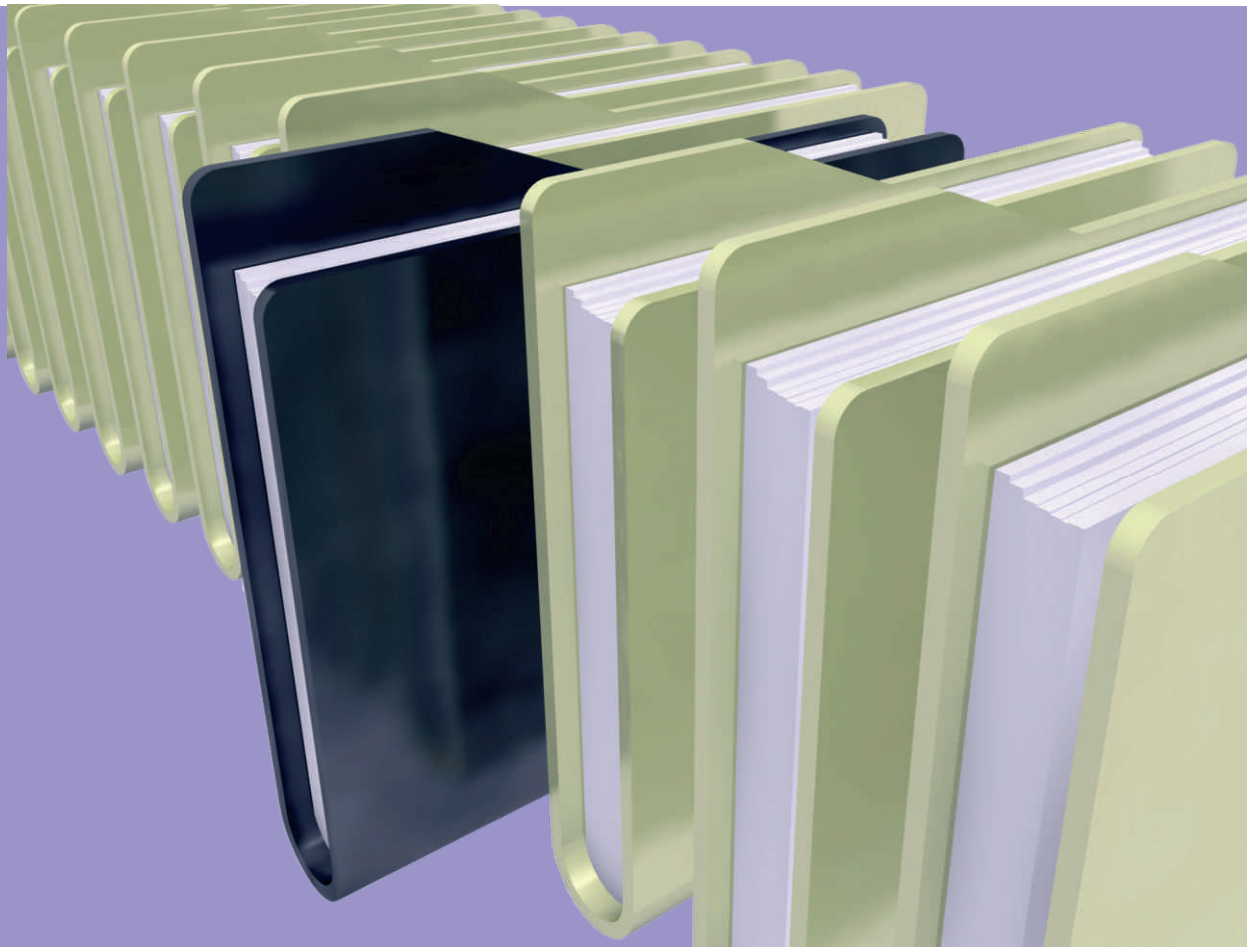
Simplified forms of procedure in criminal matters

regional criminal procedure legislation and experiences in application

Editors: Ivan Jovanović and Miroljub Stanisavljević
(Legal Officers, OSCE Mission to Serbia)



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OSCE Mission to Serbia
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This monograph written by a group of authors under the title "Simplified Forms of Procedure in Criminal Matters - regional criminal procedure legislation and experiences in application" deals with a particularly significant and above all current issue related to the process of reform of the criminal procedure codes of the countries in this region (Serbia, BiH, Croatia, Macedonia, Slovenia and Montenegro) and elsewhere. The process of reform of the criminal procedure legislation in the countries of the region has lasted for over a decade now. The said codes share quite a few of the characteristics whichever country we choose to look at. One of the most prominent characteristics is that tremendous effort has been invested in their reform. As a result, all of these countries have passed new CPCs and, in addition, the said codes have subsequently been altered through one or in some cases more amendment laws (primarily in Serbia and BiH). The objectives of the reforms of the criminal procedure legislation in the countries of this region are almost identical as well. The key objective, in all of the codes, is to create normative grounds for more efficient criminal proceedings, and not only through providing for such proceedings but by constantly broadening the area of the application of the simplified forms of proceedings in criminal matters. Namely, starting from the fact that the criminal proceedings are inefficient in these (and other) countries, over the last few decades significant interventions in criminal procedure legislation, speaking in general, have been undertaken in order to ensure normative grounds for the increase of efficiency of the criminal proceedings. Their common denominator is the creation of the normative grounds for criminal proceedings to be as efficient as possible by regulating the simplified forms of proceedings in cases in which the criminal matter in question justifies their use in terms of how serious the offence is, the amount of evidentiary material, and the conduct of the individual charged with the said offence. The rationale for such regulation is found in the indisputable fact that although the reasons for insufficient efficiency of criminal proceedings outside of the criminal procedure legislation are important, the normative grounds are also among the very important factors that influence the efficiency of the proceedings as a whole. It is due to this that one of the more important characteristics of the modern criminal procedure legislation in general, therefore of the countries in this region as well, is the simultaneous – parallel existence of a single general – ordinary form of criminal proceedings prescribed as a rule and the increasingly used simplified (less complex) forms of proceedings in criminal matters. Parallel coexistence of several forms of criminal proceedings in one particular criminal procedure legislation is justified by the heterogeneous structure of crime – heterogeneous structure of the criminal offences and their perpetrators. The procedure suitable for one type of criminal offences or of the perpetrators does not have to be and, as a rule, is not suitable or rational for another type. Similarly, a uniform procedure is not in compliance with the relevant international documents which guarantee the right to a trial within a reasonable time. In other words, it is not in compliance with the defendant's interest, who has the right to speedy and adequate proceedings, or with

the public interest of the society as a whole since its objective is an efficient fight against crime, which certainly cannot be achieved in uniform proceedings used in all criminal cases. Bearing in mind all this, in the modern criminal procedure law and criminal procedure legislation which follows its tendencies, from the point of view of regulation, possibilities for increased efficiency are sought primarily in the introduction of special, summary, simplified forms of proceedings in criminal matters for certain categories of criminal offences. It may be claimed with certainty that simplified forms of proceedings in criminal matters are one of the extremely important instruments for the efficiency of criminal proceedings. As such, they are intended, as a rule, for less complex criminal offence trials (minor and medium-level of seriousness). If we add the fact that this particular category of criminal offences occupies a prominent place in the overall structure of crime, then the importance of such proceedings is seen as even greater. In addition, in terms of the justification under criminal policy of such proceedings it is necessary to take into account another fact. Such proceedings, through their practical application, directly contribute to the increased standard of quality of trials involving more serious cases by reducing the caseload courts are dealing with, thus creating more room for more serious, more complicated cases. In view of all this, it is not surprising that criminal procedure codes in the countries of this region have been characterised by multiple simplified forms of proceedings in criminal matters for a number of years. Nowadays, when it comes to, for instance, the category of adult defendants, in addition to the traditional and relatively well known two forms of simplified criminal proceedings (summary criminal proceedings and the proceedings for the pronouncement of judicial admonition), a number of other forms of simplified criminal proceedings also appear. For instance, in cases where a plea agreement, criminal order, witness immunity, prosecutorial discretion, direct indictment etc are used. As such, all of these simplified forms of proceedings are based on the elements related to the criminal matter, the state of the evidentiary material and the conduct – demeanor of the subjects in the proceedings and they are characterised by a lower degree of complexity of the structure of the proceedings compared to the general form of proceedings. Instruments used for the simplification of the procedural form are three-fold and are manifested in: the elimination of certain procedural phases and stages, which depends on the specific form of the simplification; shortening of the deadlines during the proceedings and deformalisation of the proceedings (elimination of certain formalities and guarantees).

Considering the nature and reasons related to the criminal policy when making provisions for such proceedings, the regulation of simplified forms of proceedings in criminal matters is not easy. When regulating this matter it is necessary to ensure one thing and that is not to compromise the basic principles of criminal procedure and the *ratio legis* of its detailed regulation in order to achieve the desired level of efficiency. This especially applies to new legal provisions, particularly those that require in depth theoretical analysis and expert interpretation. In addition, it is an indisputable fact that the norm itself is not sufficient and that its adequate application is also necessary for which the prerequisites are a carefully thought through and executed preparation, i.e. the fact that the compatibility of the criminal policy of the legislator and the policy of the subjects applying appropriate norms of the criminal legislation is necessary (practical application of the said policy) which adds even more to this type of claim. Only in the cases in which these two aspects of criminal policy are mutually compatible may we refer to it as the instrument of a successful fight against crime in general, which is otherwise not the case. Considering everything, the publication of the monograph which offers a critical, scientific and expertly argumented overview of the subject matter in question, as is the case with the submitted manuscript, is more than fitting.

In terms of content, the analysis of the said monograph, i.e. the manuscript at hand, revolves around five sets of issues. Firstly, we have the reasons related to the criminal policy when providing for the increasing number of simplified forms of proceedings in criminal procedure codes of the countries in the region and in general. Secondly, plea agreement as a crucial example of simplified forms of proceedings in criminal matters. Next, the principle of prosecutorial discretion as first and foremost specific form of simplified proceedings in criminal matters. This is followed by the issues related to the summary proceedings and other simplified forms of proceedings used as an instrument of criminal proceedings efficiency. Finally, the fifth set of issues deals with the relationship between the basic principles of criminal procedure law and the simplified forms of criminal proceedings.

The issues dealt with in this monograph are looked at from different angles. Aspects which particularly stand out are: the normative aspect under which each of the aforementioned issues is analysed in the light of the existing criminal procedure norms of the countries of the region that are being discussed (Serbia, Montenegro, BiH, Macedonia, Slovenia and Croatia), of the appropriate international standards and relevant comparative criminal procedure legislation and the degree of their harmonisation. Next, there is the aspect of practical application of the analysed subject matter pointing to the ways of practical application of the provisions of these laws. Finally, as a separate issue there is the aspect of their theoretical component in criminal (and not just criminal) law offering the analysis of various theoretical views related to the subject matter in question. In view of the method used to discuss these issues and the analysed aspects of the said issues, it may be concluded that this monograph may be greatly relevant when trying to assess the degree of implementation of modern tendencies in legal science related to the criminal procedure law in the newly adopted criminal procedure codes of the countries in the region in terms of simplified forms of criminal proceedings and when assessing how and in what way can these be implemented more fully in the said codes, which is one of the objectives of the reform of these forms. Moreover, the monograph identifies the methods of adequate application of thus regulated solutions which adds to its importance, since only adequately applied norm has its justification under criminal policy. In addition to the aforementioned it may be said that the monograph undoubtedly offers a critical, scientific and expertly argumented analysis of the subject matter from all of these standpoints, which makes the stated claim even more relevant. Consequently, it may be stated that the said monograph serves the purpose of meeting this objective of the reforms of criminal procedure legislation in the countries of the region, which have been in progress from the turn of our century. Analytical and comprehensive interpretation of the new rules of procedure which are discussed makes the content and the meaning of the analysed institutes understandable, while the critical overtones of arguments in certain cases shed some light on the imprecision and ambiguities of the legal norms, their internal and outward contradictions, which ultimately should alert the legislators that these should be re-examined once again at the very least. Essential explanations of the new procedural institutes or rules, the reasons arising from the criminal policy and procedure law which have led to their introduction and of their intended purpose may be safely relied on for accurate interpretation and application in the judicial practice. Although the subject of this discussion is the existing legislation, the monograph suggests a considerable number of proposals de lege ferenda with a view to improve the text of the law and its coherence, which competent authorities may take as a signal for certain actions. Theoretical explanations of the regulation of the simplified forms of the criminal proceedings, interpretation of the principles of the procedure upon which they are founded and of the position of the subjects in the proceedings, their application in practice all make the said monograph

current literature for further study of the doctrine and accurate application of the legal regulations in the judicial practice, while well-defined and definite proposals de lege ferenda may be of great help to the legislators when regulating further the simplified criminal proceedings and, when it comes to particular forms of simplified proceedings, restoring the seemingly disturbed balance between the efficiency and fair proceedings which provide optimal guarantees for the protection of human rights.

In view of the aforementioned, I offer the following

Recommendation

Monograph written by a group of authors and entitled "Simplified Forms of Procedure in Criminal Matters - regional criminal procedure legislation and experiences in application" deals with a particularly significant and above all current issue related to the process of the reform of the criminal procedure legislation of the countries in this region (Serbia, BiH, Croatia, Macedonia, Slovenia and Montenegro) which is still in progress. In view of the method used to discuss these issues and the analysed aspects of the said issues (normative, theoretical and practical), it may be concluded with certainty that this monograph may be greatly relevant in terms of evaluation of the reasons under criminal policy to provide for the simplified forms of proceedings in criminal matters and for the evaluation of their regulation ensuring that their expected function is fulfilled – efficiency of the criminal proceedings. Furthermore, the monograph suggests the ways in which thus regulated provisions may be adequately applied, which adds to its importance. This follows from the position that only adequately applied norm fully lives up to its justification under the criminal policy. Otherwise, it just acts as a backdrop without any practical value. Theoretical elaborations of a considerable number of the analysed solutions offered by the codes in question, may serve as a valid scientific resource for further study of the doctrine and confrontation of the arguments on the nature, structural elements and principles of regulation of the simplified forms of proceedings in criminal matters in the countries of the region and in general.

Systematics founded in expertise, valid theoretical viewpoints, comprehensiveness of the discussion, critical analysis of the normative provisions and judicial practice ensure the scientific and expert level which makes this monograph currently relevant and original. Theoretical elaborations and extended presentations of particular issues in question may be helpful not only to the criminal procedure law of the countries which are being analysed but in general as well. The interpretation of the simplified forms of proceedings in criminal matters which are being discussed is analytical and comprehensive which makes their content and meaning understandable, while the critical overtones of certain arguments of a number of solutions used in the analysed codes indicate that these need to be studied further, not just in a theoretical sense but in terms of its further legislation which is probably in progress even though all of the countries in question have passed new criminal procedure codes. Expert criticism and well-argumented explanations of the new simplified forms of proceedings in criminal matters (primarily, various modes of plea agreements) and the analysis of the reasons under criminal policies which justify their regulation and their application may be safely relied on when regulating, interpreting and applying them. Although the existing legal norms are the subject of the analysis, this monograph offers a significant number of proposals *de lege ferenda* with a view to improve the text of the law and its coherence. Theoretical explanations of the regulation of the new provisions for the simplified forms

of criminal proceedings in the countries from this region make this monograph relevant literature for the further study of the doctrine as well as for the adequate application of the legal regulations in the judicial practice, while proposals *de lege ferenda*, well-defined and definite may be of great help to the legislators in all future interventions regarding these issues no matter which particular legislation it might concern and may provide some guidelines on how to strike the necessary balance between the desired efficiency of the criminal proceedings and the proceedings which provide optimal guarantees for the protection of human rights in the application of the simplified forms of proceedings. In view of the aforementioned, it is my pleasure to recommend to the OSCE – Mission to Serbia to publish the monograph written by a group of authors entitled "Simplified Forms of Procedure in Criminal Matters - regional criminal procedure legislation and experiences in application". The publication of this monograph would prove to be more than useful – an indispensable reading for all those it is intended for (scholars and experts in the field, legislators and drafters of the law) and the OSCE Mission to Serbia, as the publisher, would, as it has done many times in the past, give its contribution to the standard of quality of the reforms of the criminal procedure codes of the countries in the region and to the widening and strengthening of the professional network among criminal jurists (theorists and practitioners) from the countries whose representatives have participated in writing this monograph and the proceedings of the conference which has prompted its publication in the first place.

Belgrade,

6. May 2013

REVIEWED BY

Professor Stanko Bejatović, PhD

Stanko Bejatović, PhD[1]

Forms of Simplified Procedure – a Key Characteristic of Criminal Procedure Reforms in the Region

1. Forms of Simplified Procedure in Criminal Matters and Reform of Criminal Procedure Laws in the Region – an Overview

In the last ten years or so, one of the most typical features that is shared by the criminal procedure codes of the countries in the region have been highly intensive efforts to reform them. This has resulted not only in the fact that all of the countries have adopted new Criminal Procedure Codes /CPC/,[2] but some of the texts have been amended once, while few have been amended several times.[3] The reforms of criminal procedure laws implemented in the region have had not only multiple but also almost identical aims.[4] The key aim, regardless of the text of the Code, has been to create a normative basis for more efficient criminal proceedings primarily by providing for in the law as well as constantly expanding the scope of application of simplified forms of criminal procedure.[5] Namely, if we take as a starting point the fact that criminal proceedings in these countries (and not only in them) are inefficient, we can see that in general, over the last several decades, not so insignificant changes have been made with the aim of providing the normative basis for

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2 In terms of individual countries, Serbia adopted its new CPC in 2011 (*Official Gazette of the RS*, No. 72/2011), Montenegro in 2009 (*Official Gazette of Montenegro*, No. 57/09), Croatia also in 2009 (*Official Gazette*, No. 76/09 and 80/2011) and BiH in 2003, keeping in mind that numerous amendments have been introduced into all the four texts in the meantime – Criminal Procedure Codes of BiH, Federation of BiH, Republic of Srpska, and the Brcko District (See: Simovic, M. i dr., *Krivični postupak Bosne i Herecegovine, Federacije BiH i Republike Srpske*, Sarajevo, 2009)

3 This primarily refers to Serbia and BiH (See: Bejatovic, S., "Plea Agreement: Serbia's New CPC and a Comparative Analysis of Regional Legislation", Proceedings of the Regional Conference *New Trends in Serbia's Criminal Procedure in a Regional Context (Normative and Practical Aspects)*, OSCE Mission to Serbia, Belgrade, 2012, pp. 102-119

4 See: *New Trends in Serbia's Criminal Procedure in a Regional Context (Normative and Practical Aspects)*, OSCE Mission to Serbia, Belgrade, 2012

5 See: *New Trends in Serbia's Criminal Procedure in a Regional Context (Normative and Practical Aspects)*, OSCE Mission to Serbia, Belgrade, 2012

improving the efficiency of criminal proceedings. Their common denominator is the creation of a normative basis for making criminal proceedings as efficient as possible by regulating the forms of simplified procedure[6] in cases in which it is supported by a particular criminal matter taking into account the seriousness of the offence, body of evidence, and conduct of the person charged with an offence. Even though important causes of this lack of efficiency lie outside of the realms of criminal procedure laws,[7] reasons that justify introduction of such provisions can be found in an undeniable fact, namely that a normative basis is one of the major factors determining how efficient criminal proceedings are.[8] Taking precisely this as a starting point, one of the more important characteristics of the modern criminal procedure law taken as a whole, and consequently of the countries in the region, is the fact that a common or regular form of criminal procedure laid down as a rule has existed simultaneously and in parallel with simplified (simpler) forms of criminal procedure which have been more and more frequent.[9] Parallel existence of several types of criminal procedure in a particular criminal law system can also be justified on the grounds that criminality is not homogenous – the structure of criminal offences and their perpetrators is heterogeneous. A procedure that is suitable for one type of criminal offences and their perpetrators is not necessarily and as a rule suitable and rational to be applied in the case of a different type of offence. Similarly, a uniform criminal procedure is not in accordance with the relevant international instruments which guarantee the right to trial without undue delay.[10] In other words, it is contrary both to defendant's interests because he is entitled to have an expeditious and proper trial and to the public interest because the goal of society as a whole is to successfully fight crime, which most certainly cannot be achieved using a uniform procedure in all the criminal cases. Therefore, from the normative point of view, introduction of special, summary, or simplified procedures to be applied to certain classes of criminal offences have primarily been explored as possibilities for increasing the efficiency of criminal proceedings within the current criminal procedure law and legislation which follows its trends.[11] Presently, it can be stated without any doubt that simplified or simpler forms of criminal procedure are highly instrumental in achieving efficiency of criminal proceedings. As such, they are intended to be used as a rule in trials for simpler criminal cases (less serious offences and offences in the middle range of seriousness). If we add to this the fact that precisely this class of criminal offences occupies a prominent place in the total structure of criminality, the importance of such forms of procedure increases in its intensity even more. In addition, it is necessary to consider one more fact when discussing the reasons for introducing such procedures from the point of view of criminal policy. When such procedures are used in practice, they decrease the workload of courts and thus directly contribute to improving

6 Brkić, S., Racionalizacija krivičnog postuka i uprošćene procesne forme, Pravni fakultet u Novom Sadu, Novi Sad, 2004.

7 See Proceedings of the Conference "Krivično zakonodavstvo, organizacija pravosuđa i efikasnost postupanja u krivičnim stvarima", Srpsko udruženje za krivično-pravnu teoriju i praksu, Beograd, 2008.

8 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, Proceedings of the Conference "Realne mogućnosti krivičnog zakonodavstva u suzbijanju kriminaliteta, Beograd, 1997.

9 Brkić, S., Racionalizacija krivičnog postuka i uprošćene procesne forme, Pravni fakultet u Novom Sadu, Novi Sad, 2004.

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

11 See: Roxin, C., Strafverfahrensrecth, 22.Auflage, Munchen, 2002, seit. 256-268; Lutz Meyer-Gossner, *Strafprocessoerdnung*, 46. Auflage, Verlag C.H. Beck, Munchen, 2003, seit. 194-198; Lowe-Rosenberg, Die *Strafprocessordnung und das Gerihtsverfasunggesetz*, Groskomentar, 23.Auflage, Zweiter Band, Berlin, 1988, seit. 456-468; Bejatović, S., Mere za povećanje efikasnosti i pojednostavljenje krivičnog postupka, Proceedings of the Conference„Osnovne karakteristike Predloga novog jugoslovenskog krivičnog zakonodavstva", Udruženje za krivično pravo i kriminologiju Jugoslavije, Beograd, 2000. god, str. 145; Đurđić, V., Krivičnoprocesno zakonodavstvo kao normnativna pretpostavka efikasnosti postupanja u krivičnim stvarima, Proceedings of the Conference "Krivično zakonodavstvo, organizacija pravosuđa i efikasnost postupanja u krivičnim stvarima", Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 2008.

the quality of trials for more serious criminal cases because courts can devote more time to dealing with more difficult or complex criminal cases. Given these facts, it should not come as a surprise that for many years now, multiple forms of simplified criminal procedure have been characteristic of the laws governing criminal procedure in the region (and not only in one country). Presently, apart from two traditional and relatively well-known forms of simplified criminal procedure (summary procedure and procedure for imposing judicial admonition), there are also other forms of simplified criminal procedure used for instance with regard to the category of adult defendants. This refers, for example, to plea agreements, criminal orders, immunity of witnesses, prosecutorial discretion, procedure for issuing indictments without conducting an investigation, etc.[12] As such, all those simplified forms of procedure are based on the elements of a crime, body of evidence, and conduct or behaviour of the parties to the proceedings and what is typical of them is that they are less complex than the regular procedure. The means used to simplify procedural forms are threefold and include: omitting certain procedural stages and steps, which depend on the form of simplification in question; shortening of procedural time limits; and making the proceedings less formal (excluding certain formalities and guarantees).[13]

Trends in contemporary legal science in the field of criminal procedure and legislative solutions for simplified forms of criminal procedure provided by the current legislation in a comparative context have found their place with good reason in the criminal procedure laws of the countries in the region. Reasons for this are the same regardless of the text of the Code. Their aim is also the same – providing a normative basis for improving the efficiency of criminal proceedings.[14] Given their aim and from the standpoint of Serbian criminal procedure law, the 2001 CPC,[15] which was the first step taken in the reform process,[16] was notable for providing for simplified forms of criminal procedure. They primarily include: broadening of possibilities for applying the principle of prosecutorial discretion to adult offenders as well; introduction of possibility for imposing criminal sanctions without holding a main hearing; increasing the scope of jurisdiction of judges sitting alone; broadening of possibilities for conducting summary proceedings in criminal cases, etc.[17] The trend towards providing new legislative solutions for simplified forms of criminal procedure in Serbia's criminal procedure law has emerged since the adoption of the 2001 Criminal Procedure Code and continued when subsequent amendments were made thereto. For instance, the amendments to the Code made in May 2004[18] expanded the possibility of sentencing prior to

12 See: Schunemann, B., Ein deutsches Reguien auf Strafprozess des liberalen rechtssaats, Zeitschrift fur ewchtspolitik, vol. , 2009; Proceedings of the Conference "Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije", Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 2009.

13 For more details, see: *New Trends in Serbia's Criminal Procedure in a Regional Context (Normative and Practical Aspects)*, OSCE Mission to Serbia, Belgrade, 2012; Simović, M., Pojednostavljene forme postupanja u krivičnom procesnom pravu BiH, Proceedings of the Conference "Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije", Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 2009.god.; Nikolić, D., Sporazum o priznanju krivice, Beograd, 2009.god.; Bejatović, S., Sporazum o priznanju krivice i druge pojednostavljene forme postupanja u krivičnom procesnom zakonodavstvu Srbije kao instrumenat normativne efikasnosti krivičnog postupka, Proceedings of the Conference "Pravni sistem Srbije i standardi Evropske unije i Saveta Evrope", Pravni fakultet Kragujevac, 2009.god., knjiga IV; Brkić, S., Pojednostavljene forme postupanja i postupak njihovog ozakonjenja u Republici Srbiji, Proceedings of the Conference "Zakonodavni postupak i kazneno zakonodavstvo", Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 2009.god.; Đurđić,V., Presuđenje na osnovu sporazuma o priznanju krivice, Pristup pravosuđu, Niš, 2007.

14 Brkić, S., Racionalizacija krivičnog postupka i uprošćene procesne forme, Pravni fakultet u Novom Sadu, Novi Sad, 2004

15 *Official Gazette of the SFRY*, No. 70/01 and 68/02, and *Official Gazette of the RS*, No. 58/04, 85/05, 115/05, 49/07 , 20/09 , 72/09 and 76/2010

16 Bejatović. S., Izmene i dopune ZKP i pojednostavljene forme postupanja u krivičnim stvarima, Revija za kriminologiju i krivično pravo, br.2/09, str. 21-40

17 Bejatović, S., Izmene i dopune ZKP i pojednostavljene forme postupanja u krivičnim stvarima, Revija za kriminologiju i krivično pravo, br.2/09, str. 21-40.

18 *Official Gazette of the RS*, No. 58/2004

the main hearing to include criminal offences punishable with imprisonment of maximum three years.[19] This was not the end of amendments. Quite the contrary, the Amendments to the Code adopted in August 2009[20] introduced the most significant novelty precisely in that regard by providing for plea agreement in the law.[21] However, regardless of the progress, neither that was the end of amendments. Quite the opposite. The new 2011 CPC RS[22] also introduced other significant novelties in that regard.[23] Their common feature is the widening of the scope for potential application of simplified forms of criminal procedure, in the first place through three elements: agreements between prosecutors and defendants, summary procedure, and prosecutorial discretion.[24] Generally speaking, the position taken by the lawmaker was welcomed by legal experts in Serbia. However, as opposed to this general approval, what faced a barrage of severe and valid criticism from professionals all over Serbia was the manner in which a number of individual issues regarding simplified forms of criminal procedure were regulated. This prompted the Ministry of Justice and Public Administration to officially initiate a procedure to amend the text of the Code in October 2012, even before the CPC had started to be applied in its entirety. Those Draft Amendments to the Code also introduced some significant novelties in this regard. They were aimed at further establishing simplified forms of criminal procedure and providing for them in a different manner in the law. However, the work on this bill has unfortunately stopped. Instead of adopting the proposed amendments, which received support from the majority of experts, we now have the Law on Amendments to the Code which has changed virtually nothing if we compare it to the original text of the Code, and this has led to its full application despite the criticism it has received from experts over its content.[25]

Generally speaking, irrespective of the type of simplified procedure or criminal procedure laws of the countries in the region (and not only the laws of those countries), we can state that general characteristics of simplified forms of criminal procedure are as follows:

Firstly, not one, but several simplified forms of criminal procedure exist in all of the analysed legal systems. Nowadays, in addition to the traditional and relatively well-known forms of simplified criminal procedure (summary procedure and procedure for imposing judicial admonition), there are also several other forms of simplified criminal procedure used in cases involving adult defendants. They include, *e.g.*, plea agreements, criminal orders, witness immunity, prosecutorial discretion, etc.[26]

Secondly, the elements on which simplified forms of criminal procedure are founded, regardless of their type, are the criminal matter, the body of evidence, and conduct or behaviour of the

19 Article 449, Criminal Procedure Code
20 *Official Gazette of the RS*, No. 72/09
21 Bejatović, S., Izmene i dopune ZKP i pojednostavljene forme postupanja u krivičnim stvarima, Revija za kriminologiju i krivično pravo, br. 2/09, str.21-40
22 See: Proceedings of the Conference "Aktuelna pitanja krivičnog zakonodavstva (Normativn i i praktični aspekt)", Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 2012
23 See: Proceedings of the Conference "Nova rešenja u krivičnom procesnom zakonodavstvu – teoretski i praktični aspekt", Srpsko udruženje za krivičlnopravnu teoriju i praksu, Beograd, 2012
24 Đurđić,V., Izgradnja novog modela krivičnog postupka Srbije na redefinisanim načelima krivičnog postupka, Proceedings of the Conference "Nova rešenja u krivičnom procesnom zakonodavstvu – teoretski i praktični aspekt", Srpsko udruženje za krivičlnopravnu teoriju i praksu, Beograd, 2012, str.71-87.
25 Bill on Amendments to the CPC, Ministry of Justice and Public Administration, Belgrade, 2013
26 See, e.g. Korošec- Jakulin, Pojednostavljene forme postupanja u krivičnom zakonodavstvu Slovenije, Proceedings of the Conference "Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije", Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 2009, str. 456-368.

parties to the proceedings. As regards the criminal matter as a substantial element of simplified procedure, it is based on the type and nature of a criminal offence. In contemporary criminal procedure legislation, these simplified procedures are intended to be used primarily to resolve less serious offences or offences which pose danger to society to a lesser extent, which in itself calls for allocating less material resources and less time than in cases of more serious offences.[27] Such an approach taken by contemporary criminal procedure legislation is founded on a Resolution carried by III Section of the International Criminal Law Congress,[28] which expressly emphasised that the type and nature of a criminal offence should be an important basis for procedural differentiation. Among other things, the Resolution recommends that national legislation "should take all possible measures which are effective at suppressing petty crime while balancing between resources and aims and accepting different solutions and actions as alternatives to those which are traditionally used in criminal justice systems".[29] The third element of differentiation between forms of criminal procedure is procedural in character and it pertains to the body of evidence. Pursuant to this element, simplified forms of procedure are intended to be used when the facts of a case are quite straightforward or when its circumstances, given their straightforwardness, indicate that it will be easy to prove a case. Precisely the latter provides a basis for simplification of procedural forms.[30] Finally, coming to the conduct or behaviour of parties to criminal proceedings as a separate element in differentiating procedural forms, we have in mind primarily defendant's plea and parties' consent when it comes to selecting a specific procedural form. Given the above information, it can be inferred that the principle of proportionality between procedure and subject matter of a trial underlines the simplified forms of criminal procedure used not only in the countries in the region but in general; however, defendant's fundamental rights are the line which cannot be crossed when procedural forms are simplified in the process of their differentiation.[31]

The third characteristic of simplified forms of criminal procedure is reflected in the fact that their structure is less complex than that of the common or regular procedure. The means used to simplify procedural forms are threefold and include: omitting certain procedural stages and steps, which depends on the form of simplification in question; shortening of procedural time limits; and making the proceedings less formal (excluding certain formalities and guarantees, but not to the prejudice of freedoms and rights guaranteed to the participants in criminal proceedings under international instruments and national laws).

Fourthly, from the aspect of how simplified forms of criminal procedure have been provided for in the law, two predominant models have been offered. The first one is reflected in complete, independent, and separate rules for special procedures for individual criminal offences or categories of defendants. In the first place, this refers to instances in which this subject matter is regulated by a separate criminal procedure act used in cases involving minors in the legislation of some (not all) countries in the region.[32] The second method was to regulate, within the framework of

27 Grubač, M., Racionalizacija krivičnog postupka uprošćavanjem procesnih formi, Zbornik Pravnog fakulteta u Novom Sadu, br. 1-3/84, str.290.

28 The Congress was held in Vienna, in 1989.

29 Full text of the Resolution is available in the journal "Jugoslovenska revija za kriminologiju i krivično pravo", br. 4, 1990, str. 90

30 Brkić, S., op.cit. str. 202.

31 Bejatovic, S., "Plea Agreement: Serbia's New CPC and a Comparative Analysis of Regional Legislation", Proceedings of the Regional Conference *New Trends in Serbia's Criminal Procedure in a Regional Context (Normative and Practical Aspects)*, OSCE Mission to Serbia, Belgrade, 2012, pp. 102-119

32 Soković-Bejatović, Maloletničko krivično pravo, Pravni fakultat Kragujevac, Kragujevac, 2009.

the Criminal Procedure Code, only departures from the regular procedure in which case the regular form is also used in simplified proceedings at stages otherwise not provided for in separate provisions of the Code.

2. Individual Forms of Simplified Procedure and Criminal Procedure Legislation in the Region

A common feature which is shared by the simplified forms of criminal procedure used in the countries in the region is their multiplicity, especially when it comes to criminal proceedings against adult offenders. At the moment, as far as this category of defendants is concerned, in addition to two traditional forms of simplified procedure (summary procedure and procedure for imposition of judicial admonition), a number of other forms of simplified criminal procedure are emerging. Among them, the following forms are particularly important.

2.1. Plea Agreements

A major characteristic ushered in by the process in which criminal procedure legislation of the countries in the region undergone a reform has been providing for the plea agreement in the law. The essence of this can be seen in plea negotiations (bargaining) between a prosecutor and a defendant and his attorney and a subsequent acceptance or denial by the court of the agreement reached by the parties. Given the fact that plea bargaining is an undeniably important means of achieving efficiency of criminal proceedings, it was provided for in Serbia's law by the 2009 Law on Amendments to the CPC as a one of the dominant forms of criminal procedure in general.[33] Providing for the plea bargaining in Serbia's and other regional countries' CPCs resulted from an almost unanimous position taken by legal experts regarding a plea agreement as a very important and useful means of increasing the efficiency of fight against crime in general.[34] Having considered those facts, it was justified to provide for it in Serbia's criminal procedure law as well. However, even before plea bargaining was provided for in the law (immediately after the adoption of the 2006 CPC, which was also notable for introducing the plea agreement)[35] as well as during subsequent efforts to reform criminal procedure law in Serbia, there had been critical objections to some of the issues concerning provisions that govern it, and it seems they were not without grounds.[36] Not only in Serbia, but also in the region and in general, experts have been involved in the discussions on a number of issues and models for their solution. Particularly prominent among numerous issues concerning plea agreement are the ones relating to the types of agreements reached by the parties; the potential scope of their application (should this institute be applied to all criminal offences or only to the specified or less serious offences); text of the agreement; type and length of a criminal sanction cited in an agreement; injured party's place and role in the process of reaching an agreement; defence attorney's role in the negotiation process and judicial decision making process concerning an agreement; the moment at which the

33 Nikolić, D., Sporazum o priznanju krivice, Beograd, 2009

34 See: Zaključci XLVII redovnog godišnjeg savetovanja Srpskog udruženja za krivičnopravnu teoriju i praksu, Zlatibor, 26. septembar 2010.

35 Bejatović, S., Sporazum o priznanju krivice i druge pojednostavljene forme postupanja u krivičnom procesnom zakonodavstvu Srbije kao instrumenat normativne efikasnosti krivičnog postupka, Proceedings of the Conference„Pravni sistem Srbije i standardi Evropske unije i Saveta Evrope", Pravni fakultet Kragujevac, 2009, knjiga IV, str. 85-106

36 See the journal "Revija za kriminologiju i krivično pravo", br. 2/2006 (fully devoted to these issues).

Court assumes an active role in the process, or in other words, the issue of possibilities and grounds for obtaining judicial relief in such a procedure, etc.[37] However, before proceeding to examine those and some other issues relating to this form of simplified criminal procedure, four points need to be stressed. *Firstly,* not a single professional discussion either in Serbia or in the countries in the region analysed in this paper (and those discussion have been numerous) has questioned the criminal policy grounds for introducing the institute in question; quite the opposite. Over a relatively short period of time since it began to be applied, this institute has proven fully justified from the aspect of criminal policy and all the support and arguments are in favour of finding the best possible ways of its adequate use and laying down mechanisms which would prevent potential abuses.[38] *Secondly,* arguments in favour of the agreement put forward by the experts have been met with increasing approval by practitioners.[39] *Thirdly,* unlike the RS CPC which is still in force and provisions contained in criminal procedure laws of the countries in the region, the 2011 CPR RS prescribes three types of agreements that can be made between public prosecutors and defendants. They are: plea agreements, agreements on testifying by a defendant, and agreements on testifying by a convicted person. Only at first sight it seems that they represent new forms of agreements between public prosecutors and defendants. However, something else is at the heart of the matter. In the first instance, plea agreements are only a variation of the agreements on the admission of guilt from the CPC currently in force. Other two agreements that can be reached by the parties are only variations on "enlisting the help of a cooperating witness." They provide a basis for using defendant's or convicted person's statement as prosecution's evidence against the others who have been accused. In other words, a witness collaborator has been somewhat differently provided for in the Code looking from the normative point of view.[40] *Fourthly,* with regard to how the provisions of the 2011 CPC RS defined the agreement, the author of this paper, and not only him,[41] is of the opinion that experts' point of view and legislative

37 See: Simović, M., Pojednostavljene forme postupanja u krivičnom procesnom pravu BiH, Proceedings of the Conference "Pojednostavljaene forme postupanja u krivičnim stvatima i alternativne krivične sankcije", Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 2009; Nikolić, D., Sporazum o priznanju krivice, Beograd, 2009.; Bejatović, S., Sporazum o priznanju krivice i druge pojednostavljene forme postupanja u krivičnom procesnom zakonodavstvu Srbije kao instrumenat normativne efikasnosti krivičnog postupka, Proceedings of the Conference "Pravni sistem Srbije i standardi Evropske unije i Saveta Evrope", Pravni fakultet Kragujevac, 2009, knjiga IV, str. 85-106; Đurđić,V., Stranački sporazum o priznanju krivice u krivičnom postupku, Revija za kriminologiju i krivično pravo, br. 3/2009; Škulić, M., Sporazum o priznanju krivice, Pravni fakultet, Beograd, 2009

38 See: *New Trends in Serbia's Criminal Procedure in a Regional Context (Normative and Practical Aspects)*, OSCE Mission to Serbia, Belgrade, 2012

39 The best example which supports such a statement is official information about the application of that institute in the Republic of Serbia. Namely, the plea agreement has been accepted by an increasing number of public prosecutors, defendants, and their attorneys. According to official statistics, in 2011 basic and high public prosecutor's offices, Prosecutor's Office for Organized Crime, and Prosecutor's Office for War Crimes concluded plea agreements with a total of 441 defendants, which represents a 530% increase when compared to the previous reporting period. Out of the total number of agreements, 365 were accepted by trial courts in first-instance proceedings, which represent a 420% increase when compared with the previous reporting period. Pursuant to plea agreements, 191 persons were sentenced to prison terms, 37 were sentenced to pay a fine, 144 persons received a suspended sentence and security measures were imposed on 71 persons, while 29 persons were ordered to fulfil obligations stipulated in Article 235, para. 2 of the CPC and mandatory orders to return acquired gain were issued in cases of 11 persons. Other adequate rulings were made in cases of 21 persons. The Court dismiss 2 concluded agreements by a ruling, while in 14 cases, the Court denied concluded agreements by a decision. Seven appeals were filed against court decisions, of which 5 were denied and 2 have not been decided on. At the end of the reporting period, there were 144 pending proceedings. If this information is compared with the information for 2010, it takes on even greater significance. According to statistical data, in 2010 basic and high public prosecutor's offices concluded plea agreements with a total of 70 defendants in the Republic of Serbia. Twenty-five agreements were concluded in the territory under the jurisdiction of the Appellate Prosecutor's Office in Belgrade; 24 agreements were concluded in the territory under the jurisdiction of the Appellate Prosecutor's Office in Novi Sad; 12 agreements were concluded in the territory under the jurisdiction of the Appellate Prosecutor's Office in Nis; and 9 agreements were concluded in the territory under the jurisdiction of the Appellate Prosecutor's Office in Kragujevac. (Cited: Kiurski, J., Sporazum o priznanju krivice (krivičnog dela), Proceedings of the Conference "Aktuelna pitanja krivičnog zakonodavstva (normativni i praktični aspekt)", Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 2012, str .166-180).

40 Compare the provisions of Art. 504o-504ć of the 2009 CPC with the provisions of Art. 320 – 330 of the new CPC.

41 Škulić, M., Main Hearing as Provided for in the New Serbian CPC, Proceedings of the Conference *New Trends in Serbia's Criminal Procedure in a Regional Context (Normative and Practical Aspects)*, OSCE Mission to Serbia, Belgrade, 2012, pp. 88-124

solutions from the relevant criminal procedure codes in the comparative context had not been sufficiently considered. This form of simplified procedure was kept in the new CPC; however, its name was not all that was changed, but the content of the provisions which govern it was changed as well when compared to how they were formulated in the CPC which is still in force,[42] and it seems that its crucial features were altered. Such provisions contained in this text of the Code have been rightfully criticized by the experts.[43] The best confirmation that such a conclusion is valid is the extensiveness of the amendments proposed in the Draft Law on Amendments to the CPC from February this year, which have unfortunately been abandoned at this point in the reform of the Serbia's criminal procedure legislation.[44]

From the aspect of the 2011 RS CPC, the basic characteristics of this form of simplified criminal procedure are as follows:

Firstly, the name of this type of simplified procedure has been changed. Instead of the name "agreement on the admission of guilt", the name "plea agreement" has been chosen.[45] Such a choice is more correct and in line with how the notion of a criminal offence has been conceived of in Article 14, paragraph 1 of the RS Criminal Code /CC/, according to which guilty mind /mens rea/ is an integral - key element of any crime.[46]

Secondly, instead of stipulating limitations for its application (to offences or concurrent offences which are punishable with imprisonment of maximum 12 years), it is provided that plea agreements can be applied to all, even the most serious criminal offences.[47]

Thirdly, a minimum penalty that may be proposed in a submitted plea agreement has not been stipulated. Instead, it is only prescribed "that the penalty or other criminal sanction or other measure in respect of which a public prosecutor and a defendant have reached an agreement is proposed in line with the Criminal Code or other law."[48] Such a provison is contrary to the one we can find in the 2009 Code, which provided that "as a rule, a penalty may not be below the statutory minimum for the criminal offence with which a defendant has been charged."[49] With respect to the provisions contained in other Codes which have been analysed, they stipulate possibilities for agreeing on the duration of penalty or other criminal sanction "in accordance with the provisions of the Criminal Code".[50]

Fourthly, with respect to penalties, a mandatory element of any plea agreement is "an agreement on the type, extent, or scope of the penalty or other criminal sanction."[51]

42 Compare the provisions of Art. 282a-282d of the current CPC and provisions of Art. 313- 319 of the new CPC.
43 See: *New Trends in Serbia's Criminal Procedure in a Regional Context (Normative and Practical Aspects)*, OSCE Mission to Serbia, Belgrade, 2012
44 See: Draft Law on Amendments to the CPC, Ministry of Justice and Public Administration, Belgrade, 2012
45 Unlike Serbian lawmakers, the laws of other countries which have been analysed refer to plea agreements in a way that its name is adapted to the specific qualities of a particular language used in each country (e.g. "plea bargaining" or "sentence bargaining").
46 Stojanović, Z., Krivično pravo - opšti deo, Beograd, 2008
47 Compare Art. 282a of the CPC still in force and Art. 313, para. 1 of the new CPC (When comparing this feature of the agreement with the solutions found in the region, it is noticeable that different approaches have been taken to resolving this, in author's opinion, crucial issue of the plea agreement. Under the Montenegrin CPC, plea agreements may be concluded only in cases of criminal offences punishable with imprisonment of up to ten years. As opposed to this Code, other analysed Codes do not provide for such limitations (See: Sijerčić Čolić, H., Krivično procesno pravo, knjiga II, Pravni fakultet Sarajevo, 2008, str. 73)
48 Art. 317, para. 1, item 4 of the new CPC
49 On an exception to this rule or a possibility for imposing a lighter sentence, see Art. 282, para. 3b of the 2009 Code
50 See e.g. Art. 301, para 1, item 3 of the Montenegrin CPC
51 This is a mandatory element of the agreement regardless of the Code in question.

Fifthly, it is stipulated at which stages in the proceedings the parties may enter into a plea agreement (A public prosecutor and a defendant may enter into a plea agreement from the moment at which an order to conduct investigation has been issued until the defendant has entered his plea at the main hearing).[52]

Sixthly, only a public prosecutor and a defendant or his attorney are entitled to propose that an agreement be signed. A public prosecutor may propose to a defendant and his attorney to conclude a plea agreement or the defendant and his attorney may propose the same to the public prosecutor. After making a proposal to conclude a plea agreement, the parties and the defence attorney may negotiate on the terms of pleading guilty of the crime with which the defendant is charged. The Court is not entitled to take any actions with regard to the negotiation process and entering into a plea agreement.[53]

Seventhly, a decision on a plea agreement is made at a hearing to which a public prosecutor, a defendant, and his attorney are summoned.[54] The injured party/victim is not even informed of that hearing. Jurisdiction of the Court with regard to its decision making on the agreement is dependent on the stage in the proceedings at which it is submitted to the Court. Pursuant to this criterion, "Preliminary proceedings judge shall decide on a plea agreement and if the agreement is submitted to the Court after the confirmation of the indictment – the judge presiding over a panel" (Art. 315, para. 1 of the CPC RS).[55]

The Court may render three different decisions on a plea agreement. It may dismiss, accept, or deny the agreement. The hearing at which the faith of the agreement is decided is closed to the public.[56]

Eighthly, the Court will pass a judgement accepting a plea agreement and declaring the defendant guilty if it is satisfied: that the defendant has knowingly and willingly 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, especially that he has waived his 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 there is other evidence which does not run contrary to the defendant's

52 Defining at which stage in the proceedings it is allowed to submit the agreement to the Court is fully justified and this provision features as well in other Codes that have been (or not) analysed herein. Admittedly, these provisions are not identical. For instance, only the final moment in the proceedings at which a plea agreement may be submitted is stipulated under Art. 300, para. 3 of the Montenegrin CPC. Under the same Code, it may be submitted "not later than the first hearing for the main hearing before a first instance court". From this aspect, there are more possibilities for plea bargaining in BiH. For instance, under Art. 231. Para. 1 of the BiH CPC, "The suspect or the accused and his attorney may negotiate with the prosecutor on the conditions for entering a guilty plea for the offence with which the suspect or the accused is charged until the completion of the main hearing or hearing before an appellate panel." However, an agreement may not be concluded in cases when the accused enters a guilty plea at a plea hearing. In Croatia, the final moment for submitting an agreement is the plea hearing, but "the panel may postpone a session for fifteen days at the most in order for the parties to complete negotiations" Art. 360 para. 2 of the Croatian CPC.

53 A certain exception to this rule is provided for in the Croatian CPC since the Court may postpone a session of the panel for not more than 15 days so that the parties could complete their negotiations on the penalty.

54 Art. 315, para. 2 of the new CPC

55 This issue, as well as most of the issues from the legislation analysed herein, has not been addressed in an identical manner. E.g. according to the Montenegrin CPC, a submitted agreement is decided on, depending on the stage in the proceedings, either by a judge presiding over a pretrial chamber or a trial panel. The BiH CPC has similar provisions since jurisdiction of the Court which decides on a plea agreement depends on the stage in the proceedings at which it is submitted (a preliminary hearing judge, a judge, or a trial panel). Under the Croatian CPC, the panel before which a defendant enters his plea has jurisdiction over decisions on any submitted text of an agreement.

56 Provisions made by the Croatian legislator concerning the types of judicial decisions to be passed on the submitted agreements deserve our attention since it is expressly prescribed that it is possible to desist from the agreement proposal. Namely, pursuant to Art. 362 of the Code, "parties may desist from the agreement proposal before the judgement is passed."

pleading guilty to committing the offence; that the penalty or other criminal sanction or measure in respect of which the public prosecutor and the defendant have reached an agreement is proposed in line with the criminal code and other law. The judgment must provide grounds based on which the Court has accepted the plea agreement. The Court will pass a ruling denying a plea agreement in the event that one or more of the above conditions have not been fulfilled as well as when there are reasons to terminate the proceedings. In such cases, defendant's guilty plea/confession from the agreement may not be used as evidence in criminal proceedings. When such a ruling becomes final, the agreement and all the files connected with it are destroyed before a judge, and a record thereof is made, while the judge who has made such a ruling may not further participate in the proceedings. In addition, the Court will issue a ruling dismissing a plea agreement in two cases. Firstly, if it finds that its content is not in accordance with the law. Secondly, if a duly summoned defendant has failed to appear at the hearing at which a decision on the agreement is to be made and fails to justify his absence (Art. 316, 317, and 318 of the new CPC).[57]

Ninthly, a defendant may be bound under a plea agreement to fulfil obligations based on which a public prosecutor is entitled, pursuant to the principle of prosecutorial discretion, to defer prosecution on condition that the nature of the obligation allows that it is began to be fulfilled prior to the submission of the agreement to the Court.[58]

Tenthly, it is possible to file an appeal against a judgment by which a plea agreement has been accepted. Namely, under Art. 319, para. 3 of the Code, a public prosecutor, a defendant and his attorney may appeal the judgment within eight days from the date of delivery of the judgement because there are grounds for discontinuing the proceedings after examination of the indictment in accordance with Art. 338, para. 1,[59] as well as in the event that the judgement does not pertain

57 In general, court decisions on proposed agreements between parties to criminal proceedings, as well as consequences of their dismissal by judges are also identical in other herein analysed Codes. Admittedly, there are some differences with regard to how grounds for passing one of three possible court decisions have been defined (or not defined) and how the consequences of agreement denial have been defined in those Codes. For instance, if a panel decides to deny an agreement, it will go on to examine the indictment and deliver it together with the case file to the court clerk's office for a hearing to be scheduled. An exception to this occurs only if there are sufficient grounds for dismissing the indictment (Art. 361, para. 3 and 4 of the Croatian CPC). Or, according to the Montenegrin legislator, "When a ruling on accepting an agreement on the admission of guilt has become final, the judge presiding over the panel shall promptly, and not later than within three days, make a ruling finding the defendant guilty in accordance with the accepted agreement" (Art. 303, para. 1 of the Montenegrin CPC). Similar provisions have been made in the BiH CPC as well. E.g. pursuant to Art. 231 of the BiH CPC, "If the Court dismisses an agreement on the admission of guilt, the Court shall inform the parties to the proceedings and the defence attorney accordingly and say so in the record. At the same time, the Court shall set a date for the main hearing, which must be scheduled not later than 30 days."

58 This characteristic of the agreement is not universally found in the analysed criminal procedure codes. Namely, in addition to the RS CPC, it is present, admittedly having a different content, only in the Montenegrin CPC. Art. 301, para. 3 of that Code provides that "The defendant may undertake under the agreement on the admission of guilt to comply with the obligations referred to in Art. 272, para. 1 hereof, provided that it is allowed in criminal proceedings given the nature of those obligations." However, on the other hand, pursuant to Art. 363, para. 3 of the Croatian CPC, a judgement based on an agreement may impose, apart from the sentence of imprisonment and a precautionary measure, a security measure and a measure of confiscating the proceeds of crime.

59 Those grounds include: the act which is the subject-matter of the charges is not a criminal offence and conditions for imposing a security measure do not exist; the statute of limitations on prosecution has expired or it is covered by amnesty or pardon, or there are other circumstances which permanently preclude prosecution; there is no sufficient evidence to support a reasonable suspicion that a defendant committed the crime in question.

to the subject-matter of the plea agreement. As opposed to this, appeals may not be filed against a ruling dismissing or denying a plea agreement.[60]

Eleventhly, as opposed to the Code which is still in force, the new CPC explicitly provides that a defendant must have a defence attorney from the beginning of his plea negotiations with a public prosecutor until the court makes a decision thereon. Such a provision should be welcomed, and it also features in other herein analysed Codes.[61]

Without attempting to present other provisions of the Code/s/ which govern the plea agreement, it seems that a question mark can be put over those mentioned above (as well as others not mentioned herein), which define the agreement in the 2011 RS CPC. In other words, we could almost arrive at a conclusion that prevailing opinions of Serbian and not only Serbian experts had not been taken into account when provisions governing this issue were made. At this point, it should also be stressed as a reminder that the above mentioned issues are as well the most current issues experts have been addressing with regard to the plea agreement in general.[62] In author's opinion, providing for plea agreement in the law is fully justified from the point of view of criminal policy. However, a valid question mark can be put over a number of provisions which govern it in the new CPC. Only the most problematic ones are listed below.

Firstly, any analysis of the papers devoted to the issues surrounding the agreement which is anywhere near serious shows quite justly the prevailing opinion that an agreement on the admission of guilt – plea agreement should be a form of simplified procedure to be used primarily in cases of criminal offences which belong to the group of the so-called less serious crimes or crimes in the middle range of seriousness. After all, this also applies to other forms of simplified procedure used in criminal matters. In contemporary criminal procedure legislation, simplified forms of criminal procedure are intended to be used to dispose of not so serious criminal offences, those offences which pose a danger to society to a lesser extent, which in itself calls for allocating less material resources and less time than in cases of more serious and particularly the most serious criminal offences.[63] The underpinning principle of any simplified form of criminal

60 The issue of possibilities for seeking legal remedy against a court decision on a proposed agreement has been solved in other analysed Codes in a somewhat different manner. According to provisions made by the Croatian lawmaker, the possibility for seeking legal remedy is dependent on the type of a decision on the agreement as well as on the grounds on which it is contested. Pursuant to these criteria, it is not allowed to appeal the rulings of a panel by which the agreement is denied. Similarly, neither a judgement based on an accepted agreement may be challenged on appeal on the grounds of a criminal sanction imposed or decisions on confiscation of the proceeds of crime, costs of the proceedings, or restitution claims, nor on the grounds of erroneous or insufficient finding of fact unless evidence of exclusion of illegality and guilt came to defendant's attention after adjudication of the case (Art. 361, para. 3 and Art. 364, para.1 and 2 of the Croatian CPC). Under the provisions of the Montenegrin CPC, the injured party may file an appeal against a ruling to accept a plea agreement, while a public prosecutor and a defendant may file an appeal against a ruling denying the agreement. Further to this, a judgement passed based on an agreement on the admission of guilt may be appealed only insofar as it is not in accordance with the concluded agreement (Art. 301, para. 10 and Art. 303, para. 2 of the Montenegrin CPC). The BiH Criminal Procedure Code does not provide for a possibility of contesting court decisions on proposed agreements. Consequences of court decisions are twofold. Firstly, if the Court accepts a plea agreement, defendant's statement goes on the record and a sentencing hearing continues so that a penalty would be imposed under the terms of the agreement. Secondly, if the court dismissed an agreement, its decision will be communicated to the parties and the defence attorney, while at the same time, a date is set for the main hearing. It should be added that the injured party is notified of the results of plea bargaining by the Court (Art. 238, para.7, 8 and 9 of the Republic of Srpska CPC).

61 See Art. 360, para. 1 of the Croatian CPC, Art. 300, para. 3 of the Montenegrin CPC, and Art. 231, para. 1 of the BiH CPC

62 See: Loffler, J., Die Absprache in strafrozess, Tubingen, 2010; Budimilić, M., Sporazumi i potvbrda izjašnjavanja o krivici – praksa pred Tribunalom za bivšu Jugoslaviju i nacionalnim pravosuđima, Kriminalističke teme, Sarajevo, br.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 normativne efikasnosti krivičnog postupka, Proceedings of the Conference, "Pravni sistem Srbije i standardi Evropske unije i Saveta Evrope", Pravni fakultet Kragujevac, 2009, knjiga IV, str. 85-106

63 See: Grubač, M., Racionalizacija krivičnog postupka uprošćavanjem procesnih formi, Zbornik Pravnog fakulteta u Novom Sadu, br. 1-3/84, str. 290

procedure should be the proportionality between procedure and subject matter of a trial, provided that fundamental rights of the parties are the line which cannot be crossed when procedural forms are simplified in the process of their differentiation. In view of that, it seems contrary to the nature of the agreement to allow for it to be applicable to the most serious criminal offences. Additionally, such a legislative solution opens up, quite unnecessarily, a possibility for suspecting that it could be abused, which should also be considered when regulating this issue. If we add to this the fact that in general terms the Code, quite justifiably, provides for two additional forms of agreements between public prosecutors and defendants (agreement on testifying of a defendant and agreement on testifying of a convicted person) as means of detecting and proving the most serious crimes, then our position gains even more in terms of its validity.

Secondly, a solution according to which there is no explicit provision for the minimum penalty which may be proposed in the submitted plea agreement can also be challenged on valid grounds. In addition to arguments in favour of opening such an issue, the general purpose of criminal sanctions should also be considered. It cannot be disputed that their purpose is achieved, among other things, only inasmuch appropriate sanctions have been imposed. Can this be guaranteed by the solution according to which a light, even the lightest criminal sanction can be imposed for serious criminal offences, which can be conceived and which would be in accordance with Article 321, para. 1, item 3 of the Code? The author believes that no comment is needed here.

Thirdly, in addition to the above, a question must be asked about how adequately the rights of the injured party are safeguarded in the plea negotiation process. Any detailed analysis of the position this party has in the process of plea bargaining proves that this Code has made his/her position even worse in comparison with the still current CPC. We mention only two facts by way of example. Firstly, the injured party is not even informed of the hearing at which a plea agreement is to be decided. Secondly, the injured party does not have a right to file an appeal against court's decision on the agreement. Or to put it briefly, the Code does not provide for any instruments through which injured parties could successfully defend their interests in the plea agreement procedure. In this context, it should be mentioned that such a solution runs contrary to the solutions mostly accepted in the criminal procedure legislation which has been analysed or not from the comparative point of view. In order to illustrate this, we mention no more than two examples. Firstly, pursuant to Art. 301, para. 10 of the Montenegrin CPC, "The injured party may file an appeal against a ruling accepting the agreement on the admission of guilt". Secondly, according to provisions of the BiH criminal procedure law, when deliberating on the plea agreement, the Court must verify among other things "if the injured party has been given an opportunity to declare themselves on the restitution claim" (Art. 231, para. 6, item e of the BiH CPC).

Fourthly, a mandatory element of the agreement is, among other things, an agreement on the type, extent, and scope of the penalty or other criminal sanction.[64] Given such a formulation, it can be inferred that the parties may come to an agreement only on the scope of a penalty which is within the statutory range (e.g. three to five years' imprisonment) and the Court is left to impose within the "agreed scope" a specific extent of penalty of a particular type. Such a possibility is contrary primarily to Art. 317, under which the Court accepts a plea agreement by delivering a judgement when it is satisfied that certain conditions have been fulfilled. Given this provision, a question arises: How can the Court accept an agreement in which only the scope of penalty

64 Art. 314, para. 1, item 3 of the new CPC

has been defined with regard to the criminal sanction? Which penalty is imposed in the judgement of conviction in such cases? Also, if we allow for a fact (which is possible under Art. 314, para. 1, item 3 of the new CPC) that in cases when agreements stipulate only the scope of penalty, the Court may freely pronounce any extent of the penalty within "the agreed scope", a question begs to be asked: How can the Court pronounce any penalty, i.e. define the extent of a specific type of penalty if no evidence has been presented about the circumstances which are used as parameters for sentencing? Instead of making any comments, the author expresses his opinion that such a possibility does not stand to reason in any way. If the aim was to provide, on the model of some other Codes,[65] for a possibility that the parties should agree solely on the scope of the penalty and the Court should be left, in the event it accepts the agreement, to impose a specific extent of penalty within that particular scope, it should have been prescribed that the Court was obligated to present evidence based on which it would establish the facts on which the extent of any specific penalty depended.[66]

Fifthly, one of provisions contained in the new CPC and relating to the plea agreement over which a serious question mark can be placed is the one which allows the possibility that a public prosecutor, a defendant and his attorney may file an appeal against a judgement by which a plea agreement has been accepted. A number of arguments may be put forward against such a regulation. Three of them are particularly significant. Number one, the plea agreement should be an institute whose application leads to more efficient criminal proceedings. Does such a regulation achieve that goal? Surely, it does not. Quite the opposite, it causes delays in the proceedings, which is completely unnecessary. Number two, not only are the reasons for the possibility of filing appeals unjustified, they can also suggest that principal parties in the negotiation and decision making processes related to the agreement have been inadequately prepared primarily for the hearing at which the agreement is decided on, which should not even be presumed. By way of example, a question must be asked with regard to this: Is it possible for the Court to pass a judgement accepting an agreement without sufficient evidence to support a reasonable belief that a crime has been committed or if the act does not constitute an offence or if the statute of limitations has expired, etc.? Does in such cases the Court act contrary to Art. 324 of the Code? Or, dare we imagine that a prosecutor along with a defendant submits an agreement without knowing whether or not an act constitutes an offence or whether or not the statute of limitations on prosecution has expired, or if some other circumstances have emerged later on and represent potential grounds for appeal? Furthermore, how can it be imagined that any of the parties who are entitled to appeal is not aware of the circumstances which represent grounds for potential appeal at a hearing and becomes aware of them within such a short period of time after the hearing at which the agreement was decided on? In addition to those, other questions of similar type could also be

65 This refers in the first place to the USA, in which, so to speak, there is rule that a defendant confesses to a crime and a prosecutor proposes an appropriate sanction to the Court; however, the Court is not formally bound by such a proposal. The penalty it imposes may be higher, which is what happens in practice in may cases. Nevertheless, for our intents and purposes, we need to take into account that in the USA in most cases and fairly precisely it can be assumed which penalty will be imposed in a particular case. This is because USA courts follow very precise and almost mechanically formulated guidelines on how severe a penalty should be for a certain criminal offence accompanied by defined circumstances (recidivism, seriousness of the consequences of an offence, etc.). Also, the USA legislation does not lay down in any way that evidence on which depends the type of criminal sanction or its extent must be presented and examined. Contrary to this, in Serbia it is formally impossible for a court to pronounce a certain extent of penalty (this also applies to the scope previously defined by the parties) without having presented and examined evidence from which facts pertinent to sentencing will be deduced in terms of Art. 54 – 63 of the RS CC (See: Brkić, S., Dogovoreno priznanje (plea bargaining) u angloameričkom pravu, Zbornik radova Pravnog fakulteta u Novom Sad, XXXVII,1-2/2003; Damaška, M., Sudbina angloameričkih procesnih ideja u Italiji, Hrvatski ljetopis za kazneno pravo i praksu, vol.13.br.1/2006, Zagreb).

66 See: Reforma u stilu "Jedan korak napred – dva koraka nazad", Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, Beograd, 2012, str. 99-100

asked but answers would always be the same, indicating that such a way of regulating the right to appeal a judgement by which a plea agreement is accepted cannot be justified.

Sixthly, one of the elements of a plea agreement is defendant's statement in which he accepts to fulfil an obligation, based on which the prosecutor has the right, pursuant to the principle of prosecutorial discretion, to defer prosecution provided the nature of the obligation allows that it begins to be fulfilled before submitting the agreement to the Court. In respect of this element, which in principle seems quite reasonable, a question must also be raised: What are the repercussions if a defendant fails to meet his obligations? The question results from the lawmaker's position that in order for the Court to accept an agreement it is sufficient that the defendant has begun fulfilling his obligation(s) before the plea agreement is submitted. If we add to this the fact that plea agreements, of which this is an integral part, do not necessarily have to specify the final time limit for the fulfilment of the obligation(s) – which is by all means an obligation in the event prosecution is deferred since it is the key form of prosecutorial discretion,[67] then our question becomes even more current.

Consequently, it is completely justified that during work on amendments to the CPC, which was started and then in author's opinion unwarrantedly stopped, special attention was given precisely to the issues of how to provide for plea agreement. Newly proposed regulations concerning the manner in which the agreement would be provided for, which were drafted by the Working Group of the Ministry of Justice and Public Administration, illustratively speak in favour of such an opinion. Among the proposed amendments, three of them were particularly prominent. Firstly, a public prosecutor and a defendant could conclude an agreement from the moment of issuing an order to conduct investigation until the defendant pleads on the charges at the main hearing. Secondly, the submitted agreement should specify the type and extent of the penalty, and not only its scope, which is the case at the moment. The possibility that a plea agreement may include only the "scope" of penalty would be stricken because not only would it be unfair, but in practice it would discourage defendants and they would be less willing to enter into plea agreements. On the other hand, since the Court would not present evidence because the agreement has been accepted nor could it be done by the parties, the Court would not be able to establish the facts on which depends the extent of penalty which can be obtained only through presentation of evidence, i.e. by conducting appropriate evidentiary proceedings, which thus would avoid such practical problems. Additionally, with regard to this element of the agreement, it was proposed that its integral part should be an agreement between the parties on enforcement of penalty or on a single penalty for concurrent offences. Furthermore, an agreement on the proceeds from crime, which are subject to confiscation under a separate act, could be an integral part of a plea agreement (this refers to the Confiscation of the Proceeds from Crime Act). Thirdly, both the injured party and their attorney-in-fact would be notified of the hearing at which a decision on the agreement is passed, provided that they would not be in the position to prevent its conclusion, but could give their opinion on the part of the agreement which covers a restitution claim. Fourthly, it was proposed that the decision making process concerning the agreement would have two stages and the issue of appeals against court decisions on the agreement was regulated differently. In accordance with this, the Court would first pass a reasoned ruling on acceptance, denial, or dismissal of the agreement and appeals on which it would be contested would be allowed or not depending on the type of the ruling. Appeals against rulings accepting the

67 Art. 283, para. 2 of the new CPC

agreement would not be allowed. On the other hand, a prosecutor, a defendant and his attorney would be allowed to appeal against a ruling dismissing or denying their plea agreement within eight days from the date of its service. The end result of the ruling accepting an agreement would be a judgement by which the defendant is found guilty and in case of such judgement, grounds on which it is contested would be reduced from four to one. It could be contested only if it is not in keeping with the concluded agreement. A possibility for it to be contested on other grounds is excluded, thus confirming that the parties were serious in their negotiations on the contents of the agreement. How can the present regulation be justified when it allows appeals against judgements on grounds that an act which is the subject matter of a plea agreement is not a criminal offence and that there is no evidence to support a reasonable belief that a defendant committed the offence which is the subject matter of the agreement, while only several days ago the agreement was accepted? What is also important in this context is a proposal according to which the Court would deny a plea agreement by a ruling "if it finds that the criminal sanction, type or extent of the penalty, or the manner of its enforcement stipulated under the agreement are manifestly out of proportion to the offence."[68]

2.2. Summary Criminal Proceedings

One of the traditional forms of simplified criminal procedure used in criminal matters are summary proceedings. When compared to the regular criminal proceedings, this simplified form has a range of characteristics, both in terms of its structure and modification of individual institutes from the regular criminal proceedings.[69] In respect of the way in which this form of simplified criminal proceedings has been treated in the reform of the criminal procedure codes of the countries in the region, one of its characteristics can be easily noticed above all. It is the constant broadening of its scope of application. For instance, if this issue is considered from the point of view of Serbian criminal procedure legislation, what can be observed is the permanent expansion of the scope of application of the provisions on summary criminal procedure. Under the 2001 CPC, which is the Code rightly believed to represent the beginning of the reform of Serbian criminal legislation,[70] provisions governing summary criminal proceedings are applied to proceedings in connection with offences for which the principal statutory penalty is a fine or imprisonment of up to three years.[71] The 2004 Amendments to the Code prescribed that a presiding judge could approve, at the motion of an authorized prosecutor and with express consent from a defendant, that provisions for summary criminal proceedings which refer to the main hearing, judgement, and appeal procedure be applied to offences punishable with imprisonment of up to five years.[72] Such a possibility, albeit conditional, to apply summary proceedings provisions to offences punishable by imprisonment of three to five years was heavily criticized and it was held that it did not promote the efficiency of criminal proceedings. In view of that precisely, the 2009 Law on Amendments to the CPC widened the scope of application of the summary proceedings provisions to include all the offences punishable with imprisonment of up to five years, even without a prior fulfilment of the conditions prescribed in Article 433 of the Code.[73] This was not an end

68 See Draft Law on Amendments to the CPC, Ministry of Justice and Public Administration, Belgrade, 2012
69 For reference, see: Bejatović, S., Krivično procesno pravo, "Sl. glasnik", Beograd, 2010, str. 535-542
70 Radulović, D. - Bejatović,S., Zakonik o krivičnom postupku, Beograd, Kultura, 2002.
71 Art. 433, para.1 of the Code
72 Art. 433, para.2 of the CPC
73 *Official Gazette of the RS*, No. 72 /09

to it. The 2011 CPC expanded further the scope of application of provisions governing summary proceedings. Article 495 of the Code stipulates that those provisions are to be applied to criminal offences for which a fine or a term of imprisonment of maximum eight years is prescribed as the principal penalty, regardless of the proceedings in question. What is more, it is laid down that those provisions would also apply to proceedings in connection with offences tried before special departments of competent courts.[74] This practice has been taken a step further in certain countries in the region. For instance, the Croatian CPC provides that this procedure is to be used in proceedings conducted before municipal courts, i.e. as a rule, in proceedings "for offences for which the principal statutory penalty is a fine or a term of imprisonment of up to twelve years."[75]

The process in which the scope of application of summary proceedings provisions is broadened should be welcomed. Such a legislative solution will lead to more efficient and consequently less costly criminal proceedings, without prejudice to the legality of adjudication of a particular criminal matter or freedoms and rights of defendants guaranteed under international instruments and national laws. By all means, this can be achieved only if its provisions are formulated in accordance with its nature, which cannot be maintained in the case of the new RS CPC. This refers in the first place to two legislative solutions in connection with summary criminal proceedings. The first one pertains to how those provisions are applied to proceedings for offences conducted before special departments of competent courts, while the second one pertains to the preclusion of its use in all criminal trials conducted on private prosecution. The way in which summary criminal proceedings have been regulated with regard to these two issues can seriously be questioned, first and foremost since there are no reasons from the point of view of criminal policy to allow for a possibility to conduct regular proceedings in connection with criminal offences which are prosecuted on private prosecutions. In other words, the possibility to apply provisions governing summary criminal proceedings to proceedings conducted before special departments of competent courts is not compatible with their nature and purpose. In this respect, the position adopted by the Working Group that prepared the amendments to the new CPC should be applauded since they argued for regulating these two issues in the manner which would be consistent with their nature. Or, they called for precluding the possibility of applying the provisions governing summary criminal proceedings to proceedings conducted before special departments of competent courts; and denying the possibility of conducting regular proceedings in cases of offences prosecuted on private prosecutions. However, such a position has not been accepted at this stage of reform of Serbia's criminal procedure legislation.

2.3. Sentencing Hearing

The next simplified form of criminal procedure, which is a novelty in Serbia's criminal procedure legislation as well as in the region, is the sentencing hearing.[76] From the aspect of Serbian criminal procedure legislation, this form has existed since 2001, admittedly under a different name and having a different scope of application and some other normative features. Under legislative solutions from the 2001 CPC, the possibility of its practical use was relatively modest, which

74 Article 495 of the new CPC

75 Art. 520 in re. Art. 19a, para. 1, item 1 of the Code

76 This form of simplified procedure has been differently named in legal systems of individual countries in the region (Sentencing procedure – Montenegrin CPC, Issuance of a criminal order – Croatian CPC; Procedure for issuance of a criminal order – Republic of Srpska CPC, etc.).

can be explained by the fact that thus far it had been completely unknown, not only in our criminal procedure legislation, but in general, in the laws which were in force in the region of former Yugoslavia. Given the usefulness of such a procedure and modest possibilities for its use in practice under the 2001 CPC and with a view to creating a normative basis for simplification and acceleration of criminal proceedings in all the cases in which the reasons pertaining to criminal policy justify it, amendments to the CPC carried in May 2004 broadened the scope of possibility for sentencing without holding a main hearing to include offences punishable with imprisonment of up to three years and widened the scope of penalties which could be imposed in such a procedure. Such a legislative solution was applauded and was in line with experts' arguments concerning the issue.[77] However, this was not an end of it. As in cases of other forms of simplified procedure, the scope of its application continued to be extended. Here as well, ratio legis included the creation of a normative basis for acceleration of criminal proceedings. From the aspect of the 2011 CPC, if a public prosecutor believes that based on the complexity of a case and collected evidence, and in particular because a defendant was arrested during the commission of an offence or has confessed to having committed the offence, it is not necessary to hold a main hearing, he may make a motion before a judge that a sentencing hearing be held. Such a possibility is provided for criminal offences punishable principally with a fine or imprisonment of maximum five years, provided the criminal sanction proposed by the prosecutor may not exceed on average one third of the statutory penalty. In addition, as opposed to previous solutions, this hearing was based on the adversarial model. The parties were also given an opportunity to present their arguments concerning the circumstances, admittedly to a limited extent. Furthermore, with regard to this form of procedure, it is important to stress that putting it into practice depends on whether or not the Court grants a motion to that end. Namely, only in case a judge grants a motion to hold a sentencing hearing, he will issue an order setting the date, time, and venue for the hearing. The hearing is held within 15 days from the date of the order and the parties and the defence attorney are summoned thereto, while the defendant and his attorney will receive a motion to indict together with the summons. The hearing will commence with a brief statement by the public prosecutor about the evidence which is available to him and type and extent of the sanction he moves to be imposed. Thereafter, the judge will call the defendant to plead and advise him of the consequences if he admits to the allegations of the public prosecutor, in particular that he may not file an objection or an appeal against a first-instance judgement. Immediately after the sentencing hearing, the judge will pass a judgement of conviction or issue an order to hold a main hearing. A judgement of conviction is passed if the defendant has accepted the motion of the public prosecutor put forward at the hearing or if he has not appeared at a hearing to which he was summoned. In case the defendant has not accepted prosecutor's motion or if the judge has denied it, the judge will issue an order setting the date, time and venue for the main hearing. A judgement of conviction is served on the parties and the defence attorney and the defendant and his attorney may, within eight days from the date of its service, file an objection against such a judgement. If the judge does not rule to dismiss the objection either as untimely or not allowed, he will issue an order setting the date, time, and venue for the main hearing on the motion to indict filed by the public prosecutor. At the main hearing, the judge is not bound by the proposal of the

77 See: Bejatović,S., Neophodnost donošenja Zakonika o krivičnom postupku Republike Srbije, Srpsko udruženje za krivično pravo, Beograd, 2004, str.48

public prosecutor in terms of the type and extent of the sentence. The judgement becomes final if there have not been any objections filed against it (Art. 512-518 of the CPC) [78]

2.4. Other Forms of Simplified Criminal Procedure

In addition to three typical forms of simplified criminal procedure which have been mentioned above, criminal procedure laws of the countries in the region are also familiar with other forms of this manner of adjudicating criminal cases. For instance, this refers to the procedure for issuing an indictment without conducting an investigation, bringing an indictment at the main hearing, prosecutorial discretion, etc.[79] However, they will not be analysed in detail. Not because they are less important, but because of two other reasons, the first being our limitations with regard to the length of the paper and the second one being their traditional presence in the criminal procedure laws of the countries in the region, which does not apply to the two forms of simplified procedure which have been previously mentioned (plea agreement and sentencing hearing). As a result, instead of a detailed examination, we would like only to state that these other forms of simplified criminal procedure are also present in the analysed criminal procedure codes, admittedly regulated in a different manner, which is particularly prominent in the case of prosecutorial discretion.[80]

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The analysis of issues concerning simplified forms of criminal procedure shows that they have been increasingly present in criminal procedure laws of the countries in the region. Another characteristic of those laws is that each of them includes multiple forms of simplified procedure. Furthermore, both theory and practice agree that they are fully justified. However, contrary to this, not so insignificant differences exist when we consider how they have been regulated. For example, from the aspect of the plea agreement which stands out as the most recent and the most current form of simplified criminal procedure in the countries in the region, there are differences primarily with regard to issues concerning the forms of agreement between the parties, potential scope of their application (to all the criminal offences or only to the specific, i.e. the less serious ones), content of the agreement, type and extent of criminal sanction stipulated under the agreement, place and role of the injured party in the process of concluding the agreement, role of the defence attorney in the negotiation and decision making processes related to the agreement, the moment at which the Court becomes involved in the process, or the issue of possibility and basis of obtaining judicial relief in such proceedings, etc.

With respect to Serbia's criminal procedure legislation, it can be maintained that, generally speaking, in terms of these issues it has been following trends which have developed in other herein analysed codes. Nevertheless, as opposed to this characteristic, which can be judged as

78 For more on characteristics of this form of simplified criminal procedure as provided for in the legislation of other countries in the region see *e.g.* Art. 540-545 of the Croatian Criminal Procedure Code; Art. 350-363 of the Republic of Srpska CPC; Art. 461-464 of the Montenegrin Criminal Procedure Code.

79 See: Stojanović, Z., Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije, Proceedings of the Conference "Pojednostavljene forrme postupanja u krivičnim stvarima i altenativne krivične", Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 2009, str.11-29

80 For more details, see: Primena načela oportuniteta u praksi: Izazovi i preporuke, Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, Beograd, 2012

favourable, the same could not be maintained when it comes to the manner in which specific forms of simplified procedure have been provided for. As regards its provisions which govern a number of issues of this type, the new RS CPC is not in accordance with the prevailing expert opinion. The Draft Law on Amendments to this Code did eliminate a number of illogical elements of the new CPC. Nonetheless, at this point any further efforts to adopt the proposed amendments have unfortunately been abandoned. We would hope that this process would soon continue and we would welcome it, thus providing conditions for Serbia's criminal laws to have legislative solutions of those issues which are in line with the prevailing arguments of the professionals. The Conference for which this paper is written should encourage us to pursue such a course of action.

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Simplified Forms of Proceedings in the Criminal Procedure Legislation in Slovenia

I Introduction

Criminal law performs in contemporary society two mutually opposed functions. On the one hand it is an instrument of protection of the existing social and legal order. It protects besides special values, proper to a given society, also values considered as general human values (for example life, physical integrity, property). These two elements represent a protective function of criminal law. On the other hand, criminal law should protect people against arbitrary and unlawful interventions of the state apparatus. This function is called the guarantee function of criminal law.[2]

In spite of the growing importance of the protection of human rights and the strenhtened guarantee function of criminal law, a constantly increasing number of processed cases and the unreasonably long duration of court proceedings forces us to look for the simplified forms of processing which would lead to more expeditious and efficient ways of handling the cases before a court.

Simplified forms of processing in the Slovene Criminal Procedure Act (hereinafter CPA)[3] can be divided to a summary proceedings and simplified forms of treatment before the court and to simplified forms of processing in the pre-trial procedure.

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2 L. Bavcon, A. Šelih et al.: Kazensko pravo. Splošni del. Ljubljana,Uradni list Republike Slovenije 2013, p. 49.
3 Criminal Procedure Act. Official Consolidated Text. Official Gazette of the Republic of Slovenia, no.32/2012

II. Summary proceedings before a district court

In proceedings before the district court the provisions of Articles 430 to 444 of the CPA shall apply; in respect of issues not dealt with in these provisions, other provisions of this Act shall apply *mutatis mutandis*.[4]

Criminal proceedings shall be instituted on the basis of a summary charge sheet of the public prosecutor or the injured party acting as prosecutor, or on the basis of a private charge.

The public prosecutor may file a summary charge sheet on the basis of a crime report alone.

The summary charge sheet and the private charge shall be submitted in as many copies as needed by the court and the defendant.[5]

Before filing the summary charge sheet the public prosecutor may move for a single judge (hereinafter the judge) to perform specific acts of investigation. If the judge consents to the proposal, he shall perform the required investigative acts and thereafter send all files to the public prosecutor.

The acts of investigation shall be carried out as quickly and efficiently as possible.

If the judge disagrees with the motion for investigative acts, he shall notify the public prosecutor thereof.

Upon receiving the files or information referred to in the preceding paragraphs, the public prosecutor may decide either to file a summary charge sheet or to dismiss the crime report by a ruling.[6]

Detention may exceptionally be ordered against a person suspected on reasonable grounds of committing a criminal offence for which the perpetrator is prosecuted ex officio:

1) if he is in hiding, if his identity cannot be ascertained or if other circumstances point to an obvious risk of flight if detention is not ordered;

2) if the act involved is an offence against public order or sexual inviolability, or an offence with elements of violence subject to two years imprisonment, or other criminal offence for which an imprisonment of three years may be imposed, whenever the grounds exist for detention referred to in point 2 or 3 of the first paragraph of Article 201 of the CPA.

The detention before the filing of a summary charge sheet may last as long as required for the acts of investigation to be carried out, but not beyond the period of fifteen days. Appeals against the detention order shall be decided by the panel of the circuit court (sixth paragraph of Article 25).

4 Article 429 of the CPA
5 Article 430 of the CPA
6 Article 431 of the CPA

As regards the detention from the service of the summary charge sheet until the end of the main hearing, the provisions of Article 207 of this Act shall apply *mutatis mutandis*; the judge shall be bound to consider each month if grounds for detention still exist.

If the defendant is under detention, the court shall proceed with special speed.[7]

If the crime report is filed by the injured party and if, within a period of one month from the receipt of the request by the public prosecutor, the latter fails to file a summary charge sheet and to notify the injured party that he has dismissed the charge or suspended prosecution (Article 162), the injured party shall be entitled to assume prosecution as a prosecutor by filing a summary charge sheet with the court.[8]

The summary charge sheet or the private charge shall contain: the name and surname of the defendant with his personal data if known, the description of the criminal offence and its statutory definition, the court before which the main hearing is to be held, the motion as to which evidence should be taken in the main hearing, and the motion that the defendant be found guilty and sentenced in accordance with law.

The exposition shall contain those facts and evidence that are necessary to establish reasonable grounds for suspicion that the defendant has committed a criminal offence which is the object of the charges against him or a private charge.

The summary charge sheet may contain a motion to put the defendant in detention. If the defendant is in detention or was in detention during investigative acts, the summary charge sheet shall contain an indication of how long he was in detention.

In order to submit a motion regarding the type and severity of sentence or any other criminal sanction contained in a summary charge sheet issued by a public prosecutor, the provision of the second paragraph of Article 269 of the CPA shall apply *mutatis mutandis*.[9]

Upon receiving the summary charge sheet or the private charge, the judge shall first examine if the court has jurisdiction in the matter and if grounds exist to dismiss the summary charge sheet or the private charge.

If the judge himself or on the motion of parties establishes that records or information referred to in Article 83 of the CPA have been included in the files, he shall render a ruling on their exclusion from the files. The appeal against this ruling shall be decided by the court of second instance, which may, in view of the contents of excluded evidence, order that the main hearing be held before another judge.

If the judge does not render any of the rulings from the preceding paragraphs, he shall order that the charge sheet be served on defendant, he informs him in a written form about the possibility of admission of guilt for a criminal offence contained in the charge and about the consequences

7 Article 432 of the CPA
8 Article 433 of the CPA
9 Article 434 of the CPA

(point 5 of the third paragraph of Article 285. a) and shall schedule the main hearing immediately. If he fails to schedule the main hearing within a month, the judge shall notify the president of the court of the reasons for this.

The president of the court shall take the necessary steps for scheduling the main hearing as soon as possible.

If the judge estimates, that it would be reasonable to conduct for the faster course of criminal proceedings a pre-trial hearing prior to scheduling the main hearing, the provisions of the Chapter of XIX.a of the CPA shall be applied *mutatis mutandis*.[10]

If the judge finds that the case falls within the territorial jurisdiction of another district court, he shall refer the case to the court of jurisdiction after the ruling has become final. If he finds that the case falls within the subject-matter jurisdiction of the circuit court, he shall refer the case to the competent public prosecutor for further proceedings. If the public prosecutor considers that the court of subject-matter jurisdiction is the court which had sent him the request, he shall request that the matter be decided by the panel of the circuit court (sixth paragraph of Article 25).

After the main hearing has been scheduled, the court may not, *ex officio*, declare itself as having no territorial jurisdiction over the case.[11]

The judge shall dismiss with reasoned ruling the summary charge sheet or the private charge is he finds that there exist grounds to discontinue proceedings specified in Article 277 of the CPA.

The ruling shall be served on the prosecutor and the defendant.[12]

The judge shall summon to the main hearing the defendant and his counsel, the prosecutor, the injured party and their legal representatives and attorneys, witnesses, experts and the interpreter; he may, if necessary, secure objects to be used as evidence in the main hearing.

The defendant shall be instructed in the summons that he may bring to the main hearing evidence for his defence or inform the court of such evidence in due course so that it can be secured for the main hearing. Together with the summons the defendant shall be served with a copy of the summary charge sheet or the private charge if these were not served on him immediately after they were examined (second paragraph of Article 435); he shall also be instructed in the summons that he is entitled to retain counsel and that, unless defence is mandatory, the main hearing shall not be adjourned if defence counsel fails to appear or if the defendant decides to retain counsel only at the hearing itself.

