Serbian judiciary had been developed and the views on the courts and their independence in general may be seen in the texts of well-known dogmatics from those times. So, among other things, in defence of the socialist ‘unity of power’ principle, i.e. the need to limit the other two powers, it was stressed that ‘to introduce the separation of powers, i.e. to ensure the equality and equivalence of all three powers, would mean (...) to ensure the equality of the bureaucratic elements, primarily from the government, and also the judiciary, with the democratic, and representative ones from the representative bodies with legislative powers, i.e. general decision-makers.’¹⁰

Under such conditions, the idea of the independence of courts could not be realised, not even formally. The judiciary as well as the executive followed the same line as the alleged supreme power, the legislative, and this soon turned out to be the line of the Party and not of the people’s representatives and ‘democratic elements’. Judicial investigation was from the very beginning an activity primarily directed at the discovery of ‘culprits’ rather than being the activity of an independent authority. The investigating judges, who were often recruited from the ranks of the ex police officers during the first post-war decades, in practice were often acting as the extension of the police and the prosecution. Their actions, and especially their beliefs, were far from the ideas of impartiality and equality before the law, which had been at that time completely rejected and unrecognised.¹¹

8 Art. 241, Par. 2 CPC.

9 With this in view, it seems that little has changed in the understanding of the investigation since the times professor Božidar Marković described while speaking on the biased role of the investigators in Serbian criminal proceedings at the start of the 20th century. Marković so states: ‘By taking upon themselves both the roles of the investigators and prosecutors, as our experience teaches us, the investigators have prevented themselves from seeing in the accused the free citizens whose culpability needs yet to be established by the collection of evidence. On the contrary, as suspects, they are already seen as guilty. That is why they are treated with hostility and all the concern is directed at finding the evidence of the accused’s guilt. (B. Marković, *op.cit.* p. 203.). Although the modern Serbian criminal procedure formally separates the function of the investigation from the function of the prosecution, due to inherited beliefs but also to the aforementioned limitations of the law, the investigating judge has never been fully established as truly impartial.

10 R. Lukić, B. Košutić, *Uvod u pravo*, Belgrade, 1988, p. 191.

11 Even in the foreign theory, it was recognised that the actions of the investigative judges and their duty to establish the truth on what had really transpired had been justified only theoretically. However, in practice, the position of the defence was weakened by the fact that the investigative judge was not impartial and that his true impartiality deprives the defence of evidentiary initiatives, limiting it in the process of evidence collection. (J. Spencer, La preuve, in M. Delmas-Marty, (sous la direction de), *Procédures pénales d’Europe* (Allemagne, Angleterre et pays de Galles, Belgique, France, Italie), Paris, 1995, p. 539, as cited in: G. Ilić, *op. cit.*, p. 121.

All of the above, along with the reliance on the insufficiently differentiated legal solutions, which have never fully resolved the relationship between the preliminary and the main criminal proceedings, has led to serious deviations in practice. In by far the largest number of cases the investigation not only could not have been deemed as fully impartial, but it even could have frequently been seen as unnecessary. The investigative judges, feeling themselves that they represent a pseudo-judicial authority with an insufficiently defined procedural position, with restricted authority that is not sufficiently differentiated from the one the police have, have most commonly limited themselves to repeating the actions and the evidence which have been performed and collected by the police at the preliminary stage of the proceedings. Thus, a specific system has been created which has often been referred to, by many authors, as the 'dressing' of the police evidence in judicial clothing. The investigation has rarely been able to uncover something new in such a way. The investigation has always been and still is the stage of the proceedings at which the investigative judge follows a pattern the police has established, uninventively repeating the actions and 'copying' the evidence which has already been collected by someone else, thus facilitating their use before the court.

All of the aforementioned shortcomings, among which there are those which are not peculiar to the Serbian judiciary but have been registered in other European countries as well, have led, even in France, the founder of this model, to the re-examination of the investigating judge's role, to a decline in the relevance of such a judge and to the entrusting of the public prosecutor with the investigation at this stage.¹² However, these considerable advances have mostly gone unnoticed both in the traditional continental countries and in our local doctrine.

The inquisitorial actions of the court at the main hearing pose an even greater danger than the inquisitorial running of the investigation. At the central stage of the proceedings, when the evidence of the opposing parties should be confronted and when the impartiality of the court has to be at the highest level, the court has been forced to investigate. Its duty to establish the truth in the trial matter combined with the possibility given to the higher court to persistently overturn first instance verdicts if it has not been fully established according to the higher court, has resulted in a new, hidden bias. Under the obligation of the principle of substantial truth, the court is bound by the said principle even at the hearing and even if the prosecutor has failed to offer sufficient arguments compelling the court to investigate and search for any evidence that might exist and thus, unintentionally and in time, and it might be said semi-consciously, takes the prosecutor's side. Therefore, the defence has been assigned another prosecutor, the one who is even more dangerous¹³

Nevertheless, such a situation was completely acceptable under the circumstances of the 'unity of power'. The era in which the impartiality of the courts, the separation of powers and independence were not shared values, provided a favourable climate for the attitude that asserts that the police, the prosecution as well as the court are parts of the same organism, which is there to pun-

12 V. G. Ilić, *op. cit.*, p. 141.

13 'Professor Marković's observations on this topic are again quite vivid, even though he is referring to the start of the 20th century and they clearly demonstrate how the inquisitorial way of thinking which has, regardless of the subsequent amendments to the law, survived to this day. Professor Marković goes on to say: 'However, the main hearing actually does not represent real accusatory proceedings. The public prosecutor, who has been entrusted with the bringing of charges and representing the indictment, is not a separate authority independent of the court, but is actually one of the judges, a member of the court, furthermore, he is the same investigative judge who has led additional investigation and prepared the case for the main hearing... Due to the incompatibility of these two roles, the role of the state prosecutor is reduced to mere appearances... Such a situation in practice causes the presiding judge to actually perform the role of the prosecutor at the main hearing... The main hearing actually comes down to the repetition of everything that has been done in the investigation. All of these are features of the inquisitorial procedure.' (B. Marković, *op.cit.*, p.204.)

ish the culprit before all else. Those who do not recognise this, are either concealing intentionally the reality of the judicial system in Serbia of previous decades, or they are subconsciously embellishing the past.

2. The Truth as an Excuse

Nothing is more dangerous than the concealment of any shortcomings of certain systems by emphasising their allegedly highly set goals. Even the absence of the impartiality of the court in criminal proceedings and essentially discriminatory treatment of the parties involved seems less noticeable and less harmful if it is claimed that, despite all this, the criminal proceedings aim at establishing the truth. The power of this concept, the seeming clarity and undisputable value of it, prevent any challenge of the mechanism for attaining this ideal with any sort of reasonable explanation.¹⁴

However, the alleged goal of establishing the truth, no matter how appealing it might sound, should not be misleading. The truth and the goal to establish the truth were proclaimed by the medieval church courts (trials by ordeals, ordalias), the Catholic Inquisition, the courts of the Nazi Reich as well as numerous other judicial systems that could not possibly be seen as just.¹⁵ Therefore, evoking the truth as the primary goal, historically speaking, can only cause suspicion rather than exhilaration.

In addition, contrary to the first impression which the power of this term may suggest, the establishment of the truth in the criminal proceedings, in terms of the set goals, is more likely to be an exception to the rule. A whole array of restrictions which are put in place, even in the systems in which the establishment of truth is the governing principle, supports this claim.¹⁶

So, for example, even in the inquisitorial system (except in a pure model which is no longer used in the modern legislation), the court may not establish the truth about any events in the past unless the prosecutor initiates it (there has to be an accusatory instrument) or outside the parameters set by the indictment (the indictment binds the court). The court must not use evidence that

14 The truth as the goal of the criminal proceedings was emphasised in German theory of the Criminal Procedure Code and this view was accepted without any serious re-examination by the local specialists in procedure law. So, for example, Schmidt states that all criminal proceedings and verdicts have two goals: to establish the truth and justice. (E. Schmidt, *Lehrkommentar zur Strafprozessordnung und zum GVG*, Teil I, Göttingen, 1952, 29-30, cited in: Z. Jekić, *Dokazi istina u krivičnom postupku*, Belgrade 1989, pp.69-70). In addition, it is not noted by the supporters of this view, especially among local authors, that the establishment of the truth and achieving justice are in certain cases mutually exclusive.

15 The extent to which the ideas of the truth may differ, and therefore may be susceptible to the influence of the dominant belief at a certain period in history, is perhaps best illustrated by the examples of establishing the 'truth' before God's courts. Specifically, the medieval procedure before God's courts included the subjection of the accused to various life-threatening procedures (burning, beating etc). Should the accused endure these procedures and emerge safe and sound and unharmed, it was considered that the accuser's innocence was proven before the God's court. Otherwise, it was considered that the guilt was indisputably proven. Such a position, which was a specific type of the search for the truth, was founded in the underlying belief that God himself was somehow participating in the proceedings, and that God would not allow an innocent man to get hurt and the guilty not be held accountable (see T. Taranovski, *Istorija srpskog prava u Nemanjićkoj državi*, Belgrade, 2002, p. 583). Constitutio Criminalis Carolina which included the use of torture in the proceedings emphasised that the evidentiary procedure is aiming at learning the objective truth. In order to ensure that the admission of the accused given under torture was true, Carolina insisted that the accused should be questioned about the circumstances 'the innocent could not possibly have been familiar with or answered' (Art. 53 and 60) (see V. Bayer, *op cit*, p. 111)

16 This is supported by the extent to which the importance of the truth doctrine has been emphasised in our procedural theory and also the fact that certain authors claimed that the investigation and the establishment of the truth was not in any way restricted in our local criminal proceedings, despite an evidently considerable number of procedural limitations. (see Z. Jekić, *Dokazi istina u krivičnom postupku*, Belgrade 1989, p77)

is not allowed in pursuit of the truth, regardless of how valid it is. The truth is also disregarded in situations in which the court despite of its usefulness cannot present certain evidence (privileged witnesses, persons that cannot be interviewed). Regardless of how useful for the establishment of the real circumstances may be the testimony of a judge, the judge must not be presiding the proceedings if he has the status of a witness. Finally, the truth remains incompletely investigated in acquittals due to insufficient evidence, despite the fact this is rarely mentioned in theory. If it were otherwise, an acquittal would be possible solely when the proceedings determine without a shadow of the doubt that the accused did not commit the crime, which is not the case.¹⁷

The reliance on the substantial (real, essential, 'tangible') truth and the conviction that it can be attained in a certain type of procedure have not only blurred the imperfections of the chosen method, but they in themselves have, on the contrary, had an adverse effect on the impartial approach of the court. The claim that the aim of the proceedings is to establish the truth has significantly contributed to an 'esoteric' view of the judge's task. The task of learning the elusive truth¹⁸ in all cultural and scientific settings has overshadowed the process of dealing with the evidence. The substantial truth doctrine has dethroned the evidence in the criminal procedure realm. Instead of discussing the proposed evidence, the court often joined a dangerous and unfair game of searching for the 'truth' outside and sometimes even despite the proposed evidence. All of this has inevitably passivised the parties involved, which is still the case in domestic courts. But there is more. In the authoritarian society with the unity of power, all of it has led to a court that primarily exhausts the truth in looking for the evidence that supports the claim of one of the sides in the proceedings – the prosecutor's side.

3. The New Procedure Model as a Chance for the Establishment of the Court's Impartiality

If we bear in mind all of the above, the new criminal procedure model introduced by the 2011 Code should be viewed as a systemic attempt to create conditions for more impartial criminal proceedings, primarily the conditions for a more impartial criminal court. During the drafting of the Bill of the said Code, and later in the debate that accompanied its enactment and application, too much attention was paid to the analysis and assessment of particular solutions such as the model of the investigation (prosecutorial instead of judicial etc.). So far at least, there has been no in depth analysis of the fundamental change the Code is trying to bring about in terms

17 The last example represents an important illustration of the measure in which the understanding and the mechanisms of establishing the truth in the inquisitorial model are one-dimensional and accusatory in their nature. The truth about the events is arduously pursued using all the available resources if the direction this takes is towards the establishment of guilt of the accused. However, the establishment of truth is abandoned in a situation in which a different conclusion is starting to form. The innocence of the accused is never completely established, so this is where a completely new terrain of the insufficiency of the evidence of guilt is entered.

18 A discussion of the philosophical aspects of the issue would certainly exceed the topic and set parameters of this paper. It should only be stressed here that the problem arises already with the very term. As Čičovački has pointed out, even while discussing the concepts of 'the truth' and 'truthfulness' we use these words in different ways. Only after that, we can move on to a discussion of the so-called 'agents of truth' (the linguistic entities, reality itself, God...) the attitudes to which evidently have evolved throughout history. Then there are different kinds of truth (common sense, scientific, logical, philosophical...). (see P. Čičovački, *Istina i iluzija: Kant na raskršnici moderne*, Belgrade, 2010, pp. 14-16). Just these few examples are enough to show that this seemingly clear concept, that can be understood by everyone, very soon, as soon as we attempt to analyse it, even if it is done superficially, becomes one of the most complex and layered concepts in modern culture. In this sense, we can agree with Čičovački when he says that 'the concept of truth is so complex and layered that we might never be capable of developing a theory that completely exhausts all of its subtle nuances.' (P. Čičovački, *op.cit.*, p. 18).

of impartiality and equality of the parties involved, which we maintain has been neglected in Serbian society to date.¹⁹

As far as the investigation is concerned the change in the authority in charge of the investigation is much more than just a reshuffle in the investigator's position. Instead of the investigative judge, who acted earlier on behalf of the prosecutor as was already mentioned, attempting what was almost impossible, to remain neutral in the proceedings under such conditions, the public prosecutor is entrusted with the investigation, the authority which should be conducting it as a matter of course anyway. The new legal solution is based on the assumption that the most justifiable solution is the one that the collection of evidence related to the committed criminal offence and the perpetrator should be entrusted to the authority otherwise in charge of this and which will be responsible for the indictment, its successful representation before the court at later stages of the proceedings.

In order to fully ensure the equal treatment of the prosecutor and the defence at the initial stages of the proceedings, the legislator has provided two separate mechanisms. The most important is the introduction of the preliminary hearing judge. This is a new judicial authority which unlike the investigating judge is no longer in charge of running the investigation, but supervises it, ensuring the regularity of the proceedings and the rights of the defendant. The preliminary hearing judge does this now no longer burdened by the task of the collection of evidence that should serve either party to the proceedings. This new procedural position makes it possible for the said judge to fully treat impartially both of the opposing parties while taking into account the inferior position of the accused at this stage of the proceedings.

On the other hand, an additional control mechanism of the public prosecutor is the possibility, albeit restricted, provided to the defence to independently collect evidence in its own favour. The solution which has been unjustly criticised as the attempt to introduce a so-called parallel investigation, in essence represents a mixed approach which is the middle solution between the two extremes.²⁰ Although the public prosecutor is the only one competent to conduct an investigation, the defence is allowed to collect the evidence and other materials independently in order to enable as independent as possible running and directing of the proceedings. Behind this almost indiscernible distinction in terminology, lies a crucial distinction in authority and possible scope of the independent actions. While the prosecution has the authority to undertake certain actions, i.e. directly perform certain evidentiary actions, the defence is allowed only to independently conduct preliminary work in securing the evidence which would be presented later in the investigation or at a later stage. If it holds necessary that a certain evidentiary action should be undertaken during the investigation, the defence must approach the prosecutor with this proposal. Denying or not deciding on such a proposal activates another protective mechanism. The defence whose proposal was not acted on may address the preliminary hearing judge who will in turn, if the proposal is granted, direct the prosecutor to act as requested and set a deadline for this.

19 We completely agree with Beljanski's opinion when it comes to this as he points out the presence of a specific socio-psychological phenomenon that could be described as a lack of culture of impartiality in the local setting, which has certainly been encouraged by the existing legal solutions. (see S. Beljanski et al., *Predgovor uz Zakonik o krivičnom postupku*, Belgrade, 2011, p. 63.)

20 In comparative law, there are two possible solutions on this subject. The German legislator has, for example, transferred all of the former investigative judge's responsibilities to the public prosecutor, thus making the prosecutor's office the only one responsible for conducting the investigation. On the other hand, in Italy, the so-called parallel investigation is allowed and it is undertaken by the prosecution and the defence, which can gather evidence independently.

The new concept of the proceedings has called for the alterations during the indictment stage as well. Instead of the extraordinary review of the indictment on appeal or at the request of the presiding judge of the panel, as was done in the past, the court reviews each submitted indictment *ex officio*. In other words, the transfer of the running of the investigation to the public prosecutor has definitely and fundamentally, rather than just formally, distanced the investigation stage from the main hearing stage in terms of their character, goals and procedural guarantees. The court, up to that point merely a supervisor of the proceedings through the actions of the preliminary hearing judge, becomes the main factor in the main hearing proceedings stage. Considering that the preliminary stage of the proceedings (investigation) is no longer judicial, and therefore it is not possible to fully ensure the equal rights of the parties involved due to the dominant role of the public prosecutor,²¹ before turning the case over to the court stage, it is necessary to assess whether the delivered evidence is sufficient and whether the evidence collection procedure has been adequately followed. The court decides in a mandatory review of the indictment on whether the prosecutor will be allowed to take the person in question before the court. Therefore, the review of the indictment poses an obstacle of sorts to allowing the cases which are insufficiently prepared to proceed to the main hearing stage, in which the prosecutor could indict due to a lack of the critical approach to the obtained results.

However, the most significant change and the biggest step towards reaching the independence and the creation of a genuinely impartial court has been made at the main hearing stage. Fundamental misunderstanding of the more than once proclaimed goal of the new Code in terms of the creation of a truly impartial court, has led to a conclusion by many local specialists in criminal law that it is not only possible but desirable to change the concept of the investigation, without any intervention at the stage of the main hearing. In accordance with such an interpretation, the investigation should be left to the public prosecutor but the main hearing should remain inquisitorial as it has always been.

This is a serious misconception. Such a principle, which, among other things, featured in the failed 2006 Code, would lead to even more unjust proceedings than the ones we have had thus far. By entrusting the public prosecutor with the investigation and keeping the inquisitorial approach of the court at the main hearing, the rights of the defence would be reduced to an unacceptable level. In addition, such a model would condone additional irresponsibility of the public prosecution. The assigned authority (conducting the investigation), would not have been accompanied by an adequate extension of the responsibilities (proving the indictment at the main hearing) so such a hybrid system would result in new procedural mutations.²² Finally, mixing different types of procedures would resemble a situation in which the drivers are required to al-

21 Bearing in mind the new criminal procedure concept, it is more accurate to say that when the investigation is conducted by the public prosecutor it is not possible to talk of adversarial proceedings, nor of the equal rights of the opposing parties. In other words, the public prosecutor cannot be seen as a party to the proceedings, since he is the authority conducting the investigation. The rights of the defendant are primarily protected by means of the procedure for the review of the legality of the investigation which is conducted by the preliminary hearing judge, as an independent judicial authority that is not conducting the investigation. The adversarial proceedings in their full meaning take place only when the main hearing stage is reached, which is now taking a whole new meaning, according to the new concept.

22 In the local procedural theory one of the most vocal proponents of the solution according to which the investigation and the main hearing may have completely different procedural characters is Škulić. According to this author, the issue of the type of investigation is not connected in any way with the issues of the main hearing organisation, so the criminal procedure that includes prosecutorial investigation does not necessarily need to have adversarial structure at the main hearing see M. Škulić, G. Ilić, *Novi Zakonik o krivičnom postupku Srbije: reforma u stilu „jedan korak napred, dva koraka nazad“*, Belgrade, 2012, p. 40.

ternately drive on the left and on the right side of the road, never knowing at which point and based on what rules would their actions be judged as illegal.

The point of this new concept of the main hearing was to create conditions for the utmost impartiality of the court. Instead of an inquisitorial authority that has been in existence until now, the court becomes an independent arbiter according to the new solution, equally 'distant' from both of the opposing parties and disinterested as to the outcome of the proceedings. Such a position enables the court to completely focus on the evidence being presented. Rather than getting lost in the pursuit of the absolute truth about the past events defined in abstract terms, the court is now presented with a clear goal. Its main responsibility is to reach a decision whether the prosecution has offered sufficient evidence that the defendant has committed the offence he is being accused of. It needs to be said this is not about 'assigning points to the evidence' and reducing the court to 'an expert jury', as it is wrongfully inferred by certain authors.²³ The decision on whether the prosecutor has sufficiently succeeded in supporting his case, using legally allowed evidence, while at the same time securing the presumption of innocence and the protection of the defence's interests, is a very complex process. Only those who have never participated in such proceedings and who do not understand the mechanisms or the nature of adversarial proceedings can pass such judgments easily and consider this a simple task. The understanding of the new role of the court relies greatly on the understanding of the basic rules on evidence listed under Article 15 of the Code. According to the adopted solution, the first principle that is emphasised is the assigning of the burden of proof to the prosecution in the criminal proceedings. Although at first glance, it might not seem so, due to the insufficient distinction and equating of the indictment principle and *onus probandi*, it represents another of the significant changes in the local criminal procedure legislation. Specifically, the rule of the burden of proof has not been present in our local criminal procedure, while the fact that non-adversarial *onus probandi* has been in existence in the local procedure has been emphasised in the doctrine itself.²⁴

This is yet another inevitable consequence of the application of the substantial truth doctrine, which due to its nature has been transferring the bulk of the proceedings and responsibility for the evidentiary process into the hands of the court. Thus, the non-adversarial character of the burden of proof which resulted from the substantial truth doctrine has caused the above described confusion with the procedural roles. The prosecutor was the only one authorised to indict, but it was not explicitly required of him to prove such accusations later in the proceedings, while the court had a duty to remain impartial even when it had to act *ex officio* and present the evidence and ensure the establishment of what was not proven or was insufficiently proven, regardless of the fact whether it was in favour or to the detriment of the accused. The accusatory instrument used by the competent prosecutor, therefore, solely represented the necessary pre-requisite for initiating the proceedings, a procedural 'trigger' as it were, whose role has quite often been exhausted in the facilitation of the court to intervene and take over the proceedings aimed at establishing what had really transpired.

23 For instance in M. Škulić, G. Ilić, *op.cit.*, p.36

24 For instance in T. Vasiljević, M. Grubač, Komentar Zakonika o krivičnom postupku, Belgrade, 2002, p. 583.) The cited authors among other things state that 'the burden of proof does not lie formally with the parties involved, but only inasmuch it is caused by the form of the indictment procedure. This is stated even more clearly by Bayer, who stresses that the principle which says that the burden of proof lies with the public prosecutor is not derived from the evidentiary legislation of the criminal proceedings itself, but from the legislation that regulates the public prosecutor's office. (see V. Bayer, *op.cit.*, p. 355)

By transferring the *onus probandi* under Article 15 of the Code into the hands of the prosecutor, the legislator has abandoned the also otherwise suspect role of the court in evidentiary process in those cases where the prosecutor has been passive or has not provided sufficient material. Thus, for the first time in our procedure, just proceedings are provided in which the defence shall no longer dread the occasional ‘doubling’ of the prosecutorial function.²⁵

The full significance of the set rule on the burden of proof can only be understood when viewed in correlation with two other extremely important procedural guarantees stipulated by the Code. These two are the presumption of innocence and the *in dubio pro reo* doctrine. According to the mechanism provided, the accused is protected throughout the proceedings by the explicitly proclaimed presumption of innocence, while the prosecution’s and prosecution’s alone responsibility will be to refute it using the evidence. In these proceedings, there will no longer be any obligation of the court to help the prosecution in any way, even if it is on the grounds of the obligation of establishing the substantial truth. Should there be any doubt whether the prosecution has succeeded in proving its claims, there will be yet another form of protection, now explicitly stated, the rule *in dubio pro reo*.

According to the new concept, the court introduces the evidence at the proposal of the parties involved. The basic dynamics and the parameters of the evidentiary proceedings are determined by the parties now that the inquisitorial model has been abandoned, thus enabling the court to focus on what is its main task at this stage of the process – the impartial deciding on the evidence that has been presented before the court. Presenting the evidence *ex officio*, which has been the norm until now, has been allowed only under extraordinary circumstances, this allows the court in certain cases to clarify some ambiguities and contradictions when it is necessary despite the conducted evidentiary procedure.

However, despite the critics of this solution, who see in the said possibility the inevitable return to the inquisitorial model, this provision, too, should be considered within the basic *onus probandi* doctrine in order to understand it properly. Therefore, the presenting of the evidence *ex officio* should not compensate the deficit in the evidentiary activities and failure of the prosecution. In other words, by invoking this provision, the court could not present the evidence *ex officio* which would lead to the conviction of the accused if the prosecution has not presented such evidence, nor if there is any doubt about the guilt after assessing the prosecution’s evidence portfolio. In such cases, the court should acquit without presenting any additional evidence.

25 Such views have been met with stark criticism by certain authors. Škulić among other things claims: ‘During the public debate on the Bill of the CPC, some of the members of the task force which have participated in the writing of this text have repeatedly stressed that the solutions from the Bill help the overcoming of some sort of a ‘problem’ that is present which comes down to the duty of the court to ‘support’ or ‘uphold’ the indictment, for it is now finally ‘transferred’ to the prosecutor. Later in the text the said author refers to these claims as ‘proposterous allegations’ characterising them even as an admission of the judge and self-incrimination for ‘gross misconduct’ (M. Škulić, G. Ilić, *op.cit.*, 74, fn. 47.). It seems that this is a misunderstanding of the very basic danger the inquisitorial proceedings in combination with the substantial truth doctrine hold. Specifically, Škulić is obviously overlooking the fact that the substantial truth doctrine itself imposes the obligation on the court to establish the guilt of the accused if it deems that there is other evidence and if it finds such evidence, even in cases in which the prosecutor has not independently succeeded in proving the prosecution’s claims. This has been quite common in the practice of our courts thus far, and all of those who actively participate in local trials are familiar with this situation, which has apparently gone fairly unnoticed, at least so far in certain theoretical circles here. On the other hand, in the earlier literature, this issue was recognised. So, for example, Bayer says: ‘As long as the charges have not been successfully proven by the initiative of the prosecutor or the court, the defendant can limit himself to solely denying them, without any disadvantage to himself.’ (underlined by the author) (see V. Bayer, *op.cit.*, p. 355).

The rule on the evidentiary activity of the court is provided in the cases in which it is necessary, in order to ensure an all-round discussion of the subject being proved, to clarify certain contradictions or ambiguities that have appeared after both parties have exhausted the evidence. In such a way, for example, the court could act *ex officio* and establish the authenticity of the documents provided by the parties that stand in contradiction, or examine the witnesses again in order to clarify any inconsistencies in their previous testimonies. The special nature of the said mechanism is reflected in the fact that the court may first order a party to propose any additional evidence in order to clarify the said contradictions or ambiguities. Only if the problem cannot be rectified in such a way either, or if the court reaches a conclusion that this type of order would not serve any purpose, the court may proceed to act independently.

Finally, the inquisitorial approach is abandoned at the appeals stage as well. The rule about the limits of reviewing the first instance verdict, which is now fundamentally different in its concept, is defined to allow the court to review the verdict only in terms of its grounds, contested acts and direction as listed in the appeal. In accordance with its new role, the second instance court no longer has the authority to intervene with regard to the factual and legal conclusions of the first instance court against the will of the parties involved. Just as it is inconceivable for the appellate court to change the first instance verdict of its own accord, when the appeal has not been filed, it is also inconceivable for the court to do so with regard to the aspects that neither party has sought the intervention in, or with regard to the parts of the verdict that are not contested by the appeal and which are deemed accurate.

The only exceptions to this rule are those made in *favorem defensionis*. Both here and in the first instance proceedings, the court is allowed to act *ex officio* in favour of the defence. In addition to the automatic review of the decision on the criminal sanctions on appeal filed in favour of the defendant (an appeal against an erroneous or incomplete finding of fact or criminal code violations, or an appeal that does not contain the contested grounds and reasoning behind it), a new option has been introduced. The defendant may be given a criminal sanction less severe in type or measure even when the appeal has been filed only by the prosecutor to the detriment of the defendant.

4. Conclusion

The new Criminal Procedure Code certainly cannot solve all of the accumulated problems in the Serbian judiciary on its own, and especially not in a short amount of time. However, we are of the opinion that it was an absolutely necessary step on the long road for the liberation of the courts in Serbia and the creation of the conditions for their impartiality to opt for the adversarial proceedings, as was done. The inquisitorial proceedings that have defined modern criminal judiciary in Serbia, have been developed under a social and political model of the 'unity of power' and such proceedings were dangerously and firmly slanted towards the police and prosecution's side and therefore to the executive apparatus. Due to this fact, the defendant could never have expected an equal treatment in the local reality of the proceedings despite a whole series of formal procedural guarantees. On the other hand, it has never been possible to develop the public prosecution's office as a fully functioning and efficient professional authority in such a setting of undefined roles and responsibilities. The new Code provides an opportunity and the pre-requisites for such development.

However, it is clear that it is not going to be easy to go down this road as there is some resistance, primarily by certain proponents of the doctrine. It is unrealistic to expect everything to go smoothly, as is the case with every rise to the power and a call for a change of the acquired habits, which impartial positioning of the court in our local setting certainly represents. The change of the role of courts represents also a break with the authoritarian past but it is also a signal that the separation of the executive and judicial powers is seriously under way. However, it is also a sign that it is time to re-examine the acquired habits as well as abandoning some of them. Finally, it could be a sign that we should re-examine the capabilities of a section of the personnel in the judiciary that might not be a match for such a difficult task and offer this opportunity to those who are ready and capable to do these new tasks. Under such circumstances, it is to be expected that the road leading to the establishment of the new model is going to be an uphill struggle.

Nevertheless, even with the expected difficulties, we have no doubt that over time even the professional circles which have publicly expressed their scepticism and 'concern for the local tradition' will come to see the establishment of the new procedural model as the *conditio sine qua non* for the birth of the new and impartial courts in Serbia, which, if we were to be honest, have never been given a real chance.

Role of the Court in Establishing Facts and new Criminal Procedure Code of the Republic of Serbia

Summary

The subject analysed in this paper is the manner in which the new RS CPC regulates the establishment of facts in criminal proceedings and the place and role of the court in that process. From the perspective of relevance and the scope of subject-matter that is covered, the author gives special attention to analysing three groups of questions. The first one concerns reasons which, as the author sees it, have brought about a change in legislator's attitude towards individual principles of criminal proceedings (officiality, legality, accusatorial and inquisitorial principles, adversary principle, principle of orality and publicity) as reflected in the new RS CPC and the manner in which they were provided for in the text of this Code. The second group of questions relates to how the author views certain solutions from the Code, which, according to his understanding, also represent a form of departure from the truth doctrine in criminal proceedings (above all, in the case of prosecutorial discretion). Finally, the third group, which is the central one, concerns author's analysis of the court's role in the establishment of facts in criminal proceedings as it is provided for in the new CPC and it is represented in relation to the criterion of a course of criminal proceedings.