The summons shall be served on the defendant so as to leave him time between the serving of summons and the main hearing to prepare his defence, which may not be less than three days. This period of time may be shortened subject to consent of the defendant.[13]

10 Article 435 of the CPA
11 Article 436 of the CPA
12 Article 437 of the CPA
13 Article 439 of the CPA

The main hearing shall be held in the place in which the court has its seat. In urgent cases, particularly where inspection is required or the hearing of evidence is thereby facilitated, the main hearing may be conducted, subject to permission of the president of the court, at the place of commission of the criminal offence or the place where inspection is to be made, provided such place is in the jurisdictional territory of the court.[14]

The objection of territorial non-jurisdiction may only be submitted prior to the opening of the main hearing.[15]

If the defendant fails to appear at the main hearing although he was duly summoned, the judge may decide that the main hearing be conducted in his absence, provided that his presence is not necessary and that he has already been interrogated.

If duly summoned defence counsel fails to appear at the main hearing and does not notify the court of the reasons for his absence as soon as he learns this, or if he leaves the main hearing without a permission, or if by reason of his disturbing order the judge denies him the further conduct of defence in case where defence is not mandatory, the main hearing shall take place without defence counsel, unless the defendant retains one immediately.[16]

A judge may decide for the record of the main hearing to be drawn up by personally dictating into a sound recording device.

In the case referred to in the preceding paragraph, the written record shall contain only the information under the first paragraph of Article 316 and Article 317 of the CPA and the ruling of the judge about another manner of drawing up the record.

The provision of Article 84 of the CPA shall apply *mutatis mutandis* to dictating the record of the main hearing. A transcript of the voice recorded record of the main hearing shall be prepared within three days after announcing the judgment by which the defendant is sentenced to an imprisonment and, in other instances, within three days after announcing an appeal. If the appeal is not announced the transcripts are not prepared.

When the main hearing was adjourned by more than one month, a transcription of the audio record of the main hearing must always be made. Transcripts may also be made upon request of the party or when ordered by a judge.[17]

The main hearing shall commence with the reading of the summary charge sheet or the reading of private charge on the part of the prosecutor. Once opened, the main hearing shall proceed without interruption whenever possible.

After the end of the main hearing, the judge shall render and announce the judgement forthwith, setting forth the grounds for it.

14 Article 440 of the CPA
15 Article 441 of the CPA
16 Article 442 of the CPA
17 Article 442.a of the CPA

The provisions of Article 361 of the CPA shall apply *mutatis mutandis* to the lifting of detention after the judgement has been pronounced.

If the punishment of imprisonment has been imposed, the judge may order that the defendant be detained or that he remain in detention provided grounds referred to in the first paragraph of Article 432 of the CPA exist. In such instance the detention may last until the judgement becomes final, or until the commencement of the term of punishment, but not beyond the expiry of the sentence imposed by the court of first instance.

If in the course of or after the main hearing the judge finds that the case tried falls within the subject-matter jurisdiction of the circuit court, or that grounds referred to in the first paragraph of Article 352 of the CPA exist, he shall dismiss the summary charge sheet or the private charge by a ruling.[18]

The judge may adjourn the main hearing for a maximum of six months if the public prosecutor announces that the matter shall be transferred to a settlement procedure (Article 161.a).

When the public prosecutor receives notification of the fulfilment of an agreement, he shall withdraw the summary charge sheet. If the public prosecutor has not withdrawn the summary charge sheet within the specified time period, the judge shall continue the main hearing on the basis of the previous hearing.[19]

Before scheduling the main hearing for a criminal offence falling within the jurisdiction of a single judge and prosecuted pursuant to private charge, the judge may summon the private prosecutor and the injured party to appear in court on a specific day by themselves to clarify the issue in advance if he finds such move conducive to an early termination of proceedings. Together with the summons, the defendant shall be served with a copy of the private charge.

If the parties fail to reach settlement and the private charge is not withdrawn, the judge shall take down the statements of the parties, and instruct them to make motions for evidence to be secured.

If the judge does not dismiss the charge for want of grounds for this, he shall determine which evidence should be taken at the main hearing and, as a rule, shall schedule the main hearing forthwith and notify the parties thereof.

If the judge holds that evidence need not be gathered and that no other reasons exist for scheduling the main hearing separately, he may open the main hearing immediately and, after taking evidence present before the court, adjudicate the private charge. This possibility should be particularly indicated in the summons for the private prosecutor and the defendant.

Where the private prosecutor fails to appear after being summoned as per first paragraph of Article 444, the provisions of Article 58 of the CPA shall apply.[20]

18 Article 443 of the CPA
19 Article 443.a of the CPA
20 Article 444 of the CPA

When the court of second instance hears an appeal against a judgement passed in summary proceedings by the court of first instance, it shall only notify the parties of the session of its panel if the presiding judge or the panel finds that the presence of parties is useful for the clarification of the case.[21]

III. Simplified forms of processing in criminal matters before the court

The simplified forms of processing in criminal matters before a court consist of the procedure for the issue of punitive order (Articles 445.a to 445.e of the CPA) and the guilty plea agreement (Articles 450.a to 450.č of the CPA).

1. Procedure for the issue of punitive order

Where criminal offences falling within the jurisdiction of a district court are involved (i.e. criminal offences for which is provided as a principal sentence a fine or imprisonment up to three years), the public prosecutor may in filing the summary charge sheet, propose to the court to issue, without holding a main hearing, a punitive order by which the proposed penal sanction or measure is imposed on the defendant. The public prosecutor may propose the pronouncing of the following penal sanctions and measures:

1) a fine, prohibition from driving a motor vehicle, suspended sentence with a specific fine or up to six months imprisonment, or judicial admonition;
2) the confiscation of objects and proceeds of crime.[22]

If the judge considers that the evidence contained in the summary charge sheet does not provide sufficient grounds for issuing a punitive order, or disagrees with the imposition of the sanction proposed by the public prosecutor, he shall schedule the main hearing to which he shall summon the persons referred to in the first paragraph of Article 439 of the CPA. In such an instance the defendant shall only be served with the copy of the summary charge sheet without proposal for the issue of a punitive order.[23]

If the judge agrees with the proposal, he shall issue a punitive order through a judgement.

In the punitive order the judge shall rule that the motion of the public prosecutor is granted and the defendant, whose personal data must be cited therein, is pronounced the proposed penal sanction or measure. The operative part of the judgement on the issue of a punitive order shall contain the necessary data from the first and second paragraphs of Article 359 of the CPA. The statement of grounds shall contain only such evidence from the summary charge sheet as warrants the issue of the punitive order.

21 Article 445 of the CPA
22 Article 445.a of the CPA
23 Article 445.b of the CPA

The punitive order shall also contain instructions to the defendant as to his right to file objection referred to in the second paragraph of Article 445.č of the CPA, and a warning that unless the objection is filed within a specified period of time the punitive order shall, upon expiry of that period, become final and the penal sanction or measure imposed shall be executed.[24]

A certified copy of the judgement on the issue of the punitive order shall be served on the defendant, his counsel, if any, and the public prosecutor. The defendant or his counsel may, within eight days of the judgement on the punitive order being served, file an objection to the punitive order. The objection may be filed in writing or orally to be entered in the record at the court. The objection shall contain an indication of the judgement under which the punitive order was issued and may also propose evidence to be taken at the main hearing. The defendant may waive the right to object and, so long as the main hearing is not scheduled, may withdraw an objection already filed. The waiver and the withdrawal of the objection may not be revoked. Paying fine before the expiry of the term for submitting the objection shall not be considered as the waiver of the right to objection.

A defendant who for valid reasons fails to file an objection within the set time limit shall be granted by the court the reinstatement of the case; in so doing the court shall apply *mutatis mutandis* the provisions of Articles 89 and 90 of the CPA.

If in applying *mutatis mutandis* the provisions of the second paragraph of Article 375 of the CPA the court does not dismiss the objection, it shall, by a decision, annul the judgement on the punitive order and proceed according to the provisions of Articles 439 to 443.a of the CPA (provisions on the main hearing in summary proceedings).[25]

In rendering the judgement on the objection submitted, the court shall not be bound by the motion of the public prosecutor referred to in the second paragraph of Article 445.a or by the prohibition referred to in Article 385 of the CPA (*a prohibition reformatio in peius*).[26]

In the proceedings for the issue of a punitive order, the provisions of Article 445.a to 445.d shall apply, while issues not regulated by those provisions shall be covered by other provisions of the CPA, applying *mutatis mutandis*.[27]

2. Guilty plea agreement

A defendant, his defence counsel and public prosecutor may in criminal proceedings propose to the injured party a conclusion of agreement about a defendant's admission of guilt for the criminal offence he committed. A conclusion of such an agreement can be made on the motion of a public prosecutor even before the beginning of proceedings, if there is a reasonable suspicion that a suspect committed the criminal offence which will be the object of proceedings. A public prosecutor, who proposes the agreement, must in this case inform a suspect in a written form about a description and legal qualification of the criminal offence in respect of which he proposes

24 Article 445 c of the CPA
25 Article 445.č of the CPA
26 Article 445.d of the CPA
27 Article 445.e of the CPA

the conclusion of agreement. If a suspect has not been yet interrogated, he must inform him about his rights under the fourth paragraph of Article 148 of the CPA.

If parties agree with the possibility to terminate proceedings on the basis of a guilty plea agreement and a suspect or defendant has not his defence counsel, the president of the court shall appoint on the motion of public prosecutor a defence counsel *ex officio* to participate in the guilty plea procedure. In the case of the conclusion of agreement, the appointed defence counsel shall perform his duty for the further course of criminal proceedings until the finality of the judgement; otherwise he shall be dismissed, when the public prosecutor informs the president of the court that the negotiation procedure was not successful. A reward and the necessary expenses of the appointed defence counsel for the negotiation procedure are the expenses of criminal proceedings and their provisional payment in advance shall be decided by the court pursuant to the third paragraph of Article 92 of the CPA.

If a motion is filed according to the first paragraph of Article 450.a, the parties can negotiate about the conditions of admission of guilt for a criminal offence for which a pre-trial procedure or criminal proceedings are conducted against a suspect or defendant and about the content of the agreement. A public prosecutor can also negotiate only with a defence counsel, if a suspect or defendant gives his consent to this. The guilty plea agreement has to be concluded in a written form and has to be signed by both parties and a defence counsel. The criminal offence for which the agreement was concluded has to be described in a form which is required for the description of the act in a charge sheet (point 2 of the first paragraph of Article 269). The agreement shall be enclosed to the filed charge sheet or summary charge sheet; if the agreement is reached later, a public prosecutor has to submit it immediately to a court and the latest until the beginning of the main hearing.

If the conclusion of agreement fails, than all document pertaining to the procedure of negotiation must be excluded from the files.[28]

In the agreement by which a defendant pleads guilty for all or for some of the criminal offences which are the object of the charges, a defendant and public prosecutor can agree upon the following:

1. a penalty or admonitory sanction and the manner of the enforcement of sanction;
2. the public prosecutor's abandonment of criminal prosecution for those criminal offences of the defendant, which are not included in his admission of guilt;
3. the costs of criminal proceedings;
4. the performance of some other task.

There are also some issues that cannot be the object of plea agreement, such as legal qualification of the criminal offence, security measures, when they are mandatory, and the confiscation of proceeds of crime, except the manner of confiscation.

28 Article 450.a of of the CPA

A court shall decide on the hearing, set out in Article 285 č of the CPA, what is not or should not be the object of agreement.[29]

The agreement on sentence contains a type and severity or the length of the sentence to be imposed on a defendant for the criminal offence he committed. The agreed sentence has to be within the limits of prescribed penalty; the imposition of a mitigated sentence and the manner of its enforcement can be proposed in the agreement only under conditions and within limits stipulated in the Criminal Code.

If statutory conditions exist, the parties may agree to impose on a defendant an admonitory sanction instead of penalty. The agreed admonitory sanction must contain all elements which are pursuant to provisions of the Criminal Code required for the imposition of such a sanction.

A public prosecutor can agree with the defendant about the abandonment of prosecution for those criminal offences which are not included in the guilty plea agreement only in respect of criminal offences under the first and second paragraph of Article 162 of the CPA and provided that the injured party gives his consent. A criminal offence in regard of which a prosecution will be abandoned by a prosecutor, must be described in the agreement as accurately as possible, inclusively with the mention of its legal qualification. A consent given by the injured party shall be enclosed to the agreement.

The parties can agree in a guilty plea agreement that a defendant, notwithstanding the provisions of Articles 94, 95 and 97 of the CPA, can be exempted from the obligation to reimburse all costs or part of the costs of criminal proceedings. In this case costs shall be charged to the budget.

A defendant can also bind himself by a guilty plea agreement to compensate the injured party for the damage caused by a criminal offence, to fulfil a maintenance obligation or to carry out some other task under the first paragraph of Article 162 of the CPA. This should be done at the latest until the submission of agreement to a court.[30]

A guilty plea agreement concluded between a defendant and public prosecutor shall be decided by the court before which criminal proceedings are conducted either at pre-trial hearing or, if the agreement was concluded later, at the main hearing.

When the court decides about the concluded plea agreement, it will consider whether:

1. the agreement is in conformity with the provisions of Articles 450.a, 450.b and 450.c of the CPA and
2. the conditions regarding the admission of guilt from the first paragraph of Article 285.c of the CPA are met.

If the court establishes that whatever requirement from the preceding paragraph does not exist or that the defendant failed to meet an obligation from the fifth paragraph of the preceding article, a court shall render a ruling by which it rejects the agreement and shall continue proceedings

29 Article 450.b of the CPA
30 Article 450.c of the CPA

as if the accused declared to not plead guilty to the charges. If a court estimates that all requirements are met, it adopts a decision to accept a plea agreement and proceeds with the proceedings mutatis mutandis as the accused pleaded guilty to the charges (Article 285.č).

There is no appeal against the ruling from the preceding paragraph.[31]

IV. Simplified forms of processing in the pre-trial procedure

Among the simplified forms of processing in the pre-trial procedure are provided the settlement procedure (Article 161.a of the CPA) and the suspension of criminal prosecution (Article 162 of the CPA).

1. Settlement

The public prosecutor may transfer the report or the summary charge sheet for a criminal offence for which a fine or imprisonment of up to three years is prescribed and for criminal offences referred to in the second paragraph of Article 161.a into a settlement procedure. In so doing, he shall take account of the type and nature of the offence, the circumstances in which it was committed, the personality of the offender and his or her prior convictions for the same type or for other criminal offences, as well as his or her degree of criminal responsibility.

If special circumstances exist, settlement may also be permitted for the criminal offences of aggravated bodily harm pursuant to the first paragraph of Article 123, grievous bodily harm pursuant to the fourth paragraph of Article 124, grand larceny pursuant to the point 1 of the first paragraph of Article 205, misappropriation pursuant to the fourth paragraph of Article 208 and damaging another's object pursuant to the second paragraph of Article 220 of the Criminal Code; if the crime report is submitted against a minor, this may also apply to other criminal offences for which the Criminal Code prescribes a prison sentence of up to five years.

Settlement shall be run by the settlement agent, who is obliged to accept the case into procedure. Settlement may be implemented only with the consent of the suspect and the injured party. The settlement agent is independent in his work. The settlement agent shall be obliged to strive to ensure that the contents of the agreement are proportionate to the seriousness and consequences of the offence.

If the content of the agreement relates to the performance of community service, the implementation of the agreement shall be organised and managed by centres for social work in collaboration with the settlement agent and the public prosecutor.

On receiving notification of the fulfilment of the agreement, the public prosecutor shall dismiss the report. The settlement agent is also obliged to inform the public prosecutor of the failure of settlement and the reasons for such failure. The time limit for the fulfilment of the agreement may not be longer than three months.

31 Article 450.č of the CPA

In the event of the dismissal of the report from the preceding paragraph, the rights referred to in the second and fourth paragraphs of Article 60 of the CPA shall not be enjoyed by the injured party, who must be informed thereof by the settlement agent before the agreement is signed.[32]

2. Suspension of criminal prosecution

The public prosecutor may, upon the consent of the injured party, suspend prosecution of a criminal offence punishable by a fine or prison term of up to three years and of criminal offences referred to in the second paragraph of the Article 162 if the suspect is willing to act as instructed by the public prosecutor and to perform certain actions to allay or remove the harmful consequences of the criminal offence. These actions may be:

1) elimination of or compensation for damage;
2) payment of a contribution to a public institution or a charity or fund for compensation for damage to victims of criminal offences;
3) performance of community service;
4) fulfilment of a maintenance obligations;
5) medical treatment in an appropriate medical institution;
6) attending an appropriate mental health or any other consultation service;
7) observing the restraining order of prohibition to approach the victim, some other person or having access to certain places.

If special circumstances exist, criminal prosecution may also be suspended for the criminal offences of rendering opportunity for consumption of narcotic drugs and illicit substances in sport pursuant to the first paragraph of Article 187, family violence pursuant to the second and fourth paragraph of Article 191, neglect and maltreatment of a child pursuant to the second paragraph of the Article 192, grand larceny pursuant to point 1 of the first paragraph of Article 205, misappropriation pursuant to the fourth paragraph of Article 208, extortion and blackmail pursuant to the first and second paragraphs of Article 213, business fraud pursuant to the first paragraph of Article 228, damaging another's object pursuant to the second paragraph of Article 220 and presentation of bad cheques and the abuse of bank or credit cards pursuant to the second paragraph of Article 246 of the Criminal Code; if the crime report is submitted against a minor, this may also apply to other criminal offences for which the Criminal Code prescribes a prison sentence of up to five years.

If the public prosecutor imposes the task of rectifying damage from the point 1 or the task from the point 3 of the first paragraph of Article 162, the work shall be organised and managed by centres for social work, in collaboration with the public prosecutor.

If within a time limit determined by the public prosecutor, the suspect fulfils the obligation and reimburse the costs, the crime report shall be dismissed.

32 Article 161.a of the CPA

In the event of the dismissal of the report from the preceding paragraph, the injured party shall not have the rights referred to in the second and fourth paragraphs of Article 60 of the CPA (the right to start or continue the prosecution). The public prosecutor shall be obliged to inform the injured party of the loss of these rights before the injured party gives consent under the first paragraph of the Article 162.

By the general instructions, issued by the Public Prosecutor General, it is decided about the reimbursement of costs of suspended prosecution, a manner and terms for the implementation of tasks referred to in the first paragraph of Article 162 and a supervision over their implementation; these instruction shall also define in more detail special circumstances under the second paragraph of this Article that have a bearing on the decision of the public prosecutor in regard of the suspension of criminal prosecution.

In view of costs arising in the procedure of decision making regarding the suspended prosecution and are charged to the public prosecutor's office, the provisions of the CPA on the costs of criminal procedure shall be applied *mutatis mutandis*. Costs of the implementation of tasks referred to in the first paragraph of Article 162 are not the costs of criminal procedure.[33]

In the procedure under Article 162 of the CPA, the public prosecutor shall summon the suspect and the injured party to the Public Prosecutor's Office. In the summons he shall cite the reasons for summoning them. If they respond to the summons, the public prosecutor shall acquaint the suspect with the crime report and tell him that he will dismiss the crime report if the suspect behaves according to his instructions and performs certain tasks in due course.

If the public prosecutor needs to obtain certain information directly from the suspect or injured party in order to be able to decide whether to leave the case to be resolved in a settlement (Article 161.a), to conclude a guilty plea agreement or desist from starting criminal prosecution (Article 163), or move for the issue of a punitive order (Article 445.a), he may summon the suspect and the injured party, or only one of them, to the Public Prosecutor's Office. The public prosecutor shall inform the suspect of the crime report and decisions the prosecution might take in acting upon the crime report, and the injured party shall be informed of his rights.

In instances referred to in the preceding paragraphs, the public prosecutor shall draw up an official note in which he shall record the statements of the suspect and injured party. He shall not send the official note to the court if he starts criminal prosecution against the suspect. The suspect or injured party who without good reason fail to respond to the summons may not be summoned again.[34]

33 Article 162 of the CPA
34 Article 163.a of the CPA

V. Conclusion

Summary proceedings before the district court and the presented simplified forms of processing in criminal matters before the court and simplified forms of processing in the pre-trial procedure may actually contribute to a more expeditious and effective solving of criminal matters, yet some solutions seems in my opinion questionable.

Although it is explicitly stipulated in the third paragraph of Article 161.a of the CPA that the settlement may be implemented only with the consent of the suspect and injured party, it is known from the practice that in some cases the suspect and injured party were forced to make a settlement. With regard to the fact that it is essential for the settlement that each of the parties involved in the settlement procedure makes some concession, the question arises why the injured party should concede to a perpetrator. It also seems questionable why the state should put the injured party in the situation in which he is supposed to negotiate with a person who intentionally caused him an aggravated bodily harm or even grievous bodily harm. And finally, the injured party's refusal of the conclusion of agreement is as a rule considered going in favour of the suspect.

The dismissal of crime report for the reason that the suspect paid upon the order of the public prosecutor certain contribution in favour of some public institution or some charity fund, reminds me of the sale of indulgences, which is in my opinion completely inadmissible.

The provisions regarding the settlement and suspension of criminal prosecution show that the public prosecutor can exercise the sentencing policy even before the case comes before the court (if the defendant complies with the instructions of the prosecutor and performs the tasks that he imposed on him, the case will not even be brought to the court, because a crime report will be dismissed by the prosecutor). These provisions are in my opinion very questionable, because they mean that the public prosecutor sets »sentencing frameworks« in each individual case, what represents a relatively large risk for the violation of the principle of equality before the law.

The most questionable among the simplified forms of processing seems to me the guilty plea agreement. The listed provisions of the CPA on the admission of guilt are in my opinion very problematic and probably even unconstitutional at least for two reasons. Provisions, by which the judge is limited to the formal examination of plea agreement, and in respect of sentencing, to the motion of public prosecutor, deprive the judge of his basic function – that is a function of judging; this is by no doubt problematic by itself, because the judge cannot exercise the function for which he was elected. What seems even more problematic is that the public prosecutor and defendant (or his defence counsel) set the "sentencing frameworks" in each particular case, which implies that they create an ex post facto paradigm for each individual case. Such a conduct necessarily results in the violation of equality before the law, which constitutes one of the basic legal principles of every legal order.

Simplified forms of processing in criminal matters will perhaps contribute to the faster and more effective solution of cases, but I doubt that they will promote better justice and increase a trust of people in the administration of justice.

Summary

The author deals in his paper with simplified forms of processing in the criminal procedure legislation of Slovenia. Simplified forms of processing in the Slovene Criminal Procedure Act are divided to the summary proceedings and simplified forms of processing before the court and simplified forms of processing in the pre-trial procedure. He examines summary proceedings before the district court, a procedure for the issue of punitive order and a guilty plea agreement. Among the simplified forms of processing in the pre-trial procedure are treated the settlement and suspension of criminal proceedings.

The author thinks that simplified forms of processing in criminal matters might contribute to the faster and more effective solution of cases, but he nevertheless doubts that they will also promote better justice and increase a trust of people in the administration of justice.

Key words: Slovenia, simplified forms of processing, summary proceedings, punitive order, guilty plea agreement, settlement, suspension of criminal proceedings

Drago Radulović, PhD[1]

Simplified Forms of Criminal Proceedings in the New Criminal Procedure Code in Montenegro

I

Modern legislation is increasingly characterised by a more pronounced differentiation of procedural forms (proceedings), i.e. by a simultaneous co-existence of a single general form of the criminal proceedings (usually referred to as the ordinary criminal proceedings) and a certain number of special forms of proceedings the main purpose of which is to contribute, through such special (simplified) forms, to the increased efficiency of the criminal proceedings, efficiency being one of the greatest weaknesses of our judicial system, but this is the case elsewhere as well.

The differentiation of procedural forms in legislation is most commonly used in such a way that the general procedural model varies under certain conditions, in a certain way and to a certain extent.[2] Heterogeneous nature of the procedural form is caused by the heterogeneous nature of the criminal matters (criminal offences and perpetrators) The procedure suitable for one type of criminal offences and perpetrators may not be adequate or rational for another type of criminal offences and perpetrators, so it would not be in compliance with the binding international documents on the right to a trial within a reasonable time[3] if the same form of the criminal proceedings were to be applied for all criminal acts. Consequently, a more complex procedural dif-

1 Faculty of Law at the University of Montenegro, Podgorica
2 Snežana Brkić, PhD: *Krivično procesno pravo II*, Novi Sad 2010, p. 17
3 See Art. 6 item 1 of the European Convention for the Protection of Rights and Fundemental Freedoms and Art. 14 , item 3c of the International Covenant on Civil and Political Rights

ferentiation is justified in principal by the need for a greater adaptability of the criminal proceedings in substantive law.[4]

A uniform procedure would not be in the best interest neither of the individual in question nor the public, i.e. neither in the interest of the defendant who has the right to adequate and speedy proceedings, nor of the community which needs to safely and efficiently suppress crime.[5]

Ordinary criminal proceedings as a general form of procedure, comprising investigation, indictment, preparation of the main hearing and the main hearing, is justified for more serious adjudication, which due to the nature of the criminal matter itself and its complexity are difficult to resolve without disturbing the required balance between the need to protect the fundamental freedoms and human rights (of the defendant) and the need to conduct criminal proceedings efficiently. The procedure considered to be the necessary minimum for an adequate ruling in more serious criminal cases, has been proven to be redundant, a waste of time, effort and resources when applied to less complex criminal offences. Abandonment of the general procedure and its simplification provide simple, speedy and short proceedings, that match the significance of the offence in question, while making sure the simplification does not go against neither the public interest, nor the basic civil rights.[6]

Under modern circumstances characterised by the global crisis (not only economic one) accompanied by an increase in crime rates, which in turn means a greater number of criminal cases in courts, it is necessary to seek new viable solutions in order to overcome the crisis in the criminal justice system, a system which has become highly uneconomical. One of the possible paths in overcoming the crisis that may be taken is the elaboration of the procedural differentiation, which would add to a general form of the proceedings a greater number of simplified procedural models, which are intended for minor and less complex cases. Bearing in mind the structure of crime statistics that are dominated by minor offences and those of medium-level seriousness, the introduction of the simplified forms of criminal proceedings would, on the one hand, significantly reduce the workload in the courts, while, on the other hand, allowing the courts to provide a better level of quality of trials in more difficult and complicated cases.

II

Many of the amendments to our criminal procedure code in the past have aimed at simplifying the forms of proceedings and accelerating the criminal proceedings.[7] In the literature on criminal procedure, we can come across various terms that imply the departure from the general form of proceedings such as summary, abbreviated, simplified proceedings etc. What is the rationale for the simplified proceedings? It is found in the principle that the form of the proceedings should be proportionate to the subject matter of the trial (a simple subject matter requires an equally simple form of the proceedings), while bearing in mind that the basic rights of the defendant

4 Snežana Brkić, PhD: *Pojednostavljene forme krivičnog postupanja i postupak njihovog ozakonjenja u Republici Srbiji*, published in: *Zakonodavni postupak i kazneno zakonodavstvo*, Belgrade, 2009, p.176

5 Momčilo Grubač, PhD: Krivično procesno pravo, Uvod i opšti dio, Službeni glasnik, Belgrade 2004, p. 25

6 Tihomir Vasiljević, PhD: *Sistem krivičnog procesnog prava SFRJ*, Belgrade, 1981, p. 689, Stanko Bejatović, PhD: *Krivično procesno pravo*, Belgrade 2006, p.511

7 See another paper by this author: Osnovne karakteristike nove reforme krivičnoprocesnog zakonodavstva Crne Gore, RKK, issue no. 2, 2007, pp. 13-29

draw the line that the simplification, i.e. abbreviation, must not cross. It is justly pointed out in the literature on this subject that the formulation of such simplified forms of proceedings is faced with two basic challenges: identifying those attributes of the legal objects and subjects of the proceedings which merit simpler proceedings, and striking the right balance in the simplification of the form of the criminal proceedings so that it matches the characteristics of the said objects and subjects in the proceedings.[8]

In terms of the aforementioned, such forms of proceedings are characterised by special grounds (which are *ratio legis* of special forms of proceedings) and by a special structure. The special status of the grounds for the simplified forms of proceedings is derived from the characteristics of the objects (criminal matter) or the behaviour (demeanour) of the parties to the proceedings (legal subjects). As far as the criminal matter as the grounds for regulation of the simplified forms of proceedings is concerned, both substantive and procedural implications of the criminal matter in the proceedings may be of importance. From a standpoint of substantive law, the following may bear some relevance: a) the importance and the seriousness of the criminal offence and b) type or nature of the criminal offence. From a procedural point of view, the most significant are the facts of the case and the state of the evidence.

In modern legislation the simplification of the criminal proceedings is typically associated with the importance and the seriousness of the criminal offence. The circumstances of increased workload in the judiciary and attempts to solve this problem dictate that minor criminal offences and those that do not pose a great threat to the society do not merit the same use of material resources, time and the involvement of the parties to the said proceedings as in the case of more serious criminal offences and offences that pose a greater threat to society.[9]

III

Regardless of the fact that there are significant variations in the regulation of the simplified forms of criminal proceedings, it is nevertheless possible to identify the characteristics they all share no matter which criminal procedure code is being discussed, and these are the multiplicity of the simplified forms of procedure and the special nature of the elements of such forms.[10] This means we can identify European standards in the legal regulation of the simplified forms of criminal proceedings. European standards for the regulation of certain issues are not only reflected in the solutions provided by international conventions, but also by the solutions found in numerous national legislations.[11]

In the process of harmonisation of the national legislations in Europe, a special role is assigned to the recommendations made by the Committee of Ministers of the Council of Europe.

8 Snežana Brkić, PhD: *Racinalizacija krivčnog postupka i uprošćene procesne forme*, Faculty of Law in Novi Sad, Novi Sad 2004, p. 166.
9 See Momčilo Grubač, PhD: Racionalizacija krivičnog postupka uprošćavanjem procesnih formi, Collected papers by the Faculty of Law in Novi Sad, issue 1-3, 1984, p. 290.
10 Tanja Kesić, M.A. and Dragana Čvorović, M.A.: Pojednostavljene forme postupanja u krivičnim stvarima i radna verzija ZKP Republike Srbije, Pravna riječ, issue no. 29, 2011, p. 685.
11 Slobodan Nadrljanski: Pojednostavljene forme postupanja u krivičnim stvarima i standradi Evropske unije,published in : Krivično zakonodavstvo Srbije i standardi Evropske unije, Zlatibor 2010, p. a 284.

As far as the simplified forms of criminal proceedings are concerned, recommendation number R (87) 18 made by the Committee of Ministers to the member states in 1987 is of great importance as member states are in it instructed to use and further legislate standards which would be applied in:

- discretionary prosecution
- imposing measures in the proceedings related to minor and mass criminal offences
- the use of summary proceedings
- out-of court settlements
- the use of simplified proceedings
- simplifying ordinary judicial procedure

The recommendation assumes that the historical, constitutional and legislative framework is different in different national legal systems, therefore the adoption of the recommendation is connected to the possibility of applying it within the existing legal framework, and if this is impossible then it should be done by changing the legal framework. The recommendation promotes the following standards: it is in the public interest to simplify the form of the proceedings, an adequate degree of suspicion of guilt must exist that is based on the evidence, the perpetrators must consent to a simplified form of proceedings, as well as the elimination of some other parallel proceedings in the case of acceptance of the offered procedure, and to enable the injured party to file a property claim in appropriate proceedings.[12]

Similar stand was taken in the Resolution of the Section III at the International Congress on Criminal Law held in Vienna in 1989[13] in which it was emphasised that the type and nature of the criminal offence should be one of the important factors based on which the forms of proceedings are distinguished. Accordingly, national legislatures are advised "to undertake all measures which may effectively be used to combat petty crime while keeping a well-balanced proportion of means and aims and accepting different solutions and alternative procedures to the ones traditionally used in criminal judiciary."

IV

The characteristics of the criminal matter of the proceedings, in terms of legal procedure, are reflected in the sphere of case facts or the state of the evidence. The simplification of the proceedings related to the facts of the case may be manifested in terms of quality and quantity. In terms of quality, the simplicity of the facts of the case implies that the facts of the case may be easily determined. It is the easily met burden of proof that makes the simplification of the proceedings legitimate either by waiving certain stages in the proceedings or by restructuring them in terms of other methods of accelerating the proceedings.[14]

The state of the evidence may also influence the simplification of the criminal proceedings. Accordingly, if at a certain stage of the criminal proceedings, even if this stage precedes the in-

12 See : Slobodan Nadrljanski: Op. cit. 287
13 The translation of the resolution was published in a journal JRKK, issue no. 4, 1990, p. 90
14 Snežana Brkić, PhD: *Racionalizacija krivičnog postupka*..... p. 202

stigation of the proceedings (during the inquiry) a certain level of quality and quantity of the evidence is provided so that it in itself makes certain stages of the proceedings redundant, then the proceedings are thus simplified. The simplification of the form of the criminal proceedings occurs in cases of the so-called flagrant criminal offences as well.

V

In addition to the characteristics of the criminal matter of the proceedings as the grounds for the simplification of the forms of the proceedings, the grounds for the simplification of the proceedings may be found in the characteristics of the parties to the proceedings, i.e. in the particulars of their demeanor during the criminal proceedings. Such characteristics of the said parties may function as independent grounds for the simplification of the forms of the proceedings. Among the characteristics of the parties to the proceedings that are relevant to the simplification of the forms of criminal proceedings the legislation mainly specifies the defendant's admission of guilt, plea-bargain agreement, as well as the defendant's consent to the selected form of proceedings.

According to the aforementioned, simplified forms of the proceedings can be distinguished by a lesser degree of complexity in terms of the structure of the procedure compared to the general form of criminal proceedings. The simplification, as it is emphasised in the literature on the subject, most often rests on three simultaneous processes: abbreviation (leaving out certain phases of the proceedings or even entire stages), acceleration (setting short deadlines in the proceedings) and deformalisation of the proceedings (omitting the unnecessary formalities and guarantees).[15]

VI

The new Criminal Procedure Code was passed in 2009[16] and it was published in the Official Gazette of 18 Aug 2009, while its application was scheduled to start in a year from the day of its publication. This prolonged vacatio legis of one year was allowed in order to secure the conditions for its application starting with the human resources to material and technical resources, since the new CPC introduces a lot of innovations. Legislator's estimate that a year represents a period that is long enough to commence the application of the CPC has not been proven to be accurate which has prompted the Law on Amendments[17] consisting of a single article stating that the application of the CPC is being postponed for another year.

With regard to the simplified forms of criminal proceedings in the new Criminal Procedure Code of the Republic of Montenegro, nearly all simplified forms of criminal proceedings known to modern legislation are listed.

The simplification by omitting certain stages of the criminal proceedings is kept in the new CPC. Thus, the option of direct indictment is kept but with certain changes related to the

15 Snežana Brkić, PhD: *Racionalizacija krivičnog postupka*..... p. 208
16 The Official Gazette of the Republic of Montenegro, no. 57/09
17 The Official Gazette of the Republic of Montenegro, no. 49/10

requirements for such an indictment. There is no longer any difference between the direct indictments for criminal offences that carry a sentence of up to five years in prison (since the CPC stipulates summary proceedings for such offences, and the indictment is in the form of a motion to indict) and those for criminal offences that carry a stricter sentence. In order to bring a direct indictment against someone two conditions must be met: a) that during the inquiry (previously known as the preliminary proceedings) sufficient amount of information about the criminal offence in question and the perpetrator has been collected in order to issue an indictment, and b) that the perpetrator of the criminal offence has been questioned before the charges are brought. Pursuant to Article 261 Paragraph 5 interrogation may be conducted by the state prosecutor or the police (in which case the state prosecutor approves the interrogation by the police, and the suspect must consent to it and have the defence lawyer present). It should be noted that the state prosecutor must have at his disposal the information on the defendant (Art. 289) which has mostly been obtained in the course of the suspect's interrogation. Some writers hold that the state prosecutor should always, when the circumstances allow it, use a direct indictment, thus significantly accelerating criminal proceedings, which would simplify the proceedings to a great extent.[18]

VII

As opposed to the direct indictment which is brought without previous investigation, the indictment can be brought at the main hearing, which simplifies the procedure by eliminating both the investigation stage and the indictment stage. The previous CPC stipulated such a situation in two cases: 1) when the indictment is amended to include a criminal offence committed or discovered during the main hearing, 2) when another person commits a criminal offence at the main hearing during a court session. Both of these cases are listed in order to ensure the criminal proceedings are efficient and since such criminal offences are committed at the main hearing and fall under the category of flagrant criminal offences, judging from the point of view whether or not they can be proven, a ruling can be made immediately. In addition, trial based on the indictment brought at the main hearing for an offence committed by another person apart from simplifying, i.e. accelerating, the proceedings has justification both in policyl reasons and criminal law, as the punishment should set an example for others and serve as a deterrent, since the offence in question demonstrates special brazenness in terms of the time and place of the offence.[19]

The new CPC has eliminated this option for the amendment of the indictment at the main hearing in the above mentioned cases leaving the prosecutor with the option of following a regular path to the indictment. The reasons for this change are not known, however, it seems unjustified.

18 Milan Škulić, PhD: Komentar Zakonika o krivičnom postupku, Podgorica 2009, p. 837
19 Tihomir Vasiljević, PhD: Op. cit., p. 522

VIII

The simplification of the form of proceedings, i.e. departing from the general form (of the ordinary criminal proceedings), may be legislated in various ways. One possibility is to fully regulate a special form for certain criminal offences or certain perpetrators (as is the case in some countries with the specially regulated proceedings involving juvenile offenders). Alternatively, the CPC can just regulate the variations of the general form of the criminal proceedings which means that the general form is applied in cases that are not regulated by the special provisions. The latter variant is stipulated in our CPC, therefore these are not special proceedings, which is a term often encountered in the literature[20] on this subject, but criminal proceedings that partly follow the general form and are partly governed by the special provisions.

IX

With regard to the simplified forms of proceedings, in the light of the provisions of the CPC, they are most prominently featured in the summary proceedings for criminal offences punishable by a monetary fine or a term in prison of up to five years as the main penalty (Art. 446), while issues that are not specially regulated by the provisions on the summary proceedings are subject to the general provisions of the CPC accordingly. These proceedings according to the new CPC are no longer restricted to a certain type of courts (previously it was used only in basic courts), but instead they depend on how serious the criminal offence is, based on the type and harshness of the sentence that can be pronounced for such an offence.

Summary proceedings are special not only due to the fact that pre-trial proceedings are omitted but also due to the fact that the main hearing stage is significantly modified in order to make it less formal, less restricted and faster in pace, since it is reasonable to assume that different structures of the main stage in these two forms of proceedings will be reflected in their length.[21] Shorter deadlines for detention and its review, for providing the written rendering of the court decision and for its delivery to the party in question, along with an option to omit the elaboration of the decision all contribute to a faster conclusion to the proceedings.

In the new CPC there is no option that allows holding the main hearing in the absence of the authorised prosecutor, which used to be allowed, while the option of holding the main hearing in the absence of the defendant has remained, which certainly has an effect on the acceleration of the criminal proceedings. Expanding the functional jurisdiction of the sole judge to include criminal offences that carry a fine or a prison sentence of up to ten years (instead of the prior functional jurisdiction that included criminal offences punishable by a fine or a prison sentence of up to three years) will contribute to the acceleration of the criminal proceedings.[22]

20 See: Dragoljub Dimitrijević, PhD: Krivično procesno pravo, Naučna knjiga Belgrade, 1986, p. 310; Čedomir Stevanović, PhD: Krivično procesno pravo, Naučna knjiga, Belgrade 1982, p. 347; Momčilo Grubač, PhD: Krivično procesno pravo, Posebni deo, Službeni glasnik, Belgrade 2002 , p. 213; Vojislav Đurđić, PhD: Krivično procesno pravo, Niš 2006, p. 207

21 Snežana Brkić, PhD: *Pojednostavljene forme* ... p. 192.

22 Stanko Bejatović, PhD: *Pojednostavljene forme postupanja u krivičnim stvarima i njihov doprinos efikasnosti krivičnog postupka*, published in: *Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije*, Zlatibor 2009, p. 62.

X

The new CPC has introduced into our legislation another simplified form of the criminal proceedings based on the omission of the main hearing, referred to as the proceedings for the pronouncement of criminal sanctions without the main hearing[23] which is used for criminal offences that are punishable by a fine or a term in prison of up to three years, provided that the state prosecutor offers sentencing without the main hearing, the defendant gives his consent after having been interrogated.

If we consider the fact that our courts' sentencing policy is characterised by a high number of suspended sentences, fines and short prison sentences[24] that in itself is sufficient reason for the legislator to introduce this institute into our legislation as has been done in many other modern legislations. This type of proceedings in its form resembles the mandatory form of proceedings as summary method of establishing the facts of the case and circumstances related to the rendering of the decision. The Code stipulates (Art. 461, Par.2): "the state prosecutor files a motion when he deems holding the main hearing unnecessary", which means that the state prosecutor assumes the responsibility to assess whether or not the facts are clear enough without the main hearing, so it is not necessary to hold it. Therefore, it is necessary to establish specific facts which along with the information obtained from the accused through questioning will enable the court to decide on the criminal matter at hand.

The state prosecutor's assessment that the main hearing does not have to be held must be founded on something and that is what is not clearly specified in the CPC. In any case, the state prosecutor must start from the role of the main hearing in the process of forming a court decision. If the rendering of the decision is based on the application of law to specific facts, which have been established as evidence, then the assessment that the main hearing is redundant should be made from the standpoint that the available evidence on the relevant facts, the evidence on which the request to indict is judged if it is founded, is such that it eliminates the need to hold the main hearing.

Such a motion cannot be filed neither by a subsidiary nor a private prosecutor, which is understandable, since they cannot assess whether or not the main hearing is necessary as private persons. Neither would that be in their best interest since this form of proceedings favours the defendant, in addition to the fact that property claims cannot be made in such proceedings.

Even though these proceedings have been expanded to include those criminal offences for which a sentence of up to three years in prison may be pronounced, the court cannot sentence the defendant to prison, it can only sentence him to pay a fine, to perform community service, or suspend a sentence and issue a court reprimand.

23 More on this subject: Danilo Nikolić, PhD: *Postupci za izricanje krivičnih sankcija bez glavnog pretresa*, published in: *Krivično zakonodavstvo državne zajednice Srbije i Crne Gore*, Zlatibor 2003, p.. 261-297; Snežana Brkić, PhD: *Pojednostavljene forme krivičnog postupanja i postupak njihovog ozakonjenja u Republici Srbiji*, RKK issue 1, 2009; Stanko Bejatović, PhD: *Pojednostavljene forme postupanja u krivičnim stvarima i njihov doprinos efikasnosti krivičnog postupka*, published in: *Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije*, Zlatibor 2009; Slobodan Nadrljanski: *Kažnjavanje bez glavnog pretresa*, published in: *Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije*, Zlatibor 2009

24 For instance, Basic Courts in the territory of the Republic of Montenegro prounounced about 70% suspended sentences and about 25% monetary fines in the period between 1995 and 2008, more on this: Darko Radulović, PhD: *Alternative kazne zatvora*, Faculty of Law in Podgorica, Podgorica 2009.

As we can see, the CPC has excluded the possibility of pronouncement of a prison sentence in the proceedings for the pronouncement of criminal sanctions without the main hearing, which raises the question how the court can then suspend a sentence which sentences the defendant to a term in prison, if we bear in mind that Art.54 Par.5 of the Penal Code stipulates: "If the perpetrator has been sentenced both to pay a fine and serve time in prison, only the prison sentence may be suspended, not the payment of fine."

When giving such a legal definition, the legislator did not take into account this restricting provision of the CC on the suspension of sentence, which could lead to problems in practice and there are suggestions to eliminate the possibility of suspension of sentences if a prison sentence cannot be given in the proceedings for the pronouncement of criminal sanctions without a main hearing.[25]

In modern legislation this type of a simplified form of the proceedings is used as a summary model of the criminal proceedings rather than a concession to the perpetrator. However, if one of the requirements for such proceedings is the consent of the defendant, it is difficult to imagine that the defendant would consent to this without getting any concessions. These concessions are granted in Art. 462, not only in the form of elimination of the pronouncement of any prison sentences but also in the form of the restriction of any fines (to 3000 €) and even the security measure of ban to operate a motor vehicle (up to two years).

It is interesting to note that these proceedings have not taken on in practice although they have been present in our legislation for over nine years, which gives rise to a question why this is so and in turn, if this is the case should we keep a "dead regulation" in the CPC? It is impossible to give a reliable answer to that question without any further research, but such a state is most likely resulting from the fact that our judiciary is by and large rather conservative and unwilling to accept new institutes which have difficulty in finding their place in application. Similarly, the stay of criminal prosecution (diversion of the criminal proceedings) has been faced with a lot of resistance during its application, but lately its application has slowly taken off.

XI

Another institute that has been introduced into our legislation and that had as ratio legis the acceleration and efficiency of the criminal proceedings, i.e. resolving the criminal matter without the court, is the principle of discretionary criminal prosecution which is represented in two variations in the CPC: diversion of the criminal proceedings or, as the CPC refers to it, a stay of criminal prosecution (Art. 272) and dismissal of criminal charges on the grounds of fairness (Art. 273). Until recently, this institute was used only in the proceedings against minors, but in other countries it has yielded significant results and has "relieved" the courts of the so-called bagatelle offences, so it has been supported in theoretical writings as well, despite certain points of conten-

25 Slobodan Nadrljanski: Kažnjavanje pre glavnog pretresa, published in:Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije, Zlatibor 2009, p. 187

tion.[26] One of these points of contention is the question whether it is in accordance with the constitutional and legal position of the state prosecutor whose basic function is criminal prosecution of the perpetrators of the criminal offences, not the final resolution of the criminal matter which is according to the constitution and laws the court's domain. Since a separate paper on the subject of the principle of discretionary prosecution as a simplified form for the resolution of criminal matters has been prepared for this occasion, we will not dwell on this issue.

XII

Another institute until recently typical of common law, which has started to penetrate Europe, has found its place in the new CPC. The institute in question is the plea agreement which can significantly contribute to the efficiency of the criminal proceedings. Since a separate appendix[27] can be compiled on the subject of this institute, we will not provide a detailed analysis, but list in brief what is typical for the CPC of the Republic of Montenegro.

There are numerous issues that are relevant when regulating this institute by law: such as the scope of its application (whether to apply it to all criminal offences or just minor ones), the type and severity of sanctions, the role of the injured party in the process of reaching an agreement, the role of the defence lawyer, the issue of resorting to legal remedies etc. Article 300 of the CPC stipulates that the agreement may be entered into when the criminal offence in question is punishable by imprisonment for a term of up to 10 years and such a motion may be filed by the state prosecutor, the defendant or his lawyer at the first hearing on scheduling the main hearing at the latest. Agreement on the admission of guilt is submitted if the charges have not yet been brought to the presiding judge referred to in Art. 24, Par. 7 (pre-trial panel of judges) and once the charges have been brought it is submitted to the presiding judge. What is the subject of the agreement is stipulated under Art.301 of the CPC whereby the state prosecutor and the defendant are reaching an agreement on the severity of the sentence and other sanctions, costs of the criminal proceedings, property claims and on the matter of waiving the right to an appeal against the decision rendered on the basis of such an agreement by the parties involved and the defence lawyer.

When deciding on the agreement the court may deny it, reject it or grant it. If the agreement has been submitted before the charges are brought, it is being decided on by the presiding judge from the Art. 24, Par.7 (in which case the agreement must include the information on the content of the indictment), whereas the presiding judge decides on the agreement reached after the charges

26 See Vojislav Đurđić, PhD: *Načelo oportuniteta krivičnog gonjenja*, RKK issue no. 2-3, 2011; *Revizija osnovnih procesnih načela na kojima je uređen novi krivični postupak Srbije*, Pravna riječ issue no. 33, 2012; Milan Škulić, PhD: *Načelo oportuniteta krivičnog gonjenja*, Pravna riječ issue no. 15, 2008; Snežana Cigler, PhD: *Načelo legaliteta i oportuniteta krivičnog gonjenja*, Novi Sad 1995; Radmila Danić, PhD: *Načelo legaliteta i oportuniteta krivičnog gonjenja*, Belgrade 2007; Jasmina Kiurski, M.A.: *Načelo oportuniteta*, published in: *Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda i krivično zakonodavstvo Srbije i Crne Gore*, Zlatibor 2004; Dragana Čvorović: *Načelo oportuniteta krivičnog gonjenja*, RKK issue no. 1, 2008

27 More on this Danilo Nikolić, PhD: *Sporazum o priznanju krivice*, Niš 2006; *Sporazum o priznanju krivice*, RKK issue no. 1, 2007; Stanko Bejatović, PhD: *Sporazumi javnog tužioca i okrivljenog i novi ZKP Srbije*, RKK issue no. 1-2, 2012; *Sporazum o priznanju krivice i druge pojednostavljene forme postupanja u krivično procesnom zakonodavstvu Srbije kao instrument normativne efikasnosti krivičnog postupka*, Collected papers: *Pravni sistem Srbije i standardi Evropske unije i Savjeta Evrope*, Faculty of Law in Kragujevac 2009, Volume IV; *Sporazum o priznanju krivice i novi ZKP Srbije i regionalna komparativna analiza*, published in: *Savremene tendencije krivično procesnog prava u Srbiji i regionalna krivično procesna zakonodavstva*, Belgrade 2012; Vojislav Đurđić, PhD: *Stranački sporazum o priznanju krivice ukrivičnom postupku* RKK br. 3, 2009; Milan Škulić, PhD: *Sporazum o priznanju krivice*, Faculty of Law Belgrade 2009; Svetlana Vujanović: *Sporazum o priznanju krivice u praksi pravosudnih organa Crne Gore*, published in: *Savremene tendencije krivičnoprocesnog prava u Srbiji i regionalna krivičnopravna zakonodavstva*, Belgrade, 2012

are brought. The hearing at which the agreement is being decided on must be attended by the state prosecutor, the defendant and his lawyer, whereas the injured party and his representative are notified about the hearing. When the decision to grant the agreement on the admission of guilt comes into force, the presiding judge, without any delay, and within three days at the latest, makes a ruling in accordance with the agreement.

Motion to enter into agreement on the admission of guilt, as has already been mentioned, may be filed by the state prosecutor, or by the defendant and his lawyer, but not by any relatives of the defendant who may act on the defendant's behalf during the proceedings in certain situations. The legislator uses the term "to file a motion" (to motion) without specifying the form and content of such a motion whereas both the form and content of the agreement itself are clearly specified.

It seems that it is necessary to file a motion in written form and in terms of law in the form of an offer. An offer as the content of the motion represents a one-sided statement made freely and without duress offered to the other side in order to enter into the agreement on the admission of guilt. Such a motion as an offer may be seen only as an initiative to start the plea bargaining, however, it may at the same time contain some or all of the conditions under which the petitioner is willing to enter into agreement.

The parties involved have absolute freedom during the plea bargaining process related to the conditions under which the agreement may be entered into, while the court has no rights with regard neither to the initiative, the negotiating process nor the signing of the agreement.

The written form of the agreement is necessary for practical reasons – to be able to file it in the prosecutor's and court's records, to inform the judge in advance about the said agreement and to assess whether the legal requirements are met. In addition, the written form ensures the review of the validity of the agreement, of the process of negotiating it and of the content and finally enables the decision on the agreement to be made. This institute is designed to accelerate the criminal proceedings and the quicker the agreement is reached the more efficient are the criminal proceedings. The most important part of the agreement for the defendant is the part which deals with the type and harshness of the sentence and other criminal sanctions. While negotiating the severity of the penalty and other criminal sanctions, the state prosecutor, as the representative of the state, must abide by the rules of substantive law in determining the penalty, as well as the conditions of other criminal sanctions that are imposed.

The provisions of the CPC related to the agreement on the admission of guilt have been first applied six months from the day the CPC came into force, i.e. from 26 Feb 2010 (which means almost a year and a half before the integral application of the CPC began), therefore we can now refer to a three-year long experience in the application of this institute. However, so far, this institute has not been widely applied in practice. Since the beginning of the application of the provisions of the CPC on the agreement on the admission of guilt up to the first six months of last year, only in 29 cases was the agreement resorted to, which is a negligible number compared to the total number of cases.[28] The reasons for such (rare) application of the said institute could be the subject of another research, but it seems that the reason for this can largely be found in the

28 More on this: Svetlana Vujanović: Op.cit. p. 121

fact that our judiciary is rather "conservative" and is reluctant to allow broader application of any new institutes.

When different legislations are compared, there are certain differences in the regulation of the most important issues related to the agreement on the admission of guilt. Consequently, in some legislations there are no restrictions with regard to the seriousness of the criminal offence, so even the most serious criminal offences may be subject to such agreements. The legislator in the Republic of Montenegro has limited the use of the agreement on the admission of guilt to the criminal offences that by law can carry a sentence of up to 10 years in prison, and in our opinion, this a reasonable solution, since this institute, nevertheless, cancels out to a great extent the public nature in a legal sense of the criminal offence, and the right to dispose with the criminal offence, guilt and penalty given to the defendant may lead to "reprivatisation" of the criminal proceedings of sorts.[29]

There are some calls to eliminate the restrictions from our CPC as well, in terms of the seriousness of the criminal offences, as it is believed that the most serious criminal offences are the ones where the agreement on the admission of guilt is most needed in order to shed some light on such cases and resolve them. We are not familiar with the grounds on which this claim is made, but the experience of the other countries in the region that have been using the said institute for over 10 years teaches us that the admission of guilt in the most serious cases has not been as frequent as was expected.[30]

Pursuant to Art. 300, Par.4 of the CPC the agreement on the admission of guilt may be submitted before or after the charges are brought,[31] and if it is submitted before the charges are brought, the agreement decided on by the presiding judge referred to in Art. 24, Par. 7 must contain the information the indictment should contain. Upon analysis of these provisions, two issues emerge. Firstly, if the agreement is being decided on by the presiding judge under Art.24, par. 7 before the charges are brought, then, from a technical point of view, the verdict is reached without formal indictment even though the agreement must contain all of the elements of the indictment, which is, as it is pointed out in the relevant literature, contrary to the principle of the indictment.[32] Therefore, the right solution to this would be to allow the process of negotiating the agreement to occur at all stages of the criminal proceedings up to the end of the first session of the main hearing, whereas the procedure for deciding on the agreement should be allowed after the confirmation of the indictment, which would of course mean amending the existing provisions related to the agreement on the admission of guilt. Secondly, it is wrong to ask for the agreement submitted before the charges are brought to contain all of the elements of the indictment. For instance, it should not contain the proposal for the evidence to be presented at the main hearing, since the evidence is not going to be presented.

Upon comparison, legislations differ when it comes to the position of the injured party during the plea bargaining, in some the injured party is included in the process and his interests are

29 A. Eser: *Funkcionalne promjene procesnih maksima krivičnog prava na putu ka "reprivatiziranju" krivičnog postupka*, Collected papers by the Faculty of Law in Zagreb, 1992, p. 167

30 More on this: Veljko Ikanović: *Materijalnopravni i procesni aspekt priznavanja krivice*, RKK issue no. 1-2, 2012,

31 In other countries in the region (Serbia, BiH and Croatia) when making a ruling based on the agreement on the admission of guilt the indictment must exist, regardless of the fact that the admission of guilt may be negotiated before the indictment is brought as well.

32 Svetlana Vujanović: Op.cit., p. 122

looked after, and elsewhere he does not have any say in the process of signing the agreement. Our legislator has assigned a significant place to the injured party in the course of negotiating the agreement, so the property claims are subject to the agreement (Art.301, Par.1, item 2), the injured party is notified when the hearing on the agreement is being held (Art.302, Par.5), but the court decides whether the injured party's rights have been violated by the agreement when deciding on the agreement itself.

XIII

Since this occasion does not permit otherwise, we have provided a brief review of the normative solutions which are considered simplified forms of the criminal proceedings that increase the efficiency of the said proceedings. However, one must bear in mind that the efficiency of the criminal proceedings is not a static category independent of time and place. It is related to the state of the society, its homogeneity and it depends on whether, not only the legal norms are being observed but the moral norms that lead to overall human progress as well. In order to increase the efficiency of the criminal proceedings both in terms of the quantity and their quality it is urgently necessary to raise the level of respect for the law. Whereas the laws should be adapted to our reality no matter how much they are written under the influence of foreign legislation or the suggestions made by foreign experts, above all they should be applicable and free of "legislating romanticism" It is not even necessary to insist on the repressive nature of the criminal legislation, since it has long been said that the prevention is not achieved by stricter punishments, i.e. criminal sanctions, but by the inevitability of its application to every single perpetrator of a criminal offence who is found guilty .

Vojislav Djurdjić, PhD[1]

Fundamental Principles of Criminal Procedure Law and Forms of Simplified Proceedings in Criminal Matters

1. On Simplification of Procedural Forms

Simplified forms of proceedings in criminal matters have their origin in the need for rationalisation of criminal proceedings which is more and more evident every day by making itself felt in the reforms of criminal procedure laws governments have been undertaking with increasing frequency. In which direction the said rationalisation will move depends on the causes and factors which create the need for it. If the causes of a slow criminal justice system lie in the statute itself, the way out of it should be looked for in its reform. An increase in the number of new cases referred to the courts, which has not been accompanied by a corresponding increase in the number of judges and prosecutors, as well as the existing formalism whose purpose is to provide better protection of defendants are offered as arguments in favour of simplification and acceleration of proceedings.[2] In a joint action of its member states to speed up and simplify the working of the criminal justice system, the Council of Europe has also taken as its starting point a rise in the number of criminal cases handled by courts, in particular those which carry minor penalties, as well as the opinion that delay in resolving crimes brings the justice system into disrepute and affects the proper administration of justice.[3] Frequently, the duration of criminal proceedings is the main criterion for evaluating how successful judicial authorities are in their work and

1 Professor, Faculty of Law, University of Niš

2 Pradel, J., Droit pénal comparé, 2e édition, Paris, 2002, p. 603 (quoted from: Goran P. Ilić, *O pojednostavljenju forme krivičnog postupka*, in collected papers „Novo krivično zakonodavstvo: dileme i problemi u teoriji i praksi", Beograd, 2006, str. 361).

3 See the Preamble to the Recommendation No. R (87) 18 of the Committee of Ministers of the Council of Europe to member States concerning the simplification of criminal justice (adopted by the Committee of Ministers at on September 17, 1987 at the 410 meeting of Deputy Ministers).

a synonym for the premise on the "slow judiciary", "slow justice", too much time which passes from the moment a crime is committed until "its perpetrator has received a fitting punishment".[4]

How much significance is attached to justice administered without delay is expressed in all the international documents on human rights, under which *the right to a trial without undue delay (within a reasonable time)* is included in the fundamental human rights. Thus, the European Convention of the Protection of Human Rights and Fundamental Freedoms also establishes in its provisions which govern the right to a fair trial (Article 6, paragraph 1) the right to a trial without undue delay.

Acceleration of proceedings is both legal and political problem,[5] so it is understandable that the Committee of Ministers of the Council of Europe has adopted a recommendation on the simplification of criminal justice, which not only advises /the member States/ to resort to the principle of discretionary prosecution but it also sets out these guidelines on how to remedy delays in the administration of criminal justice in proceedings for minor offences which occur on a massive scale: the so-called summary proceedings should be used; out-of-court settlements should be applied as an alternative to trials; the so-called simplified proceedings should be used; ordinary judicial proceedings should be simplified – Recommendation No. (87) 18.

Pursuant to these recommendations, the acceleration of criminal procedure may move in two directions, either towards of the simplification of the ordinary form of criminal proceedings (by implementing measures for making individual stages and phases of those proceedings more simple and flexible) or towards developing special simplified forms (then, as a rule, individual phases or stages are omitted or some instruments of out-of-court resolution of criminal matters are resorted to – the diversionary method).

The lawmakers move away from the ordinary and opt for special proceedings whenever they aim to achieve expeditiousness in trials for certain criminal offences.[6] Recently, the simplification of procedural forms has turned towards avoiding trying cases at main hearings by moving the centre of adjudication to some earlier stage in the proceedings. It was typical of older forms of simplified procedure that stages which preceded the main hearing were omitted as was the case with our summary criminal proceedings in which there was no investigation.

It has been noted that contemporary legislatures are characterised by frequent reforms based on multiplication of special, simplified forms of criminal procedure.[7] However, the aspiration to simplify procedural forms may not cross the lower limit below which a process does not represent a stable system of guarantees for achieving a due process of law and a proper decision on the merits.[8]

There have been more and more new models of simplified criminal proceedings in comparative law, heterogenous and distinguished from each other by the manner in which they have been

4 Dr Drago Radulović, *Efikasnost krivičnog postupka i njen uticaj na suzbijanje kriminaliteta*, in the collected papers "Realne mogućnosti krivičnog zakonodavstva", Belgrade, 1997, str. 159.
5 Dr Tihomir Vasiljević, *Sredstva za ubrzanje krivičnog postupka*, Zbornik radova pravnog fakulteta u Novom Sadu, 1966, str. 141.
6 T. Vasiljević, *Značaj brzine i uzroci sporosti krivičnog sudskog postupka*, Arhiv za pravne i društvene nauke, br. 2/1941, str. 91.
7 Dr Snežana Brkić, *Nove procesne forme u Zakoniku o krivičnom postupku*, in the collected papers "Mesto jugoslovenskog krivičnog prava u savremenom krivičnom pravu", Srpsko uruženje za krivično pravo, Beograd, 2002, str. 218.
8 Dr Siniša Triva, *Mjere koje imaju za cilj da građanski sudski postupak bude brži I efikasniji*, Arhiv za pravne i društvene nauke, br. 4/1972, str. 421.

structured. Their underpinning idea is that the simplification of procedural forms[9] and adapting them to the subject matter of court proceedings will lead to faster, more rational and efficient trials. Following the said trend and modelled on the solutions from comparative law,[10] two completely new special criminal procedures were introduced in Serbia by the 2001 Criminal Procedure Code: a) sentencing procedure prior to the main hearing and b) procedure for imposing a sentence and suspended sentence by an investigating judge. Those were radical and bold legislative solutions, based on the idea that procedural efficiency may be achieved by preventing all the proceedings which have begun from reaching the stage of the main hearing by definitely resolving the subject matter of the proceedings at some of the earlier stategs which came before the main hearing. Thus, the Court has been released from the needless and unnecessary burden of bringing each criminal matter to the main hearing. In such a manner, the postulate of the traditional hybrid type of criminal procedure according to which *there can be no adjudication without a main hearing has been brought down*. Unlike summary proceedings, which are also built upon the idea of simplification of procedural forms from which the stage of investigation has been eliminated, the stage of the main hearing is avoided in these newly established special proceedings, which until recently would have been inconceivable for a trial in the civil law model of criminal procedure. Following modern ideas about possible models of rationalisation of proceedings, Serbian legislators introduced another new form of simplified procedure by the 2009 Law Amending the CPC, namely the agreement on the admission of guilt. Simultaneously, an instrument of negotiated justice was thus adopted, which until recentily would have been unimaginable in the hybrid model of criminal procedure. All those simplified forms of procedure, with the exception of the procedure for imposing a sentence and a suspended sentence by an investigating judge, are provided for in the new Code as well. Basically, previous legislative solutions have been kept, the scope of application of summary proceedings has been extended to include all the offences which carry the punishment of maximum eight years in prison, some provisions have been restructured, while some proceedings have been renamed.

2. Fundamental Principles of Procedure in Relation to Simplified Forms of Proceedings

It is a feature of simplified forms of proceedings that they differ from the ordinary criminal proceedings in their structure which adapts to various reasons for simplification (nature and seriousness of an offence; complexity of the case and quality of evidence; defendant's personality; parties' attitude towards the charges, such as defendant's guilty plea or an agreement between the parties, etc.). Essentially, structural changes come down to the omission of individual stages or even entire phases (the investigation stage is omitted or the entire preliminary proceedings or even the trial, after which the procedure on legal remedy may also be omitted). Precisely the said "defectiveness" of structure requires that procedural stages and actions be linked with each other and that primary procedural functions be structured on fundamental principles of procedure which are differently applied. Since an explanation of how the fundamental principles of procedure correlate with simplified forms of procedure is necessarily based and dependant on

9 For more details on the simplification of procedural forms, you can consult: Dr Momčilo Grubač, *Nove odredbe o glavnom pretresu u Zakonu o krivičnom postupku od 24.12.1976. godine*, Jugoslovenska revija za kriminologiju i krivično pravo, br. 2/87; Dr Stanko Bejatović, *Pojednostavljeni krivični postupci i tendencije državnog reagovanja na kriminal*, in the collected papers "Strategija državnog reagovanja protiv kriminala, Beograd, 2003; and Dr Vojislav Đurić, *Aktuelna pitanja i osnovne karakteristike glavnog krivičnog postupka*, Jugoslovenska revija za kriminologiju i krivično pravo, br. 3/99.

10 The German Procedural Code provided a model for our legislators, from which they adopted somewhat changed legislative solutions (§§ 407 bis 412 StPO).

how procedural principles and their function are conceived of and how principles are classified as fundamental and how their essence is defined, firstly, those general notions will be briefly explained.

Considering that in the theory of criminal procedure law there is no generally accepted definition, an opinion can be deemed acceptable according to which the fundamental principles of procedure are conceived of as *general legal rules which are made through the synthesis of the rules of procedure from international or national law from which they emerge and focused on certain postulated social values to whose achievement the establishment of criminal procedure should serve*.[11] The function of procedural principles is divided between jurisprudence, legal policy, and practice of law. Jurisprudence endeavours to build a system based on theory and reduce a plurality of individual legal rules to a definite number of principles, a need that arises out of the economy of scientific thinking which requires that as many objects as possible are reduced to the same explanatory notion.[12] In respect of the lawmaker, principles are understood as his best choice of procedural institutes in the light of criminal policy, whereas in respect of the authorities in charge of criminal proceedings, they are understood as tools which help them interpret the regulations of criminal procedure law, especially when they include legal standards or legal gaps which need to be filled.[13]

In general, legal principles are distinguished from ordinary legal rules by the normative structure which is the basis for their application – a legal rule is applied either in its entirety or it is not applied at all (it may not be applied partially), whereas principles include a requirement that a social goal is achieved either fully or as much as possible (they are "optimal commandments" - *Optimierungsgebote*[14]). The said lack of definition of required conduct, due to which the principles are referred to as "optimal commandments", may lead to a conflict of principles which results in their limited implementation. This characteristic of legal principles in general, and thus of procedural principles as well, is revealed in particular in the realm of simplification of procedural forms.

In essence, the simplification of procedural forms includes three requirements, whose subject matter is different, but which are focused on the same goal. Namely, those requirements emerge as means of reaching one and the same goal – to establish a simplified form of procedure which corresponds to the reason for simplification. This involves: *the abbreviation* of proceedings which is achieved by omitting individual stages or entire phases; the *acceleration* of proceedings by setting or lowering time limits for taking procedural actions or on the duration of coercive measures; and making proceedings *less formal* (by dispensing with formalities or some guarantees).[15] A departure from the consistent application of certain procedural principles by setting up a regime of exceptions in special criminal proceedings has emerged as a particularly suitable method for achieving the said goal.[16]

11 V. Đurđić, *Revizija osnovnih procesnih načela na kojima je uređen novi krivični postupak Srbije*, Pravna riječ, br. 33/2012, str. 449.
12 Dr Toma Živanović, *Sistem sintetičke pravne filozofije*, 1951, str. 265.
13 Dr sc. Davor Krapac, Kazneno procesno pravo, Prva knjiga: Institucije, Zagreb, 2003, str. 78.
14 R. Alexy, *Rechtsregeln und Rechtsprinzipien*, Archiv für Recht – und Soyialphilosophie, Beiheft, 25/1985, str. 19.
15 Cf. S. Brkić, *Racionalizacija krivičnog postupka i uprošćene procesne forme*, Novi Sad, 2004, str. 166.
16 T. Vasiljević, *Značaj brzine i uzroci sporosti krivičnog sudskog postupka*, Arhiv za pravne i društvene nauke, str. 96.

A general conclusion could be drawn from the above, namely that the application of certain fundamental principles characteristic of the ordinary form of procedure is limited in simplified forms so that they could be released from the burden of guarantees in accordance with the grounds for simplification and its manner and so that the purpose of introducing each simplified form of procedure could be achieved. It is not possible to lay down in advance a general rule based on which principles will be limited in simplified forms of procedure, but it seems reasonable that the purview of principles which dominate a stage or a phase which is omitted from the structure of a particular simplified form should be restricted. By way of example, the scope of the inquisitorial principle is reduced in those simplified forms from which investigation is omitted, while the purview of the principle of directness and the adversary principle is limited in simplified forms in which there is no main hearing.

Limited application of the fundamental principles of criminal procedure has relativized the optional character of those simplified forms whose initiation or completion depends on the will of the parties. The sentencing procedure prior to the main hearing, now, truth be told, wrongly renamed[17] to the sentencing hearing, commences at the motion of a public prosecutor, while a judgment of conviction is passed if a defendant agrees with the prosecutor's motion for the type and extent of a criminal sanction (Art. 512 and Art. 517, para. 2, item 1 of the 2011 CPC). Apart from this, defendants may prevent an already commenced sentencing procedure without a main hearing from being concluded and turn it into summary proceedings (in order for the main hearing to be held) by filing an objection to a judgment of conviction which has been passed because a defendant has failed to appear at a hearing (Art. 518, para. 2 and 3 of the 2011 CPC).

Generally speaking, legal principles are not related to each other in a uniform manner and they may be either superior or subordinate to each other, they may exclude each other, they may partially overlap or there may be a lack of mutual contiguity.[18] These correlations also exist between procedural principles, both in the ordinary form of criminal proceedings as well as in the simplified forms and they may be useful when selecting the manner in which procedural principles will be transformed, a process which needs to lead to the integration of structural elements (stages and phases) making up the abbreviated structure of a simplified form of proceedings. What this means is that restricting the application of a fundamental principle will not necessarily result in favouring a particular fundamental principle or definitely imply restrictions on some other principle. Transformation of the fundamental principles of procedure in the process of simplifying procedural forms is only subject to the legitimizing grounds based on which a particular simplified form of procedure is established in the first place, whereas the said correlation between legal principles may be a valuable method for coordinating the fundamental principles of procedure while achieving said goal. In brief, the fundamental principles of criminal procedure must be transformed in such a way as to serve the purpose of the simplification of procedural forms.

17 See: *Redefinisanje klasinčnih procesnih pojmova u Prednacrtu Zakonika o krivičnom postupku iz 2010*, Revija za kriminologiju i krivično pravo, br. 2/2010, str. 18 i 19.

18 U. Penski, *Rechtsgrundsätze und Rechtsregeln*, *Juristenzeitung*, 3/1989, str. 108 (quoted from: S. Brkić, Racionalizacija..., str. 256).

3. Transfer of Negative Effects of the Manner in Which Fundamental Principles are Structured From the Ordinary Form to Simplified Forms of Proceedings

Under the influence of various factors,[19] both legal and non-legal, principles are subject to change, their scope and subject matter changes, as well as reasons which justify them and purposes they serve, or one set of principles is exchanged for another – therefore, they are characterised as *relative*.[20] At the normative level, the changes of fundamental principles are manifested in the course of legislative reforms as either widening or restricting the scope of application of a particular fundamental principle, as their new redefinition in the statute, or even the abolishment of a particular principle.

Each of the said changes in the fundamental principles has an impact, either to a lesser or greater extent, on the manner in which the ordinary form of criminal proceedings is structured, while their effect on the manner in which structural elements of the proceedings are organised and interconnected is particularly prominent when it comes to limiting and setting aside one of the fundamental principles. Abolition of a principle which is applied in the ordinary form of proceedings and classified as a fundamental principle according to the doctrine, as was done by the 2011 Criminal Procedure Code, has repercussions on the restructuring of the entire ordinary criminal proceedings, in particular if it concerns the principle which is deemed (or used to be deemed) to dominate all the other principles, such as the principle of the establishment of truth. Numerous questions have arisen due to the abolishment of the principle of establishment of truth from criminal proceedings: If truth about a criminal incident is not established in criminal proceedings, how can the rules of substantive criminal law be correctly applied to any given case, which is a generally accepted purpose of criminal proceedings? Since in a country in which the "rule of law" is upheld, no one may be punished unless it has been proven with certainty that he is subject to the State's right to sanction, on which will the State's *ius puniendi* be based once the principle of truth is abolished and the Court is released from the duty to prove all the legally relevant facts? It is a crucial question, from the aspect of both legal theory and policy, but also an ethical and philosophical issue to which Serbian lawmakers have not provided an answer. Ultimately, should the State entrust the parties with the establishment of facts on which the public interest to punish an offender is based or is it a civilisational approach to rely on an autonomous, independent, impartial and competent authority such as the Court?[21]

The fundamental principles of procedure also apply to simplified forms of criminal procedure, unless their application has been restricted or abolished by special statutory provisions governing the given simplified proceedings. The said equally applies to the effect which legislative changes made to the fundamental principles have on the simplified forms of procedure, even when it involves negative effects. To put it differently, negative effects which the reform of a fundamental principle has on the manner in which the ordinary criminal proceedings are structured and used are also transferred to the forms of simplified proceedings in which the given principle is neither limited nor from which it has been excluded. Therefore, we will point out the effects of some fundamental principles redefined by the 2011 procedure code.

19 See: M. Grubač, *Načela krivičnog postupka i njihova transformacija*, Jugoslovenska revija za kriminologiju i krivično pravo, br. 1-2/1995, str. 72.
20 Dr Tihomir Vasiljević, *Transformacija principa krivičnog procesnog prava*, Anali pravnog fakulteta u Beogradu, 1969, no. 3-4, str. 300.
21 V. Đurđić, *Revizija osnovnih procesnih načela na kojima je uređen novi krivični postupak Srbije*, Pravna riječ, br. 33/2012, str. 454.

Accusatory Principle – An erroneous statutory definition of criminal proceedings had forced the lawmakers to omit from the new Code a provision governing the accusatory principle. Since the investigation is, according to the lawmakers' idea, a structural element of criminal proceedings in the narrow sense of the word and since it is initiated by the decision of a public prosecutor issued in the form of an order (Art. 7, para. 1, item 1 of the 2011 CPC), it was not possible to keep the previous statutory definition of the accusatory principle, otherwise standard in codes of procedure,[22] which read as follows, "Criminal proceedings shall be initiated upon the request of an authorised prosecutor."[23] Instead of looking for a way to eliminate the cause preventing the accusatory principle from being properly and consistently provided for in the law, the lawmakers had resorted to a pragmatic, not in the least inventive intervention – they excluded the definition of the accusatory principle from the code of procedure. However, this does not imply that any future criminal procedure will not be established on the accusatory principle because it follows indirectly from other provisions, for instance those governing the authorised prosecutor, the subject of a judgment,[24] judgments dismissing the charges, substantial violations of the rules of criminal procedure as grounds for contesting judgments, etc. (Art. 5, para. 1, Art. 420, para. 1 and Art. 422, para. 1, item 1, Art. 438, para. 1, item 7 of the 2011 CPC).

The lawmakers would have had an opportunity to see that a statutory definition of the accusatory principle was possible even when the investigation was defined as prosecutorial only if they had familiarised themselves with the experiences of comparative law in which the notion of criminal proceedings was properly defined. The statutory definition of indictment/charges exists as well in the legal systems on which we have traditionally modelled our criminal procedure law, even our legal system as a whole; as well, it also exists in the criminal procedure law of the country whose solutions have frequently been adopted or paraphrased by our lawmakers. There is a statutory definition of charges in the German procedural law, which has been our traditional source of ideas for the development of our legislation, "The opening of court investigation shall be conditional upon preferment of charges" (§ 151 StPO). In the legal system of Croatia, the accusatory principle has been elevated to the level of a constitutional principle (Art. 25, para. 5 of the RC Constitution) and as such, it has been incorporated in their criminal procedure code, "Criminal proceedings shall be conducted on the request of an authorised prosecutor" (Art. 2 of the Croatian CPC). Such a solution can also be found in the Montenegrin criminal procedure law, with the exception that the very definition specifies that the accusatory principle also needs to be applied in the course of criminal proceedings, "Criminal proceedings shall be initiated and conducted pursuant to an indictment issued by an authorised prosecutor" (Art. 18, para. 1 of the Montenegrin CPC). Instead of making use of the experiences from comparative law, the lawmakers stayed consistent with and loyal to their erroneous understanding of criminal procedure even though their persistence razed many definitions of traditional concepts of criminal procedure.

Instead of establishing preliminary proceedings on the accusatory principle, whose definition has been left out from the procedure code, their structure (the stage of investigation, in the first place) involves some prominent elements of the inquisitorial principle: the investigation is initiated

22 See: Art. 17 Macedonian CPC, Art. 405 of the Italian CPC, Art. 2, para. 1 of the Croatian CPC, Art. 18, para. 1 of the Montenegrin CPC, etc.

23 Article 19 of the 2001 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 – other law, 49/2007, 20/2009 – other law, 72/2009 and 76/2010).

24 In our opinion, the title "Subject Matter of a Judgment" is more appropriate for Art. 420 of the CPC than "Relationship of the Judgment to the Charges".

ex officio even against an unknown perpetrator, and this also applies to the criminal proceedings in the narrow sense of the word under the wording of the Code *eo ipso*; defendants are not entitled to appeal an order to conduct investigation; only prosecutors may undertake evidentiary actions in the course of an investigation whose findings may be used as evidence at a main hearing without any statutory preclusions; a public prosecutor decides on defendant's or his counsel's motions to present evidence; the defence is not entitled to question witnesses or expert witnesses during an investigation so that their testimony could be used as further evidence at the main hearing; if an investigation was conducted against an unknown perpetrator, the indictment may be confirmed only based on evidence offered by the public prosecutor, etc.

Principle of Directness – If we look at the history of amendments made to our criminal procedure law, one may get the impression that each new conceptual amendment has broadened some more the scope of departure from the principle of directness (*e.g.* both new codes of procedure, the one enacted in 2006 and the one enacted in 2011, included amendments which either directly or indirectly assailed the principle of directness).

The 2011 Code is specific because the application of the said principle has been called into question although provisions which depart from direct presentation of evidence at the main hearing have not been amended. The problem has arisen on account of the fact that the nature of investigation has been changed and as opposed to judicial, the investigation has become essentially prosecutorial, whereas the indirect presentation of evidence at the main hearing has not been adapted to that radical change. Provisions which governed the departure from the principle of direct presentation of evidence at the main hearing were not altered, so evidence gathered by non-judicial authorities has been put on a par with evidence whose presentation was ordered by the Court. The fact that the evidence presented by a public prosecutor, the Court or the police has the same strength as evidence whose obtaining was requested by the Court is evident from the provisions on "inspection of contents of the transcripts of testimonies" under which records of evidence presented during an investigation may be used at the main hearing and may constitute grounds for a judgment, irrespective of which authority presented each particular piece of evidence (Art. 406 of the 2011 CPC). Under the new statutory regulations, evidence presented by non-judicial authorities in the course of an investigation is not different in any respect from evidence presented by the same authorities during preliminary investigation. (From such perspective, it would be the same and even simpler if evidence gathered by non-judicial authorities in preliminary investigation were validated in the current procedure code instead of doing away with judicial investigation.) The fact that in certain cases an obligation is imposed on public prosecutors to obtain authorisation from a preliminary proceedings judge prior to questioning witnesses and expert witnesses (when they are questioned without a defendant being present there, either if he has not been summoned or it is a case of an investigation against an unknown perpetrator), does not increase the probative force of prosecutor's evidentiary actions nor a statement thus obtained may be validated by a prior judicial decision.

As opposed to the offered conception that both evidence ordered to be obtained by the Court and evidence gathered by non-judicial authorities in the course of an investigation has the same legal force, it is almost generally accepted that the presentation of evidence whose obtaining was ordered by the Court following strict formal rules may provide a factual basis for a judgment even when it is presented at pre-trial stages and that its probative strength is superior to that of evidence gathered by non-judicial authorities. (Physical evidence is an exception to this rule as

well as evidence obtained through the so-called special evidentiary actions taken pursuant to a judicial decision.) However, this does not imply that the prosecutorial investigation will result in evidence from the investigation being absolutely excluded at the main hearing. Such a rigid concept had been originally advocated in the radical reform of the Italian criminal procedure, when a pure version of the adversarial model was introduced, but it was later abandoned primarily due to the so-called mafia crimes. It occurs more frequently in comparative law that evidence from the prosecutorial investigation may be exceptionally used as a factual basis for rendering a judgment, but only under strict conditions, such as in German criminal procedure.[25]

When the new conception of the probative force of evidence presented by non-judicial authorities during an investigation is linked to the main hearing established on the adversarial principle, it can be inferred that one party, namely the public prosecutor is favoured in our new criminal procedure by way of provisions governing the departure from the principle of directness, which makes such a conception dubious. Whereas a defendant must prove each fact which goes in his favour at the main hearing by way of application of the principle of directness and the adversarial principle, a public prosecutor may indirectly introduce evidence he has presented himself (even evidence presented when the suspect was not present there) into the proceedings by making use of the records of presented evidence and it may constitute grounds for rendering a judgment. Proceedings in which adjudication is based on evidence gathered by non-judicial authorities are far from fair since defendants do not participate in the presentation of evidence and since the equality of arms has not been ensured.

Adversarial Principle – The adversarial principle is not defined by some express legislative norm but it follows from the very manner in which proceedings are structured. It can only exist in those models of criminal proceedings which are structured to a lesser or greater extent as a dispute between equal parties before a court of law. In legislation, adversarial proceedings are usually provided for when *physical presence of the parties* is guaranteed, when an obligation is imposed on the authorities in charge of the proceedings to *duly notify* the parties of the time at which procedural actions will be undertaken and about the subject matter of the proceedings, as well as of the rules which provide for *giving statements and making motions*.[26]

Limitations of the adversarial principle are typical of preliminary proceedings, but they may occur at a main hearing as well. Some departures from the principle of directness are at the same time departures from the adversarial principle. For instance, indirect presentation of evidence at the main hearing obliterates both the directness and adversariness of proceedings to the prejudice of the quality of judicial decisions and it is also judged negatively if viewed from the aspect of the protection of human rights.

In that respect, and from the point of view of advesariness, the biggest question mark hangs over the compatibility with the Constitution and European Convention of those provisions from the latest Serbian code which stipulate equal legal strength of evidence directly presented at the main hearing and circumstantial evidence produced at one of the previous stages in the preliminary proceedings, or even in the course of preliminary investigation. In such cases which involve testimonies of witnesses and expert witnesses or the questioning of an expert advisor, defendants are

25 See: § 251 StPO.
26 See: M. Grubač, *Krivično procesno pravo, Uvod u opšti deo*, Beograd, 2004, str. 145.

not afforded an opportunity to put questions at the main hearing as in the case of adversarial hearings and they are thus denied the right to "equality of arms" and put at a disadvantage in the proceedings. Statements given during some of the earlier stages in the proceedings may be used as evidence, which is not inconsistent with Article 6, para. 1 and 3(d) of the European Convention on condition that a defendant is provided with an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness makes his statement or at some later stage in the proceedings.[27] When legal provisions governing evidentiary actions in the course of an investigation are linked to the departures from the principle of directness at the main hearing, they do not satisfy the legal standard on which the principle of fair trial is based and which is known as the concept of "equality of arms".

In this case, the principle of "equality of arms" does not exist for a number of reasons. During an investigation, evidentiary actions are exclusively undertaken by a public prosecutor, whereas a defendant and his defence attorney may only be present when they are undertaken, but neither this right is guaranteed without restrictions (Art. 300 of the 2011 CPC). Not only witnesses for the prosecution, but also witnesses for the defence (this applies to expert witnesses as well), are questioned by the public prosecutor during an investigation because the rules on direct examination, cross-examination and redirect examination which are laid down for the main hearing do not apply to investigation. It is not difficult to infer the direction in which examination will move when a witness is questioned by an opposing party! A defendant and his defence attorney are only entitled to propose to a public prosecutor to put a specific question to a prosecution witness, a defence witness or expert witness for the purpose of clarifying circumstances of the case, which the prosecutor may either reject or rephrase (exceptionally, a public prosecutor may approve that questions be put directly). Defendants are not entitled to cross examine prosecution witnesses in the course of an investigation since those rules apply only to the main hearing. How can we even mention equality of any kind when defendants are not entitled to directly question their witnesses or cross-examine prosecution witnesses during an investigation. Rather, it could be asserted that defendant's and his defence attorney's presence during evidentiary actions undertaken in the course of an investigation is a form of control of public prosecutor's work, but that it is insufficient to ensure "equality of arms". In itself, it does not run contrary to the concept of a fair trial if its purpose was to ensure the bringing of an indictment. However, since witnesses' and expert witnesses' statements given during an investigation may be used at the main hearing without any restrictions, a defendant is not afforded an opportunity to contest them and question witnesses against him under the same conditions or to directly examine his witnesses (it is sufficient that either a witness or an expert witness does not appear at the main hearing, i.e. that they "cannot be reached" or that they refuse to testify without legal grounds, for their statements to become a factual basis of a judgment on the motion of the prosecution and by decision of the Court).[28] Equality of arms is directly defeated in cases when a public prosecutor questions witnesses or expert witnesses in defendant's or his counsel's absence and then their statements are used at the main hearing as a factual basses for a judgment without examining them by applying the principles of orality, directness, and adversariness. In cases when summonses "are not served on" defence attorneys and defendants "in accordance with the provisions" of the code of procedure and when investigations are conducted against unknown perpetrators, a public prosecutor is authorised to question witnesses or expert witnesses in the absence of the defence attorney and the

27 The Kostovski Case, judgment of November 20, 1989, A.166.
28 See Art. 406, para. 1, items 1 and 4 of the 2011 CPC.

opposing party, for which he needs to obtain a prior authorisation of a preliminary proceedings judge (Art. 300, para. 6 of the 2011 CPC). Still, it is completely clear that without a special argumentation, any prior authorisation by the Court may not enhance the credibility of evidence given by a witness or an expert witness who are questioned by a public prosecutor in the absence of a defence attorney and a defendant, nor may it have any bearing on the "equality of arms". Grounds for giving judicial authorisation have not been laid down, they are left to the discretion of a judge, so a question arises as to the ratio of such a provision. Given the fact that all the power in the investigation is on the side of a public prosecutor, it cannot be expected from a preliminary proceedings judge to prevent investigation against an unknown perpetrator by not granting his authorisation and as a legislative solution, it is dubious in itself.

Departures from the principle of directness have therefore remained the same as if the judicial investigation had not been substituted by prosecutorial. What this implies is that evidence produced by other government authorities in the course of preliminary investigation or investigation has the same value as that presented by the Court in pursuance of the strict legal form and procedural principles of directness, adversariness, and publicity which dominate the main hearing. Nevertheless, it should not be allowed that evidence whose obtaining is ordered by the Court and evidence obtained by non-judicial authorities may be put on an equal footing with regard to its probative force because in that way proceedings stray from their primary task – the correct application of substantive criminal law to a specific incident, but due to an unequal standing of a defendant with regard to the presentation of evidence, such proceedings may not be called fair.

The adversary principle presupposes that proceedings are structured to a certain extent in an "adversary manner", *i.e.* as an adversary proceeding, which is why it is the principle which features the most at the main hearing. The lawmakers have developed the said idea exhaustively: at the main hearing, evidence is presented exclusively by the parties, while the Court's role has been rendered completely passive. Evidence proposed by a prosecutor is presented first, then defence's evidence, and finally evidence whose presentation has been ordered by the Court acting *ex officio*. The law also lays down the order in which a defendant is interrogated and witnesses, expert witnesses and expert advisors are examined. Examination may be direct, when witnesses and expert witnesses are questioned by the party which proposed them, cross, when they are questioned by the opposing party, and redirect, when they are once again questioned by the party which proposed them as witnesses (Art. 396 and 402 of the 2011 CPC). Based on the above, it appears that conditions have been created for a lawyers' duel between two equal parties. Still, for criminal offences punishable by imprisonment of less than eight years, defendants do not have to have a defence attorney, which means that professional defence lawyers are optional for the majority of criminal offences according to the legal classification and committed criminal offences. In such cases, if a defendant does not hire an attorney, the manner in which evidence is presented and legal relevance of facts is assessed is left to his layman's understanding, and then the equality of parties is nonexistent. In a purely adversarial version of the main hearing, the reasons of fairness require that defendants must have professional defence lawyers in all cases irrespective of the type and seriousness of a criminal offence manifest in the punishment which it carries, but the lawmakers have overseen this requirement blinded by a new shiny model of the main hearing built on a formal equality of parties. In cases when a defendant has a defence attorney, irrespective of the fact if a defence counsel is mandatory or optional, it is also questionable in how many cases a defence will be competent and effective, on which solely depends actual and not formal equality of arms.

4. Concluding Remarks

In the process of simplification of procedural forms, a transformation of fundamental principles of criminal procedure is a very suitable method for coordinating and integrating structural elements of a particular form of simplified proceedings in criminal matters, in accordance with values postulated to represent a basis for simplification and the function which the given form should serve.

The scope of application of each fundamental principle based on which ordinary criminal proceedings are established also includes simplified forms of adjudication of criminal matters if it is not restricted or even abolished during the creation of the given procedural form. For that reason, all the effects, even the negative ones, of redefining, restricting the scope of application, or eliminating a fundamental principle, are transferred to simplified forms of criminal proceedings (elimination of the principle of truth from ordinary criminal proceedings precludes ascertainment and proving of truth in all the simplified forms of procedure).

The restructuring of fundamental principles of criminal procedure and prescribing guarantees for the right to a defence which are not adapted to the prosecutorial type of investigation and adversarial version of the main hearing raise doubts about whether or not the new criminal procedure governed by the 2011 Code ensures that trials are fair. Legislative solution which question the right to a fair trial are numerous. A defendant is not afforded a possibility to seek judicial relief against a decision of the prosecuting authority to launch an investigation against him which is under an express provision contained in the new code only the first stage in criminal proceedings, understood in the narrow sense of that word, which is in direct contravention of Constitutional guarantees of the right to a fair trial, namely that only the Court may decide "whether or not there existed reasonable suspicion which provided grounds for initiating criminal proceedings". By providing for a possibility of conducting investigation against an unknown perpetrator, defendant's right to participate in criminal proceedings conducted against him has been denied, even though the said right is a constituent element of the principle of a fair trial. It has not been provided that defendants must have a professional defence attorney in cases involving criminal offences processed in summary proceedings, which account for the great majority of criminal offences, and defendants have thus been placed at a disadvantage in adversarial proceedings in relation to public prosecutors when it comes to interpreting the rules of criminal law and presentation of evidence, which is now exclusively in the hands of the parties. The ban prohibiting defendants and defence attorneys from offering and presenting evidence after a specific stage in the proceedings directly encroaches on the right to present a defence and runs contrary to the presumption of innocence because it forces the defence to offer evidence at that stage in the proceedings, instead of placing the burden of proof exclusively on the prosecutor. The prosecution is favoured and the "equality of arms" is defeated as a fundamental factor of the fair trial principle by restricting the principles of directness and adversariness in the code, which was done when the same probative force was given to the statements of witnesses and expert witnesses obtained by the prosecuting authorities in the course of an investigation as if they were obtained during cross-examination.

Milan Škulić, PhD[1]

Relation between the Principle of Truth and Simplified Forms of Criminal Proceedings

1. Preliminary Remarks

In recent years, the principle of truth, especially when understood as the *principle of substantial truth* and an antipode to the *principle of formal truth*, which is in the criminal procedure laws of the traditional civil law systems viewed as one of the essential principles of criminal procedure according to which it differs substantially from the civil procedure, has become one of the "most discussed about" issues or even the most controversial issue in our country in connection with the reform of our criminal procedure legislation.[2] In general, two opinions can be distinguished in our country: one, which maintains that Serbia as a country which still belongs to the circle of civil law countries should remain true to the traditional principle of truth in criminal proceedings, which also requires an active or al least "more active" role of the Court in respect of evidentiary actions; and another, which insists on departing from the conventional view of the principle of truth, relying on the idea that the role of the Court in respect of evidence should be passive as much as possible, while the presentation of evidence "before the Court" is primarily an activity performed by the parties, established on the *burden of proof rules*, under which the burden of laying charges should rest on an authorized prosecutor who accordingly must take the risk of not succeeding in proving them or failure to prove them.

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2 Irrespective of the enactment of the new Criminal Procedure Code in 2011, the reform of our criminal procedure legislation is still ongoing, since not only have some minor amendments been made to the Code recently, but it is certain that it will subsequently be amended even before it possibly begins to be applied to all the criminal offences (it is already being applied to criminal offences which fall under the purview of prosecutor's offices which have special jurisdiction); those will either be major amendments, as provided in the 2011 Draft Law on Amendments to the CPC which was prepared in late December 2012, or a number of other, no too comprehensive, although certainly not minor amendments, which will be needed to rectify numerous nomotechnical errors and certain normative gaps present in that Code. For more on this topic, Dr Milan Škulić i dr Goran Ilić, *Novi Zakonik o krivičnom postupku Srbije – jedan korak napred, dva koraka nazad*", Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, Pravni fakultet u Beogradu i Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 2012.

As will be explained in more detail below, we believe that the principle of truth should not in any case be indentified with some sort of Court's "absolute duty" to ascertain always and in every particular instance a "real", "actual", "absolutely undeniable", or similar truth since it is often not possible and probably represents more of a "divine than judicial prerogative". Actually, the only issue here is that the Court must objectively do everything which can possibly be done to ascertain the truth which means "to always pursue" the truth, but only within the frame of reference of other rules of procedure which otherwise, by the obvious logic, restrict the pursuit of truth up to a point, such as the *in dubio pro reo* principle and other rules of evidence, even those which concern the inadmissibility of certain evidence, etc. The prohibition of *reformatio in peius* has a limiting effect on the establishment of truth to some extent, as well as the running out of statute of limitations on criminal prosecution and some other mechanisms of criminal procedure. All of the above implies, as it is otherwise presented in theoretical works, that neither is the principle of truth some kind of a "sacred cow" of criminal procedure nor is the establishment of truth some kind of "ideal" which must be attained without any exception at all and it is far from any *central issue* in terms of how it relates to the efficiency of criminal proceedings or even to their expeditiousness if we take as a starting point the presumption that *efficiency* of criminal proceedings is different from *how fast* they develop.

The principle of truth is very important from the aspect of the right to a fair trial and its purpose which is necessarily not only legal, but also ethical in character, because on the one hand, citizens or an overwhelming majority of them expect that the Court shall establish truth in criminal proceedings, whereas on the other hand, the Court may not, or at least should not have the right to impose criminal sanctions or to punish (*ius puniendi*), in cases of judgments of conviction, if it does not base its judgment on correctly and completely established facts of the case, i.e. the truth, and when it already does not have any duty to ascertain the truth. Also, this shows how utterly absurd is the existence of the possibility to appeal judgments on the grounds of erroneous or incomplete finding of facts, or in other words, on the grounds of failure to ascertain the whole truth (*incomplete finding of facts*) or establishment of the "non-truth" (*erroneous finding of facts*) when the duty of the Court to establish the truth does not exist at all in some criminal proceedings (which is unfortunately the case in the most recent CPC enacted in Serbia in 2011). Our theorists explain it in the following manner, "If the Court is neither responsible for obtaining and presentation of evidence nor is it obligated to establish the truth in criminal proceedings, it is inconsistent with such a conception to challenge the finding of facts by an appeal."[3]

The principle of truth should not be a priori devaluated even when legislators introduce certain (more) summary or (more) simplified forms of proceedings in order to achieve more efficient criminal proceedings, i.e. their faster development and conclusion. Even then, the principle of truth should be applied when it otherwise exists in a given criminal procedure (as in the case of our still current 2001 CPC and the majority of civil law countries, as opposed to the Serbia's CPC passed in 2011); certainly, that does not preclude placing some additional restrictions on it through certain procedural mechanisms since the principle of truth is not absolute in other respects either, but as it has been detailed above, it may be "subject" to certain necessary restrictions. Naturally, even when such reasonable "restrictions" are concerned, they may be imposed only on condition that it is not contrary to the fair trial principle and in particular that it does not violate any fundamental or essential rights of defendants.

3 V. Đurđić, *Priroda i procesna struktura novog krivičnog postupka Srbije*, "Pravni život", broj 9, tom I, Beograd, 2011, str. 770.

2. Principle of Truth in Traditional Criminal Proceedings of Civil Law Jurisdictions

The principle of truth is considered to be a traditional principle of criminal procedure which is frequently and somewhat routinely referred to as the ultimate principle of criminal procedure. However, it is not questionable that the truth, no matter how important it is in criminal proceedings, cannot and may not stand for such a value which is attained at any cost, meaning that it is certainly the aim of criminal proceedings, but an aim which may be achieved only by using legal and procedural instruments available to participants thereto and by respecting all the rights guaranteed to the parties, in the first place the right to defence counsel of persons against whom proceedings are conducted.[4] As opposed to this, if the truth were such an inviolable and absolute value which had to be attained at any cost in the course of criminal proceedings, then there would be nothing to limit it or in other words, it would be possible to use any means serving that purpose which would clear the way to torture, narco analysis, and other means which not only influence the will of a certain person, primarily a defendant, but are deeply inhumane and their use comes down to subjecting persons to degrading treatment. Therefore, it is necessary and helpful to get at the truth, although not at any cost and only by adhering to all the rules of evidence as well as exclusionary rules. For those reasons, the truth is an important purpose of the proceedings in contemporary versions of criminal procedure, but it may only be achieved within the normative frame of reference established by the law in cases of national criminal proceedings, in which process constitutional and legal norms safeguard the most important rights and freedoms in criminal proceedings.

In the majority of contemporary criminal procedure laws of civil law jurisdictions, the principle of truth boils down to Court's duty to search for and ascertain truth in criminal proceedings by presenting evidence *ex officio*, based on all the facts and *media probandi* available to it and relevant to rendering a judicial decision.[5] Customarily, the principle of truth is less important in common law versions of criminal procedure since based on a dominantly adversarial nature of the presentation of evidence in such adversary types of criminal proceedings, the judicial duty to establish facts has been reduced to a necessary minimum.

The principle of truth is often referred to as the "substantial truth"[6] doctrine, which is sometimes regarded as totally unacceptable because it implies that other than the said "substantial" truth there is also another truth ("unsubstantial" or "ideal") which would be out of the range of criminal proceedings, but which might be typical of some other procedure or the purview of another public service; thus, adjectives such as "real" or "actual" are sometimes added to the word "truth", which suggests that there is another truth outside of the criminal proceedings.[7] In fact, the term "substantial truth" is not incorrect in itself and valid justifications could be provided for it; granted that, we nevertheless do not use it since we believe that "truth" as a noun, term, and notion has a meaning which is per se strong and persuasive enough. As a matter of fact, the expression "substantial truth" is not an antipode to some "ideal" or "idealistic" truth, but it represents a certain opposite to something which is traditionally referred to in the theory of criminal procedure

4 For more on this topic, see: M. Škulić, Krivično procesno pravo, "Službeni glasnik" i Pravni fakultet Univerziteta u Beogradu, Beograd, 2012, str. 80 – 83.

5 F. Stamp, *Die Wahrheit im Strafverfahren*, Nomos Verlagsgesellschaft, Baden-Baden, 1998, str. 15.

6 For more on this topic, C. Roxin, *Strafverfahrensrecht*, Verlag C.H.Beck, München, 1998, str. 74. This author regards the following principles as the segments of the "inquisitorial principle": instructiveness, investigation, and substantial truth.

7 B. Petrić, *Priručnik za primenu Zakona o krivičnom postupku*, "Poslovna politika", Beograd, 1985, str. 11.

law as the "formal truth"; also, it is not at all difficult or undesirable to find appropriate reasonable justifications for using that term. From the historical perspective, the expression "substantial truth" originated in Germany at the time they were abandoning the inquisitorial model of criminal procedure and legal evaluation of evidence (formal truth).[8]

We have already explained that truth, although pursued, is not always or at any cost attained in criminal proceedings and that sometimes it is absolutely impossible to uncover it officially. For instance, criminal proceedings were instituted and conducted against a particular person, an indictment was issued, there was a main hearing, after which the accused was acquitted by a final judgment on grounds of insufficient evidence or for some other reason based on which judgments of acquittal are otherwise delivered in criminal proceedings. Then, the acquitted person could make a public statement that he actually did commit the criminal offence which was the subject matter of the proceedings and this could also be corroborated by other persons for whom it was not known at the time the criminal proceedings were underway they had any such information, so they were neither summoned nor questioned as witnesses or other highly credible evidence could emerge; however, because of the *ne bis in idem* principle, none of it may in any way lead to the person who has already been acquitted by the final judgment being charged once again or convicted. In such cases, the fact that he did not commit the criminal offence is regarded as the truth in the formal sense, *i.e.* the truth established in criminal proceedings which were lawfully conducted and concluded, although there exists "another", "real" or "substantial" truth as well. Naturally, only the truth established in criminal proceedings and contained in the final judicial decision may be relevant to the legal standing of the person acquitted in the above example and that person may not suffer any adverse legal consequences because there are circumstances which very convincingly or even absolutely reliably indicate that the said "formal truth" or the truth to which it was possible to get at in the criminal proceedings at the given moment after all does not correspond to reality. Similar examples could easily be provided to illustrate some other institutes of criminal law, in the first place in relation to the expiry of the statue of limitation on criminal prosecution and the rules on the prohibition of *reformatio in peius* when appeals are brought. This implies that contemporary legal systems in democratic countries predominantly give precedence to the general principle of legal certainty over the principle of truth in criminal proceedings, which is especially obvious in those criminal procedure systems (this also applies to our country) which absolutely forbid reopening of criminal proccedings for the same offence to the prejudice of a defendant.

The principle of truth is established by provisions contained in Art. 17, para. 1 of the Criminal Procedure Code which pertain to: 1) *the participants* which have a duty to ascertain facts correctly and completely, and they include not only the Court, but also other government authorities partaking in criminal proceedings; 2) *the subject matter* which needs to be correctly ascertained, namely pertinent facts or facts relevant to passing a lawful decision, and it is always a question of fact which facts are relevant in each particular case. In that process, both the Court and government authorities are obligated to examine and establish with equal attention both incriminating and exculpatory circumstances (Art. 17, para. 2). From the procedural aspect, the Court violates the principle of truth if it fails to correctly establish in its decision the facts relevant to making a lawful decision, which is prohibited in an appropriate manner by the provisions contained in the

8 N. Matovski, G. Lažetić-Bužarovska i G. Kaladžijev, *Kazneno procesno pravo 2*, Izmenjeno i dopunjeno izdanje, Akademik. Skoplje, 2011. str. 50.

Criminal Procedure Code. One of the causes for appeal or grounds for contesting judgments is erroneous or incomplete finding of facts, which exists when the Court establishes a decisive fact in an erroneous manner or when it fails to establish such a fact (Art. 370, para. 1).

In deliberating on appeals, courts of second instance vacate decisions based on erroneous or incomplete finding of facts when they deem that due to erroneous or incomplete finding of facts a new main hearing should be ordered before a court of first instance (Art. 389, para. 1). A court of second instance may hold a hearing when it finds that the court of first instance has violated the principle of truth, i.e. if it is necessary to adduce new evidence or once again examine already presented evidence on account of incorrectly or incompletely established facts, as well as if there are justifiable reasons for not returning the case to the court of first instance for a retrial (Art. 377, para. 1). Also, a judgment passed by a court of second instance based on a hearing at which facts have been established differently than in a decision by the court of first instance (Art. 395, para. 1, item 2) may be contested by an appeal; consequently, it will be rescinded by a ruling of a court of third instance if it is found that the court of second instance has erroneously or incorrectly established the facts. In addition, erroneous or incomplete finding of facts or in other words, breaches of the principle of truth contained in a judicial decision constitute one of the grounds for filing extraordinary legal remedies or motions to reopen criminal proceedings (Art. 407); even though a motion for the protection of legality (Art. 426) and motion to examine the legality of a final judgment (Art. 432) may not be filed as extraordinary remedies on grounds of erroneous or incomplete finding of fact, a court which adjudicates on them may, in case considerable suspicion has been aroused with regard to the correctness of decisive facts established by a decision contested by one of the said extraordinary remedies, set aside the decision by its judgment and order that a new main hearing be held before the same or some other court of first instance which has subject matter jurisdiction in the case.

3. Truth in Typical Adversarial Criminal Proceedings and Summary Form of Criminal Proceedings Characteristic of the US

Although the "cradle" of common law was England,[9] presently, the US is considered to be a typical modern representative of that great legal system.[10] The US criminal law still originates from some rather *heterogeneous* sources: 1) the majority of provisions governing criminal law are laid down in laws (statutes) of the states as well as in laws (statutes) enacted at the federal level; 2) in part, criminal law is contained in trade, sanitation, health care, financial and tax regulations which are adopted not only at the federal level, but also at the state level or by regulatory agencies;[11]

9 Lately, the UK has mostly abandoned the common law as its source of criminal law, so the vast majority of criminal offences in the UK are nowadays prescribed by laws (statutes), whereas Scotland has still remained much more faithful to the traditional common law system, which implies that there are also criminal offences in that country which are laid down by laws or statutes, although there are still more criminal offences which belong to common law, while the criminal offences provided for in the statute have been directly taken over from the common law system. For more on this topic, F. Lyall, An Introduction to British law, "Nomos Verlagsgesellschaft", Baden-Baden, 2000, p. 182.

10 Unlike the commercial law, tax law, or civil law, which are primarily regulated at the federal level, substantive criminal law in the US is traditionally regulated by the statutes of federal states, in which process codifications in the majority of states are oriented towards solutions contained in the Model Penal Code. For more on this topic, P. Hay, U.S – *amerikanisches Recht*, „Verlag C.H.Beck", München, 2000, p. 259.

11 In respect of these enactments, they mostly pertain to providing for certain wrongful acts connected with the basic subject matter regulated by such general enactments (most commonly, secondary legislation), similar as in the case of the so-called subsidiary criminal legislation in our country, whereas it should be considered that in the US, such enactments do not provide for criminal offences as the most serious types of wrongful acts, but rather for minor crimes, which are basically misdemeanours.

3) a segment of the US criminal law emerges directly from its Constitution; and 4) nowadays, in some federal states, criminal law is rarely made as common law, which used to be the first and earliest source of criminal law in the US modelled on the English law and basically boils down to a specific kind of common law, i.e. it includes the law and crimes made by judges themselves (*judge-made crimes*).[12]

In respect of the rules of criminal procedure, they are very similar in all the federal states and in that regard, differences are not as great as when it comes to substantive law. There are two essential characteristics of the US criminal procedure:

1) Criminal proceedings are structured as strictly *adversarial,* or adversary so that they basically represent a specific evidentiary or procedural "duel" taking place between the parties and before a jury made up of ordinary citizens who decide on the essential question of criminal procedure, *i.e.* whether or not it has been proven that a defendant is guilty, in which process the Court has a very passive role and is predominantly focused on ensuring that the parties observe the rules of procedure and on imposing a specific sentence should the jury find the defendant guilty.
2) A plea agreement or the so-called plea bargaining has enormous importance in criminal proceedings and the overwhelming majority of initiated criminal proceedings are thus concluded, even though it is formally an exception to a jury trial which must be understood as a rule and which is otherwise provided for by the US Constitution as well, which means that each citizen charged with a criminal offence enjoys the right that following a criminal proceedings conducted in a fair manner a jury of his peers reaches a verdict on the said charges and professional judges do not participate in drawing conclusions on whether or not charges have been proved. This represents the most typical and basic form of *summary criminal proceedings* in the US.

Some other substantial characteristics of the US criminal procedure system follow from the two of its fundamental and essential characteristics which have been explained above or in connection with them:

1) Almost a complete *lack of formality of criminal investigation*, which is not considered part of criminal proceedings nor is it undertaken based on some special decision, implies that in effect, it comes down to clearing up of the facts of a criminal offence by taking all the necessary actions by the police, but without making any formal decision (such as a "finding", "order", "decision", etc.) which would formally mark the launching of an investigation which is incidentally dominated by the police, although the State Attorney

12 T.J.Gardner and V.Mainan, *Criminal Law – Principles, Cases and Readings*, „West Publishing Company", St. Paul, New York, Los Angeles, San Francisko, 1980, p. 30 and p. 31.

may perform a certain instructive role, which is not a rule, but reserved for some very specific situations, not so extremely common in practice.[13]

2) *Criminal investigation is markedly limited in respect of evidence*, which comes down to the fact that any statement made in the course of an investigation may not be used in the very criminal proceedings except in cases of statements given to the police by suspects on condition that all their rights which are elements of the right to a defence from criminal charges have been strictly respected, in which process it is especially important that before taking their statements, they are *ex officio* and clearly advised and informed of their rights (the so-called Miranda rule).[14]
3) *In principle, the investigation is focused on physical evidence,* which follows from the rule that physical evidence gathered in the course of an investigation may be used at a trial if charges are laid but only on condition it has been legally obtained, in which process a very known concept of the exclusion of evidence which is either per se inadmissible as well as evidence which would otherwise, as such, i.e. per se, be admissible but which has been obtained in an unlawful manner – "the fruit of the poisonous tree doctrine" – is strictly applied.
4) The existence and practical use of ordinary legal remedies is very limited – *appeals against judgments in the US are virtually an exception to the rule* and they are very rare in practice and they may be filed only in respect of manifest breaches of procedural rules or violations of rights; in such process, the court of appeal is not obligated to hear each appeal, but only if it deems that there could be a violation of rights and that a decision on a particular issue has bearing on the future practice.
5) In principle, *a lack of providing for the establishment of truth as the purpose of criminal procedure* – follows from the adversarial nature of the proceedings, according to which it is only established which party is more successful in presentation of evidence on its behalf and not which factual elements of a criminal offence which is the subject matter of the proceedings actually exist; an immense importance attached to defendant's guilty plea follows from the above, as well as his attitude towards the charges and prosecution's version of the incident, because if the defendant himself pleads guilty to the charges in a plausible manner, other evidence will not be presented, same as the court will not become involved in any proving of the facts which are not considered a moot issue by either party irrespective of the fact that it sometimes may be questionable or even in some more extreme situation quite apparent that such a "concurrence of opinion" between the parties is inconsistent with what is actually true in a given case.

13 A police investigation in the US does not resemble very much our current investigation nor does it remind a lot of the prosecutorial investigation as it is conceived of in the 2011 Criminal Procedure Code; rather, it resembles the most our current preliminary investigation in a number of elements. This probably represents an important reason why some foreign expert from the US (*who have incidentally participated in the Working Group for drafting the 2010 draft CPC*) and countries having a similar criminal procedure system do not understand the legal role and function of the current investigation carried out by investigating judges under Serbia's current CPC, because the said investigation is essentially not too much *investigatory in nature*, but it is a kind of a "judicial filter" for actions previously taken in preliminary investigation and evidence gathered before criminal proceedings are formally launched. Basically, the preliminary investigation is a typical "stage in an investigatory process", and since the police dominate therein, although a public prosecutor is formally in charge of it, it could be inferred that for a long time, Serbia has had a form of "police-prosecutorial investigation". When an investigation is launched in connection with the same criminal offence at the following stage of the process (which is formally an integral part of the structure making up criminal proceedings, unlike the preliminary investigation), some special investigatiory efforts are not de facto made at this phase in the proceedings, at least not to any substantial extent, but in effect, only judicial control of previous police actions is carried out and information which has already been obtained in a certain form based on the findings from the very preliminary investigation is corroborated by evidence.

14 This means that in respect of the so-called personal sources of evidence, i.e. testimonies given as evidence which originate from investigation, or in other words that were given to non-judicial authorities (in the first place to the police), only suspect's statement may be used as evidence on condition that all the Constitutional rights which pertain to suspect's right to a defence have been respected, in particular the Miranda warning.

The last mentioned distinctive quality of the US criminal procedure, i.e. that it lacks the principle of truth in the sense that there is no duty to establish truth *ex officio* in criminal proceedings or that it is not *actively investigated by gathering and examining evidence*,[15] is the main reason why a markedly summary form of criminal proceedings is strongly preferred in the US criminal procedure, which entails the conclusion of proceedings based on defendant's guilty plea obtained in the majority of cases by means of an agreement with a prosecutor (the so-called plea bargaining, plea deal, plea agreement, etc.), which is certainly the most distinctive quality of the US criminal procedure. This is the main reason why different forms of plea agreements, although they exist even now in many criminal procedures which belong to traditionally civil law jurisdictions (such as *Absprache* or the so-called Deal in German criminal procedure), get less easily "established" than in the US, meaning that the number of criminal matters which are thus resolved is never exceedingly high.[16] As long as the principle of truth in criminal proceedings is understood in the traditional sense of that expression or at least as long as judges have "respect for tradition" according to which the purpose of criminal proceedings is the truth, defendant's confession may not have such "immense significance" as it has in some other systems of criminal procedure in which a confession is almost officially the Queen of evidence (*regina probationem*).[17] Our neighbour, the Republic of Srpska or BiH,[18] provides a good example because the plea agreement has been used there for more than a decade, but the percentage of matters thus resolved has never amounted, not even close, to some "striking number" when considered in relation to the total number of criminal matters; and even if it could be expected that there would be far more plea agreements in the future, they would probably never come "even close" to the number of "negotiated pleas" in the US or for instance in Canada whose system is similar to that of the US, presently the most typical representative of a purely adversarial version of criminal procedure.

15 It should be stressed here that it is not possible, even in the US, that a court's decision or jury's verdict on defendant's guilt is based on facts for which it is certain that they are not true, although this issue has been utterly relativized by the fact that the Court is by no means obligated to establish truth *ex officio* or in other words, to present evidence necessary for the ascertainment of truth on its own initiative but instead, the entire evidentiary proceedings are basically left to the disposition of the parties, whereas the Court, as a rule, may not even get involved in it. As a rule, the parties, guided purely by their interests, are naturally not extremely interested in the pursuit of truth in criminal proceedings, but each party seeks to achieve its primary goals – the prosecution to prove the charges and the accused to defend himself. Since a verdict on someone's guilt or the success of the prosecution in proving someone's guilt is made by a jury made up of laypersons, the primary goal is to convince the jury of a particular "version of truth" offered by either party. Therefore, everything is predominantly in the hands of the parties when it comes to evidence presented before a jury as the "court" which decides whether or not a defendant is guilty and a professional judge who mostly makes sure that all the procedural formalities are observed, but does not engage in evidentiary proceedings, *i.e.* he neither presents nor orders presentation of evidence, etc. All of the above, among other things, constitutes the reason why confession *is the crown proof* in the US criminal procedure, in such a manner that almost a "mere" admission of guilt is sufficient to result in the conclusion of criminal proceedings at their earliest stage, since it is usually considered credible when adult, mentally healthy persons are concerned and so no further evidence is needed to support it; essentially, it is sufficient to exclude any reasonable grounds to suspect that it is a false confession, and since the Court does not have the duty or a formal possibility to uncover the truth, it is very rare that such a "reasonable suspicion" about the veracity of defendant's will emerge in practice.

16 Admittedly, according to some "more recent" statistics, based on new statutory provisions (because the "Deal" was introduced in the German CPC as late as in September 2009, although it had been unofficially used even decades before), around 1/3 of the cases in Germany are resolved by applying their version of the plea agreement; however, we should keep in mind that it is mostly applied to not so serious (minor) criminal offences as well as to wrongful acts which are from the perspective of our legal system classified as misdemeanours. It is not so well known in our country that a similar situation exists in the US and that when those 90% of the cases resolved by plea agreements are mentioned, we should not lose sight of the fact that it involves all the possible types of wrongful acts, even those which are from the point of view of our legal system considered to be "harmless" misdemeanours, such as parking offences.

17 It is something of a paradox that a confession used to be regina probationem in the most traditional inquisitorial models of criminal procedure which used to be characterised by a formal evaluation of evidence and a possibility that confessions (even quite routinely) could be obtained by torture and that today, a confession has gained, admittedly more in fact than in matter, the status of the "Queen of evidence" in the most typical adversarial models of criminal procedure.

18 For more information on BiH legislation, H. Sijerčić-Čolić, Krivično procesno pravo, knjiga II, Tok redovnog krivičnog postupka i posebni postupci, treće izmijenjeno i dopunjeno izdanje, Pravni fakultet u Sarajevu, Sarajevo, 2012, str. 73 – 78.

3.1. Does the Truth Have Greater Significance in the US than in Serbia's Criminal Procedure Judging from the New Criminal Procedure Code?

It has been explained that the principle of truth does not exist in the US in the manner it is conceived of in traditionally civil law models of criminal procedure; however, it has been emphasised that the truth is not insignificant in the US criminal procedure, but that in principle, only the Court takes a passive stance with regard to evidence, does not endeavour to uncover the truth *ex officio*, and solely relies on evidence presented by the parties.

However, *certain rules of evidence in the US virtually place more importance on the truth in criminal proceedings than the new 2011 Criminal Procedure Code in modern-day Serbia*, which is absurd in itself if we consider our previous tradition and the fact that Serbia undoubtedly belongs to the circle of Continental European countries, not only geographically, but historically, culturologically, and even legally.

Namely, it is true that Federal Rules of Criminal Procedure, which are sometimes mistaken for a similar source of law such as criminal procedure laws or codes in Europe, do not mention "uncovering of the truth" or "the search for the truth", but something like that is unnecessary in such a source of law because there is a special legal discipline in common law countries – the law of evidence, which also represents a special source of law from the normative aspect. Within the framework of that field of study, rules are established which pertain to the ascertainment of truth and substantiation by evidence both in criminal and civil procedure, i.e. generally in relevant "legal procedures" to which belongs the "matter of truth" in its procedural sense. Thus, truth is mentioned already in the second article of Federal Rules of Evidence which stipulates that "rules should be construed… to the end of *ascertaining the truth and securing a just determination*."

Rule 1.02 of the Federal Rules of Evidence literarly reads as follows: "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination".

4. Devaluation of the Principle of Truth in the New Criminal Procedure Code of Serbia

Truth has been implicitly labelled in the new Criminal Procedure Code of Serbia as an unnecessary luxury in criminal procedure since neither the establishment of truth nor even the pursuit of truth by parties officially partaking in criminal proceedings are defined in any way as the aim of criminal proceedings.

The new Criminal Procedure Code promotes a passive stance of the Court in respect of evidence. Evidence would be presented by the parties, whereas the Court's role would come down to ensuring that evidentiary proceedings are correctly conducted. The parties are formally equal. Thus, a public prosecutor, who can count on full logistic support of the machinery of government to which he belongs, will be opposed by a defendant who can be assisted by a defence attoreny. Naturally, on condition that the defendant has finances to pay for his services or in cases of mandatory professional defence, when the Court appoints him an *ex officio* defence counsel because he does not have one. A mandatory defence counsel is prescribed only for more serious criminal

offences, so the majority of defendants may or may not have a defence counsel. However, affluent defendants, such as those who are accused of being "drug lords", will be defended by "star lawyers". They will be in a position to have defence teams on their side and to hire private detectives to collect evidence.

Besides, a serious error has been made in the key principal provision contained in the 2011 Criminal Procedure Code which pertains to the examination of evidence and burden of proof. Namely, under Article 15, paragraph 3, the Court presents evidence *upon motions by the parties*, which would imply that evidence is not presented by the parties but by the Court, but only upon their motions as used to be the case in the 2001 CPC or our traditional system of criminal procedure which was previously in force.

However, there is a number of provisions in the Code which promote a strongly passive role of the Court with regard to evidence and the parties are not only primarily but almost exclusively entrusted with the presentation of evidence, which completely contradicts the provision contained in Article 15, paragraph 3. The same Article of the Code, i.e. already its next paragraph, lays down that the Court may order a party to propose additional evidence or exceptionally *order such evidence to be presented* if it finds that the evidence that has been examined is contradictory or unclear and that such action would be necessary to thoroughly examine the matter which is substantiated by evidence. Thus, *not* even the said provision *allows the Court a possibility to present evidence* but only to order its presentation. Evidently, the intention has been to render the Court, as much as possible and at any cost - *passive in respect of evidence*. Although not expressly stated in the Code, it is presupposed that such evidence would have to be presented by a particular party or a person assisting the realisation of a party function, such as a defence attorney in cases of defendants. Consequently, the provision contained in Article 15, paragraph 4 directly and obviously contradicts the provision contained in Article 15, paragraph 3 of the Code, which is by no means a solitary example of mutually contradictory provisions found in the new Criminal Procedure Code of Serbia.

What are the chances of a defendant who has no defence attorney to be successful in an evidentiary "duel" with a public prosecutor? Even in a Brazil v Congo football match, each team has 11 players. Does it mean that they stand equal chances of winning? Well, only 6.5% of Serbia's population has a university degree.

If we known that for decades our criminal policy has been "a fishnet that catches only small fish and lets through the big fish", we know the educational attainment of an average defendant. With the present state of things, some parties will nevertheless be a bit more equal than others in practice or in a substantial number of cases.

A typically adversarial model of criminal procedure which exists in the US presupposes a *jury* consisting of ordinary citizens who decide the winner of the evidentiary duel.[19] Only when a jury of his peers finds that a defendant is guilty, a judge will sentence him. If the jury acquits him, the judge's task is over. However, in such proceedings, defendants always have the right, if they lack resources, to be appointed an *ex officio* defence counsel at state expense. This is not the case in Serbia.

On the other hand, it is not questionable that also in the US the quality of defence conducted by court-appointed attorneys is rarely exceptional. As opposed to this, opulent individuals "buy" services of top-notch lawyers. Let us remember the OJ. Simpson case, who was caught almost red-handed and charged with the murder of his wife and her lover,[20] but, owing to skilful legal manoeuvring of his lawyers he managed to avoid being convicted just to recently publish a book, *If I Did It*, in which he de facto confesses to killing them.[21] In addition, a jury trial is an exception rather than a rule in the US because more than 90% of the cases are resolved in summary proceedings based on guilty pleas, which are in the majority of cases "plea bargains" or officially negotiated pleas between the State Attorney and the defence.

Ordinarily, the Court in continental Europe is the sovereign and absolute "master" of evidentiary proceedings, regardless of the fact that the parties may take adequate evidentiary actions and thus take part in the presentation of evidence to a certain extent. Such a situation is the most typical of Germany and other countries whose legal systems have been our traditional models. A similar situation exists in Austria as well, which is characteristic and interesting because it has also recently introduced the system of prosecutorial investigation, but naturally, it has neither adopted the adversarial structure of the main hearing in its entirety, nor has it eliminated from its new Criminal Procedure Code the principle of truth.[22] Adversarial models of criminal procedure (which are sometimes said to be an example of a specific type of "Americanisation" of criminal procedures in some European countries) now exist in some countries of continental Europe, for instance in the Republic of Srpska or in general in BiH, a neighbouring country, although the principle of truth still exists in their systems of criminal procedure.[23] Also, such a system exists in Italy, where a defendant must always have a defence attorney and this in principle ensures a minimum of formal equality of the prosecution and the defence at the main hearing structured on an adversarial model, *i.e.* it comes down to an evidentiary duel between the two parties before a passive (only with regard to evidence) judge, standing for some kind of a "spectator" whose activity in the course of a trial has been reduced to a minimum.

19 The US criminal proceedings are structured as a sort of "evidentiary duel between the parties". The prosecutor and the defendant or his attorney, because it is extremely rare that defendants have no attorneys, use their own arguments to "fight" in front of a jury made up of ordinary citizens, who then assess whose arguments were more convincing. The judge himself stays relatively passive. Only if the jury finds that the defendant is guilty, the judge will take the floor by imposing an appropriate sentence. If the jury finds that he is not guilty, the judge's task is over. Even laypersons know this from fiction and films. What many people do not know is that such a "textbook" trial is de facto an exception rather than the rule in the US. It takes place in less than 10% of all the cases. Nearly 90% of the cases are terminated based on defendant's guilty plea, in which cases there are no jury trials and the Court only pronounces the sentence taking the guilty plea as a mitigating circumstance and guided by the plea agreement, but he has no formal duty to impose the sentence proposed by the parties. If there were some more jury trials in the US, their judicial system would certainly collapse.

20 Z.Erzincliogly, Forensic – *the Crime Scene Investigations, "Barnes&Nobles"*, New York, 2004, p. 19.

21 Afterwards, he was even found guilty in civil proceedings (which is formally possible in the US) of the murder of his former wife and her lover, which was why he was sentenced to pay a large sum of money by way of compensation for damages to close relative of his victims.

22 For more information on this topic, S. Seiler, *Strafprozessrecht*, 10., überarbeitete Auflage,„Facultas.wuv", Wien, 2009, p. 31 – 34.

23 For more information on this topic, Z. Jekić and M. Škulić, *Krivično procesno pravo*, Pravni fakultet u Istočnom Sarajevu, Istočno Sarajevo, 2005, str. 291.

Turning judges into "a panel of experts" who will "give points" for how successful the prosecution and the defence have been in proving their cases may represent a very tricky experiment. Maybe some judges are looking forward to this, thinking along the lines of "passing the buck". Now, they see themselves as "neutral spectators" of a match between the parties. However, a trial is not a match or at least it should not be. Judges should not be either spectators or supporters.

Pursuant to the new Criminal Procedure Code of Serbia, the truth is no longer the purpose of the future criminal proceedings; instead, as in any traditional civil lawsuit, the party which is more successful in an evidentiary "duel" "wins" in such proceedings. The truth is not some "sacred cow" of the contemporary criminal procedure in other respects either. It is pursued in a typical civil law model of criminal procedure, but not at any cost. When the truth cannot be ascertained, a decision is made in favour of a defendant. Now, the truth will not even be pursued. The Court will simply weigh up the charges laid by the prosecution against the arguments put forward by the defence to see which are more probable and where does the truth lie, "who should know". Maybe the Almighty…

In the majority of countries in continental Europe, in particular when it comes to traditional legal systems of the so-called Old Europe or the countries which form the "core" of the European Union and whose legal systems have customarily served as models for a number of other European countries, the former Yugoslavia included and thus the countries which emerged therefrom, there are some very significant differences between civil and criminal proceedings. These differences are primarily manifested in the rules of evidence and establishment of the facts of the case or they pertain in the first place to the scope and effect of certain evidentiary principles, i.e. principles which refer to the purpose and goal of each procedure. Procedural principles which apply to civil proceedings whose subject is a particular civil matter (*causa civilis*) in dispute are essentially different from procedural principles applied to the procedure whose subject is the so-called *causa criminalis* or a criminal offence, *i.e.* an offence which is illegal and prescribed by the law as a criminal offence, which is resolved in a criminal proceedings.

For instance, it is traditionally emphasised in German theory of criminal procedure law that the principle of disposition, reflected in the fact that litigants themselves are responsible for the establishment of facts which could constitute grounds for adjudication, applies to civil proceedings in which primarily "private interests" are resolved. This also indicates the existence of a corresponding burden of proof, so the Court, pursuant to the rules of civil procedure, may base its decision only on what litigants have argued, entered into evidence or proved, in which process a judge himself is bound by facts indisputable for the litigants; in this regard, it is underlined that the *principle of formal truth* applies to civil litigation in general.[24]

Contrary to this, it is emphasised in the German theory of criminal procedure law that as opposed to civil proceedings, the *principle of substantial truth* applies to criminal proceedings, including as well the inquisitorial principle which means that the Court shall investigate the criminal matter from the aspect of its subject ("on one's own initiative") and that while performing the said task and with regard to the clarification of the matter in hand, the Court is not bound by

24 C. Roxin und B. Schünemann, *Strafverfahrensrecht*, 26. Auflage,„Verlag C.H.Beck", München, 2009, str. 78.

any activities undertaken by the parties to the proceedings,[25] which is particularly evident in the fact that the Court "investigates the truth by presenting by virtue of its office all the evidence relevant to adjudication".[26]

Unlike the traditional civil law view of the aim of criminal proceedings and rules of evidence or *ex officio* judicial ascertainment of the facts in criminal proceedings which has been described above, this issue is viewed quite differently in the US; thus, the US criminal proceedings are very similar to civil proceedings, which comes down to the structuring of "adversarial proceedings" whose dominant characteristic is that each party bears the burden of proof of its contentions, whereas the verdict on "who has done better in proving its case" is passed by a jury.[27]

It is typical of traditional civil law models of criminal procedure that the Court endeavours to establish the truth which is a declared aim of criminal proceedings, in which process it considers relevant evidentiary actions taken by the parties not unconditionally, but only when the Court deems they involve adequate evidence proposed by the parties. For instance, in the German criminal procedure, the Court *shall in order to establish the truth, proprio motu*, extend the taking of evidence to all the facts and means of proof relevant to the decision (§ 244 Abs. 2 StPO).[28]

As a complete opposite to the above example or the quoted legal rule from a traditionally civil law model of criminal procedure which clearly illustrates the "traditional civil law model", the new Criminal Procedure Code of Serbia passed in 2011 has very consistently eliminated any effect of the principle of truth from criminal proceedings, thus making the new Serbian criminal procedure extremely similar to the traditional model of civil proceedings, similar as in the US. We should take into account that the concept formulated in Serbia is distinctly paradoxical considering that as opposed to the general rule on that type of judicial proceedings, the principle of truth is applied in some types of such proceedings, i.e. the Court is required, under some strict statutory regulations, to establish the truth *ex officio*, without the evidence proposed by the parties or not bound by such evidence, such as in cases of civil proceedings in which children's rights are decided on or when the subject of civil proceedings are marital and domestic relations.

5. Impact of Principle of Truth on Representative Examples of Simplified Forms of Procedure in Serbia's Criminal Procedure Law

Even when it is formally present in a given civil law model of criminal procedure, as we have explained above and which is the case in our country in terms of the 2001 CPC, *i.e.* according to our decades-long tradition in criminal procedure, certain exceptions are made to the principle of truth and it should by no means be understood as the goal of criminal proceedings which *may* or *must* be achieved at all costs. On the contrary, it is only a goal to be pursued, whereas the very

25 A characteristic example is particularly illustrative of this, namely the rule under which *it is impossible to render a judgment based on the fact that a party has failed to appear at a criminal trial*, as opposed to civil proceedings where the failure of either duly summoned party to appear at a trial results in a judgment on account of a failure to appear at the trial or if this involves a plaintiff, it is considered that merely by failing to attend the main hearing, he has dropped his lawsuit; however, such rules do not exist in the traditional civil law model of criminal procedure.

26 C.Roxin und B.Schünemann, op.cit., p. 78.

27 Ibid., pp, 79 – 80.

28 For more on this topic, L.Meyer-Goßner und J.Cierniak, *Strafprozessordnung – Kommentar*,„Verlag C.H.Beck", München, 2009, pp. 958 – 959.

Criminal Procedure Code provides for a number of exceptions to this rule, such as the institute of statutory limitation, the effect of *in dubio pro reo*, the prohibition of *reformatio in peius, etc*.[29]

Mechanisms of criminal procedure which belong to simplified forms of proceedings represent on the one hand an adequate *departure from the general rules of criminal procedure*, while on the other hand *they ensure faster and simpler disposition of criminal matters* or in other words, proper adjudication of criminal offences which are already being resolved in criminal proceedings or which could become a subject matter thereof. The following forms of criminal procedure belong to the said group: 1) acting in accordance with the principle of prosecutorial discretion; 2) forms of the so-called negotiated justice, such as the agreement on the admission of guilt (plea agreement) in our law; 3) summary conclusion of the main hearing without presentation of evidence or the largest portion of evidence, based on an existing guilty plea of the accused; 4) rules of summary criminal proceedings as abbreviated and simplified proceedings used in cases of relatively minor criminal offences; as well as 5) rules of other summary forms of criminal proceedings, such as the sentencing procedure without the main hearing.

In respect of particular "simplified" or summary forms of criminal procedure, they sometimes may officially require not so much formal as actual departure from the principle of truth, which may be justified in the first place by the fact that the most relevant summary forms of procedure presuppose the existence of either explicit or implicit admission of guilty by a defendant.

An explicit admission of guilt is always required when it comes to the institute of the agreement on the admission of guilt (the 2001 CPC) or the plea agreement when we refer to the 2011 CPC, as well as when the main hearing is concluded without presentation of the largest portion of evidence because there is an adequate guilty plea by a defendant.

An implicit admission of guilt by a defendant or a suspect is required with regard to other summary forms of procedure, for instance in cases when it is proceeded in accordance with the principle of prosecutorial discretion.

6. Principle of Truth and Prosecutorial Discretion

Conditionally deferred prosecution is yet another type of a hybrid or mixed institute of criminal procedure which includes both the elements of the traditional *non-institution of criminal proceedings* on grounds that it is not opportune and the elements of giving *a pardon to the offender*,[30] on condition that by fulfilling some specific obligations he should "earn" such an amnesty; given the nature of such obligations which are also somewhat similar to some criminal sanction (for instance, to a fine or community work), the said institute can to a certain extent achieve *the purpose of sentencing* without formal punishment and some usually adverse effects of administration of punishment or a stigma associated with convicted people. In addition, considering the nature of some obligations imposed on a suspect, which he assumes with consent from the injured party, such a solution of a criminal procedure issue may include some elements of *reconciliation* between the suspect and the injured party or a settlement reached

29 For more on this topic, M. Škulić, *Krivično procesno pravo*, "CID", Podgorica, 2012, str. 78 – 79.
30 Naturally, from the formal point of view, it is not "an offender" because of the presumption of innocence.

by them, which otherwise, when relatively minor criminal offences are concerned, represents one of the more prominent trends in contemporary criminal procedure.[31] A public prosecutor may on his own initiative, in order words independently and without authorization from the Court, stay criminal charges for offences punishable by a fine or a term of imprisonment of *maximum three years*; whereas, in order for charges to be stayed for criminal offences which are punishable by a term of imprisonment of *more than three years and less than five years*, an additional requirement must be met, an authorization needs to be obtained from a pre-trial chamber (Article 236, paragraph 2).

The very fact that the main condition for dismissing criminal charges is that while prosecution is suspended, a defendant should fulfil one or several obligations imposed on him by a public prosecutor leads to a conclusion that without an adequate "cooperative" attitude from the defendant with regard to his own "non-prosecution", the public prosecutor may not act in such a manner which is an exception to the principle of legality of criminal prosecution undertaken *ex officio*. By taking on a particular obligation, the defendant actually *in fact pleads guilty* to a criminal offence because if he believed that he had not committed the offence, he would by the obvious logic refuse to fulfil obligations imposed on him by the public prosecutor, which would practically lead to criminal prosecution and resolution of the matter in the "traditional" manner. Naturally, such a "guilty plea" by a defendant does not exist in this example in the formal sense of the word, which makes it significantly different form the agreement on the admission of guilt (plea agreement). In addition, when a public prosecutor acts based on the principle of prosecutorial discretion, a suspect is "spared" not only from being prosecuted, but from being sentenced as well and he officially "remains an innocent man" although he has de facto "pleaded guilty" to a crime. Naturally, there is a theoretical possibility that a suspect who in fact believes that he has not committed a crime at all, but faced with a contrary opinion of the public prosecutor, nevertheless assumes obligations from the mechanism of conditionally deferred prosecution in order to "spare" himself from the inconveniences of criminal prosecution and maybe even in fear of a potential "judicial error". Since in such cases there is no formal guilty plea by a suspect as opposed to agreements on the admission of guilt, a public prosecutor or the Court (when the pre-trial chamber issues their authorisation) do not have any particular parameters to rely on when evaluating "the veracity of the suspect's plea", but there only remains the general rule according to which the authority which is in charge of criminal proceedings must in principle be conscientious and guided by the principle of truth. Consequently, the said principle is also relevant to the above case, which is why a problem in principle may also occur in that regard owing to the fact that the 2011 CPC (which somewhat differently, but essentially in a similar manner as thus far, governs the way in which public prosecutors act pursuant to conditionally deferred prosecution) does not regulate the principle of truth.

31 Such possibilities are often referred to in the theory of criminal procedure as the so-called diversionary models which represent suitable alternatives to traditional criminal proceedings before a court of law when minor offences and offences in the middle range of seriousness are adjudicated, which in the first place brings about an effect with regard to economy and a stigma which is attached to conviction is thus avoided. For more on this topic, S.Seiler, Strafprozessrecht, 10. überarbeitete Auflage,„Facultas.wuv", Wien, 2009, стр. 22.

7. Principle of Truth and Agreement on the Admission of Guilt (Plea Agreement)

In respect of the agreement on the admission of guilt prescribed by the 2001 CPC (the 2009 Law on Amendments to the CPC), the Court shall issue a substantiated ruling *accepting the agreement on the admission of guilt* and issue a decision which corresponds to the contents of the agreement if it has found that *the following cumulative conditions have been met*:

1) conditions which refer to defendant's awareness and will and the quality of his admission – it is required that the defendant has knowingly and voluntarily admitted to a crime or crimes with which he is charged and that the possibility of his error in judgment has been excluded;
2) a condition which refers to a *criminal sanction and the extent of penalty* – it is required that the agreement stipulates an arrangement between the parties with regard to the criminal sanction or penalty which must be within the scope prescribed by the law;
3) a condition which refers to *defendant's awareness* of the consequences of a concluded agreement – the defendant must be fully aware of all the consequences of the concluded agreement, which means that he must understand that he has confessed to the crime with which he is charged and it is particularly required that the defendant has fully understood that by signing the agreement, he waives two important rights: a) the right to a trial and b) the right to appeal a judicial decision which is based on the agreement;
4) a condition *under which there needs to exist other evidence which corroborates defendant's admission of guilt* – there must exist other evidence which support the defendant's admission of guilt;
5) a condition under which *the rights of the injured party and the principle of fairness must be respected* – the agreement on the admission of guilty may not violate the rights of the injured party nor may it run contrary to the reasons of fairness.

The condition under which a defendant's confession must be supported by other evidence essentially means that it is in fact imperative that the Court is satisfied that it is a truthful confession and that it must be corroborated by other evidence, which implies that this summary form of procedure must be in accord with the principle of truth in criminal proceedings.

The new Criminal Procedure Code introduces *three types of agreements which may be reached by a public prosecutor and a defendant*: 1) a plea agreement, 2) an agreement on testifying by a defendant and 3) an agreement on testifying by a convicted person.

The first agreement between the parties is only another version of what is referred to in the 2001 Criminal Procedure Code as the agreement on the admission of guilt in accordance with the amendments passed in 2009, whereas the other two agreements are variations on "enlisting the help of a cooperating witness" or providing for the former institute of witness collaborator in a another manner from the nomotechnical aspect. Since only the first type of plea agreement represents a summary form of criminal procedure in the new CPC, we will analyse how it correlates with the principle of truth.

One of mandatory elements of any plea agreement, among other things (particulars of the offence, defendant's plea, etc.), is *an agreement on the type, extent, or scope of the penalty or other criminal sanction* (Article 314, paragraph 1, item 3). It would follow from the above

that the parties may agree *only on the scope of penalty* within the range prescribed by the law (for instance, two to three years' imprisonment or alike), after which a judge would be left to impose a specific extent of penalty within the agreed scope. However, that is not consistent with a provision contained in Article 317 under which the Court shall pass a judgment accepting a plea agreement when it has found that certain conditions have been met, such as that a guilty plea was entered knowingly and voluntarily, in which process it remains unclear how the Court can accept the agreement when in respect of a criminal sanction, it only stipulates the scope of penalty. Which penalty should then be imposed in a judgment of conviction? On the other hand, if it is presumed that when a plea agreement stipulates only the scope of penalty, the Court is completely free to impose any extent of penalty within the "agreed scope", such a presumption would not stand to reason because how can the Court impose any penalty at all or determine the extent of a specific type of penalty if it has not presented and examined evidence concerning the circumstances which are relevant to sentencing?[32] If the intention was to afford the parties with a possibility to agree only on the scope of a penalty, and then to leave it to the Court to impose a specific extent of penalty within the given scope if it ultimately decided to accept a plea agreement, it should have been laid down that the Court should present evidence to establish the facts on which the extent of penalty depends.

The Court shall issue a judgment accepting a plea agreement and pronouncing a defendant guilty if it has found (Article 317 of the 2011 CPC):

1) that the defendant has knowingly and voluntarily pleaded guilty to a criminal offence or crimal offences with which he is charged;
2) that the defendant is aware of all the consequences of the signed plea agreement, in particular that he waives the right to a trial and that he accepts the restriction on the right to file an appeal (Article 319, paragraph 3) against a court's ruling based on the agreement;
3) that there exists other evidence as well which does not run contrary to the defendant's guilty plea;
4) that the penalty or other criminal sanction or other measure in respect of which the public prosecutor and the defendant have reached an agreement is proposed in line with the criminal and other law.

32 This is allowed in the US, the cradle of the plea bargaining system, and it even occurs as a rule, which means that a defendant pleads guilty to a crime and a prosecutor proposes an appropriate sentence to the Court; however, the Court is not formally bound by such a proposal and the sentence it imposes may even be stricter, which happens as a rule in practice. Nevertheless, in the US it is possible to "assess" fairly precisely in advance which sentence will be imposed more or less in each particular case, despite the above-mentioned. Possibly, the said US solution had served as a model to our lawmakers, who had nevertheless forgotten to harmonise such a solution, which may have a certain ratio legis, although it is questionable that defendants would so readily risk getting involved in an uncertain situation concering judicial specification of the penalty whose "scope" has been proposed, in an adequate manner with other provisions from the Code and thus provide for judicial presentation of evidence necessary for deciding on the extent of penalty, i.e. establishment of facts which would be significant as mitigating and aggravating circumstances. Namely, US courts are guided by very precise and nearly automatically formulated "guidelines" on the duration of penalties for particular criminal offences and providing there exist specific circumstances (e.g. the offender is a recidivist, severity of consequences, etc.), the statute does not require either in the US that evidence on which the type or extent of sentence depends must be presented, whereas in our country it is formally impossible for the Court to impose a specific extent of penalty (even within the scope previously *defined by the parties*) without beforehand presenting evidence from which facts relevant to sentencing will follow.

As opposed to the 2001 Code, the Criminal Procedure Code passed in 2011 represents a very significant departure from the principle of truth as well as a potential departure from the principle of the fair conduct of criminal proceedings owing to fact that it is no more required that there must *exist other evidence supporting* a defendant's plea, but "only" other evidence which *does not run contrary to his plea, which is in essence a substantially lower standard of proof*. This implies that it practically may be any kind of evidence, which, although not contrary to the plea, does not even have to be relevant to it. Consequently, it is possible that in practice a guilty plea per se is in effect and with the existence of virtually "any other evidence" sufficient, which does not appear to be an adequate solution.

8. Principle of Truth and Summary Conclusion of Main Hearing Based on Defendant's Guilty Plea

Under the 2001 Criminal Procedure Code, *a defendant's admission of guilt* is not some kind of *absolutely superior evidence* or the so-called Queen of evidence (regina probationem) in our criminal procedure, which is also immanent in other civil law models of criminal procedure in modern democracies, even though a defendant's guilty plea entered at the main hearing in principle releases the Court from the duty to present further evidence other than in *two situations*: 1) when the Court finds that defendant's plea is not valid because there are reasonable grounds to suspect the veracity of his confession or if the confession is incomplete, inconsistent, vague, as well as if it is not substantiated with other evidence; 2) when it involves evidence which influence a court's decision on the type and extent of sentence, which must nevertheless be presented. The so-called uncorroborated admission of guilt (an "empty" plea) which is not substantiated with other evidence may not be sufficient. In the logic of things, if an admission of guilt is unquestionably true and a confession is full, unambiguous, and consistent, other evidence which support it will certainty follow from such a confession or a statement containing it or it will provide a solid basis for the Court to present other evidence which substantiate such a confession.

Consequently, under the rules contained in the 2001 Criminal Procedure Code, a confession judged by the Court to be *truthful* allows that proceedings are concluded summarily, only with the presentation of evidence necessary for the Court to make a decision on the type of criminal sanction and extent of penalty.

Under Article 392, para. 1 – 3 of the 2011 CPC, after the prosecution has presented the charges, a presiding judge will put these questions to a defendant: 1) if he has understood the charges and if the judge is convinced that he has not understood them, he shall once again set forth their contents to the defendant in a manner in which he can comprehend them the best; 2) if he wishes to enter his plea and state his position on a restitution claim, providing one has been filed; 3) if he pleads guilty to the criminal offence with which he is charged, and if the judge is convinced that the defendant has not understood the meaning of a guilty plea, he shall explain it to him as well as the consequences thereof in a manner in which he can comprehend it the best.

Under Article 88 of the 2011 CPC, when a defendant pleads guilty to a crime, the authority in charge of the proceedings is obligated to continue with the collection of evidence on the crime and its perpetrator only if there are *reasonable grounds to suspect the veracity of his confession* or if his confession is incomplete, inconsistent, or ambiguous and if it is contrary to other evidence.

Under Article 350, paragraph 3 of the 2011 CPC, if a defendant has pleaded guilty to a criminal offence at the main hearing, the proposition of evidence to be examined at the main hearing shall be limited to the evidence on which depends 1) the assessment of whether or not his confession may be regarded as valid and 2) a decision on the type and extent of criminal sanction. With regard to the assessment of the "quality" of defendant's confession, the Court will judge if it satisfies the prerequisites referred to in Article 88 of the CPC, meaning its following characteristics: 1) whether or not it is incomplete, 2) inconsistent, or 3) ambiguous (which are all the same qualities mentioned in the 2001 CPC, but what is missing is *the existence of other evidence which substantiates it*) as well whether or not there exists a reasonable suspicion about the veracity of his confession. This indicates that should the Court assess that a confession is full, consistent, and unambiguous and that there are no reasonable grounds to believe the confession is false, proceedings are summarily concluded only with the presentation of evidence relevant to sentencing.

Not even with regard to this issue has the new Serbian CPC passed in 2011 departed from its principled position that the principle of truth does not belong in criminal proceedings. Namely, even though it may appear at first glance that Article 350, paragraph 3 in conjunction with Article 88 lays down a requirement that a confession is *truthful*, which would be an adequate solution, unfortunately it is not the case here, because in addition to the confession not being incomplete, inconsistent, and ambiguous, it suffices that there are no reasonable grounds to suspect the veracity of the confession; this means that the Court may question the veracity of a confession up to a point, but that is not still enough for it to pass a judgment of conviction precisely on the grounds of "a questionable confession". However, when compared with other provisions which are far more "rigid" in their treatment of truth, we should applaud these rules from the new CPC which come rather close to the attribute "truthful" when describing the confession, because if it is *full, consistent, and unambiguous*, it can practically be characterised as *truthful*, which is in a way implied when it is said that there must not be any reasonable grounds to suspect the "veracity" of the confession. In fact, it means that there is no reasonable suspicion that the confession is false. Naturally, it would be even better if a condition was laid down that the Court should be convinced that a confession is *truthful*, in which regard there would obviously have to exist other evidence which substantiates the said confession and not only evidence which is not contrary to the confession.

9. Principle of Truth and Some Markedly Summary Types of Criminal Procedure

Under the 2001 CPC, there are two types of markedly summary criminal procedures which include sentencing procedures in which the main hearing is not conducted, namely: 1) sentencing procedure prior to the main hearing and 2) procedure for imposing a sentence and a suspended sentence by an investigating judge.[33] Naturally, summary proceedings themselves, according to their definition and a name, represent a (more) summary form of procedure than the common (ordinary) criminal proceedings.

The sentencing procedures which do not include a main hearing are special types of summary criminal proceedings which are characteristic because they lack the main hearing and are

33 The second type of summary procedure is in fact impossible since it concerns criminal offences which are no longer subject to investigation, which means that it only an "empty" norm.

basically very simplified forms of proceedings,[34] which ensure a very prompt conclusion of criminal proceedings. Given the fact that in such proceedings there is no trial in the narrow sense of the word and that a defendant is in principle entitled to have a trial, *defendant's consent is the conditio sine qua non* when criminal matters are thus disposed of because the defendant and his defence attorney can automatically cause the proceedings to "return" to their ordinary course by activating a specific procedural mechanism, i.e. by filing an objection against a ruling issued in such proceedings. Apart from this, when such types of proceedings are conducted, rules contained in the Code restrict the Court with regard to the imposition of criminal sanctions which would otherwise be possible if the traditional summary proceedings were conducted, which practically provides "motivation" for a defendant to accept such proceedings, i.e. not to file an objection which would automatically vacate a ruling issued in such proceedings and thus lead to the traditional manner of disposition of criminal matters.

Both forms of the utmost summary conclusion of criminal proceedings involving minor or less serious crimes, which come down to imposition of a criminal sanction without holding the main hearing *presuppose that a defendant assent to them*, because if the defendant should file a proper legal remedy, the proceedings are "automatically returned to the ordinary course of action". Thus, by assenting to a suitable summary form of proceedings, the defendant *both de facto and implicitly pleads guilty to the crime*, which to a certain extent resembles defendant's assent to assume obligations by whose fulfilment he "earns" not to be prosecuted in cases when a public prosecutor (conditionally) defers prosecution by following the principle of prosecutorial discretion.

A similar, maximally "simplified" form of criminal proceedings used in cases of relatively less serious crimes (punishable by a fine or imprisonment of up to five years) can also be found in the 2011 CPC and it is a *sentencing hearing*. Here as well, a defendant's assent to such a form and manner of conclusion of criminal proceedings is the *condition sine qua non* since pursuant to Article 517, immediately after the conclusion of the sentencing hearing, a judge will issue a judgment of conviction or order the main hearing. The judgment of conviction is passed if a defendant has 1) assented to a motion put forward by a public prosecutor at the hearing or 2) failed to respond to a summons to appear at the hearing. As opposed to this, if a defendant does not assent to a motion put forward by a public prosecutor at the main hearing, a judge will issue an order setting the date, time, and venue of the main hearing, which means that proceedings are thus "automatically returned to the ordinary course of action."

10. Conclusion

Summary forms of criminal proceedings are very important because if they are introduced into the system of criminal procedure on a wider scale and used significantly more often in practice, the caseload of the criminal justice system may be reduced in an appropriate way and it may result in far shorter average duration of criminal proceedings.[35]

34 For more on this topic, Z. Jekić and M. Škulić, Zakonik o krivičnom postupku – *sa predgovorom, objašnjenima i registrom pojmova*, Beograd, 2002, str. 31.

35 For more on this topic, S. Bejatović, *Pojednostavljene forme postupanja u krivičnim postupcima i njihov doprinos efikasnosti krivičnog postupka*, proceedings of the conference Srpsko udruženje za krivičnopravnu teoriju i praksu, Zlatibor, 2009, str. 58 – 59.

The majority of summary and the so-called simplified forms of criminal proceedings presuppose a corresponding "cooperating" attitude of a defendant with regard to such form of criminal procedure; on the one hand, this comes down to a requirement that the defendant must plead guilty to a crime, while on the other hand, the defendant must be adequately "motivated" to agree to an "abbreviated" form of procedure.

Defendant's motivation, when he "assents" to a corresponding simplified form of proceedings basically comes down to a milder criminal sanction which will be imposed on him in such criminal proceedings, which is sometimes provided for in the law, such as in our country when sentencing proceedings which do not involve the main hearing are concerned, and sometimes it is in fact implied, such as in cases of agreements on the admission of guilt or plea agreements, i.e. it may be subject to plea bargain "negotiations". Naturally, this is essentially justified or there is a relevant reason behind it, but in respect of this issue, a certain amount of caution is advised since in essence, the principle of truth should not be neglected with regard to summary forms of conducting and concluding criminal proceedings and it is primarily reflected in the rule that the Court must be satisfied, based on the existence of other evidence and not only and exclusively on defendant's statement, that his confession is *truthful*. In that regard, there are no reasons for some unreasonable "mystification" because, by the obvious logic, a genuinely truthful confession will in practice usually "produce" other evidence which *substantiate it*, which is why it is wrong that the 2011 CPC insists in corresponding provisions which govern defendant's confession, such as confession as an element of a plea agreement, that there must exist other evidence "which is not contrary" to the confession. Such wording is not adequate since in practice it may in fact lead to the "survival" of confessions which are truly completely "uncorroborated" confessions. Namely, it may happen that there are a number of pieces of evidence which are really *not contrary to a confession*, but are also not related to it in any relevant way, which would be completely absurd and may lead to a markedly unfair manner of resolution of criminal matters if such confessions were routinely assessed as credible.

With regard to the evaluation criteria for veracity of a defendant's confession and in general the fundamental condition under which simplified forms of criminal proceedings may be conducted, which comes down to an explicit or implicit "agreement" by a defendant, in particular when the plea agreement is concerned, the 2001 Criminal Procedure Code unfortunately offers far better guarantees than the rules contained in the new Criminal Procedure Code enacted in 2011, which more than anything is a consequence of an *erroneous and damaging devaluation of the principle of truth* in that Code.

Zvonko Fišer, PhD[1]

State Prosecutor as a Party to Summary and Simplified Criminal Proceedings in Slovenia

1. Introduction

At the very beginning, we need to explain that Slovenia belongs to the category of those now quite rare countries which have not until this moment (yet) reformed their criminal proceedings in accordance with the prevailing trend that has developed in Europe since the late nineteen-eighties.

Certainly, this does not mean that Slovenia's Criminal Procedure Code (CPC)[2] has not changed in many ways since its adoption in the mid-1990s. On the contrary: in the first place, a number of important decisions passed by the Constitutional Court of Slovenia led to several Amending Laws to the Code and thus changing some important elements of procedural law. From time to time, the lawmaker himself would introduce some changes, although, some believe, such decisions happened too rarely and occasionally they were made with too much caution and even fear.

In any case, the introduction of the institutes of the so-called restorative justice, which as we all know result in abandonment of prosecution should be mentioned as one the above changes. Only afterwards did Slovenian legislators turn to the real institutes of summary and simplified proceedings in narrower terms, to which we focus on in this paper. Nevertheless, both directions have undoubtedly resulted in some positive and innovative modifications of the Slovenian criminal procedure.

In any event, an indisputable fact remains – all those changes took place within the framework of procedural law whose underpinning concept and structure had not been changed. It could be

1 State Prosecutor General of the Republic of Slovenia and professor

2 See OG RS /*Official Gazette of the RS*/, No. 63/94 for the original CPC. It came into force in early 1995.

said that only recently, and I refer to the amendments which came into force in May 2012[3] when (true) plea bargaining was legislated, have deeper, even systemic amendments been made in terms of the principles underlying the 1994 Code.

One could say, without exposing himself to being proven wrong, that Slovenia's Criminal Procedure Code (and this also applies to Yugoslav Codes or the Criminal Procedure Codes prior to the early 1990s) did not provide for the true summary and simplified proceedings. It was a major shortcoming of the system. What was officially referred to as summary proceedings[4] was nothing more than a simplified and rather uninventive variation on the regular criminal proceedings, its "shorter" brother, so to speak. Over time, differences between the regular and thus simplified proceedings had become slighter not greater, which would be expected in our period in history. The lawmaker made a decision sic et simpliciter to legislate some sort of not-so-complex proceedings to be applied to all less serious offence. The line of division that was set was completely linear, and it took into account only the prescribed punishment, no exceptions at all.[5] No other potentially relevant circumstance was of interest to him; he completely ignored the will and aspirations of the parties,[6] as well as what is required in connection with the proceedings in each specific case, for instance with regard to proving the case and similar.

The fact that more room for manoeuvre for shortening or simplifying criminal proceedings was allowed and created by some variants of the regular criminal proceedings is a paradox. This particularly refers to the both forms of direct indictment[7] and, to the evidentiary or preliminary hearing,[8] which is usually forgotten because it is a case of a stillborn in our criminal proceedings since it has unfortunately never taken hold as a potential starting point for plea bargaining.

Whereas the parties to the summary proceedings which have been thus formulated have minimal or no influence on the selection of proceedings, the use of above-mentioned variants of the regular proceedings depends for the most part on a decision of the state prosecutor. The opposing side, the defence, has virtually been marginalised, so it could hardly be maintained that those cases stand for summary or simplified procedures which meet contemporary theoretical standards in this field.

3 Law Amendding the CPC-K, see OG RS, No. 91/2011.
4 See Chapter XXV of the CPC whose title is Summary Proceedings before Circuit Court.
5 In the Slovenian CPC, that line has been set at the level of three years' imprisonment and there are (practically) no exceptions to this. It is evident to everybody that it involves an enormous number of offences which must be dealt with in practice, but which differ among themselves to a great extent. However, in spite of this, all those offences are processed in one and the same type of proceedings, no difference whatsoever.
6 It is clear that this refers to the prosecuting authority, although by describing and classifying the act in an accusatory instrument, he exerts a substantial influence on which type of proceedings will be selected for the case. It would be interesting to learn if state prosecutors have used mechanisms such as correctionalisation within the framework of the known institutes of criminal procedure. This phenomenon has not yet been investigated in Slovenia and as a state (public) prosecutor of many years I would dare to assert that it has not been used systematically, in particular for procedural motives (to refer cases to a simpler type of proceedings). At the same time, it is completely certain that the said mechanisms have been applied to individual cases.
7 See Article 170, paragraphs 1 and 6 of the CPC.
8 See Article 169, paragraph 3 of the CPC

2. Prosecuting Authority and Summary and Simplified Proceedings

This paper addresses more recent institutes of Slovenian criminal procedure law which lead to summary or simplified proceedings and in which the role played by the prosecuting authority is either decisive or very important. However, we would paint an incomplete picture if we did not consider in this context the institutes of restorative justice[9] which exist in our system of criminal procedure, although, strictly speaking, they do not belong to the class of summary or simplified proceedings; consequently, we will briefly deal with them as well.

Nonetheless, this time we will not put an emphasis on theoretical issues (which are still very close to me) but instead, we will give priority to some practical issues, such as: how have summary and simplified proceedings been accepted in practice in a wider context; what results have they yield; and perhaps, where do their weaknesses lie which have thus far come to light. The subject is rather vast and complex, so it will not be possible to discuss all the procedural options on the same level: we know rather a lot about some of them, while others are so recent that we are barely capable of making first overall assessments of their implementation.

Summary and simplified proceedings whose use depends on whether or not they are opted for by the parties belong to the category of proceedings which have a subjective basis.[10] In such proceedings, the accusatory and thus adversarial character of procedure is stressed. A party may move for summary or simplified proceedings to be conducted (usually as an alternative) and the opposing party must agree to it. There can be various models of such proceedings, as well as procedures which must be followed to get to them, and to a certain extent the levels of parties' consent. But in principle, the parties have equal roles and they should also have equal procedural rights, so it depends only on their interests which party will show more initiative in each particular case and who will wait for a move of the opposing party, while in some other case, maybe a very similar one, the situation will be reversed.

It is thus important that it is a subjective decision (made voluntarily and knowingly) by the parties to accept summary or simplified proceedings or to embark thereon. If the minimum required consent is lacking, then there cannot be (true) summary or simplified proceedings since the Court may not impose on the parties a decision regarding the selection of the proceedings it deems fit.

Only the state prosecutor in his capacity as prosecuting authority has a special task to decide on the number of cases he will bring before the Court. I am deeply convinced that the purpose of a modern prosecuting authority is to bring before the Court (only) as many cases as the Court may adjudicate on within a reasonable period of time. Selection of cases which will be prosecuted based on their quality and quantity, abandonment of prosecution, as well as summary and simplified proceedings are the principal instruments which state prosecutors use to perform this task of theirs.

9 See: Bošnjak, M.: Koncept restorativne pravičnosti. Magistarski rad, Ljubljana, 1999

10 Grounds for shortening or simplifying proceedings may include, not only the above-mentioned – subjective grounds, but also the objective ones (seriousness of a crime, compelling evidence, a flagrant manner in which the crime was committed) and a combination of the two. Advanced and well-articulated procedural laws mostly take into account all or at least most of those grounds. Unlike such laws, our law was lacking in true "philosophy of shortening and simplification" because its starting point was that a judgment of conviction (on the merits) was always the result of fully conducted proceedings and a main hearing.

As we have previously mentioned, this paper will give a short account of the Slovenian experience, including a special overview of the role fulfilled by a state prosecutor in his capacity as the prosecuting authority in the public interest, which pertains to:

- conditional suspension of prosecution (Article 162 of the CPC);
- settlement procedure (mediation, Article 161.a of the CPC);
- penal orders (chapter XXV a of the CPC);
- plea agreements (chapter XXVI a of the CPC, along with pre-trial hearings).

In prosecutorial jargon in Slovenia, suspended prosecution and settlement procedure are usually referred to using a single expression – an alternative, because they are characterised by alternative reactions to a committed crime.

3. Slovenian Experience

3.1. Conditionally Suspended Prosecution

(Conditional) suspension of prosecution was the first institute of restorative justice which was officially introduced into Slovenian criminal procedure law as a mechanism of selection[11] by the very enactment of the CPC in its original text and form in 1994. Suspended prosecution, which is so well-known in the comparative law that it should not be even presented,[12] was legislated on the model of the institute referred to in Article 153.a of the German Criminal Procedure Code.

Principal solutions are very similar to the German model, but there are also some significant differences: for instance, prosecutorial decisions are not subject to judicial review. Such a solution can be met with criticism, although – from the aspect with which we are particularly concerned here, namely powers of prosecuting authorities – it is in accordance with the position of the state prosecutor in our criminal justice system. Namely, his so-called negative decisions per se (decision to dismiss criminal charges, which can also happen after successfully suspended prosecution) are not subject to judicial review in principle, which is why they are not subject to it in this case either.

Further development of the institute of suspended prosecution offers excellent material for an analysis of what the legislator has done well, where he went wrong, and then subsequently had to make improvements.[13] What definitely comes to our attention is the fact that potential application of suspension of prosecution was extremely limited at first, only to criminal offences punishable by a fine or imprisonment of maximum one year. It is apparent that the legislator was in fear

11 Legislator's intention that suspension of prosecution would function as a mechanism of selection used to prevent prosecution of offences of minor significance was so clear that it probably does not require any explaining here. On this topic and more, see Bavcon, L. (lead researcher), Uveljavljanje novih institutov kazenskega materialnega in procesnega prava. Raziskava št. 124, Inštitut za kriminologijo pri PF v Ljubljani, Ljubljana, 2000.

12 Serbian legal community is by all means familiar with it; see Article 236 of Serbian CPC.

13 It is impossible to cover within the scope of this paper objections made to the institute of conditional prosecution, which are known in comparative law and which had also been raised in our country at first. Truth to be told, it needs to be added that afterwards, after it was used in practice, those objections had almost completely subsided.

of giving too much room to a mechanism of selection which was procedural in nature but with which he had had no previous experience.

At first, the idea was that it might be sufficient to gain initial experience, allow state prosecutors to get practice and get used to a new procedural situation. It proved fairly quickly that the scope of criminal offences was too narrow, as many of us had believed since the beginning.

Suspension of prosecution had not taken hold in practice because it was too limited to a relatively small number of the least serious criminal offences, while being surrounded by its competitors, other existing institutes of criminal law[14] which had already at that point allowed state prosecutors to abandon prosecution with even less effort and involvement on their part than it was required by the said institute. It could be maintained that state prosecutors, looking from a narrow perspective, acted rationally in a way, but did not sufficiently consider the interest of the system which was to avoid a trial in cases of offences of minor significance whenever possible. That transition, in which state prosecutors started to understand what their role was in criminal proceedings from a broader perspective, was one of the major setbacks which prevented achieving better results both in respect of the alternative and summary and simplified proceedings.

Suspended prosecution required that the average prosecutorial practice and tradition of those times (we must go back nearly two decades) should adopt new approaches which thus far had been either rare or had not existed at all. Selection criteria needed to be laid down for cases in which prosecution would be suspended, then procedure needed to be defined,[15] and prosecutors who would follow that procedure needed to be trained and given instructions. Many objections were made for reasons of principle and they were linked to the role of the prosecuting authority in the system of criminal law and alike; let us avoid enumeration because so much more could be said on this topic than the time available for this entire paper allows us to do.

In our opinion, the central problem was the overall situation and the system into which suspension of prosecution was introduced, which was not favourably disposed towards such an innovation. We failed our exam precisely at the question at which as a rule fail legislative solutions which are, even though well-meant, adopted primarily on a voluntary basis. There was a serious danger that an institute, already well-known and tested abroad, which could serve as a relevant and relatively adequate deflator and mechanism of selection in the area of criminal prosecution, would collapse before it had become established. The fact remains that in the first years following its adoption state prosecutors virtually did not use it and it more or less remained an empty word.

In the years that followed, the scope of suspended prosecution was broadened in a number of directions due to weaknesses which have already been described. This primarily referred to the offences which could be subject to suspended prosecution. Thus, the first step was taken in 1998,[16]

14 This, above all in this jurisdiction, included a traditional institute of offences of minor significance (Article 14 of the then-current Slovenian CC). Although interesting from the aspect of theory, but less inspiring from the view point of practice, the relationship between the institutes which allowed the prosecuting authority to select cases which he would prosecute can neither be explored here. For more on this topic, see: Izbirni mehanizmi v kazenskem postopku, u: Izhodišča za nov model kazenskega postopka, K. Šugman (ur.), Inštitut za kriminologijo pri PF v Ljubljani, 2006

15 For instance, through mandatory instructions which exist even in our legislation governing state prosecution. For present purposes, see Art. 167 of the State Prosecutor's Office Act and articles which follow it (SPOA-1, OG RS, No. 58/2011); such instructions have been adopted and still exist.

16 See OG RS, No. 72/98.

when together with the introduction of the settlement procedure, which will be dealt with below, the scope of suspended prosecution was widened linearly to include all offences punishable with imprisonment of up to three years. It was a very important inclusion, even relevant from the perspective of statistics and phenomenology. However, the process had not been completed yet, because later on, there was another widening of the scope, which this time was not linear, but it rather included certain classes of more serious offences.[17] Most recently, the number of obligations which a state prosecutor can impose on a suspect has been increased, but it is probably the less interesting aspect at the moment.

After all of the changes mentioned above, conditionally suspended prosecution has been used relatively frequent in practice. For instance, prosecution was suspended in case of 1,890 persons in 2006 (5.8% of all the charged persons), 1,379 of which had fulfilled their obligations, so criminal charges against them were dismissed. Afterwards, there was a percentage decline (in 2010, it was reduced to 4.7% and then in 2012, it fell to 4.4%).[18] At first glance, these numbers may appear modest,[19] but considering that the number of criminal trials thus avoided was equal to the number of people, whereby money and human resources were saved (in prosecutor's offices and in courts), we believe that those results are not to be dismissed by any means. What causes concern is the trend of decrease in the use of suspended prosecution in prosecutorial practice. Reasons behind this are complex and they will be addressed in more detail below when the results of settlement will be commented on, which have unfortunately somehow taken the same direction. Another unfavourable conclusion which must not be underestimated is that suspended prosecution is very differently applied from one prosecutor's office to another; this is surprising for a relatively small country as Slovenia, in which there are no large cities and so differences between its regions are not particularly big.

3.2. Settlement Procedure (Mediation)

At first, Slovenian legislation did not provide for the settlement procedure as one of the procedural options which could lead to abandonment of prosecution, although it was similarly an institute that was known in comparative law. Only after facing criticism over the fact that suspended prosecution may not be sufficient to cover all the situations in which prosecution may not be necessary or opportune and that alternatives to it should be sought, the lawmaker decided to legislate mediation as well.[20] Similarly as in the case of suspended prosecution, a state prosecutor is in charge of making decisions on mediation. Namely, he is the one who selects cases in which there will be an attempt at settlement and he also ultimately decides if a settlement procedure should be considered successful or not.

17 This happened in 2004, when the CPC was amended (see: OG RS, No. 43/2004). Some (in abstract terms) more serious offences, which in more concrete cases or forms can be less serious (*e.g.* some offences in connection with narcotics, aggravated thefts, blackmail, etc.) were also included in the group of offences for which prosecution could be suspended. The record with regard to the statutory punishment was set by allowing the use of narcotics from Article 187, paragraph 1 of the CC-1, which is punishable with six months' to eight years' imprisonment.

18 All statistical data presented in this and following chapters are taken from annual performance reports of state prosecutor's offices in Slovenia and they refer to the years 2006, 2010, and 2012.

19 By way of illustration, in 2012, all Slovenian state prosecutor's offices received criminal charges against a total of 33,352 adult individuals.

20 See Article 161.a of the CPC, which was legislated by the above mentioned Law Amending the CPC-A in 1998.

As opposed to suspended prosecution, state prosecutors do not participate in the mediation procedure as such, either indirectly or in particular directly. Namely, settlement procedures are handled by mediators, persons who do not belong to the system of criminal justice and who are independent of prosecutors: mediators are not just any persons, but people who have to have certain personal qualities and specific education. Mediators in criminal proceedings are organized and connected into an association, but they should not be confused with mediators in civil or other non-criminal proceedings. The duty they discharge is honourable, but for their efforts, they only receive a symbolic reward from the budget of the state prosecutor's office both for successful and unsuccessful settlement procedures.

Cases in which mediation is used should be essentially different from suspended prosecution: it is believed that in those cases a mediator should take action to eliminate a criminogenic situation which exists between the parties who have engaged in a disagreement. Thus, the emphasis is put not only on an alternative, although still (quasi)punitive reaction to a crime outside of the realms of the traditional criminal proceedings, but on a more ambitious goal: to eliminate or at least reduce the danger that the crime will be committed again.

The scope of application of mediation, which at first could be used for criminal offences punishable by imprisonment of up to three years, was later broadened into two directions. Similarly, as in the case of suspended prosecution, mediation can now be applied to some more serious offences which are expressly cited in the Code.[21] In certain cases this includes very serious offences, but in no case does it include criminal offences which are punishable by imprisonment of more than five years. Another broadening of the scope, which had occurred some time earlier, was even more interesting since it went beyond the rule according to which it was an institute completely controlled by state prosecutors and limited to pre-trial proceedings. Namely, mediation can also be conducted in case when summary proceedings have already reached the stage of the main hearing.[22] In such cases, the Court may adjourn the hearing and give the parties an opportunity to settle their case. If they succeed in settling, criminal proceedings are discontinued. This form of mediation is used more rarely and entails certain dangers.

In Slovenia, state prosecutors use mediation in parallel with suspended prosecution. When they opt for an alternative, they take into account both procedural options and select the one which they deem the more suitable one for that specific case. By way of comparison, here are some statistical data on the settlement procedure: 1,660 adult individuals were directed towards the settlement in 2006 (5.1% of charged persons)[23] and it was successful in the case of 880 persons, which amounts to around 53%. As a rule, the percentage of settled cases is somewhat lower that the percentage of successfully suspended prosecutions, which is in our opinion to be expected. In percentage terms, in 2010, there was a decrease when the number of persons who partook in the settlement procedure fell to 3.8% of all the charged individuals, to be reduced even more in 2012 to no less than 2.4% of all the charged persons. Meanwhile, the success rate of the settlement procedure has been in the range 50 to 55 percent of the persons directed towards the settlement of their cases.