Concluding comments made in the final part of the paper essentially reflect author's opinion, namely that "Abandoning the discovery of truth doctrine and judicial establishment of facts, which has been one of the fundamental changes in criminal procedure, has not left participants in criminal proceedings, in the first place a defendant, and to a certain extent the injured party, without any legal protection or without a possibility that a court itself might in the end take evidentiary actions and intervene in a body of facts to complete it. This has not in either way

1 Judge of the Belgrade Appellate Court

contested or derogated from the fundamental responsibility and right of the parties, the public prosecutor first and foremost, to take evidentiary actions, but the court has been given an opportunity (even a right) by way of something we could call an exception, to protect and safeguard some other values and rights of participants in criminal proceedings incorporated in the principles of criminal proceedings and standards of modern society.”

Key words: court, truth, main hearing, verdict, defendant, principles, legal remedies, new CPC, prosecutorial discretion, factual situation

There is no doubt that the situation in the criminal justice system of the Republic of Serbia, namely in public prosecutor’s offices and courts of various jurisdictions, has been more than complex for a number of years. What we mean by this is the fact that both prosecutor’s offices and courts have been overloaded with cases, that those cases, as well as proceedings themselves, have become more and more complex, both in terms of their matter and ever increasing volume.

Either limitations have been imposed on standard principles of criminal proceedings (officiality, legality, the accusatorial and inquisitorial principles, adversary proceedings, the principle of orality and publicity) or they have been seriously questioned. The above fact, how criminal courts had been overburdened, urged for those principles to be amended, or more precisely, to be adapted to the existing circumstances, to be limited or to be assigned meanings different from previous ones.

The Criminal Procedure Code (Official Gazette of the RS, no 72/11 – hereinafter: the new CPC) defines in its Article 1 its own scope and lays down that what falls within in are “the rules whose purpose is to ensure that no innocent person is convicted and that a criminal sanction is imposed on a perpetrator of the crime under the conditions stipulated by criminal law and based on lawfully and fairly conducted proceedings.” Provision contained in Article 15 of the new CPC draws on thus defined scope of the Code, or should we better say the purpose of criminal proceedings and its paragraph 2 states that the burden of proof is on the prosecution, after which the Court presents and examines evidence upon motions by the parties (paragraph 3 thereof), while in paragraph 4 of the said Article, it allows the Court certain discretion when it stipulated that “the Court is entitled to order a party to propose additional evidence or by way of an exception, order such evidence to be examined, if it finds that the evidence that has been examined is either contradictory or ambiguous and that taking such an action would be necessary in order for a matter that needs to be proved to be thoroughly heard.”

The role of the court is stipulated in a considerably different manner in the Criminal Procedure Code which is still in force (the 2001 one and later amendments thereto), so Article 17, paragraph 1 of the current Criminal Procedure Code stipulates that “the Court and state authorities participating in criminal proceedings shall truthfully and completely establish the facts which are material to reaching a lawful decision”. Article 2 stipulates that “the Court and state authorities shall with equal attention examine and establish the facts incriminating and exculpating the accused”.

Indisputably, the ever-growing complexity and comprehensiveness of social relationships, both in terms of their quality and quantity, had also resulted in mounting problems in everyday lives and in a need for the justice system to respond in order to resolve the problems that have arisen. A drastically altered catalogue of criminal offences, which a decade or two earlier had barely existed but at present were at the top of most frequent or not rarely most complicated crimes and proceedings, such as drug-related offences, financial crimes, computer crime, traffic-related offences, and alike, resulted in the overload of state authorities which dealt with such criminal offences and handled proceedings related to them.

State's attempt to react to an increase in a number of criminal proceedings by enhancing and expanding capacity of the judiciary – by increasing the number of prosecutors, judges, and other employees, as well as by expanding and enlarging its material resources and technical equipment, gave some, albeit limited results since it had become obvious that over an extended period of time such reactions would yield unpromising results because an adequate reaction to an increased number of criminal proceedings was not only to increase the number of judges and prosecutors. In consequence of such an automatic reaction, those authorities would have enormously increased in number and hypertrophied and positive results would have been rather modest. Apart from this, the increased number of proceedings had caused that on average they lasted longer, the outcome of which was, in addition to still limited number of its personnel and capacities, a loss of trust in the criminal justice system and the legal system in general.

Therefore, the issue called for a completely different approach and an essential modification of criminal procedure in general if the goal was to set up a viable and efficient system of criminal justice, which would additionally strengthen the trust in the justice system. In other words, this meant that the State, i.e. its relevant authorities, were supposed to reorganise criminal procedure which had thus far been organised based on the mixed inquisitorial-accusatorial model so that the balance would be tilted in favour of the accusatorial or adversarial procedure, with significantly changed roles of the court and the parties. The goal was and remained the same, more efficient criminal proceedings, which must not result in their legality or the lawfulness of decisions being questioned or in the rights of participants being infringed on, but in additional strengthening of the rights and freedoms of participants in criminal proceedings and promoting compliance with international criminal law.

If we put it differently, it entailed the abandonment of the previous model of the justice system, in which the public and common interest took certain precedence over the individual and private one, which notably increased the authority of the court in relation to the authority of the parties. The consequence was that in former proceedings courts almost always examined certain evidence *ex officio* and facts were established even without motions from the parties, even when it was obvious that one of the parties opposed to such an initiative of the court.

Abandoning such a model of criminal procedure, in which substantial truth (or only the truth) is pursued and in which courts were bound to completely ascertain the facts within the scope of charges and independently of evidentiary motions by the parties, would lead to introducing a different model of criminal procedure. A path was embarked on towards a model of criminal procedure in which, tentatively speaking, the roles of courts, prosecution and defendants, and even of the injured party (a victim) had more weight, and the court's role and task was to position itself differently, so instead of being a "principal and an executive" in charge of the fate of the

entire proceedings, it should become some kind of a moderator, a supervisor, or the one who articulates opinions of the parties, naturally in keeping with the law.

A change of course took place, towards defendants “making a contribution” to an expeditious completion of criminal proceedings, which resulted in the introduction of plea bargains or plea agreements. A defendant, who may expect rightfully and with certainty that some harm might come to him in criminal proceedings brought against him, such as to be convicted and punished, was given an opportunity to cooperate with relevant authorities in those criminal proceedings and avoid the greater evil, or at least to hope for the lesser one. At the same time, this meant that the State or the court were divested of their powers, until then unquestionable, to punish defendants since a plea bargain between the state and a defendant is in fact an agreement made between them as a result of giving in of both sides. Thereby, some of the sacred principles of criminal proceedings, such as legality and discovery of truth, were derogated from to a certain extent.

As mentioned earlier, general trends in modern society led to, among other things, an increased number of criminal offences and thereby to a larger number of criminal trials before courts. Consistent application of the law and insistence that each offender should be prosecuted for each criminal offence, which is the foundation of any modern state adhering to the rule of law, has apart from its legal and philosophical grounds some not so positive consequences, such as a large number of criminal proceedings, a large number of defendants, and expensive and ineffective authorities. It was almost inevitable to reach for solutions that would make such a situation less burdensome. That is how it happened that in certain cases the authorities can on grounds of prosecutorial discretion “give in” or step back and not initiate or abandon prosecution. A possibility has been provided for public prosecutor’s offices not to prosecute under certain conditions, with (as a rule) consent from the injured party and not so seldom in compliance with a series of prerequisites which must be met in order that prosecution is brought, or more precisely that the principle of prosecutorial discretion is applied instead of the principles of legality and discovery of truth. Such a concession of the state’s and self-limiting its right to punish were brought about in the first place by the increased number of criminal proceedings and a need for lighting courts’ heavy caseload and for enabling them to pay more and due attention to the rest of more important and complex cases while taking into account a need for greater involvement of injured parties in criminal proceedings, for acknowledging their opinions, wishes and beliefs. Naturally, authorities are obliged to give more attention to cases in which such opportunities are taken in order not to cause frustration, by “generously” renouncing its monopoly over prosecution and punishment, among injured parties and the public due to such concessions towards defendants and raise doubts about legitimacy of such actions and create distrust of the justice system in general. A similar reaction might be brought as well by an uneven and non-transparent employment of the institute of abandoning criminal prosecution, or more precisely by making indiscriminate and not principled choices and taking the same approach towards how that institute is treated. In any case, the application of the principle of prosecutorial discretion is undoubtedly contrary to the discovery of truth doctrine and a complete and accurate finding of facts in criminal proceedings.

Even though the institutes mentioned above have not been introduced for the first time in the new CPC but have been in use for several years in the existing CPC, admittedly in somewhat different form, we are still lacking both comprehensive data and a serious analysis of their application, which would be a prerequisite for potential criticism or approval, and constructive

proposals concerning their further implementation or necessary changes. However, when criticising the idea that the discovery of truth doctrine should be abandoned and when insisting on a consistent implementation of that doctrine, which by all means is legitimate and has grounds in general principles of every civilized and modern society, which is also a just society, one should bear in mind the idea of effective implementation of that principle and of devising a different but equally effective replacement mechanism which would comparably preserve the functions of a state adhering to the rule of law and rule of law in general.

A question arises: has the new CPC, by which an adversarial model of criminal procedure has been established, actually devaluated completely the discovery of truth doctrine in criminal proceedings and the truth, as an “unnecessary luxury,” has been, to put it vividly, expelled from the courtroom. More precisely, have the authorities and to which extent still remained interested in establishing substantive truth so that the guilty ones would not stay unpunished and that the innocent ones could not be punished. Have the authorities and courts completely and irreversibly been denied any possibility of ascertaining the truth by giving public prosecution and the defence a possibility to influence the quantity and quality of the facts to be established in criminal proceedings by their own actions, evidentiary motions and statements? Is the starting point of those who criticize such a legislative solution (which is naturally a legitimate one) that in such a system rich defendants would fare better or that those who are also known as “criminals of affluence” and who undoubtedly and usually hold better positions in the society would be privileged due to such a concept of criminal proceedings if they happen to be persons of interest to it? Are we only a step away from qualifying it as a “class code” which would protect and preserve “class injustice”? How correct is the proposition that by eliminating the truth doctrine from criminal proceedings we will also wipe out morality, law, and justice? At any rate, how realistic and rational are reasons for maintaining that establishment of truth is the ultimate principle and purpose of criminal proceedings based on previous experiences and according to existing legislative solutions as well as solutions and experiences of comparative law?

Without intending to elaborate on the issue of truth in criminal proceedings, I would like to mention for the purpose of this paper that truth is never experienced, nor can it in any case be experienced as undeniably objective and substantial. The goal of criminal proceedings is to establish facts, to which some theorists refer to as “stark facts”. What poses a problem is an objection that when we establish such facts there are always subjective elements involved – firstly, the source of information about facts (e.g. when witnesses, who are most common media probandi, as eyewitnesses recount and describe an identical incident differently) and then, the one who decides on and assesses such evidence is also subjective (and he himself is contingent on and limited by his abilities, beliefs, and opinions). The consequence of all that is that unfortunately, truth or reality cannot be established using the language of numbers, formulas or any mathematical or other scientific method, which would actually be the only unquestionable and correct way to establish the truth.

Insistence on substantive truth, which can be established in an “objective way” in trial proceedings, apart from being a noble and honourable intention and aspiration of the legislator and behind which as a rule lie great mental and not seldom physical exertion of the court to attain it, has often been undercut by the results of evidentiary proceedings and findings of the court based on facts ascertained in the process. This is specifically evident when e.g. evaluating results of expert witness findings (most often used as evidence), which as a rule are based on scientific,

professional, and empirical principles, often supported by mathematics. And yet, not rarely do we encounter situations (naturally, this refers to criminal proceedings conducted under the current CPC and its application) in which the court, either acting *ex officio* or granting appeals and objections of parties, decides to have new expert evaluation carried out, colloquially known as additional review of expert findings. Thus, something that has been mathematically stated and set in numbers, which would imply that such facts are objective and substantially true, is called into doubt and objected to, and often there are contrary conclusions drawn about reliability and accuracy of the facts stated in such findings and opinions. This is only an example which can show how pressing the issue of truth and accurate and complete finding of facts is a very ambitious and unattainable goal, while the truth being searched for and established is a relative one, the judicial truth. Also, concepts are used in criminal proceedings, such as being convinced, manifestness, and certainty, which, no dilemma about it, are psychological categories that provide a certain rational basis, thereby in fact strengthening the results and findings of the court in criminal proceedings. All of this indicates that the truth doctrine in criminal proceedings is based on fragile grounds (under the current CPC) and leads to a conclusion that terms of Article 17 of the existing CPC and the duty of both the court and state authorities participating in criminal proceedings to truthfully and completely establish facts material to reaching a lawful decision fundamentally represent a declarative opinion, which conceptually completes the structure of the existing CPC and provides a formal guarantee without having any truly valuable results.

It would be interesting to analyse court cases being or having been tried under the current CPC in which appellate courts “criticised” first-instance courts for not taking evidentiary actions and failing to establish factual situations and complete the evidence without motions from the parties. More precisely, it would be interesting to find out the share of such cases in the total number of cases appealed. I am convinced that it is a truly small number, regardless of the fact that such an opinion of an appellate court, naturally in instances provided for by the law, would be in line with the discovery of truth doctrine. Insistence on “immorality” and “lack of ethics” of the legislator for eliminating the discovery of truth doctrine means nothing more (as claimed by those who criticise the new CPC) than returning to the existing situation, which undoubtedly needed to change. Such as the previous case-law of courts and prosecutor’s offices was analysed and judged, which resulted in legislative changes in criminal procedure as well as in the change of focus and its shift from the judicial side to the side of the prosecution and the defence concerning evidentiary actions and responsibility for the outcome of the proceedings, so will the future case-law show if taking such steps was correct and justifiable or not.

Although some other papers will specifically cover the subject of preliminary investigation, I find it necessary to mention that it was imperative to change the previous model of judicial investigation. Namely, jurisprudence has proved that the position of an investigating judge was turning into that of a “registrar” of evidence which was obtained by the police or (more frequently) on the initiative of a public prosecutor or (uncommonly) on his own initiative or upon motions by the defence as early as in pre-trial proceedings, which questioned his legal position of an impartial and unbiased participant. That is how an impression was formed that courts were “in charge of” and responsible for a “positive outcome” of preliminary investigation, which meant that they were obliged to gather enough evidence so that proceedings could be continued by bringing an indictment. By placing investigation in the hands of public prosecutors greater responsibility and influence were given to them with regard to the outcome of preliminary investigation and at that stage of proceedings the court has the role of a supervisor who ensures that prosecutors act in a

lawful manner upon objections from the opposing party (a suspect), thereby fulfilling the function of someone who protects the rights of suspects or defendants. In the same manner, although not differently in terms of its essence or concept, the role of presiding judge or judge sitting alone at the main hearing is defined. Namely, the current CPC provides, as after all does the new one, that all the evidence on which a court's verdict is based should in principle be examined and presented at the main hearing. Naturally, what is important is the order in which evidence is examined (to which special attention is given in the new CPC).

It is not rare that examination of a certain piece of evidence or lack thereof is tremendously important for establishing if a decisive fact exists or not, which later on (in case of the current CPC) becomes a ground for appealing a first-instance verdict, either on account of substantive violation of criminal procedure referred to in item 11, paragraph 1, Article 368 of the CPC or failure to provide grounds for decisive facts or court's failure to completely and correctly establish the factual situation, which constitutes grounds for appeal when contesting first-instance verdicts for erroneous or incomplete finding of fact referred to in Article 370 of the current CPC.

The main hearing represents a reliable basis for establishing such a factual situation and an opportunity to hear thoroughly all the facts relevant to reaching a lawful verdict in the future. Unquestionably, in addition to an indisputably important role played by the parties at the main hearing – public prosecutor, defendant, his attorney, and other participants in the proceedings, such as witnesses, expert witnesses, and even the public, the key role in criminal proceedings according to the previous CPC was occupied by a presiding judge or a judge sitting alone. Great authority given to him under the current CPC with regard to the preliminary and main hearing stages and conduct thereof, which has been even greater until recently (e.g. concerning the order in which participants in criminal proceedings were questioned), has put the presiding judge in a dominant position, not only as a key figure in the courtroom, but as the most important decision-maker when it comes to taking evidentiary actions.

The result of legislator's insistence (in the current CPC) on the duty of the court – thus, of a presiding judge or a judge sitting alone to truthfully and completely establish facts material to rendering a decision is that at the very beginning of the proceedings, a trial judge has to have some kind of idea, an initial version of, or an attitude towards an incident which is the subject-matter of a trial, but which will more often than not influence him with regard to evidentiary actions so that he will conduct the main hearing and establish facts and examine evidence in order to support his version or attitude, which sometimes greatly differs from that of the parties and potentially to someone's disadvantage.

Changes already made to the current CPC, and especially those to the new CPC in which a position of the presiding judge and a judge sitting alone is laid down quite differently both with regard to actions taken in the preparatory stage and to conduct thereof, can be interpreted with regard to evidentiary actions not only as legislator's intent to introduce new accusatorial elements to the main hearing, but as his aspiration towards increasing objectivity of the a trier of fact, which must manifest itself both substantially and formally.

Namely, insistence of the professional and general public, supported by an array of international conventions, that the court, in addition to a reasonable request that it should be objective and impartial, should also look and act that way, is not only an empty phrase. Participants in criminal

proceedings – the parties and everybody else, including the public, should get an impression that the court is proceeding as an independent and impartial adjudicator. When a court reaches and delivers its verdict at the end of a hearing, it should be objective and lawful and must not leave any room for doubting the impartiality and objectivity of the court with regard to how it was reached. The fact that a presiding judge *ex officio* presented and examined more items of evidence at a main hearing than was proposed by a public prosecutor, based on which it was established and proved beyond a doubt that a defendant had committed a crime with which he was charged, does not question the legality of his decision, but may provoke the question: did he, by doing so, undermine the impression of being an independent adjudicator between two opposing sides. Naturally, a similar impression could be formed in a situation involving identical actions with regard to the defence and subsequently rendered a not-guilty verdict.

As regards the establishment of facts at the main hearing, experience suggests that judges presiding over hearings most commonly grant evidentiary motions by the parties. It also suggests that there are relatively frequent situations in which judges presiding over hearings order *ex officio* that evidence be presented and examined. If we interpret these actions taken by presiding judges, we may conclude that in terms of court actions as they are laid down in the current CPC, they are in accordance with the discovery of truth doctrine or the inquisitorial principle. Another issue is why courts so frequently exercise their right and take up opportunities to present and examine certain items of evidence even without a motion by the parties. Experience suggests that there have not been cases in which parties objected to the court for examining certain evidence even without their motion, nor would such evidentiary actions of the court and results thereof be subject to appeal against a verdict, nor would any appellate court acknowledge something like that as an omission or illegality.

In my opinion, the basic reason for which courts quite frequently take their opportunity to examine evidence *ex officio* lies in the fact that parties are uninvolved and unprepared to participate in a trial in an adequate and appropriate way. Namely, we can accept as convincing a conclusion that presiding judges and judges sitting alone are the best prepared and most informed participants in criminal proceedings with regard to factual situations and potential legal issues connected with them. It is not uncommon that parties are not so well prepared for main hearings, so they are “invisible” and inactive there, taking as fewer evidentiary actions as possible or even not having any opinions regarding evidentiary motions of the opposing party. Sometimes there are even intentional omissions to offer a certain exhibit into evidence so that an unestablished decisive fact would constitute grounds for an appeal against a verdict. Although unethical and unprofessional, the last instance can occur sometimes, as a rule when interests of one of the parties lie in longer-lasting criminal proceedings, either because statute of limitation may run out on prosecution or because more time would pass from the commission of a crime, which, according to established practice and as a rule could have positive effects on the type and duration of a criminal sanction. Facts cited in appeals are rarely decisive ones and more frequently circumstantial evidence or supporting facts on which presentation appellants insist exaggerating their importance.

Article 370, paragraph 2 of the current CPC provides that grounds for appeal against a verdict on account of incomplete finding of fact exist even in cases when new facts and evidence point to it. As a rule, when any new evidence is stated, along with its grounds and substantiation as required under Article 366, paragraph 4 of the current CPC, which only requires that an appellant

states reasons for failing to propose it earlier, it will lead to a contested verdict being overturned or a hearing before a second-instance court being opened.

The new CPC has cut down and reduced scope for contesting verdicts on appeals by defining that what constitutes an incomplete finding of fact is when a court “has failed to establish a decisive fact subject to substantiation” (Article 440, paragraph 2 of the new CPC). Reducing in this way incomplete finding of facts to only decisive facts provides scope for different application and interpretation of the new CPC, along with a restricted and reduced range of possibilities for proposing new evidence and facts on appeal and simultaneously pressing parties to take as many as possible evidentiary actions in first-instance proceedings.

If we return to the role a presiding judge has at a hearing as laid down in the current CPC, experience suggests that one of the most common reasons for which facts are erroneously or incompletely established is that participants are not asked adequate questions during examination. This implies that when a person is being questioned, there is a failure to ask him relevant or more correctly substantive questions. This failure is not a result of not allowing or prohibiting a question or its answer, but it is simply a matter of an omission or an oversight due to which a substantive or a pertinent question was not asked. An uncommon consequence of this would be a failure of the court to complete the body of facts accurately and in full, resulting in an appropriate reaction of an appellate court.

In parallel with a different model of criminal procedure being introduced, the new CPC also provides for a different method of questioning and examining, adapted to the principles of adversary procedure. This refers in the first place to the order of questioning and priority to ask questions is given to the party that proposed a particular witness, expert witness, or a professional, while in a case of defendant, questions are first asked by his defence counsel, then by the prosecutor, and finally by the bench.

Naturally, more important that this is the introduction of yet another specific quality of the adversarial procedure – cross-examination. Cross-examination will follow after direct examination of witnesses, essentially identical to previous manner of examination in which witnesses are asked to state what they know about a case. At this point, witnesses may not be asked leading questions or misled. At a later stage, on cross-examination, witnesses may be asked leading questions. Undoubtedly, practice will provide answers to most questions and solutions to dilemmas that will arise when this new method of questioning has begun to be used. A primary goal of such an examination conducted by the party opposing to the one who proposed that a certain witness be examined is to discredit or to undermine the factual (or actual) meaning of his direct testimony because he is believed to be unfavourable to the party conducting cross-examination. A prerequisite for any examination, be it direct and especially cross and redirect (for which a presiding judge must give his permission), is to be well acquainted with the case, previous witness statements, and to analyse well what can be expected of such a testimony and answers given during cross-examination. This type of examination is also called “adversarial examination”, which is why a presiding judge has a heavy responsibility of allowing questions that are leading or unpleasant for a witness, yet without allowing that he is needlessly disturbed or exposed to stress if he finds that such a manner of examination is not aimed at establishing the facts but instead at nothing more than playing to the gallery.

Undoubtedly there will be failures to adapt to these new methods of questioning, at least when the new CPC is begun to be used, which will result in a situation in which parties, through inactivity, will tacitly place their trust in the hands of a presiding judge for to ask questions and embark on the establishment or clarification of facts.

Some of the objections to the new CPC are about the complete wiping out of the truth doctrine from criminal proceedings. Naturally, the role of the court under the new CPC is significantly different from the role it used to have. We have already discussed how current legislative solutions have charged courts with the duties concerning burden of proof, evidentiary actions, and accurate and complete finding of facts, all for the purpose of searching for truth, which more often than no has come down to formalistic, shallow, and pretentious invocation of the truth as the ultimate principle, without any real foundation in the facts.

The new CPC, notwithstanding it is lacking in this principled duty, has still not limited the court's task by evidentiary actions and motions by the parties and it does not come down to a presiding judge passively observing a "duel" taking place in the courtroom and quietly "assigning points" for himself after every "round" – examination of a witness, an expert witness, judging who has done better.

Courts will be entitled to issue orders to the parties telling them to propose additional evidence and a court may, by way of an exception, order that such evidence be presented if it finds that the evidence that has already been presented is either contradictory or ambiguous and that taking such an action would be necessary in order for a matter that needs to be proved to be thoroughly heard (Article 15, para. 4 of the new CPC). Naturally, the key issue is the moment at which the court chooses to exercise its powers. Stipulations covering contradictory or ambiguous evidence pertain to situations in which a certain number of items of evidence have been presented which on their own or when compared to other items of evidence are such as defined by the CPC.

More important, and it is my belief more common than the previous situation is the question as why it is necessary for a court to take evidentiary actions. Undoubtedly, such wording of the Code will give courts justification for making decisions to present pieces of evidence on their own initiative in order for their finding of fact to be more complete. Such cases can and should be understood in the manner mentioned above, even more so when one bears in mind that the new CPC provides for a preparatory hearing as one of the stages at the main hearing, at which "parties shall state their positions with regard to the charges, grounds shall be given for evidence to be presented at the main hearing and new evidence shall be offered, factual and legal issues that will be subject to discussion at the main hearing shall be defined" (Article 345, para. 1 of the CPC). Article 350, para. 2 of the same Code provides that "presiding judge is entitled to order that new evidence be obtained for the main hearing, even without a motion from the parties, the defence attorney or the injured party" (Article 15 para. 4 of the CPC).

As well, a similar provision is stipulated in Article 356, para. 3 of the CPC, and it concerns the proposition of evidence for the main hearing before which there was no preparatory hearing.

Considering that it is the very beginning of the main hearing, when actual presentation of evidence and establishment of facts have not yet started and considering that it is known that a factual basis for a verdict is evidence presented at the main hearing (Article 419, para. 1 of the

Code), then we are free to accept the opinion that evidentiary actions of the presiding judge (and thus of the court), to which he is entitled not only during evidentiary proceedings but at its beginning as well, when evidence has not yet been presented or evaluated, are significant and may not be regarded as supplementary or unimportant. As previously stated, this basically subsidiary activity of the court, in terms of its priority and order of activities, will apply only as an exception and it should not become a rule. It concerns legislator's intent to instruct and motivate primarily prosecutors to become more involved in direct gathering of evidence as their primary function by considerably reducing a scope of court's evidentiary actions. Jurisprudence will prove the extent to which these new positions of the courts and parties have been implemented in a proper and lawful manner. Certainly, courts should not order presentation of evidence which would ascertain the existence of decisive facts and which would lead to a guilty verdict. It should rather be a matter of filling up gaps in findings of fact when the body of facts has already been relatively rounded off and by no means a matter of presentation of new evidence without previously having a footing in offered evidence.

In criminal theory and practice decisive facts are those which provide a basis for direct application of the law (some theorists also refer to these facts as legally relevant facts). A factual situation is actually a set of decisive facts, which represent elements of a crime on the basis of which law is applied. In addition to decisive facts, facts that can contribute to the establishment of a decisive fact are also ascertained in the proceedings, such as those which serve to verify if a decisive fact that has already been established is authentic and accurate, and they are also called confirmatory facts, and facts used to establish another decisive fact, which are called circumstantial evidence. Confirmatory facts and circumstantial evidence contribute to the establishment of decisive facts or factual situations, and they are called relevant facts. These facts are also subject to establishment /of a factual situation/.

It is imperative that these relevant facts are ascertained when there is no evidence based on which decisive evidence can be directly ascertained, in which case those relevant facts are material to the establishment of decisive facts.

I am convinced that courts will, by exercising their right to take evidentiary actions as an exception rather than as a rule, focus primarily on ascertaining relevant facts, namely circumstantial evidence and probative facts, which they will use in order to try to establish if some decisive facts or facts which are considered to be elements of a crime exist or not.

Unquestionably, each law is a reflection of how legislator's ideas and opinions are implemented as rules when he decides to regulate certain social relationships. In this process, the legislator considers not only the current state of society and economy in general, the situation in that segment of society and the country which is being regulated by the law, /social/ environment, political opinions and values to be safeguarded and promoted, but as well the existing capacities and actual abilities of those who should enforce a certain law. In making laws, both this Criminal Procedure Code and the previous ones, the legislator was guided by some general principles which represented either fostering or protection of certain social values and interests. It is not uncommon that those social values and interests are conflicted, which in addition to the fact that authorities in charge of criminal proceedings and legal and technical means are divided and ambivalent with regard to those values results in departures from and exceptions to proclaimed principles. Thus, in cases of previous codes that used to govern criminal procedure, the legislator

also held to some basic principles of criminal procedure and created laws which among others principles proclaimed the discovery of truth doctrine, binding both parties and other state authorities participating in criminal proceedings, in particular courts, to truthfully and completely establish the facts material to reaching a lawful decision. These laws also had numerous exceptions to this doctrine and their purpose was to protect some other particular interests, values and legal principals. Even then the legislator was aware that searching for truth and establishment of an accurate and complete factual situation, although one of the most important goals of criminal procedure, was not its only goal.

Some other goals and values of the legal and political system of a country and society are achieved and fostered by initiating and conducting criminal proceedings. Thus, the previous criminal procedure codes also contained (since they were necessary) concessions and compromises with regard to various goals intended to be attained. For the purpose of this paper, I would like to enumerate only some exceptions to the discovery of truth doctrine and thus the ways in which court's right and duty to completely and truthfully establish a factual situation were derogated from (as is in any case stated in the current CPC).

For instance, those exceptions refer to the protection of defendant's rights in criminal proceedings – a defendant, who is basically the central figure of criminal proceedings and certainly the best source of information about facts, is granted a right and an opportunity to plead his right to silence or to have his defence based on not telling the truth tolerated. Such protection of defendant's rights, by which possibilities for establishing accurate and complete facts are limited, also includes a prohibition of questioning a defence counsel as a witness about facts his client told him, prohibition of *reformatio in peius*, the fact that a court may not exceed charges, meaning that it may not establish facts exceeding the scope of an accusatory instrument. There are also exceptions laid down in order to safeguard the rights of other participants in criminal proceedings, e.g. privileged witnesses, using prosecutorial discretion, immunity, complying with statute of limitations on prosecution, etc., which describe a good deal of those situations in which courts are, even under the new CPC, placed in the same position as the parties which are supposed to take initiative with regard to evidence, namely, possibilities of completely and accurately establishing a factual situation have been reduced.

CONCLUSION

Abandoning the discovery of truth doctrine and judicial establishment of facts, which has been one of the fundamental changes in criminal procedure, has not left participants in criminal proceedings, in the first place a defendant, and to a certain extent the injured party, without any legal protection or without a possibility that a court itself might in the end take evidentiary actions and intervene in a body of facts to complete it. This has not in either way contested or derogated from the fundamental responsibility and right of the parties, the public prosecutor first and foremost, to take evidentiary actions, but the court has been given an opportunity (even a right) by way of something we could call an exception, to protect and safeguard some other values and rights of participants in criminal proceedings incorporated in the principles of criminal proceedings and standards of modern society.