21 By the same Law Amending the CPC as in the case of suspended prosecution, consequently: the 2004 CPC-F (see footnote no. 16).
22 See Article 443.a of the CPC, which was legislated by the Law Amending the CPC-D (see OG RS, no. 111/2001).
23 Let us mention that both suspended prosecution and settlement procedure are also applied to proceedings against juvenile offenders. Issues connected with the use of alternatives in proceedings against juvenile offenders are somewhat different which is why they will not be considered in this paper not will statistical data be presented.

Taken as a whole, the alternative is a very complex issue in terms of prosecutor's involvement and it is an endeavour looking from the point of view of organisation. First and foremost, a network of mediators needed to be established across the country and then provisions needed to be made with regard to their education. Funding (not so insignificant amounts) needs to be provided from the budget for these two institutes (alternatives). It needs to be ensured that conditions in which mediators work are appropriate (premises outside of the prosecutor's offices) and they need to be supervised constantly and even (by way of illustration, only one activity is mentioned) disciplinary actions need to be taken in case they violate any of the rules which apply to their work.

However, there is more to this: if any tasks or obligations arise in connection with suspended prosecution or mediation which entail community work, arrangements need to be made with a view to that. At first glance, that seems easy, but it is not. Fortunately, other authorities and not directly state prosecutor's offices are in charge of those tasks. The establishment of the Victims Compensation Fund is an example which proves how challenging such endeavours can be. Although such a fund would be beneficial to the state budget, so many problems have come to light that the fund has not been set up yet (after nearly two decades!).

Suspended prosecution may entail ordering a suspect to pay a certain sum to the benefit of humanitarian organisations. Given the fact that in the last few years those sums have been in the neighbourhood of hundreds of thousands of Euros per year, it is reasonable that this portion of work, which also falls on the back of state prosecutor's offices, must be performed in an absolutely correct and transparent manner. In any event, beneficiaries of those sums have great interests.

From the perspective of the judiciary (and the society as a whole), the alternative results in significant economies. Cases are resolved faster and without court's involvement. Nevertheless, the criminal justice system is not that self-contained to be able to use such economies as much and as completely as possible.

Unfortunately, even though mandatory instructions for suspended prosecution and settlement have been adopted, the practice of district prosecutor's offices is still fairly inconsistent. Some offices use the alternative more frequently than others; some, for various reasons, give precedence to suspended prosecution while others to settlement and *vice versa*.[24] This can result in unequal treatment of persons (suspects or injured parties).

Certainly, those two legal institutes are useful and the state prosecutor is the person who is practically in charge of all of their aspects. In addition to him, the roles of a suspect and the injured party are also significant since those proceedings are not possible without their consent, whereas the role of the court is completely marginal and limited to rare instances of mediation in already instituted criminal proceedings. If criminal charges have been dismissed on these grounds, the injured party will naturally lose his right to institute proceedings as a subsidiary prosecutor.

24 We need to be realistic when it comes to selecting: criteria are not always the ones which are prescribed and which should stand in the foreground according to theory. If a prosecutor's office has better experience with one or another procedural option, then it is possible that it favours one against the other. If a prosecutor's office is short of staff, it is more likely that it will not use suspended prosecution which requires more personnel involvement (the entire proceedings are conducted by prosecutorial staff). However, on the other hand, a settlement procedure costs much more, so in larger prosecutor's offices, costs of mediation may be considerable, in particular at the time of currently restrictive budgetary policy. The issue of good quality mediators arises with respect to persons involved in the process, but there are also other factors that influence the selection of alternative proceedings.

On several occasions we have drawn attention to the trend of decreasing use of suspended prosecution and mediation. Unfortunately, causes which have led to such a decrease have not been systematically examined, so we can only speculate on them. One of them is probably their relative complexity: prosecutor's offices must put a lot of effort into them, but their results are uncertain. On the other hand, whereas there used to be a time when good quality institutes which were used to select which cases would be prosecuted and how were scarce, today there is an abundance of such institutes (mostly procedural) in this area and they might be even overlapping. And finally, in parallel with the abolishment of its traditional offence of minor significance, Slovenian legislation has provided for new grounds for dismissing criminal charges and that is disproportion between the minor significance of a criminal offence and consequences of criminal proceedings.[25] It is not possible to critically examine this regulation in this paper, but the fact remains that it is a rival to suspended prosecution and mediation. What is more, it has an advantage, so it first needs to be established whether or not prosecution is inappropriate and only then, if it is not, suspended prosecution and settlement can be taken into account. And since a penal order, which we will introduce below, has virtually occupied the same space in the meantime, the task is even more demanding…

3.3. Penal Order

If we were close to the outlines of summary or simplified proceedings or even crossed them when we discussed alternative forms of reaction to criminal offences under the Slovenian CPC, a penal order is something different – without any doubt it belongs to their circle, even to its centre. Such procedures have been known in comparative law and presently, there are almost no criminal procedure laws which do not provide for them.[26] As we have done so far, we will not enter into an in-depth theoretical discussion on the procedures of this type and instead, we will focus on the role of a state prosecutor with regard to the penal order as provided for in the Slovenian CPC.

It could not be asserted that Slovenian legislator introduced the penal order to our legal system because he was not satisfied with the results achieved by the alternative; certainly not, because there is no research or an analysis which would prove that. In our opinion, the problem lay in the indecisiveness of our legislator with regard to which approach to take towards the criminal procedure as a system: should he continue with introducing gradual changes (partially of his own accord, but also because of the decisions by the Constitutional Court, as previously mentioned) or should he reform it in its entirety with one broad stroke. When it emerged that for the time being there was no consensus on the latter model, the lawmaker opted via facti for the policy of small steps. Consequently, in 2003, he legislated the penal order in a separate (new) chapter of the CPC[27] and he modelled it after the criminal proceedings of the Federal Republic of Germany.[28]

25 See Article 161, paragraph 1 of the CPC.

26 For more on this topic, Šugman, K. (ur.), Izhodišča za nov model kazenskega postopka, op. cit., str. 479-492. Compare as well a sentencing procedure prior to the main hearing under Art. 449 and subsequent Articles of Serbia's CPC.

27 See Chapter XXVa of the CPC, the title of which is "Procedure for Issuing a Penal Order" (Postopek za izdajo kaznovalnega naloga), Article 445.a through 445.e (OG RS, No. 56/2003).

28 See *Strafbefehlsverfahren* from Article 407.412. StPO. In particular, such a model was advocated by experts from the Federal Republic of Germany who were engaged on the project aimed to modernize the judicial system in Slovenia before its accession to the EU. (See: Modernisation of the Judicial System of the Republic of Slovenia. Institutional Support – Twinning project Slovenia. Ministry of Justice of the Republic of Slovenia, Ljubljana, 2006).

Penal orders function rather simply and they are very common to such procedures: their application is limited only to criminal offences which fall into the jurisdiction of circuit courts.[29] When filing the summary charge sheet, state prosecutors are allowed to move that the Court should issue a penal order by which a penalty or a measure[30] would be imposed on a defendant without holding a main hearing. Judge's duty is to check if the evidence provided in the charge sheet constitutes sufficient grounds for issuing an order and then, to promptly issue a penal order if he agrees with the proposed sentence. If a defendant does not agree with a penal order, he may file an objection, which results in the case being referred to the proceedings otherwise prescribed for that type of matters.

Several aspects need to be stressed here: for the first time in Slovenian criminal proceedings, penal orders have allowed for judgments of conviction to be passed without holding a main hearing (trial). That was one small step for the man and a giant leap for Slovenian criminal procedure whose form had thus far been defended strictly from the point of view that judgments of conviction could be made only after a main hearing, completely independent of the will of the parties and the need to prove the case in each particular criminal matter.

This dogma, so to speak, has been overcome precisely by the penal order. If we look at such a solution from the perspective of procedure as a system, it was rather illogical to insist on it because procedure in its entirety was established in such a manner that it could be completed only after all the stages in the proceedings had been finalized. Still, on the other hand, at the time of a sudden rise in the number of criminal cases which needed to be handled by the system, it would be very unrealistic not to be open towards procedural options which could lead to faster completion of the proceedings, at least in the cases where there were real and convincing reasons and the parties did not object to it.

State prosecutors role is crucial to the implementation of the penal order: without his proposal, the defence cannot achieve anything on its own and naturally, neither can the Court. Both could mostly informally warn a state prosecutor that he may have missed an opportunity to end the proceedings quickly, but nothing more than that. We are of the opinion that the defence has the legitimacy to raise this issue, whereas Court's actions to such end in a particular case could be disputable. Lately, we have seen in practice that courts in general request from state prosecutors to re-examine their cases in which they omitted to file a motion to that end, providing conditions have been met for them to act in such a manner.

Besides, objections regarding the penal order as it is provided for under Slovenia's CPC can be found in theoretical works. Defence's disadvantageous position is mentioned in particular since it may not even express either its consent or its disagreement with such a shortening of proceedings, but may do so only when filing an objection to a penal order already issued by the Court. In such a situation, the defence has two opponents: certainly, there is the prosecuting authority, its "natural" opponent, and the Court, which has already accepted arguments of the state prosecutor, which might indicate that objection's chances of success are slight.

29 Punished by a fine or imprisonment of maximum three years.
30 Penal orders may be used to propose and impose only a fine, a driving ban, a fine or maximum six months' imprisonment suspended sentence or a judicial admonition, as well as the seizure of objects or proceeds from crime (Article 445.a, paragraph 2 of the CPC).

Under the Slovenian law, the order is obviously meant to be used in cases of offences of minor significance in connection with delinquency. That is clear from the sanctions which might be proposed by a state prosecutor and imposed by a judge. Recently, suggestions have been made by practitioners, and it seems that the legislator has been leaning towards them, that the range of sanctions which can be imposed within the framework of a penal order should be expanded. Thus, the penal order would facilitate that an even greater number of criminal cases are disposed of without a main hearing.

Theorists emphasise that the penal order is a type of proceedings particularly suited to handle certain criminal offences, especially those which as a rule do not require any special evidentiary proceedings. Therefore, this concerns a need to harmonise the rules of substantive and procedural law; in terms of Slovenian legislation, it could not be maintained that the said fact was taken into consideration when the penal order was introduced.

The penal order has been accepted by practitioners rather well and fast. As early as in 2006, state prosecutors filed for penal orders in cases of 3,368 persons, of which 75% were granted and 67% became final. In other words, judgments of conviction were delivered without a main hearing in cases of 1,679 persons. By 2010, the number of motions for orders had slightly declined (to 2,906 persons), but their success rate had significantly risen (to 80% of filed motions), of which 1,935 had become final or 83% of the ones granted by the Court. In 2012, 2,714 motions for penal orders were filed and courts granted as many as 87% of them, of which 82% became final (for 1,925 persons). Thus, the overall results considered from the perspective of prosecuting authorities could be judged as more than satisfactory.

In addition to a declining trend, which nevertheless arouses concern because it is not clear what has been causing it (on the contrary, the high success rate of motions for a penal order could even be a reason for broadening the scope of its use), some of its negative aspects need to be mentioned as well. Similarly as in the case of suspended prosecution and settlement, individual state prosecutor's offices have a fairly inconsistent practice in this regard: some use it regularly and widely, while other use it more rarely. Mandatory instructions for the use of penal order, adopted in the second half of 2012, have not yet contributed to the harmonisation of prosecutorial practice.

Some warn of the fact that the relative success of the penal order could be a result of an "unprincipled" coalition formed among a state prosecutor, who has to propose a sanction so low as not to cause the defence to react (i.e. file an objection), defence itself, which must by engaging in such proceedings gain more than if it opted for a trial, and even a judge, whose motivation is to become established as a successful judge by issuing a penal order with little effort.[31] Objective information about whether or not such objections are credible is fairly difficult to obtain. Thus far, it has not been possible either to confirm or disprove them with arguments.

31 In respect of judges, they do not need to conduct a hearing nor do they need to draft a rationale for a judgment, while the risk of an appeal is reduced to minimum.

3.4. Plea Agreement

Plea bargaining in criminal proceedings and plea agreements,[32] as well as some other institutes closely connected with them,[33] were introduced into Slovenia's criminal procedure though the front door only by the CPC-K Amendment in November 2011, whereas they fully came into force in May 2012.[34] It could be asserted that in a way, the institutes of restorative justice and the penal order set out above did in fact serve as an exercise for the so-called negotiation situations – ones more successfully than others.

Slovenian lawmakers were slow when it came to introducing plea bargaining and plea agreement into its criminal procedure. On the one hand, it was expected that at some point a complete reform of criminal procedure would still be carried out and that it would include the so called *plea bargaining*, since it was believed that its legislation would be problematic without making extensive changes with regard to the concept and structure of the procedural law.[35] On the other hand, as time went on, the introduction of plea bargaining was regarded with an increasing amount of scepticism which was based on some instances of its not so successful implementation in criminal procedures in Europe. When both strength and time needed for a fundamental reform had been depleted, it was decided to continue with partial changes and so, as we have mentioned above, plea bargaining and pre-trial hearing were legislated by said Amendment. The innovation aroused great interest and (perhaps even too high) expectations among the public. Recently, we have witnessed a creation of an extensive body of literature which has managed to cover its subject well and from various aspects over a relatively short period of time, sometimes in a very critical manner.[36]

Some negotiation situations which could have served the same purpose even earlier were not taken advantage of.[37] On the other hand, the fact remained that negotiations took place between prosecuting authorities and the defence even earlier, although to a limited extent, especially in recent times, but they were not provided for in any manner.[38] It could be even argued that the general attitude taken by the association of prosecutors towards negotiations was fairly ambiva-

32 See Chapter XXVa of the CPC, whose tilte is: "Plea Agreement" (Article 450.a through 450.č of the CPC). The fact that it comes right after the chapter on the issuing of a penal order might indicate that it is actually a simplified proceeding. According to the Code itself, one summary and two simplified proceedings are provided for in this section. In our opinion, this is not correct, but any discussion on the topic would exceed the scope of this paper: as we see it, regulations concerning the guilty plea in the Code (together with some other amendments which will be mentioned below) have changed the concept of the Code.

33 I refer to the Chapter XIXa of the Code whose title is "Pre-trial Hearing" (Article 285.a through 285.f of the CPC). It is the first chapter of the second section of the Code ("Main Hearing and Judgment").

34 See OG RS, No. 91/2011.

35 In a way, that was a message of the research which was supposed to pave the way for the reform of Slovenia's criminal procedure. This paper has already been cited, *Izhodišča za nov model kazenskega postopka* (footnote no. 13).

36 Due to limited space, it is neither possible nor suitable to cite all the works which cover this subject. I have selected several of them although I am aware that such a selection is subjective and partial, which is why I offer my apologies to authors I have not quoted. Consequently, see for instance: Tratnik, A.: Nekateri pomisleki ob uvajanju pogajanj o krivdi v slovenski kazenski postopek. Zbornik znanstvenih razprav, LXXI (2011); Gorkič, P.: Pravni vidiki pogajanj in sporazumov o krivdi v kazenskem postopku i Šugman Stubbs, K.: *Plea bargaining*: sociološki in psihološki vidiki. V: Zbornik 4. konference kazenskega prava in kriminologije, GV Založba, Ljubljana, 2011; Šorli, M.: Pogajanja med obdolžencem in obrambo. Podjetje in delo, št.6-7/2011; Fišer, Z. i Gialuz, M.: Primerjalnopravni pogled na pogajanja v kazenskem postopku v Sloveniji in Italiji. Pravnik, 9-10/2012 i Tratnik, A.: Kako se pogajati v kazenskem postopku. Pravna praksa, 12/2013.

37 See for instance, defence's answer to the charges under Article 322 of the CPC. Within the limited scope of this paper it is not possible to analyse some of the so-called negotiation situtations in our CPC which previously proved that negotiations, although not expressly provided for, were by no means impossible or prohibited. A discussion on this subject, although undoubtedly interesting considering that in some countries negotiations were first introduced into the law by the side door, through practice, even though they were not regulated by any law, would exceed the limits of the given title. It is clear that introduction of any legal institutes into statutory laws is not only a technical matter, but it primarily concerns legal culture.

38 *E.g.* Fišer, Z., Ali se državni tožilci pogajajo. V: Zbornik 4. konference kazenskega prava in kriminologije, GV Založba, Ljubljana, 2011.

lent: while some rejected them firmly, others tolerated or supported them. However, it was clear to everyone that it was only a matter of time when they would be legislated.

From the aspect of introduction of new summary and simplified proceedings in terms of participants, suspended prosecution was especially invaluable since for the first time, state prosecutors found themselves in an actual negotiation situation that was anywhere near serious. It is interesting that those who used to oppose its use now acknowledge this, recognizing that the biggest changes brought about by the introduction of summary or simplified proceedings do not concern procedural technology, but changes which must take place in the minds of prosecutors. Our state prosecutors in their capacity as state authorities traditionally linked to the principle of legality was not willing to negotiate with anyone, let alone with a potential offender. Moreover, when he was given a choice, he avoided negotiations. But, if we wish to successfully implement the institutes based on negotiations in our criminal procedure, such an attitude of a state prosecutor must be changed; it would be an important change of paradigm. It is clear that defence's role and certainly the role of the Court have been changed due to the introduction of plea bargaining, but for the purposes of this paper, which specifically addresses the prosecuting authority and its role in summary and simplified proceedings, we are particularly interested in the changes of *forma mentis* which pertain to state prosecutors.

Technical characteristics of the plea bargaining and guilty plea under the Slovenian law may not be the most interesting. Since they have been in force only a year, we still cannot notice based on practice their strong and weak points. Apart from this, it should be taken into account that in the first period, old cases were adjudicated, i.e. cases which had been on trial before plea bargaining was expressly permitted. Or to rephrase it, our sample has not probably been statistically representative enough.

In principle, a plea agreement can be made with regard to any criminal offence, ranging from the least to the most serious ones, without any restrictions. As a rule, a plea agreement should be reached at the stage following the issuing of an indictment since it is believed that the framework of the proceedings has thus become established, whereas the law allows that plea agreements are signed at earlier stages in the proceedings. Understandably enough, the Code guarantees procedural rights of the defence in the course of plea negotiations and in the phase during which plea agreements are concluded and it also stipulates the fundamental elements of an agreement as well as elements which a plea agreement may not provide for. Accordingly, legal classification of a criminal offence may not be negotiated on, which indicates that the so-called *charge bargaining* is not allowed; however, whereas it has emerged that the vertical charge bargaining is not possible, the horizontal *charge bargaining* is nevertheless permitted with certain restrictions. Furthermore, neither security measures which are imposed as mandatory nor the seizure of material gain acquired through crime may be negotiated on.

No specific plea bargaining procedure has been prescribed in detail, which is understandable. Whether plea negotiations will be initiated or not entirely depends on the parties, although in theory, the state prosecutor is the one who should be more active because it is considered that he has more information at his disposal which is relevant or decisive to signing an agreement. In the first months of its use, this assumption has not proven true since the defence has more frequently initiated plea bargaining.

It can be expected that, at least in the initial period, the state prosecutor's biggest problem will be the selection of cases in which he could enter into plea negotiations. Another general problem could arise in connection with a negotiation platform which should be created for each specific case, especially with regard to penalties. The Slovenian sentencing system is fairly open, so prosecutors often have problems to determine what type of sanction should be imposed to satisfy the general requirements, while at the same time being attractive enough to the defence. This problem also exists *mutatis mutandis* with regard to the defence and even to the Court. Mandatory instructions for plea bargaining have been adopted by the association of prosecutors of Slovenia.

A concluded agreement needs to be confirmed by a judge. The Court is completely excluded from the plea bargaining process until the moment the parties propose an agreement to the judge. The law proceeds from the opinion that the role of a judge is essentially a passive one. However, his decision is crucial, so it could be inferred that there is some room for manoeuvre which some judges will probably use to take certain actions, in particular when it comes to establishing evidentiary standards which need to be met for a judgment of conviction to be passed.[39]

Until this moment and contrary to expectations, plea bargaining has not taken place at the early stages of the proceedings. As a rule, the pre-trial hearing has been the key moment and the procedural context in which plea agreements are achieved. Even though it is not clearly laid down from the point of view of theory,[40] this hearing, an innovation in our criminal procedure, has already come up to our expectations.

The law prescribes that it is a mandatory hearing in regular proceedings and optional in summary proceedings. It has two purposes: on the one hand, it serves as a procedural framework for concluding plea agreements after negotiations since the law does not provide any other procedural institute to that end. On the other hand, the lawmaker has introduced it into the Code with a clear intention of accelerating the course of the main hearing. It is an objective which is interesting and important in the context of a discussion on summary or simplified proceedings, but the problem is that we are not yet in a position to judge whether or not the lawmaker has succeeded in his aim to accelerate the proceedings.

From a theoretical point of view, a pre-trial hearing is not an integral part of some special summary or simplified proceedings, but instead, it is a general procedural institute such as plea bargaining or plea agreement.

Some believe that a relatively great success of shortening of proceedings in our law based on plea agreement should be attributed (not only) to plea bargaining, but to the pre-trial hearing which has been thus positioned that the parties can already see pretty well how their trial might end, so they are well enough motivated to reach an agreement. According to statistical data for 2012,[41] state prosecutor's offices in Slovenia registered 166 instances of plea bargaining, which led to 140 plea agreemens. At the same time, pre-trial hearings were held in connection with 3,271 per-

39 This is a novelty in Slovenia's criminal procedure: the Court may convict a defendant only if it has been "… convinced of his guilt," see Article 3, paragraph 2 of the CPC.

40 It is not clear whether it is the final action from the preliminary proceedings or an initial stage of the main hearing (according to the law).

41 It should be underlined once again that those data refer to the period May 15, 2012 – end of 2012 because it was when the Law Amending the CPC which provided for the possibility of ending the proceedings through plea bargaining came into force.

sons, while 1,203 persons entered a plea of guilty (more than each third defendant at a pre-trial hearing!).

Numbers, in particular the last ones regarding the success of the pre-trial hearing, have come as a surprise even to state prosecutors up to a point. If nothing else, it turned out that the law had required a procedural institute such as this which would prevent going (directly) to trial whenever an accusatory instrument was issued. To put it differently, it was shown that criminal proceedings could after all be treated as a dispute between the parties, and not only as a proceeding conducted by state authorities which either way must go through all its stages in order to result in a legitimate judgment of conviction. This is not correct and obviously, it is not in the interest of the parties, at least in a certain percentage of the cases.

Finally, this paper would not be complete if we failed to briefly mention another result of the introduction of plea bargaining and plea agreement, which directly influences the shortening of the proceedings. Until these last amendments to the Code, the main hearing in Slovenian criminal procedure had been a typical single-stage main hearing. Within the framework of the one and the same hearing, the Court discussed both the issues of guilt and the issues pertaining to sentencing. Everyone is familiar with objections to the main hearing which has such a concept and structure, but there are not many lawmakers who have resolved that matter in a radical way, i.e. by introducing a two-stage main hearing. Clearly, the solution is both complex and costly. Neither have our legislators done so, but in cases when an agreement has been made with regard to a guilty plea, a hearing is continued only by discussing the circumstances which have a bearing on the selection and imposition of a criminal sanction, and naturally by a decision on the sanction. Parties have an opportunity to reach an agreement on a composition of the Court which differs from the one prescribed by the law; it is the first case of an agreement on the procedure in our law. This has not yet resolved the problem of the single-stage hearing, but it has somewhat reduced its extent, which is why this is an important step towards a definitively better solution and at the same time towards further simplification of criminal proceedings.

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Acceleration of Proceedings - One of the Aims of Criminal Procedure Reform in the Republic of Macedonia

1. Introduction – Dysfunctional and Slow Mixed (Inquisitorial) System as a Motive for Reforms

A fundamental reform of criminal procedure in Macedonia, including the new Criminal Procedure Code enacted in November 2010 (to be applied as of November 2013), entails the abandonment of the previous model or the so-called "mixed" procedure, frequently referred to abroad as the inquisitorial model, and its replacement with a modern accusatory (adversarial) procedure modelled on the reforms implemented in Italy and other European countries.[3] The reform had two primary goals which were pursued in parallel: *to accelerate* proceedings and make them more efficient and 2) to further courts' impartiality and *fairness* of the proceedings. Acceleration of proceedings leads not only to the increased efficiency of a criminal justice system which – as we all know – depends on as quick as possible convictions of as many offenders as possible, but the right to be tried within a reasonable time is in itself an important element of a fair trial.

Introduction of the adversarial model had asserted itself by a gradual, although more and more discernable international recognition of this model as the more suitable one for achieving justice. Judicial paternalism which existed in the continental procedure was seriously flawed due to an overt conflict of interests in a judge as an investigator which resulted in him being biased and

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3 See: Criminal Law Reform Strategy, Ministry of Justice, Skoplje, 2007 (www.justice.gov.mk).

proceedings taking too long to the prejudice of a defendant (particularly if he was remanded in custody) or the society as a whole. The fact that the said system had proven dysfunctional and that the court had failed to perform its function can be seen from judicial statistics which show that more than half the criminals remained undetected (53% in 2011),[4] while a significant percentage of criminal charges (a quarter of them) were dismissed by public prosecutor's offices,[5] whereas an enormous percentage of indictees was found guilty by the court![6]

Inefficiency of the judicial system was particularly reflected in lengthy proceedings, which to a substantial degree depended on the model of procedure.[7] Not only was the previous criminal procedure marked by apparent judicial paternalism and strong inquisitorial elements, but expeditious proceedings were not its priority at all.[8] Everybody is aware that the larger the number of "work stations" or state authorities which deal with a matter, the larger the amount of time lost "treading water", or more precisely, the time which passes without any actual work being done on the case.[9]

For some time now, we can see that literature has been proposing that judicial investigations are one of the main reasons for long duration of criminal proceedings. In practice, they have ceased to play an important role with regard to the protection of suspects from unfounded trials with all of the negative publicity and other effects which threaten his freedom, his private life (the old doctrine of the confidentiality of investigation for the purpose of avoiding such adverse effects on a defendant has virtually been abandoned),[10] but their principal purpose has been to provide evidence against a defendant and valid presentation thereof even before a trial begins, whereby investigation has become more of "a trial before a trial" than a protective filter for the defendant. Judicial investigations have not proven they are legitimate either from the aspect of any

4 Statistics reveal that a percentage of perpetrators of detected and registered offences whom the police failed to uncover was high (between 40 and 50 percent). These numbers have been constantly rising; for instance, from 7,114 in 2002 (39%) to 16,657 in 2011 (53%). See: National Statistics Office of Macedonia, Perpetrators of criminal offences in 2011, Skoplje, 2012 (www.stat.gov.mk). Compare, Ministry of the Interior of Macedonia (http://www.mvr.gov.mk/DesktopDefault.aspx?tabindex=0&tabid=392).

5 Twelve percent of all the criminal charges were dismissed, but numbers are drastically different depending on whether charges were filed by the Interior Ministry or directly by citizens or legal persons. Namely, prosecutor's offices deny half of the charges filed directly by citizens or other parties (49%), whereas they prefer almost all charges brought by or through the police (an amazing 93%). According to data from the public prosecution service, a percentage of dismissed criminal charges was twice the number which was made public by the National Statistics Office or 28.28%. See the 2011 Report on the Work of Public Prosecutor's Offices in Macedonia.

6 Thus, out of 10,051 persons who were charged in 2011, as many as 9810 of them were convicted, which accounts for a prodigious 93%! This shows that courts perceive themselves more as an authority which should fight crime and convict suspected criminals, than guarantee legality and fairness of trials.

7 Thus, according to information on the duration of proceedings from the filing of charges to adjudication in cases of identified perpetrators for 2011, out of 14,627 charges in total, proceedings lasted: up to 1 month in 4477 cases; from 1 to 2 months in 1755 cases; from 2 to 4 months in 1920 cases; from 4 to 6 months in 1249 cases; from 6 months to 1 year in 2198 cases; more than a year in as many as 3028 cases. Source: National Statistics Office (www.stat.gov.mk).

8 As opposed to this, the concept of "a speedy trial" is one of the underlying principles of proceedings in the US and importance is also attached to expeditious trials in continental systems. Consequently, in Germany, the *maxim of focus* is included among the underpinning principles of its criminal procedure. The principle of acceleration is also expressed in Article 163, paragraph 2 of the German CPC under which the police shall transmit their records to the public prosecution office without delay. See: C. Roxin/ B. Schunermann, Strafverfahrensrecht, 26 Auflage, C.H. Bech, München, 2009, 59-85.

9 See: Delays in the criminal justice system: reports presented to the 9th Criminological Colloquium, Council of Europe, 1989; Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights, (CEPEJ(2006)15).

10 Investigations were *discontinued* in a small number of cases because the defendant was a fugitive or he was for other reasons *out of reach* of the authorities (approximately 150 cases per year, which accounted for 0.36% in 2011). There were a considerably higher number of investigations which were *ceased*, most often because the act itself did not have the elements of a crime or *there was not sufficient evidence* (at a constant rate of 700 cases per year). Data from the National Statistics Office (*supra*.) show that the "protective" role of an investigation as some sort of a filter for unfounded charges had not been totally inefficient because the number of discontinued or ceased investigations amounted to around 20 percent of all the investigations (20% in 2002, 17% in 2011).

legal inquiry since investigating judges rarely gather new evidence but only formally present evidence which has already been obtained by the police and the prosecution.

All this indicates that we are facing a serious problem, not only with court's underperformance with regard to its role of protector of rights in criminal proceedings at the micro level, but also with a serious failure on the part of the court at the macro level, in terms of its role in the system of separation of powers, which is to protect citizens from law enforcement agencies (the executive branch).

2. Accelerating the Proceedings by Changing the Model and its Effect on the Parties

2.1. Acceleration of Preliminary Proceedings through Dispensing with the Formalities (or Skipping Investigation)

The original idea is that by changing the model of procedure, proceedings themselves will become more expedient through restructuring preliminary proceedings by eliminating judicial investigation, but not on the model of Serbia and Croatia, where judicial investigation has been substituted with the prosecutorial one, which is equally formal, but by skipping it.[11] The main idea is to reduce the number of the so-called "work stations" in the proceedings and to conduct preliminary proceedings in continuity, by having the police and public prosecutor's office perform coordinated activates.[12]

In order to achieve a more active involvement of the public prosecutor and accelerate preliminary proceedings, it is important that the prosecutor is *promptly informed* by the police. The new CPC of Macedonia requires that the police should immediately inform the public prosecutor. Naturally, the police will act so when they themselves have gathered certain information and run preliminary/required checks of the facts to see whether or not it is a criminal offence which is prosecuted *ex officio*. By all means, the police will also take on the powers granted to it by the CPC for the purpose of uncovering and apprehending offenders, as well as providing traces and evidence of crimes in a more urgent (and professional) manner.

It can be noticed that the *aim* of preliminary proceedings has been essentially changed. There is wide disagreement as to the true and declared aim of an investigation and preliminary proceedings as a whole. It does not make much sense that an investigating judge should gather evidence because of a decision by a public prosecutor![13] It is more than obvious that when an investigating judge plays an active role as an investigator, it will lead to a conflict of interests or function due to the fact that his function or duty to investigate clashes with his function of a protector of

11 See: G. Kalajdžiev, Koncepcijske razlike u istragama u Hrvatskoj i Makedoniji, u Zbirci radova na Pravnim fakultetima u Skoplju i Zagrebu, Skoplje/Zagreb, 2010 (available at http://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=100280). Compare: D. Krapac, Reforma mješoviotg kaznenog postupka: potpuna zamjena procesnog modela ili preinaka prethodnog postupka u stranački oblikovano postupanje?, Zbirka radova na Pravnom fakultetu „Justinijan Prvi" u Skoplju, Zbornik radova Pravnog fakulteta u Zagrebu, 2007, str. 177, 185-89

12 See: G. Kalajdžiev, Bitnije dileme i razlike u reformi istrage u državama bivše Jugoslavije, u: Zborniku radova: Kriminalističko-krivično procesne karakteristike istrage prema Zakonu o krivičnom postupku u prošloj deceniji, Vol. 5, Br. 1 (novembar 2012.), str. 432-443.

13 Nevertheless, practice (as we have seen) does not confirm that the court plays a truly protective role in the investigation because it very rarely denies requests from the police and public prosecutors regardless of whether it is to open an investigation or take measures which encroach on the freedom and privacy of suspects and other persons, such as remand, searches, wiretapping, etc.

civil rights. It is more than clear that the goal of a formal judicial investigation is to provide evidence and present it already in the course thereof (which is still done through a public prosecutor in Serbia, Montenegro and Croatia). This is achieved by a supposed participation of the parties and a semblance of "equality of arms" although it is clear that the defence has been given neither adequate nor reasonable opportunity to test and contest the statements of witnesses and other defendants during an investigation, without knowing which evidence will be presented at the trial. A modern concept of the fair trial requires that evidence be tested at a public and adversary hearing before an independent court of law.

For those reasons, the new Macedonian CPC does not provide for a formal investigation which entails presentation of evidence. If there is any real danger that it will not be possible to present certain pieces of evidence at a trial, there will be a special or the so-called "evidentiary hearing" at which evidence is presented under the rules which apply to the main hearing. As opposed to this, Croatia, Montenegro, and Serbia have stood by the idea that evidence should be presented as early as during preliminary proceedings, which is done by a public prosecutor! This concept is unheard of in comparative law and therefore an original solution which will hardly pass the test before the Strasbourg court. Thus, it could be maintained that the new indictment/investigation procedure in Macedonia is designed more as a preparation for a trial than as actual investigative proceedings because the prosecution examines whether or not evidence and information which has been previously gathered in the course of a preliminary investigation will be sufficient to prove before a court of law that a suspect is guilty of a crime more than it investigates in the narrow sense of the word.[14]

2.2. Accelerating Investigation through Strengthening Capacities of Public Prosecutor's Offices by Introducing Judicial Police Inspectors

An important innovation which makes the new criminal procedure of Macedonia different from all the others in the region is the establishment of judicial police as an authority assisting public prosecutor's offices. It denotes criminal police that closely cooperates with public prosecutor's offices and a small part thereof will directly be on the team of the prosecution in the so-called investigation centres of the public prosecutor's offices. Those are the main tools which will help public prosecutor's offices to respond to the challenges of their new active role which has been assigned to them following the reform of criminal law both in our country and on a global scale.

The innovation which should make a substantial contribution to the acceleration of preliminary proceedings is precisely the public prosecutor's team of investigators which consists of CID inspectors and other associates who should support them in gathering and checking information and evidence during preliminary proceedings. Namely, the main shortcoming of the previous criminal proceedings was that public prosecutors did not have capacities to gather necessary information and evidence to be able to make appropriate decisions on the further course of the

14 Unlike in Bosnia and Herzegovina and in Macedonia, the new criminal procedure laws in Serbia, Montenegro, and Croatia include an enormous number of provisions which govern investigation and evidentiary actions which are undertaken in the same /proceedings/, whereby evidence obtained in a formal manner in preliminary proceedings remains the core information at the trial. Thus, the formal judicial investigation is replaced by an equally formal prosecutorial investigation, while keeping a considerable number of provisions from the previous law. Prosecutorial investigation, as the second stage of preliminary proceedings, in not essentially different from the old concept of judicial investigation given that public prosecutors are now those who undertake all the evidentiary actions which used to be performed by investigating judges, even though they are not a party to the proceedings.

proceedings.[15] That was the reason why public prosecutors requested in writing from the police, banks, and other government authorities to undertake certain activities in order to obtain necessary information, which they then submitted to investigating judges, and that resulted in losing a considerable amount of time and naturally, the matters were progressing slowly. These new solutions allow that prosecutors, with the help from their own investigation teams, first gather information so that they could decide whether or not to conduct an investigation against a particular person, and so that the investigation would be concluded "in one breath" or without interruptions, with energy and intensity.[16]

Following the example of Italy, the new (2010) CPC governs that "senior officers" within the judicial police, namely officers who are directly in charge of judicial police units that remain with the competent ministries, are now directly linked to public prosecutor's offices, which will allow for their easier employment by judicial police.[17] This has been an attempt to establish a clearer and more functional relationship which thus far used to be a relationship between two organisations with strictly hierarchical structures. Still, the new CPC allows for a (thus far not much used) possibility that inspectors from the judicial police be assigned to them by order of a public prosecutor for the purpose of conducting criminal proceedings when necessary (*ad hoc*).[18]

The CPC provides that judicial police assigned to a prosecutor's office shall be organized into the so-called "investigation centres" of that office.[19] The idea of setting up investigation centres in public prosecutor's offices with a heavy workload with the aim of finding a reasonable solution which will be both effective and economical has led to some major differences in respect of how statutory provisions are construed.[20]

2.3. Accelerating Proceedings by Making the Main Hearing More Focused

The previous criminal procedure law (which will be in force in Macedonia not only until November 2013, when the implementation of the new 2012 CPC should start, but it will continue to be applied to offences whose prosecution has commenced) allowed that indictments were brought without gathering all the evidence, providing criminal matters would be first resolved at the main hearing and both the Court and the parties could offer evidence without any problems.

15 The Interior Ministry's monopoly on investigation was the principal reason for inadequate investigations of cases in which the police overstepped their authority /as cited/ in a number of judgments by the European Court of Human Rights which ruled against Macedonia. For instance, see: *Case of Pejrusan Jasar v. FYROM (2007*).

16 Judicial police in investigation centres will primarily act at the preliminary stage of collecting of information more than in the course of investigative proceedings during which the prosecution undertakes actions, although judicial police may render assistance. This does not mean that judicial police in investigation centres may not also be involved at the stage of detecting and filing of charges in cases when the prosecution itself learns about suspicions that a criminal offence has occurred (firsthand knowledge, voice, notoriety, etc.).

17 See: New Relationship between the Police and the Public Prosecutors Office in the Republic of Macedonia, Justinian Law Review, available at www.law-review.mk/pdf/02/Gordan%20Kalajdziev.pdf

18 An important goal to be attained by setting up the judicial police and transferring some of the CID inspectors from the Ministry of the Interior to the public prosecution service is overcoming the problem posed by the monopoly of Ministry's investigative capacities and the so-called "hierarchical dualism".

19 Prosecution's investigation centres are in a way an original concept, even though similar models of structure which entail close cooperation in carrying out operations under the supervision of public prosecutors exist in a number of countries. For instance, in Italy, each prosecutor has his own team made up of two to three inspectors, whereas in other countries, police officers are assigned to public prosecutor's offices without being organised into any particular units. See: B. Pavišić, Ed., Talijanski kazneni postupak, Pravni Fakultet Sveučilišta u Rijeci, 2002.

20 Although the idea of those who drafted the new CPC was to make them more like specialised departments within public prosecutor's offices or personnel assisting public prosecutors in their operations, competent state authorities – which are involved in preparing the implementation of the new CPC – have understood them as separate (outsourced) specialised centres.

Its duty to establish the truth fully and completely placed the burden of proof on the Court – thus leaving the mark of the inquisitorial model on the trial, while proceedings dragged on for months, sometimes for years. Namely, considering that the priority was given to the establishment of absolute truth, there was nothing which would preclude offering of evidence and it was left to the Court and the parties to freely offer evidence even after the conclusion of a trial.[21]

The attempt to simplify proceedings by remodelling them through the abandonment of the inquisitorial principle and elimination of its elements had not stopped at the preliminary proceedings. Not only in Macedonia, but also in all the other countries in the region, the issue of releasing the Court from the duty to establish the truth *ex officio*, which unnecessarily burdened the judiciary – by practically imposing on it some of the duties of the parties – was considered to have strategic importance and deserved to be treated as a priority. It is widely known that the procedure followed at the main hearing underwent reform in all the countries by transferring the task of taking evidentiary actions to the parties and introducing cross-examination at a trial. Nevertheless, majority of the countries in the region have opted against assigning the Court a totally passive role, which is why they have continued to allow the Court to propose evidence, although with certain restrictions.[22] Such a hybrid model has been regarded as a reasonable compromise which is allegedly optimal precisely because the initiative to offer and present evidence is left to the parties and the Court is finally given an opportunity to ask questions, present evidence, and alike, when the Court deems it necessary.[23]

Macedonia is the only country in the region which has assigned a completely inactive role to the Court with regard to presenting evidence.[24] The purpose of this is not only to attain the purity of a model of criminal procedure because of some theoretical consistency or in professor Damaska's words – to be more catholic than the Pope – but because we believe that it will lead, in addition to promoting judicial impartiality, to considerable acceleration of the proceedings! The latter goal seems to have been unjustifiably pushed back into the background in academic and legislative debates in other countries in the region. Namely, the idea is clear: if there is a provision which precludes proposition of evidence and neither the Court nor the parties may first offer evidence at a trial – the prosecution will go to trial only if it actually has sufficient evidence to prove defendant's guilt and trials will last much shorter. Plans for a trial will be simple and trials will be conducted in continuity and without interruptions (Art. 359 of the 2010 CPC), by assigning as many days for a trial as are needed to complete it depending on the amount of evidence which has been proposed. In all honesty let us say that evidence has either been obtained or it has not; it happens very rarely that there are some exceptional circumstances which truly justify an adjo-

21 Thus, as we all know, pursuant to Articles 274 and 314 of the previous CPC, the parties and the injured party may request that new witnesses or expert witnesses be summoned and new evidence be obtained even after the main hearing has been scheduled and started. On the other hand, the presiding judge, who used to have the most active part in a trial, can (could), even without a motion from the parties, order that new or other evidence be obtained for the main hearing.

22 This is the case in Bosnia and Herzegovina, Serbia, and Montenegro, while in Croatia, it is subject to serious restrictions. See a comparative analysis of the issue in H. Sijercic-Colic, Substantial Truth Docrtrine in Criminal Proceedings, in: A. Petrovic, I. Jovanovic, *New Trends in Serbia's Criminal Procedure in a Regional Context (Normative and Practical Aspects)*, OSCE Mission to Serbia, Belgrade, 2012, pp. 169-191

23 Professor Damaska makes a good point when he asserts that the Court's passive attitude is more consistent with the typical adversarial hearing because in such systems a jury decides on the facts of a case, so moral responsibility for the correctness of a verdict is placed on the jury; however, he believes that such a concept is not perfectly suitable for the new European proceedings which have remained hybrid. Damaska argues that the new Croatian concept is unnecessarily more restrictive than concepts in the majority of common law countries from which adversarial presentation of evidence originates: M. Damaška, Hrvatski dokazni postupak u poredbenopravnom svjetlu, Hrvatski ljetopis za kazneno pravo i praksu, br. 2, 2010, str. 821, 824.

24 Truth to be told, by way of exception, the Court may order the so called "review of expert witness findings and opinion" (Art. 394 of the CPC).

urnment for the purpose of collecting some new pieces of evidence.[25] On the contrary, it is unreasonable and prejudicial to adjourn trials and that they last indefinitely, which is what is happening at the moment. In respect of the parties, inadmissibility of evidence of which they were aware but failed to propose to the parties prior to the main hearing without any justifiable reason asserts an obligation on them to adequately prepare for a hearing before a court of law and makes them responsible not only for the outcome, but for the efficiency and faster conclusion of criminal proceedings.[26]

Another issue has proven controversial, namely should the entire case file compiled in the course of an investigation (along with all the statements from a defendant and witnesses) be referred to the main hearing. In case investigative files remain the principal source of information, main hearings will be nothing more than verification of evidence from the investigation.[27] Opinions differ with regard to whether or not the Court's access to such files would promote the efficiency and expeditiousness of trials or whether or not it would only unnecessarily prejudice the Court. Finally, professor Damaska warns that this new variant of adversarial presentation of evidence before trial courts includes as well remainders of the old evidentiary model (e.g. the injured party's right to participate in the presentation of evidence) so it is likely that a *combination* of the new and old elements would lead to confusion and *prolonged* hearings.[28]

2.4. Making the System of Legal Remedies More Expedient and Functional

The need to restructure the system of legal remedies in the criminal procedural law of Macedonia, in other words to make them more functional, was one of the basic guidelines of the criminal procedure reform in accordance with the aims formulated in the Criminal Law Reform Strategy.

Amendments to the provisions which govern regular and extraordinary remedies would represent a combined effort of theorists to speed up the proceedings, make legal remedies more functional (extraordinary remedies, in the first place), and underline the need for holding hearings more frequently before courts of second instance instead of setting aside judgements and referring matters to the courts of second instance for retrials, on the one hand, and dealing with the problems which have been identified by practitioners and which could be resolved by making certain provisions more precise or by amending or supplementing them.

Together with this, a provision which precludes proposition of evidence with appeals has been introduced for the first time in so far as new facts or pieces of evidence may not be mentioned in appeals except those which the parties prove could not be presented before the end of evidentiary

25 We must admit that the new CPC also provides for adjournments or postponements of main hearings for the purpose of obtaining new evidence (Art. 370 and 372 of the 2010 CPC). To be honest, these solutions are more an example of provisions indiscriminately adopted from the previous CPC, without having analysed if they are in accord with the new concept; there is a number of such instances in the new CPC and majority of them have been registered for a potential revision of the statute which is now being advocated in professional circles.

26 See: D. Tripalo, Z. Đurđević: Predlaganje dokaza, Hrvatski ljetopis za kazneno pravo i praksu, vol. 18, broj 2/2011, str. 471, 486.

27 In this sense, barriers have been set up in Macedonia with regard to the influence of investigation on the main hearing, which have been modelled on some of the current European laws. For example, in Italy, presiding judges have limited access to materials collected during an investigation, which are otherwise available to the prosecution. In principle, evidence is once again presented before the Court. Similarly, following the German example, statements made in the course of preliminary proceedings can now be used in Macedonia only to remind a defendant and to assess the credibility of evidence, but they are not considered evidence which constitutes grounds for conviction.

28 Damaska, *op. cit*.

proceedings during the main hearing because they were not aware of them or they were not available to them. Thus, tactical manoeuvres, most frequently carried out by the defence, are avoided in respect of evidence which has a substantial impact on the outcome of proceedings, but which is not presented in the course of first instance proceedings. For the purpose of speeding up the proceedings, time limits for filing answers to appeals have been modified, as well as deadlines within which judges who notify upon being assigned to cases have a duty to proceed.

Unfortunately, proposals for taking some more radical steps whose purpose would be to substantially accelerate and simplify proceedings on remedies were not accepted. For instance, our proposal that only defendants and not public prosecutors should be allowed to appeal judgments, which is the case in common law systems, only scandalised our national experts although it was consistent with the accusatory model.

3. Accelerated Proceedings under the New CPC of Macedonia

The new CPC of Macedonia provides for several forms of accelerated proceedings whose purpose is to simplify procedure and release judges from the duty to take extensive procedural actions. Simplification of criminal justice is an imperative recommended by the Council of Europe in its Recommendation R(87)18 which aims at increasing the awareness of legislature with regard to expediting proceedings, changes in how defendant's guilty plea is treated from the point of view of sentencing, increasing the scope of powers of prosecutors who should assume some powers of judges.[29]

Accelerated proceedings may be possible in three cases:

- in terms of less serious criminal offences – summary proceedings,
- in case when an offender and the injured party agree to settle their case with a help from a neutral third party – mediation, or
- in cases when a decision may be made even without holding a main hearing based on collected evidence – penal order.

3.1. Summary Proceedings

Summary proceedings have been traditionally used in all criminal systems for resolving the cases of less serious offences. The new CPC has introduced some minor changes. In terms of the CoE Recommendation Rec (2003)23, according to which more than five years' imprisonment is considered long-term incarceration, Macedonia legislators have broadened the scope of jurisdiction of single judges to the effect that summary proceedings may apply to all criminal offences punishable with a fine or imprisonment of maximum five years.[30] Thereby, the Court has been released from the duty of taking extensive actions in cases of less serious offences and judges are given enough time to devote their attention to more serious offences. The new position of public prosecu-

29 Recommendation no. R (87) 18 concerning the simplification of criminal justice, 17 September 1987.
30 Definition of life sentence and long-term prisoners, Appendix to Recommendation Rec(2003)23 of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners, 9 October 2003.

tors in the course of criminal proceedings and their duty to argue in favour of the indictment in person have resulted in abandoning the possibility of holding main trails in their absence. Namely, the prosecutor's role at the main hearing and in the course of summary proceedings can be fulfilled only if he plays an active part in all the activities which make up a main hearing. The new CPC has extended the deadline which must be given to a defendant to prepare his defence. Namely, a summons to a main hearing should be served on a defendant providing sufficient amount of time is given to him to prepare his defence from the date of the service of summons to the date of the main hearing, but not less than eight days and not minimum 3 days which used to be the case until now. This change was brought about by guarantees provided under Article 6(3) (b) of the European Convention on Human Rights. Everyone charged with a criminal offence must be given adequate time and the facilities for the preparation of his defence. At the same time, judges are obligated to advise defendants that a main hearing may be conducted in their absence if statutory requirements have been met – this applies to offences punishable with a fine or imprisonment of up to three years in cases when a defendant fails to appear at the main hearing although he was dully summoned thereto or it was not possible to serve him with the summons because it was obvious that he was trying to avoid being served. Along with the summons to the main hearing, the defence should be served with a list of evidence submitted by the prosecutor, at the same time advising them that they have a deadline for submitting their list of evidence.

The main hearing is preceded by a conciliation hearing. It is an innovation introduced in the CPC which entails the possibility of proposing the prosecutor and the injured party to settle the case through the mediation in cases of private prosecutions. With regard to this, it should be mentioned that the CPC of Macedonia does not lay down that it is mandatory for a judge to make an attempt at mediation, but it leaves is to his discretion to direct the parties to mediation when he deems it opportune. At the same time, each party is entitled to consent to settling its case through mediation. If either party withholds its consent, the judge proceeds to act pursuant to provisions which govern summary proceedings. Macedonia lawmakers have provided for an alternative method of resolving criminal cases which are tried in summary proceedings.

In addition to out of court settlement when charges are brought by a private prosecutor, a possibility of negotiations in summary proceedings is neither excluded when charges are brought by a public prosecutor. Namely, the CPC does not prescribe any limitations with regard to how serious an offence must be in order for the parties to be allowed to negotiate on it, so if it is possible in cases of more serious crimes, negotiations should be initiated even more in cases of less serious offences. Defendants are given an opportunity to plead guilty in the course of summary proceedings and provisions which govern entry of guilty pleas at the main hearing apply to such situations. Judges have a duty to ascertain such pleas and assess if they can be accepted or not, after which they undertake evidentiary actions in connection with sentencing. Namely, a guilty plea results in a more efficient main hearing and evidentiary proceedings which are to a substantial degree devoted to the establishment of guilt, the extent of criminal liability, and facts of the case.

Within the framework of summary proceedings, changes have been made in respect of the manner in which investigative actions are taken. Namely, in current summary proceedings, a public prosecutor will propose a single judge that investigative actions should be undertaken and if his proposal is granted, the judge is obligated to take those actions. In the new CPC, given the new powers granted to the public prosecutor who is the dominus litis of criminal charges,

investigative actions are undertaken independently by the prosecutor prior to the filing of a motion to indict. Before filing the motion, the prosecutor should inform the defence about the evidence he has gathered and investigative actions he has undertaken, which are the so-called disclosure obligations provided for in Article 302, para. 5 of the CPC. Thereafter, the defence should be given a period of time to prepare a defence in terms of their own investigation. It depends on the prosecutor when he will initiate negotiations on criminal offences which are the subject matter of summary proceedings. By analogy, it is also possible that a single judge, when he deems it necessary, summons the parties to the court to clarify their motions or objections, all for the purpose of preparing the main hearing in terms of Article 347, para. 2 of the CPC.

3.2. Mediation

Mediation was widely adopted by national legislatures following the Recommendation R(99)19[31] of the Council of Europe which stressed the flexibility and comprehensiveness of the mediation procedure which could be used complementary or as an alternative to common criminal proceedings. In this respect, the views of those who believe that mediation should be treated as going back to the source of a conflict[32] and that the parties involved should have the power to settle the conflict themselves are accurately qualified as being radically non-interventionalist.[33] Mediation activities allow the victim to feel as he has equal standing under criminal law.[34] Benefits obtained from mediation include the acknowledgement of the victim's interests and promoting the role of private individuals within the framework of settlement of disputes arising out of criminal offences. Mediation is based on the following principles: voluntary participation by the parties involved, its availability, active participation of the parties involved, an interactive approach with a view of finding a common and mutually acceptable solution, as well as the confidentiality of the mediation procedure.[35] Introduction of mediation into criminal procedure laws is the result of restorative justice.[36] Restorative justice is focused on the interests of victims and the wider community since it facilitates the restoration of disrupted relations following a crime. The concerned parties are much more interested in resolving a dispute and overcoming all the disagreements. One should not believe that resolving a dispute is only beneficial to the state.[37] Mediation has an advantage and that is the possibility of overcoming a criminal matter through active par-

31 Recommendation no. R(99)19 on Mediation in Penal Matters, 15.09.1999.

32 This idea came form Nils Christie, according to whom the state should be stripped of its powers to resolve conflicts and they should be returned to those who are involved in a conflict; Nils Christie, "Conflicts As Property", The British Journal of Criminology, Vol. 17, 1/1977, pp. 1-15.

33 Michael von Voß,"Anzeigemotive, Verfahrenserwartungen und die Bereitschaft von Geschädigten zur informellen Konfliktregelung. Erste Ergebnisse einer Opferbefragung", Monatsschrift für Kriminologie und Strafrechtsreform, 1/1989, p. 35.

34 Victims did not have such a status in the traditional response to crime; Jean -Pierre Bonafé - Schmitt,"La Médiation Pénale en France et aux États-Unis", Maison des Sciences de l'Homme, Réseau Européen Droit et Société, 1998.106. Mediation activities lead towards the so-called "private justice"; Stuart Henry, "Justice on the Margin: can Alternative Justice be Different?", The Howard Journal, Vol. 28, 4/1989, p. 53.

35 As cited in A. Snare,"Psychosocial Interventions Aimed at Resolving the Conflict Between the Perpetrator and the Victim, for Example within the Framework of Mediation and Compensation Programmes", 20th Criminological Research Conference: "Psychosocial Interventions in the Criminal Justice System", 1993, p. 60.

36 John Blad, The Scope of Restorative Justice, Papers presented at the Third Conference of the European Forum for Victim - Offender Mediation and Restorative Justice, Budapest, Hungary, 14-16 October 2004; W. Van Ness, Restorative justice: International Trends, October, 1998, www.restorativejustice.org; Гордана Лажетиќ Бужаровска, Медијацијата и обештетувањето во законодавствата на европските држави, Годишник на Правниот факултет "Јустинијан Први" - Скопје во чест на проф. Тодорка Оровчанец, том 42, Скопје, декември, 2006, стр. 540-565; Лажетиќ Бужаровска/Мисоски, Спогодување и медијација, МРКПК, бр2/2009 година, стр. 215-260; Гордана Лажетиќ Бужаровска, Реститутивната правда од аспект на меѓународните документи, Годишник на Правниот факултет "Јустинијан Први" - Скопје во чест на проф. д-р Димитар Поп-Георгиев, том 40, Скопје, декември, 2006, стр. 630-645.

37 Bonafé – Schmitt, op.cit., str. 256.

ticipation of the parties involved, creating a new balance in their relations, their mutual encounters which are managed by a neutral third party – the mediator. Mediation entails negotiations between an offender and his victim or the injured party whose aim is to bring about reconciliation between them, create an opportunity for the offender to extend his apologies or express his willingness to compensate for the damage. Such a form of proceedings is acceptable only in cases of first offenders who have committed a less serious offence.

As regards its elements, the mediation process includes mediation and conciliation. By mediating between a victim and an offender, the mediator endeavours to arrange for their joint meeting. This is possible if both parties consent to it. Mediators need to be very skilful in order to succeed in convincing the parties that a joint meeting would be very beneficial to overcoming their conflict which ensued following a less serious criminal offence. Comparative experiences show that it is not that easy to get consent from the parties involved to organize a joint meeting since each party has a psychological burden – the offender is trying to avoid facing the consequences of his crime,[38] whereas the victim is in fear of his safety and coming face to face with the offender.[39] It is of paramount importance that the mediator convinces the parties that it would be helpful if the victim could have an opportunity to express the pain and suffering he experienced during a criminal offence, as well as to request that the offender accounts for the reasons for committing the offence,[40] and if the offender could pluck up the courage and face his victim whom he did not take into account when he committed his crime, who in principle is not aware of the situation in which the victim was during the criminalised act and after the crime. Meetings which take place in the course of a mediation process develop a sense of personal responsibility in an offender.[41] In cases when mediators do not succeed in convincing the parties to have a joint meeting, a mediation process can also take place through separate meetings. The primary goal of mediation is that the parties arrive at a mutually acceptable solution or to agree on how they will resolve the conflict. In many cases, mediation ends with an agreement on compensation for damage, but it is not to be excluded that a meeting ends with offender's apology to his victim.[42]

Considering the said characteristics of mediation, Macedonian lawmakers decided to allow mediation in respect of criminal offences which are prosecuted by private prosecutors in cases of criminal offences which are within the jurisdiction of single judges. Namely, in the course of a conciliation hearing which is part of summary proceedings, a single judge is entitled to put forward a motion to the prosecutor and the injured party to consider mediation. By opting for such a solution, Macedonian lawmakers did not accept a mandatory attempt at mediation, but they left it to judge's discretion to decide whether or not he will suggest mediation to the private prosecutor and the suspect. In the context of the principle of voluntariness, the consent of interested parties is a precondition for the mediation procedure. Namely, consent needs to be obtained in writing within three days after the judge referred the parties to mediation. If either party does not submit its written consent, the judge will make a ruling stating that his motion to attempt mediation was unsuccessful and setting the date of the main hearing pursuant to the provision which govern summary proceedings. Upon receiving the written consent, the judge will make a ruling referring the case to mediation and giving the parties three days to select by mutual agreement the person who will act as a mediator in their dispute. The CPC allows

38 Hans-Jörg Albrecht, "Sanctions and Their Implementation", Twenty-first Criminological Research Conference (PC-CRC), Strasbourg, 1996, 37.
39 Martin Wright, "Victims, Mediation and Criminal Justice", Criminal Law Review, 1995, p. 192. Richard Young, "Reparation as Mitigation", Criminal Law Review, July, 1989, p. 465
40 Tony Marshall, "Mediation & Criminal Justice - The UK Expiriance", Pan-European Seminar on Victim-Offender Mediation", Barcelona, 13 july 1995
41 James A. Inciardi, "Criminal Justice", Harcourt Brace Jovanovich Inc., 1987, str. 637.
42 Marshall, op.cit., p. 4. Sometimes, even an apology reveals the therapeutic significance of mediation, Young, op.cit., p. 69.

that the parties select one or more persons as their mediator. In Macedonia, mediators have their own association, the Chamber of Mediators, and there is also a Directory of Mediators according to the filed in which they are trained to participate. Mediators have a duty to conduct the mediation procedure in accordance with the provisions contained in the Law on Mediation – arrange for joint meetings, and if that cannot be accomplished, they will arrange meetings separately with each party. The mediation process must be concluded within 45 days from the date of the written consent by the parties.

The CPC provides that mediators have a duty to inform the parties of the principles, rules, and costs of mediation, but considering the fact that the parties give their consent prior to getting into contact with a mediator it is essential that prior to suggesting mediation, the judge should briefly explain to the interested parties the advantages of mediation and its possibilities.

A mediation process may be ended in several ways: 1) based on the principle according to which a mediator must be objective and ethical and must ensure that a dispute does not escalate during the mediation, the process ends when the mediator informs the Court by his written statement that further attempts at amicable settlement of the dispute are not justified; b) under provisions of the Law on Mediation, a mediation procedure may not last more than 45 days and given that it begins on the day the parties submit their consent to a judge, the 45-day time limit starts to expire on that day; c) due to the principle of voluntary participation of interested parties in the mediation process, the process will be discontinued in cases when either party withdraws from the mediation; and d) given the principle of legality of the final outcome of the mediation procedure, a mediator may terminate the procedure if he finds that a settlement which was reached was either illegal or unfit to be implemented. In any event, after the mediation procedure is concluded, the judge is promptly notified thereof and he must set the date of a court hearing as soon as possible.

Mediation is considered to be successful when the parties reach a settlement and commence signing an agreement made in writing. The CPC lays down the elements of a written agreement: a) information about the parties; b) particulars of the incident and legal classification of the criminal offence; c) date on which the mediation procedure commenced; d) information about the meetings between the parties and a mediator; e) subject matter of the agreement – compensation of damage, fulfilment of certain obligations to the benefit of the injured party, an apology which the offender should extend to the injured party, return of appropriated items or other reasons for settling; f) deadline for fulfilment of the obligation which may not be longer than three months; g) decision on the defrayment of costs; h) date of the settlement; i) parties' signatures; j) signature and seal of the mediator verifying the agreement.

A settlement agreement which has been signed and sealed is submitted to a judge immediately. Considering it is easy to take on obligations which are never fulfilled, the signed agreement does not result in the termination of criminal proceedings. Namely, the CPC provides that a defendant shall within the statutory limit of three months submit evidence to the judge that he has met his obligations and defrayed the costs of the proceedings. The judge will issue a ruling terminating the proceedings once the defendant has submitted evidence which proves that he fulfilled his obligations and not when a written agreement has been signed. Otherwise, if a defendant fails to prove that he has met his obligations within the statutory time limit, a judge shall order the date for the main hearing following the rules of summary proceedings, regardless of the fact that the settlement agreement has been signed and sealed.

3.3. Penal/Criminal Order

The Council of Europe recommends that a penal/criminal order should be provided for in national statutes if the following conditions have been satisfied: that evidence is clear and that it conclusively indicates that a defendant is guilty; that proceedings are initiated by a prosecutor; that a sentence is imposed without having conducted criminal proceedings; that the defendant is fully advised of all the consequences which arise from his acceptance of a penal order; that the defendant shall have an available legal remedy to challenge the penal order; that sentences which may be pronounced by the Court without conducting criminal proceedings are limited and defined by the law and that imprisonment may not be one of them; if the defence does not challenge a penal/criminal order, it will have the status of a judgment to which the principles ne bis in idem and *res Judicata* apply and that challenging of a penal order shall result in criminal proceedings being conducted without the prohibition of reformation in peius being applied to the sentence cited in the penal order which has been contested and vacated.

Macedonian legislators renamed the previous procedure "Rendering a Judgment without Holding a Main Hearing" which could be found in the 2004 CPC to the "Procedure for Issuing a Penal Order" in the new CPC.[43] This refers to an accelerated proceeding in which a prosecutor takes considerable initiative with regard to the evaluation of evidence and imposition of appropriate sentence.[44] In German case law, a penal order is frequently used because it saves time and leads to more expeditious disposition of cases by the court.[45] [46] Such a proceeding is fast-track and summary and allows a departure from the principles of orality and directness when a prosecutor judges that it is not necessary to conduct a main hearing since the evidence which is available to him will suffice for a judgment. Penal orders may be issued only in cases of less serious offences which are punishable with a fine or imprionsment of up to five years.[47] The procedure for issuing a penal order allows public prosecutors to file as their initial action a motion to issue a penal order and not a motion to indict.

A motion to issue a penal order contains: a) personal information about a defendant; b) particulars of the criminal offence with which he is charged as a perpetrator; c) legal classification of the offence; d) evidence available to the prosecution; and e) type and duration/amount of a criminal sanction or other measure proposed to a judge by the prosecution.

43 This term is also known in the comparative criminal procedure law as *Strafbefehlsverfahren* in the German law or as *decreto penale* in the Italian law. A comparative study is to be found in European Criminal Procedures, (eds. M.Delmas-Marty / J.R. Spencer), Cambridge University Press, 2002; Гордана Лажетиќ Бужаровска, Рефлексиите на начело за забрзување на кривичната постапка врз примената на постапката за казнена наредба, МРКК, br. 1-2, 2003, str. 55-71.

44 Kurt Madlener, "The protection of human rights in the criminal procedure of the Federal Republic of Germany", Human rights in criminal procedure - comparative study, The Hague, p.242, according to whom as many as 70% of the accused agree to such a proceeding and passing of judgments. Likewise, Werner Beulke, "Strafprozeßrecht", 6., neubearbeitete Auflage, C.F.Müller Verlag, Heidelberg, 2002, p. 276; Robert Esser, "Criminal Procedure System of the Federal Republic of Germany", in Transition of Criminal Procedure Systems, (ed. Berislav Pavišić), Vol. II, Rijeka, 2004, p. 117.

45 K. Madlener, op.cit., p.242, cites that in more than 400,000 cases per year indictments do not go to trial but instead, penal orders are imposed (Strfafbefehlsverfahren); P. Hünerfeld, "La célérité dans la procédure pénale an Allemagne", International Review of Penal Law, Vol. 66, no. 3-4/95, p. 394, mentions an opinion of H. Dahs that this form of proceedings is used to dispose of approximately 30% of criminal cases which are adjudicated by courts.

46 B. Huber, "Criminal procedure in Germany", in Comparative criminal procedure (eds. Hatchard, Huber, Vogler), British Institute of International and Comparative Law, 1996, pp.157-158, states that without a penal order, the court system would hardly survive; W. Beulke, op.cit., p. 228.

47 Under the German StPO, penal orders may be issued only with regard to less serious criminal offences (*Vergehen*) punishable with a fine or imprisonment of maximum one year, R. Juy-Birman, "The German system", in European Criminal Procedures, pp. 316-317.

The CPC specifically enumerates sanctions from which prosecutors may select one or a combination thereof: a) a fine amounting to 10 to 100 day-fines;[48] b) conditionally suspended sentence including a defined prison term of three months or a conditional fine; c) a two-year driving ban; and d) confiscation of assets or the proceeds from crime as well as seizure of objects.

Upon the receipt of a motion to issue a penal order, a judge will assess whether or not there are grounds for issuing the order and he may decide:

- to pass a ruling dismissing the motion to issue a penal order for formal reasons – when he finds that it is a criminal offence for which penal orders may be issued. Prosecutors have the right to appeal such a ruling before a panel of the basic court's criminal division within 48 hours;
- to set the date of a main hearing following the provisions which govern summary procedure – when he finds that information provided in the motion does not constitute grounds for issuing a penal order or that a proposed penalty or measure is unacceptable; or
- to pass a judgment based on the motion to issue a penal order – when the motion is well-founded with regard to the particulars of the offence, submitted evidence, and proposed criminal sanction or measure. The judgment should also include in its operative part a decision on a restitution claim, if such a claim exists, as well as a brief explanation about the evidence supporting the issuance of the order. At the same time, this is the only judgment in the CPC which contains a legal remedy – objection to the judgment.

The defence is not involved in the procedure for issuing a penal order until a defendant has been served with a judgment. Given the fact that the defence has 8 days to prepare their answer to a judgment passed based on a motion to issue a penal order, a question arises, whether or not the said period of time is sufficient for the defence to prepare themselves since they are not informed of the actions undertaken by a public prosecutor until they have received the judgment and the penal order. The set time limit should be reconsidered since an objection does not have to include an explanation, but it should mention evidence in favour of the defence. If a judge dismisses an objection on grounds of a lapsed statutory time limit, the defence may appeal before a panel of the basic court's criminal division within three days. If a judge finds that an objection is well-founded, he shall set the date of a main hearing following the provisions which govern summary procedings. In case there is a main hearing, the Court shall not be limited by the penalty or measure which was proposed in the motion to issue a penal order. Under the provisions governing regular criminal proceedings, in summary proceedings which are conducted on an upheld objection to a judgment, the defence must be given a deadline for submitting their list of evidence. Namely, it is necessary that the Court should advise the defence of their obligation to submit a list of evidence within a specified time limit after they have received a ruling upholding the objection.

The procedure for issuing a penal order is the only procedure in which it is considered that following the scheduling of a main hearing, a judgment to which the defence has filed an objection has never been passed at all, and so proceedings are conducted as if the judgment had never existed. Several departures from the concept, which occur in the procedure for issuing a penal

48 In Germany as well, fines are imposed following the system of day-fines (Tagessatz), between 5 and 360 day-fines if a single offence has been committed or 720 day-fines for multiple offences, B.Huber, op.cit., p.158.

order, should be mentioned. Namely, this is the only procedure in which a judgment is passed without holding an adversary hearing. It is a fact that evaluation of evidence which is carried out in cases of the procedure for issuing penal orders differs substantially from the concept of presentation of evidence through direct examination and cross-examination. The previous method of evaluation of evidence which was based on written witness statements, physical evidence, and alike has been kept in this procedure. Judges make decision on the validity and significance of evidence submitted by the prosecution in their motion to issue a penal order without testing it at an adversary hearing. Precisely due to such departures, the said procedure should be used solely in situations when there is clear and unequivocal evidence the quality and credibility of which has been verified.

4. Conclusion

An efficient system of criminal justice is a prerequisite for the rule of law. Efforts to make criminal justice equally accessible to all the citizens and to achieve it in the shortest possible period of time have led to modern trends of dynamic development and reforms of procedural actions. The same are the motives for analysing and adapting various solutions whose aim is to accelerate criminal proceedings and simplify procedure under the circumstances which have been defined by the law.

Simplification and acceleration of proceedings was one of the principal goals of the reform. Not only because possibilities for settlement and new forms of accelerated proceedings briefly described in this paper have been adopted with the view of the above, but the whole concept of the reform is aimed at simplification of criminal procedure in its entirety. Not only judicial investigation, but judicial paternalism in its entirety has been abandoned in order to achieve that purpose. An important aim of the reform is to release the Court from the duty to resolve the case itself and *ex officio*, while placing the burden of proof of guilt beyond any reasonable doubt on the prosecution, which should result in judges keeping their role of impartial arbiters and in significant acceleration of proceedings.

There are two main reasons for giving the Court a passive role with regard to evidentiary actions: 1) if the Court remains obligated to resolve cases by virtue of its office, proceedings will remain substantially inquisitorial and the Court will continue (as it has done thus far) to perceive itself as an authority whose primary task is to convict criminals and not to ensure fair trials and equality of arms; and 2) it will substantially delay proceedings. We do not require arguments to support this statement, for a simple reason that lengthy criminal proceedings with a long investigation and many hearings, which are as a rule postponed for a month, are something to which we are virtually accustomed.

Thus, in Macedonia, unlike in the majority of the countries in the region, judicial investigation is deformalised and virtually skipped but it is not replaced by a new prosecutorial investigation in which public prosecutors take the same actions as judges previously used to. On the other hand, the CPC of Macedonia is the only one in the region which establishes the judicial police modelled on the example of Italy. An important element of the idea that a public prosecutor should have at his disposal a team in which there are also some experienced CID inspectors is in connection with the acceleration of proceedings. Now, not only has judicial investigation been

eliminated, but efforts are being made to create conditions in which public prosecutors could themselves, and with the help of inspectors and expert associates as their assistants, quickly gather information and evidence in order to be able to decide whether or not they will conduct investigative proceedings at all, which follow after preliminary investigation and already constitute preparations for a trial.

It should be emphasised that except for the fact that the court will not carry the burden of proof, there is also a provision which precludes proposal of evidence by the parties. Namely, at the very trial, new evidence may be proposed only in exceptional cases.

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Main Characteristics of the Criminal Investigation System in the Legislation of Bosnia and Herzegovina and its Impact on the Simplification of Criminal Proceedings

1. Introduction

For our purposes, investigation is understood to include all actions of collecting the data needed in order to decide whether or not to issue the indictment (i.e. the instrument based on which the case reaches the court).[2] In this sense, the investigation includes the actions of uncovering a criminal offence and the perpetrator and the actions of collecting the evidence on the committed offence and the perpetrator based on which the indictment is decided on.

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2 See Grubač, M. (2006), *Shvatanje pojma krivičnog postupka u novom Zakoniku o krivičnom postupku Srbije*, Novi Sad: *Glasnik Advokaske komore Vojvodine (Gazette of the Bar Association of Vojvodina)*, (10-11), pp. 531-545 and *Kritika "novog" Zakonika o krivičnom postupku*, Belgrade: *Revija za kriminologiju i krivično pravo*, 2006, (2), pp. 5-42

Investigation in different criminal procedure codes[3] may be defined differently[4] and one should take into account both its broader and more restrictedmeaning.[5] The practice of the European Court of Human Rights suggests that each criminal procedure system used in Europe – accusatory, mixed or inquisitorial – has its weaknesses. This applies to the investigation phase as well, regardless of the way it is legislated under national law, which justifies the discussion of possible improvements of the national systems, i.e. search for a "new" optimal European model of criminal procedure[6] and within the investigation.[7] Two tendencies have clearly emerged in the efforts of trying to find an optimal solution over the last few decades.[8] A tendency to bring closer together national systems and a tendency towards harmonisation of national systems or their convergence, especially towards harmonising them with the practice of the European Court of Human Rights.[9]

What used to be called preliminary investigation and pre-trial criminal proceedings is in the new Criminal Procedure Code of BiH[10] merged into a single uniform investigation which is conducted, managed and overseen by the prosecutor as the original holder of the investigating authority. The prosecutor has become dominus litis of the pre-trial proceedings, while the role of the investigating judge has been transformed into a pre-trial judge, with the authority to review the

3 See Đurđić, V. (2009), *Komparativnopravna rješenja o prethodnom krivičnom postupku i njihova implementacija u srpsko krivičnoprocesno zakonodavstvo*, Belgrade: *Revija za kriminologiju i krivično pravo*, Serbian Association for Criminal Procedure Theory and Practice and the Institute for Criminal and Sociological Research.

4 See Pavišić, B. (2004). Overview: *Transition of Criminal Procedure Systems*, published in: *Transition of Criminal Procedure Systems*, Rijeka, p. 24

5 In German pre-trial proceedings the state prosecutor dominates the proceedings. He is the one who receives the information from the citizens, also he is the one who must investigate and oversee police inquiries conducted by the police on his instructions. In order to effectively investigate, the right to use means of coercion is given to him: arrest, search, forfeiture of property and identity checks, some of which are allowed only if the danger of stay of proceedings exists. Upon the completion of the investigation he decides whether to proceed with the prosecution, at which time he files the written indictment. The prosecutor has quite broad authority: he may dismiss the charges or desist from prosecution. In order to desist from prosecution, the court must grant its permission, which is done almost automatically. Austria has basically the same arrangement in which the state prosecutor's office is subordinate to the Minister of Justice. In Italian criminal proceedings the investigative activities and the collection of the evidentiary elements are entrusted to the state prosecutor who is *dominus litis* of the investigation and under his command to the judicial police. The purpose of the activities during the pre-trial proceedings is to determine whether or not to initiate the criminal proceedings. After having conducted an investigation, the prosecutor must choose whether to instigate the proceedings or to file it away in the case archives (archivazione). In keeping with the principle of legality of prosecution, the legislator has set the criteria based on which the state prosecutor must decide and at the same time has provided for a court review of the decision to file it away. If there is no request to file the case away, the pre-trial investigation concludes in lodging a request for a trial to be held, which constitutes an indictment. France has kept the division into an inquiry and investigation and a strong investigating judge. When the formal investigation is optional (it is mandatory only in the case of crimes), and the investigation is not conducted, the inquiry is the only form of the pre-trial proceedings. Pre-trial investigation (inquiry) is run by the judicial police at the request of the state prosecutor or *ex officio*. The role of the state prosecutor is reduced to supervision and the direction of the investigative activities of the police.

6 See Elsner, L.Z. (2008), *Police Prosecution Service Relationship within Criminal Investigation*, European Journal on Criminal Policy and Research, 14, pp. 203-224.

7 See Bejatović, S. (2007), *Koncepcijska dosljednost tužilačke istrage prema novom Zakoniku o krivičnom postupku*, Belgrade: *Revija za krimnologiju i krivično pravo*, (1), pp. 71-94.

8 See Ivičević Karas, E. (2010), *O reformama savremenog francuskog krivičnog postupka iz aspekta jačanja procesne uloge državne advokature*, Zagreb: Hrvatski ljetopis za krivično pravo i praksu, vol. 17, (1), pp. 109-124.

9 See Radulović, D. (1997), *Efikasnost krivičnog postupka i njen uticaj na suzbijanje kriminaliteta*, in Collected papers: *Realne mogućnosti krivičnog zakonodavstva*, Belgrade, p. 159; Vasiljević, T. (1966), *Sredstva za ubrzanje krivičnog postupka*, Novi Sad: Papers Collected by the Faculty of Law in Novi Sad, p. 141; Triva, S. (1972), *Mjere koje imaju za cilj da građanski sudski postupak bude brži i efikasniji*, Belgrade: Legal and Social Sciences Archives, (4), p. 421; V. Đurđić (1996), *Načelo oportuniteta*, Belgrade: Pravni život, (9) pp. 421-437; Cigler, S. (1998), *Racionalizacija krivičnog postupka i uprošćene procesne forme*, doctoral dissertation, the Faculty of Law in Novi Sad, p. 212; Vasiljević, T. (1941), *Značaj brzine i uzroci sporosti krivičnog sudskog postupka*, Belgrade: Legal and Social Sciences Archives, (2), p. 91; Brkić, S. (2009), *Pojednostavljene forme krivičnog postupanja i postupak njihovog ozakonjenja u Republici Srbiji*, Belgrade: *Revija za kriminologiju i krivično pravo*, vol. 47, (1), pp.77-121.

10 *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 and 93/09. Hereinafter: the Code. In addition to this Code, Bosnia and Herzegovina has three more criminal procedure codes in application, [in Republic of Srpska - Criminal Procedure Code of the Republic of Srpska *Official Gazette*, no. 72/11, 101/11and 121/12), in the Federation of Bosnia and Herzegovina – the Criminal Procedure Code of the Federation of BiH (*Official Gazette of the Federation of BiH*, no.28/05, 55/06, 27/07 and 9/09) and in Brčko District – the Criminal Procedure Code of the Brčko District (*Official Gazette of Brčko District of BiH*"- Consolidated text, no. 44/10)], which all contain identical provisions on the investigation.

prosecutor's decisions if necessary. Thus, with the rationale of raising the level of efficiency of the pre-trial proceedings, an old issue reappeared whether this apparent procedural merging of the two functions of prosecution and investigation is good or bad. The side effect of these changes is the change of the position and role of the officers in charge.

The investigation is a part of the pre-trial proceedings but it is not equivalent to the pre-trial proceedings. Pre-trial or preparatory proceedings in comparative law, in addition to the investigation as described, include 1) the indictment and 2) the decision on the indictment before the main hearing begins.[11] The investigation must meet the key requirements related to the right to a fair trial pursuant to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[12] Some of these requirements during the investigation have a different meaning (e.g. public access to the proceedings).[13]

The investigation includes two segments in terms of its content. The first segment is the discovery, latent phase.[14] It includes the discovery of the criminal offence (or the findings), gathering of information on the perpetrator, the victim and other information, as well as undertaking actions in order to ensure the conduct of the criminal proceedings. At this stage of the proceedings the criminal offence is not quite determined yet and the same can be said about the perpetrator as well. In terms of the awareness of the crime, at this point, there is the initial or starting (which is the lowest) probability that the criminal offence has been committed. This represents the grounds for suspicion which may be limited to the initial probability that the said offence has been committed or, in addition to that, to the perpetrator's character.

The second segment is the gathering of evidence on the criminal offence in question committed by a perpetrator who is detected (individualised, but not necessarily identified), against whom certain actions are being undertaken with regard to the said criminal offence. As a rule, these are pre-trial proceedings in a legal sense of the term. The second phase of the investigation is in some cases conducted immediately, without the preceding phase. First of all, this is done in the cases of flagrant criminal offences.[15]

The investigation is greatly determined by the scope of the investigation. It includes the following actions: 1) gathering of the evidence, 2) conducting the proceedings, 3) deciding and 4) using the methods of coercion. Gathering of evidence includes the preparation of those who are holders of the evidence to become the evidence at the main stage of the proceedings by means of evidentiary instruments. During the investigation stage, the discovery, i.e. inventive component, is prominent and accordingly the requirements in terms of the organisation and planning are substantially greater.[16]

11 Pavišić, 2004, p.47

12 Hereinafter: the European Convention

13 See Lazin, Đ. (2007), *Zaštita ljudskih sloboda i prava prema novom Zakoniku o krivičnom postupku*, published in Collected Papers: *Primjena novog Zakonika o krivičnom postupku Srbije*, Kopaonik: the Criminal Law Association of Serbia, pp. 29-50.

14 The latent phase of the investigation is fundamentally determined by the initial findings. It usually represents the actions of the police aimed at creating the basis for the preliminary, differential diagnosis of the crime.

15 See Brkić, S. (2002), Nove procesne forme u Zakoniku o krivičnom postupku, published in Collected papers: *Mjesto jugoslovenskog krivičnog prava u savremenom krivičnom pravu*, Belgrade: Serbian Association for Criminal Law, p. 218.

16 See Bejatović, S. (2009), *Međunarodni pravni stanadardi u oblasti krivičnog procesnog prava i način njihove implementacije u Zakonik o krivičnom postupku* Republike Srbije, Collected Papers: *Zakonodavni postupak i kazneno zakonodavstvo*, Belgrade: Serbian Association for Criminal Procedure Theory and Practice

2. The Role of the Prosecutor in the Investigation

The role of the prosecutor in the criminal proceedings is "twofold". Firstly, the prosecutor is acting as the state authority in charge of the discovery and prosecution of the perpetrators of criminal offences, which includes exclusive jurisdiction to order and conduct investigations, as well as issuing and representing the indictment. In the other role, the prosecutor functions as a party to the proceedings, with the same authority as the opposing party (the suspect), which is in compliance with the provisions on the equal status of both parties to the proceedings.

Pursuant to Article 35, Paragraph 2 of the Code, the prosecutor's duties are as follows: 1) to take necessary measures and actions, immediately upon learning of the commission of a criminal offence, in order to discover the said offence and conduct an investigation, to locate the suspect, to manage and oversee the investigation, as well as to manage activities of the authorised officers related to the location of the suspect, taking depositions and collecting evidence. The purpose of the said provision is to intensify the activities of the prosecutor's office, to formulate the procedure, to enhance and achieve greater efficiency with regard to the discovery of criminal offences and the location of their perpetrators and also with regard to the management of the activities of the officers in charge of locating the suspect, taking the statements and collecting the evidence;[17] 2) to conduct the investigation in accordance with the law; 3) to grant immunity in accordance with the law;[18] 4) to request information to be supplied by the state bodies, companies, legal entities and natural persons; 5) to issue summonses and orders and propose issuing summonses and orders in accordance with the law; 6) to order the officer in charge to comply with the court order in accordance with the law;[19] 7) to establish facts necessary for the decision on the property claim; 8) to propose the issuance of a criminal order;[20] 9) to issue and represent the indictment; 10) to file legal remedies;[21] 11) to perform other duties stipulated by law (e.g. request international legal assistance etc).

17 Sijerčić-Čolić, Hadžiomeragić, Jurčević, Kaurinović i Simović, p.133

18 As is provided for by the Code, the witness has the right not to answer the questions if a truthful answer would expose him to criminal prosecution. The witness may give answers to such questions if the prosecutor decides to grant him immunity from prosecution. Once immunity has been granted, the witness shall not be prosecuted unless he gives false testimony.

19 Until the charges are brought against him, the suspect shall only be summoned by the prosecutor. As far as orders are concerned, some are issued by the prosecutor independently (order for the expert evaluation, order to conduct an investigation, order to suspend the investigation, order to bring in the suspect etc.) or the prosecutor proposes the orders to be issued (search warrant, forfeiture warrant, exhumation order, order to undertake special investigative actions etc.) . The prosecutor is given a special option to depose detainees if it is necessary in order to uncover other criminal offences committed by the same perpetrator, his accomplices or criminal offences committed by other perpetrators. Detainees may only be summoned related to the listed offences and the summoning of the detainee first must be approved by the court. In this case the officers in charge are not allowed to gather information on the offences for which the detainees are held in custody. Such a provision is considered just, since it is unacceptable that the two official bodies are simultaneously questioning the said detainee about the same criminal offence.

20 The prosecutor has the right to request in the indictment a criminal order to be issued by the court, in which the court would order the imposition of criminal sanctions or measures without conducting the main hearing.

21 The prosecutor is the only one who is allowed to lodge an appeal both in favour and to the detriment of the accused, which results from his dual role as a party to the proceedings and as a civil servant.

The prosecutor's rights and duties are stipulated by the Law on the Prosecutor's Office of Bosnia and Herzegovina,[22] which establishes the Prosecutor's Office as the body responsible for efficient enforcement of the regulations under the jurisdiction of Bosnia and Herzegovina, the protection of human rights and legality in the territory of Bosnia and Herzegovina. Therefore, the prosecutor, according to the principle of the legality of criminal prosecution, must initiate criminal prosecution if there is evidence that a criminal offence has been committed. Acting based on the principle of legality, the prosecutor is not authorised to decide whether the prosecution is opportune except in special cases stipulated by the law.

The current model of investigation requires immediate involvement of the prosecutor in the investigation as well as undertaking evidentiary actions, which is the prosecutor's legal obligation contained in the statement that the prosecutor is required not only to prosecute but also to discover perpetrators of criminal offences. He directs the investigation towards a complete and all-round examination and clarification of all relevant facts related to the criminal offence and its perpetrator, both of those facts that go in favour of the suspect and those that are detrimental to his case. Such an approach gives to the prosecutor, on the one hand, a strong mechanism to develop investigative strategies and tactics, that will secure him a strong position at the main hearing after the indictment is confirmed, in a sense that he will have evidence at his disposal that has been obtained legally and that cannot be challenged in the proceedings, thus preventing any surprises the defence might try. On the other hand, this will enable him to look at the facts that go in favour of the suspect from all angles. Thus, it is prevented that the indictments are brought against persons in cases where there is a lack of evidence of their guilt that could have led to a guilty verdict. Such a role requires from the prosecutor to observe the law consistently, professionalism, effort, persistence, discipline, investigating spirit, constant professional development in various fields of science, as well as high moral standards. He must thoroughly investigate and prepare the case for the trial, he must provide a theory which explains the case and he must be able to predict the strategy of the defence.

The prosecutor has been transformed from a passive office to an active one, an operative subject of the criminal prosecution, the investigation and criminal proceedings, who is faced with numerous challenges. The prosecutor is expected to be highly proactive, knowledgeable and skillful. From the point he is notified of the criminal offence, the prosecutor directly influences the start, the course and the conclusion of the criminal proceedings.[23] His role is dominant at the main hearing as well, where he represents the indictment, presents evidence, questions witnesses and experts, proposes evidence to be presented etc. It is clear that the above mentioned goals and tasks cannot be fulfilled successfully if the duties and obligations of the officers in charge are not fulfilled efficiently and at a high quality level.[24] The activities of the officers in charge

22 *Official gazette of BiH* – Consolidated Text – no. 40/09. Entities in BiH also have their laws on the prosecutor's offices and there is a Law on the Prosecutor's Office of Brčko District of BiH. Integral text of the Law on the prosecutor's Offices of the Republic of Srpska may be accessed at this address: www.vladars.net/.../ zakon% 20o%20 tužilaštvima%20rs, ... and it includes the Law on the Prosecutor's Offices of the Republic of Srpska (*Official Gazette of the Republic of Srpska* no. 55/2), which came into force on 12 September 2002; the Law on the Amendments and Supplements to the Law on the Prosecutor's Offices of the Republic (*Official Gazette of the Republic of Srpska* no. 85/03) and Law on the Amendments and Supplements to the Law on the Prosecutor's Offices of the Republic (*Official Gazette of the Republic of Srpska* no. 37/06), which came into force on 5 May 2006. The Law on the Federal Prosecutor's Office of the Federation of BiH published in the *Official Gazette of the Federation of BiH* no. 42/02 and 19/03, and the Law on the Prosecutor's Office of Brčko District of BiH in the *Official Gazette of Brčko District of BiH* no.19/07.

23 See Bejatović, S. (2006), *Tužilačko-policijski koncept istrage i efikasnost krivičnog postupka sa posebnim osvrtom na krivično procesno zakonodavstvo Srbije, Belgrade: Revija za kriminologiju i krivično pravo*, (3), pp.109-119.

24 See Talk, P. (2005), *The Relationship Between Public Procesutors and the Police in the member states of the Council of Europe*, Coference of Procesutors General of Europe 6th Session, Budapest, 29-31 May 2005

during the investigation consist of providing law-enforcement, technical or other assistance to the competent prosecutor, i.e. the court, as well as of investigative activities (evidentiary actions), under the conditions and as provided for by the Code, in addition to certain search actions (issuing warrants for people or objects, finger-printing, etc.).[25]

The burden of proof lies with the prosecutor, the suspect may refuse to answer questions during the investigation. This cannot be used against him.

3. Initiating and Conducting the Investigation

The investigation is initiated at the prosecutor's order to conduct the investigation. The order is issued based on the grounds for suspicion that a criminal offence has been committed. This is a form of probability based on certain circumstances which point to a possibility of the commission of a criminal offence and to its possible perpetrator, i.e. this is a type of suspicion with a limited differential reach.[26] The grounds for suspicion must be specific, based on concrete data solid enough to support it. One must always look at the grounds for suspicion from the point of view of their function, as a set of circumstances and indications that point to a probable commission of a criminal offence that cannot fit a theory that there has been no criminal offence at all.

The legislator has left an option to the prosecutor to issue an order to conduct an investigation. – if he deems it necessary. Therefore, it is not right to assume that the prosecutor must issue an order to conduct an investigation in each case in which there are grounds for suspicion that a criminal offence has been committed,. However, when a court is asked to intervene during the investigation (in terms of rendering a decision on search warrants, detention etc.), the order to conduct an investigation must be issued in a written form and presented to the pre-trial judge along with the request for a certain type of order or decision. It is the only way the court can gain insight into the grounds, subject and results of the investigation up to that point, as well as determine whether the requested decision should be rendered.

Investigation order must list precisely the circumstances that should be investigated, as well as the investigative actions that should be undertaken for this purpose. On the day the said order is issued the time set by the Code for the prosecutor to complete the investigation starts running.

The prosecutor shall not order the investigation if it is clear from the report and accompanying documents that the reported act is not a criminal offence, if there is no reason to suspect the reported person has committed a criminal offence, if the statute of limitation applies, or if the said offence is subject to amnesty or pardon or if there are some other circumstances that preclude criminal prosecution (Art. 216, Par. 3 of the Code). A new provision has been introduced that ensures that the prosecutor in such cases is under an obligation to inform the person who has reported the crime within three days of the day the decision is rendered not to conduct the investigation. The person who has reported the crime and the injured party have the right to file a complaint against the said decision of the prosecutor with the Prosecutor's Office within eight days

25 See Memorandum of Understanding between the State Investigation and Protection Agency and the Prosecutor's Office of BiH on the Detection and Criminal Prosecution of the Perpetrators of Criminal Offences, which was signed on 12 Oct 2005 in Sarajevo.

26 Modly, Petrović, Korajlić, pp. 64 and 65

(Art. 216, Par. 4 of the Code). Neither the procedure nor the form of the decision made on such a complaint is set out, but it is clear that based on the nature and character of the said provision that the Prosecutor's Office may decide that the complaint is well-founded and order the investigation to be conducted or that it is unfounded and inform the complainant of its decision. In order to conduct the investigation it is also necessary that there are no legal provisions that preclude investigation as it is the case when foreigners who have immunity are involved and who are subject to international law, as well as in the cases where the prosecution must be first approved by the state authorities.

The prosecutor has broad authority to conduct the investigation (Art. 35 and 217 of the Code). His competences include: identification of the suspects; summoning natural persons and legal entities; option to order the police or other authorised officers to comply with the court orders; request the court to issue a search warrant (Art.53) and the order to seize objects (Art 65); summoning and interrogating the suspect (Art 77); granting immunity to witnesses (Art.84); requesting information from natural persons and legal entities and government agencies; conducting crime scene investigation; requesting expert assistance (Art.96) and requesting special investigative actions to be undertaken (Art 118 of the Code). The prosecutor may request an order which allows temporary seizure of property acquired illegally (Art. 73 of the Code)

4. Special investigation methods

Almost all modern criminal legislations, to various degrees, provide special rules for the use of measures for undercover collection of data on the most serious crimes.[27] *Ratio legis* of their use lies in the fact that the traditional, conventional evidentiary methods are not sufficient in the most serious cases, and especially in the cases with international reach.[28] Special investigative actions[29] may be used against suspects in the following cases: if the evidence cannot be obtained otherwise or if obtaining it would cause disproportionately great difficulty and if there are grounds for suspicion that the person in question has committed or is currently committing criminal offences against the integrity of BiH, crimes against humanity and values protected under international law, acts of terrorism or criminal offences that are by law punishable by a term of three years in prison or a more severe sentence (Art. 116 and 117 of the Code). Special investigation measures include: surveillance and technical recording of telecommunications; access to a computer system and computer-assisted cross-referencing of the data, surveillance and technical recording of premises; secret surveillance and technical recording of individuals, transport vehicles and related objects; use of undercover investigators and informants; simulated[30] and controlled

27 With regard to this, the following are of great importance: the Convention of the Council of Europe on Laundering, Search, Seizure and Confiscation of Proceeds of Crime from 1990; Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances from 1988, Interpol's Resolution on Organised Crime(AGN/57/RES/17 and AGN/58/RES/5), as well as the Resolution of the Council of Europe on the Prevention of Organised Crime from 1998.

28 See Krapac D. (1997), *Posebne mjere i radnje za otkrivanje i suzbijanje krivičnih djela organizovanog kriminaliteta u novom Zakonu o krivičnom postupku Republike Hrvatske, Zagreb: Hrvatski ljetopis za krivično pravo i praksu*, (2), p.405.

29 In Germany the terms "special investigative measures" and "special police investigative methods" are used, as well as "secret investigations" (verdeckte ermittlungen). . In the countries that use Anglo-Saxon legal system, these measures are called "undercover methods" and "undercover operations". Montenegro uses the term "secret surveillance measures", and in Croatia they are described as "measures that temporarily limit constitutional rights and freedoms in order to collect data and evidence for the conduct of the criminal proceedings".

30 See Marinković D., Đurđević Z. (2006), *Simulovani poslovi i usluge kao dokazna radnja i oblik navođenja na krivično delo*, Belgrade: Pravni život, (9), pp. 1025-1939.

purchase of objects[31] and simulated offering of bribes and monitored transport and delivery of objects (Art.116, Par. 2 of the Code).

All of the special investigative actions must be undertaken in accordance with a court order. The evidence obtained by using the special investigative actions properly is admissible in court and may be considered proof. This includes the testimony of undercover investigators, technical recordings, documents and objects obtained in the course of the investigation (Art. 122 of the Code). The court is not allowed to base its decisions on the evidence obtained through the use of special investigative methods without a court order or by violating the court order.[32] In addition, the suspect cannot be found guilty for committing the offence at the order or request of a police officer working undercover, who has incited the criminal activity ("entrapment").[33]

5. The Role of the Officers in Charge during the Investigation

The role of the officers in charge during the investigation is many-fold: they are the ones who are the first to respond to a call, who investigate and cooperate with the prosecutors. The officers in charge are the first to respond to an emergency call, to a report of a crime or some other incident which calls for immediate action for public security reasons. Such criminal offences or emergencies may be various and may include a wide range of possible events, from serious traffic accidents to terrorist attacks and hostage situations.[34]

In order to complete the tasks which are related to the location of perpetrators of criminal offences, to the prevention of concealment and flight of suspects or their accomplices, detection and preservation of traces of criminal offences and objects that might be used as evidence, as well as to the gathering of information that might be useful during the criminal proceedings, the officers in charge may (Art.218 of the Code): take statements from the persons involved; inspect vehicles, passengers and luggage[35]; restrict movement in a certain area for a time period necessary to complete certain actions[36]; take measures necessary in order to locate the suspects or objects that are

31 See Vujačić, A. (2004), Kontrolisane isporuke, Belgrade: *District Court Bulletin*, (64), p. 33 and 34.

32 The use of recording devices for the evidentiary purposes is legislated in various ways. Planting listening devices is regulated in England in detail by the Police Act passed in 1977 (the use of which is decided by a senior police officer), in Germany by *OrgKrimG* from 1998 (it is decided by the court). Wire-tapping of phone calls in Spain, Luxemburg and France is granted by the investigating judge, in Germany and in some other legal systems at the first stage the state prosecutor decides on it, and at the second stage the court. In general, the seriousness of the crime is taken into consideration as well as whether or not the requirements stipulated by the law have been met (subsidiarity, time limitation, detection of the person in question), in addition to detailed conditions of implementation.

33 See Knežević, S. (2005), *Zaštita privatnosti osumnjičenog u svjetlu novih zakonskih rješenja. Novo krivično zakonodavstvo Srbije* (Collected Papers), Kopaonik, pp.169-185 and Škulić M. (2007), *Uloga posebnih dokaznih radnji u suzbijanju organizovanog kriminala. Primjena međunarodnog krivičnog prava - organizovani kriminal* (Collected Papers), Belgrade, p. 35 and onwards.

34 See Hodgson, J. (2001), The Police, the Prosecutor and the Judge D`Instruction, Judicial Supervision in France, *Theory and Practice, Brithish Journal of Criminology*, (41), pp. 342-361.

35 Inspection is not a formal investigative action and is not subject to a court decision and authorisation. During the inspection, the structure of the facilities being inspected must not be disturbed. In the process of the inspection the situation is recorded as found by using human senses without disturbing the integrity of the facilities, i.e. the space that is being inspected.

36 This measure represents a form of arrest that does not last any longer than necessary. It is applied to an undetermined number of persons found in the place where such measure is being implemented, the purpose of which is to locate perpetrators of criminal offences, securing the traces of a committed criminal offence and the objects connected to or used for the commission of a criminal offence.

being searched for[37], call a search for the person or objects that cannot be found[38]; in the presence of the responsible officer, search certain facilities and premises of state agencies, public enterprises and institutions and get access to certain documents they have[39]; undertake other measures and actions.[40] In addition to the listed actions, officers in charge may undertake other actions such as detaining someone at the crime scene (a special form of an arrest), as well as the actions that are the prosecutor's competence, but which may be undertaken by the officers in charge under the conditions stipulated by the Code such as crime scene investigation and expert evaluation, except autopsy and body exhumation. Basically, officers in charge may undertake all evidentiary actions, provided that the prosecutor is notified, but the notification of the prosecutor is not a legal condition to undertake such actions but a formal requirement to assess their legality.

The officers in charge and the prosecutors may enter into conflict or encounter difficulties in the following situations: police investigator may blame the prosecutor for not issuing the indictment or lack of interest to pursue the case processed by the police; it is possible for the police investigator not to concur with the prosecutor's investigation methods, the prosecutor may blame the police for not acting on the received instructions or for not obtaining the evidence legally. In order to overcome such conflicts, the police and prosecutors must work together, as members of a team working towards the same goal.

6. Prosecutorial Supervision of the Officers in Charge

The prosecutor acts as the superior, in terms of supervision of the officers in charge, from the moment he learns that there are grounds for suspicion that a criminal offence has been committed. It follows that the prosecutor does not supervise nor manage or direct the work of the officers in charge prior to learning that there are grounds for suspicion that a criminal offence has been committed. The responsibility for the actions and work of the officers in charge rests solely on them and the agencies they work for until the moment the prosecutor is informed that a criminal offence has been committed.[41]

The prosecutor's supervision of the work of the officers in charge manifests itself in three ways. The prosecutor: 1) provides professional support and the interpretation of the provisions of the criminal law, in addition to making sure that the human rights of citizens are protected during the actions of the officers in charge; 2) issues necessary instructions to the officers in charge in the course of the investigation, in terms of collecting the information and evidence as is prescribed

37 This refers to the procedure of criminal identification, the purpose of which is to determine who is the person whose identity is unknown, the person who is hiding his/ her identity or who is not in the condition to state their personal details or in order to identify a corpse, human remains etc.

38 Search is no different from an arrest warrant in terms of procedure, but the difference is in the regulation based on which it is called. The search for individuals or objects is called pursuant to the provisions of the Par. 1 of the Art. 218 of the Code and based on the regulations that legislate the operations and procedures of the officers in charge, therefore the subject of such a search is not just the suspect.

39 The search must be conducted in the presence of the liable officer from a state agency, public enterprise or institution. This search is substantially different from the search of a flat, other premises and movables because the said officers must limit the search just to the facilities and premises, as well as the documentation that is believed to be connected to the criminal offence that prompted the search. Gaining access to the documentation includes copying the said documentation (photocopying, scanning etc.), and when it is necessary, the liable officer should be asked to compare the copy to the original and certify it is the same as the original, i.e. initial it.

40 It is not specified which actions and measures are those, but it should be understood to mean all of those measures and actions that are necessary to complete the set task, including: collecting information while concealing the capacity of an officer in charge, gathering information from informants, checking who is the user of telecommunications addresses etc.

41 Milošević, Tirić, p. 48

by the law, so that they may be used before the court as legally admissible, 3) participates in the necessary procedural actions during the investigation that require the involvement of the officers in charge.

The method of reporting to the prosecutor with regard to the committed criminal offence varies depending on the severity of the prescribed penalty for the said offence. Therefore, for the offences which are punishable by law by a term of more than 5 years in prison, the officers in charge must inform the prosecutor immediately upon learning that there are grounds for suspicion that the said offence has been committed. With regard to the offences punishable by a term of up to 5 years in prison, the officers in charge must inform the prosecutor about all of the available information, actions and measures that have been undertaken within 7 days from the day of learning that there are grounds for suspicion that a criminal offence has been committed at the latest (Art. 218 of the Code). The officers in charge have the right and obligation, i.e. duty, to undertake the following actions and measures provided they inform the prosecutor as stipulated: crime scene investigation (Art.221); requesting the necessary expert evaluation (apart from the examination, autopsy and exhumation of a body) – Art 221 and detaining persons found at the crime scene (Art.220 of the Code). Measures and actions which may be undertaken by the officers in charge with the prosecutor's permission are: filing a motion for a court ordered search (Art. 53, Par. 2); filing a motion for a court ordered temporary seizure of objects (Art. 65, Par. 2); and releasing the photographs of the suspects to be published (Art. 220, Par. 2 of the Code).

7. Management of the Investigation

Investigation management is inescapably linked to the planning of the course it is going to take. How the prosecutor plans the investigation depends on many factors. First of all, on the seriousness and the nature of the committed offence, but also on the prosecutor. Specifically, there are prosecutors who transfer completely the competences for undertaking investigative actions to the officers in charge, while the prosecutor later makes the prosecutorial decision. Alternatively, the prosecutors may investigate themselves or the prosecutor may combine the two mentioned approaches.

In simpler investigations, mainly involving the offences for which a prison sentence of up to 5 years is prescribed, there is no legal obstacle to give the officers in charge broader authority. In more complex investigations, the prosecutor should conduct the investigation in a team with the officers in charge, who may work for different law enforcement agencies. Such a team should in practice function as a whole, each member within their competencies and abilities.

Officers in charge make the first assessment which actions should be undertaken, since, as a rule, they are the ones who are the first to be informed of the commission of a criminal offence. The first thing the officers in charge should do in such a situation is to secure the crime scene, so that the scene would not be disturbed until the investigation unit arrives; to collect the data that might become unavailable at a later time, to make a record of the witnesses and separate them (so that they do not have contact with each other), as well as to collect as much information as possible about the perpetrator etc. In addition, the prosecutor immediately decides whether or not he will visit the crime scene or authorise the officers in charge to conduct the crime scene investigation.

If there is a danger of delaying certain evidentiary actions, the prosecutor may even verbally request from the court to issue a search warrant. A temporary seizure of objects may also be requested. Whether or not there is a danger of delaying the actions, the prosecutor shall determine together with the officers in charge in each specific situation.

8. The Role of the Injured Party in the Investigation

When the new Criminal Procedure of BiH came into force, the role of the injured party in the investigation proceedings changed significantly.[42] The investigation proceedings have fallen under the exclusive competence, under public law, of the prosecutor, whereas the injured party practically has no role in it.[43] In addition, by introducing the investigators into the criminal procedure, the prosecutor gains mechanisms which allow him to manage the criminal prosecution more easily.[44] The investigation itself and its content may be kept secret from both the suspect and the injured party. The injured party does not have to be aware of the investigation at all, since the prosecutor is not under an obligation to notify him of it.[45]

The entire criminal proceedings, including the investigation, are conducted, first and foremost, in order to protect the rights and freedoms of citizens, who in the event of the commission of a criminal offence are given the status of the injured parties – if some of those rights or freedoms are violated, i.e. infringed. Therefore, the prosecutor must bear in mind the interests of the injured party at all times during the investigation proceedings. The prosecutor is under an obligation to question the injured party during the proceedings and establish all of the facts and circumstances that are of importance for the settlement of a property claim made by the injured party. Moreover, the Code grants the right to the injured party to file complaints in connection to the prosecutor's decisions not to conduct, i.e. suspend the investigations.

42 There are several recommendations made by the Council of Ministers of the European Council that regulate the status of the victims during the criminal proceedings, i.e. in relation to the witness protection. The most important among such recommendations are R(85)11, R(87)4, R(87)18, R(87)21 and R(06)8. These recommendations regulate the general procedure related to the victim (understanding, protection, information on their rights and the conclusion of the investigation, special methods of interrogation), the right of the victim to make a statement on record on the use of prosecutorial discretion and oppose the decision on the suspension of criminal prosecution. European Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) is particularly important. Among the UN documents the following should be noted: the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (The Declaration was adopted by the UN General Assembly in 1985), as well as the Convention against Transnational Organised Crime and the accompanying protocols. See Tomašević, G. and Pajčić, M. (2008), *Subjekti u kričnom postupku: pravni položaj žrtve i oštećenog u novom hrvatskom krivičnom postupku*, Zagreb: *Hrvatski ljetopis za krivično pravo i praksu*, vol. 15, (2), pp. 817-857.

43 One of the first cases in which the European Court of Human Rights has deliberated on the right of the injured party in the light of the Art. 6, Par. 1 of the said Convention was *Moreira de Azevedo vs.Portugal* (23 Oct 1990, §§ 46, 66 and 67). In the said case the injured party joined the public prosecutor in the criminal prosecution as an assistant ("assistente"), but he did not file a property claim at a certain procedural stage (instead he asked to decide on that later in the proceedings). In contrast to the position held by the European Commission for Human Rights that the result of the proceedings was not of deciding importance for the exercise of civil rights of the injured party, the European Human Rights Court took a different stand.

44 See Pavliček, J. (2009), *Uloga istražitelja u krivičnom postupku*, Zagreb: *Hrvatski ljetopis za krivično pravo i praksu*, vol. 16, (2), pp. 895-910.

45 According to the European Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, the member states must ensure sufficient educational level for all professional groups which are in contact with the victim. Such training should enable the police officers, prosecutors and judges to understand the situation and the needs of the victims, evaluate their own actions in such a context, as well as develop new work and operational procedures in order to prevent the secondary victimisation and make sure that the victims feel recognised and respected.

9. The Role of the Suspect in the Investigation

According to the character of the undertaken investigative actions and measures during the investigation proceedings, there are three different degrees of the rights of the suspect. Consequently, there is a distinction in the position and the rights of the suspect: 1) against whom no measures or actions are taken that require the court's permission; 2) against whom measures or actions that require the court's permission are taken; 3) who is remanded in custody (including those who are arrested). In general, when the investigative measures and actions or their consequences result in the infringement, i.e. limitation of certain rights and freedoms of the suspect, they need to be approved by the court, i.e. by the pre-trial judge.

The suspect has the right, first of all, to a defence lawyer during the investigation proceedings, already from the first time he learns that he is the subject of an investigation, i.e. from the first time he appears before the investigating officers. However, during the investigation proceedings, the suspect not only is not allowed to contest the grounds upon which the investigation against him is being conducted as was stipulated by the previous criminal procedure code (by complaining against the decision to conduct an investigation), but he even does not have to know that he is being investigated, since the prosecutor is not under the obligation to inform him about it, nor does the prosecutor need to serve him with the initial document on the conduct of the investigation (i.e. the order).

The scope of the rights of the suspect and his lawyer during the investigation is mainly reduced to the following: suspect's notification of the criminal offence he is being accused of and of the grounds of suspicion that he is facing; giving procedural guarantees and instructions during the first interrogation of the suspect conducted by the prosecutor or the officer in charge and the notification of the time when the suspect and his lawyer may examine all the evidence that goes in favour of the suspect. However, if the prosecutor does not decide to interrogate the suspect at the beginning of the investigation, the suspect cannot in essence formulate and conduct his defence, i.e. in such a case his role at this stage remains passive.[46]

The presence of the suspect, i.e. his defence lawyer, when certain investigative actions are being undertaken, is provided for quite restrictively, specifically, it is required in such cases where certain civil rights and freedoms are being restricted (e.g. during the search), although even then their role is not an active one, but consists of the control of sorts of the legality of certain investigative actions. Accordingly, the role of the suspect and especially of his defence lawyer comes down to rights, not authority, in order to exercise and protect the suspect's constitutional rights and freedoms.

Pursuant to Art. 47 of the Code the defence lawyer has the right during the investigation to examine documents and inspect the collected objects that may be used in favour of the suspect. Such a right may be denied to a defence lawyer if the documents and objects in question may jeopardise the purpose of the investigation if they are shown. This right of the defence lawyer is derived from the requirement for equal legal means (equality of arms) during criminal proceedings, which is at the foundation of the right to a fair trial protected under Art. 6, Par.1 of the European Convention. However, the legislator has limited the type of evidentiary material that the suspect, i.e. his defence lawyer, may have access to – only the evidence that goes in favour of the suspect, and even when it comes to such evidence the said right does not have to be adhered to if it jeopardises the purpose of the investigation.

46 Milošević, Tirić, p. 57

10. The Role of the Court in the Investigation

When the Code came into force, the Court was given a role of a kind of supervisor of the investigation in the situations when the investigative measures and actions undertaken by the prosecutor and the officers in charge infringe the civil rights and freedoms. In addition, at this stage of the criminal proceedings, the court does not review the grounds of the investigative proceedings although it indirectly assesses whether the prosecutor's conclusions are well-founded (when it is deciding on the prosecutor's motions). When the assessment is made whether certain motions by the prosecutor or the officer in charge should be granted, the pre-trial judge may indirectly, while assessing whether conducting certain investigative actions is well-founded and justified, comment whether there are grounds for suspicion, he may as well, finding that the prosecutor or the officer in charge were wrong to conclude that there are grounds for suspicion, reject the request for the asked court order. In such cases, the rejection of the request for a court order for certain investigative actions to be conducted does not have a constitutive formal effect in terms of the continuation of the investigation, since this assessment is entirely under the prosecutor's jurisdiction.

One of the specific roles of the court in the investigation proceedings is to preserve evidence. This is done in special situations when the court prior to the trial is put in a position of the body before which a certain piece of evidence is presented. In terms of the preservation of evidence by the court related to questioning the witnesses, the Code specifies two different situations: taking statements from the witnesses and the use of such statements. Material condition for the witnesses to be heard before the main hearing is that it is in the interest of justice and there is a possibility that the witness will not be available during the trial. The formal condition is contained in the appropriate procedural initiative that is reflected in the motions of the parties involved or the defence lawyer, as well as in the acceptance of the said motions by the pre-trial judge who will in such a case issue an order for such a witness to depose at a special hearing. The witness testifies in accordance with the rules stipulated for such a testimony at the main hearing ensuring that the principle of contradiction is observed. This does not mean automatically that the said testimony will be used at the main hearing. With regard to that, the Code imposes an additional condition that the parties, i.e. the defence lawyer, must meet when requesting for the statement obtained in such a way to be taken into consideration as evidence at the main hearing, to prove that despite all the efforts to secure the presence of the witness in question at the main hearing, the said witness has remained unavailable (Art.223, Par. 2). If the person who has given such a statement is present at the main hearing, the said statement shall not be used, and instead, the witness shall testify in the manner provided for the main hearing testimony.

The Code distinguishes between the application of the court securing of evidence when it comes to witness statements and when it is related to other objective evidence with regard to which there are no stipulations to meet any material or formal requirements. The Code, under Art. 223, Par. 3 stipulates that if the parties involved or the defence lawyer consider that certain pieces of evidence might disappear, i.e. that they might not be available to be presented at the main hearing, they may file a motion to the pre-trial judge to undertake certain necessary actions – for the purpose of preserving such evidence. Should the pre-trial judge grant such a motion, the parties involved and the defence lawyer are notified about it, but no special hearing is scheduled for the presentation of the evidence, instead the judge directly examines it (through direct observation) and establishes the facts, or he may order other actions to be undertaken in order to preserve the evidence. Finally, the pre-trial judge may reject the motion to preserve the evidence, rendering the decision against which an appeal may be lodged with the pre-trial chamber (Art.223, Par.4).

11. Suspension of the Investigation

Only the prosecutor has the right to suspend the investigation by using an order to suspend the investigation.[47] The suspension of the investigation represents the prosecutor's decision to desist from criminal prosecution after having opened the investigation. The reasons for the suspension of the investigation are listed under Art. 224 of the Code: 1) if the committed act does not constitute a criminal offence; 2) if there are circumstances that exonerate the suspect, except in the case specified under Art. 206 of the Code[48]; 3) there is insufficient evidence that the suspect has committed a criminal offence and 4) if the offence in question is subject to amnesty or pardon or if the statute of limitation applies and if there are some other obstacles that preclude criminal prosecution. In the third case, the said situation occurs when the undertaken investigative measures and actions have not resulted in the evolution of the grounds of suspicion into a reasonable suspicion that a certain person has committed a criminal offence.[49] In such a case, the decision to suspend the investigation is relative in its nature, because the Code in such a case leaves the option of reopening the investigation – if at a later time new facts and circumstances come to light, which indicate that there are grounds for suspicion that the suspect has committed the said offence. Among the other obstacles that preclude criminal prosecution are death and mental illness of the suspect after the commission of the said offence, a final court decision, as well as immunity from domestic and international law.

The prosecutor issues a written order both when he decides to suspend the investigation and when he decides not to conduct it in which he lists the reasons for the suspension, and such a decision must be delivered to the injured party and the person who has reported the crime, who both have the right to file a complaint against such a decision with the prosecutor's office within 8 days. The difference between the obligations of the prosecutor in the case of not conducting and the suspension of the investigation is that the prosecutor must inform the suspect as well (in writing) of the suspension of the investigation[50] provided that he was interrogated at the investigation stage.

47 The Constitutional Court of BiH does not have the jurisdiction to decide the appeal against the order to suspend the investigation, since the said order is not essentially a ruling, at least not to the extent that it has been issued by "any court in BiH", i.e. does not constitute a decision referred to under Art 16, Par.1 of the Rules of the Constitutional Court (the Decision on Permissibility of the Constitutional Court of BiH, no. AP 1101/11 of 20 April 2011).

48 The said Article applies to the proceedings in case of mental incompetence of the suspect, i.e. the defendant.

49 Modul 1 Krivična oblast – istražni postupak, p. 97

50 The Constitutional Court does not have the jurisdiction over such appeals against the notifications of the prosecutor, since the notifications do not constitute rulings, at least not to the extent that they have been issued by "any court in BiH", i.e. does not constitute a decision referred to under Art 16, Par.1 of the Rules of the Constitutional Court (the Decision on Permissibility of the Constitutional Court of BiH, no. AP 2368/09 of 11 Feb 2010; the Decision on Permissibility, no. AP 1979/09 of 11 Feb 2010; the Decision on Permissibility, no. AP 3304/09 of 25 Feb 2010; the Decision on Permissibility, no. AP 166/10 of 11 March 2010; the Decision on Permissibility, no. AP 1036/10 of 13 May 2010; the Decision on Permissibility, no. AP 1182/10 of 13 May 2010; the Decision on Permissibility, no. AP 1251/10 of 13 May 2010; the Decision on Permissibility, no. AP 809/10 of 15 June 2010; the Decision on Permissibility, no. AP 1872/10 of 29 June 2010; the Decision on Permissibility, no. AP 3084/09 of 29 June 2010; the Decision on Permissibility, no. AP 2702/12 of 18 Sept 2012 and the Decision on Permissibility, no. AP 2932/12 of 18 Sept 2012). The Constitutional Court of BiH refers back to its jurisdiction pursuant to Art. VI.3 (b) of the Constitution of BiH, according to which "the Constitutional Court has the jurisdiction over the appeals related to the issues contained in this Constitution, when they become contentious due to a ruling made by any court of Bosnia and Herzegovina".

12. The Completion of the Investigation

The prosecutor ends the investigation when he finds that the circumstances of the case are sufficiently clear to issue an indictment (Art. 233, Par. 1 of the Code). The termination of the investigation will be recorded in the case file. However, such a decision by the prosecutor is subject to the pre-trial judge's review when the judge is deciding whether to confirm the indictment – at which time, the pre-trial judge may decide the circumstances of the case are not sufficiently clarified during the investigation, i.e. that the evidence proposed with the indictment does not indicate that there is reasonable suspicion that the suspect has committed the offence in question. In such a case, the prosecutor may continue the investigation in order to further clarify the circumstances of the case.

The optimal time-frame within which the investigation should be conducted is stipulated by the law and that is six months from the day of the decision to conduct the investigation. If the investigation is not finished within the set time, the jurisdiction over the investigation is transferred to the Prosecutor's Office, which should undertake all the necessary measures in order to complete the investigation.[51] The violation of the right to a decision within a reasonable time pursuant to Art II/3e) of the Constitution of Bosnia and Herzegovina and pursuant to Art. 6, Par. 1 of the European Convention occurs when the competent prosecutor's office does not complete the investigation within four years and seven months at the most, without offering a valid or reasonable excuse for the length of duration of the said proceedings, while omitting to undertake measures or actions that would result in the completion of the investigation.[52]

The Code does not explicitly specify which measures are those that would bring the investigation to a close, but in practice these measures may have a wide range (e.g. involving an additional number of prosecutors and appropriate professional staff in order to relieve the acting prosecutor of excess burden, especially in more complex cases etc). The purpose of the above mentioned provision is limited to the need to observe the right of the suspect to face the charges before the court as soon as it is reasonably possible and to be tried without delay, which is derived from the right to a fair trial guaranteed under Art.6 of the European Convention, and is not meant to put a restriction on the prosecutor in terms of the allowed duration of the investigation.

Furthermore, the legislator stipulates another requirement that must be met in order to complete the investigation, i.e. in order to issue an indictment, and that is the requirement that the suspect has already been questioned during the investigation. It is not specified by the Code when exactly during the investigation the prosecutor or the officers in charge should question the suspect, which means that it may be done immediately upon issuing the order to conduct the investigation or right at the end of the investigation, i.e. right before the indictment is to be issued. However, it is widely held both in local theory and practice, that the suspect should be interrogated at the early stages of the investigation, so that his right to a defence would not be infringed.

51 *Modul 1 Krivična oblast – istražni postupak,* p. 102
52 The Decision of the Constitutional Court of BiH on Permissibility, no. AP 3232/09 of 10 Oct 2012

13. Conclusion

Numerous arguments in favour of the prosecutorial rather than a court investigation may be supported by the application of the Code thus far. The most important ones are the following: prosecutorial model of the investigation contributes to the efficiency of the criminal proceedings[53], a considerably higher degree of activity by the prosecutor and a considerably clearer and more appropriate way of regulating accountability for the inefficiency of the investigation; the redundant repetition of the evidence is reduced, which at the same time has an overall effect on the efficiency of the first instance proceedings; the principle of directness is fully observed; a better protection of the basic human rights and freedoms of the participants in the proceedings is ensured, especially the suspect's, the proceedings are accelerated in terms of removing obstacles that are slowing down the criminal proceedings in question.

Motions *de lege ferenda* that may have a positive effect on the concept of the investigation in the criminal procedure legislation of Bosnia and Herzegovina are related to the increase of effectiveness and efficiency of the investigation and its harmonisation with the relevant *EU acquis communautaire*.[54] One of the goals is to allow the officers in charge and the prosecutor's office to cooperate. The prosecutor should be able to request any information related to the investigation in progress from the officers in charge at any time. In practice, the officers in charge consider the case solved when the prosecutor's office is notified. If the collected evidence is proven to be insufficient for a guilty verdict, it may frustrate both sides. Therefore, on the one hand, the restrictions with regard to the admissibility of the evidence collected by the officers in charge should be lifted. On the other hand, the officers in charge should accept certain institutional reform measures, while especially increasing the efforts to effectively improve the level of professionalism, transparency and accountability. In another context, the institutional reform is necessary in order to secure the general balance of measures: it is necessary to strengthen the independence of the prosecutor's office, as well as the internal control in the prosecutor's office. In addition, it is necessary to enhance the capacity of the court with regard to the control of the investigations, as well as offer a better protection of the rights of the suspects and the victims. The suspect and the victim may at any time approach the officers in charge and the prosecutor in order to prompt the collection of evidence and in order to get the information on the actual state of the proceedings.

The pre-trial judge has a key task of deciding in the situations such as the arrest, the search of private premises or the enforcement of secret surveillance. On the other hand, certain competences may be left to the prosecutor, as is issuing the order for DNA testing or for the expert evaluation. On the third level, the officers in charge may, under circumstances that are stipulated by the law, decide independently to: summon the suspect or a witness, identify people etc.

53 According to the concept of the court investigation, the prosecutor has a passive role which mainly comes down to what the police and the investigating judge submit to him during the investigation, which is contrary to the prosecutor's basic function to discover and prosecute the perpetrators of criminal offences.

54 See Recommendation Rec (2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system (Adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies).

Since the undercover operations are concealed from the suspect, he cannot defend himself against them for the whole duration of the said operations. All of the conventional tools of defence are useless – as long as the suspect is unaware that the investigation is in progress.[55]

Functional judiciary that the citizens can trust and that enforces the accepted norms and procedures represents a key factor for successful transition and economic and social development of the country, in addition to providing a peaceful and just society. On its path to the European Union, Bosnia and Herzegovina is going to have to solve present institutional weaknesses in its segmented and disintegrated judicial system, in order to secure the rule of law and in order to be able to fight corruption and organised crime. Technical, financial and political assistance of the international community is required in order to implement the most significant reforms.

As far as the harmonisation of the investigation with the relevant EU *acquis communautaire*. is concerned , it is necessary to strengthen the rights of the victims at the investigation stage[56], to set up and finance general and specialised organisations for the support of the victims, as well as secure a compensation for the victims of violence[57] and to secure the trust in the police[58] and the prosecutor's office of the public.

55 Since the effect of the undercover measures and actions depends on the need that they are kept secret from the suspect, a possible solution to this dilemma is to allow another subject to be involved who will offer arguments in favour of the suspect. In Austria, a public body was established called "the commissioner for the legal protection" ("*Rechtsschutzbeauftragter*") which supervises all of the undercover operations (Art. 146 of the new StPO). Whenever the state prosecutor requests the measure of undercover operations to be allowed, the commissioner for the legal protection is notified giving him the right to comment on such a request. The commissioner is supposed to supervise the legality of the undercover investigations and familiarise himself with the results of the investigation if there are any.

56 When the victims wish to be informed, they should first approach the police directly. If the police is not acting on their wish, it should be allowed that the victim can approach the prosecutor on this issue. As a last resort, the victim should have an option to go to the pre-trial judge as well.

57 European Council's Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings defines clearly the obligations of the member states to improve the position of the victims. Meeting these obligations requires a set of measures. One part is related to the adaptation of facilities, primarily court buildings, and secondly the police premises. In Germany and Austria legal grounds for the money paid by the perpetrators of criminal offences to be transferred to organisations that provide support to the victims have been provided. This is primarily applied to the payments made as a measure of alternative sanctions.

58 There is a general feeling that the police does not enjoy the support of the public. In order to build trust between the public and the police, the following approach is recommended: 1) to form an independent commission for complaints against the police; 2) to encourage internal and external review of the effect, as well as quality management and 3) to increase the involvement of the community and decentralisation of the organisational structure.

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Danilo Nikolić, PhD[1]

Plea Agreements: A Representative Example of Simplified Procedure Used in Criminal Matters

1. General Remarks

The plea agreement has been in use in Serbia since September 11, 2009 and until now, the number of concluded agreements has been: 70 agreements were concluded in 2010, 441 were concluded in 2011, while 523 agreements were concluded in 2012. Consequently, prosecutors' offices and courts in Serbia have gained three years' experience in applying this institute. However, this institute of criminal procedure has been used in practice across the world for much longer.[2] For instance, plea agreements are predominantly used to conclude criminal proceedings in the criminal system of the United States. The beginnings of its use date back to the 1858 case of Cancemi v. People, in which a New York court held that a defendant could not waive his constitutional rights, including the right to a trial. However, as soon as 1859, the Supreme Court found that a defendant could waive his guaranteed procedural rights, including the right to a speedy trial, as well as the right to be tried in regular proceedings before the grand jury. Presently, as many as 90 to 98 percent of all criminal cases in the USA are resolved through plea bargaining.

The main reason this institute has been used is because it promotes judicial efficiency in criminal trials.

The latest amendments introduced when the 2011 CPC was enacted and in the 2013 Bill on Amendments have solely improved and adapted this institute to suit Serbia's needs and its legal system.

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2 Nikolić, D., Sporazum o priznanju krivice, Beograd, 2010

At present, there are less and less theorists and practitioners in the Republic of Serbia who oppose the introduction of this institute into Serbian criminal law and its application.[3]

Neither the latest amendments to the Republic of Serbia's Criminal Procedure Code nor the previous legislative solutions provide a definition of the concept of "plea agreement". Likewise, no particular theoretical examination has been carried out with a view to defining the concept and legal nature of this institute of criminal procedure. In lieu of a legal definition of the concept, the agreement is governed by Articles 313 to 319 of the Code. The following is particularly provided for in those Articles: conditions for concluding a plea agreement; contents of a plea agreement; adjudication on plea agreements; dismissing a plea agreement; accepting a plea agreement; denying a plea agreement; and appealing decisions on the agreement. Thus, the Code does regulate in considerable detail all the conditions for concluding an agreement and stages thereof, regardless of the fact that it does not define its concept in Article 2, which includes definition of the terms used in the Code. Considering provisions of the Code which govern the plea agreement and its legal nature, we can identify its notion as follows: A plea agreement made in writing represents consensus ad idem /a meeting of the minds/ of a public prosecutor of the one part, and a defendant and his attorney of the other part, by which the defendant knowingly, voluntarily, and without a possibility of any misconception fully admits guilt for one or more criminal offences with which he is charged and which are subject matter of the indictment, while the state prosecutor in turn agrees to make certain concession to the defendant which pertain to the type and extent of criminal sanctions, potential abandonment of prosecution for other criminal offences which are not covered by the agreement, as well as consensus about other relations which arise from the criminal offences which are not covered by the agreement or which are in connection with those or other criminal offences.[4]

2. Procedure for Concluding Plea Agreements

Article 313 of the Code lays down a procedure for concluding plea agreements and specifies persons authorized to conclude them only in general terms, leaving to practitioners a degree of freedom concering the process which results in their conclusion. Its fundamental characteristics are manifested as:

Initiating plea negotiations and signing plea agreements with regard to the stage in the proceedings - Unlike the 2009 legislative solution, the latest amendments provide that a plea agreement may be signed before the conclusion of a main hearing. Therefore, instead of the previous solution, according to which a plea agreement may be entered into only "not later than a defendant has given his answer to the charges at a main hearing", the time limit for concluding an agreement has now been extended until a judge or a presiding judge has declared the main hearing concluded. In the event a first-instance judgment is set aside and there is a re-trial and decision making in the new trial, an agreement may be concluded not later than the conclusion of the main hearing.

3 Bejatović,S., Sporazumi javnog tužioca i okrivljenog i novi ZKP RS, Revija za kriminologiju i krivično pravo, br.1-2/2012, str.65-85

4 See: *New Trends in Serbia's Criminal Procedure in a Regional Context (Normative and Practical Aspects)*, OSCE Mission to Serbia, Belgrade, 2012

Under the latest legislative solution, there are no time limits for signing a plea agreement[5] with regard to the stage of criminal proceedings.[6]

A question arises: When can plea negotiations begin given the stage in the criminal proceedings? We are of the opinion that the beginning of plea negotiations in connection with criminal offences which are being investigated should depend on the issuing of an order to conduct an investigation, while in cases of criminal offences processed under summary procedure, they should not begin before investigative actions have been completed or a motion to indict has been filed. Only when a prosecutor has presented particulars of an offence and qualified it in an order or a motion to indict can plea negotiations begin.

The Code does not define any particular formal requirements for initiating negotiations or their process, which means that it can be done either in writing or orally and by a prosecutor or a defendant in person or through a defence attorney. The very act of initiating may be an intention to negotiate for the purpose of signing an agreement and appropriate conditions may be set out, which is an issue of fact. If a proposal is made in writing, both the proposal and the entire negotiation process represent stages in the process which are closed to the public.

If plea negotiations are not successful, all written traces of them ever being conducted should be destroyed. Naturally, everything may be agreed upon verbally and then an offer which includes all the necessary elements of a plea agreement could be made in writing.

Form in which plea agreements are done - For the justifiable purpose of protecting a suspect or a defendant, no particular form of procedure which precedes the signing of a plea agreement has been laid down, but to the same end, Article 313, para. 3 prescribes that plea agreements shall be done in writing. The written form of the agreement is its constituent element and any agreement which has not been made in writing is null and void. All plea agreements need to be entered into prosecutorial and court records and files need to be prepared so that preliminary proceedings judges or presiding judges could deliberate on them in order to judge if they meet statutory requirements. The fact these agreements are done in writing ensures that procedure for their passing and their content are assessed and allows competent judges to decide whether to grant or deny them, verifying if they have been signed by the prosecutor, the defendant, and his attorney.

Right to a defence attorney - The Code makes it imperative for a defendant to have a defence attorney when a plea agreement is being concluded (Art. 313, para. 2). What this means is that any defendant can by himself negotiate with a prosecutor, whereas he must be accompanied by his defence counsel when a record is made and an agreement is concluded before a prosecutor. If a defendant does not obtain a defence attorney, a court shall appoint an attorney to represent him *ex officio*.

Submitting a plea agreement to the competent judge - Plea agreements are submitted to the Court in writing and only by a public prosecutor. Such a provision is logical since criminal prosecution is conducted *ex officio*.

5 Bejatović, S., op.cit., str. 80

6 Bejatovic, S., "Plea Agreement: Serbia's New CPC and a Comparative Analysis of Regional Legislation", Proceedings of the Regional Conference *New Trends in Serbia's Criminal Procedure in a Regional Context (Normative and Practical Aspects)*, OSCE Mission to Serbia, Belgrade, 2012, pp. 102-119

A plea agreement may be submitted to a preliminary proceedings judge prior to the confirmation of an indictment. If an indictment has been confirmed, a presiding judge who would otherwise proceed on the indictment in regular proceedings is competent to adjudicate on the agreement. If the agreement is not accepted, the presiding judge or a judge sitting alone may not take part in the further course of the proceedings.

Provisions governing the examination of an indictment do not apply to an indictment which forms an integral part of a plea agreement; instead, the Court directly adjudicates on the plea agreement. Both the indictment and the agreement have the same faith. If the plea agreement is accepted, the indictment has thus "been confirmed" and a judgment may be passed based on these two documents. If a judge denies a plea agreement, it will be destroyed and he proceeds on the indictment as if the plea agreement had never existed. If an indictment is not confirmed, it will be delivered to a pre-trial judge, or if it has been confirmed, it will be delivered to a presiding judge, but only when a ruling to accept the plea agreement has become final.

3. Contents of a Plea Agreement

The Code lays down two types of elements which make up a plea agreement: mandatory and optional. There are six mandatory elements (those which must be included in every plea agreement regardless of a criminal offence to which it pertains) and five optional elements stipulated under the Code. They include:

Particulars of the offence which is the subject matter of the charges - This is the first mandatory element and it is necessary that it is included in each and every plea agreement regardless of the type of a criminal offence. Without "the particulars" as it is phrased in the Code, or to put it more correctly, a factual description, it cannot be judged if acts of any defendant include all the facts and circumstances which pertain to a criminal offence and its perpetrator. A factual description should be comprehensive and should include a detailed account of the incident(s) from which it can be established if such a comprehensive account mentions all the general and all the particular elements of a crime to which the agreement pertains or more crimes in cases of concurrence of offences.

Defendant's guilty plea with regard to the criminal offence which is the subject matter of a plea agreement - As opposed to the 2009 Code, which required that a defendant should "fully admit commission of a criminal offence," such a provision is now gone, but it is prescribed that a plea agreement must, as a special element, include a defendant's guilty plea – admission that he did commit the offence which is the subject matter of the agreement. This element must be agreed upon and described as an independent part of the agreement.[7]

An agreement on the type and extent of a penalty or other criminal sanction, the manner in which that penalty will be enforced or on a single penalty for concurrent offences - The 2011 Code provides that a mandatory element shall be "an agreement on the type, extent, or scope of the pe-

7 Kiurski, J., Sporazum o priznanju krivičnog dela i izvršenje krivične sankcije utvrđene u sporazumu, Proceedings of the Conference "Aktuelna pitanja krivičnog zakonodavstva (Normativni i praktični aspekt)", Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 2012, str.166-180

nalty…" Thus, it was allowed to negotiate on a penalty in approximate terms. The new Working Group assessed that such a provision on negotiating on the scope of penalty did not serve the purpose or legal nature of a plea agreement and that it was not in line with the manner in which our Criminal Code regulated sentencing, so we turned to the provision from the 2009 Code under which not only the type of penalty must be defined, but its duration as well.

To agree on the type and extent of a penalty means that a prosecutor who is a prosecuting attorney and a defendant, after having established that the latter committed a criminal offence, provide for the type and duration of penalty which shall be imposed on the defendant after a plea agreement has been confirmed. This is an example of how the so-called judicial sentencing is applied based on the rules on sentencing and a statutory penalty for the offence which is the subject matter of the plea agreement.[8]

When negotiating the type and duration of penalties, prosecutors assume a role otherwise performed by the Court in regular criminal proceedings and in doing so, they actually perform the role of the Court with regard to sentencing – its individualisation in that specific case. When providing for the type and duration of penalties, prosecutors are obligated to abide by all the rules from the Criminal Code which regulate this specific area. Article 43 of the Criminal Code stipulates the types of penalties, while Art, 64 and 77 provide for precautionary measures and Article 79 provides for security measures. Thus, types and duration of criminal sanctions are specified in the Code. A prosecutor may agree with a defendant only on the type of penalty or criminal sanction prescribed in the Criminal Code or the Court will not accept their plea agreement.

Efforts to provide for the type of penalty or criminal sanction are not the difficult part of the negotiation process for prosecutors and defendants. Deciding on the duration of penalty is much more difficult and complex.[9]

When negotiating on the type and duration of penalties prosecutors must observe statutory rules on principal and secondary penalties. Thus, imprisonment may only be imposed as a principal penalty. A fine, community service, and revocation of driver's licence may be imposed both as principal and secondary penalties. The statute may prescribe several penalties for one offence, but only one of them may be agreed upon and imposed as the principal penalty.

Agreement on any other criminal sanction must be in full accordance with the provisions contained in the Criminal Code which govern that particular sanction and specify conditions for its imposing.[10]

Sentencing requirements for imposing a single penalty for concurrent offences are provided for in Article 60 of the Criminal Code and they must be understood as imperative provisions, meaning that a single penalty may be imposed only pursuant to the above regulation.

8 Đurđić,V., Stranački sporazum o priznanju krivice u krivičnom postupku, Revija za kriminologiju i krivično pravo, br. 3/2009

9 Škulić, M., Main Hearing as Provided for in the New Serbian CPC, Proceedings of the Conference *New Trends in Serbia's Criminal Procedure in a Regional Context (Normative and Practical Aspects)*, OSCE Mission to Serbia, Belgrade, 2012, pp. 88-124

10 Bejatovic, S., "Plea Agreement: Serbia's New CPC and a Comparative Analysis of Regional Legislation", Proceedings of the Regional Conference *New Trends in Serbia's Criminal Procedure in a Regional Context (Normative and Practical Aspects)*, OSCE Mission to Serbia, Belgrade, 2012, p. 116

Provisions governing the mitigation of penalties contained in Art. 56 and 57 of the Criminal Code must be correctly applied since their incorrect application constitutes grounds for a denial of a submitted plea agreement by the Court.

Agreement on the costs of criminal proceedings, confiscation of the proceeds from crime which is covered by a plea agreement - Provisions governing the costs of criminal proceedings are contained in Articles 261- 267 of the CPC.

Unlike the previous solution, it should be noted that this one does not include only costs incurred in the course of preliminary investigation and investigation, but also the costs incurred at a main hearing given the rule that a plea agreement may be concluded before the conclusion of a main hearing. A prosecutor may agree that a defendant is released from the duty to defray those costs only under the terms stipulated in Art. 264, para. 3 of the CPC.

Statement by which the parties and a defence attorney waive the right to appeal against a decision by which the Court accepts a plea agreement in its entiretly, except in the case referred to in Art. 310, para. 3 - The right to appeal ranks very high among defendant's rights in criminal proceedings. Thus, Art. 36, para. 2 of the Constitution of the Republic of Serbia guarantees the right to appeal or other legal remedy against any decision on his rights or lawful interests.

Consequently, in a plea agreement, the parties agree to give up their right to appeal a judgment passed based on the plea agreement which has been accepted following a proper procedure. A prosecutor and a defendant and his defence attorney are bound to provide for such a statement in the plea agreement. Thus, the three parties entering into a plea agreement waive their right to appeal a judgment of conviction which is to be passed based on the agreement. A question arises: do other persons referred to in Art. 433 (defendant's spouse, his next of kin, etc.), who are permitted under the law to file an appeal on behalf of a defendant, still retain the right of appeal. When a defendant and his defence attorney have individually waived the right to appeal, provisions contained in Art. 434, para. 5 are to be applied to persons authorized to file appeals under Art. 433 and a waiver of appeal may not be revoked. Such an appeal or any inadmissible appeal by a defendant or his attorney shall be dismissed by the Court pursuant to Art. 443.

There is a single exception to this rule, only if a judgment which has been passed is not in accordance with a signed and finally accepted agreement.

Whether or not a judgment is in accordance with a plea agreement is an issue of fact. In any case, a judgment must be in full accord with a plea agreement in terms of the type and duration of a penalty or other sanction as well as with other elements including: how the offence has been classified, the amount of costs, decision on a restitution claim, confiscation order for the proceeds from crime, etc. Thus, after accepting a plea agreement, the Court has no authority to amend elements which have been provided for therein. Neither is the Court empowered to leave out any of the elements of a plea agreement from its judgment. If there have been any irregularities in the agreement, the Court should not have accepted it, i.e. was obligated to deny it.[11]

11 See: Proceedings of the Regional Conference *New Trends in Serbia's Criminal Procedure in a Regional Context (Normative and Practical Aspects)*, OSCE Mission to Serbia, Belgrade, 2012

Signatures of the parties and defence attorney - Rightfully, the Code provides that a plea agreement must include signatures of the parties, i.e. a public prosecutor and a defendant, which form an important and mandatory element thereof. When a plea agreement is being concluded, defendant's attorney must be present since he will guarantee that correct procedure has been followed and that all the advantages and disadvantages of the agreement have been explained to the defendant. By signing the agreement, the defence attorney confirms that its contents are correct and lawful. He guarantees that the defendant is aware of all the consequences of a signed plea agreement. His signature is a guarantee to the defendant that the agreement has not been made to his prejudice.

Optional elements include:

Prosecutor's statement on desisting from prosecution for offences not covered by a plea agreement - The Code permits that a plea bargaining process includes negotiations with a defendant and his attorney on desisting from prosecution for an offence or offences not covered by a plea agreement. Except for providing for such a possibility, the law does not stipulate conditions under which a prosecutor may act in such a way. Thus, it is an issue of fact and it depends on prosecutor's discretion when and under which conditions he might include this element into a plea agreement. Nevertheless, prosecutors are at least obligated to keep in their files official notes stating reasons for which they decided to abandon prosecution for some other offences. Those reasons may include defendant's cooperation in the detection or proving of some other crimes against other defendants. In any case, it could be any form of defendant's cooperation with a prosecutor.

Defendant's statement by which he accepts obligations referred to in Art. 283, para.1 - Article 283, para. 1 of the CPC provides that a public prosecutor may stay criminal proceedings for criminal offences punishable by a fine or a term of imprisonment of up to five years and prosecuted *ex officio* provided a suspect accepts one or more measures prescribed in the same Article. Therefore, this is an optional right of the prosecutor's to stay proceedings, which is clearly expressed by the modal "may". Thereby, the principle of prosecutorial discretion was introduced into our legal system in 2002.

The law enumerates the type of measures whose enforcement may be requested and public prosecutors may not exceed the scope of those measures. They include as follows:

1) A suspect shall rectify a detrimental consequence caused by commission of an offence or indemnify the damage caused
   It should be mentioned that the consequence in question is not a consequence in the sense of conduct which leads to a certain consequence. It is not the consequence of a crime which constitutes an element thereof. It is another type of consequence, the one in relation to the protected object of a crime. Namely, in order for a crime to exist, it has to have a consequence. However, a detrimental consequence can follow from certain crimes and it reflects on or additionally damages the object of protection. This is a case of damage caused to the object of protection which is a motive for prosecution. Often, such consequences are an objective condition for prosecution. Such a consequence – damage – can arise both in cases of crimes which cause damage and criminal endangerment.
2) payment of a certain amount of money to the benefit of a humanitarian organization, fund, or public institute

Two aspects of this requirement are interesting from the point of view of its practical use. Firstly, what entities should be regarded as belonging to these legal persons whose activities are public and which work in the public interest? This question needs to be answered and it needs to be determined what constitutes a humanitarian organisation or fund, because in practice we need to be very cautious when it comes to numerous pseudo-humanitarian organisations and funds. Namely, there are a lot of organizations both in Serbia and around the world whose activities are allegedly humanitarian, but in reality these organisations and funds are suspect, not only because of their founders, but because they do not perform activities for the purpose of which they were established. Many of them, both domestic and foreign are used to launder money and engage in other criminal activities. Consequently, in our opinion, when setting down this requirement, we should concentrate on humanitarian organisations which are universal in time and space and established in the society, such as the Red Cross, Commissariat for Refugees, funds for preventing fatal diseases, foundations of Ivo Andric, Vuk Karadzic, research medical centres, and hospitals.

As regards public institutions, such payments should be made towards the National Library of Serbia, town, university, faculty, school, and other libraries; or towards funds used to restore houses or establish foundations of distinguished persons, etc. In any event, public prosecutors are bound to exercise caution and be informed in order not to discredit themselves or this procedural institute by making a wrong selection with regard to a beneficiary.

As regards the sum of money to be paid by a defendant, the criteria which apply to determination of a fine under Article 54, para. 2 of the CC should be used. In our opinion, the sum should be significantly higher than an expected fine for several reasons. In this instance, a defendant is privileged in many respects. Namely, he is not subject to prosecution and he is spared from all the inconveniences immanent to criminal proceedings. He does not have to hire a defence counsel nor does he incur any similar expenses; he does not waste his time because he must appear at a main hearing nor does he have to pay any fares; he does not have to bear any of the consequences suffered by a convicted person nor does he come up as a recidivist when a new offence is committed because his name is not entered into criminal records of convicted persons, etc.

3) community service or humanitarian work

This measure is not specific to our legislation. Namely, after learning that prison sentences, in particular short-term custodial sentences, achieve quite the opposite, efforts were devoted to looking for alternative measures both abroad and in Serbia. At first, efforts were made to find an alternative to short-term incarceration, but presently, it is a general trend in contemporary criminal law. Alternatives to custodial sentences are no longer the only ones which are being sought, but alternatives to punishment in general are being sought as well. One of the most successful alternatives to custodial sentences is community service.

4) fulfilment of maintenance obligations which have fallen due

This measure is in connection with commission of the crime "avoiding maintenance payments" from Art. 195 of the CC, even though the Code does not formulate it. By using the phrase "fulfil maintenance obligations which have fallen due", the legislator actually says that those obligations had first been imposed and then fell due. Thus, a suspect has defaulted on his payment(s) for maintenance which was awarded by a valid titulus executionis (title of execution) – a judgment, settlement, etc, but it can be done without

those writs of execution, in other words, only based on a criminal complaint. If there is no title of execution, a competent prosecutor shall summon a suspect and the injured party and attempt to establish which payments are due and for which period; naturally, he has to have full consent from the summoned persons and in such case, he may stay criminal proceedings.

5) submitting to an alcohol or drug treatment programme
Among other security measures, the Criminal Code also provides for a) compulsory drug addiction treatment and b) compulsory alcohol addiction treatment. These two measures used to be known as one measure before the Code was passed. At present, they are governed by Art. 83 and 84 of the Criminal Code as two separate measures.
If it is established in the course of plea bargaining that a suspect or a defendant committed the offence which is the subject matter of plea negotiations due to constant addiction to narcotics or that he committed the offence due to addiction to alcohol and that there is a serious threat that the offender might continue to commit criminal offences due to either addiction, it is in the public interest to eliminate the cause which leads to commission of crimes. Since their abuse of alcohol or narcotics to which they are addicted is the reason why such offenders commit crimes, it is necessary that they undergo appropriate treatment. Both alcoholism and abuse of narcotic drugs mostly lead to commission of offences against property: thefts, embezzlement, misuse of funds, fraud, and other crimes committed for gain as motive, for the purpose of providing financial resources for purchasing alcohol or narcotics. Also, those two are common causes not only of domestic violence, but of other offences as well. In the process of negotiating on this measure, a prosecutor should comply with the provisions contained in Art. 83 and 84 of the Criminal Code and observe the conditions under which it may be imposed. Thus, whether or not a plea agreement will stipulate compulsory alcoholic or drug addiction treatment at a healthcare institution or undergoing such treatment programme at liberty should be subject to evaluation in each specific case. Duration of the treatment on which the parties have agreed cannot exceed the time limits stipulated under Art. 84 and 85 of the Criminal Code.

6) submitting to psycho-social treatments
This measure will be rarely used in practice. It has no tradition in our criminal law or jurisprudence. It should be stipulated under a plea agreement in cases of offenders who commit crimes because of the structure of their personalities and their antisocial behaviour. An assessment of whether or not such an offender needs the help of a social worker, psychologist, sociologist, or other professionals are relative, i.e. an issue of fact.

7) fulfiling an obligation determined by a final court decision or observance of restrictions determined by a final court decision When laying down conditions for this obligation, it is necessary that there is a final court decision imposing the obligation. This measure does not pertain only to obligations imposed by decisions made in criminal proceedings; it also includes decisions rendered in civil and non-contentious proceedings. That will be particularly prominent in cases of obligations arising out of domestic relations acts.

Agreement in respect of proceeds from crime subject to confiscation under a separate act - This element of a plea agreement is applicable only to offenders who have acquired property through commission of crime(s). Provisions which apply to this part of the plea agreement can be found in the Confiscation of the Proceeds from Crime Act.[12] As part of regular proceedings, proceeds

12 *Official Gazette*, No. 97/08

are first confiscated temporarily, after which proceedings are conducted in which the Court decides on the merits of whether certain assets were obtained through commission of an offence or acquired by their owner in a lawful manner.

Agreement on measures securing the presence of a defendant during criminal proceedings (Art. 188, items 3 through 7 of the CPC) - The 2009 Criminal Procedure Code did not provide for an obligation to agree on a measure securing defendant's presence during criminal proceedings either as mandatory or as optional. Still, the fact that the Code did not contain provisions in its section on the plea agreement did not mean that in practice it was impossible to stipulate in a plea agreement one of the measures from Art. 188 of the CPC. In particular, it was necessary to provide in a plea agreement for situations when a defendant is held in custody.

A plea agreement may stipulate that a defendant is held in custody or that a detention warrant be revoked. Remand may be replaced by other measures cited in Art. 188 of the CPC, which is subject to negotiations and an agreement. Naturally, any decision on a measure securing the presence of a defendat must comply with statutory conditions stipulated under Art. 188 through 223 of the CPC. This element of plea agreements, from the standpoint of the fact that it is based on the law, is subject to assessment by the Court when deciding on the agreements.

Agreement on restitution claim - The principal task of criminal procedure law is to clear up and resolve criminal matters, which means to determine whether or not a crime has been committed and whether or not the person who is being prosecuted is the perpetrator of that crime, and if he is, that a criminal sanction be imposed on him. When offences are committed, they frequently lead to consequences in connection with property. Frequently, in addition to a criminal offence, a civil wrong is inflicted by causing damage to the assets of natural or legal persons, which gives a right to the injured party to file for a restitution claim.[13]

Authorised claimants may have their restitution claims allowed in criminal proceedings, but only those arsing out of commission of an offence. Restitution claims put forward in criminal proceedings must arise out of a criminal offence and they may relate to: compensation of damage caused by a criminal offence, return of an object which has been appropriated, or rescission of a particular legal transaction. It needs to be emphasised that the CPC does not limit the right to put forward a restitution claim in criminal proceedings solely to injured parties. This right is enjoyed by any person authorised to pursue such a claim in civil litigation.[14]

In the process of plea bargaining, a restitution claim is filed to the competent public prosecutor at the stage of investigation. The prosecutor will include the injured party or his representative into the plea bargaining process. Negotiations may be conducted either directly with a defendant or in the presence of the prosecutor, or the prosecutor may partake in the negotiations. The claim itself may be filed in writing, or it may be made orally on the record. In any event, an agreement between the injured party and a defendant improves defendant's position in the proceedings and may work in his favour when the type and duration of his penalty or sanction are being negotiated.

13 Bejatović, S., Imovinskopravni zahtev oštećenog, "Jugoslovenska revija za kriminologiju i krivično pravo" br. 2/99
14 See Art. 2 of the CPC

4. Judicial Assessment of Plea Agreements

A plea agreement is a contract made by and between a public prosecutor and a defendant on what constitutes its subject matter. The subject matter of a plea agreement is specific. According to international and national legal standards, criminal sanctions, in particular prison terms, may be imposed only by courts. Thus, for various reasons, plea agreements must be assessed by courts because they provide a basis for rendering judgments.

When adjudicating on a plea agreement, the Court, i.e. a preliminary proceedings judge or the judge presiding over a trial panel or a judge sitting alone, may decide as follows in the form of a ruling: to dismiss, to accept, or to deny the plea agreement.

The Code has allowed that plea agreements may be concluded as early as at the investigation stage. If an agreement is signed at that stage, then the presiding judge referred to in Art. 21, para. 4, who has been assigned to the case based on an annual judges' roster, is competent to adjudicate on the agreement.

If an agreement is submitted after the filing of an indictment, entered into the indictment or annexed thereto or submitted along with an objection to an indictment or motion to indict at the beginning of a hearing on the motion to indict, the judge presiding over a trial panel or a judge sitting alone will decide on it depending on whether the criminal offence is within the jurisdiction of the criminal panel or the judge sitting alone.

Plea agreements may be submitted before the conclusion of the main hearing either in regular or in summary proceedings.

The injured party and his attorney-in-fact (if the injured party has one) are informed of a hearing scheduled for adjudication on a plea agreement. Naturally, a notice will be sent only if there is a person who was the injured party in a criminal offence which is the subject matter of the agreement.[15]

Injured parties have the right but not an obligation to attend along with their attorneys-in-fact hearings on plea agreements, so the Court may hold a hearing not only with the injured party being present, but also if he does not appear in court although he was duly summoned. Injured parties' attendance at the hearing at which a plea agreement is assessed is not compulsory nor is it a condition for holding the hearing, but it is certainly desirable and helpful.

Dismissal of plea agreement - The Code stipulates in its Article 316 when the Court shall dismiss a plea agreement. Plea agreements are dismissed in the event they do not contain the information specified in Art. 314, para. 1, which we have termed "mandatory elements" of any plea agreement. Agreements submitted by third parties (for instance, parents, spouses, the injured party, or other close relatives) may not be dismissed; instead, a hearing is scheduled at which the Court will decide on the agreement, naturally in the presence of the parties. This implies that it is irre-

15 Đurđić,V., Stranački sporazum o priznanju krivice u krivičnom postupku, Revija za kriminologiju i krivično pravo, br.3/2009; Škulić,M., Sporazum o priznanju krivice, Pravni fakultet, Beograd, 2009.

levant who submits a concluded agreement to the Court for the purpose of making a decision thereon.

In its Article 316, para. 2 the Criminal Procedure Code lays down another mandatory condition for dismissing a plea agreement, which occurs if a duly summoned defendant fails to appear at a hearing scheduled for adjudication on a plea agreement. Summons to this hearing must be served on a defendant in person, which means that provisions of the Code which stipulate the personal services of process apply to such cases. The Code governs the possibility of seeking an enlargement of time by a defendant. It expressly allows defendants to justify their absence from a hearing on plea agreement. As regards the exercise of rights to seek return to the previous stage in the proceedings, no provisions have been made to that effect. The Code allows return to the previous stage under some other circumstances, whereas a ruling dismissing a plea agreement may not be appealed. An analysis of the entire system of the Criminal Code shows no other case in which a defendant's failure to appear is so strictly punished by dismissing a legal document which is by nature in his favour without granting him the right of appeal. E.g. it is reasonable to assume that by failing to appear and inform the Court of the reasons for not attending a hearing, the defendant has withdrawn from a concluded agreement. However, what if he has not withdrawn from the agreement, if reasons beyond his control have prevented him from appearing and he still supports the concluded agreement? Then, why should not he be granted the return to the previous stage in the proceedings even though the Code does not explicitly provide for it? Allowing for the return to the previous stage in the proceedings would not violate any of the provisions from the Criminal Procedure Code. If a defendant justifies his absence, another hearing is scheduled. Furthermore, if we look into this issue, we are bound to ask: can one and the same agreement be submitted to the Court for assessment and adoption twice. In other words, again after its dismissal. The Code does not regulate this issue; but neither does it prohibit that plea agreements be submitted to the Court for assessment once again nor does it provide for a dismissal on grounds that an agreement has already been dismissed in the proceedings. Consequently, plea agreements may be resubmitted, but always and solely before the conclusion of a main hearing. We find that it does not run contrary to the nature and act of this criminal procedure institute to legislate for a possibility of filing a motion for continuance, return to the previous stage in the proceedings (not provided for), or resubmission. In our opinion, a postponement of a scheduled hearing and resubmission for assessment of a plea agreement dismissed due to defendant's failure to appear at the hearing should always be allowed if those actions are taken prior to the conclusion of a main hearing.

Hearing on plea agreement - Procedure for deliberating on plea agreements and passing judicial decisions thereon is provided for in Article 315 of the Criminal Procedure Code. The Code prescribes that plea agreements are to be decided on at a hearing. The hearing, irrespective of the stage in the criminal proceedings, is scheduled by issuing an order either by a preliminary proceedings judge or a judge presiding over a trial panel, i.e. a judge sitting alone. The order by which a hearing is scheduled sets the date, time, and venue thereof, while a defendant and his defence attorney, the injured party and his attorney-in-fact are advised of the subject matter of the hearing by a special summons or notice. A public prosecutor is also served with a summons whose contents clearly state the subject matter of the hearing. If a defendant has not signed a plea agreement, either by himself or through his attorney, or if the agreement does not contain a decision on a restitution claim, the injured party and his attorney-in-fact must be served with the summons or a notice to appear at the hearing as well as with the segment of the agreement which

covers the restitution claim. Why only the segment of the agreement which pertains to the restitution claim? The reason for this is that plea agreements, together with all the files which are in connection with them, must be destroyed by the Court if they are not accepted, that is, if they are denied or dismissed. Thus, by delivering to the injured party only the section of the agreement or a notice thereof which covers the restitution claim, he is given an opportunity to familiarize himself with its contents in a timely manner in order to attend the hearing, while in parallel, defendant's interests are safeguarded with regard to potential consequences resulting from the abuse of the agreement of which the injured party would be in possession in case there are regular proceedings. Let us remind ourselves of all the rights a defendant has in criminal proceedings in view of his defence; among others, he has the right to plead his right to silence, not to incriminate himself, etc. Consequently, the Court should protect and must protect the rights not only of the injured party, but of a defendant as well.[16]

A record should be made of the hearing and its introduction should not differ from other court records, except that it should clearly state that it is a record made before a particular court at a hearing on plea agreement. The names of people partaking in the hearing should be entered in the record and it should be easily noticeable to which agreement it pertains.

The amendments carried on August 31, 2009 introduced obligatory participation of a defendant's attorney at a hearing on plea agreement. Article 313, para. 2 of the CPC stipulates that a defendant must have a defence attorney as early as during the conclusion of a plea agreement or the Court will appoint him a counsel *ex officio*.

A defendant and his defence attorney must be present at a hearing on plea agreement. If the defendant has been duly summoned and he has failed to justify his absence or file for continuance either personally or through his attorney, the Court will dismiss the agreement by issuing a ruling.

Failing to appear at a hearing by a selected or court-appointed defence attorney does not constitute grounds for dismissal of a plea agreement; instead, his absence shall be regarded in the same way as in the regular proceedings, which means that the hearing will be rescheduled and he will be summoned thereto or another attorney will be appointed, only providing the defendant does not withdraw from the agreement.

Unlike the presence of a defendant and his attorney, the presence of a public prosecutor is not mandatory and the hearing may be held in his absence, naturally on condition that he has been duly summoned. We would like to confirm that such a legislative solution is the correct one. As an authorised representative of the state, the prosecutor has, within the limits of the law, performed his official duty. He has endorsed the agreement, affixed a seal and set his hand thereto and officially submitted it to the Court. Should his presence be obligatory under such circumstances? It is not, but it would be desirable, in the first place because reasons which have led him to

16 Simović, M., Pojednostavljene forme postupanja u krivičnom procesnom pravu BiH, Proceedings of the Conference "Pojednostavljaene forme postupanja u krivičnim stvatima i alternativne krivične sankcije", Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 2009; Nikolić, D., Sporazum o priznanju krivice, Beograd, 2009; Bejatović, S., Sporazum o priznanju krivice i druge pojednostavljene forme postupanja u krivičnom procesnom zakonodavstvu Srbije kao instrumenat normativne efikasnosti krivičnog postupka, Proceedings of the Conference "Pravni sistem Srbije i standardi Evropske unije i Saveta Evrope", Pravni fakultet Kragujevac, 2009, knjiga IV, str. 85-106; Đurđić, V., Stranački sporazum o priznanju krivice u krivičnom postupku, Revija za kriminologiju i krivično pravo, br.3/2009; Škulić, M., Sporazum o priznanju krivice, Pravni fakultet, Beograd, 2009

conclude a plea agreement that has such contents need to be explained orally. Judges would almost always need clarifications and require that doubts and ambiguities be resolved in connection with the portion of the agreement which covers the proportionality between concessions made by the prosecutor and defendant and reasons which he was guided by.

Not only a prosecutor, but a defendant and his defence attorney, may withdraw from a plea agreement before the conclusion of the first hearing. Under such circumstances, the Court should deny the agreement since it is no longer concluded voluntarily. The Court may not, even if it wanted to, accept an agreement if either of the parties has withdrawn therefrom. The Court does not judge whether or not the parties have signed and concluded the agreement and thus may no longer dispose of it. On the contrary, as long as the Court has not accepted the agreement, it is has not taken legal effect in any wider context except between the parties. The Code does not grant the parties the right to withdraw from a plea agreement, but this right indirectly arises from a situation stipulated in the Code, that the Court will dismiss an agreement if a duly summoned defendant fails to appeal at a hearing on plea agreement.

When holding a hearing on plea agreement, the Court verifies in a suitable and proper manner all the circumstances which allow it to make a decision on the merits of a plea agreement, or on its adoption or denial. In order to perform this duty professionally and conscientiously, the Court must not by any means approach a plea agreement in a bureaucratic or formalistic manner, without adequate verification and answers which will satisfy the judge and help him form value judgments so that he could make a decision professionally, fairly and in accordance with the law.

Assessment of plea agreement elements - The very procedure for deliberating on a plea agreement at a hearing should develop in such a way that the Court should also state for the record, in addition to general information on the type of the record and persons who are present there, that the agreement has not been dismissed and that the hearing may be held. After having stated that conditions for holding a hearing have been satisfied, the judge advises a defendant of all of his rights with regard to the proceedings. In particular, he cautions him of his right to a defence and the right to a defence counsel, informs him about the contents of the agreement and in detail explains to the defendant and informs him of all the consequences which will arise from an accepted agreement, especially that a judgment will be passed based on the agreement and without holding a trial, thus giving all the elements of the agreement legal effect as well as an enforcement clause, which entails the right to enforced execution. Regardless of the contents of a plea agreement which is considered at the hearing, the defendant is informed as follows: that there will be no main hearing; that no evidence will be presented; and that if the agreement is accepted, he pleads guilty to having committed acts which qualify as a criminal offence; as well as that he has no right of appeal against a judgment which will contain the complete subject matter of the agreement and by which he will be sentenceed and ordered to fulfil other obligations. Therefore, not only will he be presented with the meaning and nature of his guilty plea and appeal waiver, these will be explained to him, meaning that after the agreement has been accepted and become final, he may no longer appeal his judgment.[17]

17 See: Proceedings of the Regional Conference *New Trends in Serbia's Criminal Procedure in a Regional Context (Normative and Practical Aspects)*, OSCE Mission to Serbia, Belgrade, 2012

Quality of defendant's guilty plea - In order to be able to embark on making an assessment as to the validity of a plea agreement, the Court must, at a hearing on plea agreement, ascertain whether or not certain conditions existed or were present when the agreement was concluded, as well as a) whether or not the defendant knowingly and voluntarily admitted to the criminal offence(s) which are covered by the agreement.

Guilty plea – entered knowingly and voluntarily - Assessing whether or not a defendant has knowingly admitted to a crime in a signed plea agreement means to establish if such an admission was made by a mentally competent person. What is required with regard to defendant's mental state means that his ability to think and reason about the outside world of differences and facts, or about himself and his actions, needs to be established. It practically refers to an ordinary state of mind in which a person is aware of his existence. Defendant's mental state as a condition for accepting his plea agreement actually represents an assessment of his mental competence. Mental competence is a set of elements pertaining to person's cognition and volition which make him capable of understanding, reasoning, and forming decisions about his actions and of controlling them. Thus, in order for the condition of competence to be satisfied, there need to be two elements, the state of mind and the will.

With regard to the state of mind, the same ability, i.e. the cognitive element, exists as well in those offenders who are able to reason and understand the effects of their actions – acts which they committed. To put it more simply, it means that an offender is capable of understanding the act he committed, primarily in its natural sense, proceedings from the actions – acts or omissions which lead to a certain consequence, as well as what his act represents and what its effects are in the society. The state of mind is not only an element of competence; it is also an element of guilt and all forms thereof, either positively or negatively. It should be mentioned that "competence" is a legal category whose existence is presumed and any conclusions thereon are made by the Court based on defendant's conduct as a whole, while the lack of competence must always be ascertained, which is done by expert witnesses in the field of neuropsychiatry. Offenders are deemed competent when they are able to comprehend the effects of their act as well as when they are capable of controlling their actions. Competence may be multilayered. However, only persons who are undoubtedly mentally competent should be allowed to enter into plea agreements.

In respect of conclusion of plea agreements, it should be said that international legal standards apply to this procedure, including as well the right to a fair trial guaranteed under Article 6 of the European Convention. Among other rights, it guarantees the right to effective participation in the proceedings. Consequently, it means that in these proceedings as well, a defendant must understand the very nature and contents of a plea agreement. He must be aware of the rights he waives and the obligations he undertakes which will be translated into legal effect of a judgment and the right of the State to enforce such a judgment. The defendant must be aware of all the benefits he gains from the plea agreement, which we have already pointed out. In particular, the defendant must be aware that he waives his right to seek legal remedy and consequences which it entails.

In addition to the state of mind as a mental characteristic, there is also another element, which is voluntaristic, and that is the will. The will, as a legal institute and not only an institute of criminal law, is one of the most important facts both in civil and criminal law. The mere existence of will

is not sufficient for creation of legal relations since will is only relevant if it has been exercised, either by a statement or some other form of act or omission.

In order for a guilty plea and the conclusion of a plea agreement to be voluntary, a defendant needs to confess to a crime and concludes an agreement only when and because he chooses to and wants to do it, and not because he must. No person, not even prosecutors, investigative bodies, or the Court, can and especially may in any way obligate, coerce, or inappropriately incite a defendant to plead guilty to a crime or enter into a plea agreement.

If a guilty plea and acceptance of terms and conclusion of a plea agreement are voluntary, that means that any possibility of such a guilty plea being coerced evidence or evidence obtained in an unlawful manner is excluded. Only evidence legally obtained in criminal proceedings, which also applies to guilty pleas in these or some other regular or summary proceedings may be used as evidence relevant to the Court and evidence on which a judicial decision may be based. Such a position follows not only from the spirit of Serbia's Criminal Procedure Code, but also from Article 9 thereof. Article 12 of the CPC stipulates that all forms of violence are prohibited and punishable, as well as coercion of defendants or any other persons participating in the proceedings into pleading guilty or giving other statements. Prohibitive measures cited in Article 9 are also protected by the fact that evidence obtained through the use of violence against a defendant or another person is legally classified as inadmissible. Namely, it is stipulated in Article 16, paragraph 5 of the CPC that judicial decisions may not be based on evidence which is in itself or by the manner in which it was obtained in contravention of the Constitution, ratified international treaties, or the Code or expressly prohibited under some other statute.

In respect of the use of this new institute of criminal law, it is also ensured that guilty pleas are entered voluntarily. When applying this institute, free will should not be interpreted narrowly or by accepting the literal meaning of the notions from the provision: "that the defendant has knowingly and voluntarily pleaded guilty to the criminal offence or criminal offences which are the subject matter of the charges and that the possibility of the defendant having pleaded guilty as a result of his misconception has been excluded." Any narrow interpretation would imply that his plea pertains solely to the criminal offence, both to the factual description of its elements and to its legal classification. Namely, the voluntary element must exist in a defendant with regard to all the agreed terms, i.e. the subject matter of an agreement, which includes the type and duration of penalty and/or some other criminal sanction and other elements which have already been specified. It means that a defendant may voluntarily admit to a criminal offence, but be coerced or induced to sign a plea agreement through the use of force or a serious threat or a fraudulent action. Consequently, any activity that precedes the conclusion of a plea agreement: plea bargaining, guilty plea, conclusion – agreement and its signing must be performed both knowingly and voluntarily. The voluntary element is certainly included when defining the contents, subject matter, and basis of a plea agreement as well as its legal effects. Plea agreements belong in the type of bilateral agreements and as such, they are binding on the parties and thus may not be deficient in any of their elements. Voluntariness excludes force, threat, blackmail, and therefore any activity

which influences an offender, his free will when pleading guilty and committing to the elements of a plea agreement.[18]

Assessment of whether sentencing provisions have been correctly applied or not - Our Code grants to the Court the right and duty to ascertain at a hearing on plea agreement whether or not provisions of Art. 54, 56, and 57 of Serbia's Criminal Code governing substantive law were applied when a plea agreement was made and this refers not only to those provisions, but also to others, such as those governing concurrent offences, continuing offences, settlement between a defendant and the injured party, etc. with regard to penalties, or other rules of substantive law with regard to other criminal sanctions. Thus, when agreeing on a suspended sentence, it is necessary that the provisions contained in Art. 64, 65, and 66 of the Criminal Code are applied correctly. It concerns judicial evaluation of a concluded plea agreement from the aspect of whether or not a public prosecutor in his capacity as a contracting authority has correctly applied rules of substantive law when providing for the penalty or other criminal sanction. We cite the public prosecutor since he is the one who proceeds on behalf of the State and he must ensure that substantive law is correctly applied.

Sentence bargaining/ providing for penalties in relative or approximate terms - It is not possible under the law to arrange for a penalty in a plea agreement, for example in the range one year to three years, and then leave it to the Court to define its absolute duration within the agreed range. An argument in favour of such a practice suggests that the Court should hand down sentences or criminal sanctions because it is thus given a more active role. Then, it is proposed that only the Court is competent to discharge such a duty. In such a way, the risk of a submitted plea agreement being denied by the Court is reduced, because while deliberating on whether or not to adopt the agreement, the Court may assess that the penalty from the agreement has been set too high or too low, but within its statutory powers, it may decide not to accept, i.e. deny the agreement. The disproportion between the set penalty/another sanction and the severity of the criminal offence constitutes grounds for not accepting a plea agreement. A very important, although vague formulation from the previous CPC has been eliminated by this amendment. Namely, this provision gives to the Court a role in which it will nevertheless assess the penalty provided for in the plea agreement.

The Court is not empowered, either directly or indirectly, to alter a plea agreement and to adopt an agreement thus altered. Accepted plea agreements are not binding only upon the parties, but on the Court as well when it pasess its judgment. The judgment must be in accordance with every aspect of a plea agreement pursuant to Art. 314, para. 1, item 3.

The Court takes cognizance of whether or not the issue of crediting detention time towards the penalty stipulated for a committed criminal offence has been correctly provided for in a plea agreement. Any irregularity with regard to crediting detention time or other forms of deprivation of liberty is subject to judicial review and constitutes grounds for agreement denial by the Court (Art. 317, para. 1 item 4).

18 Nikolić, D., Sporazum o priznanju krivice i njegov doprinos efikasnosti krivičnog postupka, Proceedings of the Conference "Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije", Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 2009, str. 116

A judgment based on a plea agreement is the same as any other judgment and it may also constitute grounds for application of the provisions governing concurrent offences without actually reopening proceedings, i.e. may be relevant thereto, if appropriate conditions are met.

Assessment of awareness of consequences of a concluded plea agreement - In its Article 317, para. 1, item 2, the Code requires a special condition, that a defendant is fully aware of the consequences of a concluded plea agreement. The Code emphasizes the high level of awareness and its all-inclusiveness by using the notion "fully". "Fully" would mean both in its entirety and in its elements. It would mean awareness of all the potential consequences of a concluded plea agreement. However, it should be mentioned that, apart from using the expression "fully of all its consequences", the Code nevertheless specifies two consequences of a plea agreement as the most important ones: waiver of the right to a trial and acceptance of restriction of the right to appeal.

Waiver of right to a trial - International standards, but above all Article 6 of the European Convention, guarantee(s) that everyone is entitled to a public hearing in the determination of their civil rights and obligations or of any criminal charge against them. Naturally, a suspect or a defendant may renounce this right voluntarily and knowingly if such a possibility is provided for in a national law.

In one of its cases, the European Court of Human Rights, deciding on an application for this right (right to a trial), holds that "the right to a "public hearing" included an entitlement to an "oral hearing" unless there are exceptional circumstances."[19] Thus, the ECHR also allows tacit waivers of the right to a trial.

Restriction of the right to appeal - After a ruling by which a plea agreement is granted has become final, a judgment of conviction is passed and its operative part represents implementation of the plea agreement. Consequently, whatever is provided for in a plea agreement is implemented through a judgment of conviction. Thus passed judgment of conviction leads to a very important, if not the most important consequence and that is that a defendant may not seek judicial relief against it. Namely, it must be stipulated even in the concluded plea agreement that the defendant and his attorney waive the right to appeal against a decision based thereon.

The right to appeal ranks high among defendant's rights in criminal proceedings, the topic we have dealt with when we discussed the subject matter of plea agreements.