The Principle of Equality of Arms in The Context of the Right to Defence (Regional Comparative Review)

Summary

The author proceeds in this paper from the fact that the broader aspect of the concept of equality of arms constitutes a defendant's right to a defence, and that the postulate of the procedural equality of the defendant and the prosecutor is affirmed fully and comprehensively particularly in the defendant's right to a defence. In fact, the premise from which the author proceeds is that the principle of equality of arms is a constituent element of the principle of a fair trial as the only framework within which it is possible to affect a successful defence of a defendant in criminal proceedings. The author also states that the principle of equality of arms necessarily implies the existence of a balance of procedural rights which provides for the parties equal presentation, representation and exercise of their interests in criminal proceedings. He stresses that the principle of equality of arms should be understood as a 'functional principle', according to which participants in criminal proceedings must have equal opportunities to affect its course and outcome, in which process the effective supremacy of the prosecutor over the defendant must be compensated for by increased rights for the defence. The author concludes by stressing that the relevant Croatian legislation, but also that of Bosnia and Herzegovina and Serbia, complies with universally accepted international legal standards and the good practice of high domestic and international courts, although, in his words, a more thorough assessment would require a more comprehensive and in-depth comparative analysis.

Keywords: right to a defence, criminal proceedings, equality of arms, equality of the parties

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INTRODUCTORY NOTES

The concept and contents of the right of the defence

1. The right of the defence in criminal proceedings consists of the procedural activities of the defendant and his/her defence counsel aimed at establishing facts which favour the defendant, the application of legal regulations in *favorem defensionis*, and partial or full refutation of the charges, all with the aim of achieving a court decision which is the most favourable possible for the defendant.² As regards the contents, the defence consists of numerous individual rights of the defendant allowing him the successful realisation of the defence function. The right of the defence is a defendant's most important right, and as such exists as one of the fundamental human rights guaranteed by Article 6 § 3.c of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), under which everyone charged with a criminal offence has the right "to defend himself in person or through legal assistance of his own choosing". This provision has been taken up by the criminal law system of the Republic of Croatia. Under Article 29 § 2 item 4 of the Constitution of the Republic of Croatia (Constitution of Croatia),³ where there exists suspicion or an indictment in connection with a criminal offence a suspect, an accused or a defendant has the right to "defend himself, or together with a defence counsel of his own choice (...)". Under Article 5 § 1 of the Criminal Procedure Code of the Republic of Croatia (CPC/Croatia)⁴ "a defendant has the right to defend himself, or with the professional assistance of a defence counsel he selects from the ranks of lawyers". It proceeds from the foregoing that the right to defence in criminal proceedings is an international, constitutional and legal right of a person suspected of or indicted in connection with a criminal offence, and as such one of the most important fundamental human rights.

2. Although it is difficult to find a more precise definition of the concept of the right to defence in the practice of the ECHR, the provisions of Article 6 §§ 3.a to 3.e nevertheless contain a catalogue of individual rights which constitute "minimal rights of the defence" and which determine the scope and contents of that right of the defendant. A similar catalogue of defendants' rights exists in Article 29 § 2 of the Constitution of Croatia, set out in detail, with certain new rights, in Article 64 § 1 of the CPC/Croatia. All the rights making up the 'minimal rights of the defence' seen together are a constituent element of the right to a 'fair trial' in criminal proceedings. They make up the broader aspect of the right to a fair trial, which besides the right to a defence also contains other individual and specific rights, such as the right to the equality of parties in criminal proceedings – the right to 'equality of arms'. The European Court of Human Rights (ECtHR) frequently defines those rights as 'rights to a full and comprehensive defence'. A full, effective and efficient defence of a defendant can only be realised in fairly executed proceedings, because only the fair examination of a criminal case, with full implementation and observance of the adversarial principle and the principle of equality of arms, can guarantee the successful challenge of an indictment, and thereby a fair trial.⁵

2 Usp. Pavišić, B., Kazneno postupovno pravo, Rijeka, 2011, p., 113., Sijerčić Čolić, H., Krivično procesno pravo, knjiga I, Sarajevo, 2008, p. 222.

3 Constitution of the Republic of Croatia, Constitutional Court of the RoC, Zagreb, 2011.

4 Criminal Procedure Code, Narodne novine, Nos. 152/08, 76/09, 80/11, 121/11.

5 Drenški Lasan - J. Novak, - L. Valković, Pravni i praktični problemi dobre obrane okrivljenika, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, 2/2009, pp. 521-541.

2. The general aspects of the right to a fair trial

1. The concept of the right to a fair trial first appeared in English law. The *Magna Charta Libertatum*, dating from 1215, contained certain guarantees for the protection of the nobility from the arbitrariness of the king during court proceedings.⁶ The document introduced into English law the concept of the 'rule of law', which implied 'procedural equality' between an individual and the state authorities.⁷ In essence, that procedural equality means the equality of arms between the parties in proceedings.⁸ Other historical documents contained provisions on the protection of fundamental freedoms, for example the Petition of Rights, dating from 1628, the Habeas Corpus Act, from 1679,⁹ and others. In the systems of the Anglo-Saxon legal tradition the right to a trial became a constituent element of the concept of the rule of law, the concept of a fair trial¹⁰ and the concept of due process.¹¹ The legal standards of a 'fair trial' in the area of protecting fundamental human rights and liberties originating in the Anglo-Saxon legal tradition affected much more than other international documents (e.g. the 1789 French Declaration on the Rights of Man and of the Citizen) the authors of the ECHR, later also the practice of the ECtHR.

2. In its practice the ECtHR¹² proclaimed the principle of equality of arms as one of the fundamental elements of the Convention's right to a fair trial, for which reason this principle is interpreted in the broader context of the principle of a fair trial.¹³ In its essence equality of arms characterises the heritage of the adversarial model of procedure, with strict observance of the equality of the opposing parties.¹⁴ According to that concept, 'finding the truth' in every criminal proceedings is achieved better by means of a contest between the two parties.¹⁵ Nevertheless, the meaning of the principle of equality of arms should be determined differently in criminal proceedings which belong to the Anglo-Saxon legal tradition from criminal proceedings of European continental law, which belong to the Roman and Germanic legal tradition, due to differences in interpreting the word 'process' (process or trial) and differences between the constituent elements of the types of criminal proceedings. In the practice of the ECtHR, the principle of equality of arms, like the principle of a fair trial, is inspired by the Anglo-Saxon legal tradition.¹⁶

3. The right to a fair trial in criminal proceedings is a set of guarantees the legislator provides to suspects and defendants in criminal cases. The right includes procedural rights, aimed at providing the parties with equal rights and opportunities to realise their interests in criminal proceed-

6 Although the concept of 'fair trial' did not exist as such in the text of the *Magna Charta Libertatum* (1215), its item 29 nevertheless contained the provision that the king should deny to no person a right or justice that belongs to that person, and a guarantee that no one shall be deprived of liberty, except based on a lawful decision of his peers or based on the law of the land: Ivičević Karas, E., *Načelo jednakosti oružja kao konstitutivni element prava na pravični kazneni postupak iz članka 6. Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda*, Zbornik PFZ, 4-5/2007., 761-788, note no. 20, p. 765.

7 Zupančić, B. M., *Kazneni postupak i njegove funkcije u državi izvornog liberalizma*, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, 2/1995, p. 272.

8 Trechsel, S., *Human Rights in Criminal Proceedings*, Oxford University Press, 2006, p. 82.

9 See more in: Krapac, D., *Engleski kazneni postupak*, Faculty of Law, Zagreb, 1995, p. 93.

10 In case law, the fundamental principles of English criminal proceedings are: presumption of innocence of the accused, the principle of public trial, the principle of verbatim, the principle according to which an accused is entitled to challenge witnesses' testimony by cross-examination, and the adversarial principle. See more in: Spencer, J. R., *The English system*, in: *European Criminal Procedures*, eds. Delmas-Marty, M., Spencer, J. R., Cambridge University Press, 2004, p. 147.

11 According to: Ivičević Karas, E., op. cit. Note no. 5, pp. 765 et al.

12 ECtHR decisions are available on the Court's internet site: <http://www.echr.coe.int/echr>.

13 More on the principle of due process in: Ivičević Karas, E., loc. cit., pp. 762-764.

14 Henrion, H., *Légalité des armes "et" le proces penal allemand*, *Nemesis Bruylant*, 2003, p. 185.

15 Corker, D. - Young, D., *Abuse of Process and Fairness in Criminal Proceedings*, Butterworths, London Edinburgh Dublin, 2000., p. 119.

16 Ivičević Karas, E., loc. cit., p. 767.

ings.¹⁷ The Convention's fair trial guarantee is a set of rights made up of a number of components, in particular a guarantee of 'minimal rights to a defence', the adversarial principle and the principle of equality of arms. The rules of a fair trial (due process of law, *fares Verfahren*) have procedural and substantive content. The material component of the right to a fair trial (substantive due process) is made up of provisions regulating the conditions under which a public authority in criminal proceedings could infringe upon an individual's fundamental rights. The procedural content of the right to a fair trial (procedural due process) is made up of rights which must be guaranteed in criminal proceedings.¹⁸

4. Certain general elements of the right to a fair trial have developed in the ECtHR's practice which are not explicitly stated in Article 6 § 1 of the ECHR: (a) the rights of parties to be present when procedural actions are undertaken and to be heard before a decision is taken (adversarial principle - *audiatur et altera pars*), (b) the rights of parties to undertake all actions in proceedings which can be performed by their adversaries (principle of equality of arms), and (c) the obligation to substantiate the court's decisions.¹⁹ The special guarantees of a fair trial in Article 6 §§ 2 and 3 of the ECHR, as additional guarantees of a defendant's rights in criminal proceedings and compensation of his position towards the 'supremacy' of the prosecutor, are: the presumption of the defendant's innocence, and minimal rights of the defence.²⁰ One of the strict procedural guarantees of a fair trial is the guarantee that an individual must be able to affect the outcome of the proceedings for their entire duration.²¹ Therefore, the fundamental principles encompassed by the Convention's right to a fair trial in particular include the adversarial principle (*audiatur et altera pars*) and the principle of equality of arms, which in essence constitutes the broader aspect of a defendant's right to a defence, of which more will be said later.

5. Within the framework of the principle of a fair trial one question that can be raised is the lawfulness of *in absentia* trials. English and American law does not provide for such a possibility,²² but those of many other countries do.²³ In contemporary international criminal law standing and *ad hoc* tribunals insist on the presence of defendants during their entire trials. According to the Rome Statute of the ICC, a defendant has the right to be present at the trial (Article 63.). The European Court of Human Rights in Strasbourg has so far not declared *in absentia* trials unlawful when permitted under the national laws of the states, parties to the ECHR.²⁴

17 Krapac, D., Načelo enakosti orožij strank v kazenskem postopku (Rezultati raziskave na preiskovalnem oddelku Okrožnega sodišča v Mariboru), u: Uveljavljanje novih institutov kazenskega materialnega in procesnega prava, Uradni list Republike Slovenije, Criminology Institute of the Faculty of Law in Ljubljana, 2000, p. 212.

18 For more, see: Pavišič, B., KPP, 2011, p. 78.

19 See: Krapac, D., Kazeno procesno pravo, knjiga I, Zagreb, 2007, pp. 128-138.; same author, Evropska konvencija o zaščiti ljudskih prava i temeljnih sloboda i hrvatski kazneni postupak, Hrvatski ljetopis za kazeno pravo i praksu, Zagreb, 1/1995., p. 21 et al.

20 Krapac, D., KPP, 2007, p. 138 et al.

21 Focarelli, C., *Equo processo e Convenzione europea dei diritti dell'uomo*, Casa editrice dott. Antonio Milani, 2001., p. 170., Ashworth, A., *Human Rights, Serious Crime and Criminal Procedure*, Sweet & Maxwell, London, 2002.

22 Except if the defendant would attempt to flee after the first court appearance.

23 Including: Croatia, France, Belgium, Greece, the Netherlands, most Latin American countries and China, but not Bosnia and Herzegovina, Spain, Germany and some others.

24 It nevertheless appears in view of the gravity of international crimes being prosecuted that the presence of defendants before international tribunals is justified. See in: Degan, V. Đ. - Pavišič, B., *Međunarodno kazeno pravo*, Rijeka, 2005.

II. EQUALITY OF ARMS AS AN ESSENTIAL ASPECT OF THE RIGHT TO A DEFENCE

1. The general concept of the principle of equality of arms

1. The principle of equality of arms²⁵ appeared and was developed in the practice of the ECtHR by way of application of the provisions of Article 6 of the ECHR. According to some authorities commenting on the ECHR,²⁶ although Article 6 does not mention it explicitly, the ECtHR developed gradually the concept of equality of arms in its decisions, and cases where the defendant and his defence counsel had been denied participation in proceedings on a footing equal with that of the public prosecutor.²⁷ According to views presented in those judgements, the ECtHR demanded that if one participant had been allowed to make all his allegations and claims, his adversary had to be given equal opportunities to be heard on the allegations of the other side. In subsequent decisions the ECtHR expanded the meaning of the principle, on the one hand defining it as a set of procedural guarantees for parties enabling them in an equal manner to access important information (e.g., the right to inspect case files, the right to be present at procedural activities, the right to move for actions in the proceedings, a defendant's right to confront the prosecution's witnesses) and the possibility of affecting decisions in proceedings (the right to be heard by a court or other body conducting the proceedings before a decision is made), and stating that equality of arms must extend to all phases of criminal proceedings.²⁸ It is a fundamental premise that the principle of equality of arms is one of the essential constituent elements of the right to a fair trial contained in Article 6 of the ECHR and also an important segment of the defendant's right to the defence.²⁹

2. In essence, the principle of equality of arms means the equality of the parties before the court. It is particularly significant in criminal proceedings, which are from the beginning structurally permeated with inequality of the parties – the defendant as a natural person stands before a public prosecutor, a body of the repressive apparatus of the state. That principle presupposes in criminal proceedings the equal treatment of the parties in which the defendant may not be denied in his fundamental procedural rights in comparison with the prosecutor. Criminal proceedings “would not be fair if held in conditions unjustly placing the defendant in an inferior position” towards the prosecutor.³⁰ The principle of equality means the “absence of differences in the treatment” of one party as opposed to the other. The principle of equality of arms calls for fair, equal, treatment of the defendant and the prosecutor, especially in respect of the right of each to “explain and act for his interests”, which can only be achieved if the parties to the proceedings are “equally armed”.³¹ Equality of arms means the equality of procedural rights of parties in criminal proceedings. The right of a party to undertake all actions which may be performed by its adversary means that the proceedings may not be regulated or managed so that there is unjustified discrimination between parties.³² Equality of arms implies a “fair balance between the parties”. A fair

25 The term equality of arms comes from the English legal tradition.

26 Trechsel, S., *op. Cit.*, Note no.7, p. 94 et al.

27 See Commission decisions in the following cases: *Neumeister v Austria*, 27 June 1968, § 22, and *Delcourt v Belgium*, 17 January 1970, § 28.

28 See: Krapac, D., KPP, 2010, p. 25. See ECtHR decision in the *Lamy v Belgium* case, 30 March 1989, § 29.

29 See ECtHR decision in the *Kaufman v Belgium* case, A.10938/84.

30 See ECtHR decisions in the following cases: *Delcourt v Belgium*, 17 January 1970, § 24; *Steel and Morris v United Kingdom*, 15 January 2005, § 62.

31 Soulier, G., *L'egalite de parole, principe de la democratie et du proces penal*, Presses Universitaires de France, 1992, pp. 247 and 248.

32 Krapac, D., KPP, 2007, p. 131.

trial is among other things provided by the observance of the principle of equality of arms, which essentially means securing a procedural balance between parties in criminal proceedings. A balance between the prosecution and the defence is achieved by the application of the principle of a fair trial, especially its integral part - equality of arms. The principle of equality of arms is deemed an instrument for achieving the principle of a fair trial.³³ The right to equality of arms constitutes the essence of the adversarial nature of contemporary criminal proceedings.³⁴

3. The principle of equality of arms does not require 'arithmetic or symmetrical equality of the parties in criminal proceedings,' but the existence of procedural guarantees which provide the parties with balanced opportunities to affect the course and outcome of proceedings.³⁵ A complete balance between parties is not possible due to the different legal positions and roles the parties play in criminal proceedings.³⁶ Full equality of parties can also not be achieved from the aspect of the efficiency of the criminal proceedings, or the protection of the state from crime, as well as from the aspect of the protection of the rights of injured parties.³⁷ In the continental -combined - form of criminal proceedings, the symmetry of their "arms" (*Waffen*, etc.) is not necessary in proceedings because of the great difference in the position of the prosecutor and the defendant.³⁸ Criminal proceedings of the mixed character endeavour to eliminate or lessen the inequality that exists between the defendant and the public prosecutor in various ways: one way is by expanding the defendant's rights, but also by establishing a balance between the parties' opportunities to realise their interests in criminal proceedings.³⁹

4. According to its 'internal component,' the principle of equality of arms proceeds from the defendant's innocence, the obligation to secure appropriate means to challenge the accusations, the obligation to 'disclose evidence,' the right to hear witnesses for the defence under conditions equal to those enjoyed by witnesses for the prosecution, the parties' right to be present at procedural actions - not just physically, but to participate actively - the right to have one's say about the factual and legal claims made by the adversary, and certain other rights. The precondition for exercising that right is proper notification of the party about procedural acts, and the possibility of proper communication with the court.⁴⁰

5. In the theory of continental criminal procedural law, such as Croatia's,⁴¹ the aforementioned condition could not be precisely designated as 'equality of arms' between the parties, because the principle should in fact be understood to mean 'prohibition in principle of changing the position of one of the parties in criminal proceedings,' which change would not be justified by differenc-

33 ECtHR decision in the *Brandstetter v Austria* case.

34 Bassiouni, C., *Human Rights in the Context of Criminal Justice*, *Duke Journal of Comparative & International Law*, Spring, 1993, <https://web.lexis-nexis.com>, p. 11.

35 Ivičević Karas, E., op. cit. Note no. 11, p. 761.

36 Comp. Krapac, D., KPP, 2003, p. 109. Trechsel, S., op. Cit. Note no. 7, pp. 95 and 96.

37 Kobe, P., „Enakost orožja“ v kazenskem postopku in jugoslavensko kazensko procesno pravo, *Zbornik znanstvenih razprav*, let. XXXIII, Ljubljana, 1968, p. 20 et al.

38 Comp. Krapac, D., KPP, 2010, p. 25., Pavišić, B., *Komentar Zakona o kaznenom postupku*, Rijeka, 2011, p. 66., Ambos, K., *Internationales Strafrecht*, Munich, 2003, pp. 614-619.

39 Comp. Krapac D., KPP, 2010, p. 24.

40 Notwithstanding judicial impartiality and neutrality, if one of the parties abuses its procedural rights to the detriment of the other, the judge must prevent such abuse, expanding his discretionary powers (for example by prohibiting certain evidentiary actions which would violate the 'objective' fairness of the proceedings, or by adducing evidence on his own initiative for the benefit of the weaker party. See: Krapac D., KPP, 2010, p. 24.

41 But also the laws of Bosnia-Herzegovina, Serbia and other states created by the break-up of Yugoslavia.

es in their procedural positions.⁴² The procedural status of defendants is the most unfavourable in the preliminary procedure, especially during the police inquests and the investigation stage. It is much more favourable in the trial stage, which is public, direct and adversarial, and a little less favourable in the legal remedies proceedings stage. It is nevertheless not necessary for the legislator to guarantee to the parties in advance full or absolute equality of arms in all phases of the proceedings, but only balanced opportunities for affecting the course and results of criminal proceedings as a whole. Croatian criminal procedure law contains a number of rules providing for equal treatment of parties in exercising their rights to undertake procedural actions, as well as the so-called right of the defendant to confront evidence of the prosecution.⁴³

2. Relationship between the principle of equality of arms and adversarial principle

1. The adversarial principle contains the right and opportunity of a party to challenge the claims of its adversary in a manner ensuring that its voice is heard (*audiatur et altera pars*).⁴⁴ The adversarial nature of proceedings implies a legally regulated dispute of two opposed parties (*adversary proceedings*).⁴⁵ The adversarial nature may also relate to procedural subjects, but also individual procedural actions (e.g., confrontation of witnesses). The right to adversary proceedings is an essential precondition of the principle of equality of arms, which means that in criminal cases parties must have an opportunity to be informed about the opposing party's evidence, to have its say about it, and to challenge it.⁴⁶ The aspect of the principle of equality of arms also includes a defendant's possibility to challenge testimony of a witness for the prosecution, which is also a fundamental precondition for the adversarial principle.

2. Although like the principle of the equality of arms the adversarial principle is not explicitly proclaimed in the text of the ECHR, they have been affirmed in the practice of the ECtHR as a fundamental aspect of the Convention right to a fair trial, thereby also the right to a defence.⁴⁷ The adversarial principle allows parties to participate actively in proceedings and influence their outcome, whereby the defendant becomes a subject of the criminal proceedings and not just an object of repressive measures and actions.⁴⁸ The adversarial principle is intimately linked to the principle of equality of arms. The right of parties to have their say on evidence which has been adduced and to be heard is an essential aspect of the principle of equality of arms. There is no doubt that the two principles are similar. The postulate of equality of arms differs from the adversarial principle by its wider scope, yet a more narrow content.⁴⁹ The equality of arms means the right of a party to present its position and its evidence in any procedural action or during any

42 See: Krapac, D., KPP, 2007., p. 131-132., Schroeder, F. C., Strafprozessrecht, 2. Aufl., C. H. Beck, Muenchen, 1997., p. 32. According to certain German theologians, "equality of arms" may only be spoken about in respect of a "partisan structured" procedure, like that in use in the United States. Provisions on criminal proceedings of the International Criminal Tribunal for the former Yugoslavia (ICTY) have emphasised the right of defendants to a "fair trial" (see. Article 21 of the ICTY Statute) within which interpretation of the term "equality of arms" appeared early, taken from the practice of the ECtHR, in the form of an obligation of the tribunal to provide each party equally with a reasonable opportunity to present its views; see: Krapac, D., KPP, 2010, Note no. 125, p. 132.

43 See: Articles 42. §§ 2., 54, 58 § 1, 70 § 1, 197 § 1, Articles 322, 382 and 365 § 4. of the CPC/Croatia.

44 About the adversarial principle, see: Pavišić, B., KPP, 2010, p. 71.; Vasiljević, T., Sistem krivičnog procesnog prava, Belgrade, 1983, pp. 120-129, 235-255.

45 Pavišić, B., KPP, 2010, p. 71.

46 ECtHR decision in the case *Brandstetter v. Austria*.

47 ECtHR decision in the case *Niderhöst-Huber v. Switzerland*, 18 February 1997, §§ 24 et al. See also the following judgements: *Kamasinski v. Austria*, 19 December 1989, § 102; *Rowe and Davis v. United Kingdom*, 16 February 2000, § 60; *Duriez-Costes v. France*, 7 October 2003, § 32.

48 Trechsel, S., *op. cit.* Note no. 7, p. 82.

49 Trechsel, S., *ibid.*, p. 85.

stage in the proceedings under conditions not placing the party in a substantially inferior position compared with the opposing party. The adversarial principle concerns certain procedural actions about which a defendant has to be informed so as to have an opportunity to challenge them with counter-arguments.⁵⁰ Another difference is that the adversarial principle is a 'constructional principle' which defines criminal proceedings as a dispute between two parties who are equal in law, while the principle of equality of arms is a functional principle implying equal procedural rights and equal opportunities to affect the course and outcome of the proceedings.⁵¹

3. One of the requirements for a fair trial is that a defendant must have an opportunity to realise his right to confront and question witnesses for the prosecution.⁵² Certain restrictions are allowed. According to the practice of the ECHR, restrictions are allowed: (a) to protect threatened witnesses,⁵³ (b) to protect especially vulnerable witnesses (e.g., sexual offences victims).⁵⁴ These exceptions are justified by the protection of interests whose importance competes with the rights of the defence.

3. The legal and statutory aspects of the principle of equality of arms

3.1. The statutory basis for the principle of equality of arms

1. The basis for the principle of equality of arms is contained in Article 4 § 1 of the CPC/Croatia, under which parties are guaranteed equal standing before criminal courts. Under the aforesaid provision, "The court shall ensure equal possibilities for establishing evidence at the hearing to the party and the defence counsel pursuant to this Act". The parties are thereby granted equal opportunities and possibilities of influencing the final decision of the court, which may under the law only be based on facts and circumstances presented and discussed during the trial. The principle of equality of arms requires that parties have balanced opportunities to affect the course and outcome of proceedings, especially in respect of the use of the right to disclosure and participation in adversarial proceedings.⁵⁵ Paragraph 2 of the aforementioned article prescribes the duty of the court and the public authorities participating in criminal proceedings to examine and establish with equal care both facts which are incriminating and exonerating. In principle, the provision concerns the general approach to facts in criminal proceedings, which encompasses the standard of equal care for both types of facts.⁵⁶ In respect of the public prosecutor the obligation stems from his status as a body of the public authorities, not as a party to the proceedings. The obligation also relates to investigators,⁵⁷ but not to other participants in criminal proceedings, who are not public authorities, as well as to the injured party.

50 Krapac, D., KPP, 2010, p. 132.

51 Krapac, D., *op. cit.* Note no. 16, pp. 211-212.

52 See: Ivičević Karas, E., Okrivljenikovo pravo da ispituje svjedoke optužbe u stadiju istrage kao važan aspekt načela jednakosti oružja stranaka u kaznenom postupku (u povodu presude Europskog suda za ljudska prava u predmetu Kovač protiv Hrvatske), Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, 2/2007, p. 1012.

53 About vulnerable witnesses, see: Pajčić, M., Ugroženi svjedoci u kaznenom postupku, Hrvatsko udruženje za kazneno znanosti i praksu, Ministarstvo unutarnjih poslova Republike Hrvatske, Zagreb, 2006, p. 1 et al.

54 ECtHR decision in the case *S. N. V. Sweden*, 2 July 2002, § 47. See: Trechsel, S., *op. cit.* Note no. 7, pp. 321-322.

55 See: Ivičević Karas, E., *op. cit.* Note no. 5, p. 784.

56 ECtHR decision in the case: *Lobo Machado v. Portugal*.

57 Compare articles 57-86 of the Law on the State Attorney and the Law on Police Affairs and Competences.

2. The Criminal Procedure Code of Croatia contains other rules providing for the possibility of the exercise of the right to procedural equality with the prosecutor. These rules include the right to inspect case files, rules on the serving of decisions, submissions and communications, rules on questioning defendants before taking decisions in the investigation stage as well as before issuing decisions ordering certain forcible measures, on the right of parties to undertake concrete procedural actions, rules on the defendant's possibility to have his say on all counts of the indictment at the trial, rules on questioning parties before issuing decisions on holding the trial, prohibition of holding the trial without the presence of the defendant, rules on parties' proposals to adduce evidence at the trial, rules on the adversarial manner of presenting evidence at the trial, rules on right of adverse party to respond to appeal, and others. Procedurally, this principle may be exercised in three directions: (a) providing for the equality of the prosecution and the defence in relation to forcible measures limiting or depriving of liberty, on which under that principle a third party shall decide: a neutral court, (b) guarantee of the procedural rights of defendants, and (c) providing equal opportunities to question witnesses and expert witnesses at trial.⁵⁸ The principle of equality of arms is a permanent and most important criterion of a fair trial.⁵⁹ Domestic courts most often cite the principle of a fair trial by way of the principle of equality of arms.

3. The principle of equality of arms is among the fundamental functional principles of contemporary criminal procedural law. Contemporary criminal proceedings are aimed at achieving equal status for defendants and prosecutors in criminal proceedings as an expression of the principle of equality before the law, or the principle of equality of means, or arms. The principle of equality of means (arms) includes the realisation of the concept of a fair balance between parties in the proceedings⁶⁰ relating to 'all aspects of the proceedings'.⁶¹ In this manner an effort is made to balance the procedural status of the parties by means of various procedural means and rights granted to them.

3.2. Individual constituent parts of the principle of equality of arms

The principle of equality of arms is a complex one because it is composed of a number of important constituents, the most important being: (1) the right of access to information, (2) active participation in proceedings, especially the performance of procedural actions,⁶² (3) the right of parties to undertake all actions in proceedings which are available to their opponents, (4) the right and opportunity to challenge the opposing side's arguments,⁶³ (5) the right to have witnesses for the defence heard under the same conditions as witnesses (and expert witness-

58 Pavišić, B., *Komentar CPC*, 2011, p. 18.

59 Fairness, according to the practice of the ECtHR, may be synonymous for "good judiciary" which includes the right to a trial before an independent and impartial court, within a reasonable time and in an adversarial and public procedure. See: Pradel, J.; Corstens, G., *Droit penal europeen*, Dalloz, Paris, 2002, p. 375.

60 ECtHR decision in the case *Auguste v. France*.

61 ECtHR decision in the case *Hopjinger v. Austria*.

62 Availability and access to information and documents in case files must be secured in an extent which could affect the formation of the court's opinion in the concrete case; see ECtHR decision in the case *Kamasinski v. Austria*, A.168, 1989.

63 ECtHR decision in the case *Hopjinger Barbera, Messegue and Jabardo v. Spain*, A.146, 1988.

es) of the prosecution,⁶⁴ (6) the obligation to allow ‘discovery’,⁶⁵ (7) the prosecution and the defence must have opportunities to be informed about motions, requests and other procedural actions of their opponent and possibilities to counter with their own,⁶⁶ (8) parties at the trial may voice objections and comment on evidence adduced in the proceedings.⁶⁷ In the catalogue of all individual rights, the right to examine witnesses under equal conditions is of particular importance. Equality in examining witnesses is a special aspect of the principle of equality of arms; it guarantees adversarial proceedings,⁶⁸ in which the principle of equality of arms finds its ‘most appropriate expression’. The procedural guarantee of the right to examine witnesses makes it possible for the defendant to play an active role in the evidentiary proceedings and influence the course and outcome of the trial.⁶⁹ Examining witnesses ‘under equal conditions’ assumes that a balance exists in the examination of witnesses – equal participation in adducing that evidence.⁷⁰ Nevertheless, the right to examine witnesses both for the prosecution and for the defence is not an absolute one, because the court may reject certain evidence.⁷¹ In Croatian law, the defendant’s right to examine or have examined witnesses for the prosecution is proclaimed in Article 29 § 2 of the Constitution of Croatia, and additionally guaranteed by numerous provisions of the CPC/Croatia.⁷² It proceeds from constitutional and statutory provisions that criminal proceedings may not be based on unjustified discrimination against parties and that no party to the proceedings may have procedural or practical advantages or privileges in relation to the other party.