A defendant must be fully aware, which means without any exception, that if, for instance, a plea agreement provides for a one-year sentence, he will be sentenced to that type and duration of penalty which will be imposed by a judgment of conviction and that such a judicial decision is final and consequently enforceable and he must be advised that immediately after the judgement had been pronounced, he will be sent to serve his sentence. Everything which has been provided for in the plea agreement is translated into the judgement whose enforcement commences immediately and the defendant should be aware of that. The Court is obligated to explain all that to the defendant in a manner which he can understand, depending on his education and how the situation develops at the hearing on plea agreement. After the hearing, the defendant is sentenced and he undertakes to indemnify or not damages or meet other obligations as stipulated in the

19 Fischer v. Austria, 26 April 1995, para. 44

plea agreement. Provisions made in an accepted agreement, after the ruling on its acceptance becomes final, may no longer be subject to review. Therefore, the defendant may not file an appeal with a court of higher instance. If a defendant or his attorney should file an appeal, it will not be considered, but instead, it will be dismissed as inadmissible.

The defendant and his attorney are entitled to appeal within eight days from the date of service of judgment only on condition that the judgment in not in accordance with the concluded agreement with regard to its agreed elements.

Evaluation of evidence in support of a guilty plea - Previous statutes which used to govern criminal procedure in Serbia were familiar with the idea of establishing whether or not there is sufficient evidence for filing an indictment, so in this area, there is a wealth of experience, both theoretical and practical. In our opinion, the term "sufficient grounds to suspect" should be kept, naturally apart from a full confession. We cannot see any reasons why the expression "that there exists other evidence which substantiates…" would be clearer than, for instance, the phrase that suspicion is based on evidence which is in addition to a full confession annexed to a plea agreement. Such a wording would be more acceptable since the lawmaker does not require quality from evidence "beyond any suspicion" or "conclusive evidence". We believe that, with all those examinations and reviews which are necessary in order for defendant's full admission of a criminal offence to be positively evaluated, the law rightfully requires that it only be "substantiated by other evidence". This is even truer since any possibility of false or partial pleas has been excluded because of the manner in which its veracity is assessed. Consequently, we can see no reason for which other pieces of evidence would have to have greater evidentiary strength in order to substantiate defendant's plea than those required when an indictment is examined.[20]

Existence of other evidence supporting an indictment will be assessed by the Court, which will summarily evaluate the degree of its probability, i.e. make a summary evaluation of a complete body of evidence. It is not suitable for these proceedings to assess individually each particular piece of evidence and how they all relate to each other, in the manner in which they are evaluated in judgments after main hearings. Thus, the quality and quantity of other pieces of evidence must be such as to satify the Court, or better to say a judge, that there is no doubt that defendat's plea is truthful and that the defendant actually committed or did not undertake the acts which constitute the elements of the offence to which he pleaded guilty. Such a conclusion is partially hypothetical, but given other methods used to verify the truthfulness of a guilty plea, it is sufficient and fulfils all the international and national legal standards.

When assessing this condition for accepting or denying a plea agreement, a judge will use not only his professional experience in free evaluation of evidence, but his discretionary right which implies his belief that the plea and evidence is of such quality that their veracity can be judged as having a high degree of certainty.

Protection of defendant's rights - In its Article 2, paragraph 1, item 8, Criminal Procedure Code defines the notion of the injured party as follows: "An injured party is a person whose personal or property right has been violated or jeopardized by a criminal offence".

20 Nikolić, D., Stranački sporazum o krivici „Službeni glasnik RS", Beograd, 2009, str. 70

At a hearing, when the Court adjudicates on a plea agreement, it is bound to establish, i.e. evaluate in particular which element of the agreement pertains to the restitution claim, naturally provided any of the injured party's property rights have been violated through commission of the offence or in connection therewith. When passing its decision to accept a plea agreement, the Court has a duty to assess if the part of the agreement which covers the restitution claim violates the rights of the injured party or not. His rights may also be violated even by failing to provide for them in a plea agreement, although a restitution claim obviously arises from the incident itself. A public prosecutor may provide in a plea agreement for a full indemnification of damages including grounds for them and their amount, but only with full and express consent from the injured party himself or from his attorney-in-fact who has been duly authorized. With regard to plea agreements which provide for full indemnification against restitution claims, we stress once again that it is necessary to state in detail and precisely all the types of tangible and intangible damages, both their class and amount for each type of damage. In case of some other type of compensation, for instance paying for a car repair, it should be stipulated that such repair work is represented by the amount stated on a pro-forma invoice and paid in advance, prior to the conclusion of the agreement, etc.

If a plea agreement settles the issue of a restitution claim only in part, that must be clearly stated and mentioned therein, namely that the injured party is advised to pursue a civil lawsuit for the portion of his restitution claim which exceeds the one covered by the agreement, both in terms of its grounds and amount (because a judgment must comply with the provisions of the CPC).

A public prosecutor and a defendant may agree that the injured party be advised to pursue a civil case in order to have its restitution claim upheld and not to provide for his restitution claim in a plea agreement. Not only does the Criminal Procedure Code allow for such a possibility, but in practice, such decisions by criminal courts are most frequent, they always happen when it is probable that arguing for or against and ascertaining whether there are grounds for a restitution claim of the injured party would be prolonged, thus complicating criminal proceedings and delaying them significantly.

When assessing a legal situation thus provided in a plea agreement or when a plea agreement does not provide in any way for a restitution claim, although it arises from the circumstances and the injured party is known, the Court will exercise utmost caution when deciding whether or not to accept such an agreement. Efficiency of criminal proceedings may not prevail over nor may some other reasons be more important than the rights of a victim of a criminal offence whose class of protected objects belongs to property. Why should a plea agreement be signed with a perpetrator of a crime against property, without having him return the stolen goods before the conclusion of the agreement or without him having sufficient funds to compensate for such goods since he has no property? Does such a defendant deserve any privileges arising out of a plea agreement? We are of the opinion that courts, when deciding on whether or not to accept – grant a plea agreement, should attach great value to its section which provides for a restitution claim. If a restitution claim of the injured party has been fully satisfied, it is a very important reason (if not the most important one, depending on the class of the offence) in favour of granting the defendant greater benefits with regard to other elements of the agreement and granting the agreement by the Court.[21]

21 Nikolić, D., Stranački sporazum o krivici, „Službeni glasnik RS", Beograd, 2009, str. 89

Besides, in the general part of the Criminal Code there is a special provision for remittance of punishment when an offender compensates the damage caused by the criminal offence. Thus, pursuant to Article 59 of the CC, the Court is empowered to remit from punishment such an offender if the offence in question is punishable by imprisonment of up to three years or a fine.

Apart from the provisions contained in Article 59, which stipulate optional grounds for remittance of punishment, the Article 58 of the CC, which prescribes grounds for optional remittance of punishment, in its paragraph 3 provides the Court with a possibility to release from punishment a perpetrator of an offence punishable with imprisonment of up to five years if the defendant eliminates the consequence of his offence or compensates the damages incurred thereby prior to learning that he has been found out by the authorities. These two grounds, provided they were not applied although there was a possibility of their application, are very relevant for the Court when assessing not only the defendant's conduct towards the injured party, but also as grounds for unlimited mitigation of penalty or mitigation without restrictions prescribed under Article 57, para. 1-3 of the CPC.

In cases of partially or completely settled restitution claims, the legislator has assigned to the Court the duty to protect the injured party. If it is certain that the injured party will not receive any compensation based on his restitution claim arising from a criminal offence or in connection therewith, we believe that in principle, the defendant should not be privileged nor should a plea agreement be signed with him.

In respect of criminal offences against property, in the course of plea bargaining, a condition should somehow be imposed on a defendant to indemnify the injured party (theft, fraud, misuse of funds, embezzlement, abuse of office, etc.) as a prerequisite for signing a plea agreement. Why? Not only for the purpose of fully protecting the injured party, but to regulate their further relations and avoid lengthy and costly civil disputes the outcome of which is uncertain as regards payment and which follow after judgments of conviction which do not include a decision on a restitution claim have become final.

Prior to passing its decision, the Court takes a statement from the injured party, whom it asks if he took part in the conclusion of a plea agreement concerning his restitution claim, if he is satisfied with it, and, providing the claim was paid, if he renounces any future claims which would be in terms of their grounds and amounts in connection with the criminal offence and the defendant to which the plea agreement pertains.

5. Judgment based on a plea agreement

A judgment is a judicial decision by which court proceedings are concluded and the merits of charges from the accusatory instrument (a private prosecution, a motion to indict, or an indictment) are adjudicated. In criminal proceedings, judgments are mostly passed after the main hearing. There are proceedings for imposing punishment prior to the main hearing, procedure for imposing punishment and suspended sentence by an investigative judge, as well as these proceedings, but these are exemptions to the rule that any judgment is a result of an adversarial, direct, and as a rule public presentation and examination of evidence before a court of law.

Consequently, they are exemptions to the rule that there may be no judgment without a trial and no trial without a judgment.

The proceedings in which a judgment is passed based on a plea agreement are also specific in comparison with the regular proceedings for delivering a judgment. The prerequisite for delivering such a judgment is a final ruling on the adoption of a plea agreement. The judge who decided on the plea agreement must state in the files that the ruling by which it was adopted was final.

We have already emphasised that a plea agreement may be concluded at the stage of an investigation and be submitted to the Court for a preliminary proceedings judge to make a decision thereon. When such an agreement is adopted by the Court and its ruling becomes final, a public prosecutor is bound to draft an indictment "in which he includes the plea agreement, providing the indictment has not been filed yet". The legislator orders that the prosecutor "shall include" the plea agreement into the indictment which he files *ex officio*.

Judgment of conviction - A presiding judge (or a judge sitting alone) delivers a judgement of conviction by which he pronounces a defendant guilty of the crimes cited in the accusatory instrument, as they were described and legally classified therein, and sentences him to a fixed penalty as provided for in a plea agreement. The judgment should also include in its operative part all other terms from the agreement or issues provided for therein, such as the damage claim, costs of criminal proceedings, the lump sum, other obligations of the defendant, etc.

Actually, the operative part of thus passed judgment has to be identical in terms of its contents to the plea agreement. We have already highlighted that it may be stipulated under a plea agreement that the Court will set the amount of the costs of criminal proceedings and the lump sum in its judgment. In addition to the contents of a plea agreement, a judgment passed on the basis thereof should include, as any other judgment of conviction, all the elements prescribed under Article 424 of the CPC. This primarily refers to a decision on crediting detention, potential deprivation of liberty, or a part of the sentence previously served, which implies an appropriate application of the rules of substantive law – the Criminal Code which governs this matter.

Provisions of Article 428 of the CPC should be applied to the contents of a judgment done in writing. Naturally, in addition to the indication of the accusatory instrument which is decided on, the introductory part should state that it is passed in the proceedings based on a plea agreement, after which a regular introduction should follow, as in case of any judgment of conviction.[22]

Judgment of non-suit - Apart from a judgment of conviction and provisions for a guilty plea and a sentence, the subject matter of an agreement may include an arrangement under which a prosecutor abandones prosecution for some other offences committed by a defendant because he has obtained from the defendant some important information about a criminal offence, accomplices to the offence, prevention of a criminal offence whose commission is in preparation, proving other criminal offences. In our opinion, when a plea agreement is made with such a stipulation, a full admission of guilt should be obtained from the defendant. Thus made confession, which is

22 Nikolić, D., Sporazum o priznanju krivice i njegov doprinos efikasnosti krivičnog postupka, Proceedings of the Conference "Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije", Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 2009, str. 113

full and detailed, will ensure the filing of an accusatory instrument which contains a factual description and a legal classification which are abandoned, as well as the precise citation of criminal offences for which the public prosecutor abandones prosecution.

In case when a plea agreement provides that a public prosecutor will desist from prosecution for criminal offences not covered by the agreement (but which pertain to the judgment of conviction), those offences should be included in the accusatory instrument and then, before the judgment is delivered, the prosecutor would file a special brief in which he states that he desists from prosecution, so the Court will rule in the same judgment or if the procedure allows for it, in a separate judgment, that charges are denied pursuant to Article 422 of the Criminal Procedure Code.

Therefore, a judgment of non-suit may be done separately or it may be part of the judgment of conviction, in the way it is usually done in regular proceedings when there is both a judgment of conviction and a judgment of non-suit in one single case. A judgment of non-suit done in writing should be in accordance with Article 428, paragraph 7; it should not include evaluation of evidence, only a statement that a public prosecutor has abandoned prosecution pursunt to a peviously concluded plea agreement. The reason for this is that the criminal matter in respect of that defendant has finally been adjudicated when the judgment becomes final, regardless of the fact it is the judgment of non-suit.

A certified copy of the judgment shall contain a Court's special instruction to the injured party advising him that he may not assume prosecution for offences covered by the agreement for which the prosecutor has abandoned prosecution. A judgment of non-suit does not encroach upon the right of the injured party to put forward a restitution claim. When such a judgment is passed based on a plea agreement, it may not be appealed.

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Application of Plea Agreements: Experience of Prosecutor's Office for Organised Crime

Introduction

For a number of years after the Second World War, our public prosecution service had been organized on the Soviet model, from which it adopted numerous solutions.[3] By taking over the Soviet solutions, prosecutor's offices functioned for decades by strictly adhering to the principles of the civil law system without coming closer to the common law model in any way or having any opportunity to acquire effective solutions therefrom. In the post-Cold War era, two of the above mentioned legal systems began to converge, more and more bridges were built across which effective solution could be transferred from one system into the other.

Following the period of transition during the 1990s, which was characterized by changes taking place in the economic sphere and the system of economy of the then FRY, a specific kind of transition of the Republic of Serbia's criminal law system occurred in the early 21st century. Prior to this period, public prosecutors and defendants could not reach an agreement of any kind. Public prosecutors had a duty, pursuant to the principle of legality of criminal prosecution,[4] to initiate and conduct prosecution against persons in connection with whom there were reasonable gro-

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3 Dr Goran Ilić i dr., *Položaj javnog tužilaštva u Republici Srbiji i uporedno pravna analiza*, Udruženje javnih tužilaca i zamenika javnih tužilaca Republike Srbije, Beograd, 2007, str. 31-32.
4 Certain authors believe that the principle of legality of criminal prosecution should be viewed only together with the principle of officiality of prosecution and they refer to it as the principle of legality of official criminal prosecution. See dr Milan Škulić, *Krivično procesno pravo opšti deo*, Pravni fakultet Univerziteta u Beogradu i Službeni glasnik RS, Beograd, 2007, str. 69.

unds to suspect that they had committed a crime, except for in criminal proceedings against juvenile offenders.[5]

The plea agreement is a legal institute typical of common law systems, but nowadays it is gaining more and more acceptance in the criminal procedure laws of the civil law jurisdictions to the extent that sometimes in theory we can read about some sort of a "plea bargain infection".[6] A literal interpretation of the expression "plea bargaining" would be haggling, deal-making, or bartering between a prosecutor of the one part and a defendant and his defence attorney of the other part, in which process their agreement does not have to pertain strictly to defendant's guilty plea, but it can also pertain to some other elements which can be included in the agreement as an integral part thereof. The simplification of ordinary criminal proceedings through the legislation of institutes which previously used not to be representative of the civil law systems, and the plea agreement could be included in the lot, has been a feature of the modern criminal procedure laws of the countries in the region.[7]

To put it very briefly, the agreement on the admission of guilt (plea agreement) could be defined as a meeting of the minds of a public prosecutor of the one part and a defendant and his defence attorney of the other part, which is made in writing and by which the defendant knowingly, voluntarily and excluding any possibility of his error in judgment fully pleads guilty to one or more counts in an indictment.[8]

It should be stressed that before the plea agreement was introduced by the amendments to the Criminal Procedure Code in September 2009,[9] which provided for this institute in Art. 282a-d, there had already been certain institutes which provided for negotiations between public prosecutors and defendants.[10]

There was a range of factors which influenced Serbian lawmakers to decide to take such a serious step in 2009 and introduce the plea agreement into the system of the current law which governs criminal procedure in the Republic of Serbia. The following reasons could be highlighted as principal: rise in the number of criminal cases; lengthy and strenuous criminal proceedings which were the result of the fact that courts could not schedule hearings within a short time; parties' dissatisfaction with the fact that their cases had not been concluded and an increasing number of judgments on procedural issues instead of judgments on the merits; numerous petitions to the Court in Strasbourg; as well as the limits of the state treasury no longer able to fund a judicial system which was thus organised. The synergy of these factors had created a need for finding alternative methods of improving the efficiency of the judiciary.

5 Prior to the introduction of deferring of prosecution into our legal system, prosecutorial discretion could be exercised in our criminal procedure only in proceedings against juvenile offenders, while it did not exist in criminal proceedings conducted against adult persons.

6 Dr Stanko Bejatović i dr., *Primena načela oportuniteta u praksi izazovi i preporuke*, Udruženje javnih tužilaca i zamenika javnih tužilaca RS, Beograd, 2012, str. 52-53.

7 Dr Stanko Bejatović, *Plea Agreement: Serbia's New CPC and a Comparative Analysis of Regional Legislation* (quoted from *New Trends in Serbia's Criminal Procedure in a Regional Context (Normative and Practical Aspects)*, OSCE Mission to Serbia, Belgrade, 2012), p. 103

8 Emilija Tončić, *Javni tužilac kao subjekt zaključenja sporazum o priznanju krivice* (citirano prema zborniku radova *Zakonik o krivičnom postupku i javno tužilaštvo*, Udruženje javnih tužilaca i zamenika javnih tužilaca RS, Beograd, 2009. godine), str. 213.

9 Official Gazette of the RS, No. 72/09

10 This refers to deferring of prosecution (Art. 236 of the 2001 CPC) and the witness collaborator (Art. 504o-ć of the 2001 CPC), which have virtually paved the way for the agreement on the admission on guilt. Vesko Krstajić, *Sporazum o priznanju krivičnog dela*, Bilten Vrhovnog kasacionog suda br. 2/2012, Beograd, 2012. godine, str. 54.

From the aspect of human rights, it was necessary to ensure that trials were held without undue delay, which then-current legislative solutions could not provide for. The right to a trial without undue delay (within a reasonable time) is not only one of the elements of the fair trial in criminal matters, but it is also a very important right of defendant's which is governed both by the Constitution (Art. 33 of the Republic of Serbia's Constitution) and international standards (Art. 6, para. 1 of the European Convention on Human Rights).[11] The defendant's right guaranteed under the Constitution and the law to have criminal proceedings against him begin and end within a reasonable time is embodied in the quintessence of this right. It would be possible to promote the right to a trial without undue delay by proper application of the plea agreement, without it running contrary to the right to a fair trial.

The average duration of criminal proceedings in the Republic of Serbia before the agreement of the admission of guilt began to be applied in our criminal procedure law implied a profound lack of economy of our criminal procedure. In as many as 73.94% of criminal cases it took more than six months for judgments to become final, whereas nearly half the criminal proceedings in the Republic of Serbia lasted more than a year before they were adjudicated by a final judgment.[12] Certainly, all those who have been involved in criminal proceedings in the Republic of Serbia would be astonished to learn that each criminal proceeding which lasts over a year in the UK stands good chances of becoming a scandalous criminal case.[13] In addition to implementing the right to a trial without undue delay trough the plea agreement, this institute could also be used to further the general interest of the society whose aim is to fight crime as successfully as possible.[14]

The judicial circles received with great scepticism the introduction of the plea agreement in our criminal procedure law as an institute of the current criminal law. Compelling evidence of that is the fact that over the first full year during which the institute was applied, namely in 2010, the First Basic Public Prosecutor's Office in Belgrade registered a total of 12 cases in which plea agreements were signed with 21 indictees.[15] Considering it is the biggest prosecutor's office in the Republic of Serbia, which on a yearly basis has over 10,000 criminal cases with at least twice as many defendants, it is clear how much the effects of the institute were minimized over the first year by its non-application. Nevertheless, a rising trend in the number of signed plea agreements could be noticed in the next 2011, so the First Basic Public Prosecutor's Office registered 77 cases in which plea agreements were signed with 112 defendants and in 2012 that number went to 167 cases in which plea agreements were signed with 231 defendants.

Undoubtedly, the plea agreement is a powerful weapon in the hands of public prosecutors, but it only needs to be used properly and it will certainly yield even better results in the future. Information from the US case law is clear evidence of the plea agreement's significance for any legal system since it shows that as many as 95.7% of the cases were disposed through the plea agreement in 2004, while this number usually does not fall below 90% of the cases settled

11 Mr Jasmina Kiurski, *Zloupotreba prava i njen uticaj na efikasnost rada* (citirano iz zbornika radova *Uloga javnog tužioca u pravnom sistemu*, Udruženje javnih tužilaca i zamenika javnih tužilaca RS, Beograd, 2010. godine) str. 355.

12 Dr Snežana Brkić, *Pojednostavljene forme krivičnog postupanja i postupak njihovog ozakonjenja u Republici Srbiji*, Revija za kriminologiju i krivično pravo br. 1/2009, Beograd, 2009, str. 86.

13 Ranko Sokolović, *Policija i krivični postupak – suprotstavljanje organizovanom kriminalu*, Službeni glasnik RS, Beograd, 2005, str. 183.

14 It was Beccaria who pointed out as early as in the 18th century that the quicker a punishment that was enforced following a crime, the more just and beneficial it would be. Žan Pradel, *Istorijat krivičnih doktrina*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2008, str. 31.

15 Source: Clerk's Office at the First Public Prosecutor's Office in Belgrade.

through the plea agreement per year.[16] From the above information it can only be concluded that without this institute, the US criminal justice system would soon reach a total impasse and then it would collapse.

Consequently, we hope that in the future the use of the agreement on the admission of guilt (plea agreement) as a simplified form of criminal procedure in the Republic of Serbia would gather even more momentum and that it would contribute to the acceleration of work process both at public prosecutor's offices and at courts.

Experience of the Organized Crime Prosecutor's Office of the Republic of Serbia

When the plea agreement was first introduced into our legal system in September 2009, it was not used in the Prosecutor's Office for Organized Crime to any great extent either. During 2010, the Prosecutor's Office for Organized Crime concluded a total of 3 plea agreements with 3 defendants.[17] However, unlike basic prosecutors' offices, the Prosecutor's Office for Organised Crime was held back from fully implementing this institute by an objective and limiting factor. Namely, Art. 282a of the 2001 CPC lays down that the upper limit for the statutory penalty for criminal offences to which the plea agreement may be applied is twelve years. Considering the type of criminal offences which fall under the jurisdiction of the Prosecutor's Office for Organised Crime under Art. 2 of the Law on Organisation and Jurisdiction of Government Authorities in Suppression of Organised Crime, Corruption and Other Severe Criminal Offences, as well as an average upper limit for penalties prescribed for such offences, it was clear that in the majority of those criminal cases it was not possible to initiate the procedure for concluding an agreement since the maximum limit of statutory penalties was over twelve years. Nevertheless, the situation somewhat improved in 2011 because during that period, the Prosecutor's Office for Organised Crime managed to sign 10 plea agreements with 10 defendants despite the said constraint.

Since the 2011 Criminal Procedure Code came into force and began to be implemented on January 15, 2012, the expansion of plea agreement's[18] use in the proceedings handled by the Prosecutor's Office for Organised Crime has become noticeable in the practice of the said prosecutor's office. Thus, in 2012, the Prosecutor's Office for Organised Crime concluded 58 plea agreements with 58 defendants. The reason for such a sudden rise in the number of signed plea agreements lay in the lack of any rule setting the upper limit on the duration of a penalty for criminal offences which were subject to the plea agreement. Therefore, under the 2011 Criminal Procedure Code, plea agreements can be signed for any criminal offence, regardless of the duration of the penalty prescribed by the law.

16 Mr Vanja Bajović, *Sporazum o priznanju krivice uporedno-pravni prikaz*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2009, str. 55.

17 Source: Clerk's Office at the Prosecutor's Office for Organized Crime of the RS.

18 From a strictly formal point of view, we cannot help but notice that the name of the institute as it is defined under the 2011 Criminal Procedure Code (*Official Gazette of the RS*, No. 72/11) is more accurate, considering it is "plea agreement". The Criminal Code has adopted a definition of general elements of a crime both in terms of its subject and object and therefore the very name of the "agreement on the admission of guilt" from the perspective of theory sounds as if a defendant pleaded guilty only to the subjective and not to the objective element of the crime, which implies that he did not admit to it in its entirety. Naturally, only full admission of guilt, including both the objective and subjective elements of a crime, can be included within a guilty plea, which is why "plea agreement" is the name that certainly corresponds more precisely to the essence of this institute.

Although certain authors take a dim view of such a legislative solution,[19] we are of quite the opposite opinion. Professor Skulic finds that by lifting the upper limit on the prescribed punishment of twelve years' imprisonment for criminal offences on which the plea agreement is allowed to be concluded an anomaly is created which reflects in the fact that now agreements can be concluded in respect of any offence, regardless of its type and the duration of prescribed penalty, which would imply that in practice such agreements could also be concluded in connection with rape of a child, multiple murder, etc.

Such a position is not based on any practical experience which results from the application of the plea agreement or prior to it, the application of deferring of prosecution. Namely, *argumentum a contrario* to the objection which concerns the application of plea agreements could refer only to the nature of the said agreement. *Per definitionem*, the plea agreement represents a consensual legal instrument or in other words, in order for it to be concluded, there must be a meeting of the minds of a prosecutor and a defendant. Without it, there can neither be the conclusion of a plea agreement *in concreto*. Consequently, it is clear that in practice public prosecutors need to evaluate under which circumstances and for which criminal offences they can offer a defendant to sign a plea agreement or when and under which circumstances they can accept a defendant's offer to sign an agreement. There is no strict rule under the law which requires that a public prosecutor must enter into an agreement in any particular case or in connection with any particular criminal offence. Therefore, it is reasonable to anticipate that in practice, public prosecutors will decide whether or not they will opt for a plea agreement at all in connection with the types of offences which are mentioned by the cited authors and one would assume they will not. On the other hand, we can see no reason for a priori tying prosecutors' hands and preventing them from signing agreements in connection with certain types of crimes by setting a limit on the duration of a statutory penalty. As it was/has been done in practice with regard to deferring of prosecution (Art. 236 of the 2001 CPC and Art. 283 of the 2011 CPC), public prosecutor's offices may also issue internal mandatory rules of procedure by which particular offences would be excluded from the body of criminal offences in connection with which plea agreements may be signed.[20] In the same way the principle of prosecutorial discretion is applied by deferring criminal prosecution, it depends on the prosecutor's own discretion when and whether at all he will enter into a plea agreement in connection with certain criminal offences. Thus, we believe that repealing the restriction on the duration of penalty prescribed for criminal offences in connection with which a plea agreement may be concluded is a good solution from the 2011 CPC.

A definite indication of how useful a tool the plea agreement is in the hands of the prosecution which can use it to end proceedings within a short period of time is the case no. SK 1/12 which was pursued by the Prosecutor's Office for Organized Crime. This criminal proceeding was conducted against an organized crime group which used to be involved in unlawful production and circulation of the narcotic drug cannabis (skunk). In this case, eleven members of the said organized crime group out of twelve of them assented to signing a plea agreement, whereby their

19 Dr Milan Škulić i dr Goran Ilić, Reforma u stilu „jedan korak napred – dva koraka nazad", Udruženje javnih tužilaca i zamenika javnih tužilaca RS, Srpsko udruženje za krivičnopravnu teoriju i praksu, Pravni fakultet Univerziteta u Beogradu, Beograd, 2012, str. 98.

20 *E.g.* with regard to the application of the principle of prosecutorial discretion, a list of criminal offences to which deferring of prosecution could not be applied was compiled as part of the practice of former municipal public prosecutor's offices since it was believed that there were reasons for which criminal proceedings should nevertheless be initiated in cases of those offences, irrespective of the fact they did formally meet statutory requirements for deferring of prosecution. The so-called minor traffic accidents caused by alcohol were included in the list (Endangering Road Traffic under Art. 289, para. 1 of the CC), as well as domestic violence under Art. 194 of the CC, illegal manufacture, possession, carrying, and sale of firearms and explosives under Art. 348, para 1. of the CC, etc.

case was resolved virtually without going to trial (naturally, if we do not count the hearing on plea agreement referred to in Art. 315 of the CPC). Each defendant who had concluded a plea agreement was ordered to serve an actual prison sentence, objects which they used to commit a crime in terms of Art. 87[21] of the CC as well as material gain obtained by crime in terms of Art. 91 of the CC were seized from them, while in cases of some defendants, agreements were reached to permanently seize their proceeds of crime in terms of Art 34 of the Law on Seizure of the Proceeds from Crime.

Also, in the case no. SK 2/12 pursued by the Prosecutor's Office for Organised Crime seven out of eight defendants who were charged by the prosecution with criminal alliance and unlawful production and circulation of the narcotic drug cannabis had accepted to enter into a plea agreement, on condition that security measures of seizure of objects under Art. 87 of the CC and permanent seizure of the proceeds of crime in terms of Art. 34 of the Law on Seizure of the Proceeds from Crime were imposed on them.

Five plea agreements had been concluded with five defendants in cases no. SK 24/, SK 27/12, SK 28/12, SK 33/12 and SK 38/12 pursued by the Prosecutor's Office, whereby the complete criminal proceedings against the members of said organized crime group had been resolved. The extent to which the workload of the Prosecutor's Office and the Court was thus reduced does not need to be additionally emphasised, nor the extent to which the pursuing of criminal proceedings against those organized crime groups was simplified and accelerated by the conclusion of the said agreements with so many defendants, while the prosecution and the Court had been left enough room to proceed in other criminal cases.

Under the provision contained in Art. 314, para. 1, item 4 of the CPC, plea agreements must include a decision on the costs of criminal proceedings, on seizure of material gain obtained through crime, as well as on a restitution claim, if one has been put forward, whereas Art. 314, para. 2, item 3 of the CPC provides that plea agreements may also include a decision about the proceeds of crime which will be seized from a defendant. Plea agreements will undoubtedly contain decisions about the seizure of material gain obtained by crime or decisions on permanent seizure of the proceeds from crime, provided gain or proceeds of such kind exist in a given case. However, in cases SK 20/12 and SK 22/12, the prosecution made an arrangement with defendants in plea agreements that assets which had been temporarily seized from them in terms of Art. 147 of the CPC would be returned, after which the Court issued a ruling accepting such plea agreements. There is no argument against providing in a plea agreement for seizure of the proceeds of crime or material gain obtained through crime, as well as for their return, but maybe a question could be raised with regard to the purposefulness of making provisions for such prestation of the Court when Article 151 of the CPC already lays down *ex lege* that objects temporarily seized in the course of proceedings will be returned to their holder if the reasons for which they were temporarily seized cease to exist, and there are not grounds for their permanent seizure. Still, motives of

21 It is interesting that under one of the plea agreements signed in this case, the seized object used to commit a crime in terms of Art. 87 of the CC was actually real property, or more precisely, a plot and a house which had been used by the defendants as a laboratory for preparing cannabis.

both parties are not relevant here,[22] what is important is that the prosecution should obey the law and that there are no impediments to following this practice in the future as well.

We would like to mention that unlike the seizure of material gain obtained through crime, which is mandatory under Article 91 of the Criminal Code, the proceeds of crime are open for plea bargain negotiations between the prosecution and a defendant and they do negotiate on them in practice. The prosecution's assessment comes down to weighing between the prosecutor's interest to seize certain property from a defendant on one part, and interests of the state, represented by the public prosecutor in a criminal proceeding, which is to efficiently end the criminal proceeding against the same defendant.[23] Naturally, prosecutors will make such assessments only in situations when they judge that they are linked with serious difficulties to achieve both goals in ordinary criminal proceedings.

In respect of the right to appeal against a ruling on a plea agreement provided for in Art. 319 of the CPC, it should be mentioned that Art. 319, para. 3 of the CPC expressly lays down that appeals are allowed against a judgment accepting a plea agreement within eight days from the date of the service of judgment, but only on grounds provided for under Art. 338, para. 1 of the CPC[24] or if the judgment does not pertain to the subject matter of a plea agreement (Art. 314 of the CPC). On the other hand, appeals are not allowed against rulings by which plea agreements are dismissed or denied. Judgments passed by the Special Department of the High Court in Belgrade, Spk /plea agreement/ Po1 /special department/ no. 1/12 of March 7, 2012, Spk Po no. 7/12 of March 23, 2012, Spk Po1 no. 8/12 of March 26, 2012, Spk Po no. 12/12 of March 27, 2012, and Spk Po1 no. 11/12 of May 25, 2012, by which plea agreements signed by the Prosecutor's Office for Organised Crime and defendants were accepted became automatically final because the parties waived their right to appeal at the hearing on plea agreement referred to in Art. 315 of the CPC. However, we are of the opinion that such a practice is not good, regardless of the fact that it additionally speeds up the ending of proceedings on plea agreement.

Namely, time limits for filing appeals are short and there will rarely arise a need to file an appeal when everything has been arranged for in a plea agreement and confirmed at a hearing before the Court. Nevertheless, regardless of an agreement reached by the parties, situations can develop in which it will be necessary to appeal a court's decision with a good reason, so it is not necessary to part with this ordinary legal remedy which does not result in any excessive delay of proceedings and it can also be useful. We will illustrate the point we are trying to make by offering a practical example.

In an already mentioned case of the Prosecutor's Office for Organised Crime whose number is SK 1/12, the Office had arranged with ten out of eleven defendants that they would defray the

22 Defendants' motives can be found in their wish to have the objects for which it was found in the course of proceedings that there was no title under which they could be sized returned to their possession or to have title to it returned to them as quickly as possible and that they simply do not wish to wait for any subsequent court actions through which those objects would be returned to them, but they want through a judgment accepting a plea agreement to have an instant title of execution based on which they could request the return of the seized objects. On the other hand, if a plea agreement has already been reached with a defendant, the prosecution has no reason not to accommodate him in that regard.

23 Dr Goran P. Ilić i dr., *Komentar Zakonika o krivičnom postupku*, Službeni glasnik RS, Beograd, 2012, str. 671.

24 This refers to situations in which: one of the parties believes that an offence with which a defendant is charged is not a criminal offence and that there are no grounds for imposing a security measure; statute of limitations on criminal prosecution has expired or the offence is covered by amnesty or pardon or there are other circumstances which permanently preclude criminal prosecution; there is not sufficient evidence to justify the suspicion that a defendant has committed the offence with which he is charged.

costs of criminal proceedings, while it had been arranged with one of the defendants to exempt him from paying the said costs since the prosecution was aware of his low income and their arrangement became an integral part of an agreement concluded between the defendant and the prosecution. In the judgment Spk Po1 no. 24/12 of May 17, 2012, the Special Department of the High Court in Belgrade accepted the prosecution's and defendant's agreement under which he was exempted from paying the costs of criminal proceedings, but it imposed on him an obligation to defray those costs in the amount of 75,440 dinars, which was the result of an obvious oversight. Being aware that the Court may accept a plea agreement only in its integral form and not partially and that it may not make any changes thereto, the defendant and his defence attorney appealed the judgment by which the agreement was accepted, and the prosecution sustained their appeal. Thereafter, the Belgrade Court of Appeal, namely its Special Department, upheld the defendant's appeal by their decision Kž1 /criminal case - appeal/ Po1 no. 14/12 of June 29, 2012, vacated the first instance judgment and returned the case to the Special Department of the High Court in Belgrade for a retrial. In the course of the retrial, the fault was corrected and a judgment became final.

It follows from the above that it would nevertheless be useful not to renounce the right to appeal since even the Court can make a mistake and pass a judgment accepting an agreement which is not identical with the contents of the accepted agreement – an error that can be corrected quickly and efficiently in appellate proceedings. Had the parties waived their right to appeal in this instance as well, a request for the protection of legality would have had to be filed with the Supreme Court of Cassation, which would certainly take much more time than a situation in which the parties reserve their right to appeal and thus resolve any potential dispute before a competent second-instance court.

A concrete example from practice unequivocally shows that objections raised by certain authors who criticise the possibility of appealing judgments by which a plea agreement is accepted are not valid.[25] A conclusion drawn by such authors that granting the right to appeal will only stall the proceedings on a plea agreement is disproved by our argument that the Court, as the third participant in the proceedings on the plea agreement, may unintentionally infringe on the rights which a defendant has earned under a plea agreement. How should such situations be handled in practice and how should such defendants be protected? Filing an extraordinary legal remedy would stall criminal proceedings even more. Therefore, the right to appeal should be reserved for a defendant and a prosecutor as an ordinary legal remedy even if it is not brought in the majority of cases.

When compared to the statutory regulations from the 2001 CPC, a provision included in Art. 313, para. 2 of the CPC, under which a defendant must have a defence counsel during the conclusion of a plea agreement, is definitely progress. Thus was corrected a fault from the 2001 CPC which provided in its Art. 282v, para. 1, item 5 that a defendant must have a counsel not earlier than at a hearing on plea agreement. Since a defendant must have a defence counsel already during the conclusion of an agreement, he has been provided with legal assistance as early as at the stage of plea bargain negotiations with a prosecutor. Therefore, it is precluded that a prosecutor signs a plea agreement with a defendant who does not have a defence counsel and perhaps abu-

25 See: Dr Stanko Bejatović, *op. cit.*, p. 113.

ses the fact that he has does not know the law, whereby defendants' procedural rights are better protected.

Also, an interesting issue concerns the range of topics on which a defendant and his defence attorney may negotiate with a prosecutor and on which they can reach an agreement. Certainly, there are elements which a plea agreement must include (mandatory elements – Art. 314. para. 1 of the CPC), as well as those which it may include (optional elements – Art. 314, para. 2 of the CPC). This concerns an answer to the question: is it possible that a public prosecutor reaches an agreement with a defendant and his counsel on some other matters of dispute, which are outside the scope of elements enumerated in Art. 314 of the CPC, or is it a numerus clausus of issues on which agreements may be reached?

The CPC does not provide a definite answer to this question, but the practice of the Prosecutor's Office for Organised Crime supports a premise that agreements may also be made on elements not cited in Art. 314 of the CPC, but they stay in the realm of "gentlemen's agreements" between the prosecution and the defence and may not form an integral part of a plea agreement. The Prosecutor's Office for Organised Crime has overcome this problem in its practice by entering in a record of plea bargain negotiations[26] with defendants the contents of an arrangement on issues which may not be officially included in a plea agreement and a copy thereof is submitted to the defence as a proof that an arrangement on those issues has indeed been made. Naturally, the Court accepts by its judgment only the issues provided for in the plea agreement and so there is no effective statutory mechanism to force the prosecution to comply with obligations it has assumed in the record of plea bargain negotiations.[27] Naturally, in the practice of the Prosecutor's Office for Organised Crime there has not been a single situation in which the prosecution did not comply with agreements taken from such records and other prosecutor's offices should also honour their agreements. Not only is it expected that both parties act in good faith when they reach an agreement in such situations, but as a rule, obligations cited in such a record are exclusively assumed by the prosecution. Considering the prosecution is a party to the proceedings,[28] but at the same time a government authority as well, and thus someone who is by the nature of things obligated to act impartially and not to be guided by any personal interests or emotions in proceedings, there is no fear that the prosecution will not *pro futuro* honour obligations assumed in the said manner.

26 Both the record of plea bargain negotiations, as well as the record of a guilty plea statement are mandatory elements of the procedure for plea bargain negotiations between any prosecutor's office in the territory under the jurisdiction of the Republic of Serbia and defendants and they are provided for in the mandatory instructions on application and conclusion of agreements on the admission of guilt A no. 299/09 issued by the Republic Prosecutor's Office on October 22, 2009. We have already addressed the need for simplification of the plea bargaining procedure and weaknesses of those instructions (see Videti Predrag Ćetković, *Primena sporazuma o priznanju krivice u praksi*, Tužilačka reč br. 22/2012, Beograd, 2012. godine, str. 46) so we do not wish to dwell on it in particular.

27 Here, it should be mentioned that it in the practice of some lower-level prosecutor's offices in Serbia there have been situations in which the Court ordered them to submit records of plea bargain negotiations and records of guilty plea statements along with agreements on the admission of guilt. Since these two records are internal documents of prosecutor's offices and made pursuant to the mandatory instructions of the RPO as an internal document, we can see no statutory grounds based on which the Court would have a right to inspect such records, nor do we believe that they can be legally binding on a prosecutor, but an obligation they create is solely moral. The document which is relevant for the Court and whose contents should possibly be translated into a judgment by which a plea agreement is accepted is only the plea agreement and only it should be submitted to the Court.

28 Also, under the 2011 CPC, before an indictment is issued, the prosecution is also the authority in charge of proceedings whose scope of prerogatives has been broadened by this Code and consequently, the assumption that it will act objectively is liable to be disproved.

With respect to the range of issues on which the Prosecutor's Office for Organised Crime and defendants have made arrangements, but which have not been included in plea agreements, they include as follows:

1) the prosecution undertook to support defendants' future motions to put in force a judgment by a national criminal court including transfer of defendants to another country as the country of their origin and residence in terms of the provision contained in Art. 80 of the Law on Mutual Assistance in Criminal Matters of the Republic of Serbia;
2) the prosecution undertook to support defendants' petitions for release on parole in terms of Art. 46 of the CC after they had served 2/3 (two-thirds) of their sentences and subject to their good behaviour during incarceration and achieved purpose of punishment;
3) the prosecution undertook to state, when time came for them to give their opinion, that they did not agree with sending defendants to serve their prison sentences at the Special Department for serving prison sentences for organised crime offences in terms of the provisions contained in Art. 15, para. 2 and 3 of the Law on Enforcement of Prison Sentences for Organised Crime Offences;
4) the prosecution agreed to support defendants' future petitions for transfer to a specific correctional facility in the territory under the jurisdiction of the Republic of Serbia to serve their prison sentences there;
5) in individual cases, the prosecution had undertaken, providing a remand order was issued against defendants, to uphold defence's motions for revocation of remand after a judgment accepting a plea agreement reached between a public prosecutor and a defendant was delivered.

In respect of this last instance, we hold that statutory provisions which lay down that the Court is the authority which may order that a defendant be detained and revoke detention orders in criminal proceedings are absolutely clear, from which it unequivocally follows that the prosecution and a defendant cannot in any way control the issuing or revocation of detention orders in their agreement. Thus, we believe that there exists no such dilemma as mentioned by certain authors about whether or not a plea agreement can provide for an arrangement between a defendant and a prosecutor in connection with remand.[29] We are of the opinion that it may not because in addition to the fact that under Art. 314 of the CPC a plea agreement may not include this kind of arrangement as one of its elements (either mandatory or optional), Art. 213, para. 1 of the CPC also prescribes that detention during an investigation may be ordered, extended or repealed only by a ruling issued by a preliminary proceedings judge or a panel cited in Art. 21, para. 4 of the CPC, whereas Art. 216, para. 1 of the CPC lays down that from the moment an indictment is filed with the court until the commitment of a defendant to serve a custodial sentence, detention may be ordered, extended, or repealed by a ruling issued by the panel. Thus, there can be no dilemma here at all. The prosecution may only agree with a defence's motion for revocation of remand or undertake to move for revocation of remand (which is less likely to happen in practice), but in no way may it undertake in a plea agreement or a record of plea bargain negotiations that a detention order issued against a defendant will be repealed for the simple reason that it is not within prosecution's purview to make such decisions. Such a position has also been confirmed in a judgment Kž1 Po1 no. 23/12 passed by the Special Department of the Court of Appeal in Belgrade on February 1, 2013. Namely, in the case no. 29/12 pursued by the

29 Siniša Petrović, *Sporazum o priznanju krivičnog dela*, Bilten Višeg suda u Beogradu, br. 83/2013, Beograd, 2013. godine, str. 67.

Prosecutor's Office for Organised Crime, the prosecution had undertaken an obligation in a record of plea bargain negotiations to agree with a defence's motion for revocation of remand after delivery of a judgment accepting a plea agreement between the public prosecutor and a defendant and the prosecution acted accordingly. However, as the Court denied the said motion which had been supported by the prosecution, the defence appealed the judgment accepting the plea agreement and offered as their argument that the Court had not accepted the agreement on detention between the prosecution and the defence, but the Court of Appeals turned down their appeal by the above mentioned judgment.

A moot point could arise in practice in connection with whether or not a judgment accepting a plea agreement must include the agreement "word for word" or is the Court authorised to exceed the limits of the agreement and if it is, to which extent. We are of the opinion that the Court is entitled to specify in its judgment accepting a plea agreement issues which are provided for by the agreement in general, but specifics must be given solely within the framework of provisions contained in the agreement and in no manner outside their frame of reference. We will provide an example to illustrate what we have in mind. In the case of the Prosecutor's Office for Organised Crime no. SK 24/12, the prosecution and a defendant concluded a plea agreement and in clause 2 thereof it was provided that a one-year prison term would be imposed on a defendant for having committed the continued criminal offence of tax evasion, whereas clause 3 of the agreement provided that the prosecution and the defendant had arranged that the Court would order that her sentence be enforced by prohibiting her from leaving the premises at which she resided, except for in cases prescribed by the law governing enforcement of criminal sanctions. It is clear from such wording that it was an issue provided for in general terms in the agreement and subsequently specified by the Special Department of the High Court in Belgrade in its judgment Spk Po1 no. 42/2012 of October 22, 2012, which designated more precisely the manner in which her sentence would be administered. The manner of enforcement was specified by the Court which ordered in its judgment that the convicted person was allowed to leave the premises at which she resided only when she left for work and returned therefrom, by precisely defining the exact time at which she was to leave and return home as well as her home and work addresses. Providing such specifications is entirely appropriate since in some situations, the prosecution and a defendant may not be aware of all the details at the moment they sign a plea agreement so the Court will have to define in more detail the obligations arising out of individual clauses of the agreement. It is only important that those specifications do not exceed the general frame of reference set by a plea agreement, since that would be contrary to law. The Court is not allowed to impose on a convicted person any new obligations by its judgment accepting a plea agreement, but it only may accept the agreement in the form in which it was signed by the prosecution and the defendant or to deny or dismiss it if there are grounds provided for in the law which support such a decision.

Drawing on the above, we should also address objections raised with regard to Art. 314, para. 1, item 3 of the CPC, under which an agreement on the type, extent, and scope of a penalty or other criminal sanction made between a prosecutor and a defendant is a mandatory element of any plea agreement. The weakness of a thus formulated legislative norm is that it implies that the parties could agree only on the scope of a penalty within the range provided for by the law and then a judge would be left to impose a specific duration of penalty within the arranged scope.[30] It wo-

30 Dr Milan Škulić i dr Goran Ilić, op. cit., str. 99.

uld be unreasonable to allow the Court to specify the penalty cited in a plea agreement because the Court is not authorised to assess extenuating and aggravating circumstances in the procedure for accepting or denying the agreement and therefore may not properly specify the penalty within the given scope.

From the point of view of theory, there can certainly arise a situation described by the cited authors. However, in the practice of the Prosecutor's Office for Organised Crime there has not been a single situation in which the prosecution and a defendant arranged for the scope of a penalty or other criminal sanction, but each time a specific penalty or a criminal sanction was agreed on. A reason for acting in that manner is very simple – it concerns defendants' motives for signing a plea agreement. One of the essential motives by which defendants are guided during the conclusion of plea agreements is to put an end to uncertainty which surrounds the course of any criminal proceedings. By all means, one of the worst things which weigh down on defendants in the course of criminal proceedings is that they are uncertain about how the proceedings will end or do not know whether or not they will be convicted and which sentence will be given to them. An important segment of concluding a plea agreement is that by signing it, a defendant brings an end to the said uncertainty and gets a clearer picture of what awaits him at the end of criminal proceedings. Considering the above, it is quite certain that in the future defendants will not agree to sign plea agreements in which only the scope of a penalty is stipulated and not a specific duration of penalty or other criminal sanction which will be imposed on them under the terms of agreements, because they would thus unnecessarily face further uncertainty about the conclusion of criminal proceedings. Still, regardless of practical experience, the words "or the scope of a penalty" should be stricken off *de lege ferenda* by any future amendments that might be made to the Criminal Procedure Code in order not to leave a possibility for stipulating only the scope of a penalty or other criminal sanction and not defining it precisely when signing a plea agreement.

A provision contained in Art. 313 of the CPC could be mentioned as a shortcoming from the normative perspective of enacting laws. The legislator mentions an indictment, when it is issued and confirmed several times in the said article, but nowhere does he mention a motion to indict as a type of accusatory instrument on the basis of which a public prosecutor initiates summary proceedings pursuant to Art. 499, para. 1 of the CPC. Besides, it cannot be established from the wording of a provision contained in Art. 313 of the CPC at which stage in summary proceedings a plea agreement may be concluded given the fact that an order to conduct an investigation is not issued in summary proceedings and it is the initial moment from which an agreement may be signed. Therefore, the period during which plea agreements may be concluded should have been defined more precisely in that article by taking into account summary proceedings as well, so that there would be no doubts about whether or not plea agreements may be concluded in the course of summary proceedings (which should not be subject to debate) and what constitutes the initial moment from they can be signed. Criminal offences which are processed under summary proceedings are not very common in the practice of the Prosecutor's Office for Organised Crime, but such legal wording will certainly create numerous dilemmas when the 2011 CPC begins to be applied in basic prosecutor's offices in the territory under the jurisdiction of the Republic of Serbia.

When compared with the provisions contained in the 2001 CPC, we can agree with a statement that under the provisions of the 2011 Criminal Procedure Code, the position of the injured party has been made considerably worse given the fact that now he is not summoned to a hearing on

plea agreement, that he may not appeal a judgment by which a plea agreement is accepted, nor has a judge been charged with a duty to verify if a plea agreement is in his interest or if the rights of the injured party have been violated by signing such an agreement.[31]

The concept of "victim participation", which is based on the fair treatment of victims and recognition of their dignity, is becoming more and more established in contemporary criminal proceedings.[32] The fact is that the above mentioned solutions are not consistent with that concept and that the position of the injured party is not up to par under the current solutions from the 2011 CPC. By way of comparison, one of particularly sensitive issues in the UK law is the position of the victim with regard to a plea agreement between a public prosecutor and a defendant. After the Robin Peverett case, new guidelines for negotiated plea agreements were set in the UK under which prosecutors are obligated to take into account the interests of victims as well.[33]

If the practice of the Prosecutor's Office for Organised Crime is analysed from the aspect of the position of the injured party, it could be concluded that it has been relatively limited. A cause for this could be found in the structure of criminal offences whose perpetrators are most frequently prosecuted by this Office. The majority of our cases involves the so-called victimless crimes in which there are no injured parties who are natural persons or victims (e.g. Criminal alliance under Art. 346 of the CC, Unlawful production and circulation of narcotics under Art. 246 of the CC, Illegal manufacture, possession, carrying and sale of firearms or explosives under Art. 348 of the CC, etc.). Nevertheless, even when defendants are processed for crimes in which there is an injured party (e.g. Fraud under Art. 208 of the CC), the prosecution has not thus far insisted on reaching an agreement with a defendant on a restitution claim, but plea agreements stipulated that a prosecutor and the defendant had agreed that the injured party should be advised to pursue his restitution claim in a civil action. For instance, in the case SK 5/12, the Prosecutor's Office for Organised Crime and the defendant provided for in clause 5 of a plea agreement that they had agreed that the injured parties should be advised to bring a civil action for the purpose of satisfying their restitution claim, after which the Special Department of the High Court in Belgrade found by its judgment Spk Po1 no. 6/2012 of March 22, 2012, that the section of the plea agreement which covers that issue was accepted and that the injured parties were advised to bring a civil action because information obtained in the criminal proceedings did not provide reliable grounds either for complete or partial adjudication on their restitution claim. How the Office acted in the similar manner can be seen in the case SK 26/12, when a prosecutor and a defendant made an agreement that persons who had suffered damages due to a fraud should be advised to bring a civil action to have their restitution claim satisfied, which was accepted by the Court as part of the plea agreement by its judgment Spk Po1 no. 50/12 of the November 23, 2012. The fact is that there has not been a single case in the practice of the Prosecutor's Office for Organised Crime in which we have encountered a situation that an agreement is made between a defendant and a prosecutor on the injured party's restitution claim, but as a rule, injured parties have been advised to pursue a civil lawsuit, which indicates that their position with regard to the conclusion of plea agreements has not been provided for in the best possible manner because under the existing provisions, prosecutor's offices and the court cannot be expected to react in a substanti-

31 *Ibidem*, p. 100.

32 Thus, under the influence of this concept, two models of victim participation were introduced in Japanese criminal procedure in 2008: Victim's Statement of Opinion and Victim Participation System. Dr Goran P. Ilić, *O položaju oštećenog u krivičnom postupku*, Anali Pravnog fakulteta u Beogradu br. 1/2012, Beograd, 2012. godine, str. 138.

33 *Ibidem*, p. 143, footnote. 22.

ally different fashion with regard to this issue. It should be mentioned that courts' earlier practice was also such that in the majority of cases they did not adjudicate on restitution claims in criminal proceedings. Still, it should be recalled that injured parties' rights are not infringed on by referring them to pursue a civil lawsuit for the purpose of satisfying their restitution claims[34] but only time limits within which the court (now a civil one) will decide on the injured party's restitution claim are thus extended. By passing a judgment in a criminal matter, an injured party is provided with grounds for seeking pecuniary compensation in a civil case.

Not only public prosecutors, but defendants as well may initiate the conclusion of plea agreements. With regard to the practice of the Prosecutor's Office for Organised Crime, a conclusion can be presented that until now, defendants have exclusively initiated plea bargaining and all of the previous plea agreements have been concluded on the initiative of defendants and their defence attorneys. Such practice has been followed for various reasons. Primarily, criminal cases which are within the jurisdiction of the Prosecutor's Office for Organised Crime are mostly offences punishable by penalties whose maximum duration is set rather high. Therefore, defendants are fearful that long prison sentences may be imposed on them and by signing plea agreements, they are undoubtedly trying to avoid being sentenced to prison terms which would gravitate towards the maximum. The only lawful manner in which they can influence the duration of their penalty is through plea negotiations with the prosecution, which can be beneficial to proceedings conducted by the Prosecutor's Office for Organised Crime because as a rule, sentences pronounced before the Special Department of the High Court in Belgrade are prison terms.[35] On the other hand, the prosecution usually has evidence which it can use to prove that a defendant is guilty in case of opting for ordinary criminal proceedings, so it does not need to rush into plea bargaining. Evidence is obtained both through ordinary and special evidentiary actions, which may not be undertaken by basic prosecutor's offices, and that is probably why defendants and their defence teams regularly initiate the conclusion of plea agreements in the practice of this prosecutor's office.

A very interesting issue that concerns the practice of both public prosecutor's offices and courts is whether or not judgments passed on plea agreements should be used as evidence in ordinary criminal proceedings against co-defendants who have not signed a plea agreement. When a judgment by which a plea agreement is accepted has become final, a defendant then has the status of a convicted person and criminal proceedings are no longer conducted against him so he neither has an obligation nor a reason to attend the main hearing any further.

The fundamental issue addressed at this point is whether the final judgment by which the plea agreement has been accepted should be presented as evidence in the further course of criminal proceedings against other defendants without summoning convicted persons to testify or it should not be presented as evidence, but the convicted persons should instead be summoned to testify? Or perhaps the judgment should be presented as evidence and the persons convicted based on the plea agreement should be summoned as witnesses? If we adopt the position that convicted persons should be summoned subsequently as witnesses in criminal proceedings against their co-defendants, the first question that arises is whether or not a person may participate in the

34 Vesko Krstajić, *op. cit.*, p. 63.

35 Interestingly enough, basic prosecutor's offices follow significantly different practice when agreements on the admission of guilt are concluded. For instance, in the First Basic Public Prosecutor's Office in Belgrade it is not a rare occurrence that prosecutors are those who initiate plea bargaining and a considerable number of plea agreements have been concluded on prosecutor's initiative.

same criminal proceedings as a defendant in one phase and then as a witness in another phase? Such situations used to arise in the practice of courts and prosecutor's offices when they acted pursuant to the 2001 CPC and they can probably still be encountered in ordinary proceedings. A question could be asked, namely if a provision contained in Art. 406, para. 1, item 3 of the 2011 CPC resolves this dilemma by prescribing that inspection of the contents of transcripts of testimonies of already convicted accomplices in a criminal offence may be performed by accordingly applying Art. 405 of the CPC[36] when it concerns the testimonies of co-defendants prosecuted in a severed criminal proceeding or criminal proceedings already concluded by a judgment of conviction. Nevertheless, we are of the opinion that the cited provision does not define all the situations which pertain to the plea agreement. The provision contained in Art. 406 of the CPC refers to the testimonies of defendants who have already been convicted of a crime. Since plea agreements may be concluded pursuant to Art. 313, para. 1 of the CPC from the moment an order to conduct investigation has been issued and until a defendant has entered his plea at the main hearing, it is possible that he concludes a plea agreement with the prosecution immediately after an order has been issued and then no testimony at all is given by him in criminal proceedings. A situation may also develop in which a defendant pleads his right to remain silent before concluding a plea agreement and so a question arises as to the probative value of reading such a testimony. Likewise, a defendant may plead not guilty in the course of an investigation, but afterwards he may decide to enter into a plea agreement. Which testimony of his should be read then: the one given during the criminal proceedings or the one from the plea agreement? Obviously, the provision contained in Art. 406, para. 1 of the CPC cannot encompass all the situations in which testimonies are given in the course of plea agreement procedure, but only some of them.

In addition to the issue which is open to debate from the theoretical perspective, there are also some practical elements which speak against summoning convicted persons to testify. Naturally, one of the motives for signing a plea agreement by which defendants are frequently inspired is to end criminal proceedings against them within a short period of time, along with avoiding lengthy trials and painful forensic atmosphere which rather often accompanies criminal proceedings before the Special Department of the High Court in Belgrade. If defendants were aware that even after having signed a plea agreement they would have to participate in criminal proceedings once again and give their testimony, it is uncertain that any of them would choose to sign a plea agreement at all. One of the questions most frequently put to the prosecution by defendants in the course of the plea bargain process is if they will have to participate in criminal proceedings again after a judgment based on their plea agreement has been passed.[37]

On the other hand, if convicted persons were not summoned to main hearings and did not testify, would the right to a defence of co-defendants who are still being prosecuted be thus violated? Under such circumstances they are deprived of their right to question persons already convicted at a main hearing, to confront the allegations from their testimonies with other evidence presented in the proceedings. The principle of directness is thus called into question because the Court is unable to directly examine evidence by questioning a convicted person who has previously pleaded guilty since it is certain that *in vivo* questioning either establishes or destroys someone's credibility as a witness before a court of law (numerous factors contribute to this, such as that

36 Art. 405 of the CPC lays down that those transcripts will be familiarized with by inspecting them, and if necessary, a presiding judge may relate their content in brief or read them out.

37 Some justices with the High Court in Belgrade have also made it clear that there has not been relevant practice at the court concerning this issue. See: Siniša Petrović, *op. cit*., p. 68.

person's attitude, if he comes across as believable or not in the course of his testimony, his facial expressions while he is testifying, etc.).[38]

However, if we were to accept the opinion that convicted persons should not be summoned as witnesses in the further course of criminal proceedings against their co-defendants, a question would arise with regard to how relevant judgments accepting plea agreements are as evidence. To which extent could such judgments be considered evidence and what can be proved by them? Clearly, by signing a plea agreement, a defendant pleads guilty to the charges brought against him, but does he automatically accuse his co-defendants by pleading guilty? In the practice of the Prosecutor's Office for Organised Crime, defendants have pleaded guilty under their plea agreements to complete enacting clauses of orders to conduct investigation or accusatory instruments if particulars of their acts of commission could not be separated from the acts of other co-defendants without difficulty. Nevertheless, it does not mean that because they had pleaded guilty, they knew everything about the activities of co-defendants and they were accusing other co-defendants as well. On the contrary, there were situtations in which defendants themselves stated that they did not know some of defendants mentioned as members of an organised crime group nor what they knew about his activities within the group.[39] Consequently, we are of the opinion that judgments based on plea agreements should be presented as evidence, but only of certain circumstances and not of everything written therein. A general rule cannot be established, but the Court must *ad hoc* evaluate what has been proven by a judgment based on a plea agreement (*e.g.* if three defendants confess that they were members of an organised crime group, then judgments based on their plea agreement may be used as evidence that there was an organised crime group which was active, but not that other defendants were its members. Other means of evidence would have to be used to prove the fact who among other defendants was a member of the said organised crime group.).

In practice, the fact that classification of criminal offences accepted by the Court granting a plea agreement should not be binding upon that Court in criminal proceedings conducted against co-defendants should not be open to debate. In the case SK 12/12, the Prosecutor's Office for Organised Crime had signed a plea agreement with a defendant and it was accepted by the Court which found the defendant guilty of Criminal alliance under Art. 346 of the CC and Unlawful production and circulation of narcotics under Art. 246 of the CC. In addition, another defendant from the case SK 10/12 pursued by the Prosecutor's Office for Organised Crime has signed a plea agreement with the prosecution because he committed the offence of Criminal alliance under Art. 346 of the CC. The Court found in ordinary criminal proceedings (thus, not based on a plea agreement) by its judgment K Po1 no. 287/10 of March 12, 2013 that other members of this organised crime group were guilty of Unlawful production and circulation of narcotics under Art. 246 of the CC. In this judgment, the Court did not accept the prosecution's classification from the indictment by which the defendants had also been charged with committing concurrent offences of Criminal alliance under Art. 346 and Unlawful production and circulation of narcotics under Art. 246 of the CC. Without making an analysis of whether or not there was a concurrence of offences from Articles 246 and 346 of the CC in the given case, we find that the Court was not bound by the classifications it had previously accepted in the judgments based on the plea

38 Most certainly, the evaluation of evidence is a very complex process, involving various types of knowledge depending on the nature of a dispute, in the first place logic and psychology. Dr Zagorka Jekić, *Dokazi i istina u krivičnom postupku*, Pravni fakultet Univerziteta u Beogradu, Beograd, 1989. godine, str. 43.

39 And this has been expressly included in individual statements of guilty pleas by the prosecution.

agreements.[40] Article 317 of the CPC provides for conditions under which the Court may accept a plea agreement,[41] but none of those conditions includes a reconsideration of classification of criminal offences which are the subject matter of an agreement. It follows that legal classifications accepted by the Court in its judgments based on plea agreements are not binding on that Court later on when it passes judgments in criminal proceedings.

As opposed to the issue of legal classification, when it comes to the facts of a case, the Court does examine the subject matter of a plea agreement to a certain degree. Both under the 2001 Criminal Procedure Code and under the 2011 Criminal Procedure Code, a judgment of conviction by which a plea agreement is accepted may not be based only on defendant's guilty plea, but there must be other evidence as well.[42] However, it is clear that the standard of proof is lower under the 2011 CPC than under the 2001 CPC. Art. 282v, para. 8, item 4 of the 2001 CPC provides that other evidence should exist as well which support the defendant's guilty plea, whereas Art. 317, para. 1, item 3 of the 2011 CPC provides that there should exist other evidence which does not run contrary to the defendant's guilty plea. Thus, under the 2001 CPC it was required that evidence supports defendant's admission of guilt, while under the 2011 CPC it suffices that it is not contrary to his plea, it does not need to support it. We believe that such a solution is appropriate since when it comes to the plea agreement as a form which simplifies criminal proceedings, there is no need for the Court to analyse too much the merits and ascertains if the evidence supports a guilty plea, but it is quite sufficient that the Court establishes if the evidence runs contrary to the defendant's plea.[43] It should be mentioned that thus far there has not been a single case in the practice of the Prosecutor's Office for Organised Crime in which the Court issued a ruling denying a plea agreement either for reasons provided for in Art. 317, para. 1, item 3 of the CPC or for any other reason provided for by the law.

In respect of the analysis of penalties, criminal sanctions and measures imposed by the Special Department of the High Court, we cannot agree with claims of certain authors that limitations of the plea agreement are reflected in the impossibility to create a stricter sentencing policy and dissatisfaction of the public with the mild sentencing policy.[44] Having analysed all the agreements on the admission of guilt (and plea agreements) concluded by this prosecutor's office and defendants in the period 2010 – March 2013, we have found that only in one instance there was an admonition pronounced following an accepted agreement, more specifically a suspended sentence, while in all the other instances, actual six months' to fifteen years' prison sentences were imposed! In certain cases which were concluded based on a plea agreement, fines were imposed in addition to prison sentences, and they ranged from the minimum fine of RSD 10,000 to

40 The scope of this paper does not allow us to elaborate on this topic, even though it concerns an issue which has not yet been definitely resolved in practice and deserves special attention.

41 Under Art. 317, the Court will accept a plea agreement by a judgment and find that a defendant is guilty if it has been satisfied: 1) that the defendant has knowingly and voluntarily pleaded guilty to a crime or crimes with which he is charged; 2) that the defendant is aware of all the consequences of a signed plea agreement, in particular that he waives the right to a trial and that he accepts the restriction of the right to file an appeal (Art. 319, para. 3 of the CPC) against a court's decision passed based on the agreement; 3) that there exists other evidence which does not run contrary to the defendant's guilty plea; 4) that a penalty and/or other criminal sanction or other measure in respect of which the public prosecutor and the defendant have reached an agreement has been proposed pursuant to the criminal code or another law.

42 Vesko Krstajić, *op. cit.*, p. 65.

43 The Court must also examine other pieces of evidence and establish if the defendant's plea contradicts them, since confession is no longer the Queen of evidence (*regina probationem*) in the modern criminal procedural law. A confession is credible as evidence only if it does not run contrary to other evidence. Dr Milan Škulić, Komentar *Zakonika o krivičnom postupku*, Službeni glasnik RS i Pravni fakultet Univerziteta u Beogradu, Beograd, 2011. godine, str. 965.

44 Branislava Inić-Jašarević, *Uloga tužioca u primeni sporazuma o priznanju krivice*, Tužilačka reč br. 16/2010, Beograd, 2010. godine, str. 28.

the maximum fine of RSD 7,000,000. In two instances, fines were imposed in the amount of RSD 5,000,000 each, and in another two instances, fines had also been imposed, each in the amount of RSD 2,000,000 based on plea agreements. Based on plea agreements, material gain obtained from crime in terms of Art. 91 of the CC had also been seized and the sums which had thus been seized ranged from the minimum of EUR 100 and RSD 9,000 to the maximum amount of RSD 274,653,189 which had been seized from a single defendant; also, another instance of the seized material gain obtained through crime deserves to be mentioned because it involved an amount of RSD 246,327,072 (therefore, more than half a billion dinars were seized only from two defendants!). Likewise, based on signed plea agreements, the proceeds from crime which had thus far been seized include a number of permanently seized real property (eight flats, two plots, one house, one commercial property) and passenger motor vehicles (six motor vehicles), as well as foreign currency (the largest sum of seized foreign currency was EUR 546,340). By making the final reckoning, the following conclusion may be drawn, at least with regard to the practice of the Prosecutor's Office for Organised Crime of the Republic of Serbia, that the plea agreement is a powerful tool in the hands of prosecutors which they can utilise to significantly simplify criminal proceedings without lowering the bar of sentencing policy and to ensure that not only material gain obtained from crime is fully seized, but that the proceeds of crime are also permanently seized.

Conclusion

In the afterword of this analysis, it could be concluded that over the course of three and a half years since the agreement on the admission of guilt (plea agreement) began to be applied in practice, the Prosecutor's Office for Organised Crime of the Republic of Serbia has gained a wealth of experience, which has been mainly positive, although it is still faced with certain dilemmas about the application of the agreement which have not thus far been resolved by practice. What we would like to highlight as the most important improvement which the 2011 Criminal Procedure Code has led to and which has *de facto* opened the door for the full application of this very important institute in the practice of our prosecutor's office,[45] is the lifting of restrictions on the duration of penalties prescribed for criminal offences in respect of which plea agreements may be concluded. If it had not been for such a step taken by the lawmakers, neither would a number of agreements have been signed between this prosecutor's office and defendants which provided for actual prison sentences, along with the seizure of considerable sums of money by way of material gain obtained from crime as well as permanent seizure of the proceeds from crime. We have rated favourably the possibility provided for in the Code to exercise the right to appeal judgments by which plea agreements are accepted and explained by way of a practical example what kind of difficulties can be caused if the right to appeal is waived at a hearing on plea agreement. A statutory provision under which defendants must have a defence attorney during the conclusion of a plea agreement is a proper solution since in that way defendant's rights are fully protected as early as during plea bargain negotiations with the prosecution. A good solution which has asserted itself in practice is an arrangement between a prosecutor and a defendant on issues which may not be included in a plea agreement, but which they resolve as gentlemen through records

45 Considering the fact that the Prosecutor's Office for War Crimes of the RS, which is for the time being the only one, apart from the Prosecutor's Office for Organised Crime, applying the 2011 CPC, has already had an opportunity to conclude plea agreements in relation to crimes punishable by imprisonment of 40 years, *i.e.* the most serious crimes, pursuant to the now repealed Art. 136 of the Law on Organisation and Jurisdiction of Government Authorities in War Crimes Proceedings.

of plea bargain negotiations. We have also analysed the extent to which and a direction in which the Court is entitled to specify in its judgment accepting a plea agreement the contents of the said agreement.

As regards the weaknesses of legislative solutions which govern the plea agreement, efforts should be definitely made to improve the position of injured parties in respect of the conclusion of plea agreements so that this text of the Code would meet the European standards in that regard. Irrespective of the fact that it has not led to any dilemmas in practice, it is a valid objection that the solution according to which a public prosecutor and a defendant may agree only on the scope of a penalty, after which the Court imposes a specific penalty or other criminal sanction should be changed. We have described as uncomprehenisve the definition of the moment from which the parties may enter into a plea agreement because it does not encompass the summary proceedings. It should be pointed out that, regardless of the more than satisfactory number of plea agreements concluded on the initiative of defendants, the Prosecutor's Office for Organised Crime should show initiative in the future and propose defendants to sign plea agreements, which would additionally contribute to the simplification of criminal proceedings.

For the time being, we are facing another unsolved dilemma in practice which concerns the manner in which persons convicted based on plea agreements should be treated, in other words, will they be summoned to testify as witnesses in proceedings against their co-defendants or not. If not, to which extent could judgments based on plea agreements be used as evidence?

We have shed some light on the dilemmas about whether or not legal classifications from judgments by which plea agreements are accepted are binding upon the Courts in criminal proceedings against other defendants, as well as about the extent to which defendant's guilty plea must be corroborated by further evidence.

As a great advantage of concluded plea agreements, in addition to inarguable simplification of proceedings brought about by this institute of criminal law, we have stressed as well the amount of seized material gain obtained by crime and the amount of permanently seized proceeds from crime, in which process the Prosecutor's Office for Organised Crime has managed to conclude plea agreements involving relatively long-term prison sentences and levying of substantial fines.

To sum up the most important points, we are of the opinion that in the previous three years of its application, the plea agreement has become a very important instrument used in the practice of the Prosecutor's Office for Organised Crime of the Republic of Serbia, that the experiences of the Office in respect of this institute have been mostly positive and that it is expected that the plea agreement would be applied more comprehensively in practice in the forthcoming period, not only by our Prosecutor's Office, but also by other prosecutor's office in the territory under the jurisdiction of the Republic of Serbia.

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Plea Agreements in the Practice of the War Crimes Prosecutor's Office of the Republic of Serbia

1. General Observations

The new Criminal Procedure Code has been in application in the proceedings involving criminal offences related to organised crime and war crimes conducted before the Special Department of the competent court since 15 Jan 2012. Unlike the previous Code which recognised the agreement for the admission of guilt, the term used in the new Code is the agreement for the admission of a criminal offence (plea agreement). Furthermore, the new Code does not stipulate a restriction with regard to the severity of the prescribed penalty, whereas the previous Code allowed the agreement to be concluded only in cases involving criminal offences for which the prescribed penalty was up to12 years of imprisonment. However, regardless of the said legal provision, the amendments to the Law on the Organisation and Jurisdiction of Government Authorities in Prosecuting the Perpetrators of War Crimes Art. 13b stipulated that the proceedings conducted in criminal cases under the jurisdiction of the Prosecutor's Office for War Crimes, the plea agreement could have been concluded without any restrictions pursuant to Art. 282a, Par. 1 of the CPC, including the said restriction in terms of the prescribed penalty of up to 12 years. Such a legal provision was intended to "reduce the workload" in very complicated criminal proceedings in this matter, certainly represented another specific quality in the processing of war crimes, although no plea agreements have been signed pursuant to the said legal provision in the practice of the Prosecutor's Office.

A plea agreement by definition represents a written meeting of the minds on the one side public prosecutor's and on the other the defendant's and his counsel's reached freely and it is one of the three agreements between the public prosecutor and the defendant.

1 Deputy War Crimes Prosecutor of the Republic of Serbia

2. Rules of Regulation regarding the Plea Agreement

Plea agreement may be entered into by the public prosecutor and the defendant from the moment the investigation is ordered until the plea of the defendant is entered at the main hearing.

The plea agreement, apart from the mandatory elements and data, may contain also a statement by the public prosecutor on the abandoment of criminal prosecution for the criminal offences which are not included in the agreement, the statement of the defendant on accepting the obligations which may result in a stay of criminal proceedings (Art. 283, Par. 1 of the CPC) provided that the nature of the obligation imposed is such that the defendant may start complying with it before the agreement is submitted to the court and that it facilitates an agreement regarding the assets obtained through the commission of a criminal offence, which shall be seized from the defendant.

The decision on the Agreement is under the jurisdiction of the pre-trial judge, and if the Agreement has been submitted after the confirmation of the indictment – of the presiding judge. The War Crimes Prosecutor's Office thus far in its practice has had the single judge pass the decisions with regard the agreements between the Prosecutor's Office and the defendants since the criminal offences in question were punishable by a fine as the main penalty or a term in prison of up to 8 years.

The decision on the agreement is rendered at the hearing to which the public prosecutor, the defendant and his counsel are summoned and which is closed to the public.

The court shall grant the agreement in a judgment and it shall contain all of the elements the judgment normally shuld contain. The plea agreement may be granted by the court only as a whole.

Ever since the "new" Code has entered application, one of the basic dilemmas has been, first of all, the question whether the prosecutor and the defendant may negotiate about the detention. The Code neither stipulates a ban on negotiating about the detention nor does it provide for this. For the moment, the decision on detention as an element of the plea agreement is expressed in the form of an opinion rather than a position.

The Criminal Procedure Code does not prescribe the deadline for the court to schedule the hearing on the agreement and in this respect it would be of great importance for this deadline to be as short as possible, and certainly without a delay in scheduling, since only if the hearing is scheduled as soon as possible the purpose of this institute is fully served.

A good solution might be the one adopted in the Republic of Croatia. Pursuant to Art. 371 of their Criminal Procedure Code it is prescribed that the presiding judge should schedule a preparatory hearing within a month at the latest if the defendant is held in detention and within two months if this is not the case. If the presiding judge does not schedule the preparatory hearing within the set time period, the president of the court is informed and he shall undertake the measures for the preparatory hearing to be scheduled forthwith, which could be a model for our legal provision as well.

3. Experiences of the War Crimes Prosecutor's Office in the Application of the Plea Agreement

Through the application of the former Criminal Procedure Code, the War Crimes Prosecutor's Office after the indictment KTRZ no.13/08 concluded 6 (six) plea agreements SK no. 1/11, on 14 Apr 2011, 15 Apr 2011, 18 Apr 2011 and three agreements on 20 Apr 2011 (according to the former Code) for the criminal offence under Art. 333, Par. 3 with regard to Par. 1 of the CC, in connection with the concealment of Stojan Župljanin who was indicted by the Hague Tribunal. The Law on the Organisation and Jurisdiction of Government Authorities in Prosecuting the Perpetrators of War Crimes prescribes that the War Crimes Prosecutor's Office has jurisdiction over the cases involving the criminal offence of aiding the perpetrator after the commission of the criminal offence under Art. 333 of the CC, if it has been committed in connection with the criminal offences under the jurisdiction of the War Crimes Prosecutor's Office. The aforementioned represents another specific quality due to the fact that the offenders, the so-called "harborers", are perpetrators of a criminal offence directly linked to grave breaches of international humanitarian law.

In the cited case, prior to the start of the main hearing, the Prosecutor for War Crimes held that there were sufficient grounds to take initiative and orally propose the conclusion of the agreement to the defence counsels of the defendants. After the oral proposal, pursuant to Art. 282 the War Crimes Prosecutor rendered the proposal in writing for entering into the Agreement on the Admission of Guilt. He proposed to the defendants to fully confess to commiting the criminal offences they had been charged with and the Prosecutor's Office and the defendants would agree to a suspended sentence and one of them would recieve a term in prison. According to the agreement they agreed that the costs of the criminal proceedings should be paid by the defendants as well as that pursuant to the then Code both sides would waive the right to an appeal against the court decision passed based on the said plea agreement.

Based on the concluded agreements, the prosecutor and the defendants agreed on the pronouncement of the suspended sentences whereby they were sentenced to a year of imprisomnet which was immediately suspended provided that the defendants did not commit another criminal offence during the next three or four years depending on the defendant. In terms of the negotiated type and severity of the criminal sanction, the Prosecutor's Office in these particular cases assessed all of the circumstances stipulated under Art. 54 of the CC which could affect both the type and the severity of the criminal sanction. As extenuating circumstances on the part of the defendants primarily were taken the circumstances under which the said offence had been committed, i.e. whether the defendant was a friend or a relative of Stojan Župljanin. In addition, the conduct of the defendants after the commission of the criminal offences has been taken into consideration as was the fact that they had no earlier convictions. With regard to one of the defendants the fact that he cooperated with the law enforcement forces and the international community for the purpose of locating Stojan Župljanin was taken into account. There were no aggravating circumstances for the defendants.

Bearing in mind the degree of guilt in the context of identified extenuating circumstances, the Prosecutor's Office in these particular cases held that the proposed sanctions for the said offence, represented a sufficient caution against committing the same or similar criminal offences in the future and that the purpose of the imposed sanctions would be served – special prevention, and at the same time general prevention, i.e. that the imposed sanction would deter others from committing the same or similar criminal offences.

The High Court in Belgrade, at the hearing held pursuant to Art. 282b, Par. 5 of the CPC, determined that the defendants, the so-called "harborers", had entered into the plea agreements in the presence of their defence counsels with the War Crimes Prosecutor's Office, that they had knowingly and willingly admitted the commission of criminal offences they had been charged with (aiding the perpetrator after the commission of the criminal offence) that the said admissions had not been misguided and that the defendants were fully aware of the repercussions of entering into the said agreements, especially of the fact that the agreement entails waiving the right to a trial and to an appeal against the decision passed by the court based on the said agreement.

Based on the agreements with the six defendants the High Court in Belgrade – the War Crimes Department rendered a decision K.Po2 no.5/10 in which it granted the plea agreements in full and five of the defendants were given a suspended sentence, while one of the defendants recieved a one year prison sentence. The court also accepted the agreement between the prosecutor and the defendant on the manner in which the prison sentence would be served, i.e. the agreement stipulates that the defendant must not leave the premises where he resides pursuant to the provision of the Art. 45, Par. 5 of the CC.

The War Crimes Prosecutor's Office has concluded two more plea agreements in connection with the concealment of Stojan Župljanin, who was indicted by the Hague Tribunal, after the new CPC entered into force. Namely, the Prosecutor's Office has submitted motions to indict KT no. 11/12 and KT no. 13/12 and plea agreements SK no. 4/12 and SK no. 5/12, so the motions to indict have become integral parts of the agreements concerning the criminal offence of aiding the perpetrator after the commission of a criminal offence pursuant to Art. 333, Par. 3 with regard to Par. 1 of CC.

The High Court in Belgrade – the War Crimes Department has rendered decisions based on the aforementioned plea agreements K.Po2 no. 9/12 and K.Po2 no. 1/13 thus granting the said agreements in full.

Certainly, upon concluding the agreements, the Prosecutor's Office encountered difficulties in terms of the defendants' ignorance at first that they had committed a criminal offence thinking that their aid to Stojan Župljanin belonged in the domain of friendship and relationship between relatives. However, during the plea bargaining, based on the accurate representation of firm facts and the analysis of the evidence provided by the Prosecutor's Office they realised the significance of their actions and based on that entered into agreements.

The role of defence counsels was key in all of the agreeements of the War Crimes Prosecutor's Office, since they were the ones who explained the significance of the agreements to the defendants, except in one case, in which the defendant decided to enter into agreement with the Prosecutor's Office against the defence counsel's opinion. The defence counsel advised the defendant against concluding the plea agreement but the defendant despite this advice decided to sign it. The plea bargaining negotiations were concluded in relatively short periods of time.

Apart from the agreements related to the concealment of Stojan Župljanin, indicted by the Hague Tribunal, the War Crimes Prosecutor's Office entered into two more agreements with the defendants who helped conceal Ratko Mladić who was indicted by the Hague Tribunal.

The motions to indict KT no. 8/12 and KT 9/12 and the plea agreements SK no. 2/12 and SK no. 3/12 allowed the Prosecutor's Office and the defendants to agree that the defendants should receive a suspended sentence for concealing Ratko Mladić, specifically sentencing them to a year and six months of imprisonment respectively and immediately suspending the sentences provided that the defendants did not commit another criminal offence in the period of three or two years respectively

In these particular cases, the Prosecutor's Office deemed that the criminal sanction matched the seriousness of the criminal offence the defendants admitted to having committed, primarily bearing in mind that the defendants were related to Ratko Mladić either by blood or marriage. Based on the said agreements, the High Court in Belgrade passed judgments K.Po2 no. 5/12 and SPK-Po2 no. 4/12 whereby it was determined that legally prescribed requirements had been met pursuant to the provision of the Art. 317 of the CPC and the agreements were granted and suspended sentences were passed. In these cases as well, the Prosecutor's Office has taken a stand on the type and the severity of the criminal sanctions and on the part of the defendant evaluated the circumstances under which the offence had been committed, i.e. that the defendants were related to Ratko Mladić and that they had no previous convictions.

4. Comparison of the Plea Agreements in the Hague Tribunal and the Courts in the Region

The plea agreements before the International Criminal Tribunal for the former Yugoslavia are regulated by the Statute, Rules of Procedure, Evidence and Practice. The rule 62bis stipulates a guilty plea if the defendant pleads guilty or requests to change his plea to guilty and the trial chamber finds that the defendant is entering a guilty plea willingly, aware of all the relevant information, that the guilty plea is not ambiguous and that there are sufficient factual grounds for the existence of the criminal offence and for the defendant's participation in it, either through independent indications or through the absence of any crucial disagreement between the parties to the proceedings regarding the facts of the case, the trial chamber may declare the defendant guilty and instruct the Secretary to set a date for the sentencing hearing (amended on 10 July 1998, amended on 4 December 1998).

The rule 62ter prescribes the plea agreement. The prosecutor and the defence may agree that after the defendant pleads guilty to one or more counts of the indictment, the prosecutor shall request before the trial chamber to amend the indictment accordingly, shall state what specific sanction is deemed appropriate or the range of the appropriate sanction. The trial chamber is not bound by any of the aforementioned agreements. If the parties to the proceedings reach a plea agreement, the trial chamber shall request the said agreement to be announced in an open session or if there is a valid reason – in a closed session at the moment the defendant pleads guilty pursuant to the rule 62 or when he requests to change the entered plea to guilty.

In terms of the practice of the ICTY, the first plea agreement was signed in "Erdemović" case. However, the acceptance of his guilty plea did not go without considerable difficulties caused by the "common law proceedings" Erdemović's defence lawyer was unfamiliar with (he was from former Yugoslavia) as were the members of the trial chamber (from France, Costa Rica and Egypt). In the appeal proceedings Erdemović's lawyer argued that the guilty plea of his client was the consequence of the fact that neither the defendant nor his lawyer had understood the implications of a guilty plea. He emphasised that the institute of entering a guilty plea was a foreign procedure which was then applied to former Yugoslavia and described it as an example of a

"clash" between the common law and civil law legal systems. As may be seen in the aforementioned, the process of reaching a plea agreement was an innovation of the practice and the proceedings and the proceedings before the ICTY. After the "Erdemović" case the rules which regulate the procedure for concluding plea agreements have been adopted.

The purpose of a plea agreement is first of all to show sincerity and it is important for the Tribunal to encourage the offenders to assume responsibility through the said institute.

The set rules 62bis and 62ter primarily refer to that: that the guilty plea is given willingly, knowingly, that it must not be ambiguous and that there have to be sufficient grounds for the criminal offence and the participation of the defendant in the said criminal offence. These four legal rules for a valid guilty plea (rule 62bis) and the procedure for concluding the plea agreement can best be understood through the analysis of a guilty plea in the case of Dragan Obrenović. The request in the "Obrenović" case is an example of how the agreement between the prosecutor and the defence is submitted to the trial chamber in the form of a request together with the plea agreement and the factual grounds. With regard to the "Obrenović" case, the specific characteristic was that the Prosecutor's Office recommended 15 to 20 years in prison while the defendant accepted not to appeal the trial chamber's judgment unless it imposed the sentence exceeding the limit the Prosecutor's Office had proposed. The cited part of the plea agreement directly refers to the provisions of the Rules and the Statute on the sentencing range. The defendant may be sentenced to a maxmum sentence of life in prison in accordance with the rule 101, while the range of the sentence proposed by the Prosecutor's Office is not binding for the trial chamber which has the authority to pass a sentence it deems appropriate (rule 62ter (b)).

Our legal provision is largely similar to the legal provision of the ICTY, except in the part related to the agreement on the sanction since our court is under the obligation to grant the agreement in full, whereas the ICTY trial chamber if it deems it appropriate may pass a more severe sentence than the one proposed by the agreement.

In terms of the aforementioned, in the ICTY cases of Dragan Nikolić and Momir Nikolić harsher sentences were given than the ones proposed in the plea agreement. In the case of Momir Nikolić, the trial chamber passed a sentence of 27 years in prison dismissing the proposed sanction by the Prosecutor's Office of 15 to 20 years, as well as the recommendation of the defence of 10 years. In the case of Dragan Nikolić, the Prosecutor's Office proposed a sanction of 15 years in prison, while the trial chamber sentenced him to 23 years in prison.