3.3. Application of the principle of equality of arms in various stages of proceedings

An important characteristic of the principle of equality of arms is that it must be observed and implemented in all stages of criminal proceedings: (1) the preliminary proceedings,⁷³ (2) the trial, and (3) the legal remedies proceedings, albeit not equally and in an identical manner.

1. *Preliminary proceedings.* Application of the principle of equality of arms in the preliminary proceedings is incomplete and lesser in scope, because unlike the trial stage, that stage of proceedings is not characterised by directness and adversariality.⁷⁴ This principle comes into play from the moment a person acquires the status of defendant in the substantive sense.⁷⁵ Under Article 2 § 5 of the CPC/Croatia, acquiring the status of defendant is linked to the moment when criminal prosecution is initiated, i.e., when a criminal complaint is registered or any action or restrictive measure implemented by a competent authority which limits personal rights and freedoms and is aimed at clearing up suspicion that a person has committed a criminal offence.

64 ECtHR decision in the case *Hopjinger Bonisch v. Austria*, A.92, 1985.

65 The principle of equality of arms places before law enforcement and investigatory organs an obligation to disclose to the defence all facts they have at their disposal (disclosure) and which might be of use to the defendant for being acquitted or getting a lighter penalty. The prosecutor is also required to place at the disposal of the defendant all materials he could use to challenge the accuracy of testimony given by witnesses for the prosecution. See ECtHR decisions: *Kress v. France*, *Coeme v. Belgium*, *Jespers v. Belgium*, *Baumet v. France*, *Cruz de Carvalho v. Portugal*.

66 ECtHR decision in the case *Hopjinger Brandstetter v. Austria* dated 28 July 1991.

67 ECtHR decisions in the cases: *Ruiz - Mateos v. Spain*, *Neumeister v. Austria*, *Sagir v. Turkey*.

68 Trechsel, S., *op. cit.* Note no. 7, p. 292.

69 Trechsel, S., *ibid.*, p. 293.

70 ECtHR decision in the case *Guilloury v. France*, 22 June 2006, § 55.

71 ECtHR decision in the cases *Bricmont v. Belgium*, *Laukkanen and Manninen v. Finland*, *Vidal v. Belgium*.

72 See articles 198 § 4., 198 § 5, 198 § 7 of the CPC/Croatia.

73 ECtHR decision in the cases *Lamy v. Belgium*, 30 March 1989, § 29; *Imbroscia v. Switzerland*, 24 November 1993, § 36; *Magee v. United Kingdom*, 6 June 2000, § 41.

74 More about the preliminary procedure in: Đurđić, V., *Krivično procesno pravo*, Niš University Law School, 2011, pp. 43-68.

75 Trechsel, S., *op. cit.* Note no. 7, p. 234.

According to the ECtHR, a person becomes a defendant from the moment he/she is officially notified of that by a competent authority, but also from the moment when ‘important implications’ for the status of that person occur.

In spite of a certain level of inequality between parties in the preliminary stage of the proceedings, implementation of the principle of equality of arms is also provided for by law in that stage of the proceedings. During preliminary investigation and the investigation, the principle of equality of arms requires in particular that defendants have the right to access to information, exercised by insight into the case files, and the right to propose that certain procedural actions be performed and to participate in their performance. In the event of unequal opportunities for exercising the aforementioned rights, compensation is possible in the trial stage, for example by filing a motion that the court and public authorities involved in the criminal proceedings collect with due and equal care evidence both about the culpability and the innocence of the defendant.

In the investigation proceedings implemented by the state attorney (public prosecutor), marked by diverse, greater or smaller, limitations of certain defendants’ rights (for example the right of access to information), application of the principle of equality of arms is possible and guaranteed, the scope of application being somewhat smaller. A limited scope of application of the principle also exists at the evidentiary hearing. The limitation is that when the prosecutor moves to hold an evidentiary hearing, the prosecutor must be present at it, and when such a hearing is proposed by the defendant and his defence counsel, their presence is optional. The prosecutor is thereby provided an advantage over the defendant, which would be a violation of the equality of the status of parties in that stage of the proceedings.

Application of the principle of equality of arms is also limited in the regular procedure of judicial control of the indictment. In the case of a mandatory formal defence, under the law a session of the indictment panel may be held without the presence of the defence counsel, which would represent a violation of the principle of equality of arms, because the defendant is deprived of professional assistance at what is a crucial moment for him. In cases when the defendant but not his defence counsel comes to a session of the indictment panel, although a case of mandatory defence is in question, in which case under the law a session may be held, the defendant is unable to efficiently use his right to be heard before the court makes its decision. This would violate the equality of arms in proceedings before the indictment panel, because the defendant is obviously in a position less favourable than that of the prosecutor.⁷⁶

Exceptions from the principle of equality of the parties in this stage of the proceedings are possible for the purpose of protecting interests whose importance competes with the rights of the defence. For the purpose of protecting certain values or superior interests, it is possible to restrict the right to equality of arms, for example the right to inspect case files or the right to be informed about the identity of a prosecution witness, or other rights. There are three prerequisites for such a restriction: it must be exceptional and restrictive, it must be absolutely necessary, and the consequences suffered by the defence must be sufficiently compensated for during the criminal proceedings.⁷⁷

76 Compare with Ivičević Karas, E.- Kos, D., *Sudska kontrola optužnice*, Zagreb, HJJKPP, 2/2011.

77 ECtHR decisions in the cases *Edwards and Lewis v. United Kingdom*, 22 July 2003, § 53, *Fitt v. United Kingdom*, 16 February 2000, § 45, *P. G. and J. H. v. United Kingdom*, 25 September 2001, § 68.

2. *The trial stage.* The trial itself is the central and most important stage in criminal proceedings because it serves for the establishment of facts and circumstances based on which the court makes its final decision. The dominant principles in the trial stage are adversariality, verbality, publicity and directness, and for that reason this stage may be characterised as a contest between parties with equal rights before an independent and impartial court. The fullest application of the principle of equality of arms takes place during the trial stage, and is founded on Article 4 § 1 of the CPC/Croatia. The trial is characterised primarily by the application of the principles of adversariality and directness, which means that all actions at the trial take place directly and in such a manner that the parties are entitled to be heard on every action, challenge motions of the opposing side and file their own motions, thereby influencing the contents and course of the evidentiary proceedings. As far as equality of arms is concerned, provisions which are of importance are those concerning the serving of summons for the trial, in particular to the defendant (for the purpose of preparing a defence), the possibility of making opening statements by the parties, the entering of a plea in respect of the indictment, the right of each party to present its position and its evidence under conditions which do not place it in a substantially inferior position vis-à-vis the opposing party, the right to cross-examine witnesses for the prosecution, expert witnesses, co-defendants or persons already convicted of the criminal offence under conditions equal with those applied to defence witnesses,⁷⁸ and the right and opportunity to present the defence briefly in a concluding statement and to reflect on claims made by the prosecutor and injured party or parties.

Limitations of the principle of equality of arms are also possible, exceptionally, in the trial stage, if there exists a need to protect certain interests whose importance transcends the rights of the defence. Under the law there are two such cases: in examining threatened, protected and vulnerable witnesses, and during in absentia trials. Such limitations of the principle of equality of arms must be used restrictively, and within narrow interpretation of the law

3. *Legal remedies proceedings.* Application of the principle of equality of arms is also possible in legal remedies proceedings. The defendant has a right to seek a legal remedy, the right to have an appeal of the opposing party delivered to him, the right to respond to an appeal of the opposing party, the right to take part in the hearing of the appeals panel, and the right to counter an appeal filed by the opposing party in the proceedings. Nevertheless, the application of the principle in the legal remedies stage is more narrow in scope than during the trial stage.⁷⁹

III. APPLICATION OF THE PRINCIPLE OF EQUALITY OF ARMS IN THE PRACTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

1. According to the Croatian criminal law system, legal provisions pertaining to the equality of arms are a result of the constitutional principle of equality before the law and the judicial authorities.⁸⁰ Under Article 3 of the Constitution of Croatia, together with other values, equal rights for

78 It is a fundamental principle that a defendant must have a right to examine a witness for the prosecution at least once during the trial. See: Tako Ivičević Karas, E., op. cit. Note no. 51, p. 1015. See ECtHR decision in the case Kovač v. Croatia, 12 July 2007.

79 More about legal remedies in criminal procedural law: Bubalović, T., *Pravni lijekovi u kaznenom postupovnom pravu*, Rijeka, 2011.

80 The principle of equality before the law and the judicial authorities is guaranteed by the constitutions of most European countries; see: Delmas-Marty, M., *Evolution du ministère public et principes directeurs du proces penal dans les democraties europeennes*, Justices no 3, Janvier/Juin 1996, p. 83.

all citizens are among the highest values of the constitutional order of the Republic of Croatia. Under the explicit provision of Article 14 item 2 of the Constitution of Croatia, “All persons shall be equal before the law”. Under Article 29 item 2.6 of the Constitution of Croatia suspect and accused have the right “to interrogate or have the prosecution witness interrogated and to demand the presence and hearing of the defence witnesses under the same conditions as for the witnesses for the prosecution”. These constitutional provisions are detailed in a number of procedural laws, in particular the Criminal Procedure Code.

2. There are a number of decisions of the Constitutional Court of Croatia in which the (im)proper application of the principle of equality of arms in criminal proceedings are discussed. We shall refer in this paper to only a few of the constitutional law opinions presented in those decisions.

In Decision No. U-III/1128/2010 dated 27 May 2010, the Constitutional Court of the Croatia (CC of Croatia) found that the rejection of the applicant’s evidentiary motions in the concrete case “was not in accordance with equality of arms, as one of the requirements of the concept of a fair trial”⁸¹ and that the applicant’s constitutional right guaranteed by Article 29 § 1 of the Constitution of Croatia had been violated.⁸² The Decision cited to the Decision of ECtHR in the case of *LB Interfinanz A.G. v Croatia* /29549/04/, dated 27 March 2008, holding: “The Court once again emphasises that according to its practice the principle of equality of procedural arms requires the existence of a reasonable opportunity for both parties to present the facts and support them with their evidence, in conditions which place no party in a substantially inferior position to that of the opposing party (...)”⁸³

Of particular importance is Decision No. U-III/64667/2009 dated 1 March 2011 in which the CC of Croatia found a violation of the constitutional right to defence, i.e., a defendant’s right to choose his defence counsel, guaranteed by Article 6 paras 1 and 3 of the ECHR, and Article 62 para 1, and Article 65 paras 5 and 6 of the CPC/Croatia.⁸⁴ In its decision the Constitutional Court held that the right to choose a defence counsel of the defendant is one of the main constituents of the constitutional right to a defence. The Court also cited the ECtHR’s position according to which a defendant’s choice of defence counsel must always be respected (case: *Goddi v. Italy*, judgement dated 9 April 1984), and that the state can deny the observance of that right “only on relevant and sufficient grounds” (case: *Croissant v. Germany*, dated 25 September 1992). In the concrete case, after the applicant had withdrawn the power of attorney from his defence counsel at a court hearing, the president of a higher-instance court had issued a ruling appointing that same person as an *ex officio* defence counsel. The Constitutional Court noted that in the concrete case the applicant had been denied the right to have legal assistance provided by a defence counsel of his own choosing. In a situation where the defence counsel chosen by the applicant was not able to be present at a session of the second-instance panel, to which the defendant had not been brought from detention, so that his legal interests were protected (only) by the defence counsel

81 See ECtHR decision in the case *Perić v. Croatia*, 3499/06, 27 March 2008.

82 Decision of the Constitutional Court of Croatia, U-III/1128/2010 dated 27 May 2010.

83 Decision of the Constitutional Court of Croatia, U-III/1128/2010 dated 27 May 2010.

84 According to the same Decision of the Constitutional Court of Croatia, “a defender is a procedural assistant of the defendant who by his legal knowledge and procedural skills assists the defendant in locating and establishing facts which benefit him, in the application of the most favourable regulations for the defendant, and in exercising procedural rights. By helping the defendant he (the defence counsel) eliminates the shortcomings of the real possibilities of the defence in comparison with the state attorney in his capacity as the authorised prosecutor, thereby also realising the postulate of the equality of arms and other elements of the principle of a fair trial enshrined in Article 29 paras 1 and 2 of the Constitution and Article 6 paras 1 and 3 of the ECHR”: CC of Croatia Decision U-III/64667/2009, dated 1 March 2011.

appointed ex officio, the same lawyer whose power of attorney had been withdrawn by the defendant at an earlier stage in the proceedings due to disagreements about the conception of the defence, in the view of the Constitutional Court, “the applicant’s constitutional rights to fair trial were violated”. The Constitutional Court said that “failure to observe established procedural rules during court proceedings (guaranteed by way of the principle of legality) brings into question the observance of other principles such as procedural equality of the parties before the court, and legal security”. Based on the aforementioned, the Constitutional Court found that by the disputed decisions of lower courts the applicant’s constitutional right to a defence, i.e., the right to a defence counsel of his own choosing, guaranteed by Article 29 paras 1 and 2.4, and Article 6 paras 1. and 3.c of the ECHR had been violated.⁸⁵

According to the same CC of Croatia decision U-III/64667/2009 dated 1 March 2011, the meaning of the right to a “good judiciary” and a fair trial in a democratic society necessarily includes *equality of the means available* to the parties in proceedings (equality of arms), i.e., an obligation of the court to grant each party in proceedings an opportunity to present its case in conditions not placing it in a position of obvious inequality in relation to the opposed party”.

By its Decision U-III/3880/2006 dated 7 July 2009, the Constitutional Court of Croatia found that in reality the courts had considerably eased the prosecution’s burden of proving the applicant’s guilt (by unjustifiably rejecting all evidentiary motions of the defence), and by ignoring the principle of equality of arms placed the applicant in a less favourable procedural position than that of the prosecution, which, according to the Constitutional Court, represented a breach of the constitutional right guaranteed by Article 14 para 2 of the Constitution (everyone is equal before the law), and the principle of equality of arms, as one of the requirements of the principle of a fair trial guaranteed by Article 29 paras 1, 2.3 and 2.4 of the Constitution of Croatia.

3. Besides the decisions quoted in its own decisions by the Constitutional Court Croatia, it is also useful to point to several other ECtHR decisions which, as regards application of the principle of equality of arms in criminal proceedings, concern the Republic of Croatia.

Especially important in that context is a judgement of the ECtHR in the case of *Kovač v. Croatia* dated 12 July 2007.⁸⁶ In the judgement the Republic of Croatia was found guilty of violating Article 6 para 1 and Article 6 para 3.d of the ECHR, because in the concrete criminal proceedings the defendant’s right under the convention to examine a witness for the prosecution had been violated. During the investigation stage, the competent court did not respect the defendant’s right to be informed in an appropriate manner about the undertaking of the investigatory action of questioning a witness, or had had an opportunity to question the injured party in her capacity as a witness for the prosecution on whose statement given to the investigating judge the court had mainly based its conviction of the defendant. The competent higher-instance court rejected the appeal filed by the applicant and upheld the judgement of the first-instance court, in the process making no comment at all about the claims made by the defendant that he had been provided no opportunity to question the injured party during the criminal proceedings. Ruling on a request for extraordinary review of a final judgement, the Supreme Court of the Republic of

85 Decision of the Constitutional Court of Croatia, U-III/64667/2009, dated 1 March 2011.

86 ECtHR decision in the case *Kovač v. Croatia*, 503/05 dated 12 July 2007. Text in Croatian available on the Constitutional Court’s internet site, <http://www.usud.hr>.

Croatia rejected the request as unfounded. The Constitutional Court of the Republic of Croatia also rejected the constitutional complaint as inadmissible, because it did not concern the merits of the case. Ruling in this case, the ECtHR found that the applicant's right to examine witnesses for the prosecution guaranteed by Article 6 para 3.d of the ECHR had been violated in proceedings before the Croatian court, as a specific aspect of the right to a fair trial guaranteed by Article 6 para 1 of the ECHR. In its judgement the Court listed a number of arguments in favour of its decision: (a) in no stage of the criminal proceedings, in the investigation as well as the trial, had the defendant been given a right to directly or indirectly question the injured party, whose testimony, which was in any case unreliable, was the only evidence of his guilt, (b) the defendant was not able to view the manner in which the injured party had responded to the investigating judge's questions, as he had not been duly summoned to attend the investigatory hearing, and no technical recording of the testimony had been made,⁸⁷ (c) during the trial the court did not examine the injured party in detail, or read out the minutes of the investigation.⁸⁸ Regarding this omission of the second-instance court, the ECtHR found a denial of the defendant's right to a defence. Given that the applicant had in criminal proceedings before Croatian courts had no proper and appropriate opportunity to challenge a witness's testimony given before an investigating judge, which was of decisive importance for his conviction, the proceedings were not fair and the ECtHR found a violation of Article 6 para 1 of the ECHR and a violation of the minimal guarantees of the defence guaranteed by Article 6 para 3.d of the ECHR.⁸⁹

In another decision in the case *Hrdalo v. Croatia* dated 27 September 2011, the ECtHR found that the applicant's right to a fair trial (Article 6 para 1 of the ECHR) had been violated due to a breach of the principle of equality of arms, because he had never been served a response of the Government of Croatia to a complaint filed with the Administrative Court of Croatia, and that he had thereby been prevented from commenting on it.⁹⁰

In its decision 25282/06 dated 26 November 2009 in the case *Dolenc v. Croatia*, the ECtHR also found a breach of the right to a fair trial in respect of the equality of arms, together with a violation of the right concerning a rights of the defence, because the defendant had not been provided unimpeded access to the case files and been prevented from preparing an adequate defence.

EQUALITY OF ARMS ACCORDING TO THE POSITION OF THE EUROPEAN COURT OF HUMAN RIGHTS

1. According to the practice of the European Court of Human Rights, the principle of equality of arms⁹¹ is a criminal procedural law principle which should be viewed in a technical context, from which proceeds that the principle of equality of arms is a functional principle,⁹² concerning a set of procedural rules whose aim is to secure for the parties equal rights and equal opportunities in

87 Regarding observation of non-verbal conduct of test subjects, see: Pavišić, B. – Modly, D. - Veić, P., *Kriminalistika*, Vol. 1, 2006, pp. 410 et al.

88 Comp. Krapac, D., *KPP*, 2010, p. 128.

89 ECtHR decision in the case *Kovač v. Croatia*, § 31 et al.

90 ECtHR decision in the case *Hrdalo v. Croatia*, 23272/07, dated 27 November 2011.

91 The principle of equality of arms proceeds from the provisions of Article 6 § 3.d of the ECHR, but also Article 14 § 3.e of the International Covenant on Civil and Political Rights.

92 Krapac, D., *Osnovna prava čovjeka i građanina i načela krivnog postupka*, Zbornik Pravnog fakulteta u Zagrebu, 5-6/1989, pp. 829 and 830., Roxin, C., *Strafverfahrensrecht*, C. H. Beck'sche Verlagsbuchhandlung, Muenchen, 1998, pp. 76, 77.

the realisation of their interests in criminal proceedings in the practice of the ECtHR the principle of equality of arms was developed in parallel with the humanisation of criminal law repression and the increasingly effective protection of the fundamental rights of defendants in criminal proceedings. The principle of equality of arms appears as a means of accomplishing fairness in criminal proceedings in the ECtHR's decisions in the cases *Neumeister v. Austria*⁹³ and *Delcourt v. Belgium*⁹⁴, whereby it became an autonomous expression of a fair trial in that Court's practice.⁹⁵

2. The ECtHR treats the principle of equality of arms as a basic element of the concept of a right to a fair trial, although the principle of equality of arms itself is not explicitly mentioned in the Convention.⁹⁶ For that reason it belongs to the 'internal' and 'unsaid' criminal procedural guarantees,⁹⁷ imbued in full in Article 6 of the ECHR.⁹⁸ The principle of equality of the parties is a universal principle applicable primarily to criminal proceedings, but the view of the ECtHR is that its application is also possible in other types of proceedings.⁹⁹ According to the ECtHR, the equality of the parties contains a postulate that each party in proceedings is entitled to present its case and its evidence in conditions not placing it in a substantially inferior position to that of the other party.¹⁰⁰ This means that each party in proceedings "must have a reasonable opportunity to present its case to the court under conditions not depriving it substantially of its rights compared to the opposing party".¹⁰¹

3. In the judgement in the case *Engel et al v. the Netherlands*, the ECtHR said that the principal objective of Article 6 para 3.d of the ECHR is the achievement of equality of arms of the parties in criminal proceedings.¹⁰² Nevertheless, a 'slight' inequality of arms between the parties would not necessarily be contrary to the provisions of the aforesaid article of the ECHR, provided the proceedings in their entirety are fair. For that reason one should not look for a possible breach of equality of arms solely in respect of the fact that one party uses certain privileges and the other does not, but in respect of the "effect such a breach could have had in the proceedings viewed in their entirety".¹⁰³ The view of the ECtHR is that the state is not required to endeavour to guarantee "full equality of the rights of the parties" or "full equality of arms", provided that each party has a "reasonable opportunity to represent its interests in conditions not placing it in a position substantially inferior to that enjoyed by the opposing party".¹⁰⁴ It proceeds from this that according to the practice of the ECtHR the principle of equality of arms does not require establishment

93 "The Court's view is that this fact is contrary to the principle of equality of arms which the Commission has quite rightly, in a number of decisions and opinions, placed as belonging to the concept of a fair trial guaranteed by Article 6. § 1.: ECtHR decision in *Neumeister v. Austria*, 27 June 1968, § 22.

94 ECtHR decision in the case *Delcourt v Belgium*, 17 January 1970, § 28.

95 Ivičević Karas, E., *op. cit.* Note 5, p. 777.

96 Pavišić, B., *Kazneno pravo Vijeća Europe, Izvori, komentari, praksa, Golden marketing - Tehnička knjiga*, Zagreb, 2006, p. 101.

97 ECtHR decisions in the cases *Laudette v. France*; *Popov v. Bulgaria*.

98 Pavišić, B., *Komentar CPC*, 2011, p. 66.

99 ECtHR decision in the case *Dambo Beheer v. The Netherlands*.

100 ECtHR decisions in the cases *Krees v. France*, *John Murray v. The United Kingdom*, *Conron v. The United Kingdom*, *Kam Panellis v. Greece*.

101 European Commission for Human Rights, report no 434/58, 30 June 1959, Ann. II, p. 535. ECtHR decisions: *Bulut v. Austria*, 22 February 1996, § 47; *Foucher v. France*, 18 March 1997, § 34.

102 ECtHR decisions in the cases *Destrehem v. France*, 18 May 2004, § 39; *Vatuti v. France*, 13 April 2006, § 51; *Guillouy v. France*, 22 June 2006, § 55.

103 Fourment, F., *Procedure penale, Paradigme Publications universitaires*, Orleans, 2003, p. 145.

104 ECtHR decision in the case *Steel and Morris v. United Kingdom*, 15 February 2005, § 62.

of an “arithmetic or symmetrical equality between parties to the proceedings“, but the establishment of a “fair balance“, a balance adapted to their procedural situations.¹⁰⁵

V. COMPARATIVE LAW REVIEW OF THE PRINCIPLE OF EQUALITY OF ARMS

1. The principle of equality of arms in the criminal procedural law of Bosnia and Herzegovina

1. In the criminal procedural law of Bosnia and Herzegovina (BiH) the position that the principle of equality of arms is an essential constituent of the right to a fair trial is generally accepted, for which reason that principle, i.e., the principle of “equality of parties“, is mentioned and processed within the framework of the principle of a fair trial.¹⁰⁶ Also within the framework of the principles of substantive truth, directness and adversariality one also speaks about postulating the equality of parties in criminal proceedings. The legislative foundation of the principle of equality of arms is found in Article 14 para 1 of the Criminal Procedure Code of BiH (CPC/BiH),¹⁰⁷ according to which the court is required to treat the parties and the defence counsel in an equal manner and to offer all parties equal opportunities in respect of access to evidence and their adducement at the trial (“equality of action”). The second important legal provision dealing with the content of this principle is a provision requiring the court, the prosecutor and other bodies taking part in the proceedings to examine and determine with equal care both facts incriminating (*in peius*) the suspect or defendant and those in his favour (*in favorem*). Other provisions of the CPC/BiH prescribe a duty to establish accurate and full facts in criminal proceedings, such as provisions on discretionary powers in evaluating evidence (Article 281 para 1),¹⁰⁸ the obligation to test confessions (Article 229 and Article 230), the court’s obligation to ensure comprehensive examination of the case (Article 239), and others.

Under the CPC of BiH, but also other procedural laws in use in Bosnia and Herzegovina, parties before the court present two opposed theses: a thesis of the prosecution, and a thesis of the defence.¹⁰⁹ In that process that have a right to present their reasons challenging the thesis of the opposing party. It proceeds from this that criminal proceedings in BiH are a dispute between equal parties before an impartial court.¹¹⁰ The equality of the parties in those proceedings, i.e., equal treatment before the judge, together with the principle of adversariality, is an essential

105 For the principle of equality of arms the following ECtHR judgements are also important: *Mac Gee v. France* (denial of insight into the motions made by the opposing side); *De Haes and Gijssels v. Belgium* (denial of the right to examine evidence); *Vacher v. France* (failure to notify about deadlines). Especially important are ECtHR positions according to which “proceedings would not be fair if they were to take place in conditions of such a nature that the defendant were unjustly placed in an inferior position” against the prosecutor. See ECtHR decision *Coeme et al v. Belgium*, 22 June 2000, § 102. The principle of equality of arms represents the foundation of criminal proceedings also according to the UN Human Rights Committee, proceeding from Article 14 of the International Covenant on Civil and Political Rights (ICCPR), under whose Article 4. § 1 “everyone is equal” before the court, while under Article 14 § 2, every indicted person has the right to minimal guarantees in criminal cases “in full equality”.

106 See: Sijerčić-Čolić, H., KPP I, 2008., pp. 133 and 136. See also for this and other criminal procedural principles: Simović, M., *Krivično procesno pravo, Banja Luka, 2009*, Bubalović, T., *Pravo na pravični kazneni postupak prema međunarodnom pravu o ljudskim pravima, Pravna misao, Sarajevo, 9-10/2004*.

107 Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette of BiH, Nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09.

108 See decisions of the Constitutional Court of BiH: AP-1083/04 dated 13 October 2005 and AP-1926/05 dated 16 January 2007.

109 More about the main functions in criminal proceedings in: Simović, M., *Praktični Komentar Zakona o krivičnom postupku, Banja Luka, 2006*.

110 Comp. Sijerčić-Čolić, H., KPP I, 2008., p. 102.

precondition of a fair trial.¹¹¹ By providing the defendant with an opportunity at the trial to present his thesis but also to counter the arguments of the opposing side, he is also given an equal chance of realising his fundamental right - that to a defence.¹¹²

The principle of directness is reflected in the requirement for all statements by the parties, all evidence and other procedural actions required for rendering a decision must be made and adduced directly, before the court.¹¹³ The CPC/BiH contains a number of procedural rules making possible the application of the principle of directness in criminal proceedings; one of the most important is the prohibition of holding trials if parties are absent, including the defendant (Article 247.).

The principle of adversariality is another fundamental principle of criminal procedural law. Content-wise, the principle of adversariality enables parties to present their statements and arguments before the court, and to have their say on the statements of the opposing party before the court renders a decision in the criminal case. The principles of adversariality and 'equality of parties' make possible a fuller realisation of the principle of truth because the safest way to reach the truth is by means of an adversarial procedure in which the parties play an active role and have equal opportunities to present their cases and challenge those of the other party. This is realised most concretely at the trial during the main, direct, examination, cross-examination, and re-direct examination, of witnesses and expert witnesses.¹¹⁴

Due to the exceptional importance of the principle of a fair trial in criminal proceedings before courts in BiH, the Constitutional Court of Bosnia and Herzegovina has assumed clear and committed positions in a number of decisions regarding that principle and its constituent segments, including the principle of equality of arms, making possible the proper application of that important principle in criminal proceedings in BiH.¹¹⁵

2. The principle of equality of arms in criminal procedural law of the Republic of Serbia

Although the principle of equality of arms is not mentioned explicitly in the theory of criminal procedural law in Serbia¹¹⁶ and in its legislation,¹¹⁷ there is indubitably mention in the register of general principles of a requirement of "procedural equality"¹¹⁸ of the parties in criminal

111 Sijerčić-Čolić, H., KPP I, 2008, p. 102., Simović, M., KPP, 2009.

112 See: Sijerčić-Čolić, H., KPP I, 2008, p. 102.

113 For directness in criminal proceedings, see: Sijerčić-Čolić, H., KPP I, 2008, pp. 121-122.

114 More about new models of examining witnesses at the trial in: Simović M., *Krivično procesno pravo II – posebni dio*, Istočno Sarajevo, 2011, pp. 121-125., Sijerčić Čolić, H., *Krivično procesno pravo*, Vol. II, Sarajevo, 2008, pp. 93-98.

115 See decisions of the Constitutional Court of the BiH: AP -7/00 dated 19 August 2000., AP - 19/00 dated 13 March 2001., AP - 557/04 dated 30 November 2004. For other relevant decisions, see: Simović, M., *Novija praksa Ustavnog suda BiH iz oblasti krivičnog zakonodavstva i Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda*, Pravo i pravda, 1/2008, pp. 49-98. Comp. Simović, M., KPP, 2009., Sijerčić-Čolić, H., KPP I, 2008, p. 137.

116 See: Bejatović, S., *Krivično procesno pravo*, Official Gazette, Beograd, 2008., p. 92-120., Škulić, M., *Krivično procesno pravo*, Belgrade University Law School, 2010, pp. 41-86., Stevanović, Č. - Đurđić, V., *Krivično procesno pravo – opšti dio*, Niš University Law School, 2006, pp. 67-88.

117 See provisions of the Criminal Procedure Code of Serbia, Official Gazette of the RS, No. 46/2006. For more detail on criminal procedural law in the Republic of Serbia, see: Bejatović, S., *Međunarodni pravni standardi u oblasti krivičnog procesnog zakonodavstva i način njihove implementacije u Zakonik o krivičnom postupku*, Zbornik: „Zakonodavni postupak i kazneno zakonodavstvo”, Srpsko udruženje za krivičnopravnu teoriju i praksu, Belgrade, 2009, Ilić, G., *Krivično procesno zakonodavstvo Republike Srbije i standardi Evropske unije*, Zbornik: „Krivično procesno zakonodavstvo Republike Srbije i standardi Evropske unije”, Srpsko udruženje za krivičnopravnu teoriju i praksu, Belgrade, 2010.