As far as the countries in this region are concerned, Croatia has prescribed under Art. 66 of the Criminal Procedure Code elements for the conclusion of the agreement and their legal provisions mainly coincide with our Code, except in particulars of the procedure itself for the conclusion of the agreement which are specified in greater detail , i.e. the rights and obligations of the prosecutor which are regulated by the Law on the State Attorney's Office of the Republic of Croatia.

The War Crimes Prosecutor's Office has assumed criminal prosecution in several cases received from the Cantonal Court of Bihać, BiH, involving a criminal offence of war crimes against civilians pursuant to Art. 142, Par. 1 of the CC of FRY. In one of the said cases, the Prosecutor's Office of BiH enered into plea agreements with 5 defendants, while the War Crimes Prosecutor's Office has assumed criminal prosecution of one of the accomplices who is currently in the territory of the Republic of Serbia. The defendant and his defence counsel have been offered a plea

agreement, primarily due to the fact that other accomplices have entered into such agreements in BiH. The deadline for deciding on this proposal has not yet expired.

Assuming criminal prosecution on behalf of the Prosecutor's Office of BiH has been allowed based on the Agreement between the Republic of Serbia and Bosnia and Herzegovina on the legal assistance in civil and criminal matters (Official Gazette of Serbia and Montenegro – International Agreements no. 6/2005 and Official Gazette of the Republic of Serbia – International agreements no. 13/10), as well as on the Law on International Legal Assistance in Criminal Matters (Official Gazette of RS no. 20/09).

Conclusion

In terms of its application, the said institute under criminal law has been proven to be justifiable in the practice of the War Crimes Prosecutor's Office and has yielded good results. The total number of concluded agreements in the War Crimes Prosecutor's Office is ten, out of which four pursuant to the "new" Code. The economy principle has been prominent in the application of this institute, since the court, the injured party, the witnesses, experts, parties to the proceedings and the defence counsels do not have to be subjected to additional expenses related to the main hearing.

In adition to the economy principle, the principle of efficient criminal proceedings has come to the fore since these agreements help the termination of trials within a reasonable time through the observance of the principle of a fair trial.

Plea agreement is an important institute and it should be decided in each case if the legal requirements for its application have been met. Considering that this is a new institute which has only just started its practical application, it is evident that the defendants and their defence counsels are wary of entering into these agreements. In this respect, we should find a way to stimulate the defendants to enter into plea agreements whenever it is advisable, especially when we consider that in the US system over 90% of cases end in some form of an agreement between the prosecutor and the defendant.

The War Crimes Prosecutor's Office emphasises that Art. 313 of CPC does not expressly regulate the plea agreements in the summary proceedings in which the criminal offences are punishable by a fine as the main penalty or a term in prison of up to 8 years. Specifically, in the summary proceedings certain evidentiary actions may be taken but the investigation is not ordered, and this order is a legal prerequisite for the conclusion of the agreement. The Prosecutor's Office has determined through analysis and interpretation of the Code that the motion to indict is the initial document needed for the conclusion of the agreement. Due to the aforementioned, in order to overcome any dilemmas, it is necessary to regulate the plea agreements expressly with regard to the summary proceedings as well, and especially when it comes to the proceedings involving Public Prosecutor's Offices with special jurisdiction.

Thus far , in the practice of the War Crimes Prosecutor's Office, an active role of the prosecutor in terms of initiating the conclusion of the agreement has been proven to be crucial. Since the results of such activities of the prosecutor have been positive, we hold that the said institute deserves to be widely applied in the future as well, both in the Prosecutor's Offices with special jurisdiction and in the Prosecutor's Offices with general jurisdiction after the new Code enters into application.

Veljko Ikanović, PhD[1]

Plea Bargaining after Ten Years of Application in Bosnia and Herzegovina

Introduction

When Bosnia and Herzegovina (BiH) joined the Council of Europe, it undertook a series of obligations which were listed in the opinion of the Parliamentary Assembly of the Council of Europe no. 234 (in 2002).[2] One of the more important obligations was the reform of the criminal legislation which was carried out both at the state level and the entity levels. In addition to local experts, international legal experts played an important role in the said reform. Substantive criminal legislation has retained, after this reform, the traditional characteristics of the law of continental Europe. On the other hand, the criminal procedure legislation was developed under the deciding influence of American legal advisors, inspired by common law procedural ideas and certain provisions used in the Statute and Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (ICTY). Consequently, a number of institutes and proceedings foreign to our legal tradition and understanding of the role and aim of the criminal proceedings have been introduced and one of the most significant ones is plea bargaining. It was included in the Criminal Procedure Code of BiH (CPC BiH)[3], Criminal Procedure Code of Republika Srpska (CPC RS)[4], Criminal Procedure Code of the Federation of Bosnia and Herzegovina (FBiH)[5] and Criminal Procedure Code of Brčko District of Bosnia and Herzegovina (CPC BD BiH)[6] in almost identical form in 2003.

1 Justice of the Supreme Court of Republika Srpska, Senior Lecturer
2 Opinion of the Parliamentary Assembly of the Council of Europe no. 234/ 2002
3 Official Gazette of Bosnia and Herzegovina, 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.
4 Official Gazette of Republika Srpska no. 50/03, 111/04, 115/04, 29/07, 68/07, 119/08, 55/09, 80/09, 88/09 92/09, 100/09 and 53/12
5 Official Gazette of FBiH 37/03,56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 09/09, 12/10, 08/13
6 Official Gazette of Brčko District of BiH no. 10/03, 48/04, 6/05, 14/07, 19/07, 21/07, 2/08 and 17/09 and 44/10.

Ever since it was introduced, opinions have been divided on the need for its acceptance, on its content and whether the legal definition is comprehensive and whether the set objectives of its introduction have been met. Therefore, it is necessary to provide an analysis of the practical effects of the legal provisions, point out the discrepancies between the substantive and procedural provisions of the codes, numerous problems and dilemmas which are hindering and jeopardising the application of this controversial institute after ten years in application. To this end, we shall focus only on certain aspects of plea bargaining which, in our opinion, require another reform and on those aspects which have been introduced into the law in the meantime. The remainder of the paper shall mainly focus on the legislation of Republika Srpska (RS), while certain differences compared to the other entity or District or at the state level shall be indicated only if they bear some relevance to our research.

The Reasons for the Introduction of Plea Bargaining into the Legislation of BiH

The introduction of the institute of plea bargaining is the result of the change in the model of criminal proceedings towards the introduction of an adversarial (accusatory) criminal justice system. In such a model, the judge should perform the role of a neutral arbiter assessing the disputed issue, while the central role is assigned to the prosecutor and the suspect, i.e. the defendant. The rationale behind such a radical approach to the regulation and the break with the previous European tradition was the intent to make the criminal proceedings shorter and more cost-effective, to reduce the backlog in courts and reduce the number of unresolved cases. It seems that one of the reasons which goes unmentioned was to facilitate the work of foreign judges and prosecutors of the Court of BiH since they are mostly from countries that use common law system. Foreign experts, predominantly from the USA have participated in the training of judges and prosecutors in the application of the new legislation thus critically influencing the understanding and interpretation of the substance of this institute.

From the very start, scholars and experts have polarised around the two opposing views on the need to introduce this institute, its advantages and disadvantages. According to the first point of view, plea bargaining is the holy grail of solving the backlog of difficult criminal cases, the instrument of speedy and efficient justice, which is also cost-effective, but this did not prove to be the case. First of all, criminal justice system has never been encumbered by the sheer number of cases which could not be resolved within a fairly reasonable time. Secondly, in the most difficult cases in terms of their scope and content of the procedural materials, the admission of guilt is not that common as has been expected. The defence counsels play a key role in this, especially those appointed *ex officio*, since they are not motivated to conclude the proceedings quickly due to the potential high remuneration.

Proponents of the second point of view hold that plea bargaining cannot be applied in our judicial practice and that it may undermine the whole legal system founded in our traditions. It has been pointed out that everything is left to the prosecutor, which allows room for abuse and corruption, and that by doing this the trust in courts is lost. These objections have not been proven to be well-founded either.

Proponents of both views agree that there is a certain vagueness and imprecision about the existing provisions, that the procedural and substantive legislations are not harmonised and that

there is a need to formulate precise criteria and control their application. The legislator has been amending the original provisions, rendering them more comprehensive and clearer but their substance has been partly lost which has led to new problems in practice. It is now apparent that it was not sufficient to translate and insert the provisions used in the common law systems into our code, because they have a strange tendency to pose a problem and insurmountable difficulty when we least expect it.[7]

Considering that the right to dispose of the criminal offence, guilt and punishment is to a great extent left to the defendant, this leads to a kind of reprivatisation of the criminal proceedings.[8] Therefore, it is unacceptable to marginalise the role of the injured party which is in this segment reduced to a minimum.

Content and its Evolution

In the original text of the Criminal Procedure Code of Republika Srpska[9] from 2003, it was prescribed that the suspect, i.e. the defendant and his counsel may enter plea bargain negotiations until the main hearing with regard the criminal offence he is charged with (Art. 238). Since the defendant expects certain concessions if he pleads guilty, while the prosecutor aims to make the proceedings more expeditious and cost-effective, it is understandable that the negotiations may last until the main hearing stage. At that stage the presentation of the evidence has not started yet, the parties to the proceedings do not know how the case shall unfold in the trial, since they are not certain in the outcome based on the evidence at their disposal. Given the fact that the court upon deciding on the agreement makes sure that the suspect, i.e. the defendant, understands that the agreement entails waiving the right to a trial, it is clear that the plea bargaining may only take place before the trial.

However, it has been known to happen in practice that the defendant wishes to negotiate after the main hearing starts and even at the second instance court hearing. This suited both the prosecutor and the courts since it meant avoiding complex and difficult trial proceedings, the drafting of extensive judgments, appeals proceedings and saving time. Since the law did not provide for this, in most cases it was moved on to the regular trial proceedings ending in the passing of the judgment. The defendants have rarely chosen to plead guilty at the main hearing which would have shortened the proceedings since that would mean that only the evidence related to the sentencing would be presented (Art. 272). This is understandable since the law does not provide for the possibility that the defendant should enjoy some special privilege in exchange for the confession, apart from the fact that it may be judged as any other extenuating circumstance. It seems that this should have been stipulated under substantive law thus rendering the procedural provision logical and acceptable in real life.

7 More on this in: M. Damaška, *Sudbina anglo-američkih procesnih ideja u Italiji*, Hrvatski ljetopis za kazneno pravo i praksu (Zagreb) Vol. 13, no. 1/2006, pp. 3 – 15

8 More on this in: A. Eser, *Funkcionalne promjene procesnih maksima krivičnog prava: na putu k „reprivatiziranju" krivičnog postupka*, Collected Papers, Faculty of Law, Zagreb, 42 (2) pp. 167 – 191 (1992).

9 Official Gazette of Republika Srpska, no. 50/03

In response to the application of the code in practice and the suggestions made by the judicial circles, the legislator has chosen to extend the set deadline for plea bargaining.[10] Now the suspect, i.e. the defendant and his counsel, may enter plea bargain negotiations with the prosecutor with regard to the criminal offence he is charged with until the end of the main hearing, i.e. the hearing before the second instance panel (Art. 246 of the CPC RS). The Code has allowed a very flexible deadline for plea bargaining, while the judicial practice has allowed the negotiations at the earliest stage of the proceedings as well. The prevailing reasons here are obviously due to pragmatism, without going into detail whether this jeopardises the very substance of the said institute. It is our opinion that this is not a good solution because it allows various abuses of procedural rights by the defendant and an unconscientious counsel, especially if the prosecutor does not take an appropriate and proper stand. It is hard to say what exactly motivates plea bargaining after the evidence has been presented unless it is awareness the outcome of the proceedings are going to be unfavourable to the party who initiates the negotiations. Not only is it a question whether the defendant should be allowed to use this "privilege" at that point, but also if the prosecutor should do so due to the principle of truth and possibility to present all of the evidence which obviously may go in favour of the defendant. This also takes away from the effect of saving time and resources, as a crucial element of plea bargaining. The aforementioned is especially strikingly obvious if the plea bargaining occurs at a later stage of the trial or at the hearing before the second instance court. On the other hand, the question is raised what purpose the guilty plea serves at the hearing (Art. 280) which belongs to this stage of the proceedings anyway. After certain amendments to the substantive law are made as has been suggested, this should be the only possibility for the admission of guilt after the main hearing starts.

Plea agreement is rendered in writing and is submitted together with the indictment to the pre-trial judge, judge or the panel. When the indictment is confirmed, the plea agreement is taken under advisement and the criminal sanction is imposed based on the said agreement by the pre-trial judge until the case is submitted to the judge, i.e. a panel in order to schedule the main hearing. After the case is submitted for the purpose of scheduling the main hearing, the judge or the panel decides on the agreement. This stands to reason, since without the confirmed indictment, the defendant's guilt cannot be an issue, and therefore the existence of the confirmed indictment is the prerequisite for the plea agreement to be considered, while the said agreement may be entered into before the indictment is issued. The authority of a single judge to decide on the plea agreements for the criminal offences under the jurisdiction of a panel (for which the prescribed penalty is over ten years in prison) is debatable. The justification claiming that since there is no trial, the panel is not necessary, does not seem convincing. It is evident that the motivation behind this is to create "savings" in the number of judges used rather than the belief that such a position is right. Deciding on the agreement entails the assessment of the evidence, as well as deciding on the sanction, in this case a long term in prison is possible, as an important process of the trial. Given the fact that the sanction cannot be appealed, this issue gains even more significance.

The legislator has not imposed any limitations on plea bargaining in terms of the type of a criminal offence or the severity of the prescribed penalty. Such a solution is unique among the

10 Amendments to the Criminal Procedure Code, Official Gazette of Republika Srpska no. 119/08 and the Criminal Procedure Code of Republika Srpska, Official Gazette of Republika Srpska no. 53/12

countries in the territory of the former SFRY and it has been criticised by the professionals in the field and the general public. The cited reason was that the prosecutor is given too much authority to determine the penalty for the most serious criminal offences, offer privileges to the defendant, all of which may lead to abuses and unequal treatment of citizens before the law. However convincing these arguments might seem, they are not justifiable. The point of plea bargaining is to facilitate and speed up the resolution of the most complex cases, which involve, as a rule, the most serious criminal offences for which the most severe penalties are prescribed. For less complex and less difficult cases the plea bargaining is not of critical importance. Such cases may be resolved quickly and efficiently in ordinary proceedings or by entering a guilty plea at the plea hearing or at the main hearing. The scope and the content of privileges the suspect or the defendant is offered by the prosecutor may be controlled by a senior ranking prosecutor, and by establishing an efficient prosecutorial organisation with an appropriate level of responsibility. In addition, it is the court that reviews the agreement, including the sanction settled on in the agreement, so there is a safeguard against the illegal application in practice. It is crucial to establish trust in the institutions, efficiently control them and hold them accountable rather than restrict the actual plea bargaining. Plea bargaining must either be accepted in full or abandoned as an institute. The system must be trusted completely, not just to a certain extent, in this case there is no middle ground and no compromise to be reached. For this reason, the existing provision is seen as adequate, which has been confirmed by the results of its application so far.

During the plea bargaining with the suspect, i.e. the defendant and the defence counsel, the prosecutor may propose the imposition of a sanction that is below the legally prescribed minimum of imprisonment for that particular offence, i.e. a mitigated sanction for the suspect or defendant in accordance with the Criminal Code. However, the Criminal Code of Republika Srpska[11] does not prescribe the agreement as the institute which represents grounds for and allows a lighter sentence. Due to this, the prosecutor's motion is not binding for the court which is deciding on the agreement, thus putting the defendant in a precarious position which often holds him back during the negotiations. It seems that the agreement should be included under substantive criminal legislation, which would lay the foundations for its role during the proceedings either through special mitigation or some other privilege.

The pre-trial judge, the judge or the panel may grant or dismiss the agreement. The question is why it is only possible to dismiss the agreement, and not to reject it, since the court judges its content when deciding whether to grant it. So far, this has not been addressed and we believe that the said provision must be supplemented in order to allow the agreement to be rejected as well.

When deciding on the plea agreement, the court makes sure: a) that the plea agreement has come about without duress, consciously and with understanding and after the information on the potential repercussions including those related to the restitution claim and costs of the proceedings has been given, b) that there is sufficient evidence on the defendant's guilt, c) that the defendant understands the plea agreement amounts to a waiver of the right to a trial and that the criminal sanction to be imposed cannot be appealed, d) that the proposed criminal sanction complies with the law and e) that the injured party has been given the opportunity

11 Official Gazette of Republika Srpska, no. 49/03, 108/04, 37/06,7 0/06, 73/10 and 1/12

to make a statement on the restitution claim before the prosecutor. If the court grants the plea agreement, the defendant's plea is entered into record and followed with the hearing for pronouncing of criminal sanction specified by the agreement.

These are mainly the same conditions as the ones for the admission of guilt at the plea hearing, the notable difference is that it is checked if the defendant understands that he cannot appeal the criminal sanction that is to be imposed. It is this solution regarding the right to an appeal that is inadequate and at the start of its application it has caused a lot of difficulty.

First of all, the legislator in the provisions on the right to an appeal against the judgment did not make a distinction between the judgments made in the ordinary proceedings and those rendered after the plea agreement has been granted. Accordingly, it is not prescribed that the right to an appeal against such a judgment is limited or precluded. So, the question is if the right to an appeal may be limited based on the provision on the procedure for the decision on the plea agreement and if so, to what extent. The courts have accepted that an appeal may not be filed with regard to the criminal sanction, which is in accordance with the substance of this institute. However, the legislator has not addressed the said issue even after a considerable number of amendments and supplements to the Code, and in Republika Srpska after the new Code has been passed.

Secondly, if the defendant is not allowed to file an appeal against the imposed criminal sanction, does this mean that he is allowed to file an appeal related to other parts of the judgment? At first, there were opinions that the appeal is precluded completely, which was the result of a restrictive and unsystematic interpretation of the wording of the law. Upon deciding an appeal against the judgment passed in the proceedings in which a plea agreement had been granted, the Supreme Court of Republika Srpska has taken the stand that the appeal is allowed, except in the part related to the criminal sanction. The cited reasons suggest the defendant must be given the opportunity for a higher court to examine on appeal if the provisions under substantive and procedural law have been applied appropriately when the plea agreement was granted. This practice has been accepted by other courts in BiH. The fact that this practice is right is supported by the practice in the USA, where this institute originated from, where the defendant may request the higher court to examine the violations of the law in the proceedings in which the agreement was granted and the defendant convicted based on it.

When criticising the justification of allowing the plea bargaining to occur at any stage of the proceedings, we had in mind the problems this might cause in the appeal proceedings as well. The agreement may be concluded during the hearing before the second instance court, after the said court has overturned the first instance conviction. An appeal at the third instance is not allowed against the second instance judgment of conviction (Art. 333). This is completely clear and justifiable if the ordinary proceedings have been conducted. However, the situation changes if the agreement has been entered into since the defendant waives the right to a trial in such a case and this raises the question if he is denied the option for a higher court to examine the regularity of the proceedings prior to the agreement. The answer to this is not easy al-

though the Supreme Court of Republika Srpska has taken a stand in such a situation that the appeal is not allowed.[12]

The position and the role of the injured party is of secondary importance, since the court shall just notify the said party of the results of the plea bargaining. However, upon granting the agreement the court makes sure that it was concluded only after the defendant had been informed of the potential repercussions, including those related to the restitution claim and the costs of the proceedings. This ensures that the suspect, i.e. the defendant, is aware of the fact that the criminal sanction is not the only consequence of the agreement and that the court may pass a judgment including a decision on the restitution claim or refer the injured party to settle their claim in a lawsuit. The role of the injured party complies with the concept of the law, but the question arises if the said party has the right to file an appeal, which is otherwise allowed in the ordinary proceedings, against the decision on the restitution claim and the costs of the criminal proceedings. Given the fact that the section of the code on appeals does not preclude it, and neither do the provisions on plea bargaining, it may be concluded that the appeal is allowed.

The existing legal framework does not provide for the inclusion of the injured party in the plea bargaining proceedings. However, according to the role of the prosecutor that entails the obligation to collect the evidence and data related to the restitution claim, there are instances where the injured party was included in the agreement. Such agreements have been granted by the courts, which is a positive example of how the judicial practice may correct certain vagueness and passiveness of the legal norm.

Results in Practice

In the USA almost 90% of criminal cases end in the admission of guilt, which is largely due to plea agreements between the prosecutors and the defendants.[13] Such an effect cannot realistically be expected in BiH where the plea agreement has never been applied before. A series of difficulties had to be overcome, it had to be accepted that it is not a temporary solution and dispense with personal reservations. These have been successfully conquered, but the public sees the agreement as something unacceptable, often as dishonest and an act of conceding to the criminals. This could be attributed to a lack of information on the meaning of the agreement, control of its conclusion and sentencing policy with or without the agreement. On the other hand, negative comments made by the high ranking representatives of the state institutions prior to the court's decision on the announced agreement, especially of late, add to the confusion of the public. In addition, such comments are influencing the court indirectly to dismiss the agreement. Regardless of how justified the criticism is, this is not how we should go

12 From the judgment of the Supreme Court of Republika Srpska number: 80 0 K 001043 13 Kžž of 13 March 2013: "After the submission of the plea agreement entered into by the defendant and his/her counsel on the one side and the district prosecutor on the other at the second instance court hearing and after the court has accepted the agreement, a sentencing hearing was held, and at that hearing the contested judgment was passed declaring the defendant guilty and sentencing her to a term in prison of three months. Pursuant to the provision of Art. 333 of CPC RS it is stipulated in which cases an appeal against the second instance judgment is allowed, when both the first and the second instance judgments are convictions or acquittals, there is no possibility according to the said provision to appeal against the second instance judgment. Since this is precisely the situation in the case at hand, the appeal filed by the defence counsel is not allowed, which is why the said appeal should have been dismissed based on the Article 326 with regard to Art. 333 of the CPC RS and rendering the same decision as is pronounced in this ruling."

13 George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America*, Stanford University Press, 2003

about redressing the oversights. This creates tension surrounding the agreement and the participants of the process, especially the prosecutors. Despite all of the aforementioned, the plea agreement has significantly contributed to more expeditious criminal proceedings and efficiency of the justice system. The effects this has had in Republika Srpska, and they are similar in other parts of BiH as well, shall be represented based on the statistical data shown for the period from 2006 until 2012, in tables 1 and 2 enclosed with this paper.[14]

In 2006 out of 5257 issued indictments, in 688 cases a plea agreement was proposed, while the total number of proposed plea agreements was 1038 (after the indictments were issued, there were another 350). The courts dismissed 3 agreements and passed 920 convictions based on the plea agreements, in 152 cases the agreements have not been decided on.

In 2012, out of 5517 of the issued indictments, 116 proposed a plea agreement, and the total number of proposed plea agreements was 738 (after the indictments were issued another 622). The courts dismissed 8 agreements and passed 663 convictions based on the plea agreements, and on 67 agreements the decision was not passed.

The presented data indicates that the admission of guilt has become an important institute in the criminal legislation in Bosnia and Herzegovina, which facilitates the resolution of more than a half of the total number of cases annually without a regular trial, complex and costly evidentiary proceedings at the main hearing and without long proceedings. The greatest number of agreements was concluded in the earlier stage which may be the result of resolving the accumulated backlog of cases. It is also evident that the number of agreements concluded after the indictment was issued has been increased, while during the first years a greater number of agreements had been proposed in the indictment. A contributing factor was the fact that the amendments to the code have allowed the plea bargaining to last until the second instance court hearing. The number of dismissed agreements by the courts is negligible which may be due to their level of quality, but also of conformity in part, in order to avoid processing them in ordinary proceedings.

Sentencing

The relationship between the substantive and procedural criminal law with regard to the admission of guilt is most evident during the sentencing. This is not due to the complexity of this relationship, but due to the oversights, and also the lack of desire on the part of the legislator to regulate this relationship according to the rules of the legal science and nomotechnics. We hold that it is necessary to point out certain specific characteristics of sentencing when this institute is applied. The reform of the criminal procedure legislation and the introduction of the new rules of the criminal proceedings have established certain prerequisites for the mitigation of sanctions through plea bargaining between the prosecutor and the defendant. The application of the said institute primarily depends on the activities of the prosecutor, defendant and the defence counsel, if the defendant has a counsel, while the court's role is limited to granting or dismissing such actions.

It must be stressed here that there is a discrepancy between the substantive and criminal procedure legislation which causes certain difficulties in the application of the general rules for

14 We are grateful to the Deputy Chief Republic Prosecutor of Republika Srpska for providing the said data.

sentencing. Namely, the procedure code indirectly and unlawfully takes and includes the provisions of the substantive code, where the rules for sentencing indisputably belong. The said discrepancy carries even more weight since the substantive criminal legislation has been undergoing alterations simultaneously with the procedure code without establishing the prerequisites for what was being done to the criminal proceedings. Even after several amendments to the procedure legislation, the amendments to the Criminal Code have not been initiated in order to provide the basis for such procedural provisions.

Few papers draw attention to this discrepancy,[15] the legislator has ignored it, while the judicial practice, even if it has identified it, evidently tried to disregard the problem. The fact that the second instance courts do not look for any violations of the law *ex officio*, but only if the appeal is lodged has kept the status quo in this respect (the new CPC RS partially altered this). No objections based on the said discrepancy have been filed apparently.

Plea bargaining between the defendant and the prosecutor is largely related to the sanction which is to be proposed to the court. The defendant, rightly, expects a more favourable position with regard to the possible criminal sanction that is to be imposed. The parties may offer proposals on the legally prescribed sanction for the criminal offence in question and the willingness of the defendant to admit his guilt, under the condition that the proposed sanction is the least severe type or of the lowest degree. The uncertainty the trial implies in terms of the sanction that may be handed out is the most common reason why the defendant agrees to enter into an agreement. By imposing the sanction proposed in the agreement, the defendant removes the risk that the second instance court might revise the imposed sanction.

Given the fact that the court does not have to grant the agreement, it has the authority to assess if the proposed sanction fits the criminal offence and the perpetrator.[16] The court shall assess all those circumstances that are ordinarily assessed when determining the sentence. However, the defendant often undertakes certain obligations in the course of plea bargaining, provides the prosecutor with certain information or promises to cooperate and help the detection and processing of other perpetrators of the same or some other criminal offences. These are undoubtedly those other circumstances that should be judged as extenuating and that should influence to a certain extent the type and severity of the sanction which is to be imposed. It is hard to expect all of these circumstances to be listed in the rules for sentencing, but it is reasonable to include some of the most delicate circumstances, such as the conduct during the plea bargaining, in the said provisions. This would give the courts better direction whether to, or if at all, consider the demeanor of the defendant during the plea bargaining, and particularly assess acceptability of the proposed sanction.

There are opposing views saying that the court does not have the authority to assess whether the proposed sanction is adequate, but only whether it complies with the law, and therefore must accept it every time the other prerequisites for the agreement to be valid are met. This understanding is not right and does not correspond with the substance of this institute. The purpose is not to transfer the trial to the parties involved, which would be the case if the choice of the type of the sanction, scope and severity of the penalty had been left to them. The purpose is to allow the trial to be conducted more expeditiously and efficiently by securing the

15 On this topic: G. Rubil, *Neusaglašenost pravila o odmjeravanju sankcija*, www. pravosudje.ba, last accessed on 15 March 2010
16 See Rule 62ter of the Rules of Procedure and Evidence of the ICTY

concessions from both parties, to reduce the costs, enable the detection of other offenders and accomplices, which will serve as a reasonable foundation for the motion for the court to accept the sanction which the parties are proposing as the result of mutual compromise. Such a stand has been taken by the Supreme Court of Republika Srpska in its judgment denying the appeal filed in favour of the defendant by the prosecutor and the defence counsel.[17]

In order to resolve all of the aforementioned and other dilemmas, first of all substantive legislation must provide the grounds for the application of these institutes in criminal procedure. We hold that the absence of these violates the principle of legality, enables the arbitrary decisions of the prosecutor, as a result the courts proceed differently when their role is reduced to either dismissing the motion filed by the parties involved and the defence counsel or granting it, all of which leads to treating the defendants charged with the same criminal offences unequally in identical or similar situations. Thus the principle of justice is severely jeopardised, which certainly was not the legislator's intention, nor is it an objective of modern legal provisions.

The Procedure in Cases with Several Co-Defendants

The law does not stipulate how the court should proceed if there are several co-defendants and some admit the guilt, while others do not and the ordinary proceedings are to be continued for them. This often happens in practice and the situation is clear and simple if both proceedings end in convictions. However, there have been some cases where one of the defendants admits the guilt (at a plea hearing or according to the plea agreement), while other defendants do not wish to do so and opt for the trial which results in an acquittal. In these cases the same factual description, the same legal qualification, the same evidence specified in the indictment have led to two different judgments. The question arises if the earlier conviction should stand. Here, one must start from the fact that the principle of material truth has been abandoned and the principle of (formal) truth has been adopted.[18] When assessing the admission, the court evaluated the available evidence from the point of view if the said admission complies with the evidence. Considering that the evidence is in accordance with the admission of guilt it does not mean that the decision on the guilt of the defendant and his conviction are wrong. The conviction is the result of the defendant's subjective view of the committed criminal offence and his admission has facilitated the evidentiary proceedings by simplifying them. Alternatively, the evidence presented by the prosecutor at the main hearing may be challenged by the evidence presented by the defence.

In predominantly adversarial proceedings this is like a shadow play which may cloud what is of essence and lead to an acquittal because the presented evidence has not been convincing enough since it is not supported by a guilty plea here, instead it is denied by the defence of the accused. Therefore, such a situation resulting from different paths to judgments should not lead to

17 An excerpt from the exposition reads: "Contrary to the claims made in the appeal filed by the defence counsel, the first instance court had the authority pursuant to the provisions of Art. 246, Par. 6, item d) with regard to Par. 3 of the Criminal Procedure Code – Consolidated Text, to examine if the sentence proposed in the Plea Agreement would serve the punitive purpose, and if the answer was not affirmative, the Court was then authorised to dismiss the submitted agreement, based on the authority stipulated by the provision of Par. 8 of the cited legal provision. Therefore, in this particular case the first instance court has not violated the cited legal provisions, and accordingly there have not been any violations of the provision of the criminal procedure pursuant to the provisions of Art. 311, Par. 2 of the Criminal Procedure Code – Consolidated Text which has been referred to in the appeal by the defence counsel without any foundation." (The Judgment of the Supreme Court of Republika Srpska no. 11 0 K 004039 10 Kž of 29 March 2011)

18 More on this in: M. Blagojević, *Ogledi iz krivičnog procesnog prava*, Doboj, 2005

unnecessary dilemmas and disputes. This also means that the answer to the question if an acquittal of a co-defendant may serve as grounds for repeating the proceedings at the request of the defendant should be negative. This also protects the defendant who has pleaded guilty from the judgment being revised to his detriment if the other defendants are convicted for a more serious criminal offence due to the amendment of the indictment at the main hearing. On the other hand, we hold that it would be justified to allow the proceedings to be repeated at the prosecutor's motion if the admission of guilt is proven to be false at the main hearing (e.g. confessing to committing a criminal offence of murder in order to conceal another perpetrator, perhaps a close relative). The judicial practice has not addressed these issues yet since there have not been any decisions on appeals.

Plea Agreement with the Obligation to Testify

From the very beginning, a question was raised if the conditions of a plea agreement may include an obligation of the defendant to testify against other defendants in the same indictment or in another criminal proceeding. The law does not preclude such an agreement, and we believe that this is one of the important elements that justifies the use of this instrument. Such deals are brokered in a roundabout way due to the prosecutors' caution and uncertainty how the judicial practice shall react if such a provision is included in the agreement. The prosecutor and the defendant conclude the agreement without the said obligation, but the agreement is not submitted to the court until the defendant is deposed as a witness by the prosecutor. Thus the prosecutor secures a valid statement which may be used at the main hearing during the direct examination of witnesses if he changes his earlier testimony. However, if the agreement has been granted in the meantime, the fact that the defendant is changing his testimony or is refusing to testify does not have any bearing on the already passed judgment against him imposing, as a rule, a milder sanction. This is how the void in the law is bypassed and it should be eliminated by specifying clearly defined conditions and repercussions if the agreement is breached.

Conclusion

This paper offers an overview of the ten-year evolution of the plea bargaining as an institute in BiH. The aforementioned indicates that the said institute has been successfully applied in practice and that it has been accepted a lot more easily than has originally been expected. This is not to say that there have not been any problems, dilemmas and lack of understanding, which are still present. The problems often emerged where they were least expected, but the judicial practice has been flexible and dealt with them in an acceptable manner thus paving the way for future legal amendments. The decisions of the courts in this area are most commonly reviewed before the Constitutional Court of BiH regarding the protection of human rights, which guarantees that a more liberal interpretation of the code shall not result in infringement of human rights. The procedural provisions are still vague and imprecise and are not in compliance with the Criminal Code. This suggests that the said matter should be regulated more comprehensively, systematically and better in terms of its quality. This would make the judiciary operate more easily and reduce to a minimum the arbitrariness in the interpretation of a delicate legal matter. In addition, it would contribute to fewer negative reactions by the public. For this reason, changes that do not affect the substance of the institute of plea bargaining are both necessary and useful.

TABLE 1

2006

Case designation "Кт"	The number of indictments issued during the reporting period*			The number of confirmed indictments during the reporting period*		
	with a criminal order	without a criminal order	with a proposed plea agreement	with a criminal order	without a criminal order	with a proposed plea agreement
COLUMN =	VIII	IX	X	XI	XII	XIII
Economic Crimes	119	227	51	114	205	43
War Crimes		5			5	
General Crimes	3221	2201	809	3059	1180	645
Total	3340	2433	860	3173	1390	688

2007

Case designation "Кт"	The number of indictments issued during the reporting period*			The number of confirmed indictments during the reporting period*		
	with a criminal order	without a criminal order	with a proposed plea agreement	with a criminal order	without a criminal order	with a proposed plea agreement
COLUMN =	VIII	IX	X	XI	XII	XIII
Economic Crimes	89	174	43	92	167	43
War Crimes		8			8	
General Crimes	3262	1876	616	3268	1990	616
Total	3351	2058	659	3360	2165	659

2008

Case designation "Кт"	The number of indictments issued during the reporting period*			The number of confirmed indictments during the reporting period*		
	with a criminal order	without a criminal order	with a proposed plea agreement	with a criminal order	without a criminal order	with a proposed plea agreement
COLUMN =	VIII	IX	X	XI	XII	XIII
Economic Crimes	127	145	41	108	132	41
War Crimes		10			5	
General Crimes	2786	1894	307	2636	1787	307
Total	2913	2049	348	2744	1924	348

2009

Case designation "Кт"	The number of indictments issued during the reporting period*			The number of confirmed indictments during the reporting period*		
	with a criminal order	without a criminal order	with a proposed plea agreement	with a criminal order	without a criminal order	with a proposed plea agreement
COLUMN =	VIII	IX	X	XI	XII	XIII
Economic Crimes	42	133	63	60	129	57
War Crimes		8			7	
General Crimes	2468	1753	240	2489	1638	238
Total	2510	1894	303	2549	1774	295

2010

Case designation "Кт"	The number of indictments issued during the reporting period*			The number of confirmed indictments during the reporting period*		
	with a criminal order	without a criminal order	with a proposed plea agreement	with a criminal order	without a criminal order	with a proposed plea agreement
COLUMN =	VIII	IX	X	XI	XII	XIII
Economic Crimes	63	180	19	56	177	19
War Crimes		8			8	
General Crimes	1903	2246	58	1817	2091	58
Total	1966	2434	77	1873	2276	77

2011

Case designation "Кт"	The number of indictments issued during the reporting period*			The number of confirmed indictments during the reporting period*		
	with a criminal order	without a criminal order	with a proposed plea agreement	with a criminal order	without a criminal order	with a proposed plea agreement
COLUMN =	VIII	IX	X	XI	XII	XIII
Economic Crimes	86	175	11	81	165	21
War Crimes	1	15			11	
General Crimes	2281	2354	135	2069	2310	162
Total	2368	2544	146	2150	2486	183

2012

Case designation "Кт"	The number of indictments issued during the reporting period*			The number of confirmed indictments during the reporting period*		
	with a criminal order	without a criminal order	with a proposed plea agreement	with a criminal order	without a criminal order	with a proposed plea agreement
COLUMN =	VIII	IX	X	XI	XII	XIII
Economic Crimes	163	208	14	160	169	14
War Crimes		14			22	
General Crimes	2343	2670	105	2193	2440	102
Total	2506	2892	119	2353	2631	116

TABLE 2

2006

Case designation "Кт"	Plea Agreements			
	the number of proposed agreements	the number of dismissed agreements	convictions based on plea agreements	the number of proposed agreements not decided by the courts
COLUMN =	VIII	IX	X	XI
Economic Crimes	50		45	6
War Crimes				
General Crimes	988	3	875	146
Total	1038	3	920	152

2007

Case designation "Кт"	Plea Agreements			
	the number of proposed agreements	the number of dismissed agreements	convictions based on plea agreements	the number of proposed agreements not decided by the courts
COLUMN =	VIII	IX	X	XI
Economic Crimes	59		64	4
War Crimes				
General Crimes	1024	1	794	96
Total	1083	1	858	100

2008

Case designation "Кт"	Plea Agreements			
	the number of proposed agreements	the number of dismissed agreements	convictions based on plea agreements	the number of proposed agreements not decided by the courts
COLUMN =	VIII	IX	X	XI
Economic Crimes	64		51	13
War Crimes				
General Crimes	934	6	857	92
Total	998	6	908	105

2009

Case designation "Кт"	Plea Agreements			
	the number of proposed agreements	the number of dismissed agreements	convictions based on plea agreements	the number of proposed agreements not decided by the courts
COLUMN =	VIII	IX	X	XI
Economic Crimes	75		65	10
War Crimes				
General Crimes	797	1	747	49
Total	872	1	812	59

2010

Case designation "Кт"	Plea Agreements			
	the number of proposed agreements	the number of dismissed agreements	convictions based on plea agreements	the number of proposed agreements not decided by the courts
COLUMN =	VIII	IX	X	XI
Economic Crimes	62	1	52	9
War Crimes				
General Crimes	564	2	530	32
Total	626	3	582	41

2011

Case designation "Кт"	Plea Agreements			
	the number of proposed agreements	the number of dismissed agreements	convictions based on plea agreements	the number of proposed agreements not decided by the courts
COLUMN =	VIII	IX	X	XI
Economic Crimes	54		49	5
War Crimes				
General Crimes	616	1	577	38
Total	670	1	626	43

2012

Case designation "Кт"	Plea Agreements			
	the number of proposed agreements	the number of dismissed agreements	convictions based on plea agreements	the number of proposed agreements not decided by the courts
COLUMN =	VIII	IX	X	XI
Economic Crimes	66		59	7
War Crimes				
General Crimes	672	8	604	60
Total	738	8	663	67

Damjan Kaurinović[1]

Confirmation of Indictments and Pleading by Defendants – Simplified Forms of Criminal Procedure in Bosnia and Herzegovina

Introductory Remarks

An accelerated reform of the BiH criminal legislation was undertaken in mid 2002 and completed on March 1, 2003 when the BiH Criminal Procedure Code, BiH Criminal Code, and BiH Law on Protection of Witnesses under Threat and Vulnerable Witnesses were enacted and came into force, and it has continued with the process of making amendments to the said statutes, which is still underway.[2] The focus of attention of the completed legislative reform has been the BiH Criminal Procedure Code (BiH CPC) since the most important innovations, which were for the first time introduced in the region, were made in the field of criminal procedure. They include: prosecutorial investigation, ordering limited-duration detention throughout all the stages in the proceedings, granting immunity to witnesses by prosecutors, special investigative actions, confirmation of indictments, pleading by defendants, plea agreements, preliminary motions, procedure for issuing criminal orders, holding main hearings and making decisions before courts of second instance without a possibility of returning cases to be retried before courts of first instance, direct examination and cross-examination, review of a first-instance judgment only within the limits of the appeal, proceedings against legal entities.

Criminal Procedure Codes of the entities (RS CPC and FBiH CPC) and of the BiH Brcko District are a specific variation of the BiH CPC and thus they share identical underlying principles, main notions, stages of criminal proceedings, main institutes of criminal procedure, as well as

1 President of the Appellate Court of the Brčko District, BiH. Velibor Milicevic, a justice of the Brcko District Basic Court, BiH, also took part in the production of this paper.

2 The BiH CPC was published in the *Official Gazette of BiH*, No. 3/03 of February 10, 2002 and it came into force on March 1, 2003, after which as many as 17 amendments have been made thereto.

second-instance and special proceedings. A comparative analysis of their indictment procedures and judgments delivered without holding a trial shows that all of those procedural laws have accepted the same solutions which have in the most direct manner led to increased efficiency and judicial economy of the proceedings, while at the same time ensuring mandatory protection of all the rights enjoyed by the defendant as the primary party in criminal proceedings.

Confirmation of indictments and pleading by defendants represent simplified, rational, and efficient procedural institutes which enable parties to the proceedings to dispose of criminal cases as soon as at an early stage in the proceedings or to have the cases immediately transferred to a judge or a panel for conducting a main hearing. The simplicity and economy of this stage of criminal proceedings is also confirmed by the fact that only one judge – the preliminary hearing judge presides over the case at this stage in criminal proceedings. The CPC of BD BiH has gone a step further in respect of this issue because it has extended the jurisdiction of preliminary hearing judges so their duty is to decide whether to accept or to reject guilty pleas, which is analogous to a legislative solution which is prescribed for the procedure for deliberating on plea agreements at the stage of indictment procedure.

Indictment Procedure

After an investigation, which is the first stage in the preliminary proceedings, there follows the indictment procedure,[3] the second and final stage by which preliminary proceedings are concluded as the first phase of the criminal proceedings. The indictment procedure involves a preparatory procedure, issuing of an indictment and referring it to a preliminary hearing judge, confirmation or denial of all or some counts of the indictment, entering a plea by a defendant, defendant's guilty or not guilty plea, plea-bargaining (negotiations) and plea agreement, withdrawal of the indictment and preliminary motions. The indictment is the only accusatory instrument of a prosecutor in the regular criminal proceedings, which is drawn up and filed in writing only by a single authorised prosecutor, the Prosecutor of BiH.

Considering the above-mentioned procedural institutes, it is evident that this stage of the criminal proceedings has undergone a radical transformation, since innovations, which had not been available in the previous, inquisitorial model of criminal procedure, were introduced. This stage of proceedings provides an answer to the question if the charges satisfy statutory conditions to be the subject matter of a hearing, *i.e.* whether there will be a trial or termination of proceedings. What virtually happens here is that a preliminary evaluation of a criminal case is made, thereby placing limitations on a prosecutor with regard to a possibility of him unnecessarily bringing a defendant before the court and trying him on the counts which do no fulfil statutory conditions. The first, preliminary examination of an indictment is carried out by a preliminary hearing judge, who checks the indictment from the aspect of its form and facts by taking procedural actions to examine if the indictment has been correctly drawn up in terms of its form and rendering his decision on the indictment, while the second and final examination of an indictment is performed at a motion of a defendant and his defence attorney through the procedural

3 For more details on the topic, see: Commentary on the Criminal Procedure Code in Bosnia and Herzegovina, Prepared by: prof. Hajrija Sijercic Colic, PhD, Malik Hadziomeragic, Marinko Jurcevic, Damjan Kaurinovic, prof. Miodrag Simovic, PhD, Project sponsored by the Council of Europe and the European Commission, Sarajevo 2005, pp. 608-631

institute of preliminary motions. The new procedural institutes in the indictment procedure are modelled after the *Rules of Procedure and Evidence*, which are applied in proceedings before the International Criminal Tribunal for Former Yugoslavia, and after the Rome Statute of the International Criminal Court adopted on July 17, 1998.

The notion of an "indictment" or a "criminal charge" as defined under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) should be understood in its essence and not based on the letter of the law. From the technical aspect of law, the notion of an "indictment" is defined by laws governing criminal procedure, while its fundamental nature is determined by how an act is classified in the legal system of a country, which is an auxiliary criterion, and by the nature of the act, as well as by the nature and seriousness of punishment as the main criterion. This implies that the overriding importance is not attached to whether or not an act is defined as a misdemeanour or a criminal offence, but to whether or not the nature and severity of punishment takes on a criminal character.[4] Consequently, any violation that involves deprivation of liberty and a possibility for imposing a prison sentence or exchanging a fine for a prison sentence should be considered a criminal charge. It is thus provided that Articles 6 and 7 of the ECHR are implemented and the rights guaranteed under those Articles are safeguarded, regardless of how the signatories differentiate between the criminal and misdemeanour law in their national legislation.

Issuing an Indictment

When in the course of an investigation a prosecutor finds that the factual situation has been sufficiently cleared up for an indictment to be issued, the investigation is finalised and an indictment is drawn up and referred to a preliminary hearing judge. Preparation of an indictment entails that a prosecutor should take procedural actions which involve an analysis of evidence collected during the investigation, reaching conclusions as to the issues of fact and law, and drawing up an indictment. In order for an indictment to be issued, the standard of proving the case needs to be met which requires that there is sufficient evidence based on which there are reasonable grounds to suspect that it was precisely the defendant who committed the criminal offence. A well-grounded suspicion involves a higher level of suspicion based on gathered evidence which leads to a conclusion that a crime has been committed (see: Article 20, item m. of the BiH CPC). The law does not stipulate any special time limit for issuing indictments after the conclusion of an investigation, but providing the factual situation has been sufficiently cleared up for an indictment to be issued, it will be done so promptly.

When an indictment is issued, the suspect or the defendant and his defence attorney automatically have the right to access all the files and evidence. At this point, it suffices to mention that the term "suspect" denotes a person in respect of whom there are grounds to suspect that he committed an offence, given the indictment has not yet been confirmed. A preliminary hearing judge who presides over the case after an indictment has been issued or at the stage of indictment procedure decides on a request for examination and copying of all or individual files and evidence from suspect's or defendant's defence attorney. The parties and a defence attorney are entitled to

4 See Decisions by the European Court for Human Rights: *Engel et al. v. The Netherlands* of June 8, 1976; *Lauko v. Slovakia* of September 2, 1998; *Ezeh i Connors v. The Ununted Kingdom* of October 9, 2003

propose that the Court should provide evidence even after an indictment has been issued under the same conditions which apply to investigation. The prosecutor, the suspect or defendant and his attorney submit their requests to the preliminary hearing judge.

Contents of an Indictment

Contents of an indictment show that it is a formal, procedural instrument with precisely defined elements, exclusively a written instrument of a prosecutor drawn up in a form prescribed by the law. Article 227 of the BiH CPC lays down the contents of mandatory elements of an indictment which it must include in order to be correct from the technical aspect of the law. An indictment is filed with a court which has territorial and subject matter jurisdiction over the case and in respect of the criminal offences stipulated in the BiH CC, it is always the Court of BiH.

Suspect's personal data refer to all the information under Article 78 of the BiH CPC, which should in particular include complete information about previous convictions, sentences served, other criminal proceedings, and correct information about duration of detention if a suspect used to be or is still remanded in custody, etc.

Particulars of an act from which arise elements of a crime stipulated under the law should include all the facts necessary to classify a criminal offence as precisely as possible and to determine the time and place of its commission, the object and instrument of the crime, etc. They all represent a factual basis of an indictment (its enacting clause), which determines the subject matter of criminal proceedings or main hearing. The factual basis of an indictment defines and limits the subject matter of a trial, which is the reason why a judgment must correspond to a relevant indictment (see Article 280).

The legal name of a criminal offence is its name under the BiH CC, so a statutory provision which corresponds to that criminal offence needs to be cited, as well as its general form or class, form of complicity or other provisions of substantive law which are applicable to that particular case. Thus, a prosecutor qualifies the act referred to in the indictment from the legal aspect or in other words, classifies it as a particular criminal offence.

A motion to present evidence always indicates a direct presentation and examination of evidence, so evidence needs to be precisely labelled, including not only witnesses' and expert witnesses' names and full addresses, but also correct designations for documents and exhibits which need to be read or shown during a trial. Understandably enough, neither the names of witnesses who are being threatened or are vulnerable nor their addresses are to be specified in an indictment if those witnesses are subject to witness protection measures (e.g. protection of identity) pursuant to the Law on Protection of Witnesses under Threat and Vulnerable Witnesses of BiH, but instead, only the aliases of protected witnesses are to be cited.

Investigation findings are a special form of a shortened explanation, prosecutor's factual conclusion about the evidence he has obtained and examined and moved to be presented at the main hearing. Evidence which is submitted along with an indictment will be sufficient for a preliminary hearing judge to render a decision either confirming or dismissing all or some counts of an indictment.

Evidence which supports charges in an indictment includes all types of evidence: transcripts of interrogation of a defendant, witnesses' statements, findings and opinions of expert witnesses, seized objects, written documentation, official notes, sketches, estimates, analyses, photographic documentation, various audio-visual recordings, etc. It is not mentioned what this evidence which supports indictment allegations contains because a judge or a presiding judge can thus be prejudiced with regard to the relevance of certain pieces of evidence before the very trial in case it takes place. Namely, the judge or the panel may not have anything in the case file but an indictment, a detention warrant and a warrant of further detention, evidence offered by the defence to be presented at the main hearing and a list of thus-incurred costs of criminal proceedings.

An indictment may cover more than one criminal charge or more than one suspect under the conditions which apply to the joinder of proceedings, so a potential issue of whether or not to join charges or parties is simply resolved at the stage of issuing of an indictment. This is the first optional element of an indictment.

A motion for detention is another optional element of an indictment. A motion to order detention may be put forward if a suspect is not in custody at the moment an indictment is brought. If he has been detained in custody, it may be proposed that his detention be extended or that he be released. Systematic interpretation of the Code leads to a conclusion that a decision on detention may be passed only after an indictment has been confirmed since the Code lays down three types of detention which can be ordered depending on the stage in the proceedings: in the course of an investigation, after the confirmation of an indictment, and after the service of judgment. Preliminary hearing judges are competent to issue detention warrants or order termination thereof, while pre-trial chambers are competent to issue warrants of further detention. However, the CPC of BD BiH has extended the scope of jurisdiction of preliminary hearing judges, analogous to the duties discharged by preliminary proceedings judges during the course of an investigation, so both preliminary proceedings judges and preliminary hearing judges have jurisdiction over ordering, terminating, or extending detention. This has further simplified and accelerated criminal proceedings since there is no need for a pre-trial chamber and another three judges to be included in the preliminary proceedings.

Decision on an Indictment

A preliminary hearing judge will decide to confirm or dismiss all or some counts in an indictment depending on its contents, i.e. whether or not there is one or more counts in the indictment. Naturally, prior to that, a preliminary hearing judge has a duty to ascertain if the indictment is correct from the technical aspect of law and if need be, call on a prosecutor to correct or amend it so that it could be acted thereon, advising him of the consequences of his failure to act accordingly (see Article 148). Prosecutor's failure to act as requested by the Court in respect of correcting the indictment leads to its dismissal due to it not being completely or correctly drawn up. Likewise, a preliminary hearing judge ascertains if the Court has jurisdiction over the matter, if there are conditions to terminate investigation due to circumstances which preclude prosecution, and if the indictment has been duly drafted i.e. if it includes the statutory elements required under Article 227 of the BiH CPC. By taking this procedural action, he examines the indictment from the technical aspect of law.

If a preliminary hearing judge denies all or some counts of an indictment, he is obligated to pass a ruling and submit it to a prosecutor. Prosecutors may file an appeal against a ruling denying confirmation of all or some counts of the indictment within 24 hours and a court of second instance shall decide on the appeal within 72 hours. Such a legislative solution gives unnecessary precedence to prosecutors over defendants in two ways. Firstly, prosecutors are granted the right to appeal in case all or some counts in an indictment have not been confirmed (Article 228, paragraph 2) and ultimately, the right to bring a new or amended indictment based on new evidence, which is then submitted for confirmation (Article 228, paragraph 6). In the course of a new decision making process on the indictment, prosecutors are once again entitled to appeal in case all or some counts in a new or amended indictment are dismissed! There are no rational reasons to support such a provision since prosecutors are specialised state authorities whose profession is to prosecute offenders and they do not require a double protection under the law in case of an error at this stage of criminal proceedings. The right to issue a new or amended indictment is sufficient, without the right to appeal against decisions rendered by preliminary hearing judges. In addition, if the reform of criminal procedure legislation aims to achieve efficiency and procedural equality of both the prosecution and the defence (the so-called equality of arms), why should criminal proceedings be slowed down by giving precedence to one of the parties? Prosecutors do not need such a "privilege" and its detrimental effects to the integrity of criminal proceedings are greater than procedural benefits reaped by prosecutors.

In terms of the law, counts of an indictment are individual and independent particulars of acts from which arise elements of a criminal offence or concurrent criminal offences or a continuing criminal offence. Decision on an indictment is rendered within eight days and in cases of more complex matters within 15 days from the date on which the indictment was filed with the Court, without summoning the parties and without them being present. This is the first examination of the facts cited in an indictment and it is performed *ex officio* by a preliminary hearing judge, its subject being indictment's factual basis, its enacting clause, and the evidence submitted therewith by the prosecutor. This procedural action offers an answer to the question whether or not the charges are substantiated by evidence gathered by the prosecutor in the course of his investigation. If the evidence substantiates the charges, then there are reasonable grounds to believe that the suspect committed the offence at the time and in the manner as charged in the indictment and so the indictment is confirmed.

In the course of confirmation process, a preliminary hearing judge analyses each count of an indictment and evidence submitted by a prosecutor. Based on evidence annexed to the indictment, the preliminary hearing judge ascertains if the suspicion is well-grounded or not. Consequently, the principal and key elements in rendering a decision in a confirmation process is the evidence obtained and submitted by a prosecutor. Indictment confirmation is a procedural action which essentially stands for a factual analysis of an indictment, a duty assigned to a preliminary hearing judge, which is performed *ex officio*. Therefore, it is a judicial, legal, factual, and mandatory analysis of an indictment. Upon confirmation of an indictment, its factual analysis may not be carried out again, except in the course of evidentiary proceedings and delivery of judgment at the main hearing. The process of indictment confirmation is specific in cases of special proceedings. Consequently, during proceedings for issuing a criminal order, if a judge who decides thereon grants a motion to issue a criminal order, he will also confirm the indictment (Article 336). Ultimately, in proceedings against mentally incompetent offenders, an indictment must be

confirmed so that a main hearing could be held in order to determine if the offender committed the crime in the state of diminished capacity. Naturally, the possibility of his guilty plea is excluded since mental competence is a prerequisite for guilt.

Following the confirmation of some or all counts of an indictment, a suspect becomes an accused person, which leads to restrictions with regard to certain rights or in other words, legal consequences of initiated proceedings (see Article 18). The law does not specify formal requirements for confirmation of indictments, for instance by a ruling or an order. The simplest way of confirmation is to affix to the upper right corner of an indictment a judicial stamp which has indictment's reference number, date of confirmation, and the name and signature of a preliminary hearing judge who has confirmed it. Such a form of indictment confirmation is applicable to indictments which have only one count or when all counts contained therein are confirmed. However, when an indictment has several counts and only some of them are confirmed while others are denied, their confirmation needs to be given in the form of a ruling. A single ruling is made on all the counts in an indictment so that it can be clearly seen which counts have been confirmed and which have been denied. A confirmed indictment is served with the defendant and his defence attorney, if he has one, and if the defendant has not hired an attorney to defend him, one will be appointed providing the indictment has been brought for an offence punishable by imprisonment of 10 years or more. Obviously, as a party to the proceedings, a prosecutor must be advised of a positive outcome of the decision making process with regard to the indictment in order to take further steps in the course of the criminal proceedings. In effect, the Court will also serve the confirmed indictment on the prosecutor along with a summons to a hearing at which the defendant will enter his plea on all the counts contained in the confirmed indictment.

If a defendant is not remanded in custody, the indictment is served on him promptly, whereas if he is held in remand, the indictment is served within 24 hours following its confirmation. Therefore, a confirmed indictment is always served immediately after its confirmation, but if a defendant is in custody, a preliminary hearing judge is bound to act thereon as a matter of particular urgency. In addition to being served with a confirmed indictment, the defendant is summoned and notified by the preliminary hearing judge as follows: that he has 15 days from the date of the indictment service to file preliminary motions; that his plea hearing will be scheduled right after a ruling on his motions or after the deadline for filing preliminary motions has passed; as well as that at this hearing, he can state which evidence he intends to present at the main hearing. Preliminary motions are legal instruments which serve to assist in examination of indictments, but only on the initiative of defendants and the defence, which is why they are of optional character. However, the term "preliminary motions" does not correspond to the contents, i.e. essence of this legal remedy since it serves to contest an indictment that has already taken effect, i.e. been confirmed. From the procedural perspective, those are essentially "subsequent motions" and by filing them, the defence can hardly achieve its ultimate aim, to secure that the prosecutor withdraws the charges and thus terminate criminal proceedings (see Article 232). Therefore, in order for it to be an effective legal remedy from the point of view of the defence, the right to its use should precede the procedure for confirmation of indictments. Apart from this, there is a question whether or not the preliminary hearing judge is impartial when he rules on preliminary motions simply because he was the judge who confirmed the indictment and he has no procedural options to alter his decision. Ultimately, the underpinning principle of equality of arms has once again been compromised since the defence enjoys the right to an ineffective judicial relief, filing of preliminary motions, whereas the prosecution enjoys the right to an effective judicial

relief against rulings by which all or some counts in an indictment are dismissed, and that is the right to an appeal.

The law provides prosecutors with a possibility to issue new or amended indictments after all or some of the counts have been dismissed. New or amended indictments must be based on new evidence since the previous ones were dismissed precisely because a preliminary hearing judge did not establish that the suspicion was well-founded. These new/amended indictments must be submitted for confirmation as opposed to indictments amended at the main hearing, which need not be confirmed (Article 275).

After a preliminary hearing judge has made a decision on preliminary motions against an indictment or after the time limit for filing those motions has expired, a plea hearing is scheduled of which a defendant is notified when he is served with the indictment.

Entry of Plea

A defendant enters his plea before a preliminary hearing judge in the presence of a prosecutor and his defence attorney if he has selected one or if one has been appointed to him under the terms prescribed by the law. His plea is entered into the record, i.e. this procedural action is recorded using audio recording equipment. Previously, the defendant is advised of all the potential procedural consequences of his guilty plea, which are enumerated in Article 230 of the BiH CPC and which play a decisive role in accepting his plea of guilty at a hearing at which his guilty plea is deliberated on and adjudicated. This is the first time a defendant appears before the Court in person since criminal proceedings against him have commenced, providing he is out on pre-trial release. Namely, if in the course of an investigation an order was issued to detain a defendant, he should be brought before a preliminary proceedings judge prior to the issuing of a detention warrant in order to make a statement about the prosecutor's motion, give his arguments and contest the legality of the motion to detain, the so-called *habeas corpus* (see: Article 5, paragraph 3 of the ECHR). If a defendant refuses to plead, it is absolutely assumed that he pleads not guilty or denies his guilt, which is entered on the record. This means that defendant's right not to present his defence can be exercised at any stage of criminal proceedings, even at the stage of indictment procedure.

If a defendant enters a plea of guilty (*guilty plea*), a preliminary hearing judge refers, transfers the case to a judge or a panel for a hearing to be scheduled in order to determine if the conditions referred to in Article 230 of the Code have been met. The Code does not define a deadline by which the preliminary hearing judge must proceed accordingly, but it is obvious that the action must be taken promptly. The most common reasons which lead to defendant's decision to plead guilty include prosecution's solid evidence and the fact that pleading guilty is as a rule considered a mitigating circumstance during sentencing. If an indictment covers more than one defendant, and one or more of them (but not all) plead(s) guilty, criminal proceedings may be severed in respect of such persons. With regard to the defendants who have pleaded guilty, the procedure for delivering a judgment without holding the main trial continues if the Court accepts their guilty pleas. Regular criminal proceedings will continue against the defendants who have pleaded not guilty or whose guilty pleas have been rejected by the Court. As opposed to this, if only one defendant should plea guilty only on some counts in an indictment, it is not opportune to sever the proceedings for several reasons. In the first place, proceedings are not thus accelerated, but instead slowed down and

made more complex, which is not an intention of the guilty plea. Apart from this, defendant's rights to a trial without delay as well as the Criminal Code may be violated to the prejudice of such a defendant. Namely, two proceedings against the same defendant would be under way in parallel, while criminal sanction imposed on him would be independent and provisions governing single penalties for concurrent offences could not be applied to them. Whether the case file or a guilty plea are referred to a judge sitting alone or to a panel depends on the statutory penalty prescribed for the most serious offence cited in an indictment based on which the composition of the Court is defined. In the Brcko District, preliminary hearing judges deliberate on guilty plea statements and in this manner, the solution laid down by the lawmaker for deliberation on plea agreements at the stage of indictment procedure has been adopted (see Article 231), which is an optimal solution from the perspective of efficiency and economy of criminal proceedings. Also, such a legislative solution is in line with the principle of legality underlying Article 2, paragraph 3 of the BiH CPC since a criminal sanction may be imposed on an offender only by the competent Court in the proceedings conducted pursuant to the Code, unless otherwise provided for therein. The Code precisely provides that defendant's entering of guilty plea and deliberation thereon, as well as the sentencing hearing are under the jurisdiction of one judge, and that is the preliminary hearing judge, not a new judge sitting alone or even a panel composed of three new judges.

The original plea of not guilty is not considered in the process of sentencing in two cases. Firstly, the defendant does not change his original plea of not guilty and after the main hearing he is found guilty, and secondly, in the course of the evidentiary proceedings, the defendant changes his original plea of not guilty and subsequently enters a guilty plea. Such a ban pertains primarily to the Court and prevents it from using defendant's prior plea of not guilty to his prejudice when deliberating on his sentence. Pleading not guilty is an integral part of defendant's right to a defence and it may not be denied.

If a defendant enters a plea of not guilty (*not guilty plea*) and after his plea has been entered on the record, a preliminary hearing judge refers the case to a judge or a panel who have been assigned to the case in order for a main hearing to be scheduled within 30 days from the date on which the defendant entered his plea. Exceptionally, this time limit may be extended by additional 30 days at the motion of an interested party, most commonly the defendant and his attorney, for the purpose of preparing a defence. The Code does not stipulate a deadline by which a case should be referred to a judge or a panel, but it is expected that it is done promptly, immediately after defendant's plea of not guilty has been put on the record. Similarly, if his guilty plea has been rejected, the case is also referred to a judge or a panel since in that event, a main hearing or a trial will be held. It is necessary that preliminary hearing judges should act with urgency when undertaking the above-mentioned procedural actions so that the Court would have enough time to deliver a first-instance judgment in all the matters in which detention has been extended or ordered after the issuing of indictments.

Deliberation on the Guilty Plea

When deliberating on a guilty plea, a judge or a panel will examine several cumulatively defined elements. Firstly, whether or not the plea was entered voluntarily, knowingly, and with understanding, which means that it must be complete and unequivocal, issued knowingly and without any doubts with regard to defendant's competence. It also means that guilty pleas which are incomplete, partial, disputable and equivocal should be rejected. Likewise, a guilty plea may not be

the result of a threat, duress, ignorance, misunderstanding, permanent or temporary mental disorder, nor may it be conditional on anything, etc. The above facts only confirm that it is required that a defence attorney be present when this procedural action is undertaken so that defendant's rights are safeguarded. In view of that, if a defendant has not retained a counsel, the Court will in each particular case ascertain whether or not statutory conditions for assigning an attorney for the defence have been fulfilled: complexity of the case, defendant's mental state, the interests of justice and fairness. Otherwise, the Court is exposed to a danger of violating defendant's right to a defence and thus substantially violating criminal procedure rules.

A defendant is also advised of potential consequences of his guilty plea which are certain to take place. It is particularly examined if he has understood that by pleading guilty he waives his right to a trial, i.e. all of the rights in connection with the main hearing and evidentiary proceedings or the regular criminal proceedings. Also, other consequences stipulated under the Code are mentioned: imposition of an appropriate criminal sanction, seizure of object(s), confiscation of proceeds, awarding a restitution claim, obligation to pay the costs of the criminal proceedings, etc. With regard to potential consequences of a guilty plea, they also include facts connected with the character of future criminal proceedings. Namely, a defendant must be informed that the entire proceedings entail only a sentencing hearing and that by pleading guilty he virtually renounces his right to a trial. Consequently, the defendant is advised in detail and officially of all the consequences of his guilty plea and circumstances connected with this institute: whether or not he has sufficient time to prepare his defence, whether or not he has been given an opportunity to select a defence attorney from the roster of lawyers prior to having been assigned an attorney in cases of mandatory defence or indigent persons. It is judged based on all those circumstances if the guilty plea has been issued voluntarily, knowingly, and with full understanding and without violation of the right to a defence. Thus, defendant's plea of guilty and acceptance of such a plea by the Court will result in the conclusion of criminal proceedings without a main hearing, whereby the proceedings are concluded in a simple and efficient manner since they are limited to a sentencing hearing.

Then, the Court examines if there is sufficient evidence to support defendant's guilt. This refers to defendant's guilt for a criminal offence committed in terms of Article 36 of the BiH CPC. Practically, defendant's mens rea is established based on evidence submitted by the prosecutor to the preliminary hearing judge together with the indictment as well as based on the contents of defendant's guilty plea done in writing, which is examined by the Court. Consequently, it is ascertained whether or not there are grounds which exclude defendant's guilt because criminal sanctions may be imposed only on a competent offender who perpetrated a crime with intent or by negligence if thus expressly prescribed under the law. If the quality of evidence submitted with the indictment does not confirm that the defendant was precisely the person who perpetrated the offence, his guilty plea will be rejected.

The parties may not submit a plea agreement to the Court before deliberation on a guilty plea because Article 231, paragraph 2 of the BiH CPC forbids conclusion of a plea agreement if a defendant has entered a guilty plea at a plea hearing. However, a plea agreement is a procedural institute which represents a procedural situation more favourable and safe for a defendant. Advantages which the institute of plea agreement brings to a defendant are obvious due to the fact that the type and extent of a criminal sanction which is imposed based on a plea agreement and which cannot be appealed are certain. Thus, taking into account defendant's interest, the defence is entitled to deny his guilt on any grounds at a plea hearing so that the Court would reject the guilty plea. Thereafter, the defence

is given a procedural option of drawing up and submitting a plea agreement to a judge sitting alone or to a panel assigned to the case so that a main hearing would be scheduled. In case the Court accepts a guilty plea, defendant's plea is put on the record and the Court immediately proceeds to hold a sentencing hearing. A sentencing hearing is conducted by a judge sitting alone or by a panel who deliberated on the guilty plea and accepted it. Sentencing hearings deal solely with the evidence which pertains to a decision on a penalty and mitigating and aggravating circumstances on which it depends if the sentence will be more severe or lighter. Thus, the purpose of this institute can be found in the fact that Court's decision to accept a guilty plea is final, that it may not be appealed or that it is not subject to a review or change at a sentencing hearing. Understandably enough, judgments based on accepted guilty pleas may be appealed on grounds of the criminal sanction imposed, although appeals on other grounds are not excluded either. However, due to the nature of this procedural institute, chances of success of appeals filed on other grounds as a rule are not great because at an earlier stage the defendant had expressly waived his right to a trial.

In case the Court rejects a guilty plea, the parties and the defence attorney are informed accordingly and the rejection is put on the record. A decision to reject a guilty plea may not be appealed. The Court concludes the procedure for deliberation on the guilty plea with this procedural action and the regular criminal proceedings are continued in accordance with the law. Naturally, the guilty plea may not be used as evidence in the criminal proceedings so the records of the entry of guilty plea and deliberation thereon are kept and preserved in a special envelope in the case file of the preliminary hearing judge. Those records may not be included in an annex to the indictment or in the case file which is submitted to a judge or a panel so that a main hearing would be scheduled. In practice, an accompanying document is submitted to the Court in the form of a notification about the date on which procedure for deliberation on the guilty plea is concluded because the time limit for scheduling the main hearing starts to expire on that date. By analogy, this procedural action is also taken when plea agreements are dismissed.

We would like to recall that under the CPC of BD BiH, deliberation on a guilty plea and a sentencing hearing are within the jurisdiction of a preliminary hearing judge, which has simplified and accelerated the criminal proceedings in several ways since all procedural actions are performed by a single judge without unnecessarily referring the case to a new judge sitting alone or to a new panel.

The principal characteristic of this procedural action and an efficient model for concluding criminal proceedings is a total lack of evidentiary proceedings and proceeding to hold a sentencing hearing. Guilty pleas are not limited by the type and seriousness of a crime, category to which a defendant who enters his plea belongs, nor by the type of Court before which criminal proceedings are conducted. Statistical data show that more than half the criminal cases in Bosnia and Herzegovina are disposed of by applying guilty pleas, plea agreements, and criminal orders, of which 10% of cases are concluded by applying the guilty plea.

Conclusion

Confirmation of an indictment and guilty pleas are simplified forms of procedure as well as mandatory procedural actions whose introduction into criminal proceedings conducted in Bosnia and Herzegovina has met all the expectations from the aspect of efficiency and economy of criminal proceedings and the right to a trial within a reasonable time.

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Plea Bargaining under the CPC of the Republic of Macedonia

1. Preliminary Remarks

The last decade could be described, in terms of laws governing criminal procedure, as a decade of reforms in a number of countries in Continental Europe. It was characterised by dynamic development and legislative interventions which led towards the acceleration of criminal proceedings, dispensing with formalities when resolving criminal matters, and adoption of certain institutes of the common law system, along with necessary modifications to suit the mixed model of criminal procedure. The mixed model of criminal procedure has come under a barrage of criticism for being markedly formal, rigid and inefficient. The Council of Europe has had a key role in the adoption of various forms of proceedings since its Recommendation P(87)18 underlines the need for simplification of criminal proceedings which should be simple and expeditious and that a defendant who pleads guilty to a crime should not be uncertain for a long time about what his sentence would be.[3] A comparative analysis of criminal procedure models used in several European (Germany, Italy, France, Norway, and the Netherlands) and Balkan countries (Serbia, Bosnia and Herzegovina, Croatia) preceded various solutions included in the CPC of Macedonia by which proceedings were accelerated.[4] The most recent solutions introduced into the Criminal Procedure Code of Macedonia have remodelled several of its procedural instruments; this has redefined the roles fulfilled by the parties to proceedings and a defence attorney and emphasised the importance of the initiative taken by the parties in criminal proceedings as a possibility to avoid regular criminal proceedings and achieve a more rational and effective system of crimi-

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3 Recommendation no. R (87) 18 concerning the simplification of criminal justice, 17 September 1987.
4 Гордана Лажетиќ Бужаровска/Лазар Нанев/Бобан Мисоски, Компаративно истражување на решенијата за забрзување и поедноставување на казнената постапка, МРКК, br. 1/2008.

nal justice which it entails. It should be stresses that the plea bargaining process has profound significance as an expression of the so-called negotiated criminal justice.[5]

The comparative analysis which preceded these new provisions on plea bargaining, in addition to the rules and laws of the countries which uphold the common law tradition, namely the USA and the UK, encompassed as well the legal systems of Italy, Germany, France, Croatia and Bosnia and Herzegovina, as those European countries whose systems of criminal procedure are hybrid, combined with the institutes of the common law.[6] The analysis indicated that the traditional continental criminal procedure was being combined more and more with the institutes and forms of common law with the following aims: unburdening the regular criminal proceedings; avoiding unnecessary delays; dispensing with formalities in the regular proceedings and procedural actions; stressing the importance of party's initiative under the conditions set out by the law; improving the position of the injured party; introducing new possibilities for alternative and out of court settlement of cases. Considering the aims and the course of the reform, it can be concluded that the traditional form of mixed procedure has been going out of practice slowly, yet certainly, and that it has been more frequently combined with the institutes of common law and models of negotiated criminal justice.

2. Characteristics of Plea Bargaining

Macedonian lawmakers have accepted a legislative concept which is used in some European countries and which provides for a sentencing procedure based on negotiations between the parties during investigative proceedings. Such a solution can be found both in Italian (*patteggiamento*) and French (*plaider coupable*) legal systems.[7] Following the Italian model for rendering judgments based on motions by the parties (*patteggiamento*), Macedonian lawmakers adopted a procedure for rendering judgments based on plea agreements between public prosecutors and defendants during investigative proceedings.

Plea bargaining is precisely one of the methods which provides for the demonstration of *parties' initiative and consent,* optimal use of financial and human resources, and leads to economic efficiency. There is a noticeable difference between motives for plea negotiations in the countries which follow the common law tradition and those in Continental Europe. The US model includes *charge bargaining*, which has an impact on the scope of an indictment (counts in an indictment, particulars of the offences, legal classification of the offences), whereas the model of plea bargaining which has been adopted in Europe pertains to the type and duration of criminal sanctions, which is known as *sentence bargaining*; also, legislative systems differ among themselves with regard to the participation of judges in the process of plea bargaining. The legal tradition of Continental Europe, due to its dominant principle of legality, precludes something that is frequently used in common law countries – namely, it precludes plea bargaining from developing in

5 The new CPC was published in the *Official Gazette of the Macedonia*, No. 150/2010

6 Гордана Лажетиќ – Бужаровска/Бобан Мисоски, Спогодување и медијација, МРКПК, бр. 2/2009 година, стр. 215-260.

7 Articles 444 through 448 of the Italian CPC, Andrea Tassi, Posebna postupanja, u Talijanski Kazneni Postupak (ed. B. Pavišić), Pravni Fakultet Sveucilišta u Rijeci, 2002, str. 197-212; It was introduced in France by the *Law Loi Perben II*, on March 9, 2004, *Official Journal* March 10, 2004; its implementation began in October 2004; for more details, see: Elizabeta Ivičević, Plaider coupable - Nove alternative klasičnom kaznenom postupku u francuskom pravu, str. 203-208, www.pravo.hr/_download/repository/09ivicevic%5B3%5D.pdf

practice first, and only then being legislated. For instance, plea bargaining had been used in the UK for a long time, whereas it was introduced into its legislation only in 1996.

The concept is framed upon the Recommendation R(87)18, which allows the Court to render a decision even without conducting investigative proceedings, but after having heard the parties in respect of a plea agreement. Namely, a judge must have an opportunity to examine if a defendant is aware of plea agreement's import and its consequences, then to ascertain the circumstances of the case based on available evidence which pertains to the facts of the case, as well as to assess offender's personality.

Provisions of the new CPC have introduced the concept of *sentence bargaining* between a public prosecutor and a defendant, but not the concept of charge bargaining. Namely, in an order to conduct investigation, a public prosecutor is obligated to provide particulars and legal classification of the offences which should be investigated. Plea bargaining is possible with regard to all or some criminal offences cited in the order and all or some suspects can enter into plea bargain negotiations. What this means is that an order to conduct investigation and the subject matter of plea agreement do not need to correspond precisely to each other either in terms of offences (charges) or in terms of defendants. However, the limits of the subjective and objective identity may not be crossed – a prosecutor may not negotiate on a sentence to be imposed on a person who is not mentioned in the order or for an offence which in not mentioned therein. The subject matter of a plea agreement includes the type and duration of a penalty. In respect of penalty which may be stipulated in a plea agreement, a prosecutor must take into account the limits set in the Criminal Code as well as requirements prescribed for mitigation of a sentence.

The final document of plea bargaining is *a draft plea agreement*. The term was selected since it is not an agreement out of which arise any legal consequences. Although it is signed by the parties and a defence attorney, a draft plea agreement does not constitute a title of execution, nor do the doctrines *ne bis in idem* and *res Judicata* apply to it. A signed draft plea agreement is a document made in writing which gives grounds for beginning procedure for assessing the subject matter of the agreement by the Court. The subject matter of such a draft plea agreement will have legal effect only when it is included in the operative part of a judgment of conviction which the Court has passed based on the accepted draft plea agreement. Under the provisions of the CPC, a draft plea agreement has several elements, which could be divided into three sections. The first section contains information about the parties and a defence attorney, particulars of the offence on which the parties negotiated and its legal classification pursuant to the provisions of the Criminal Code. These elements are not the subject matter of plea bargaining, which is why they could be regarded as the so-called introduction of a draft plea agreement. The main section of a draft plea agreement contains the subject matter thereof, namely a proposed sentence, its type, duration and form, the amount of a restitution claim (providing the defence has consented to including the restitution claim into the plea agreement), suspect's statement that he knowingly and voluntarily accepts the draft plea agreement and parties' statement by which they waive their right to file an appeal in case the draft plea agreement is accepted and the Court delivers a judgment based thereon. The third section of a draft plea agreement contains the costs of proceedings and the manner in which they will be covered, parties' and defence attorney's signatures, date and place of concluding the draft agreement.

Only the provisions on plea bargaining which can be found in the CPC of Macedonia implicitly include *the injured party.* Namely, the injured party does not participate in plea bargaining. Taking into account interests of the injured party, a prosecutor is bound to obtain a written statement from him. Namely, the prosecutor must inform the injured part that plea bargain discussions with a suspect are under way and that the injured party may put forward a restitution claim in writing. The injured party should be advised that his restitution claim may, but does not have to be, the subject matter of plea bargaining. Namely, it depends on the defence whether or not a restitution claim will be the subject matter of a plea agreement. Nevertheless, the injured party is not left without judicial relief and in cases when his claim is not included in a plea agreement, he may bring a civil action for indemnification after receiving a judgment based on a plea agreement between the parties.

Plea bargaining allows that *a mutually acceptable outcome of criminal proceedings* is achieved *as early as at the stage of an investigation*. In cases which are prosecuted *ex officio*, public prosecutors have the right and duty to decide whether or not there are reasons which can justify entering into plea bargain negotiations with a defendant under the conditions stipulated by the CPC. Both the prosecutor and the defence may initiate plea negotiations. Namely, the defence (a defendant and his defence attorney) may initiate plea bargain negotiations if they deem negotiations are opportune in the light of the circumstances of their case. What is new is that a judgment based on a plea bargain may be rendered as early as in the course of investigative proceedings. A preliminary proceedings judge has powers to such an end and such a solution greatly expedites criminal proceedings.

Having deemed that evidence is the factor that influences plea bargaining and not the severity of a criminal offence, the Macedonian legislators decided not to restrict that process with regard to statutory sentences. In this respect, *each and every criminal offence may be subject to plea bargain negotiations.* A guilty plea is not a prerequisite for the beginning of plea bargaining negotiations during investigative proceedings. A draft plea agreement is an expression of consent of both parties, not only one of them, and it must include a proposed sentence, whose type and duration must be within the scope prescribed by the law for each specific criminal offence, but not below the limits for sentence mitigation provided for in the Criminal Code.

In order to ensure that plea bargaining is realistic and fair, the Macedonian lawmakers have broadened the scope of *mandatory defence* – defence attorney's presence during plea bargain discussions is mandatory from the very beginning of the process. The aim of this is to safeguard defendant's rights, which also entails complying with the principle of equality of arms and consequently preventing a defendant from participating in negotiations on his own since he is usually a lay person and is not aware which penalty is realistic and which facts of a criminal case can be used in plea bargaining. Thus, the defendant is provided with legal representation to assist him when assessing if his participation in plea negotiations is opportune and justified.

Given that plea bargaining is defined as a negotiation process between a prosecutor and the defence (a defendant and his defence attorney), *the court may not participate in such negotiations.* Namely, lawmaker's position according to which a judge may not participate in plea bargain discussions is expressly singled out. The purpose of such a ban is to curb the influence of the Court with regard to the selection of the type and duration of a sentence, as well as to stress the role of the parties in the plea bargain process. Since judges do not participate in the plea bargaining

process, they have no information about its course. A judge can only examine a draft plea agreement with which he is provided by the prosecutor. After receiving a draft plea agreement, the Court fulfils its true role by making an assessment of the agreement. A preliminary proceedings judge has a duty to examine a submitted draft plea agreement at a special hearing of which a record is made. This conforms with the spirit of the Recommendation made by the Council of Europe, which stipulates that evaluation of plea agreements must take place at a public hearing and in the presence of both parties and that a judge must not rule on a draft plea agreement without having an opportunity to examine its contents, ask a defendant some control questions to make sure that he is aware of the consequences of the agreement, that he voluntarily entered into it, and that he has not erred in his judgment of the contents and effects of the agreement. At the same time, the judge must examine if the defendant is aware of the consequences with regard to the restitution claim and costs of criminal proceedings. It is the duty of a preliminary hearing judge to advise the parties that they may withdraw from a submitted agreement before the Court commences its evaluation, as well as that court's acceptance of the agreement and rendering of a judgment based thereon implies that the parties have waived their right to appeal. These facts are known to the parties since they are included in the very agreement, but the judge nevertheless has a duty to verify them before ruling on the agreement.

Either party is entitled to expressly *withdraw from a submitted agreement* by stating at the hearing that they are withdrawing therefrom or by notifying the judge in writing that they are withdrawing from the submitted agreement. If it should happen that in the course of the hearing either party expresses doubts about the penalty proposed in the agreement and belief that the penalty could be stricter (the prosecutor) or lighter (the defence), this shall be construed as the withdrawal of the agreement and the judge shall discontinue further plea bargaining procedure. The Macedonian lawmakers have decided not to introduce any restrictions with regard to the number of draft plea agreements which the parties may submit to a judge. Namely, the parties may withdraw from a draft plea agreement, only to submit a new one to a preliminary proceedings judge who is bound to act as if the previous agreement never existed. This implies that plea negotiations are completely in the hands of the parties.

The role fulfilled by a judge is the most prominent when it comes to *the evaluation of a draft plea agreement.* He will issue a ruling dismissing a draft agreement in case either of the parties withdraws from a plea bargain or proposes a different sentence from the one stipulated under the draft agreement. However, when examining a draft plea agreement, a preliminary proceedings judge should assess the quantity and quality of submitted evidence with regard to the facts of the case, irrefutable evidence with regard to defendant's guilt and evidence relevant to the selection and meting out of a sentence. The judge will issue a ruling dismissing the draft plea agreement in case he finds that it does not justify passing a judgment on account of questionable or incomplete evidence or if he is not satisfied that the defendant is guilty or if he finds that from the evidence obtained he cannot judge if the proposed sentence is legal and justified. Consequently, a draft plea agreement is dependant on the will of the parties, while a decision on its acceptance falls under the purview of the judge. In the event a judge makes a ruling by which he dismisses a draft plea agreement, he has a duty to return all the files to a public prosecutor, whereas the hearing record and the draft plea agreement made in writing may not be used any further in the criminal proceedings; they are removed from the case file and kept in a separately sealed envelope. In the event a preliminary proceedings judge decides to accept a draft plea agreement, he will deliver *a judgment based thereon,* by which he may not impose any other sentence than the one proposed

in the agreement. It shall include all the elements of a judgment of conviction, it will be made public directly after it has been rendered and it is drafted within three days. The judgment is immediately served on the public prosecutor, the defendant and his defence attorney. Not to forget the injured party, a copy of the judgment is delivered to him as well, so that he could exercise his right in a civil action in cases when he is not satisfied with the result of the judgment which pertains to his restitution claim. Such a judgment is the judgment on merits, it is final and enforceable. It is thus provided that criminal proceedings can be ended as early as at the investigation stage.

According to the Recommendation of the Council of Europe, legislators must ensure that guilty pleas are entered at a public hearing and that judges have an opportunity to verify if defendants truly accept their guilt and if they are aware of the consequences of a guilty plea. Under the CPC of Macedonia, plea bargaining can also take place *at the stage of examination of an indictment,* but a prerequisite for this is that a defendant has expressly pleaded guilty. A defendant can plead guilty to all or some of the counts in an indictment. Similarly, a guilty plea may be entered by one of the suspects against whom a single indictment has been brought (not all of them have to plead guilty). Defendants may plead guilty in two ways. Upon receiving an indictment, the defence has 8 days to notify a judge or an indictment panel that a suspect is ready to enter a guilty plea. In such cases, a competent judicial authority sets a hearing date. The purpose of holding a hearing is that a judge or a panel should assess the veracity of a guilty plea, whether or not it was issued voluntarily and whether or not the suspect is aware of the fact that the proceedings will end by rendering a judgment at the stage of the indictment examination and if that is his intention. If a guilty plea is not accepted, the hearing proceeds to examination of the indictment and the guilty plea and a record thereof are separated from the case file and kept in a separate envelope not to be used in further proceedings. If a guilty plea is accepted, the judge or the panel do not make any particular decision but instead, they adjourn a hearing for a period of 15 days. The parties then have 15 days to negotiate and submit a draft plea agreement. Another way entails pleading guilty at a hearing at which the indictment is examined. Upon entry of a plea of guilty, providing it is accepted, proceedings are conducted in the same manner as when a guilty plea is accepted in the previous case. If the public prosecutor and the suspect file a draft plea agreement in the form prescribed by the law at the hearing continuing after the adjournment, the judge or the indictment panel must assess if the draft plea agreement is well-founded: if it is deemed inadmissible, the judge or the indictment panel will issue a ruling denying the draft agreement and proceed to the examination of the indictment. A draft plea agreement which has been denied may not be used as evidence in the following stages of criminal proceedings, which is why it is placed in a sealed envelope and separated from the case file. If a draft plea agreement is found admissible, the judge or the indictment panel shall make a judgment by accordingly applying provisions which govern the rendering of judgments based on agreements between public prosecutors and defendants at the investigation stage; if a guilty plea and a draft plea agreement pertain only to some offences cited in an indictment, the judge or the indictment panel shall assess if the indictment is well-founded only with regard to its segment which is not included in the draft plea agreement. This implies that plea negotiations which take place during the examination of an indictment are substantially different from plea bargain negotiations which are conducted in the course of an investigation. Namely, during the examination of an indictment, only the defence may initiate plea negotiations, not the prosecution. A plea bargaining process is limited in terms of its duration and it may last only 15 days. Unsuccessful plea negotiations may not be resumed. If efforts at plea bargaining have failed and the parties do not submit a draft plea agreement to the Court, proceedings will continue by examination of the indictment. With regard to the role of the Court, the

same does not apply. Namely, in order for plea bargaining to begin, the Court must first evaluate and accept a guilty plea, after which it will assess a draft plea agreement.