118 Comp. Bejatović, S., KPP, 2008, p. 117., Stevanović, Č. - Đurđić, V., KPP, 2006, p. 78.

proceedings. This principle has been expressed and explained as a doctrine through a number of individual general principles, in particular the principles of determining the substantive truth, a fair trial, directness and adversariality.¹¹⁹ The principles of equality of parties and adversariality are intimately linked to the principle of establishing the truth in criminal proceedings.¹²⁰

The legal foundation of the principle of equality of the parties proceeds from Article 13 of the Criminal Procedure Code of the Republic of Serbia (CPC/RS),¹²¹ under which the court and the public authorities taking part in criminal proceedings are required to establish accurately and fully the facts to render a lawful decision, and to afford equal care to the examination of establishment of facts both aggravating for the defendant, and those which favour the defendant ('procedural equality').¹²² According to the CPC/RS, the status of a defendant in criminal proceedings is determined by the comprehensive set of his rights and duties. Among those rights should be mentioned those individual rights which make possible the application of the principle of equality of arms within the defendant's basic right to a defence: the right to be questioned before an investigation is instituted or an indictment filed, but also before certain decisions are rendered; the right to be heard on all facts and evidence burdening the defendant (*audiatur et altera pars*); the right to present facts and evidence which benefit him; the right to examine case files and examine objects, under certain conditions, the right to respond to an appeal lodged by the opposing party, the right to participate in a session of the appeals panel, and other rights.¹²³

It should be emphasised that within the framework of explaining the principle of a fair trial the 'principle of possessing equal arms' in criminal proceedings is also mentioned.¹²⁴ What should be understood under the principle of 'equality of parties' is the equal position of both parties in criminal proceedings, so that no party is in a position superior to that of the other party.¹²⁵ This means basically that the prosecutor and the defence should have equal criminal procedural status.

The principle of directness, proceeding from Article 362 para 1 of the CPC/RS, contains an explicit provision under which the court bases its decision solely on facts and evidence presented at the trial, implying the presence of the parties at the trial and their active and equal participation. The principle of directness implies that the court arrives at the source of knowledge about the criminal case directly, without anyone's mediation, and issues a decision based on the facts it determines on its own.¹²⁶ One aspect of this principle is that as a rule the defendant attends the trial and participates actively in it together with the prosecutor.¹²⁷

The principle of adversariality is a right of the parties to the proceedings, but also an obligation of the court to make it possible for them, to present their position on the concrete criminal case and have their say on all facts presented by the opposing side (*audiatur et altera pars*)¹²⁸

119 See: Bejatović, S., KPP, 2008., pp. 104., 108 and 115., Škulić, M., KPP, 2010., p. 83., Grubač, M., Načela krivičnog postupka i njihova transformacija, Jugoslavenska revija za krivično pravo i kriminologiju, 1-2/1995., Belgrade, 1995.

120 See: Stevanović, Č / Đurđić, V., KPP, 2006, p. 79.

121 Criminal Procedure Code of the Republic of Serbia, Official Gazette of the RS, Nos. 46 dated 2 June 2006, 49/07 and 122/08.

122 Comp. Bejatović, S., KPP, 2008, p. 105.

123 For more detail, see: Stevanović, Č / Đurđić, V., KPP, Niš, 2006, pp. 184-186.

124 See: Škulić, M., KPP, 2010, p. 83.

125 Škulić, M., KPP, 2010, p. 83.

126 See: Jekić, Z., Krivično procesno pravo, Belgrade, 2003, p. 168.

127 On the principle of directness, see more in: Škulić, M., KPP, 2010, pp. 58-61.

128 Jekić, Z., KPP, 2003, p. 196.

and accordingly to offer their own conclusions about the outcome of the proceedings,¹²⁹ which in essence represents an important aspect of procedural equality of parties in the proceedings, i.e., of the principle of equality of arms. Although the CPC/RS makes no explicit mention of it in its provisions, it has made possible the full realisation of the principle of equality (adversariality) by numerous provisions.¹³⁰ Besides explicit individual legal provisions, it has also been done systematically, in two directions: (a) by separating the main procedural functions (prosecution, defence and adjudication) and entrusting them to separate entities, which is a precondition for the realisation in practice of the principle of equality, and (b) by securing under the law procedural equality of the prosecutor and the defendant in proceedings, which implies the equality of arms in proceedings. Only by way of equality of the parties can the principle of adversariality be realised fully, and thereby also a defendant's right to an efficient defence.¹³¹ The essence of the principle of procedural equality of parties in criminal proceedings lies in the opportunity provided to the parties to present their own views about questions related to the criminal matter and to have their say about claims made by the opposing side,¹³² by acceptance of the presumption of innocence and the defendant's unquestionable right to a formal (professional) defence.

VI. CONCLUDING REMARKS

It may be said in conclusion that the principle of equality of arms, which should be understood to mean the equality of the procedural rights of parties in criminal proceedings, is an important constituent of the right to a fair trial guaranteed by Article 6 of the ECHR, as well as an important segment of a defendant's right to a defence. Contemporary criminal proceedings, like those we have in our countries, seek to strike a balance between the need to protect society from crime and the protection of the personal freedoms and fundamental rights of defendants. According to generally accepted views, securing such a balance does not, however, imply full equality of the positions of the parties in criminal proceedings, or absolute protection of a defendant's rights. Nevertheless, the principle of equality of arms necessarily implies the existence of a balance of procedural rights making possible for the parties equal presentation, representation and realisation of their interests in criminal proceedings. That balance should be able to guarantee equal opportunities for the parties to utilise procedural means and equal opportunities to affect the course and outcome of the criminal proceedings. Given that we are talking about a complex right made up of several components, a full answer to the question of the final content of that principle has still not been given, because the principle is constantly being upgraded and redefined. The examples of (im)proper application of certain Convention rights before national courts confirm the importance of the existence of supranational protection of guaranteed fundamental human rights and liberties in cases where citizens are unable to obtain such protection before domestic courts. Regarding the principle of equality of arms, in spite of individual cases of its improper application, and the restrictions of that right of the defendant which are allowed by law, it is possible to conclude that the Croatian legislation in that area complies with generally accepted international legal standards and the good practice of high domestic and international courts. The same assessment can be made for the legislations of Bosnia and Herzegovina and the Republic

129 Comp. Škulić, M., KPP, 2010, p. 71., Petrić, B., Priručnik za primenu Zakona o krivičnom postupku, Belgrade, 1977, p. 14.

130 According to: Bejatović, S., KPP, 2008, p. 117.

131 See: Bejatović, S., KPP, 2008, pp. 116-117.

132 Stevanović, Č / Đurđić, V., KPP, 2006, p. 79.

of Serbia, although a more comprehensive and deeper analysis would be required for a more thorough assessment.

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Equality of Arms and the Status of the Defence in Criminal Proceedings in Bosnia and Herzegovina (Practical Experiences)

Summary

The topic of the equality of the parties (equality of arms) and the status of the defence in criminal proceedings in Bosnia and Herzegovina (BiH) has been divided into two segments – introductory questions and concluding remarks. The introductory remarks contain a review of the process of reform of criminal procedure law in BiH, initiated in 2000, which is notable for featuring an exceptionally high degree of identity of the four criminal procedure codes which are now being applied in BiH. Furthermore, there are observations in connection with the objectives of the reforms (the efficiency of the criminal proceedings, and compliance of legislation with relevant international documents).

The essence of the two central segments of the paper is an analysis (normative and practical aspects) of the basic principles of criminal proceedings concerning in particular the status of the prosecutor and the defence in criminal proceedings. Other topics discussed are the prosecutorial concept of the investigation and the institution of guilty plea agreements, the two being among the dominant novel features introduced in the process of reform of the criminal procedural legislation in BiH; the status of the defence in criminal proceedings in BiH and the instruments guaranteeing its equality with the prosecutor as a party in criminal proceedings. The author notes in the conclusion that “the Criminal Procedure Code of BiH guarantees the right of the defence to equality in criminal proceedings in a major degree.”

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Keywords: criminal proceedings, Bosnia and Herzegovina (BiH), criminal procedure law, investigation, cross-examination, prosecutor, defence, basic principles, legal remedies, appeal, adversarial system, plea agreement

I INTRODUCTORY NOTES

The process of reforming criminal law in Bosnia and Herzegovina began around the year 2000. New criminal and substantive and criminal procedural legislation took effect from 2003 at state level, and at the level of the entities and the Brčko District. The new criminal law was based on the former Yugoslav criminal procedural legislation, albeit with a powerful influence of the Anglo-Saxon (common law) tradition, and the result is a combined model of criminal proceedings, with an upgrading of the importance of adversarial elements and the status of the parties in criminal proceedings. The most important institutions taken from the Anglo-Saxon common law tradition are among other things negotiation between the prosecutor and the suspect on culpability, cross-examination, entering a plea of guilty or not guilty, confirmation of the indictment and others. The aim of most of these novel features is increasing the efficiency of criminal proceedings and cutting their costs. Although one rarely sees such substantial changes of an entire legislative framework in an area as sensitive as criminal law, this was done in Bosnia and Herzegovina because a very low efficiency of criminal prosecution simply required major changes. The other major objective of the criminal law reform was compliance with the highest international standards, especially by introducing procedures which would secure more efficient application of the European Convention on the Protection of Human Rights and Fundamental Freedoms.

Another task of the criminal law reform process was to cross-harmonise the three BiH entities' criminal procedures, so as to ensure that all citizens in Bosnia and Herzegovina were in an equal position and enjoyed equal rights before any court, anywhere on the territory of Bosnia and Herzegovina. The reform was certainly also encouraged by a need for a more efficient fight against organised crime, corruption and terrorism, as well as war crimes.

Certainly the most novel feature of the new criminal procedure law is a vastly different investigation procedure from that in use before, when it was directed by an investigative judge, who has now given way to the public prosecutor, with judicial control by a preliminary proceeding judge, and a preliminary hearing judge.

After the adoption of the Criminal Procedure Code, the Ministry of Justice of Bosnia and Herzegovina founded on 18 March 2003 a team to monitor and assess the enforcement of criminal laws in Bosnia and Herzegovina. The team included representatives of institutions in Bosnia and Herzegovina - courts, prosecutions, the Bar Associations, the Ministry of Justice, judicial institutions in the Brčko District, law schools and the Parliamentary Assembly of BiH, as well as the Council of Europe, the Office of the High Representative, and the OSCE. During the process of drafting the Code and the public debate on it its main characteristics were highlighted: by the latest revisions of the Criminal Procedure Code Bosnia and Herzegovina would get a modern and democratic law placing it in that respect in the ranks of modern, civilised and democratic countries. Secondly, the adoption of the law would represent an important new step in harmonisation with the criminal procedure legislation of progressive countries. Thirdly, it was said the Code's authors extensively consulted domestic courts' practice and contemporary achievements

in this field of law science, and its adoption served to resolve certain dilemmas existing in both theory and practice. Accordingly, one may conclude that the intent of the legislators was to draft a law ensuring a more efficient criminal law procedure, but one not threatening the guaranteed freedoms and rights of participants in criminal proceedings.

II BASIC PRINCIPLES

We shall deal here with the main principles of criminal proceedings under the Criminal Procedure Code of BiH² which define the status of the prosecutor and the defence. It should be noted that the procedural provisions discussed in this analysis are either identical with or very similar to those existing in the Criminal Procedure Codes of the BiH Federation, Republika Srpska, and Brčko District. Any existing deviations are not significant enough to be analysed herein. For that reason this analysis will deal only with the provisions of the Criminal Procedure Code of BiH.

One of the main principles concerning persons deprived of liberty is regulated by Article 5 of the CPC:

- “(1) A person deprived of liberty must, in his/her native tongue or any other language he/she understands, be immediately informed about reasons for his/her apprehension, and instructed of the fact that he/she is not bound to make a statement, or answer to any questions, of his/her right to a defence counsel of his/her choice, as well as the fact that his/her family, a consular officer of a foreign state whose citizen he/she is, or other person designated by him/her shall be informed about his/her deprivation of liberty.
- (2) A defence counsel shall be appointed at the request of a person deprived of liberty if due to his/her financial standing he/she cannot bear the costs of the defence.”

This provision emphasises a principle usually described as the principle of the protection of an individual's human right to liberty. Intimately tied to that right is a suspect's or defendant's right regulated by Articles 6 and 7 of the CPC:

- “(1) A suspect shall be informed at the first questioning about the offence he/she is charged with and the grounds for suspicion against him/her, and that his/her statements may be used as evidence against him/her in the further course of the proceedings.
- (2) A suspect or accused must be provided with an opportunity to make a statement regarding all the facts and evidence incriminating him/her and to present all facts and evidence in his/her favour.
- (3) A suspect or accused shall not be bound to present his/her defence or to answer questions posed to him/her (Article 6), and

2 Published in the *Official Gazette of BiH*, No. 3/03 dated 10.02.2003, in force from 1 March 2003. Amendments published in the *Official Gazette of BiH*, Nos. 26/04 dated 7 June 2004, 63/04 dated 31 December 2004, 13/05 dated 9 March 2005, 48/05 dated 19 June 2005, 46/06 dated 19 June 2006, 76/06 dated 25 September 2006, 29/07 dated 17 April 2007, 32/07 dated 30 April 2007, 53/07 dated 16 July 2007, 76/07 dated 15 October 2007, 15/08 dated 25 February 2008, 58/08 dated 21 July 2008, 12/09 dated 10 February 2009, and 16/09 dated 24 February 2009.

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- (1) A suspect or accused has a right to present his/her own defence or to defend him/herself with the professional aid of a defence counsel of his/her own choice.
 - (2) If the suspect or accused does not have a defence counsel of his own choice, a defence counsel shall be appointed to him/her in cases as stipulated by this Code.
 - (3) The suspect or accused must be given sufficient time to prepare a defence” (Article 7)

As we have seen from Article 6 para 1, a suspect must be informed at the first questioning about the offence of which he/she is accused and must be informed about the fact that his/her statement may be used as evidence in the further course of the proceedings. The suspect must also be informed that he/she is not bound to present a defence or answer any questions.

As for the defence, an important principle, that of equality of arms, is regulated by Article 14 of the CPC of BiH:

- “(1) The Court is required to treat the parties and defence counsel in an equal manner and to provide all parties with equal opportunities in respect of access to evidence and its examination at the trial.
- (2) The Court, the Prosecutor and other authorities participating in the criminal proceedings are required to objectively examine and establish with equal attention facts that are exculpatory as well as inculpatory for the suspect or the accused.”

This principle assumes in full all the rights enjoyed by suspects and defendants during criminal proceedings that are guaranteed by Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms which under its Constitution is applied directly in Bosnia and Herzegovina and has precedence over all other legislation. The principle of equality of arms is therefore the most important principle proceeding from Article 6 of the European Convention, embodied in Article 14 of the CPC of BiH, according to which every party in proceedings must have equal opportunities to present its arguments, and no party in proceedings may have any significant advantage in relation to the opposing party. This principle also represents a duty of disclosing to the other side all information about facts and allegations possessed by one party.

When we mentioned earlier that the objective of the reform of the CPC in Bosnia and Herzegovina was to incorporate the European Convention on Human Rights into the Criminal Procedure Code, we can see that this provision of the CPC defines the status of the prosecutor and the defence, granting them ‘equality of arms’ for the duration of the criminal proceedings. It is the duty of the court to ensure the equality of the parties during the proceedings. Implementation of this right has been analysed in numerous decisions of the Constitutional Court of BiH, including one which states that “the court is required to treat the parties and the defence counsel equally and to provide each of the parties equal opportunities of access to evidence and its examination at the trial”³.

3 Decision No. AP-809/04 of the Constitutional Court of Bosnia and Herzegovina, dated 30 November 2004.

To round off the principles, we can also mention here the adversarial principle, regulated by Article 16, under which criminal proceedings may be initiated and conducted only at the request of the Prosecutor.

The basic principles on criminal proceedings regulate a suspect's or defendant's right to a defence counsel - generally identical with provisions of the Criminal Procedure Code of the former SFR Yugoslavia, and the Criminal Procedure Code of the Republic of Bosnia and Herzegovina.

III OTHER BIH CPC PROVISIONS OF IMPORTANCE FOR ASSESSING EQUALITY OF ARMS

Of exceptional importance for the debate on equality of arms in proceedings is the provision of Article 50 of the CPC according to which:

- “(1) A defence counsel in representing a suspect or an accused must take all necessary steps aimed at establishment of facts and collection of evidence in favour of the suspect or accused as well as protection of his/her rights.
- (2) The rights and duties of the defence counsel shall not cease when his power of attorney is revoked, until the judge or the panel releases the defence counsel from his rights and duties.”

This is therefore an imperative norm under which defence counsel are required to undertake all possible actions to establish facts, collect evidence in favour of the suspect, and protect his/her rights. This is an extremely important obligation which makes the lawyer's role much more professional and responsible than was the case with earlier criminal procedure codes. The provision is also important because if at any time during the proceedings a defence counsel finds that any right of his/her client is threatened, the defence counsel may, citing this provision, or that of Article 14, demand protection of the right that is under threat.

During the investigation the rights of the defence are very much restricted, which could be viewed as the greatest complaint that could be made in respect of the realisation of the principle of equality of arms in proceedings under the CPC of BiH. The provisions cited hereunder will serve to substantiate this assertion.

Article 35 lists all the rights and duties of the Prosecutor:

- “(1) The basic right and the basic duty of the Prosecutor shall be the detection and prosecution of perpetrators of criminal offences falling within the jurisdiction of the Court.
- (2) The Prosecutor shall have the following rights and duties:
 - a) as soon as he becomes aware that there are grounds for suspicion that a criminal offence has been committed, to take necessary steps to discover it and investigate it, to identify the suspect(s), guide and supervise the investigation, as well as direct the activities of authorized officials pertaining to the identification of suspect(s) and the gathering of information and evidence;

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- b) to perform an investigation in accordance with this Code;
 - c) to grant immunity in accordance with Article 84 of this Code;
 - d) to request information from governmental bodies, companies and physical and legal persons in Bosnia and Herzegovina;
 - e) to issue summonses and orders and to propose the issuance of summonses and orders as provided under this Code;
 - f) to order authorized officials to execute an order issued by the Court as provided by this Code;
 - g) establish facts required for rulings on indemnification claims in accordance with Article 197 of this Code and on the seizure of the proceeds from crime, in accordance with Article 392 of this Code;
 - h) to propose the issuance of a warrant for pronouncement of the sentence pursuant to Article 334 of this Code;
 - i) to issue and defend indictment before the Court;
 - j) to file legal remedies;
 - k) to perform other tasks as provided by law.
- (3) In accordance with Paragraphs 1 and 2 of this Article, all bodies participating in the investigative procedure are required to inform the Prosecutor on each undertaken action and to act in accordance with every Prosecutor's request.

The manner in which investigations are conducted is also a novel feature of the Criminal Procedure Code. Investigations are conducted by the public prosecutor, who is empowered to transfer the authority for carrying out certain actions to persons who are under the Code required to act on the prosecutor's instructions. Prosecutors now also have the power to grant immunity from prosecution. Transferring to prosecutors authority for managing and conducting investigations was done in order to streamline criminal proceedings and improve their efficiency. Prosecutors' authority to grant immunity exists in other legislations, and the aim is improving results in the struggle against organised crime and also in prosecuting war crimes.

Prosecutors can even conduct entire investigations without suspects being aware of them, as they are not required to inform suspects about the investigation, unless they are conducting certain investigative actions such as searches of persons or dwellings, and similar. However, a prosecutor cannot file an indictment until he has questioned the suspect, which is usually done immediately before the indictment is filed.⁴ In a great many criminal offences it is therefore possible for suspects not to be aware of investigations being conducted against them, of evidence being

4 Article 225 para. 3 of the Criminal Code of BiH

collected against them, and of witnesses being questioned - which is another revision of the law that could help to the fight against organised crime, but which nevertheless represents a considerable restriction of the suspects' and their counsels' opportunities to participate in proceedings and thereby contribute to the uncovering of facts which could be of significance for the decision to file an indictment. After the indictment is filed, the suspect is entitled to lodge complaints against the indictment, cross-examine witnesses for the prosecution, propose his own witnesses and other evidence, but in actual practice none of this can reach the standards of the right of the defendant to a defence that he enjoyed under the earlier CPC, in which investigations were conducted by investigative judges, who informed suspect and his counsel about every investigative action.

As has been said, in most cases suspects and their defence counsel are not even aware of the actions being undertaken by the prosecutor, and even if they know that an investigation is being conducted, their right to inspect files and documentation is substantially limited.

Article 47 of the CPC deals with defence counsels' right to inspect case files and documentation:

- “(1) During the investigation, the defence counsel is entitled to inspect files and view obtained objects which are in favour of the suspect. This right may be denied to the defence counsel if files and objects whose disclosure could jeopardise the aim of the investigation are concerned.
- (2) By exception from paragraph (1) of this Article, together with the motion to order detention the prosecutor shall deliver to the preliminary proceedings judge, or the preliminary hearing judge, evidence of significance for evaluating the lawfulness of the detention, and for the purpose of notifying the defence counsel.
- (3) After the indictment is filed, the suspect, defendant or defence counsel are entitled to inspect all case files and evidence.
- (4) Preliminary proceeding judge, preliminary hearing judge, judge, or panel, as well as the prosecutor, are required, when they come in possession of new evidence or any information or a fact which may serve as evidence at the trial, place them at the disposal of the defence counsel, suspect, or defendant.
- (5) In the cases referred to in paras (3) and (4) of this Article, the defence counsel, suspect, or defendant may photocopy all files and documents.”

It is evident from Article 47 that the defence counsel and the suspect cannot inspect files during the investigation, except for those cited by the prosecutor when filing a motion for detention to be ordered. Although it is stipulated in para (1) that the defence counsel may inspect files and view collected objects, which are in favour of the suspect, in practice this rarely happens. In practice the prosecutor should notify the defence counsel whenever he obtains evidence in favour of the suspect, but, as a rule, prosecutors do not do so. In numerous cases when defence counsel learn that prosecutors have evidence in favour of the suspect and ask to be shown that evidence, they are told that they will have an opportunity to inspect all evidence after the indictment is filed. The fact that under para (4) of Article 47 the prosecutor's duty also extends to the

preliminary hearing judge, the judge, and the panel – in fact all the judges handling the case before the investigation is concluded – has not significantly changed the practice of defence counsel being shown evidence only after indictments are filed, as regulated by Article 226 para 2 of the CPC:

- “(1) If during the course of an investigation, the Prosecutor finds that there is enough evidence for grounded suspicion that the suspect has committed a criminal offence, the Prosecutor shall prepare and refer the indictment to the preliminary hearing judge
- (2) After the issuance of the indictment, the suspect or the accused and the defence counsel have a right to examine all the files and evidence.
- (3) After the issuance of the indictment, the parties and defence counsel may propose to the preliminary hearing judge to take actions in accordance with Article 223 of this Code.

After the indictment is filed it is delivered to the preliminary hearing judge, who is required to assess the competence of the court, determine whether the offence is encompassed by an amnesty, pardon or barred by statute of limitations, or if there are other circumstances which exclude criminal prosecution, and whether the indictment has been completed properly. The preliminary hearing judge may reject an entire indictment, or certain counts, and the prosecutor may file a new indictment based on new evidence. This is a novel and ambitiously conceived institution which should have considerable influence on preventing lengthy proceedings based on indictments not supported by evidence or those featuring contradictory or insufficient evidence. However, actual practice has shown few significant results in the examination of indictments in the manner prescribed by the aforementioned provision, Article 228:

- “(1) Immediately upon receiving the indictment, the preliminary hearing judge shall examine the competence of the Court, the existence of the circumstances referred to in Article 224 para (1)d) of this Code, and whether the indictment has been drafted properly (Article 227 of this Code). If the Court finds that the indictment has not been drafted properly, it will act in accordance with Article 148 paras (3) and (4) of this Code.
- (2) The preliminary hearing judge may confirm or reject all or certain counts of the indictment within 8 days from receiving the indictment, and in complex cases within 15 days from receiving the indictment. If he rejects all or certain counts of the indictment, the preliminary hearing judge shall issue a ruling which shall be delivered to the Prosecutor and which can be appealed within a period of 24 hours. Decisions on the appeal shall be taken by the Panel referred to in Article 24 para (7) of this Code within a period of 72 hours.
- (3) During the confirmation of the indictment, the preliminary proceeding judge shall examine each count in the indictment and materials submitted by the Prosecutor in order to establish grounded suspicion.
- (4) Upon confirmation of some or all counts in the indictment, the suspect shall have the status of a defendant. The preliminary hearing judge shall present the defendant and his defence counsel with the indictment.

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- (5) The preliminary hearing judge shall promptly deliver the indictment to a defendant who is free, and if the defendant is in detention, within 24 hours of the confirmation of the indictment. The preliminary hearing judge shall notify the defendant that he is entitled to submit preliminary motions within 15 days of the date of being served the indictment, that the hearing for entering a plea shall be scheduled immediately after the issuance of a decision on the preliminary motions, or after the expiry of the time-limit for submitting preliminary motions, and that he may propose evidence he intends to examine at the trial.
 - (6) Upon rejection of all or some counts in the indictment, the Prosecutor may bring a new or an amended indictment that may be based on new evidence. The new or amended indictment shall be submitted for confirmation.”

The procedure envisioned by this Article runs as follows. Immediately upon receiving the indictment, the preliminary hearing judge examines whether the indictment has been completed in the manner which we have described. If the court finds that the indictment has not been drafted properly, it will return it to the prosecutor for correction or amendment, within a time period determined by the court, and if the prosecutor fails to do so before the deadline, the court will reject the indictment. The deadline given in para. 2 for the judge to confirm or reject all or individual counts of the indictment is eight days, or, in complex cases, it can be extended to fifteen days from the date of receiving the indictment. Closer examination of the duty of the preliminary hearing judge in connection with the indictment leads to a conclusion that it is almost impossible, even with simple indictments, to issue good-quality and well grounded decisions and to conduct all the procedures required of the court by this provision within such a short period of time – just fifteen days, let alone just eight days. This has been seen to be a problem particularly concerning indictments for serious criminal offences of organised crime and war crimes, especially when there are several defendants and several counts of the indictment. These short deadlines mean that in a great majority of cases indictments are confirmed. Another novel feature in this article is the possibility of appealing against decisions of the preliminary hearing judge rejecting all or some counts of the indictment. Yet another novelty is the provision in para. 5 under which the preliminary hearing judge notifies the defendant that he has fifteen days from the date of receiving the indictment to submit preliminary motions, that the hearing for entering a plea will be scheduled immediately after a decision is issued on the preliminary motions, or after the expiry of the time-limit for submitting objections, and that the defendant can submit proposed evidence he intends to present at the trial. Finally, para. 6 regulates the possibility of filing a new or revised indictment, based on new evidence. In a situation where the preliminary hearing judge refuses to confirm an indictment, the prosecution is forced to produce new evidence with its new indictment or revised indictment, because that is the only way it can expect grounded suspicion to be established and the indictment confirmed. If the prosecutor were to file an identical indictment and accompanying materials, it would lead to an adjudicated matter situation.

An exceptionally important novelty in the CPC of BiH is the obligation of the preliminary hearing judge to establish the existence of grounded suspicion that the suspect has committed the criminal offence of which he is accused in the indictment. In order to establish the existence of grounded suspicion, the judge is required to examine every count of the indictment and the materials submitted by the prosecutor. The prosecutor is required to deliver to the court with the indictment all materials, i.e., evidence, which is basis for the grounded suspicion that the suspect has committed the criminal offence of which he is accused in the indictment. The indictment will

be confirmed only if it is possible to establish grounded suspicion from the indictment filed and the materials (evidence) attached to it, failing which the indictment will be rejected.

As we have already said, it seldom happens in actual practice that the court rejects an indictment for the reasons listed¹ in para 3 of this article; the biggest problems are the short time provided for rendering a decision and the volume of the evidence the judge is expected to examine before issuing a decision. It is important to note that the preliminary hearing judge and the preliminary proceedings judge will not be trial judges in the proceedings based on the indictment in which they had participated in the proceedings in the pre-trial stage.

As we have seen in para (5) of Article 228, the preliminary hearing judge, after confirming the indictment, delivers the same to the defendant, who can then submit preliminary motions objecting the indictment within fifteen days. The objections concerned are regulated by Article 233: motions which challenge jurisdiction, which allege formal defects in the indictment, which state that the offence is covered by an amnesty, pardon or statute of limitations, or which state that there exist other obstacles which exclude criminal prosecution. Furthermore, the defendant can challenge the legality of evidence obtained, made a motion for joinder or separation of proceedings, and challenge a refusal of a request for assignment of a defence counsel when claiming indigence.

The court may, if it grants a motion that an item of evidence was obtained in an impermissible manner, separate that item from the file and return it to the prosecutor. As we have already seen, the control of the indictment in the confirmation stage which is performed by the court and regulated by Article 467 is effectively an *ex officio* control. An objection to the indictment which can be filed by the defence is a control of the indictment by a party to the proceedings – the defendant or his/her defence counsel. The aim of both of the controls is to prevent defendants from being unnecessarily taken before a court if the legal requirements for criminal prosecution have not been fulfilled.

We have already stressed that in this stage of the proceedings courts seldom reject indictments, either in full, or individual counts, but continue to act in an opportunistic manner and leave it up to the trial panel to decide the matter in rendering a judgment.

A novelty in the Criminal Procedure Code of BiH, as well as in the other CPCs applied use in Bosnia and Herzegovina, is a right granted to defendants and prosecutors to negotiate on culpability all the way until the conclusion of the proceedings – the issuance of the final decision. We have already said that this was introduced in order to speed up criminal proceedings; after the indictment is confirmed and a decision taken on any motions, the defendant is asked to enter a plea of guilty or not guilty. This is regulated by Article 229, while Articles 230 and 231 deal with the consideration of the plea entered and plea bargaining. In Article 229:

“(1) A plea of guilty or not guilty shall be entered before the preliminary hearing judge in the presence of the Prosecutor and the defence counsel. Before entering a plea the defendant shall be instructed about all the possible consequences of entering a plea of guilty within the meaning of Article 230 para (1) of this Code. If the defendant has no defence counsel, the preliminary hearing judge shall verify that the defendant understands the consequences of entering a plea of guilty, and whether the conditions exists for appointing a defence counsel

in accordance with Article 45 para (5) and Article 46 of this Code. The plea made and the instructions given shall be entered in the record. If the defendant does not enter a guilty plea, the preliminary hearing judge shall ex officio enter a plea of not guilty in the record.

- (2) If the defendant enters a guilty plea, the preliminary hearing judge shall refer the case to the judge, or panel, for the purpose of scheduling a hearing at which shall be determined the existence of the requirements stipulated by Article 230 of this Code.
- (3) If the defendant is found guilty after the conclusion of the trial, or changes his/her original plea of not guilty and enters a guilty plea, his/her plea of not guilty shall not be taken into consideration in deciding on a sanction.
- (4) After entering a not guilty plea in the record, the preliminary hearing judge shall refer the case to the judge or panel that has been assigned the case so that they can schedule main hearing, and shall return the evidence supporting the prosecution's case to the prosecutor. A main hearing shall be scheduled within 30 days of the date when the defendant entered a plea. This deadline may by exception be extended by another 30 days."

In the further course of the proceeding, and before the main hearing begins, a pre-trial hearing may be held with the parties and defence counsel to discuss questions of relevance for the trial. This provides equal opportunities both to the defence and the prosecutor to clarify before the court certain issues which is necessary to clarify before the beginning of the main hearing, and to clear up dilemmas which might affect the further course of the proceedings. The main hearing commences with the reading of the indictment and opening statements. Article 260, which regulates this stage of criminal proceedings, states that the trial commences with a reading of the indictment, and that the court then briefly checks whether the defendant has understood the indictment. Thereafter, the prosecutor briefly lists the evidence on which the indictment is founded, and then the defendant and defence counsel may briefly state the concept of the defence. This provision has been revised; formerly the defence had an opportunity to state briefly the evidence that it intended to present in its defence. Now that there is no requirement for the defence to present its evidence before it begins its case, the right of the defence to an efficient defence has been considerably strengthened. In the opinion of critics of this provision on the status of the defence in this particular case, like in certain other ones in the CPC concerning a lack of an explicit obligation for the defence to reveal its evidence before presenting its defence, the right of the prosecution to equality of arms has thereby been violated. However, what they are ignoring is the fact that under the CPC of BiH the burden of proof rests on the prosecutor, whose task is to adduce before the court all the evidence underlying the indictment, while the defence may remain passive if it wants, and does not need to adduce any evidence if it thinks that the prosecutor's evidence has failed to prove the indictment. There is no requirement for the defence to reveal in advance the evidence it will use to challenge the indictment, which does not place the prosecutor in an inferior position, as he will have an opportunity to react to that evidence just as the defence can react to the case of the prosecution.

It has almost become everyday practice for the defendant or defence counsel to state the concept of the defence, with the permission of the court, before presenting its evidence, and after prosecution presents its evidence. This makes it possible for the defence to perform an analysis of the evidence presented by the prosecutor, and to present the concept of its defence as a response to

that evidence. This is a very important stage for the defence. It is at this moment that the defence can point out to the court the weak points of the prosecution and state that during the proceedings it will partially or wholly rebut the evidence adduced by the prosecutor before the court. Under the CPC of BiH, the trial panel initially has before it only the indictment; it is informed about the evidence as it is presented. This means that the trial panel does not even have a preliminary picture of the manner in which and evidence with which the prosecutor intends to prove the criminal offence in the indictment. In the stage when the prosecutor has finished presentation of his evidence, the trial panel sees only an image of the case as presented by the prosecutor; in most cases it is not good for the defence, for which reason it needs in its opening statement to state clearly the facts it deems disputable in the prosecutor's case, why it finds them disputable, and in what manner it will present this to the trial panel. In its opening statement the defence presents only facts, but not conclusions, because it will present its conclusions in its closing statement. This is also the moment when the defence points to the legal basis on which the indictment is founded and its reasons for challenging them. In its closing statement the defence analyses the evidence presented and draws conclusions on what was achieved during the case of the defence, as 'promised' in its opening statement.

The evidentiary procedure is regulated by Article 261 of the CPC:

- “(1) Parties and the defence counsel are entitled to call witnesses and present evidence.
- (2) Unless the judge or the panel, in the interest of the justice, decides otherwise, the evidence at the main hearing shall be presented in the following order:
- a) evidence of the prosecution;
 - b) evidence of the defence;
 - c) rebutting evidence of the prosecution;
 - d) evidence in rejoinder to the Prosecutor's rebutting evidence;
 - e) evidence whose presentation was ordered by the judge or the panel;
 - f) all evidence relevant for pronouncing a criminal sanction.
- (3) During the presentation of the evidence, direct examination, cross-examination and redirect examination shall be allowed. The party who called a witness shall directly examine the witness in question, but the judge or the presiding judge may at any stage of the examination ask the witness appropriate questions.”

It can be seen from this provision that the right of the defence to see at the trial what evidence is adduced by the prosecution and so that only after the presentation of the evidence by the prosecution the defence may present its evidence. This provision introduces a new institution taken from common law system of direct examination (examination-in-chief), cross-examination and redirect (additional) examination of witnesses. The manner of examining witnesses, as well as the techniques by which this is done, are very significant for testing the evidence on which the

charges are based because they make it possible for the defence to rebut either all the charges, or part of them.

The manner of conducting direct examination (examination-in-chief), cross-examination and redirect (additional) examination is regulated by Article 262 of the CPC:

- “(1) Direct examination, cross-examination and redirect examination shall always be permitted. The party who called a witness shall directly examine the witness in question, but the judge or the presiding judge and members of the Panel may at any stage of the examination ask the witness appropriate questions. Questions on cross-examination shall be limited and shall relate to the questions asked during direct examination. Questions on redirect examination shall be limited and shall relate to questions asked during cross-examination. After examination of the witness, the judge or the presiding judge and members of the Panel may question the witness.
- (2) Leading questions shall not be used during the direct examination except if there is a need to clarify the witness’s testimony. As a rule, leading questions shall be allowed only during the cross-examination. When a party calls the witnesses of the adverse party or when a witness is hostile or uncooperative, the judge or the presiding judge may at his own discretion allow the use of leading questions.
- (3) The judge or the presiding judge shall exercise an appropriate control over the manner and order of the examination of witnesses and the presentation of evidence so that the examination of and presentation of evidence is effective to ascertain the truth, to avoid loss of time and to protect the witnesses from harassment and confusion.
- (4) During the presentation of evidence referred to in Article 261 paragraph 2.e of this Code, the Court shall question the witness and then allow the parties and the defence counsel to pose questions to the witness.”

After the Code was adopted a revision was made to paragraph (1) introducing a possibility during cross-examination of posing “questions in favour of one’s own assertions.” Some theorists say this solution is closer to the essence of cross-examination, which is correct, but also satisfies the requirement of making proceedings more economical. There is no need for a witness to be summoned to the court twice to be examined directly by both parties. When a witness for one of the parties is being examined by that party directly in the court, the other party should also have an opportunity of questioning that witness directly, if the witness has information outside the bounds of the direct examination of the party which had called that witness to testify. In practice it is done as follows. Once a witness has been examined directly by the party which had called him, the other party may cross-examine the witness if it wants to establish the reliability of the witness’s testimony, which is the purpose of the cross-examination, but it may thereafter state to the court briefly the reasons for which it wants to question the witness directly in favour of its own assertions. The defence is required to inform the court about the knowledge of significance for the defence possessed by the witness who was not mentioned in the direct examination by the party which had called the witness.

Much literature deals with the significance and techniques of conducting direct examination and cross-examination, because they are very important institutions which were introduced into our legislation only recently. For this paper we need to say that the purpose of cross-examination is testing the reliability of testimony, and that in conducting cross-examinations there must be a specific purpose, and the defence must know exactly how to reach that final purpose using simple questions. This requires good preparations. We are often able to see in motion pictures filmed in countries which have common law systems that the defence uses an aggressive approach in cross-examination, demanding only 'yes' and 'no' answers from witnesses. This is done because the decision on guilt is taken by a lay jury for which it is sometimes enough for a witness to refute a detail of a statement given earlier by using this manner of examination to believe defence's assertion that the witness is obviously lying or concealing facts. But in most cases the purpose of cross-examination in domestic proceedings cannot be achieved by answers like this, because we are trying to convince a court, judges who are professionals, that something a witness had said previously is not true. This cannot be achieved by aggressive questions and short answers, which will not make an impression on the court. Where at the insistence of the defence to answer only using 'yes' or 'no' a witness answers "No, but I should explain..." and the defence counsel then interrupts the witness, the court will allow the witness to continue, which means that this type of examination could have a boomerang effect. The objective of cross-examination is also to discredit witnesses. In many foreign systems after a witness has taken the oath and made a statement in direct examination, and is then led by the defence to admit that he had lied to the court concerning matters not directly connected to the criminal proceedings, the court will have little confidence in that witness in connection with matters which do concern the charges. A problem faced by defence counsel in Bosnia and Herzegovina is that many trial panels do not allow questions by which the credibility of witnesses can be tested, thereby not allowing presentation of evidence challenging that credibility.

Both the prosecution and the defence can call expert witnesses at the trial, as regulated by Article 269. We shall list here briefly certain important details of later stages of the proceedings. After reviewing appeals against first-instance decisions, courts are required to hold a trial if they revoke a judgement, as regulated by Article 310 of the CPC:

- “(1) In a session of the Panel of the Appellate Division, the Panel may reject the appeal as being late or inadmissible or the Panel may refuse the appeal as unfounded and confirm or modify the verdict of the first instance or revoke the verdict and hold the main trial.
- (2) The Panel of the Appellate Division shall decide in a single decision on all appeals against the same verdict.

Revocation of first-instance judgements are regulated by Article 315:

- “(1) By honouring the appeal, the Panel of the Appellate Division shall revoke the first instance verdict and hold a trial if the Panel finds that:
 - a) there exist major violations of the provisions of criminal procedure, except for cases referred to in Article 314 paragraph 1 of this Code;

b) it is necessary to present new evidence or repeat the evidence presented in the first instance proceedings that caused the state of facts to be erroneously and incompletely established.

- (2) The Panel of the Appellate division may also partially revoke the first instance verdict if certain parts of the verdict can be severed out without causing a detriment to a rightful verdict, and the Panel may hold a trial concerning the certain parts in question.
- (3) If the defendant is in custody, the Panel of the Appellate Division shall review whether the grounds for custody still exist and the Panel shall issue a decision on extension or termination of the custody. An appeal against this decision is not allowed.
- (4) If the defendant is in custody, the Panel of the Appellate Division is obligated to issue a decision not later than three months, and in complex cases not later than six months, from the day the Panel received documents.”

It is important to stress that appeals are allowed against judgements of the panel of the appellate division if the panel reverses a first-instance judgement acquitting the defendant and convicts the defendant, and in cases where upon appeals against acquittals the panel convicts the defendant. The only extraordinary legal remedy envisaged by the CPC of BiH is a request for reopening criminal proceedings.

The provisions of the Code under which in appeals proceedings it is no longer possible for a case to be returned by a second-instance court to a first-instance court has had a considerable influence on the outcomes of proceedings, which are very often not satisfactory for the defence.

In 2011 the Appeals Division of the Court of Bosnia and Herzegovina upheld 88% of all judgements, revised 8 % and overturned just 4%⁵, where proceedings were repeated before an appellate panel. These percentages could indicate a high quality of the decisions issued by first-instance courts, but regrettably that is not always the case. In many cases the appellate panel upholds a judgement simply to avoid a hearing, in spite of obvious breaches of law which require overturning the judgement and ordering a retrial. For this reason, as well as the absence of extraordinary legal remedies, the Constitutional Court of BiH receives an enormous number of appeals against legally binding judgements in criminal proceedings relating to arbitrary application of law.

We shall present here one case before the Court of Bosnia and Herzegovina which will show how the defence realises its right guaranteed by Article 14 of the CPC – equality of arms – in cases where certain procedural rights are not regulated by the Criminal Procedure Code of Bosnia and Herzegovina. Furthermore, the case will show that the defence is entitled to conduct its own investigation, fully protected from the prosecutor; as we have already pointed out in considering the sequence of presenting evidence at the trial, the defence is not bound to present any evidence to the prosecution before it is presented at the trial, which means that the defence has no disclosure obligation either during the investigation or the trial.

The defence counsel of defendant Đ.M in criminal proceedings before the Court of Bosnia and Herzegovina submitted to the prosecutor a request to have access to certain witnesses in order to

5 The High Judicial and Prosecutorial Council of BiH, Annual Report for 2011, <http://www.hjpc.ba/intro...>

prepare their defence in a case of a war crime against the civilian population covered by Article 173 para 1.c), 1.e) and 1.f) of the Criminal Code and the criminal offence of a war crime against prisoners of war covered by Article 175 para 1.a), 1.b) and 1.c) in connection with Article 180 paras 1 and 2, all in connection with Article 29 of the Criminal Code of BiH. An indictment was filed in the case.

The prosecutor refused the defence's request, and the defence approached the trial panel with a detailed elaboration of the provisions of Articles 14 and 50 of the CPC of the Federation of BiH guaranteeing for the defence equality of arms before the court; the principle of a fair trial calls for each party to have a reasonable opportunity to present its case to the court under conditions not placing that party in a substantially inferior position to that of the other party. Furthermore, the defence stated that the Criminal Procedure Code does not provide a way for the defence to contact witnesses for the prosecution, but that there is jurisprudence of International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) resolving the issue by allowing the defence access to witnesses for the prosecution.

Ruling on the defence's request, the court barred the defendant and his defence counsel from talking to prosecution witnesses.⁶ The court cited provisions of Article 261 para 2 of the CPC governing the manner and order of conducting the defence, expressing the opinion that the provisions of Articles 14 and 50 of the CPC should be viewed in the context of the other provisions of the Code regulating the procedural status of the prosecutor and the defendant. The court said that Article 261 para 2 of the CPC regulates in more detail the principle contained in Article 14 of the CPC of BiH, and that the defence had to satisfy itself with the procedural status it had under the CPC. The court pointed out that it was the duty of the prosecutor to objectively study and establish with equal attention facts that are exculpatory as well as inculpatory for the suspect or the defendant while the defence counsel collects only evidence in favour of the defendant. The court concluded that the defence could be in a position more favourable than that of the prosecutor. The court therefore placed itself in a position of 'defender' of the prosecutor, defending the prosecutor's position that he is not required to grant access to 'his' witnesses. The defence appealed against this ruling.

The Appellate Division of the Court of Bosnia and Herzegovina issued a ruling upholding the defence's appeal and repealing the challenged ruling, returning the case to the court for a new decision.⁷ In its ruling the court said that there was no doubt that the order of presenting evidence at the trial was governed by Article 261 para 2 of the CPC, but it pointed out to the court of first instance that under that provision a witness who had previously been called by the prosecution and testified could be examined directly by the defence in connection with new or other circumstances outside the framework of the cross-examination. In order for the defence to have a possibility of making a motion for evidence to be presented at the trial it was necessary for it to make certain investigative actions, including talking to witnesses who had been questioned by the prosecution. The court said that although the CPC did not prescribe a way in which the defence should or could conduct its own investigations, a lack of appropriate legal provision could not be the ground for denying a defendant's fundamental right to defence. The court cited the

6 Court of Bosnia and Herzegovina, ruling No: S1 1 K007914 12 Kri dated 9 March 2012.

7 Court of Bosnia and Herzegovina, ruling No: S1 1 K007914 Krž2 dated 2 April 2012.

Bricmont v. Belgium case (Commission report 15 October 1987, A. para 158). The court added that no one had ownership of witnesses and that a witness with knowledge on facts relevant for criminal proceedings could be summoned to the court to give evidence at the trial regardless of which party had made a motion for that witness to be heard. In the view of the court, the defence was entitled to have access to witnesses for the purpose of collecting evidence in favour of its own assertions, and said that such contacts must be made within the bounds specified by the professional code of conduct. The court said that although the CPC of BiH did not define a procedure according to which defence counsel could contact witnesses for the prosecution, all courts should be governed by the provisions of Article 6 of the European Convention on Human Rights, and the international practice guided by fundamental principles of a right to a defence, in accordance with which questions not explicitly regulated by law could also be resolved.

Acting on the ruling, the trial panel of the Court of Bosnia and Herzegovina issued another ruling barring defendant M.Đ. and his defence counsel from talking to prosecution witnesses, effectively confirming its earlier ruling dated 9 March 2012.⁸ The court of first instance repeated its earlier position, but this time added a new assertion that access by the defence to prosecution witnesses could “taint witnesses’ testimony”.

The defence also appealed against this ruling, and the Appellate Divisions finally issued a ruling upholding the appeal of the defence counsel of defendant M.Đ., reversing the first-instance court’s ruling and thereby approving the request of the defendant’s defence counsel for information to be provided on witnesses for the Prosecution of BiH for the purpose of interviewing those witnesses.⁹ The court’s decision is important for the realisation of the right of the defence to equality of arms in criminal proceedings, even in situations where the law does not provide for such a right. The court said in its ruling that the fact that the situation in question was not regulated by any provision of the CPC did not mean that it should be deemed impermissible. The question of the impermissibility of having contacts with witnesses for the opposing party for the purpose of proving one’s own assertions should by necessity be viewed from the aspect of the fundamental principles of criminal procedure and the provisions of the European Convention. The fundamental principles – Article 14 of the CPC of BiH, Article 50 of the CPC of BiH, and Article 6 of the European Convention – recognise a defendant’s right to have at his or her disposal, for the purpose of winning an acquittal or a lighter sentence, all relevant evidence that could be collected from public authorities, including the right of access to witnesses for the prosecution. The court said that witnesses’ testimony could be tainted only if they had mutual contacts, while contacts with defence counsel could in no way bring about this sort of contamination. The decision has filled a procedural void, but, much more importantly, shown that the defence has broad powers of exercising its right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights.

CONCLUSION

The Criminal Procedure Code of BiH offers very broad equality of arms guarantees to the defence. Criminal law in Bosnia and Herzegovina has undergone major changes, and is still being

8 Court of Bosnia and Herzegovina, ruling No.: S1 1 K007914 12 Kri od 23 April 2012.

9 Court of Bosnia and Herzegovina, ruling No.: S1 1 K007914 12 Krž4 dated 15 May 2012.

perfected. It is important to note that the new and better solutions are moving in a direction of improving the status of the defence before the court. Although we pointed to a number of procedural situations which are still unsatisfactory for the defence, it is very important that the court's position is very proper when in individual decisions it 'develops' the CPC in the spirit of the European Convention on Human Rights and Fundamental Freedoms.

System of Legal Remedies in the New Serbian Criminal Procedure Code

Summary

The author reviews the system of legal remedies in the new Code of Criminal Procedure of the Republic of Serbia by analysing two sets of questions and in a concluding discussion. The first set of questions deals with general notes on the system of legal remedies, the principles of their regulation and the differences between the solutions embraced in the new CPC and those of preceding criminal procedural law. The main conclusion made by the author is that “only as a first impression might one think that no fundamental changes have been made in the system of legal remedies. That first impression is not accurate – the new conception of criminal proceedings has by necessity led to major interventions in the regulation of both regular and extraordinary legal remedies. To put it shortly, *ex officio* action by the legal remedy court has been reduced to a level of exception, expressing itself best as a *favor defensionis*.”

The second and central group of questions deals with the main characteristics of each of the regular and extraordinary remedies envisioned by the Code. Among the many questions linked to each of the CPC’s legal remedies the most prominent are those concerning an analysis of the grounds for use of legal remedies, those concerning subjects entitled file a legal remedy, the deliberation procedure, and the decisions available to the court in legal remedies proceedings.

The essence of the author’s concluding discussion lies in his position that “the changes brought into the legal remedies system by the new Code of Criminal Procedure are a consequence of a new conception of criminal proceedings” in the new CPC of the RS.

Keywords: New CPC, legal remedies, appeal, judgment, ruling, repeat proceedings, request for the protection of legality, discretionary powers, court, defence

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I

The issue of legal remedies in criminal proceedings is without a doubt one of the most complex areas of criminal procedural law. That is probably one of the reasons why doctrine is reluctant to examine this subject matter in a comprehensive manner, and why legislators are generally satisfied to make minor interventions which do not threaten the existing systemic solutions, even when they are not suitable for satisfying the demands of modern criminal proceedings.

The system of legal remedies is built up by taking into consideration errors which may come about during proceedings and the court's deliberation, some concerning establishment of facts, others application of the law, and a third group courts' decisions on criminal sanctions. Of major significance for establishing a system of legal remedies is its division into regular legal remedies and extraordinary legal remedies. Regular legal remedies can be filed against judgements that are not final in order to prevent them from becoming final and enforceable before a higher court renders a ruling on their legality and correctness. Extraordinary legal remedies can be filed against final court decisions in exceptional situations, all prescribed by law, when regular legal remedies may no longer be filed, the aim being for a finally adjudicated matter to be reviewed again by a competent court.

An important property of the system of legal remedies is that in accordance with the *nemo invitus agere cogitur* rule, it depends on the persons authorised to file them whether and to what extent they intend to challenge the first-instance court's judgment. A legal remedies procedure is therefore not an obligatory phase in criminal proceedings, but one in which the emphasis is on the discretionary nature of a court's decision-making. This procedure is based on the discretionary principle, which means that the use of a legal remedy represents a legal benefit, a right freely at the disposal of authorised participants in proceedings. Its existence has relativised the principle of officiality, which is customary in the conduct of first-instance criminal proceedings, under which the state, personified in the public prosecutor, initiates criminal prosecution *ex officio* in the public interest, irrespective of the will of the injured party and the defendant who cannot, before proceedings are conducted and a decision rendered by a court, be subjected willingly to a criminal sanction.

The principles set out above were taken into account by legislators in the process of regulating the system of legal remedies in the 2011 Criminal Procedure Code (hereinafter: CPC).² Given that the CPC has retained a system of legal remedies identical to that provided by the 2001 Criminal Procedure Code (hereinafter: CPC/2001),³ one might well think that no substantial changes have been made. That first impression is not accurate – the new conception of criminal proceedings has by necessity led to major interventions in the regulation of both regular and extraordinary legal remedies. To put it shortly, *ex officio* action by the legal remedy court has been reduced to a level of exception, expressing itself best as a *favor defensionis*.

The new Criminal Procedure Code, following the pattern of positive law, places among regular legal remedies an appeal against a first-instance judgement, an appeal against a second-instance

2 Criminal Procedure Code (Official Gazette of the RS, Nos. 72/11 and 101/11).

3 Criminal Procedure Code (Official Gazette of the FRJ, Nos. 70/01 and 68/02 and Official Gazette of the RS, Nos. 58/04, 85/05, 85/05 – state law, 115/05, 49/07, 20/09 – state law, 72/09 and 76/10).

judgement and an appeal against a ruling, the extraordinary legal remedies being a request for repeating criminal proceedings and a request for the protection of legality. We shall point here the most important novel features in the legal remedies provisions of the new CPC.

II

When we consider the *appeal against a first-instance judgment*, a new feature is the possibility of extending the 'regular' 15-day deadline for filing an appeal. Such a request can be filed in exceptionally complex cases by the parties and the defence counsel, and is decided on by the president of the panel who, if he grants the request, may extend the time-limit for filing an appeal by no more than 15 days (Article 432 paras 1 to 3 of the CPC).

Among those authorised to file an appeal are persons whose proceeds from crime have been seized, and injured parties may besides filing an appeal in connection with the court's decision on the costs of criminal proceedings also file an appeal against a decision on an adjudicated indemnification claim (Article 433 paras 4 and 5 of the CPC). In introducing a right of injured parties to file claims against decisions on adjudicated indemnification claims, legislators were guided by Strasbourg standards on injured parties' possibility to realise certain rights within the framework of the right to a fair trial.⁴

The grounds for filing an appeal remain unchanged. It should be pointed out that the existence of an expiry of the statute of limitations on criminal prosecution, amnesty, pardons or adjudicated matters – other circumstances which permanently exclude criminal prosecution – represents an absolutely substantive violation of the provisions of criminal procedure (Article 438 para 1 item 1 of the CPC). This is a change from the provision of Article 369 item 2 of the CPC/2001, which placed the aforesaid circumstances among violations of criminal law. The *ratio legis* of the new legislation is the procedural effect of the aforesaid circumstances, i.e., they exclude permanently the possibility of criminal prosecution.⁵ Of the shortcomings in the judgment done in writing only an incomprehensible summary judgment remains among absolute violations of criminal procedure (Article 438 para 1 item 11 of the CPC), while the other violations of this type have acquired a relative character (Article 438 para 2 item 2 of the CPC). In other words, their mere existence is not sufficient for a first-instance judgement to be vacated, but it is also necessary that they prevented a possibility of examining whether the judgment was legal and correct.⁶ The provision on a judgment based on unlawful evidence has also been placed among the relative violations, because vacating of a judgment need not take place if other evidence shows obviously that the same judgment would have been rendered (Article 438 para 1 item 1 of the CPC). What is involved is a *quaestio facti* in connection with which the court examines if in case of the absence of a fact established on the basis of an improper item of evidence the same judgment could have

4 European Court of Human Rights, *Perez v. France*, 47287/99, 12 February 2004. It is also worthy of mention that similar proposals were made here in the 1980s. M. Grubiša, *Krivični postupak Postupak o pravnim lijekovima*, 'Informator', Zagreb, 1987, p. 161.

5 *Ibid.*, p. 114.

6 It is somewhat controversial whether this substantive violation of procedural law should have been linked to the impossibility of the court of second instance to examine whether the decision of the first instance court was proper (in respect of finding of fact). For vacating a first instance judgment it is enough for the appellate court to conclude that a substantive violation of the provisions of criminal procedure from Article 438 para 2 item 2 of the CPC prevents it from examining the legality of the judgment. For this reason there can be no special justification for this relatively substantive violation of the provisions of criminal procedure to be linked to the regularity of the judgment (the same is the case for breaches of procedure from Article 438 para 2 item 3 of the CPC).

been issued. It should also be borne in mind that by evaluating whether a judgment would have been the same even if an unlawful item of evidence had not been present one enters the realm of pure conjecture, whereby evidentiary prohibitions lose much of their significance which should, with the aim of protecting certain social values, set by the courts standards of conduct of public authorities in the collection of evidence.⁷ It should also be noted that the existing relatively substantive violation of the provisions of criminal procedure has been retained, with a slightly narrower area of application (Article 438 para 2 item 3 of the CPC).

One of the most important novel features of the appellate procedure, patterned after comparative law solutions, as well as a similar solution that exists in the administrative procedure,⁸ is the provision of Article 443 para 2 of the CPC, according to which under certain conditions the president of the panel of the court of first instance may re-open the trial and resume evidentiary proceedings. The *sine qua non* condition is that the facts presented and new evidence proposed in the appeal may, in the view of the president of the panel of the court of first instance, contribute to a comprehensive consideration of the subject matter of the evidentiary actions. This is therefore a provision based on the *court's responsibility to establish the facts*; the court of first instance, which has the initial responsibility for establishing the facts, is thereby given an opportunity to define its position in respect to the facts presented and new evidence proposed in the appeal. Whether the facts and evidence proposed in the appeal are significant enough to be able to contribute to a comprehensive consideration of the subject matter of the evidentiary actions is a *quaestio facti*. In any case, the president of the panel of the court of first instance is required to assume a certain position thereon, which among other things also means the issuance of a decision to re-open the trial and resuming evidentiary proceedings, failing which the president delivers the appeal to the opposing party for its response (Article 444 of the CPC).

When the files reach the court of second instance in connection with an appeal, they are delivered to a reporting judge; in particularly complex cases, the president of the court may appoint several members of the panel as reporting judges (Article 445 para 1 of the CPC). The court of second instance issues a decision on an appeal at a session of the panel or on the basis of a hearing; a hearing may be held only in respect of certain parts of the first-instance judgment, if they can be separated without detriment to proper adjudication. In respect of the parts of the judgments for which no hearing was ordered, a decision on the appeal is issued at a session of the panel. If the panel decides to hold a hearing, the reporting judge schedules the hearing and manages it as the president of the panel, and if there are several reporting judges, the panel assigns one reporting judge as the president of the panel (Article 446 paras 1, 3 and 4 of the CPC).

A hearing can also be held in the absence of a duly summoned defendant who fails to justify his absence. In such a case, the court assigns to a defendant who has no defence counsel, pursuant to Article 74 item 9 of the CPC, an *ex officio* defence counsel (Article 449 para 3 of the CPC). It is also the view of the European Court of Human Rights that a defendant's waiver of the right to attend a hearing must be determined in an unambiguous manner and attended by minimal guarantees corresponding to the complexity of the case.⁹ In case a defendant was not duly served a

7 T. Vasiljević, *Sistem krivičnog procesnog prava SFRJ*, third edition, 'Savremena administracija', Belgrade, 1981, p. 604.

8 Article 226 para 2 of the Law on the General Administrative Procedure (Official Gazette of the FRY, Nos. 33/97 and 31/01 and Official Gazette of the RS, No. 30/10).

9 European Court of Human Rights, *Poitrinol v. France*, 14032/88, 23 November 1993.

summons for a hearing held in his absence, a request for repeating criminal proceedings may be filed, in accordance with Article 473 para 1 item 7 of the CPC.

A provision on the scope of the examination of the first-instance judgment establishes as a rule that the court of second instance examines the judgment within the framework of the grounds, the criminal offence and the direction of the rebuttal specified in the appeal (Article 451 para 1 of the CPC). There is an exception according to which the appellate court examines the judgment *ex officio*; this authority of the court is considerably revised in the new CPC. What is essentially involved is acting *in favorem defensionis*, consisting of examination of the decision on the criminal sanction in respect to the appeal filed by the defendant. The *sine qua non* condition for the appeal is that it has been filed because of an incorrect or incomplete finding of fact or a violation of criminal law, or that it does not contain the grounds for the appeal and a rationale of the appeal (Article 451 para 2 of the CPC). Furthermore, the court of second instance may in connection with a prosecutor's appeal to the detriment of the defendant revise the first-instance judgment also to the benefit of the defendant in respect of the decision on the criminal sanction (Article 451 para 3 of the CPC).

The court of second instance may, at a session of the panel or on the basis of a hearing held earlier, dismiss the appeal as untimely, inadmissible or untidy, or reject the appeal as unfounded and uphold the first-instance judgment, or grant the appeal and set aside the first-instance judgment and refer the case back to the court of first instance for re-trial, or grant the appeal and reverse the first-instance judgment (Article 455 para 1 of the CPC). If a first-instance judgment has already been abolished once in the same case, the second-instance court issues its own judgment (Article 455 para 2 of the CPC). The duty to issue a judgment in the second instance should not be identified with the holding of a hearing, but with resolution of the case on merits. In other words, until the issuance of a judgment founded on merits by which the court of second instance rejects the appeal as unfounded, or grants the appeal and reverses the decision of the court of first instance, which can happen both at a session of the panel and after the holding of a hearing.

Also worthy of mention is that the court of second instance is required to decide on all appeals filed against the same judgment (Article 455 para 3 of the CPC). As a rule this is done with a single decision. However, there are cases in actual practice where after the court of second instance has decided on an appeal a second appeal against the same judgment arrives. Whether or not that appeal fulfils the requirements for deciding on the merits, it is a fact that the court of second instance has already decided on an appeal. Binding the court of second instance to issue a single decision on all appeals against a first-instance judgment would necessarily place that court in a position of breaking the law. For that reason Article 455 para 3 of the CPC eliminates such a danger by stating that the court of second instance, *as a rule*, decides with a single decision on all appeals against the same judgment, which means that exceptionally it can do so with two decisions, or even more.

A substantive condition for filing an appeal against a second-instance judgment exists if the court of second instance reverses a first-instance judgment which acquitted the defendant of the charges and pronounces a judgment finding the defendant guilty (Article 463 of the CPC). This means that an appeal is not possible if the court of first instance issued a judgment rejecting an appeal,

in spite of the doctrinal position that it would also be justified to allow an appeal to be made even in such a procedural situation to a third instance.¹⁰

What is also new is that the appellate court may decide on appeals against first-instance judgment not only at sessions of the panel (as provided by Article 395 para 2 of the CPC/2001), but also at a hearing. The introduction of a possibility of holding a hearing before a court of third instance eliminates the danger that this court, sitting in panel, establishes a different finding of fact and changes the factual basis of the judgment, which certain authors have advocated.¹¹

The possibility of filing an *appeal against a ruling* has been made conditional on the importance of the question which was the subject matter being decided, the stage in the proceedings at which the ruling was issued, or the authority of the body conducting proceedings which issued the ruling.¹² Of the novel features in connection with this regular legal remedy we need to stress that under the new procedure appeals are filed to the authority conducting proceedings (Article 466 para 1 of the CPC). In this manner are encompassed not just rulings issued by the court, but also by the public prosecutor or the police (as is the case with the ruling on the placement of a suspect in custody (Article 294 para 2 of the CPC), issued by the public prosecutor or the police, with the approval of the prosecutor.

Under Article 467 para 1 of the CPC, the court examines the contested ruling within the framework of the grounds, the offence and the direction of rebuttal specified in the appeal. Given that a legal remedy should as a rule lead to an outcome commensurate with the interests of the appellant, it is logical that in examining the ruling the court moves in the direction of the challenge specified in the appeal. The possibility of *reformatio in peius appellantis* has therefore been excluded, which is supported by the absence of a provision binding the court to move in a direction opposite to the direction of the challenge. That is certainly the main reason why Article 468 of the CPC does not refer to applying *mutatis mutandis* the procedural institution of a prohibition of *reformatio in peius*, as had been provided by Article 402 para 1 of the CPC/2001.

In respect of the grounds for challenging rulings, under Article 468 of the CPC Articles 437 to 441 of the CPC are to be applied accordingly - to the grounds for filing an appeal against a first-instance judgment. In this manner has been rectified a shortcoming of Article 402 para 1 of the CPC/2001 which made no mention of the grounds on which a ruling could be challenged. The new Code's wording comes close to the doctrinal position that a rule can be challenged on all of the grounds on which an appeal can be filed against a first-instance judgment, provided that they are admissible.¹³

Article 467 para 5 of the CPC prescribes a time limit for the appellate court to decide on an appeal and to deliver its decision with the case files to the authority conducting proceedings which had issued the ruling. The deadline is 30 days, the *dies a quo* being the first day following the date of the appellate court receiving the files. In other words, the relevant procedural moment is the date of receiving the files alongside which no motion of the public prosecutor is delivered,

10 M. Grubiša, 285; T. Vasiljević, M. Grubač, *Komentar Zakonika o krivičnom postupku*, 11th Revised Edition, Biblioteka Pravna biblioteka, Edicija komentari zakona, Vol. 25, J.P.'Službeni glasnik', Belgrade, 2010, p. 870.

11 *Ibid.*, 869.

12 M. Grubiša, p. 307.

13 T. Vasiljević, M. Grubač, pp. 876, 877.

because Article 468 CPC does not provide for the application *mutatis mutandis* of Article 445 para 3 of the CPC.¹⁴

III

Extraordinary legal remedies include a request for repeating (reopening) criminal proceedings and a request for the protection of legality.

Repeating (reopening) of criminal proceedings has been ‘cleansed’ of provisions not belonging by their characteristics to this extraordinary legal remedy. Thus provisions on limited reopening of criminal proceeding (Article 405 CPC/2001) and mitigation of penalty for a convicted accomplice (Article 405a CPC/2001) have been transferred from the chapter on retrial to special procedures for reversing final judgements (Chapter XIII of the CPC). Provisions on repeating criminal proceedings no longer include those relating to resumption of adjourned proceedings and proceedings terminated by a dismissal of the indictment, which questions are regulated in other chapters of the CPC.

Despite the constitutional norm which, following Article 4 para 2 of Protocol No. 7. to the European Convention on the Protection of Human Rights and Fundamental Freedoms,¹⁵ created a possibility of reopening proceedings if evidence is presented about new facts which could have influenced significantly the outcome of proceedings, or if during previous proceedings there occurred a ‘material breach’ which might have influenced its outcome (Article 34 para 5 of the Constitution),¹⁶ the new CPC retains a provision under which repeating criminal proceedings is permitted only for the defendant. Legislators obviously opted for the position that repeating proceedings to the detriment of the defendant represented a standard that has been reached and should not be lessened.

Repeating criminal proceedings is allowed only in respect of criminal proceedings concluded by a judgment (Article 470 of the CPC). This formulation could create a dilemma if repeating criminal proceedings could take place in the case of the criminal proceedings being concluded by a final ruling corresponding to a judgement, and the legal requirements for repeating proceedings are fulfilled. Given that the law uses a generic concept in prescribing the impossibility of revising a final *court decision* to the detriment of the defendant (Article 4 para 2 of the CPC), and also treats identically a judgment and a ruling which by its content correspond to a judgment in respect of the assessment of evidence and establishment of the facts (Article 16 paras 4 and 5 of the CPC), there exist no obstructions for repeating criminal proceedings to be allowed also in the case of the aforementioned rulings.

14 For this reason the formulation in Article 467 para 5 of the CPC on receiving files ‘with a proposal of the public prosecutor’ is superfluous and should be stricken.

15 This provision of the European Convention on the Protection of Human Rights and Fundamental Freedoms (Official Gazette of Serbia and Montenegro international agreements, Nos. 9/03, 5/05 and 7/05-correction, and *Official Gazette of the RS, international agreements*, No. 12/10) envisages that the *ne bis in idem* principle does not preclude reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings which could affect the outcome of the case.

16 Constitution of the Republic of Serbia (Official Gazette of the RS, No. 98/06).

Of the grounds on which repeating criminal proceedings can be requested we might list perjury by a professional advisor or a co-defendant (Article 437 para 1 item 1 *in fine* of the CPC). Placing professional advisors among those whose perjurious testimony might represent a basis for repeating criminal proceedings is a logical consequence of that person's procedural role in criminal proceedings (Articles 125 and 126 of the CPC). Although professional advisors do not give expert testimony, it is a fact that they possess professional knowledge and are commissioned either by the prosecution or the defence, making possible a professional debate on the object of the expert analysis. This provides a contribution to the quality of the findings and opinions, ultimately also the assessment of that evidence in accordance with the discretionary powers of the judge. Also new is a possibility of repeating criminal proceedings because a judgment was based on perjurious testimony given by a co-defendant. This is based on the provision of Article 406 para 1 item 5 of the CPC under which a co-defendant prosecuted in severed criminal proceedings or criminal proceedings already concluded by a final conviction cannot be heard as witnesses in proceedings conducted against another co-defendant, but only the record of his testimony can be read out.

Provisions on *requests for the protection of legality* contain a number of new solutions. Requests may be submitted against final decisions of the public prosecutor (Article 482 para 1 of the CPC), which is a consequence of the new concept of the pre-investigation procedure and the investigation, in which the public prosecutor is the primary authority conducting proceedings. Requests may be submitted by the Republic Public Prosecutor, the defendant and his defence counsel (Article 483 para 1 of the CPC). Placing the defence among those authorised to submit a request does not mean that its status has been made equal to that of the Republic Public Prosecutor. It is a consequence of the view that the purpose of a request for the protection of legality is protection of the general interest, as well as an effort to prevent this extraordinary legal remedy from being turned into a regular one by opening the door to the defence to employ it (in view of the possible number of requests).¹⁷ The defence does have an opportunity to submit within a specified time limit a request for the protection of legality due to violations of the law listed in Article 485 para 4 of the CPC, while the authorised public prosecutor can do so without any time limit in connection with any violation of the law contained in a final decision or the proceedings that preceded its issuance.

A defendant may submit a request for the protection of legality only through his/her defence counsel (Article 483 para 3 of the CPC). The *ratio legis* of this provision is a need for the defendant to be represented by a legal professional before the highest court, in proceedings in which legal questions are debated.¹⁸

There are now more reasons for submitting requests for the protection of legality; in particular violations of substantive or procedural law in a final decision or in proceedings (pursuant to Article 2 para 1 item 14 of the CPC, in the pre-investigation proceedings and criminal proceedings) which preceded its issuance. The existence of violations of procedural provisions should be interpreted as violations of procedural regulations that had preceded the issuance of the final decision, irrespective of whether breach of the law occurred at the same time by the final decision. Other reasons for submitting a request for the protection of legality include the application of an

17 M. Grubiša, p. 400.

18 Comp. European Court of Human Rights *Pakelli v. Germany*, 8398/78, 25 April 1983.

‘unconstitutional’ law, and a violation or denial of a human right and freedom (Article 485 para 1 of the CPC).

Requests for the protection of legality are processed by the Supreme Court of Cassation, which, pursuant to Article 21 para 5 of the CPC, adjudicates in a panel consisting of five judges (Article 486 para 1 of the CPC). Also very significant is the provision granting the highest-instance court the power to assess whether the violation of the law in connection with which the request for the protection of legality was submitted represents an issue of importance for correct or uniform application of the law (Article 486 para 2 of the CPC). Only in such a case will the Supreme Court of Cassation consider the merits of the request; otherwise it will dismiss the request (Article 487 para 1 item 4 of the CPC). In earlier legislation only the Republic Public Prosecutor was authorised to decide whether a request for the protection of legality could be submitted (Article 421 of the CPC/2001); in this the Prosecutor was guided by the significance of the violation of the law for correct and uniform application of the law, as well as the instructive character of the request for the protection of legality, especially prominent in cases of the issuance of declaratory decisions on requests.¹⁹

The new system envisaged by Article 486 para 2 of the CPC has certain similarities with the *writ of certiorari* procedure by way of which the Supreme Court of the United States picks the cases it will adjudicate, guiding itself by the need to secure uniformity in the application of law. There is however an obvious difference, because in contrast to the U.S. Supreme Court the Supreme Court of Cassation does not instruct a lower-ranked court to submit a certain case-file, but makes its assessment on the significance of a certain legal issue from the request for the protection of legality which was submitted to it.

Also new to the CPC are cases in which the Supreme Court of Cassation issues rulings dismissing requests for the protection of legality (Article 487 CPC). Also worthy of mention is that in spite of the absence of such a provision in the CPC/2001, the position embraced by courts²⁰ was that rulings to dismiss requests for the protection of legality were issued in the case of the public prosecutor abandoning the request before a decision was taken, which was also supported by doctrine.²¹

Also new is a provision under which the Supreme Court of Cassation may notify the public prosecutor and the defence counsel of the session at which it will decide on the request, if it thinks that their presence would be of significance for issuing a decision (Article 486 para 2 of the CPC). The new legislative formulation provides for concurrent presence of the public prosecutor and the defendant, unlike Article 422 para 3 of the CPC/2001, which stipulated the mandatory notification of the public prosecutor, and notification of the defence counsel and the defendant only if the request was filed to the detriment of the defendant. The above legislative editing is the result of the revised concept of the request for the protection of legality, which is no longer an extraordinary legal remedy available only to the public prosecutor.

19 M. Grubiša, p. 400; T. Vasiljević, M. Grubač, p. 921.

20 Supreme Court of Serbia, Kz. 10/70 dated 25 December 1970.

21 M. Grubiša, p. 404; T. Vasiljević, M. Grubač, p. 926.

It is also noticeable that only the defence counsel is notified and may attend the session, but not the defendant. It should be noted here that under case law of the European Court of Human Rights the absence of the defendant from the court of legal remedy deciding exclusively on issues of law is a violation of Article 6 of the European Convention on Human Rights, provided the defendant has had an opportunity to plead at main hearing in first-instance proceedings. In the view of the Court, the court of legal remedy does not establish facts, but only interprets disputed legal rules.²²

IV

The amendments introduced in the system of legal remedies by the new Criminal Procedure Code are the result of the new concept of criminal proceedings. The emphasis on the adversarial system, and an effort to ensure that the procedural role of the court fulfils to the highest extent possible demands for impartiality as one of the key elements of the right to a fair trial, have found their full expression in the legal remedies procedure. The reason for the former is that the issue here are proceedings based on the disposition of the parties; hence premises securing the equality of arms have been normatively developed within that framework, which also means granting certain privileges to the defendant in respect to the opposing side. Those *in favorem defensionis* provisions were the subject of the discussion above; they exist in particular for regular legal remedies and are among other things reflected in the delivery of improperly drawn up appeal in favour of the defendant to the appellate court, *ex officio* examination of the first-instance judgment in favour of the defendant in respect of the decision on the criminal sanction, the non-delivery of the ruling challenged by the appeal to the public prosecutor for a motion and similar. The extraordinary legal remedy procedure also contains several such privileges for the defence, including a general prohibition of revising a first-instance decision to the detriment of the defendant, the introduction of new reasons for repeating criminal proceedings, and the defence's right to submit a request for the protection of legality, under certain conditions.

The Criminal Procedure Code also eliminates defects that had been unjustifiably neglected in earlier revisions of criminal procedural legislation, although they had been mentioned in doctrine, and the courts had been forced in their practice to find appropriate solutions. The limits of the examination of the first-instance judgement are clearly delineated by the grounds, the offence and the direction of the appeal, certain violations of the law, given that they are procedural impediments, have been transmuted from substantive into procedural violations; provisions on limited reopening of criminal proceeding have been detached from the provisions on retrial, a ruling dismissing a request for the protection of legality has been introduced, etc.

As in all major legislation of this type, the new Code of Criminal Procedure has not managed to harmonise fully all its provisions, and some procedural institutions have not been shaped to their fullest extent. In a way this could have been expected, as ingrained habits in the applications of existing solutions represented a restraint in the consistent development of the new conception of criminal procedure and of relevant new legal solutions. On the other hand, there was a fear whether and to what extent practice would be able to accept fully the revised and the new procedural institutions, for which reason normative development of certain procedural institutions has not gone as far as could have been the case.

22 European Court of Human Rights, *Hermi v. Italy*, 18114/02, 18 October 2006

In any case, the new Criminal Procedure Code has conceptually ‘cleansed’ domestic criminal procedure of the numerous strata which had obfuscated its essence due to the adoption of previous criminal procedure codes and numerous attendant amendments. That essence was reflected in the status of the court as a dispenser of justice who, in the search for that justice, had a duty to assume the role of investigator, thereby bringing into question some of the fundamental demands of contemporary criminal procedure – its impartiality, the defendant’s presumption of innocence, and the *in dubio pro reo* principle. The moment these criminal procedural postulates were put in place as the principal guarantees of the status of the defendant in criminal proceedings, the court’s investigative role had to be abandoned – in fact replaced by the court’s responsibility to ensure that the facts to be proved are argued to sufficient extent. Argued primarily between parties, and by exception also with the help of the court, exclusively in a direction implying presentation of evidence in favour of the defence, because moving in the other direction would run counter to the presumption of the defendant’s innocence and the *in dubio pro reo* principle. Hence, this is the route that has to be taken exclusively by the prosecutor of competent jurisdiction, and in case the prosecutor fails to ‘jump over’ the aforesaid hurdles guaranteeing the status of the defendant, the court’s impartial role implies the only possible outcome – an acquittal.

Application of Legal Remedies in the 2003 BiH Criminal Procedure Code Before the Courts of Bosnia and Herzegovina (Compared to the System of Legal Remedies Prior to 2003)

Summary

In this paper the author analyses the actual application of the legal remedies from the new criminal procedure legislation in Bosnia and Herzegovina enacted in 2003. These solutions are compared to the system of legal remedies which had been in application until the enactment of the new procedure legislation in 2003 for the purposes of providing better understanding and a more complete review of the subject matter.

When viewed from a structural point of view, the subject matter is dealt with within the scope of two sets of questions followed by concluding comments. Accordingly, the introduction provides general observations on the reform of the criminal procedure legislation of Bosnia and Herzegovina and on the place and role the legal remedy system has been given in this reform. The second (main) part of this paper is dedicated to a detailed analysis of the legal remedy system in Bosnia and Herzegovina's positive criminal procedure legislation (of regular and extraordinary legal remedies – appeals, the process of repeating the criminal proceedings and requests for the protection of legality). These and other related questions are dealt with in this paper from two different points of view: from the standpoint of the legal norm and from the standpoint of their application.

Key words: appeal, grounds, decisions, hearing, practice, court, verdicts, repeating the criminal proceedings, protection of legality

1 Justice of the Supreme Court of Republika Srpska.

I Introduction

Over the course of the criminal legislation reform in Bosnia and Herzegovina (BiH) the criminal legislation has been harmonised and new laws on criminal procedure have been passed both at the state and entity levels and in Brcko District of Bosnia and Herzegovina (BD BiH). These laws have been passed under the strong influence of foreign experts coming from the American legal culture, who have also been training judges and prosecutors on how to apply them. The legislator opted for a mixture of legal systems² with predominant adversary elements rather than for a completely adversary procedure. Since all of the laws passed are almost identical this paper shall be based on the Criminal Procedure Code of the Republika Srpska – Consolidated Text (CPC RS) enacted in 2003 while other codes (CPC BiH, CPC FBiH, CPC BD BiH) are considered only in cases where they differ.³

The system of legal remedies has undergone fundamental changes. The previous appeal procedure has been altered completely and it has been regulated in the manner never before used in our legal tradition whereas the number of extraordinary legal remedies has been reduced to one. The explanation for this was the acceleration and simplification of the proceedings as well as the reduction of costs and the protection of human rights. Upon further analysis and after sharing our experiences with others, we have learned that such appeal procedure does not exist in the common law system either, which is for us difficult to understand and apply in other instances as well.⁴ Certain shortcomings have emerged upon application which stand in contradiction with the goals of this appeal procedure reform. These have caused numerous dilemmas in practical application which has in turn prompted the courts to interpret provisions of the law more often than previously and to fill in the legal voids. This paper will attempt, in part, to answer whether the courts have successfully done this. Recognising this problem the Supreme Courts of the Republika Srpska and the Federation of Bosnia and Herzegovina have suggested that this part of the Code be amended and this has been rectified in the Republika Srpska by the enactment of the new law⁵ and a similar process is under way at the levels of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and Brcko District BiH.

II Legal remedy system

As was aforementioned, one of the main characteristics of the new procedure legislation is the reduction in number of the legal remedies available. The Code provides for the following: a) an appeal, as a regular remedy, and b) repeating the criminal proceedings, as an extraordinary le-

2 M. Simović: *Krivično procesno pravo*, Uvod i opšti dio, Bihać, 2009, p. 78.

3 CPC that was passed in 2003 by the Republika Srpska does not mention in its title that it is the Code of the Republika Srpska (this label is used in the text in order to make a distinction between the Codes that bear the same title), whereas other CPCs include in their titles the name of the state, entity or District they refer to; it was published with amendments and supplements in The Official Gazette of the Republika Srpska no. 50/03, 11/04, 115/04, 68/07, 119/08, 55/09, 80/09, 88/09 and 92/09, Consolidated Text was passed on 2nd Nov 2009 (The Official Gazette of the Republika Srpska no. 100/09); CPC BiH, The Official Gazette of BiH no. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09 и 93/09; CPC FBiH, The official Gazette of the FBiH no. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 09/09 and 12/10; CPC BD BiH, The Official Gazette of BD BiH no. 44/10.

4 A. Jaganjac: *Održavanje pretresa pred drugostepenim sudom*, *Pravo i pravda*, a journal for the theory and practice of the Judges and Prosecutors Association of the Federation of Bosnia and Herzegovina, year IX, no. 2, Sarajevo, 2010, p.23.

5 Criminal Procedure Code of the Republika Srpska (The Official Gazette of the Republika Srpska, no. 53/12)

gal remedy. Subsequent amendments in 2008 to the CPC of the RS⁶ introduced the request for the protection of legality. Previous Criminal Procedure Code⁷ included, in addition to the appeal as a regular legal remedy, four other extraordinary legal remedies: a) repeating the criminal proceedings, b) extraordinary mitigation of the sentence, c) request for the protection of legality and d) request for extraordinary review of the final verdict (in FBiH without the request for the protection of legality, but the prosecutor is also entitled to request extraordinary review of the final verdict).

1. Appeals

Appeal against the verdict and appeal against the court decision are regular legal remedies (*remedium ordinarium*) and they are used when the decisions have not yet become final and they prevent the decisions of lower courts to come into force.⁸ An appeal against the first instance verdict refers to all types of first instance verdicts but the grounds for these appeals are the same.⁹ An appeal against the second instance court decision is permissible under extraordinary circumstances (Article 332).¹⁰ An appeal against the decision is permitted unless it is explicitly ruled out.

An appeal is a devolutionary legal remedy because it is decided on by a higher court and it has a suspensive effect because by appealing the enforcement of the verdict is stayed. An appeal is a comprehensive legal remedy as it can be used to contest the factual and the legal grounds of the verdict since under Article 310 of the CPC the verdict can be contested on the following grounds: a) if there is an essential violation of the provisions of criminal procedure or b) a violation of the criminal code, c) if the state of the facts has been established erroneously or incompletely and d) in order to contest the decision on the criminal sanctions, the forfeiture of property gain, costs of criminal proceedings, claims under property law as well as the public media announcement of the verdict.

1.2 Deadline for appeals

An appeal may be filed against the verdict rendered in the first instance within 15 days from the date when the copy of the verdict was delivered (Article 306, Paragraph 1). The Code allows in complex matters this deadline for appeals to be extended up to a maximum of 15 days (Paragraph 2). It is an unusual solution for us that the court may extend the deadline set by law, especially since it does not specify what qualifies as a 'complex matter'. It must be said that these motions have not been filed frequently in practice. The provision that stipulates that the deadline for filing an appeal does not start running until the court has rendered a decision on such a motion (Paragraph 3) is even less specific since it states nowhere when such a motion must be filed and what the deadline for the court to render its decision is. Theoretically, it is possible that this can take up to a couple of months during which period the time for the deadline for filing

6 Law on Amendments to the Criminal Procedure Code of the Republika Srpska (The Official Gazette of the Republika Srpska, no. 119/08)

7 Criminal Procedure Code – Consolidated Text (The Official Gazette of SFRY, no. 26/86, 47/87, 57/89 and 3/90, with the amendments in The Official Gazette of the Republika Srpska, no. 4/93, 26/, 14/94, 6/97 and 61/01).

8 M. Simović: *Krivično procesno pravo*, Third revised edition, op.cit., p. 367.

9 M. Simović: *Krivično procesno pravo*, Third revised edition, op.cit., p. 379.

10 Unless it is stated otherwise, the articles given in parenthesis refer to the Criminal Procedure Code – Consolidated Text

an appeal does not start to run (if the motion is filed at the very expiration date, the judge is absent, the proceedings take a long time or because of the workload in other cases etc.). This provision, as it was apparently taken from Anglo-Saxon law (more so from the regulations of the Hague Tribunal), should have been defined more precisely, so one option would be to file the motion immediately at the announcement of the verdict and the court can then render its decision on the motion in writing.

1.3 Subjects of the appeal

Subjects of the appeal are persons authorised by law to file an appeal. Pursuant to the provision of the Article 307, Paragraph 1 of the CPC, an appeal may be filed by the parties involved, the defendant and the injured party, and, in favour of the defendant, their legal representative, spouse or extramarital partner, a parent or a child and adoptive parent or adopted child (Paragraph 2), these are then the subjects of the appeal. The defence attorney and persons referred to in Paragraph 2 do not need any special authorisation for the filing of an appeal, however, they cannot file it against the defendant's wishes unless a long term prison sentence has been given. The prosecutor may file an appeal both to the detriment and in favour of the accused (paragraph 3).

At the very beginning we are already faced with the legislator's inconsistency in the application of the adversary procedure model as it gives the right to an appeal to the prosecutor which he does not have in such a system. In the USA, in criminal cases, the state does not have the right to appeal acquittals¹¹. It is even less justified to provide the possibility of the prosecutor's appeal in favour of the defendant in adversarial proceedings.

The injured party, as a participant of the criminal proceedings, is solely entitled to appeal the decision on costs and claims under property law (Article 307, Paragraph 4). An appeal may be filed by persons whose items or property gain has been forfeited (Article 307, Paragraph 5). These are the parties entitled to the restricted right to an appeal.

1.4 The content of an appeal, grounds for an appeal and the contested scope of the verdict

An appeal should include an indication of the verdict being appealed, the grounds for contesting the verdict, the reasoning behind the appeal, a proposal for the contested verdict to be fully or partially reversed or revised and the signature of the appellant (Article 309). The verdict may be contested: a) if an essential violation of the provisions of criminal procedure has occurred or b) a violation of the criminal code, c) if the state of the facts has been established erroneously or incompletely and d) in order to contest the decision rendered as to the criminal sanctions, the forfeiture of property gain, costs of criminal proceedings, claims under property law as well as

11 The state, however, may file an interlocutory appeal when the trial judge's decision on evidence has caused substantial impairment of the prosecution's ability to proceed arguing the case before the court which normally occurs when the trial judge grants the defendants motion to exclude evidence. Steven W. Becker, *An American Criminal Appeal Process: To Review Or Not To Review – Plain Error, Harmless Error And The Risk Of Receiving an Increased Sentence On Appeal*, original research paper, available (translated into Croatian) on www.pravo.hr, last accessed on 15th June 2011.

the decision on the public media announcement of the verdict (Article 31). These provisions are more or less the same in scope and content as in the previous Criminal Procedure Code.¹²

1.5 Jurisdiction over appeal proceedings

Due to shared jurisdiction, appeal proceedings in criminal matters are conducted before the Supreme Court of the Republika Srpska and County Courts (5 County Courts); in the Federation of Bosnia and Herzegovina, the Supreme Court of the Federation of Bosnia and Herzegovina and Cantonal Courts (10 Cantonal Courts); at the level of Bosnia and Herzegovina, the Appellate Division of the State Court of BiH; in BD BiH the Appellate Court of BD BiH. The Law on Courts of the Republika Srpska¹³ regulates the appellate jurisdiction of the Supreme Court in criminal matters. The law stipulates that the Supreme Court, as the highest court in the Republika Srpska, is competent: a) to decide on regular legal remedies against the decisions of County Courts if it is required by law to do so; b) to decide on legal remedies against the decisions of its panels unless it is otherwise provided for by law (Article 28, Items 1 and 3). This jurisdiction is derived from the jurisdiction of the County Courts which have competence in the first instance: a) to try criminal offences for which the law prescribes more than 10 years of prison or a long-term prison sentence unless it falls under another court's jurisdiction by law; b) to act during the investigation and after the indictment is brought in accordance with the law and c) to try criminal offences for which the State Court of Bosnia and Herzegovina has transferred jurisdiction over to the County Courts and d) to decide in the second instance on appeals against the decisions of Basic Courts (Article 27, Paragraph 1, Items a), b) and c) and Paragraph 2, Item a). A Special Panel of the Supreme Court decides on appeals against the decisions of the Special Department for Organised and Serious Economic Crimes of the County Court of Banja Luka, which has jurisdiction over the whole of the territory of the Republika Srpska (RS). In addition, there are the relevant provisions of the CPC, which will be referred to later in the text.

The Supreme Court in the second and third instance deliberates in a panel which consists of three judges (Article 24, Paragraph 2) and passes verdicts in a panel session or based on the hearing proceedings after setting aside the verdict in the first instance (Article 319, Paragraph 1). It reviews the first instance verdicts that have been passed in the County Courts in panels which consist of three judges. This refers to criminal offences that may receive a sentence of over 10 years of imprisonment or a long-term prison sentence. This raises a valid point about the reason why a three-member panel is reviewing the decisions of a three-member panel in such serious cases rather than a panel of five judges. This, of course, applies to an appeal against a verdict. The fact that now professional judges hear the cases in the courts of both instances, whereas according to the previous law lay judges participated as well, is not a convincing reason for such a solution. It is even less acceptable as an explanation to say fewer judges are required in this way and that this reduces the total number of judges, which was one of the goals of the judicial reform.

Since the cases in question deal with the most serious criminal offences (including the war crimes and organised crime offences) which have undergone complex proceedings in which

12 Criminal Procedure Code – Consolidated Text (The Official Gazette of SFRY no. 26/86, 74/87, 57/89 and 3/90 and (The Official Gazette of the Republika Srpska no. 4/93, 26/93, 14/94, 6/97 and 61/01).

13 The Law on Courts of the Republika Srpska, The Official Gazette of the Republika Srpska no. 119/08; 17/08;37/06;109/05;11/04 and 58/09.

mostly long prison sentences have been pronounced it is deemed justified that a panel of more members than the original trial panel should review such a verdict. A second instance panel of five judges not only would set a more serious tone of the session and add to the significance of the case, but it would provide better expertise, accumulation of experience, a more thorough analysis of the case, it would guarantee greater impartiality and reduce the possibility of abuses, in addition to relieving the burden of the decision by distributing it among more members. The previous law provided for the decisions to be passed by a panel composed of five judges. At the moment, only request for the protection of legality is decided on by a panel of five judges of the Supreme Court (Art. 24, par. 3).

Since the Basic Courts try cases for criminal offences for which a sentence of up to ten years imprisonment may be given and the case is heard by an individual judge, the composition of the County Court panel is adequate. It is another question whether a sole judge should be trying these criminal cases.

1.6 Procedure and decisions on appeals against first instance verdicts

Panel session. After the appeal has undergone the whole procedure of prior inspection, submission for reply, scheduling the reporting judge who receives the documents, the presiding judge of the panel schedules a panel session. The law provides for the presiding judge of the appellate panel to appoint the reporting judge (Article 317, Par. 1), which was provided for by the previous law as well. This provision is no longer applied, although the law has not been amended, due to a decision by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC of BiH) to introduce in courts an automatic case management system (CMS), so the computer allocates the reporting judge.

If the judge or the presiding judge of the first instance panel does not reject an inadmissible or overdue appeal, the panel of the Supreme Court shall do so in its session (Art. 324, Par. 1). The Supreme Court shall not transfer back the case to the court of first instance to do this itself, for this would unnecessarily drag out the proceedings. If it needs additional data in order to render its decision, the necessary reports or documents may be obtained from the court of first instance promptly (Art. 317, Par. 2). It would be wrong to see this as a violation of the two instances rule, since the decision is being rendered by the court that would inevitably decide on the appeal against its rejection by the court of first instance. The parties involved are not to discuss in the session whether the appeal was submitted in time or whether it is admissible as it is the sole competence of the court on which it shall decide prior to calling the public session and without notifying the parties and defence attorneys. If during the session it is found that the appeal is overdue, the panel shall remove the parties and first decide on this issue. Should the panel reject the appeal, the appeal session will not be held.

The panel's session is scheduled by the presiding judge of the panel when the reporting judge prepares (the law says 'receives' the documents which is obviously a printing error as it is impossible to schedule a session without prior preparation and notify the parties and the defence attorney) the documents (Art. 317, Par. 3).

The prosecutor, the accused and the defence attorney are to be notified about the panel session, if the accused is in custody or serving a prison sentence his presence shall be secured (Art. 318, Par. 1 and 2). The session of the panel commences with the appellant's presentation, which is followed by the respondent's answer to the appeal (Art. 310, Par 2). The failure to appear of duly summoned parties and defence attorneys does not prevent the panel session from being held (Art. 310, Par 4).

The court reviews the verdict only to the extent it is contested by the appeal while the appellant must stay within the parameters of the appeal and the answer to it in his presentation. It gives grounds to question the necessity of mandatory notification about the panel sessions of the parties and defence attorneys. Furthermore, the wording that 'the session opens with the presentation of the appellant' must be understood to mean a brief overview of the most characteristic and the most significant parts of the appeal as opposed to retelling or, even worse, reading the appeal. Occasionally, this presentation becomes a closing argument making it difficult to follow what is clarification and what is the extension of the appeal which is the reason why the presiding judge of the panel is compelled to interrupt the defence attorney and guide him through his presentation. The defence sometimes sees this as the denial of the right to a defence deeming it necessary that they should be allowed to present once again as extensively and convincingly as possible the course of the actual first instance proceedings before the panel, and especially the defendant. Worse yet is when the Republic Prosecutor is reading the appeal filed by the District Prosecutor instead of pointing out briefly the main points of the appeal.

While appreciating that this is meant to protect the appellant's rights, we are of the opinion that it could have been accomplished in a simpler, more economical, faster and more efficient way by providing for the appellant to be notified about the panel session at his own request. The need for mandatory notification of the parties, which delays the decision on the appeal and increases the costs of the criminal proceedings, is seriously called into question by the actual cases. There are instances in which the defendant's presence is secured by the court but the defence attorney who has filed an appeal fails to appear at the panel session. The session is then adjourned in a matter of minutes after the accused briefly states that he is familiar with the appeal filed by the defence attorney and that he stands by it, while the appeal is presented by the reporting judge in the section closed for the public. In such cases, all of the time, logistics, personnel and money have been wasted unnecessarily. Bear in mind that these cases usually deal with serious criminal offences and maximum level of security is required in order to bring the accused before the court as this poses a high risk. Occasionally, the accused who is in custody requests not to be present at the session as he is not interested in it. It must be noted that the attorneys acting *ex officio*, although not always, are interested in this type of a solution as every personal appearance is charged extra.

The legislator has not provided that the persons who have filed an appeal in favour of the accused, the injured party and the persons whose items or property gain have been forfeited, are to be notified about the panel session. This raises the question who is presenting their appeals and if they should be presented in the public section of the session at all. So far, the court has opted to summon the injured party to the session and allow them to give a presentation (this is accepted by the Supreme Court of the Federation of Bosnia and Herzegovina as well). The grounds for this are found in the provision that states that the session opens with the presentation of the appellant, which we deem unacceptable. This does not pose a problem if the appeal is filed by the prosecutor or the accused, and in addition there is the appeal of the injured party, who is then notified

about the session. The problem arises if the injured party is the only appellant against the costs of the criminal proceedings, while the accused is held in custody. In such cases all of the said arguments are weakened and we arrive at the conclusion that the provision must be applied consistently and notifications about the session sent solely to the persons the law specifies.

The limits of reviewing the verdict. The law provides that the second instance court reviews the verdict insofar it is contested by the appeal (Art. 320). Only an appeal when the facts have been established erroneously or incompletely or when a violation of the Criminal Code has occurred includes an appeal against the criminal sanctions decision and property gain forfeiture (Art. 322. with reference to Art. 314).

This means that the court is not officially required to note the essential violations of the Criminal Procedure provisions. This stands to logic as in the adversarial proceedings parties confront each other and both present their arguments before the trial court. The proceedings are expedited, simplified and the court is relieved of the unnecessary workload. However, certain situations have arisen that call into question absolute application of this principle.

The law explicitly states that the verdict must not be based on the evidence that has been obtained through human rights violations specified in the Constitution and international agreements that Bosnia and Herzegovina has ratified, or on the evidence obtained through the substantial violations of the said law.¹⁴ Furthermore, the court must not base its decision on the evidence that is derived from such evidence (Art. 10, Par. 2 and 3). This is binding for the courts of both first and second instance.

This brings to attention a certain discrepancy between these provisions which stand in contradiction to each other. It is an apparent obligation of the court to note any violations under the said article despite the fact that the appeal does not refer to them. As the essential violations of the provisions of the Criminal Code are listed in Article 303, Par. 1 of the CPC, it would have been logical to impose an obligation on the court to act *ex officio* with regard to some of these violations. Some of these violations also constitute human rights violations which means they should be acted on *ex officio*. Examples of this are criminal prosecution cases subject to the statute of limitation, decriminalisation of the offence, or cases in which the decision has not been rendered by a competent court. It is possible to directly apply the European Human Rights Convention, which would be a worse solution than clearly regulating the matter in the law. This stand was taken by the Appellate Court of BD BiH in its verdict finding that the provisions of Article 306 of the CPC of BD BiH, which require the second instance court to review the first instance verdict only insofar it is contested in the appeal, may not comply with the provisions of the Article 7, Par. 1 of the European Convention which prohibits a more severe sentencing when the criminal code is amended after the crime had been committed.

Taken from the verdict exposition: 'Although neither the defence attorney's appeal, nor the oral arguments during the public hearing before the sentencing panel of this Court, have referred to this circumstance, this Court, acting on defence attorney's appeal and in accordance with the obligations under Article 5, Par. 2 of the Criminal Code of BD BiH, with reference to the criminal offences described in detail in the contested verdict under Item 3 (Count 2 b) of the confirmed

14 The first draft of the CPC was even stricter as it did not limit itself to the substantial violations only, but it was later amended to do so.

indictment) has acquitted G. H., accused of committing a criminal offence of possession of and enabling the use of narcotics under Article 233, Par. 3 Criminal Code of BD BiH based on the Article 284, Par. 1, Item a) of the CPC of BD BiH. ...As a consequence of the entering into force of the aforementioned amendments to the Criminal Code sole possession of narcotics no longer constitutes a criminal offence under Article 232, Par. 3 of the Criminal Code of the BD BiH, therefore, the Court was under the obligation to apply this law (with the amendments) as a more lenient law. Consequently, this Court has acted ex officio and directly implemented Article 7, Par. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms based on the Article II, Par 2 of the Constitution of Bosnia and Herzegovina.' (The verdict of the Appellate Court of BD BiH, no. 097-0-Kž-10-000031 of 20th Sept 2010).

The fact that the provisions of the new CPC of the Republika Srpska stipulate that the second instance courts by virtue of their office register whether the Criminal Code has been violated to the detriment of the accused (Art. 320, CPC of RS) proves that this rationale is justified.

Second Instance Court Decisions on Appeals. By law, the second instance court may reject an appeal at the panel session as overdue or inadmissible or it may reject an appeal as unfounded and confirm the first instance verdict or revise the first instance verdict or set aside the first instance verdict and hold a hearing (Art, 324, Par. 1). Apart from the setting aside the first instance verdict and holding a hearing, all of these institutes are well known and we will not dwell on them. The provision that merits attention is the one that mentions the decision to set aside the first instance verdict and hold a hearing, which is rendered as a written decision with a brief explanation. The second instance court shall do so when it determines that:

a) an essential violation of the Criminal Code has occurred, except in the cases described under Article 328, Par. 1 of this Code, (if the court has violated the regulations on obtaining consent from a competent authority, if the court has rendered a decision without having jurisdiction over the case, or if it has wrongfully rejected the indictment due to a lack of competent jurisdiction and if the indictment has been exceeded)

b) it is necessary to present new evidence or evidence that has already been presented at the first instance trial but it has led to erroneous or incomplete representation of facts.

It should be stressed that the second instance court does not have the authority to transfer back the set aside verdict to the same court in order to be tried again, but it must hear the evidence itself and render a decision. This is the most controversial section of the Criminal Procedure Code and it has sparked a debate as soon as it was passed.

The hearing before the second instance court is just a part, a phase inseparable from the rest of the appeal proceedings. It is not a new main hearing although it follows the same rules. At first, there were other positions that have since been abandoned as unacceptable. The intent of the legislator has obviously not been to replace the main hearing with a new one, only before a higher instance, but to rectify any shortcomings of the first instance verdict and of the preceding trial through uniform appeal proceedings. When the hearing is being held the reporting judge assumes the role of the presiding judge in the hearing while retaining the duty to prepare the rendering of the decision. This has not been regulated by the law but it has been proven to be a jus-

tifiable solution since the said judge is the most familiar with the case documents and therefore is best equipped to manage the proceedings.

Another valid point is the question whether the new trial should be based on the original indictment or whether it is permissible to amend it. The prevailing position is to allow the amendment of the indictment at this stage in the direction laid down in the wording of the decision to set aside the verdict and hold a hearing in accordance with the prosecutor's appeal, and if the prosecutor has not filed an appeal then only in favour of the defendant. It follows that the decision to set aside the verdict in a broader sense represents the basis of this section of the appeal proceedings. There are arguments against allowing the prosecutor to change anything in the indictment, but these have been dismissed as it would cause numerous problems in practice that would not serve well the accused either.

A hearing starts with customary instructions and cautions and a brief statement by the prosecutor whether the indictment is amended or kept the same. The court usually enters most of the evidence that meets the requirements for this and presents only the evidence that is deemed necessary. The defendant who did not take the stand (give his defence) in the first instance trial may exercise his right to do so, which ensures that the right to a defence has been exercised to its full extent. The issue of presenting new evidence is a delicate one and as a rule anything that has not been mentioned in the appeal and the answer to an appeal or that has not been ordered by the court is inadmissible. However, there are inevitably exceptions to this rule since the introduction of the new evidence or the new presentation of the previously shown evidence can necessitate a verification of certain facts and circumstances that have been derived from such evidence. It is not possible to do so without introducing new evidence, so it must be allowed to present such evidence.

The concept that the second instance court should present the evidence and determine the facts is unheard of in the legal systems of modern states (apart from the attempts in Montenegro that have been abandoned in the meantime). This failed to meet the expectations that the appeal proceedings would be in this way expedited ensuring a trial within a reasonable time. The second instance court must now undertake reconstructions, call witnesses, experts and the defendants living in distant residencies and put persons on the wanted lists. This has led to an increase in costs, it has slowed down the proceedings and backed up cases at the second instance courts. In complex cases, when the verdict is being set aside due to an erroneous or incomplete representation of facts, the Republic Prosecutor appearing before the Supreme Court of the Republika Srpska is highly unlikely to be as thoroughly familiarised with the evidence as the Prosecutor who has prosecuted the case before the first instance court, which affects the standard of quality of the proceedings, results in unnecessary delays of the hearing and wastes time. The First Instance Court and the acting Prosecutor can easily rectify whatever the higher court indicates in the decision to set aside the verdict and the time needed for this comes down to a few days necessary to deliver the papers from one court to the other with minimal expenses for the postal services.

On the other hand, it must be noted that the second instance courts are 'staying away' from the decisions to set aside the verdicts as they do not have adequate composition or characteristics to decide on the facts or rather not to the extent the first instance courts do.¹⁵ As a result,

15 On this see more in: M. Grubiša: *Krivični postupak – Postupak po pravnim lijekovima*, Zagreb, 1987, p. 3.

occasionally, even absolutely essential violations are being relativized just to uphold the verdict. All of this results in a lower standard of quality of the decisions of both the first and second instance decisions. In addition, the number of set aside verdicts is not sufficient to support this solution. This can be seen, in part, in the statistics that say that out of 314 resolved cases of appeals before the Supreme Court of the Republika Srpska the verdict was set aside in 18,¹⁶ and in 2011 out of 311, only in 19 appeals the verdicts were set aside.¹⁷

These are the reasons why the Criminal Divisions of the Supreme Courts of the RS and FBiH and the Appellate division of the State Court of Bosnia and Herzegovina and the Appellate Court of BD BiH have proposed at the joint session held at the end of 2009 to transfer back the cases to the first instance courts to be retried after the first instance verdict is set aside. Only the second time would the hearing be held before the second instance court. The arguments for the transfer of the case back to the first instance court after the verdict has been set aside have prevailed and the amendments introducing this solution are in the process of being passed by the legislator. National Assembly of the Republika Srpska has passed a new Criminal Procedure Code of the Republika Srpska¹⁸ on 11th June 2012, which has entered into force on 19th June 2012. The appeal proceedings are now regulated in such a way that the second instance court may set aside the verdict once, and the second time it holds the hearing without setting it aside and closes the case. The hearing in the second instance court must be held if the verdict in the case in question has already been set aside (Art. 324, Par. 2 CPC of RS). This is a new solution so it is not possible to examine its practical implications.

2. An appeal against the verdict of the second instance court

The second instance verdict may be appealed against (Art. 324) if:

- a) the second instance court has passed a long-term prison sentence or it has confirmed such a sentence passed by the first instance court,
- b) the second instance court has revised the first instance verdict that acquitted the accused and rendered a decision that finds the defendant guilty, or if the appeal against the first instance verdict which found the accused guilty resulted in a decision to acquit and
- c) the second instance court on appeal against an acquittal reaches a verdict at the hearing finding the defendant guilty, or if on an appeal against a guilty verdict it reaches a verdict at the hearing which acquits the defendant.

An appeal against the second instance verdict is decided on by the third instance panel of the Supreme Court. This panel shall not hold a hearing (Art. 332). The issue here is whether or not an appeal is allowed against the second instance guilty verdict reached at the hearing after the first instance verdict, in which the charges were rejected, has been set aside. Under c) only an

16 The Supreme Court of the Republika Srpska Report for the period between 1st Jan 2010 and 31st Dec 2010 (no: 118-0-Cyl-10-000462 of 11th Jan 2011).

17 Supreme Court of the Republika Srpska Report for the period between 1st Jan 2011 and 31st Dec 2011 (no: 118-0-CylV-11-000009 of 10th Jan 2012).

18 Criminal Procedure Code of the Republika Srpska (The Official Gazette of the Republika Srpska no. 53/12).

earlier acquittal is mentioned, therefore the appeal against a guilty verdict that follows a rejection of charges, should not be permitted. The Supreme Court of the Republika Srpska has taken this stand in its verdict stating the following:

‘In view of the fact that the Supreme Court of the Republika Srpska has rendered a second instance guilty verdict at the hearing on appeal against the first instance decision to reject the charges rendered by the County Court of Banja Luka, under these particular circumstances, an appeal is not permitted.’ (Verdict no. *11 K 007218 12 Kžž of 13th June 2012*).

This raises the issue of the violation of the right to an appeal guaranteed under the European Convention for the Protection of Human Rights and Fundamental freedoms (ECHR). The only option is that the convention is applied directly by the Court, thus allowing the appeal, which may be accepted as a fair solution. On the other hand, the extension of the right to an appeal by a court decision may lead to legal uncertainty and the violation of other principles of the law, so the solution to this is not simple.

An appeal against the verdict of the second instance court has been introduced to rectify any oversights that the second instance court might make during a trial hearing after the first instance verdict has been set aside. If the hearing before the second instance court is an integral part of the appeal proceedings, the purpose of which is to rectify any failings identified by the appellate court, the question is why the appeal against the appellate court’s decision is allowed. It is hard to find a logical explanation for this as it assigns to a second instance verdict the characteristics of the first instance verdict, which it certainly is not. It could be said that the intent is to increase the level of protection in case the court passes a long-term prison sentence. This has apparently been taken from the earlier law which allowed such an appeal when the death sentence had been given (a). However, these sentences are different, with the death sentence the court’s error is irreparable, whereas this is not the case with a long-term prison sentence as it can be rectified by means of extraordinary legal remedies. In the other two cases (b and c) such verdicts, under certain circumstances, may be passed at the panel session even when the appeal against them is not allowed.

The right to an appeal regulated in such a way opens the path for the Supreme Court to act as the third instance in minor cases that fall under the competence of Basic Courts, reviewing the decision in full rather than just dealing with the application of law, which would be logical to be left for the request for the protection of legality. That is the reason why the Supreme Court is deciding as the third instance such cases as minor bodily injuries, illegal logging, domestic violence etc.

This defeats the whole purpose of the appeal proceedings, which merit criticism since they practically turn the second instance court into the first instance court and that in turn prolongs the proceedings at the appeal stage. This third instance panel cannot hold a hearing so in the event the verdict is set aside it returns the case file to the second instance panel for a new decision.

With the existing concept of criminal procedure and legal remedies, there are no valid reasons for the right to appeal the second instance verdict to exist. It should perhaps be allowed if the second instance court passes at the hearing a long-term prison sentence which was not passed in the previous verdict, and in all other cases eliminate it. This would significantly shorten the proceedings at this stage, which is the intent of the legislator as well. On the other hand, it is debatable

whether this would mean denying the possibility to assess the regularity of the representation of the facts using the evidence the second instance court has presented at the hearing. This is the pitfall of allowing the second instance court to deal with the representation of facts. It is difficult to defend the position that the appeal cannot contest the accuracy and completeness of the representation of such facts. This could constitute a violation of the ECHR. And then it can yet again prolong the criminal proceedings and this goes on in circles.

The Criminal Procedure Code of Bosnia and Herzegovina under Article 317 a, as well as the other two codes (Art. 333 of the CPC of FBiH; Art. 317a of the CPC of BD BiH) regulate the contesting of the second instance verdict differently. An appeal against the second instance verdict is allowed:

- a) if the panel of the appellate division has revised the first instance verdict which acquitted the defendant and reached a guilty verdict;
- b) if the panel of the appellate division acting on appeal against an acquittal has reached a guilty verdict at a hearing.

This seems to be a better solution as it regulates the third instance proceedings in a simpler manner while fully protecting the rights of the defendant. Thus, the purpose and aims of the appeal proceedings regulated in such a way are kept intact.

3. An appeal against the verdict reached in a plea bargain

If the Court accepts a plea agreement on admission of guilt, the plea of the accused shall be entered into record and the Court shall proceed with the sentencing hearing stipulated by the agreement (Art. 246, Par. 7). The law does not specify the format of this decision. Considering it refers to the issuing of criminal sanctions, the courts have rightfully taken a position to render this decision in the form of a verdict with the customary pronouncement and a modified explanation.

The question which arises is whether the accused may appeal against such a decision since the law does not allow an appeal against the criminal sanctions, which the accused must be made aware of (Art. 246, Par. 6, Item c). Since this question, too, has not been settled by the law, the Supreme Court of the Republika Srpska has taken a position when deciding such cases to allow the appeals except, of course, against the decisions on criminal sanctions. It is believed that prior to accepting the plea agreement an appropriate procedure needs to be followed to establish whether the conditions for this have been met. These proceedings may be conducted legally, however, substantial or procedural violations may occur as well as the misrepresentation of facts the decision is based on. Therefore, it is necessary to provide the opportunity to the accused to list such violations in the appeal against the verdict and allow a reassessment whether the defendant's wishes have been followed, which the law does not prohibit explicitly. The judicial practice of the US courts, which were the source of these institutes¹⁹, supports such an approach.

19 In the cases in which the defendant pleads guilty based on a negotiated plea, the defendant must first file a petition for the withdrawal of plea and the abrogation of the verdict with the trial court as a prerequisite for the filing of an appeal. On the other hand, in the cases in which the defendant pleads guilty in a non-negotiated plea, the defendant must file either a request for the review of the sentence, or a petition to withdraw the guilty plea. Failure to file one of these petitions, however, will not have an adverse effect if the defendant had not received an adequate instruction on the right to an appeal from the trial court. Steven W. Becker: *The American Criminal Appeal Process: to Review or not to Review - plain error, harmless error, the risk of receiving an increased sentence on appeal*, an original research paper, available (translated into Croatian) on www.pravo.hr, last accessed on 15 June 2011.

With regard to guilt admission at the arraignment or at the main hearing, the Supreme Court did not have the opportunity to decide on appeals against the admission in a wider sense. The appeals were directed only against the sentencing, which is not of interest for this topic.

Another question is what happens if the appeal is upheld and it is found that the verdict should be set aside. The law does not allow it to be transferred back to the first instance court, it only allows a hearing before the second instance court to be held. The Supreme Court holds that when the appeal is upheld and the first instance verdict is set aside, the case is transferred back to the first instance court to be retried and decided on again. The Supreme Court has found the justification for this position and the departure from holding a hearing before the second instance court in the following. While examining the plea agreement on the admission of guilt, the first instance court checks whether the defendant understands that the plea agreement on the admission of guilt means waiving the right to a trial (Art 246, Par. 5, Item c) and only after it is confirmed that he accepts, the plea is entered into the record and the proceedings move on to the sentencing to a criminal sanction required by the agreement (Art. 246, Par. 7). Consequently the hearing has not been held before the first instance court, therefore, it cannot be held before the second instance court either. The proceedings before the first instance court are reopened at the plea agreement examination stage, and after rectifying the errors in the agreement it may be accepted or rejected and the main hearing may be held.

4. An appeal against verdict issuing a warrant for the pronouncement of the sentence

The Prosecutor may request in the indictment a warrant for the pronouncement of sentence to be issued for criminal offences for which up to 5 years of imprisonment or a monetary fine as the main punishment can be received and which meet the appropriate requirements. The Prosecutor may request one or more criminal sanctions: a monetary fine, a reprimand, suspended sentence and the forfeiture of the material gain resulting from a criminal act or the forfeiture of items. A fine shall not exceed 50, 000 BAM (Art 357).

The judge assesses whether the requirements for the issuance of a warrant for the pronouncement of sentence have been met, presents the defendants with the content of the evidence and asks him to enter his plea. If the defendant pleads guilty and accepts the criminal sanction or measure proposed in the indictment, the judge shall first establish his guilt and then pass a verdict issuing a warrant for the pronouncement of sentence in accordance with the indictment. During the issuing of a warrant for the pronouncement of sentence, the Court is bound by the requested type of criminal sanctions, but not by their severity. This position is held by the Appellate Court of the BD BiH:

‘It follows that the Court is bound by the requested type of the criminal sanctions, and not their extent during the proceedings of issuing a warrant for the pronouncement of sentence.’ (The Verdict of the Appellate Court of BD BiH no. 097-0 Kž -06-000080 of 27th Oct. 2006)

An appeal against the verdict issuing a warrant for the pronouncement of sentence may be filed within 8 days from the day of the delivery of the verdict. The payment of the fine before the deadline for the appeal expires does not constitute the waiving of the right to an appeal (Art. 362, Par. 2).

The procedure for issuing a warrant for the pronouncement of sentence resembles that of the assessment of a plea agreement on the admission of guilt, only it is limited to the criminal offences for which the law prescribes a prison sentence of up to five (5) years or a monetary fine whereas the plea agreement may also be applied to more serious criminal offences. The acceptance of a plea agreement means that the defendant is waiving his right to appeal against the pronounced sentence, which may include a prison sentence, whereas with the warrant for the pronouncement of the sentence, the right to an appeal is not waived even in the event when the fine is paid before the deadline expires. Such a solution is completely unclear and unproductive as it would be legitimate to prohibit the appeal against the criminal sanction here as well, since it has already been accepted by the defendant in his plea. In addition, it should especially be allowed to interpret the payment of the fee as the waiver of the right to an appeal as these are all minor sanctions. This would complete the institute of the warrant for the pronouncement of sentence as a simplified form of proceedings for lesser criminal offences for which a prison sentence cannot be received, only a smaller monetary fine.

5. An appeal against the decision

An appeal against the decision is decided by the second instance court at a session closed for the public, in a panel composed of three judges and should it set aside the decision, the case is transferred back to the first instance court for a review. These proceedings differ little from the proceedings based on the previous Criminal Procedure Code and so it is not necessary to dwell on it. The only objection would be the sheer number of instances in which an appeal is permissible and the innovation is that the decision by the Supreme Court does not preclude an appeal.

6. Repeating the proceedings

All of the Criminal Procedure Codes prescribe the repeating of the proceedings as the sole extraordinary legal remedy. The repeating of the proceedings may be in favour or to the detriment of the defendant (Chapter XXIV) for reasons that do not much differ from the ones in the earlier law. There have not been many difficulties in the application, so it is not necessary to further discuss them.

The only thing that needs to be pointed out is that the legislator has omitted to provide for a limited reopening of criminal proceedings. This has caused numerous problems in application as it prevented the application of Criminal Code provisions about the concurrence of offences. The convicted, in whose cases these provisions have not been applied, have served their sentences consecutively, putting them in an unfavourable position in terms of the length of the sentence and release on parole compared to those in whose cases the law has been properly applied. There were numerous appeals against such first instance decisions that have rejected such petitions. The second instance courts have been rejecting them as unfounded and have alerted the legislator about the omissions in the law, however, this situation had lasted till 2008 when the law was amended²⁰ and the limited reopening of the proceedings was reintroduced.

20 The Law on Amendments to and Supplements of the Criminal Procedure Law (The Official Gazette of the Republika Srpska no. 119/08).

However, the provisions that refer to the appeal against the verdict are fully applied to the verdict reached at the limited reopening of the process as well. This means that a public session of the appellate panel is held to which the defence attorney and the parties are summoned, they present the appeal and so on. This is completely irrational and unnecessary since the verdict has been reached by the first instance court panel at its session solely based on the testimony of the opposing party and the defence attorney, without presenting the evidence and oral arguments.

7. The request for the protection of legality

This extraordinary legal remedy was introduced only in the CPC of the Republika Srpska in 2008²¹, while other codes in BiH do not provide it (it is in the process of being introduced in those, too). The purpose of the reintroduction of the said legal remedy was to prevent violations of the Criminal Code and the violations of the right to a defence caused by the final verdict. Without this remedy, the convicted person would be left without adequate legal protection before the ordinary courts. The following verdict of the Supreme Court of the Republika Srpska provides an example of such correction of the violation:

‘The defendant, in her request, states an objection that the second instance court has violated the Criminal Code to her detriment when it revised the first instance verdict on her appeal and sentenced her to pay a monetary fine.

In the criminal sanctions system prescribed by the Criminal Code of the Republika Srpska, a monetary fine represents a more severe punishment than a suspended sentence, which is a cautionary sanction. Only the defendant has filed an appeal against the first instance verdict and its decision on the criminal sanctions (suspended sentence) whereas the competent District Prosecutor has not. In such a case the defendant is protected by the ban *Reformatio in Peius* principle from receiving a harsher punishment pursuant to Article 313 CPC, which is why she could not have received a sentence to pay a monetary fine instead of a suspended sentence. Therefore, when the appeal has been filed only in favour of the accused, and the second instance court upholding the appeal revises the first instance verdict and instead of a suspended sentence it instructs her to pay a monetary fine, as a more serious sanction, the court is in breach of law to her detriment.’ (The Verdict of the Supreme Court of the Republika Srpska no. 71 0 K 107859 12 Kvlz of 30th May 2012).

The request may be filed only if an appeal has been lodged and if the violations have been stated in the appeal against the first instance verdict unless the appeals procedure itself has caused the violations. It is also not allowed to appeal against the decisions of the Supreme Court deciding as the third instance. This is justified since this Court, as the highest court, is capable of rectifying such violations at the appeals stage. The right to filing of the request belongs to the prosecutor, the accused, the defence attorney, and after the death of the accused other persons specified under Article 307, Par. 2 of CPC (a spouse, an extramarital partner, a parent or a child and the adoptive parent)

21 The Law on Amendments to and Supplements of the Criminal Procedure Law (The Official Gazette of the Republika Srpska no. 119/08).

It may be noted that this legal remedy is highly restrictive as it was intended to rectify the gravest violations and to avoid an unnecessary increase in workload of the court by the new cases. However, the standard of quality of the filed requests has been proven to be very low since the defence most commonly does not understand the restriction to strictly defined violations. On the other hand, there are attempts to revise the representation of facts in the request, which is not allowed under this legal remedy, and base on that the violations of the Criminal Code or the right to a defence. The appeals against the first instance verdicts are very often copied verbatim and just entitled as the request for the protection of legality. All this contributes to a very low number of granted requests. Despite the claims of its critics, this legal remedy has not added to the courts' workload substantially in terms of the number of requests filed. The number of the filed requests for the protection of legality and the decisions (Kvlz) rendered in these are shown in Tables 1 and 2 below.

Table 1

RESOLVED AND PENDING CASES MARKED „KVLZ“ ON ANNUAL BASIS

YEAR	Pending cases at the beginning of the year	Submitted cases in the course of the year	The total number of cases in the course of the year	Resolved cases in the course of the year	Pending cases at the end of the year
2009	-	22	22	8	14
2010	14	49	63	55	8
2011	8	57	65	54	11
30.6.2012.	11	20	31	25	6

Table 2.

RESOLVED „KVLZ“ CASES ACCORDING TO YEARS AND TYPES OF DECISIONS

YEAR	REJECTED	CONFIRMED	REVISED	SET ASIDE	OTHER
2009		8			
2010	11	38	2	3	1
2011	9	4	1	1	2
30. 6.2012	1	20	1	2	1

Conclusion

The legal remedy system in the Criminal Procedure Codes of Bosnia and Herzegovina from 2003 represents a break with the earlier legal tradition, both in terms of their number and their role, as well as the effects they have in practice. The intent was to expedite the criminal proceedings, ensure speedy settlement of the cases, reduce the delays in courts and observe the right to a trial within a reasonable time by excluding the transfer of cases back to first instance courts after the verdicts have been set aside on appeal. We are of the opinion that these goals have only partially been met as the standard of quality of the court decisions has been lowered, since the importance has been shifted from the establishment of the state of facts, the second instance courts are unnecessarily burdened with the establishment of facts while they are dealing with legal matters less. It was not necessary to do all this within the scope of the legal remedies since the criminal courts had mostly been efficient even with the previous concept of legal remedies. The issue of efficiency of the criminal proceedings is the least to be associated with the legal remedies sphere, it depends on the investigation, expert assessment and the main hearing, the discipline of the participants and material resources as well as on the efficiency of other institutions that serve the courts. This especially applies to extraordinary legal remedies, because the court decision is final, it is usually in the process of being executed, so they neither slow down the process nor contribute to the legality. Such a position is further supported by the last amendments of the procedural laws which have reintroduced, albeit restrictively, the setting aside of verdicts and transfers to first instance courts, and the request for the protection of legality as an additional extraordinary legal remedy.