A plea of guilty may be entered latest at *the first hearing in a trial.* It needs to be pointed out that there can be no plea bargaining or submission of a draft plea agreement during the main hearing and that instead, a guilty plea constitutes grounds for limiting evidentiary proceedings to presenting evidence relevant to the type and duration of a sentence. A plea of guilty is entered at the main hearing after the parties have made their opening statements, but before the commencement of evidentiary proceedings. At the same time, a presiding judge will call on a defendant to make a statement with regard to the counts in the indictment and the defendant may, irrespective of the nature and seriousness of the offence for which he is being tried, voluntarily enter a guilty plea for one or more counts in the indictment. The presiding judge has a duty to examine whether or not defendant's plea is voluntary and whether or not his is aware of the legal consequences of his guilty plea, of the consequences in connection with a restitution claim and costs of the proceedings. If the Court finds that the plea is well-founded, it will inform so those who are in attendance, enter it into a trial record and the main hearing will proceed to the presentation of evidence relevant to the sentence. Otherwise, the Court will put on the record that the plea has not been accepted and the main hearing will proceed as usual, whereas the plea may not be used as evidence in evidentiary proceedings. A defendant may not appeal against a judgment on the grounds of erroneous finding of facts if it has been passed based on an accepted plea of guilty. Provisions pertaining to guilty pleas which are entered at the main hearing have made procedural actions which are part of the main hearing more efficient. In this case, the focus of the main hearing is shifted not on deliberation about the issues concerning the establishment of guilt, criminal liability, and facts of the case, but on the presentation of evidence which supports the imposition of an appropriate penalty and deciding on the type and duration thereof.

Provisions which pertain to guilty pleas entered in the course of the main hearing which is part of the regular criminal proceedings are accordingly applied in the course of the hearing in *summary proceedings* conducted by a single judge. What this implies is that it is not possible to sign a plea agreement during summary proceedings, but it is only provided that a defendant is entitled to enter a guilty plea whose acceptance leads towards the presentation of evidence relevant to the sentence.

3. Parties' Roles in Plea Bargaining

Given the fact that plea bargaining is a novelty in the Criminal Procedure Code of Macedonia and for the purpose of understanding more clearly its meaning and achieving projected results in practice, we can briefly summarize the role of the parties.

Prosecutor. Since he is a *dominus litis* of the investigative proceedings and since the defence is notified of investigation results rather late in the process, it is to be expected that the prosecutor will initiate plea negotiations. This is in conformity with prosecutor's authority to *decide on the method of criminal prosecution based on his discretionary powers.* In the US, the said prosecutor's role is referred to as criminal prosecution management – it enables him to manage efficiently the scope of criminal cases which he will prosecute considering the total number of cases, their complexity, financial resources and staff which are available to him, protection of public interest, etc;

in addition to his powers with regard to the launching of criminal investigation, the prosecutor selects a method of prosecution, and one of those methods is entering into plea negotiations with a defendant instead of initiating and conducting regular criminal proceedings, by applying the principle of prosecutorial discretion and opting not to bring criminal prosecution when thus provided for in the statute. Considering the powers given to prosecutors in the course of plea bargaining, their role becomes similar to the role of a trier of facts since plea bargaining entails an agreement on the facts of the case which is made based on the available body of evidence. At the same time, the prosecutor should take into account both offender's interests and the wider public interest which is to prosecute offenders.[8] Prosecutors fulfil the said role in those legal systems which have adopted some form of prosecutorial discretion.[9]

A prosecutor should be proactive and flexible in the course of plea bargaining, but at the same time he should consider the legality of actions and of the proposed sentence. His role as the one who guarantees and safeguards the legality is very important. In this respect, the prosecutor considers the quality of evidence and its evidentiary value and based on his judgment, he decides to initiate plea negotiations. In practice, a prosecutor needs to decide which sentence he will propose in view of the circumstances of each specific case. In doing so, he should be guided by the relevant case law concerning the criminal offence in question and the penalty which would be imposed on a defendant if regular criminal proceedings were conducted against him. At the level of a public prosecutor's office there should be an /established/ manner of *proposing sentences,* general guidelines and standards to help prosecutors make the right decisions, while taking into account the provisions on mitigation of sentences contained in the Criminal Code. It will not be possible to implement in Macedonia a common law practice - the so-called bargaining tactics – when in order to win the best possible position for negotiations, a prosecutor is allowed to pursue a strategy of bringing too extensive charges horizontally, by increasing the number of criminal offences with which a defendant is charged, or a strategy of bringing too extensive charges vertically, by stating in the indictment (classifying the act as) a more serious form of the criminal offence instead of the less serious one; this entails a risk of the defence hindering the prosecutor's strategy based on the quality of evidence which he uses to support the indictment and in cases of failed plea bargain attempts, prosecutors must issue realistic indictments since jury trials do not tolerate any unrealistic indictment strategies. Prosecutor's authority to propose and decide on a sentence in the US is also referred to as the role of a direct creator of the law since in view of the common law system (*case law*), prosecutors' decisions may have considerable influence on similar criminal cases in the future.[10]

Defence Attorney. The role of a defence attorney entails his professional representation of a defendant as his legal counsel, as well as use of objective and adequate judgment which is solely focused on looking after the interests of the defendant. A defence attorney must examine the evidence and assess if it in the defendant's interest to enter into plea negotiations initiated by the prosecution or

8 Alshuler, The Prosecutor's Role in Plea Bargaining, *The University of Chicago Law Review*, Vol. 36, No. 1. (Autumn, 1968), pp. 50-112; McConville, Mike, Plea Bargaining: Ethics and Politics, pp. 562-587, Journal of Law and Society, Vol. 25, No. 4, 1998, p. 572; Hudson Barbara, Bramhall Gaynor, Assessing the "Other", Constructions of 'Asianness' in Risk Assessments by Probation Officers, 45 British Journal of Criminology, September 2005, pp. 721-749

9 Yue, Ma, Prosecutorial Discretion and Plea Bargaining in the USA, Germany, France and Italy: A Comparative Perspective, International Criminal Justice Review, 2002, pp. 12 and 22

10 Mather, Lynn M, Plea bargaining or trial? The Process of Criminal-Case Disposition, Lexington, Mass. (etc.), Teakfield Ltd, 1979, p. 142; Heumann Milton, Plea Bargaining: The Experiences of Prosecutors, Judges and Defense Attorneys, University of Chicago Press, 1978, p. 107. For French criminal procedure, see: Dervieux, Valerie, The French System, in European Criminal Procedures, Ed. by, Delmas-Marty, Mirreille and Spencer, J. R., Cambridge University Press, 2002

it would serve the interests of the defence to initiate plea bargaining. Defence attorneys should be experienced and versed in criminal policy of the courts in order to be able to judge which sentence is acceptable in a given case. Since a defence attorney must be present at plea negotiations from the very beginning of that process, it can be inferred that such procedure is fair and that defendant's interests have been adequately represented. This is only an assumption which can be challenged, probably in cases of some defence counsels appointed *ex officio*. Namely, an unfair practice has come to light, when defence attorneys, probably due to the sheer volume of work or pure conformism, for the purpose of resolving cases more easily and quickly, encourage defendants to accept plea agreements with prosecutors.[11] Similar shortcomings of the plea bargain process can also be found in Italy.[12] This problem can be overcome by imposing an obligation that the defendant himself must be present during the plea bargaining process in which case his attorney shall be under a moral obligation to represent his interests in the most adequate manner. The role of defence attorneys in the US is defined by a number of documents issued by the American Bar Association.[13] An opinion can be found in literature which comes from the US according to which, except for motives which are of financial nature, a defence attorney may also pressure a defendant to accept a plea bargain because there is a prior contract between him and a prosecutor under which the latter will give preferential or more favourable treatment to another defendant who is represented by the same attorney in another case. It is a kind of a "trade" due to which a defence attorney disregards defendant's interests instead of protecting them, which constitutes a particular violation of defendant's rights and thus can provide grounds for rendering his plea null and void.[14] However, defence attorney's role should not be construed as negative, but as a major contribution to the plea bargaining process since his role is to guard and guarantee the rights of defendants and since his duty is to use lawful methods when reacting to potential abuses of defendant's rights by the prosecution or the court in the course plea bargaining.

Court. The Court gets involved at the last stage of plea bargaining which takes place during an investigation – after the submission of a draft plea agreement, when it has a duty to assess if it is acceptable or not. The Court reserves its function to judge according to the accusatory principle of the division of roles between the parties and the court. It is entirely acceptable that a judge should have no knowledge about the course of plea bargaining, its failed attempts, various negotiation positions, variations, etc. In the US criminal justice system, under the Rule 11 of the Federal Rules of Criminal Justice, the court must not participate in plea agreement discussions. Namely, judges are independent arbiters who only determine if defendant's acceptance of criminal liability is voluntary or not as well as arbiters who assess whether or not he accepted criminal liability knowingly and voluntarily and if he was aware of all the consequences which would arise from his plea of guilty. A legislative solution according to which judges do not participate in plea bargaining is considered the most preferable because judges retain their impartiality and their position of arbiters who judge only based on evidence and have no knowledge of the plea bargaining and plea agreement processes. Thereby, judges are not burdened with previous information which the prosecution and a defendant and his defence attorney have made available to each other.

11 Alshuler, The Defense Attorney's Role in Plea Bargaining, *The Yale Law Journal*, Vol. 84, No. 6. (May, 1975), pp. 1179-1314.

12 Maffei, Stefano, Negotiations on evidence, Negotiations on sentence, (Adversarial experiments in Italian Criminal Procedure), Journal of International Criminal Justice, Oxford University Press, 2 (2004), pp. 1050-1069.

13 ABA Standards Ralating to the Defence Function; ABA Code for Diciplinary responsibility of the defence attorneys. Also see, Alshuler, op. cit., pp. 1252 and 1308; Kamisar Y., LaFave W. R., Israel J. H., King N. J., Modern Criminal Procedure, Cases, Comments and Questions, 9-th edition, American Casebook Series, West Group, St. Paul, Minn. 1999, p. 1302

14 McConvile, Plea Bargaining: Ethics and Politics, p. 567

4. Conclusion

Provisions of the new CPC of Macedonia have placed the concept of criminal justice within the framework of contemporary Continental systems with prominent accusatory elements whose aim is to promote the efficiency and economy of criminal justice while duly respecting the guarantees of defendant's right to a defence and the rights of the injured party.

Sentence bargaining can be successfully used in practice if each party to the proceedings is well informed of legal possibilities which it offers and uses them actively, which implies that the parties need to take initiative and be flexible and judges need to be impartial when they examine submitted draft plea agreements. Lawmakers have allowed a range of possibilities for plea bargaining and pleading guilty in order to motivate the parties to influence the course of proceedings given the available evidence, their practical experience and current sentencing policy. It would be useful if the parties, defence attorneys, and judges were acquainted with their powers in order to be able to use them as much as possible.

It would not be too much to expect that plea bargaining would be used more widely in practice even though the concept of the main hearing and the system of *cross examination* is rather demanding since it entails excellent preparation, quick reactions in case of unpleasant surprises during witness examination, assessing who should be cross-examined as a witness and who should not, whether or not it would serve defendant's interests if the defence offered his testimony, etc.

One thing is certain, plea bargaining will lead to more efficient and expeditious criminal proceedings, but not to the prejudice of a fair trial and an appropriate sentence, only if it is correctly used in practice.

Maja Koneska[1]

The new Role of the Public Prosecutor in the Accelerated Proceedings in Macedonia with Special Reference to Plea Bargaining

Recommendation no. R 87 18 of the Committee of the Ministers of the Council of Europe on the simplification of the criminal justice prescribes an institute – plea bargaining with a view to accelerate the procedure in criminal matters. The rule is that when the accused person admits the guilt, the proceedings should be simpler and a prolonged uncertainty about the sanction which is going to be imposed should be avoided. On the other hand, the public prosecutor has the opportunity to conclude the case quickly, i.e. to conclude a part of it, while the court just needs to impose the sanction. The path to benefiting in this way in modern proceedings has been paved by the new CPC which is expected to enter application in the Republic of Macedonia at the end of next year, when it is expected that the plea bargaining will become more common in the everyday procedural practice. It is expected that most of the criminal cases will be closed at an earlier stage through the regular application of this new institute, while the ordinary criminal proceedings should under such conditions be applied to a smaller number of criminal cases in which the defence hopes to convince the judge of the innocence of the accused at the trial.

New CPC for the first time in the criminal procedure legislation of Macedonia stipulates and regulates the possibility of applying plea bargaining with the public prosecutor on one side and the accused with a defence counsel on the other side. The plea bargaining is related only to the type and severity of the criminal sanction. It is stipulated that the plea bargaining may be applied to all of the criminal offences regardless on how severe is the prescribed sanction. When negotiating how to determine the criminal sanction in terms of its type and severity, it is determined within the limits set by the law for the specific criminal offence, but it is stipulated that the severity of the sanction is not negotiated and it is set below the limit of mitigation of the legally prescribed penalty.

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The proposed agreement expresses previously reached consensus by both parties, the defence and the public prosecutor, and it is not allowed to propose it unilaterally, i.e. to be submitted to the court just by one of the subjects. The initiative proposing the agreement may come from any of the two parties, and when the willingness to start plea bargaining is established, the preparations begin.

New CPC allows plea bargaining from the moment the public prosecutor orders the investigation proceedings to start up to the moment the panel starts reviewing the accusatory instrument. The guilty plea is not a prerequisite for the plea bargaining to start during the investigation, but at the stage of reviewing the accusatory instrument, the admission of guilt is a necessary prerequisite for the beginning of the plea bargaining procedure.

How are the rights of the injured party protected during the plea bargaining?

The public prosecutor has an obligation according to the proposed agreement to submit along with the rest of the obtained evidence a written statement signed by the injured party regarding the type of the restitution claims and the sum claimed. As a part of the plea bargaining process the public prosecutor may press the issue of the restitution claim of the injured party and eventually include it into the agreement when it is reached. If the restitution claim has not been a part of the plea bargaining at all or has been partially accepted, the injured party then may use the final judgment by which the proposed agreement was granted as legal grounds for the indemnification claim for the uncompensated damage filed with the civil court.

Mandatory procedural requirement in plea bargaining is that the suspect has a defence counsel during the whole plea bargaining proceedings who is either chosen by him or has been assigned to him *ex officio*. Mandatory defence during the whole proceedings of plea bargaining represents the guarantee of the equality of arms. The defence that has complete access to the case, the evidence in favour and against the defendant shall be able to assess accurately whether entering the process of plea bargaining is appropriate, in addition the defence shall learn what is the potential final outcome of the plea bargaining, which is a prerequisite for fully ensuring that all of the rights of the accused are observed.

At the first stage of the plea bargaining process the proceedings involve just the parties to the proceedings. After the public prosecutor and the defence reach an agreement which is then finalised in writing, the second stage of plea bargaining at which the court occupies the central stage is entered. The judge is the one who will make sure that the proceedings have met the legal requirements and shall render a judgment on the plea agreement confirming the legality of the process.

Te new CPC specifies the elements of the proposed agreement. This written document must contain the introduction, the subject of the plea bargaining, the statements of the parties, the stipulation on the method of reimbursement of costs of the proceedings and the concluding part. Taken individually their substance is the following:

- Introductory data are related to the recording of the data about the participants of the proceedings – the acting public prosecutor, the accused and his defence counsel, legal qualification of the criminal offence the accused is charged with and the particulars of the criminal incident.

- The subject of the plea bargaining is the type and the severity of the criminal sanction which is proposed as well as the type of the restitution claim and the sum claimed and in the event the suspect consents to compensate it, the method of settling the claim is stipulated.
- The statements of the parties involved are the essential part of the proposed agreement. The suspect states in writing that he accepts the agreement and its repercussions knowingly and voluntarily. The public prosecutor and the suspect waive the right to an appeal in writing when the court grants the proposed agreement.
- The method of reimbursement of the costs of the proceedings.
- The concluding part contains the signatures of the public prosecutor, the suspect and his defence counsel and the date when the document was signed.

The second stage starts by submitting the proposed agreement to the court for a judicial review.

The public prosecutor has a key role in this exceptionally important procedural activity when the main goal is swift conclusion of the proceedings against one of the defendants or a complete closure of the case with an agreement with all of the suspects. At any rate, swift disposal of the cases is the main reason for passing the new Criminal Procedure Code. Public prosecutor's enduring and accurate assessment of the evidence obtained during the preliminary investigation which is available in a particular criminal case is the basis for the decision on initiating or accepting the proposal by the defence to enter plea bargaining process with the suspect.

The public prosecutor who is *dominus litis* at this stage of the criminal proceedings acts as the guarantor of the legality of the plea bargaining process. At the same time, the public prosecutor needs to secure complete confidentiality of the process even if the agreement is not reached and the case is pursued in the ordinary proceedings.

The statement on the admission of guilt made by the accused person is a prerequisite for conducting the proceedings of plea bargaining at the stage of the review of the indictment, which is different from the previously described case during the investigation stage. During the investigation, the initiative for plea bargaining may come from both sides. At the stage of the review of the accusatory instrument only the defence may initiate these proceedings when the willingness to plead guilty is shown – when the accused admits to committing the criminal offences he is charged with in the filed indictment. The statement is made orally at the hearing for the review of the accusatory instrument or in writing, so the court after the receipt of the said declaration of intent in writing schedules the hearing for the review of the said admission. If the court does not accept the statement, it is filed away and it is not used later in the criminal proceedings.

The advantage of the termination of the criminal proceedings with the plea agreement is in the simplified rules of conduct, the evidence regarding the facts of the case are not presented, while the court assesses just the evidence related to the type and severity of the sanction. The final decision is rendered at an earlier stage of the proceedings, there are no appeals and in this way the criminal justice is expedited.

The plea bargaining process has its difficulties and risks as well. The severity of the penalty which is supposed to be the subject and main issue during the plea bargaining must not be below the minimum set by law for the sanctions related to the criminal offence in question. Under such conditions, the parties involved, especially in this context the defence, must assess well whether

they would get a lighter sentence if the case were to be processed, i.e. if the ordinary criminal proceedings were to take place. It cannot be disputed that at this moment the judicial practice in the Republic of Macedonia in terms of imposed criminal sanctions is inconsistent. This fact poses a real problem which must be addressed in the coming period before the application of the new CPC starts. Benefits from plea bargaining are great indeed, the judiciary shall reduce the caseload considerably, while the judges and certainly the public prosecutor shall be able to dedicate more time to complex criminal cases with a complex state of facts, large amount of evidence and more offenders, the costs of the criminal proceedings shall be reduced with the abbreviation of the proceedings from the filing of the criminal charges to the passing of the final judgment. Naturally, the parties involved shall be more active during the proceedings and only in this way shall the outcome for the defendant become certain earlier, with the rendition of the final judgment. In this context, it should be pointed out that the willingness of the accused to enter into agreement at the earliest stage, immediately after the order to conduct an investigation is issued, has its benefits in terms of the decision on detention as well. If the grounds for detention were justified by a reasonable fear that the accused would flee or hide in order to escape criminal responsibility, that he would interfere with the investigation which is in progress by influencing the witnesses, accomplices or experts if he were to await trial on bail, then these grounds are unfounded if the suspect enters into a plea agreement with the public prosecutor. If the accused was placed in detention due to the said circumstances, the ruling may terminate the detention stating that the grounds for it no longer exist.

The new CPC answered the challenge to strike the right balance in accordance with the law between fully observing the human rights and freedoms guaranteed under the European Convention on Human Rights and the efficient criminal justice system by regulating the accelerated proceedings using the provisions which fully conform to the standards set by the Recommendations and Resolutions adopted by the Council of Europe.

Alternative methods of resolving disputes are fully implemented into the new CPC. Citizens will benefit from these since the proceedings shall come to the conclusion more efficiently. Certainly, the efficiency of the proceedings will be accompanied by a complete observance of the rights of the participants in the proceedings.

Accelerated proceedings stipulated by the new Criminal Procedure Code, in addition to plea bargaining between the public prosecutor and the suspect and the defence, include summary proceedings, mediation proceedings and the proceedings for the issuance of a criminal order.

The provisions related to the summary proceedings are applied to the proceedings conducted before the first instance court for the criminal offences for which the legislator has prescribed imprisonment of up to 5 years. These are initiated based on the motion to indict filed by the public prosecutor or based on private prosecution initiated by the plaintiff, and, of course, the number of copies must be sufficient to serve it on the suspects and submit it to the court. Summary proceedings include the provisions regulating detention but providing for a significantly smaller number of days to be spent in detention. Consequently, the detention before the motion to indict is filed may last only for 8 days, and after the accusatory instrument is filed it may be extended to 60 days at the most. The grounds for detention exist if the accused poses a flight risk if released or if he might go into hiding and if his identity has not been established. During the period preceding the filing of the motion to indict, the detention is ordered by the pre-trial judge, later when the motion to indict

is filed, detention is ordered or extended by the single judge. If the accused is placed in detention, the proceedings are treated with special urgency. The content of the motion to indict includes personal details of the accused, the particulars of the criminal incident, an indication of the court the proceedings are to be conducted before, the proposed evidence to be presented at the main hearing and the motion to find the defendant guilty and to sentence him according to law. Upon receiving the motion to indict, the judge first examines if he has jurisdiction and if the requirements for dismissal of the motion to indict have been met. After that, the hearing is scheduled.

The ruling in which the court determines it does not have jurisdiction or that the requirements for the dismissal of the motion to indict are met is served on the public prosecutor. The main hearing on the accusatory instrument is attended by the prosecutor, the accused with the defence counsel, the injured party with his counsel, the witnesses, experts and translators or interpreters. The accused is cautioned in the summons for the main hearing that he must bring the evidence in his favour as his defence. Similarly, the accused is warned that the main hearing shall be held even if he fails to appear. He is also warned that the main hearing shall not be adjourned if the defence counsel fails to appear, naturally if the defence is not mandatory. It is stipulated that the presence of the public prosecutor is a prerequisite for the main hearing to be held. At the beginning of the main hearing, the public prosecutor shall present the content of the motion to indict. After the judgment has been passed, the parties involved have the right to an appeal within 8 days from the day of the receipt of the judgment. Upon appeal, the public prosecutor after having inspected the case file shall supply the second instance court with a written opinion on the said criminal case, while the presence at the second instance court session depends on the court's estimate on the need to summon the parties to attend the session.

In the criminal proceedings where the single judge has jurisdiction to proceed, when the public prosecutor has sufficient evidence he may file the motion for the issuance of a criminal order. The motion for the issuance of a criminal order contains the personal details of the accused, the particulars of the criminal case, the legal qualification of the offence, the obtained evidence and the type and severity of the criminal sanction which is proposed. In the motion to issue a criminal order, the public prosecutor may propose to the court a fine in the amount of ten to a hundred day-fines, a suspended prison sentence of up to three months or a fine, a ban on operating a motor vehicle of up to two years, as well as confiscation of property or proceeds from crime and seizure of objects. If the judge renders a Ruling dismissing the motion for the issuance of a criminal order when it is determined that the criminal offence in question may not be subject to such an order, the public prosecutor may file an appeal against such a ruling with the criminal panel pursuant to Art. 25, Par. 5 of the CPC within 48 hours. Such a short deadline is in keeping with the spirit of the new CPC with a view to concluding the criminal cases more expeditiously. The court may disagree with the motion of the public prosecutor which contains the motion for the issuance of the criminal order regarding the criminal sanction or the court may find that there are insufficient grounds for the issuance of a criminal order, in which case the main hearing may be scheduled and it may be proceeded with a trial according to the provisions regulating the summary proceedings. If the single judge grants the motion for the issuance of a criminal order, the criminal order shall be issued in a judgment imposing the sanctions stipulated by the public prosecutor. Upon the expiration of the deadline for the appeals, or if no appeals have been filed, the criminal order becomes final. If the main hearing is scheduled when the appeal by the defence has been upheld, the judgment issuing the criminal order shall be treated as if it had never been passed.

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Plea Bargaining from the Point of View of Defence Counsel

Introduction

As an innovation in criminal procedure, plea bargaining has created a need for redefining the role of defence counsel in that procedure. Findings of the European Court of Human Rights are highly relevant to criminal proceedings, because, by viewing therm through the prism of the implementation of Article 6 – right to a fair trial, the Court also takes a stand with regard to the very plea bargaining process. The ECHR views plea bargaining as a beneficial procedure from the aspect of human rights, taking a position that it is favourable to a defendant whose sentence can be substantially reduced when he is charged with a crime and that it prevents the prosecution from appealing the sentence which does not affect the classification of the criminal offence itself. "Equality of arms" ranks high among the principles adhered to by the ECHR. It mandates that all persons are treated equally before the Court. The ECHR provides a following explanation, "… each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent" (*Dombo Beheer B.V. v the Netherlands*).

The role of defence counsel in the process of plea bargaining is also relevant from the point of view of the OSCE, which say in one of their reports, "In the context of plea negotiating, this principle has implications for the degree to which there is an equality of bargaining power between the prosecutor and suspect or accused. **In practice, the best way to equalise the position of the parties is for the accused to have the assistance of defence counsel in the negotiating process.**" (OSCE Report on Plea Bargaining published in 2006). In the US as well, where these proceedings have been used in practice for a long time, it is mandatory that a defence attorney participates in

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plea bargain discussions, except for in cases of the most minor offences – misdemeanours which are punishable by imprisonment of one year.

Taking such opinions of the ECHR, OSCE and other relevant legal organisations as a starting point, it becomes clear that even though plea bargaining takes place between the prosecutor and a suspect or the accused, defence counsel's participation on the side of the accused is still required (at least under the CPC of Macedonia) in order to ensure the "equality of arms". Thus, defence counsel's participation is a mandatory condition or the *conditio sine qua non* of plea bargaining.

How to Initiate Plea Bargaining Procedure?

One of problems which may arise or come up at the very beginning of any plea bargain process is the fact that each party is reluctant to approach the opposing party with their offer regarding plea negotiations for the simple reason that such an offer could be understood as their "weakness" and thus weaken their negotiating position, which is not necessarily true. In such cases, the public prosecutor will hesitate to take the first step and initiate plea bargaining by making an offer so that the suspect and his defence attorney would not construe it as a weakness on his part and vice versa. Under such circumstances, plea bargaining may be prevented even from starting. Therefore, mechanisms must be laid down to overcome the said obstacle. One of them could be the following.

As opposed to a suspect and his defence counsel, a public prosecutor is obligated under the law to enter into plea bargaining with the suspect. Thus, pursuant to Article 39, paragraph 2, subparagraph 8 of the new Macedonian CPC, "In cases of crimes prosecuted *ex officio*, the public prosecutor has the right and duty to:… negotiate and bargain with the accused on his guilty plea in a manner and under the conditions laid down in this Code…"

Although prosecutors have the duty to negotiate, it should not be assumed that they are necessarily the ones who are obliged to offer a plea agreement. They are bound to plea bargain but not to be the first who initiate the process or offer signing a plea agreement. This is certainly true based on the information that such a step may be mistaken by the suspect or his defence counsel for a weakness on the part of the public prosecutor. On the other hand, perhaps defendant's attorney does not want to initiate a plea bargaining procedure also because he does not wish to allow that his taking the first step towards plea bargaining may be interpreted as a weakness and uncertainty about his own theory of the case. There are several possibilities for overcoming the above situation in which no one wants to make the first step. The public prosecutor may point out that he has the "duty" to negotiate, thus avoiding the possibility that his "first step" is understood as a weakness, as opposed to complying with his duty under the law. Also, the defence is afforded a possibility that their "first step" towards plea bargaining is not interpreted as a sign of weakness in a particular case. A defence attorney may, in order not to find himself in such a situation, attempt to reach a plea agreement for each case his law firm takes on. When a defence attorney follows such a "practice", then his conduct could never be understood as a weakness in a particular case. On the contrary, it would be something that defence attorney did in each case he took on, which is why it could not be construed in any other way than as a good and usual practice used by that attorney. Therefore, there are a number of ways of overcoming a situation in which nobody wants the opposing party to get an impression or semblance of weakness because of their first

step towards plea bargaining. What it takes is only parties' willingness and public prosecutors should certainly be willing to negotiate for the purpose of achieving savings in government funds and administering justice within the shortest possible amount of time; whereas defence's goal should be to achieve the best possible results for its client in criminal proceedings and ensure the most favourable outcome when it comes to sentencing.

Integrity

In the course of any plea bargaining process, each participant, namely the defence counsel and the public prosecutor, should safeguard the integrity of another. The public prosecutor's aim is to prosecute offenders and ensure that sentences imposed on them correspond to the degree of their responsibility. A defence counsel should understand the circumstances in which the public prosecutor acts and only by understanding them properly, can he successfully conduct plea bargain negotiations. Likewise, the public prosecutor must understand the position of the defence counsel in criminal proceedings in general and naturally, in the plea bargaining process. The prosecution should not be unfamiliar with the position of the defence counsel in which he endeavours not to let his client be found guilty and receive a sentence. Moreover, since the ancient times and ancient Roman law, there has been a maxim which should lead us all through any proceedings, "better a thousand guilty men go free, than one innocent be imprisoned". This maxim applies in particular to the defence. The defence aims to safeguard the interests of its client; it is perfectly understandable that defence counsels will make efforts not to allow their clients being found guilty due to a lack of evidence or based on evidence which cannot provide grounds for a judgment in a legal system in which the doctrine of "substantial truth" is slowly being abandoned and the so-called principle of "procedural truth" or the truth based on evidence presented at the main hearing is being adopted. Defence's main concern is not to allow the admission of evidence that has been illegally obtained and to ensure that both a judgment and the charges are not based on such evidence.

Only on condition that both the defence counsel and the prosecutor are able to properly understand to position of the opposing party, will they conduct proper plea negotiations which will lead to a signed plea agreement.

Each participant should protect his personal integrity in the same manner he safeguards the integrity of the opposing party. The public prosecutor should rise above his whish to "outwit" the defence counsel even in situations when he can lead him into concluding a disadvantageous plea agreement because his opponent is not experienced enough. A public prosecutor can get away with it once or twice. Defence attorneys are the kind of people who are always communicating with each other and sharing experiences, especially about the conduct of prosecutors. Consequently, the prosecutor who "manages to outsmart" his less seasoned opponent will suddenly be "labelled" by defence attorneys as a prosecutor who is prone to such behaviour and from that moment on, all defence attorneys will proceed with considerable caution when it comes to that public prosecutor and they may ultimately not even want to enter into plea bargaining with him for fear of being "outsmarted". Thus, the prosecutor, who has, tentatively speaking, successfully resolved one or two cases and won short-lived "glory", has unexpectedly become a prosecutor with whom nobody wants to negotiate, whose cases are not successfully resolved through plea bargaining and in the future, he will have to resolve his cases at the main hearing, which

is certainly not his intention. We could say that the same applies to defence attorneys. A defence attorney may "outwit" a public prosecutor only once, after which it will be more difficult for him to reach favourable plea agreements with any of the prosecutors. Therefore, each participant in a plea bargaining process, both the prosecutor and the defence counsel, should protect not only their integrity, but also the integrity of the opposing party. Certainly, this should be considered so as to allow for the very act of plea bargaining since plea bargaining is still a specific type of "bargaining" or presenting the opposing party with arguments in our favour which support our "theory of the case". It is the primary goal of plea bargaining, to arrive at a solution which is mutually acceptable to both parties. Successful plea bargaining results in the so-called win-win situation in which both parties to negotiations believe that they have succeeded and feel as winners.

Case and evidence analysis

In order to arrive at the above goal, the main rule or the main condition is that the defence counsel must be completely familiar with the case; he should study the case well and analyse all the evidence presented by the prosecutor, who, let us not forget, has a duty to present all the evidence to the defence counsel before an investigation is concluded; he should also have gathered his evidence if the defence learns about its existence in the course of its investigation and evidentiary activities. Then, the first step for the defence counsel it to establish whether or not there exists evidence which could be questioned from the aspect of its *legality*. Thus, it should be ascertained whether proposed evidence has been obtained illegally and if there is such evidence, he should move for such evidence to be excluded. If he engages in plea bargaining when the investigation is coming to an end, prior to filing an objection to an accusatory instrument, he should be aware and have compelling arguments to support that such evidence is tainted so as to be able to use them in plea bargain negotiations.

The second stage entails the preparation of defence's theory of the case based on facts which are unquestionably supported by evidence and outlining potential interpretations of evidence from various perspectives and taking various points of view based on such evidence depending on the theory of the case the defence plans to develop and present to the opposing party. The defence should try to consider objectively whether or not there is sufficient evidence which cannot be called into question from the aspect of its *legality* and which would inevitably result in a judgment of conviction. It is certainly very beneficial to successful plea negotiations when the defence takes an objective viewpoint of the gathered evidence.

The third stage includes that after the analysis of the facts of the case and of the evidence, the defence attorney must examine the case from the aspect of substantive law; more precisely, how he views the legal classification of the criminal offence which has been investigated and with which his client is charged, and consequently which punishment is prescribed by the law for it; then, he should consider the following issues: whether or not there exist guilt, intent, or negligence; intent as an objective element of a crime and thus criminal liability; whether or not the client was mentally competent, incompetent, or his capacity was diminished or substantially diminished *tempore crimini*. Is there evidence in favour of the mitigation of punishment? Simply, the defence attorney should form a general picture of what can be expected if there is a main hearing and maybe what kind of judgment should be anticipated. Still, a necessary requirement or the *conditio sine qua non* for foreseeing client's prospects in the first place is a transparent and established

sentencing policy. In systems in which plea bargaining is used, a sentencing policy is provided for even in the form of enactments or guidelines (the so-called sentencing guidelines), so each person, depending on the conditions set out in such an enactment which apply to his particular type of conduct, can be fairly certain about what sentence to expect at the main hearing. The essential requirement for plea bargaining in criminal proceedings is that the accused is informed by his defence attorney of the punishment he should expect at the main hearing. Only if the accused is aware of that, can it be expected that he will engage in plea bargain discussions and thus, able to agree with the public prosecutor on a less strict sentence than the one he would face if there was a main hearing. There is no other reason whatsoever for which the accused would assent to a judgment based on a plea agreement than to significantly reduce a sentence which he would receive in ordinary proceedings. Contrastingly, any defendant would be ready to "risk" going to trial if a significantly reduced sentence were not offered to him. Therefore, only a transparent sentencing policy known to any defence attorney is the sole prerequisite of successful plea bargaining. It could not be expected that the accused and his defence attorney would take "for granted" that the public prosecutor will tell them exactly which sentence would be given at the main hearing, which is why the penalty offered by the prosecutor is a "favourable plea deal". It will certainly be one of the plea bargain techniques used by public prosecutors, but defence attorneys must be closely acquainted with the sentencing policy and be able to foresee the sentence which awaits their clients at the main hearing in case plea bargain negotiations fail.

All the facts should be presented to the client

A defence counsel should ensure that he has presented to his client all the facts relevant to his decision about whether or not to engage in plea bargaining. Most importantly, the counsel should state all the facts in an objective manner. He must not allow himself to be "misguided" by his client's wishes or to adapt his behaviour to those wishes. Clients will always want to hear from their defence attorneys that they will be acquitted. However, they must not make any such promise. Even when a defence attorney is certain that there is not sufficient evidence for his client to be found guilty, he must restrain from making promises of any kind, especially of beneficial kind which may come home to roost. A defence attorney should give his client all the facts as objectively as possible. The client should face all the evidence against him so that he could conclude for himself what to expect. The client should always be the one who makes a decision whether or not to plea-bargain. In one of his cases, the author of this paper pointed out to his client that a hair had been found at the scene and that DNA testing had shown that the hair was a 99.9987 percent match for his client's DNA profile. The client maintained that it still was not a 100 percent match?! It was then up to the client to decide on how the case will be handled, but the defence attorney did present all the facts to his client, including the fact that the Court finds the results of DNA testing credible. Consequently, when the case was decided and a judgment of conviction was delivered, the client was not in a position to express any kind of dissatisfaction with his attorney. Considering the above, defence attorneys should not try to tell their clients from which perspective to view the circumstances of their case; instead, they have a duty to tell them all the facts, inform them of all the evidence, and restrain from making any suggestions or imposing their view of the case. Clients should form their own opinions. Naturally, a client will immediately ask his defence lawyer if he believes that there is sufficient evidence for a judgment of conviction and what is preferable to be done in lawyer's opinion; however, the lawyer should certainly try to present his most objective position and not to give any promises he will not be able to

keep. Otherwise, it may happen that in the future he will face the consequences of making such an incomplete promise. A client should always be the one who decides whether or not to engage in plea bargaining or accept a plea deal that has been offered.

At which stage in the proceedings is it possible to sign a plea agreement?

The Criminal Procedure Code of the Macedonia lays down that the plea bargaining process and rendering judgments based on plea agreements may take place **"before an indictment is brought"**. Thus, pursuant to Article 483, paragraph 1 of the CPC, "Prior to the bringing of the indictment, a public prosecutor and a suspect may submit a draft plea agreement thus requesting from a preliminary proceedings judge to impose a criminal sanction whose type and duration have been defined within the scope prescribed by the law for a particular criminal offence, but not below the minimum for the mitigation of a sentence defined by the criminal code."

Unfortunately, our lawmakers have opted against the concept under which it would be possible to reach a plea agreement at the stage of the main hearing. Countries in the region which had amended their criminal procedure codes before us by introducing innovations such as plea bargaining, had provided for the option that plea bargaining could also take place in the course of a main hearing. Such a model of plea bargaining has been functioning very well indeed in Bosnia and Herzegovina, in which a public prosecutor and a suspect along with his defence attorney are allowed to negotiate for the whole duration of the proceedings. Naturally, based on the experience of Bosnia and Herzegovina, we have learned that offers made at the stage of the investigation are different from those made at the beginning or at the very end of the main hearing. What used to be the most favourable offer at the beginning of plea bargain negotiations has gradually become less and less favourable as the proceedings draw to their conclusion.

However, we will dwell on what is prescribed by the provisions contained in the new Criminal Procedure Code.

Defence counsel's role at any stage of the plea bargain process is to conduct negotiations in the manner which is the most transparent to his client. The defence counsel is obligated to present to his client each and every offer made by the prosecution, even if he deems the offer unfavourable. The client has the right to know what the public prosecutor has offered since he is the one, and not the counsel, who will ultimately make a decision on a plea agreement and how it will be reached; the last say will be the client's and the defence counsel acts in his best interest. Therefore, the defence counsel should acquaint his client with each and every offer of the public prosecutor.

When a defence lawyer meets with his client for the first time, he should point out to him during their consultations that there is a possibility of reaching a plea agreement with a public prosecutor and that consequently a judgment based on a draft plea agreement may be reached. The lawyer should present to his client all the possible outcomes of criminal proceedings against him, including the said outcome as well. Naturally, the client will form different opinions depending on the stage in the proceedings. If there is strong evidence against him from the onset of proceedings, for instance the client was caught *in flagrante delictio* and he may be remanded, the defence should point out to him the persuasiveness of evidence against him. The client is certainly already aware of the fact that the evidence is powerful and he will be more prepared for plea

bargaining from the start. On the other hand, if an investigation conducted by the public prosecutor does not result at first in any concrete evidence to support the laying of the charges, the suspect and his defence lawyer will certainly not see any special reason for a plea bargaining process to begin; but if it happens that further in the course of the investigation new evidence should emerge which incriminates the suspect, it is assumed that he will change his opinion and want to engage in plea negotiations.

Although the Code provides that a plea bargaining process may take place "before an accusatory instrument is brought", it nevertheless allows that plea bargaining is conducted after the filing of the accusatory instrument, *i.e.* at the stage during which objections may be filed against the accusatory instrument. Thus, pursuant to Article 334, paragraph 3 of the CPC, "If the judge or the panel in charge of the examination of an accusatory instrument accept(s) the suspect's guilty plea, the suspect or his defence attorney or the public prosecutor may file a motion for continuance for the purpose of conducting a plea bargaining procedure and submitting a draft plea agreement pursuant to provisions contained in Articles 483 through 490 herein". At this stage, the accused is certainly aware of all the evidence the prosecution and the defence have gathered, he knows which evidence is used by the prosecution to support the indictment and which may be presented at the main hearing; the Court has already assessed if the evidence has been obtained in a legal manner or not and if it has been obtained illegally, it is separated in a special envelope and may not be used for any purpose whatsoever; the accused has, along with his defence attorney, already formulated their theory of the case and he can already judge if it can be made acceptable to the Court by substantiating it with evidence at the main hearing and he can thus decide if he will plead guilty at that particular stage and engage in plea bargaining.

Plea bargaining

Plea bargaining is a process which resembles "bargaining" at farmer's markets or any other market (bargain – haggle, trade, sell, deal), but it is a far more sophisticated process that simple bargaining; it begins with two parties at diametrically opposed positions who are trying to find the "middle" ground and a mutually acceptable price. Plea bargaining is similar to the so-called haggling, but it requires that the position of the opposing side is well-understood and on account of that, the parties avoid to set terms which they know are unacceptable to the opposing side. In respect of plea bargaining, it is very important to know the position, needs, and obligations of the opposing party. Only in that manner may plea bargain negotiations be successful and lead to an agreement on a sentence. The aim of plea bargaining is to achieve the so-called "win-win" situation or a situation in which both parties feels as if they succeeded. A prosecutor will feel as a winner if: he goes to trial and through the evidentiary proceedings without any risks; the accused is given within a significantly shorter period of time than after the trial an appropriate sentence which, although less severe than the one he would receive at a trial, is still acceptable. The accused will feel as a winner if he is certain that he will be given a less severe sentence than the one he would get if he went to trial. Given the understanding of the needs of the opposing party, neither party – neither the prosecutor nor the defence counsel as defendant's attorney – should start off from diametrically opposed positions; for instance, the prosecutor should not from the beginning take a position in which he offers a punishment which is even more severe than the one which can be expected at the main hearing, whereas the defence should not start off from the position in which they request a lenient sentence that they know is far from acceptable.

Naturally, even before engaging in "a plea bargain process", a defence attorney should have a definite and unambiguous agreement with his client:

1. whether or not there will be plea bargaining at all and
2. if plea negotiations took place, which sentence would be acceptable and which unacceptable to his client.

These two issues are the main directions in which the defence attorney should move and he must be guided by them. For his own purposes, as well as in order to avoid any misunderstandings with the client, it is a good idea that the attorney and the client should draft and sign a memorandum in which they will stipulate the main directions in which the defence will move; whether or not they will engage in plea bargaining; what could be the scope of a plea agreement. The client may insist that he is always present during plea negotiations and this should also be included in the memorandum, as well as the most favourable sentence in client's opinion. The defence attorney is obligated to abide by the directions set out in the memorandum as much as possible and if his client wants to participate in plea bargaining, he must point out to the public prosecutor that it is his client's position and that he will negotiate only in the presence of his client.

In order for plea negotiations to be successful and not pointless, the defence attorney should, after identifying his client's needs (the most acceptable sentence), look at the needs of the public prosecutor.

Similarly, in order to be successful at plea negotiations, the parties should gather as much information as possible about the opposing party. Thus, the defence attorney should make efforts to gather information about the public prosecutor, his personality, is he a flexible person or not, is he open to negotiations or not, and some smaller details, to be careful not to unintentionally offend him in any way, which would ultimately have a negative effect on negotiations themselves. Certainly, such information is most easily obtained from the experience of his fellow lawyers. On the other hand, the public prosecutor should make an effort to be more open to proposals coming from the opposing side (let us recall, he is precisely the person whose duty to negotiate is laid down by the law, whereas the accused and his defence attorney have no such duty) and should not decline them a priori. The public prosecutor should always give a chance to plea bargaining and believe that it can be successful. It should be clear to public prosecutors that the purpose of plea bargaining is achieved by resolving the matter as early as at the stage of indictment procedure in order to avoid going to trial and to cut expenditure. How well we know the person we negotiate with has a powerful effect on plea bargaining.

Hearing on plea agreement

Both parties involved in a plea bargain process must be aware that their negotiations are pointless if a judge does not ultimately accept their plea agreement. In order to avoid something like that, the parties must in the first place know the legal limits on a penalty they will agree on or in other words, they must not agree on a penalty which may not be imposed under the law or on a lighter penalty which is outside the scope of the mitigation of sentences laid down by the Criminal Code. Such a plea agreement will be dismissed as inadmissible by a preliminary proceedings judge. Furthermore, convincing arguments should be presented to the preliminary proceedings

judge justifying the opinion that the proposed punishment fits the crime. Even though a judge will accept a proposed penalty in the majority of cases when it is within the range provided for by the law, it should nevertheless be recalled that pursuant to Article 489, paragraph 1 of the Macedonian CPC, "If a preliminary proceedings judge finds that a body of evidence gathered in support of the facts relevant to the selection and determination of a criminal sanction does not justify the pronouncing of the proposed sanction or that in the course of the hearing, the public prosecutor, the accused, and his defence attorney filed a motion to impose a sanction different from the one contained in a draft plea agreement, he shall issue a ruling denying the draft plea agreement and submit the files to the public prosecutor."

Thus, both parties to plea negotiations must be aware that the judge has the right to deny a proposed sanction should he find it does not fit a particular case.

In particular, the defence attorney must advise his client that at the hearing they may not request a penalty which is different from the one stipulated in the written draft plea agreement. If they do, the preliminary proceedings judge will pass a ruling denying the draft plea agreement once again. Likewise, he should brief his client about what will happen at the hearing on plea agreement. He should inform his client of the court procedure, which questions will be put to him by the preliminary proceedings judge, and it would be advisable if he explained to the client the reason for which such questions are asked. In such a manner, the client will know precisely what to expect at court, at the hearing scheduled in order to decide on the draft agreement. The client must be informed that a judgment on the draft plea agreement, in case it is accepted by the preliminary proceedings judge, is final and that it is not subject to appeal. He must be aware of the said fact because shortly afterwards, he will be sent to serve his sentence and he must prepare for it mentally.

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Prosecutorial Discretion and Experiences in its Application so Far

Introduction

The absence of a clear concept for drafting the Criminal Procedure Code of the Republic of Serbia and experimenting in the search for adequate legal provisions in the criminal procedure legislation are most evident when we look at the institute of prosecutorial discretion. This important institute was introduced for the first time in the Criminal Procedure Code in 2002, and subsequently amended several times, specifically by first prescribing certain paragraphs under Art. 236 and Art. 237 of the CPC regulating prosecutorial discretion principle, then removing them, only to prescribe them again without any consistency or rationale. At first glance, it seems that the principle of prosecutorial discretion has evolved in our criminal procedure law, both in terms of the catalogue of criminal offences to which it may be applied and in terms of procedural stages during the proceedings when it may be proposed, but in reality it has not moved away too far from the initial concept, which only confirms that those who have been drafting the Code have not heeded numerous objections made by experts with regard to the legislation of the said institute and practical problems that have arisen in its application. Judging from a chronological point of view, our criminal procedure legislation first relied on the principle of legality, with no exceptions, after which the principle of prosecutorial discretion was introduced in the proceedings against juvenile offenders, and later it included adult offenders as well in keeping with modern trends in procedure codes based on the idea of restorative justice. It is evident that in our system based solely on the principle of legality of criminal prosecution, the attitude of the legislator toward the principle of prosecutorial discretion has gradually evolved. However, despite numerous expert conferences on this topic and several amendments and supplements to

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the Criminal Procedure Code, neither the current legal provision nor the provision used in the proposed bill of the new Code conform to comparative legislation and the Recommendation R(87)18 of the Council of Ministers regarding the simplification of the criminal justice[3] as well as the Recommendation Rec(2000)19 on the role of the public prosecutor in the criminal justice system.[4] Recommendation no. R(87)18 specifies the objective of the said principle and the requirements needed for its application and, while Recommendation Rec(2000)19 contains the criteria which may serve as a reference when deciding certain cases in order to ensure the protection against arbitrary decision-making when applying the principle of discretionary prosecution. Even though all of the past research papers related to the prosecutorial discretion have referred to these recommendations, there would be no harm to reiterate that under chapter I entitled "Discretionary Prosecution" in the Recommendation no. R(87)18 it is stated that the decision on desisting from criminal prosecution according to this principle is made only if the prosecuting authority has adequate evidence of the guilt at its disposal and that this principle should be resorted to on some general grounds such as public interest. Moreover, the competent authority when exercising this power should, in accordance with the national laws, take into account the principle of equal treatment of all citizens before the law and personalisation of guilt and especially the seriousness, nature, circumstances and consequences of the criminal offence, the perpetrator's character, probable court judgment, effects the penalty would have on the alleged perpetrator and the position of the victim.

The relevance of the said recommendations was confirmed at the Fifth Conference of Prosecutors General of Europe (CPGE) entitled "Discretionary Powers of Public Prosecution: Opportunity or Legal Principle – Advantages and Disadvantages".[5] As the greatest part of the discussion dealt with prosecutorial discretion and mandatory prosecution principles which govern the actions of Prosecutor's Offices, it was stated at the Conference that a new tendency has emerged to harmonise objectives of different European legal systems which are now inclined to focus primarily on principles of public interest, equality before the law and personalisation of criminal justice in compliance with the Recommendation no. R (87)18 of the Council of Europe and the Recommendation Rec (2000)19. The issue of selecting the type of the prosecutorial system should be dealt with only after the alternative responses to criminal law are first taken into account, such as options under civil or administrative law, which should be first in line for the resolution of a considerable number of cases involving "criminal offences which are essentially minor", so they pose a negligible threat to public interest and do not merit the intervention of prosecutor's offices or courts. The principle of prosecutorial discretion and similar programmes in legal systems which apply the principle of mandatory prosecution have been formulated with the view to be applied to "lesser criminal offences according to the circumstances of the case" in the light of the type of the criminal offence, the age and character of the perpetrator. Consequently, the Conference has encouraged the states to seriously consider the possibility of taking these offences off their lists of criminal offences. We completely agree with the said conclusion of the Conference since our Criminal Code prescribes numerous lesser criminal offences which greatly increase the workload of the Prosecutor's Office and the courts preventing them from operating efficiently. In such a context, when the trials and criminal sanctions are not justified in terms of public interest, the justice system should invest an effort to find serious, reliable alternatives for

3 Adopted by the Council of Ministers at the 410th session held on 17 Sept 1987.
4 Adopted by the Council of Ministers at the 724th session held on 6 Oct 2000
5 Held in Celle, Germany from 23 to 25 May 2004 under the auspices of the Council of Europe at the invitation of the Prosecutor General of Lower Saxony

the prosecution and trial in order to prevent the perpetrator from committing the offence again and in order to address the interests of the victim. So far, comparative legislation has shown that in such cases the best choice is mediation in accordance with the Recommendation of the Council of Europe no. R (99)19 regarding the mediation in criminal matters, the proceedings for reaching a settlement between the accused and the injured party which were prescribed by our Criminal Procedure Code from 2006 (Art. 475-482) as well.

At the said Conference, a position was taken that the prosecutor's office should decide whether it would propose such alternatives, depending on the applicable system. Each alternative should be legislated in terms of criteria and procedure so that any risk of injustice and arbitrariness can be eliminated. The decision to apply some of the alternatives entails an express or tacit agreement of the accused, and where it is appropriate the victim's consent, with a view to preserve the right of both parties to a trial. For these reasons, the rationale behind the said decisions should be given, while taking into consideration the principle of judicial personalisation which is applied both to the prosecutors and the judges, and all of the decisions should be clearly motivated and presented to both of the interested parties, so that they could file an appeal in time or take some other appropriate steps. In addition, the law should specify the consequences of the undertaken measures or the requirements for the said measures to be undertaken in accordance with the Recommendation R (92)16 on the European rules[6] which are applied in the EU when imposing sanctions and undertaking measures. The incumbents of judicial offices, especially the prosecutor's office, should make sure that all of the decisions are coherent in terms of equal treatment of the parties involved and strict observance of the principle of impartiality. In accordance with the principles of the Conference, the Criminal Procedure Code of the Republic of Serbia, apart from the prosecutorial discretion, stipulates other institutes which aim at rationalisation and efficiency of proceedings in criminal matters, such as proceedings for the imposition of criminal sanctions without scheduling the main hearing, including the proceedings for sentencing before the main hearing (Art. 449-454) and the sentencing procedure and the pronouncement of a suspended sentence by the investigating judge (Art. 455-458) and plea agreements (Art. 282a-282).

1. The Concept of Prosecutorial Discretion

In our opinion, one of the key issues in the application of prosecutorial discretion is a lack of criteria which would make the operations of the Prosecutor's Office easier and better directed when applying it. Furthermore, we hold that the insufficient application of the said principle is also caused by the lack of understanding of the concept itself, the purpose and the goal of prosecutorial discretion. Primarily, it should be noted that the term prosecutorial discretion is also used for Art. 236 and 237 of the CPC which is still in effect, although the first case concerns the so-called conditionally deferred prosecution[7] according to which the public prosecutor may use his discretionary power only after the suspect accepts and then executes one of the stipulated measures,

6 Adopted by the Council of Ministers at the 482nd session held on 19 Oct 1992.

7 Bejatović, S. Radulović, D. (2002) The Criminal Procedure Code of FRY, Belgrade , p.160: "The principle of prosecutorial discretion applies only to the provisions of Art. 237 of the CPC, while Art. 236 of the Code refers to a stay of criminal proceedings, i.e. the institute recognised by modern legislation which allows the matter to be resolved without initiating the criminal proceedings." Starting from the general definition of the principle of prosecutorial discretion it may be concluded that both of these articles refer to the application of the said principle with a common goal to accelerate and simplify the operations of the criminal justice system.

while in the second case the prosecutor may, but does not have to, dismiss the criminal charges as they are deemed to serve no purpose, i.e. for reasons of fairness without any conditions attached, acting according to the prosecutorial discretion in the real sense of the word. Therefore, the power of the public prosecutor under Art. 237 of the CPC often uses the term "real" or "absolute" prosecutorial discretion. By applying Art. 236 of the CPC the decision of the public prosecutor not to assume criminal prosecution is temporary since it is conditioned, whereas when applying Art. 237 of the CPC this decision is final. However, in practice the concept of prosecutorial discretion is often identified with the provision under Art. 236 of the CPC which is supported by the enclosed statistical data.

In addition, it is seen, unjustly, that one of the primary goals in practice, i.e. the purpose of applying conditionally deferred prosecution, is to effect payment to the account of a humanitarian organisation, fund or public institution while this is just one of the possible measures stipulated by law and just one of the advantages of the said principle. Unfortunately, the practice and the statistical data show that the application of prosecutorial discretion is mainly reduced to effecting payments, neglecting the fact that the legislator allows the public prosecutor to impose on the suspect one or more measures pursuant to Art. 236 of the CPC. Quite the contrary, we hold that other measures under this article may equally, if not even better, serve the purpose of prosecutorial discretion depending on the specific case (e.g. meeting the obligations of overdue support regarding the criminal offence of not providing financial support under Art. 195 of the CC, undergoing rehabilitation treatment for alcohol abuse regarding the criminal offence of domestic violence under Art. 194 of the CC or drug abuse regarding the criminal offence of illegal possession of narcotics under Art. 246a of the CC etc.). It should be remembered that the main purpose of the principle of prosecutorial discretion is restorative justice, so the imposition of a measure of meeting an obligation of overdue support on the perpetrator of the criminal offence failure to provide support under Art. 195 of the CC represents a kind of settlement in criminal proceedings. Conditionally deferred prosecution represents a kind of a hybrid, i.e. by its nature mixed, institute under criminal law which has both the elements of a classic abandonment of criminal prosecution as it would serve no purpose, and of pardoning the offender provided the said offender meets certain obligations thus "deserving" this specific kind of an abolition since the nature of these obligations to a certain extent resembles some criminal sanctions (for instance, a fine, as well as community service) the said institute may to a certain extent serve the purpose of criminal sanctioning while not actually sentencing the offender so the usual negative effects of imposing a sanction and the so-called stigma of being convicted are avoided.[8] In appropriate cases, the principle of prosecutorial discretion may secure greater benefit for the offender, the victim and the society than the formal criminal proceedings.. Prosecutorial discretion is not meant to be used for all criminal offences or all types of offenders and it actually confirms that in some cases, considering the nature and the circumstances of the criminal offence and the offender, the public interest would be better served if the resolution were to be achieved outside of the traditional criminal proceedings.

The principle of prosecutorial discretion is contrary to the principle of legality[9] and it implies that the public prosecutor does not have to initiate criminal prosecution although the legal pre-

8 Škulić, M. (2010) *Krivično procesno pravo*, opšti deo, Belgrade, p.52

9 The principle of legality is prescribed under Art. 24 of the CPC according to which "the public prosecutor must initiate criminal prosecution when there is a reasonable suspicion that certain individual has committed a criminal offence which is prosecuted *ex officio*."

requisites have been met for the initiation of the criminal proceedings, based on the assessment that it would serve no purpose to do so. According to the principle of prosecutorial discretion the public prosecutor has the authority to estimate from case to case if the initiated proceedings would serve a purpose by first establishing if the actual and legal requirements have been met for the initiation of the criminal proceedings and then assess if initiating criminal proceedings serves a purpose in terms of the public interest. This means that the principle of prosecutorial discretion includes the authority of the public prosecutor to decide whether to perform the function of criminal prosecution at his discretion. However, not even the principle of prosecutorial discretion allows the public prosecutor to decide whether to prosecute the offender or not arbitrarily, at his will. Purposefulness must be assessed from the point of view of the public interest, i.e. whether it is in the public interest to prosecute the offender or not.[10] This means that the public prosecutor must criminally prosecute even according to the principle of prosecutorial discretion when the legal prerequisites for the initiation of criminal prosecution are met if this is in the public interest based on the circumstances of the case. If the principle of prosecutorial discretion is so defined, it follows that it is to be used solely in cases which are prosecuted *ex officio*, regardless of the injured party's wishes. Otherwise, the principles of prosecutorial discretion and legality do not apply to the criminal offences prosecuted privately. For the injured party, where a private interest is an issue, the disposition principle applies and it is left solely up to the said party whether or not they would assume criminal prosecution. Similarly, if the actual and legal prerequisites have been met, criminal prosecution shall be abandoned if the plaintiff does not wish to undertake it. The existence of the public interest formally is not a valid reason for such a decision by the plaintiff since he decides based on private interests whether to proceed with the criminal prosecution or not.

Discretionary power of the public prosecutor (assessing the purposefulness, the issue of the public interest) inevitably implies certain latitude when deciding, which must not amount to arbitrariness. In order to avoid this, it is necessary to establish the criteria according to which the decision is formed, thus avoiding the use of unequal criteria for the assessment whether it is justified to apply the principle of prosecutorial discretion. Consequently, criminal prosecution does not have to be assumed even if all of the requirements based on the principle of legality have been met, but based on whether the criminal prosecution would serve a purpose in a particular case the prosecution may, but does not have to, be assumed while the criteria for not pursuing prosecution in some national criminal proceedings is related to e.g. high costs of the proceedings or it is based on certain characteristics of the accused.[11]

We believe that weighing the interests should factor in all criminal prosecution, regardless of the principle it is based on. The public prosecutor should use his prosecutorial discretionary power independently, in an impartial and consistent manner. The requirement related to independence when performing a prosecutorial function should be safeguarded by numerous protective measures. When applying the principle of prosecutorial discretion, and other new institutes as well, the prosecutors should act independently, without any fear of political interference or undue influence. They must base their decisions solely on what is in the public interest. Accordingly, the prosecutor must use his discretionary power fairly, impartially, in good faith and in accordance with the highest ethical standards. In order to secure the trust of the public in the criminal justice system, prosecutorial discretion when deciding should be exercised in an objective, fair, tran-

10 Đurčić,V. (2009), *Opravdanost i svrha načela oportuniteta krivičnog gonjenja*,Oportunitet krivičnog gonjenja, Belgrade,p. 13
11 Škulić, M. (2010) *Krivično procesno pravo*, opšti deo, Belgrade, p. 43

sparent and consistent manner. It is certain that such great discretionary powers entail a great responsibility for public prosecutors. As the principle of autonomy and functional independence of the public prosecutor have not been firmly embedded in our legal system despite the reform of the judiciary, we advocate new special instructions (guidelines) to be passed regarding the application of the principle of prosecutorial discretion and other new institutes.[12]

The countries which have traditionally embraced the principle of prosecutorial discretion (France, the USA, the UK) remain loyal to this principle while using various forms of formal and informal control mechanisms of its proper application. In this respect, the issue of control of the application of the said institute must be raised, since the decision on the stay of criminal proceedings, i.e. the dismissal of criminal charges may be based on the wrong estimate by the public prosecutor that the legal requirements have not been met or that it is not in the public interest to proceed with the criminal prosecution, or it may be an intentional oversight. Modern legislation recognises two forms of control: internal (inside the prosecutorial organisation) and external (judicial review). We believe that the form of internal control is more acceptable since it relies on the hierarchical structure of the public prosecutor's organisation allowing the higher authority to order at its own initiative or based on the initiative of the third party the subordinate authority to assume criminal prosecution or otherwise assume it instead of them. Therefore, the decision on the criminal prosecution is under express authority of the Public Prosecutor's Office, so it is only right that its review is conducted at that level as well.[13] The Law on Public Prosecutor's Office of the Republic of Serbia stipulates three types of control based on the said hierarchy; those are devolution, substitution and issuing mandatory instructions.[14] The Law on the Public Prosecution and the Rules of Administration of Public Prosecutor's Offices stipulate other types of control as well, such as regular reviews of the work by the Public Prosecutor's Office that is immediately superior, also through monthly and annual reports on activities of the Public Prosecutor's Office, as well as the petitions and complaints regarding the work of the public prosecutor by the citizens. These types of control may be related both to the application of the principle of prosecutorial discretion and the principle of legality.

Judicial control may be preliminary or subsequent. In the first case, it refers to certain discretionary decisions of the public prosecutor which require prior authorisation by the court and may not become final without that authorisation (for instance, Art. 236, Par. 1 of the Code from 2004 and Art. 236, Par. 6 and 7 of the Code from 2009). In the second case, the third party, usually the injured party, requests from the court a review of the already rendered decision not to prosecute thus forcing the authorised prosecutor to assume prosecution. We oppose any form of judicial control when it comes to applying the prosecutorial discretion principle, especially if it is done as stipulated by the legislator so far since the prosecution of offenders is the basic right and basic duty of the public prosecutor as an autonomous government authority according to the Constitution of the Republic of Serbia (Art. 156), the Law on the Public Prosecutor's Office (Art. 2) and the Criminal Procedure Code (Art. 46). This certainly does not eliminate two-level

12 The Republic Public Prosecutor's Office has passed Mandatory Instructions on the Application and Conclusion of Plea Agreements A. no. 299/09 of 22 Oct 2009 in order to ensure legality and uniformity in the proceedings conducted by all public prosecutors. The instruction contains the models for the application of the said institute with a view to making the operations of public prosecutors easier and simpler. The procedure for concluding a plea agreement includes the following stages: proposal, plea bargaining, conclusion of the Agreement and the proceedings before the competent court (judicial review of the agreement).

13 Cigler, S. (1994), *Obezbeđenje načela legaliteta i oportuniteta krivičnog gonjenja*, Pravo - teorija i praksa, 10-12, Novi Sad, pp. 134 - 136.

14 Official Gazette of RS, no. 116/2008, 104/1009. 101/2010, Articles 18, 19 and 20 of the Law on the Public Prosecutor's Office

decision-making within the public prosecutor's organisation considering the significance of the decisions by the public prosecutor based on prosecutorial discretion.

We hold that such a degree of distrust in the Prosecutor's Office when it comes to the principle of prosecutorial discretion is unjustifiable and unfounded since there have been no reports of the abuse of discretionary powers by the public prosecutor in practice. It has been noted that some Public Prosecutor's Offices avoid using this institute due to the distrust of the public in the work of the Public Prosecutor's Office. Therefore, it is our opinion that the control of the public prosecutor's decision to apply the principle of prosecutorial discretion is necessary since it is a decision based on merit, as the injured party does not have the right to assume prosecution pursuant to the provisions of Art. 61 of the CPC, preferably through a complaint to the immediately superior public prosecutor, which is otherwise a provision mainly used in comparative criminal procedure legislation.

2. The Application of the Principle of Prosecutorial Discretion

However, despite all of the aforementioned objections to the legal provision for the principle of prosecutorial discretion, the absence of criteria according to which the public prosecutor could make an assessment when deciding if the initiation of the proceedings would serve a purpose, the issue of constitutional principle of equality of citizens before the law, the issue of compatibility of this principle with the principle of officiality etc, over the past few years, especially during 2010, there has been a considerable increase in the number of cases in which the principle of prosecutorial discretion was applied. Statistical data shows that the application of prosecutorial discretion principle is steadily increasing. Considering the legal possibilities for its application and the frequency of its use in practice, the principle of prosecutorial discretion can no longer be characterised as an exception to the principle of legality of the official criminal prosecution

The increased application of prosecutorial discretion has certainly been boosted by the Instructions of the Republic Public Prosecutor A no. 246/08 of 28 Aug 2008 which prescribe that the public prosecutor must, upon receiving criminal charges, consider the possibility of applying Art. 236 and 237 of the CPC and take statements from the injured party and the reported individual in view of the said articles, about which an official note must be made and through the registry office of the Republic Public Prosecutor's Office request the data if the reported person has been registered in the integral register kept by the said Prosecutor's Office as a person who has been subject to the measure under Art. 236 or Art. 237 of the CPC. The Criminal Procedure Code from 2009[15] has considerably contributed to the application of the said institute as well, which prescribes under Art. 236, Par. 9 that the public prosecutor must examine the possibility for the stay of criminal proceedings before filing the motion to indict, i.e. the motion for investigative actions, when the criminal charges have been filed for the criminal offence punishable by a fine as the main penalty or a term in prison of up to three years, to which purpose he may interview the suspect and the injured party, as well as other persons, or collect other necessary data about which an official note must be made. The Instructions of the Republic Public Prosecutor A no. 478/10 of 24 Feb 2011 should be mentioned here, which stipulate the possibility of applying Art. 236 of CPC for the criminal offence - illegal possession of narcotics under Art. 246a of the

15 Official Gazette of RS, no. 72 of 3 Sept 2009

Criminal Code, in cases of illegal possession of "marijuana" in the amount of up to 5 g, in addition to all of the other circumstances which are being assessed in the case of any other criminal offence. The fact that the court's authorisation is no longer needed for the criminal offences punishable under law by a term of up to three years in prison has greatly contributed to an increased application of prosecutorial discretion.

In order to put the past experiences in the application of prosecutorial discretion of adult offenders into the right perspective, it is necessary to provide a chronological overview of legal provisions with all their advantages and disadvantages which have affected the application of the said principle.

3. Criminal Procedure Code from 2002 and the Principle of Prosecutorial Discretion

The Criminal Procedure Code from 2002[16] did not adhere to the strict legality principle when it introduced the provision under Art. 236 and Art. 237, thus joining the world-wide trend in criminal procedure legislation marked by a possibility of an agreement between the participants in the criminal proceedings and the idea of restorative justice. The purpose of their introduction was to reduce the number of cases of "bagatelle" crime before the courts by not initiating the criminal proceedings when for certain reasons it would not serve any purpose.[17] If Art. 236 of the CPC was to be applied, the public prosecutor had to ascertain first if the criminal charges were well-founded, then propose to the suspect one or more legally stipulated measures to be imposed, if he gave his consent for it, and finally dismiss the criminal charges if the suspect had completed the imposed obligation within a time period which could not exceed six months. If the said consent of the suspect had not been given, the public prosecutor had an obligation to initiate the criminal proceedings against the offender unless there was another reason for the criminal prosecution to be abandoned. Due to this, the rules for the confirmation that the said consent had been given freely and not under duress needed to be established. Since the prerequisite for the use of this institute was the suspect's consent to meet the proposed obligation, such consent had to be entered into a report which was to be signed by the suspect.[18] We support this position, however, the problem in its application arose from the fact that the Code did not stipulate any report to be made, nor did it stipulate any other kind of a written decision. The decision to desist from criminal prosecution based on this principle was possible only if there was adequate evidence of the guilt, which means that the public prosecutor had to establish the existence of the criminal offence and criminal liability of the perpetrator which resulted in a question if and

16 Official Gazette of FRY, no. 68/2002, which came into force on 28 March 2002
Article 236 used to read: (1) The State Prosecutor may defer criminal prosecution for criminal offences punishable by a fine or a term in prison of up to three years if the suspect accepts one or more of the following measures: 1. to remove the detrimental consequence caused by the commission of a criminal offence or to compensate the damage incurred, 2. to pay a certain sum of money to the account of a humanitarian organisation, a fund or a public institution, 3. to perform community service or charitable work, 4. to meet the obligation of paying overdue support. (2) The suspect must complete the imposed obligations within a period of time which cannot exceed 6 months. (3) If the suspect meets the obligations pursuant to Par. 1 items 1 and 4 of this Article or, with the consent of the injured party, the obligations pursuant to Par. 1 items 2 and 3 of this Article within a period of time stipulated by the previous paragraph of this Article, the State Prosecutor shall dismiss the criminal charges, while the provisions of the Art. 61 of this Code shall not be applied.
Art. 237 used to read: With regard to criminal offences pursuant to Art. 236, the State Prosecutor may dismiss criminal charges if the suspect, due to genuine remorse, has prevented the occurrence of damage or has already compensated the damage incurred in full, so the State Prosecutor decides based on the circumstances of the case that the imposition of a criminal sanction would not be fair. In such a case, the provisions of the Art. 61 of this Code shall not be applied.

17 Lazin, Đ. (2003). *Odlaganje krivičnog gonjenja, Krivično zakonodavstvo državne zajednice Srbije i Crne Gore*, Belgrade, p. 295

18 Škulić. M, (2007), *Komentar Zakonika o krivičnom postupku*, Belgrade, p. 832

to what extent at this stage of pre-trial proceedings we can discuss the existence of the criminal offence, i.e. guilt, which can only be determined by the court according to the Constitution. It may be concluded that the public prosecutor rendered a decision on the conditionally deferred prosecution when he estimated that in a particular case meeting the imposed obligations by the suspect would yield better results than the criminal proceedings and potential sanction.[19] As has already been mentioned, the legislator made a grave omission by not prescribing the form of the decision of the public prosecutor on the stay of criminal proceedings under the provision of this Article, which we hold should have been an elaborated ruling since the suspect and the injured party were supposed to get a document determining the duty of the suspect and setting the deadline for its execution. Regardless of such a flawed legal provision, the public prosecutor was under an obligation to warn the injured party that in case of consenting to a stay of criminal proceedings and if a decision on the dismissal of criminal charges was rendered, the right pursuant to Art. 61 of the Code would be forfeited but not the right to settle a restitution claim in a lawsuit.

The main objections in the application of Art. 237 of the CPC referred to certain terms used in the text of the law "genuine remorse", "fair" and "circumstances of the case" which were subject to interpretation since there were no clearly defined criteria based on which the public prosecutor could have determined their existence. With such a legal provision, the public prosecutor made the decision on the criminal prosecution based on his own assessment and personal observations from case to case, without objective criteria which could serve as guidelines when applying discretionary power. Incomplete and imprecise legislation caused variations in the application of the said principle in practice which ultimately resulted in unequal treatment of citizens before the law.[20]

4. Criminal Procedure Code from 2004 and the Principle of Prosecutorial Discretion

Amendments to the Criminal Procedure Code passed in May 2004[21] prescribed that the public prosecutor could render a decision on the stay of criminal proceedings only if the court authorised it. Namely, under the Art. 236, Par. 1 of the CPC after the word "may" it was added after a comma "with the court's authorisation". With such amendments to the Art. 236 of the CPC the functioning of the principle of prosecutorial discretion, as a discretionary power of the public prosecutor, was called into question. In addition, the legislator did not specify which court would be competent to give such an authorisation which in turn led to new problems in practice. Namely, in some courts the said authorisation was given by a criminal pre-trial chamber, in some by the investigating judge, and in others a single judge. We hold that such an authorisation had to be given by a criminal pre-trial chamber, since Art. 24, Par. 6 of the CPC clearly stipulated that the decisions in the first instance outside of the main hearing should be rendered by a chamber. With regard to the application of the stay of criminal proceedings under Art. 236 of the CPC a dilemma arose in practice at which point the prosecutor should request court's authorisation for the application of the said institute. The prevailing view was that the court's authorisation was to be requested after the consent of the suspect i.e. the injured party for the application of prosecutorial discretion had been obtained.

19 Grubač, M. (2006) *Krivično procesno pravo*, Belgrade, p. 139

20 Kirski, J. (2004) *Načelo oportuniteta, Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda i krivično zakonodavstvo Srbije i Crne Gore*, The Association for Criminal Law and Criminology of Serbia and Montenegro

21 Official Gazette of RS, no. 58/2004

Furthermore, obtaining the court's authorisation required certain amount of time, which slowed down the proceedings, defeating the main purpose of the principle of prosecutorial discretion. Therefore, this provision was quite rightly frequently challenged in expert circles. Two new measures were introduced by the legislator through the aforementioned amendments allowing the suspect to undergo rehabilitation treatments for alcohol or drug abuse or to undergo a psychosocial therapy treatment (added items 5 and 6 under Par. 1 of the Art. 236 of the CPC).

With regard to Art. 237 of the CPC the text of the law remained the same.

5. The application of the Prosecutorial Discretion Principle in the Territory of the City of Belgrade during the Period between 28 Feb 2002 and 1 May 2005

From the statistical data shown in the reports of Municipal Public Prosecutor's Offices of the City of Belgrade from the moment the Criminal Procedure Code entered into force on 28 Feb 2002 to 1 May 2004 it is evident that those processing the cases applied mainly Art. 236 of the CPC, in exactly 574 cases, whereas Art. 237 of the CPC was applied only once in a dismissal of criminal charges by the Municipal Public Prosecutor's Office in Obrenovac against a suspect who had committed a criminal offence of endangering the public pursuant to Art. 187, Par. 4 with regard to Par. 1 of the CC of RS.

Through the analysis of the data on Public Prosecutor's Offices in the territory of the City of Belgrade for the cited period it has been determined that the most commonly used measures were the ones stipulated under Art. 236, Par. 1 items 1 and 2 of the CPC (compensating the damage incurred and the payment of a certain sum of money into the accounts of humanitarian organisations), next the measure under item 4 (meeting the obligation of overdue support) while the measure of performing some kind of community service or charitable work stipulated under item 3 of this article was not used in practice. The reports also state that the application of the measure of effecting payments into the account of a humanitarian organisation was proven to be justified since the defendants saw it as a sanction, so this yielded results in terms of special prevention, while certain state institutions have seen concrete financial benefit. Upon deciding on the amount of money to be paid and the deadline for effecting the payment, in each individual case, personal and financial circumstances of the suspect or the reported person were specially assessed. The payment requested ranged from 10 to 30,000 RSD, while the deadline for effecting the said payment was 10 to 90 days and rarely 160 days. In certain cases if the amount to be paid was substantial, the suspects were offered an option to make the payments successively, in instalments, according to their income. The suspect had an obligation to supply the Prosecutor's Office with proof of the payment effected after each installment, while the ruling on the dismissal of criminal charges was passed after the suspect had settled his obligation in full.

Prosecutorial discretion was mostly applied in cases involving the criminal offence of endangering public traffic pursuant to Art. 195 of the CC of RS, however the First Municipal Public Prosecutor's Office in Belgrade took a stand at that time that Art. 236 of the CPC should not be applied if the suspect had been convicted for the same type of criminal offence, if he had been fined in connection with public traffic or for a traffic accident caused by driving under the influence of alcohol, for running a red light or driving carelessly or recklessly. Also in cases involving criminal offences of public endangerment pursuant to Art. 187 of the CC of RS, misappropriation

of an object pursuant to Art. 175 of the CC of RS, causing damage to somebody else's property pursuant to Art. 176 of the CC of RS, counterfeiting official documents pursuant to Art. 233 of the CC of RS etc.

Justification of applying Art. 236 of the CPC was used in practice even in those cases where it was possible to apply for such criminal offences provision of Art. 8 of the Basic Criminal Code (e.g. Art. 54 of CC of RS, Art. 52.a of CC RS, Art. 184, Par. 2 of CC RS, Art. 149, Par. 2 of the Amending Law to the Law on Building Construction of the Republic of Serbia etc.). It was questioned then if it would be more adequate to apply Art. 8 of BCC or Art. 236 when it comes to this type of criminal offences since many people hold that the institute of negligible threat to society is not contrary to the principle of legality of criminal prosecution.

As the text of the law did not prescribe the form of the public prosecutor's decision on the stay of criminal proceedings, Public Prosecutor's Offices treated this differently in practice, some made model forms in order to create a uniform procedure for processing the cases when applying Art. 236 of CPC, whereas others made official notes which determined a measure to be imposed and set a deadline for the suspect to comply with it.

Analysis of the aforementioned data prompted two issues relevant to the application of prosecutorial discretion principle which are as relevant today as they were at the time of its introduction. The first issue was related to the possibility of applying a stay of criminal proceedings i.e. the dismissal of criminal charges pursuant to Art. 236 of CPC if the suspect had not fulfilled the imposed obligation completely within the set deadline. As a rule, if the suspect fails to fulfil the imposed obligation or fulfils it in part, the public prosecutor shall file a motion to indict with the competent court or propose to the investigating judge to undertake certain investigative actions. However, since this deadline is meant as an instruction, there are some theoretical views that the public prosecutor may assess if the suspect has, and to which extent, met the imposed obligation, and depending on the circumstances of the specific case render a decision on the dismissal of criminal charges. Exceeding the deadline is essentially treated as a failure to meet the obligation but this does not have to be rigidly interpreted if the larger part of the obligation has been fulfilled or if some objective reasons have prevented the suspect from meeting the obligation in full, especially if it was not his fault.[22]

The second issue deals with the relationship between offences of minor significance (Art. 18 of the CC) and the prosecutorial discretion principle. Namely, it is held that the prosecutorial discretion principle is peculiar to the procedure legislation of the countries whose substantive law adopts a formal rather than substantive concept of a criminal offence. Our legislator has switched from a substantive to a formal concept of a criminal offence but despite this, the principle of the legality of criminal prosecution was kept in the criminal procedure legislation, while in substantive criminal law offences of minor significance as the grounds for eliminating the existence of a criminal offence remained as if nothing had changed in the definition of the general criminal offence term.[23]

22 Škulić. M, (2007), *Komentar Zakonika o krivičnom postupku*, Belgrade, p. 832
23 Đurđić, V. (2009.), *Opravdanost i svrha načela oportuniteta krivičnog gonjenja, Oportunitet krivičnog gonjenja*, Belgrade, p. 17

The application of the criminal procedure principle of prosecutorial discretion assumes the existence of a criminal offence in terms of objective and subjective elements, i.e. the existence of formal (legal) elements that constitute a criminal offence as well as of the basic procedural requirements necessary for criminal prosecution.[24] An offence of minor significance represents an institute under substantive law the application of which precludes the existence of a criminal offence. The purpose of the institute of an offence of minor significance is to eliminate the application of criminal law in cases involving offences which possess all of the elements of a criminal offence but it is such a negligible act that it does not merit the imposition of criminal sanctions. In such a case, the public prosecutor may use his discretionary power, just as in the case of prosecutorial discretion, and decide to dismiss criminal charges pursuant to Art. 18 of the CC. Namely, this represents the grounds which in our criminal procedure legislation eliminate formal element of criminal unlawfulness, which does not mean that it eliminates the element of unlawfulness altogether. Some hold that provisions under criminal procedure law (prosecutorial discretion principle) are more acceptable as a theoretical model for dealing with "bagatelle" crime because certain points of contention related to the legal nature of the institute of offences of minor significance are thus avoided.[25] Regardless of the fact that both of the said institutes have been accepted in theory since the grounds for their application are different, we believe that it has contributed to inadequate application of the institute of the offence of minor significance in certain cases in practice, and to the insufficient use of prosecutorial discretion principle (for instance, the public prosecutors have in the majority of cases dismissed the criminal charges for illegal possession of narcotics under Art. 246, Par. 3 of the CC pursuant to Art. 18 of the CC despite the fact that this offence could not have been treated as an offence of minor significance due to the degree of the threat to society it poses). We emphasise that our legislation accepted a substantive and objective general concept of a criminal offence up to 1 Jan 2006 with the following elements: threat to society, act of a man, unlawfulness and definition under the law. The Criminal Code of the Republic of Serbia, however, accepts the concept with objective and subjective elements including the guilt as a general element of a criminal offence. According to Art. 14 of the Code "a criminal offence is an act defined as a criminal offence by law which is unlawful and committed with a guilty mind." The main objection is that the substantive element is left out from the general concept of a criminal offence. It is, therefore, no longer an act which is a threat to society, but just unlawful and committed with a guilty mind, the elements of which are defined by law. The reason justifying this was that a threat to society was a political category and that it was a relict of the past which should be removed. In our view, it is not a political category of any kind but a term taken from sociology which constitutes the substance of each act. No matter what term we use, there is no doubt that each criminal offence is a social occurrence since it violates or endangers certain social or individual values. That is why the society is fighting crime. Unlawfulness and definition under law are just formal expressions of its substance. The criminal offence does not pose a danger to society because it is unlawful, it is unlawful and defined by the law because it is a threat to society.[26]

24 Đokić, I . (2009) *Načelo oportuniteta krivičnog gonjenja, Stanje kriminaliteta u Srbiji i pravna sredstva reagovanja*, part III, Belgrade, pp.303-316

25 Stojanović, Z. (2005)*Tendencije u savremenoj nauci krivičnog prava i neka pitanja našeg materijalnog krivičnog zakonodavstva, Nove tendencije u savremenoj nauci krivičnog prava i naše krivično zakonodavstvo*, Belgrade, p. 23

26 Čejović, B. (2008) *Krivično pravo u sudskoj praksi, opšti deo*, Kragujevac, pp.48-49

6. Criminal Procedure Code from 2006 and Prosecutorial Discretion

The Criminal Procedure Code from 2006[27] introduced certain innovations in terms of prosecutorial discretion. Primarily, under Par. 1 of the Art. 268 of the Code the words "with the Court's authorisation" were removed solving the aforementioned problem. Conditionally deferred prosecution, i.e. now existing institute of the stay of criminal proceedings is defined as "an abandonment of criminal prosecution against the suspect who has met certain obligations" (Art. 268) which is accompanied by alternative measures at the public prosecutor's disposal allowing the suspect, among other things, to accept a job which has become available and which suits his work skills and qualifications (Art. 268, Par. 1 item 5). It is specified which organisations may be beneficiaries of the sum of money paid into their accounts (Art. 268, Par. 1 item 6), it is also stipulated that the Republic Public Prosecutor should make a list and rank according to priority organisations, funds and public institutions for this purpose, i.e. list ranking according to priority forms of community service and charitable work (Art. 268, Par. 2). In addition to each of the listed obligation it is possible to add as a special condition for the suspect to settle a restitution claim made by the injured party and to apologise in person to the injured party (Art. 268, Par. 3). The rest of the text of the law remained the same.

Art. 237 of the CPC is stipulated under Art. 269 of the new Code entitled "Abandonment of Criminal Prosecution due to Genuine Remorse of the Suspect". In addition to formal requirements, which remained the same, the public prosecutor was to take into account the suspect's character as well as the circumstances under which the criminal offence had been committed and accordingly render a decision if criminal prosecution and imposition of criminal sanctions on the suspect would be fair and serve any purpose. The character of the suspect and circumstances under which the criminal offence had been committed raise numerous questions relevant for practical application of Art. 269 of the CPC. First of all, if the said provision could be applied to the suspect who had already been convicted, i.e. sanctioned, according to the police record or misdemeanor register, next, if it could be applied to the suspect who had committed a criminal offence with elements of violence, if it could be applied more than once on the same individual etc. Furthermore, the legal formulation suggested that in case of a dismissal of criminal charges on these grounds, all of the "requirements" had to be met cumulatively, which would make the application of the Art. 239 of the CPC considerably more difficult in practice, although the legislator clearly had in mind the opposite effect.

7. The application of Prosecutorial Discretion Principle in the Territory of the City of Belgrade for the Period from 28 March 2002 to 1 Sept 2006 and for the Period from 1 Jan 2003 to 31 Dec 2007

How important the principle of prosecutorial discretion is, may be reflected in the fact that in the territory of the City of Belgrade for the period from 28 March 2002 to 1 Sept 2006 the District Public Prosecutor's Office and Branches of Municipal Public Prosecutor's Offices dismissed criminal charges in 1104 cases by applying Art. 236 of the CPC. Out of these, 1095 individuals

27 Official Gazette of RS, no. 46 of 2 June 2006 this Criminal Procedure Code entered into force on 10 June 2006 and it was supposed to start application on 1 June 2007 except for the provisions of the following articles: 107, 110. 117-122 and 333-335 which entered application on 10 June 2006.

fulfilled the imposed obligation and in 9 cases court proceedings were instituted since the individuals in question failed to fulfil the imposed obligation within the set deadline. As was the case earlier, the most commonly used measure was the one stipulated under Art. 236, Par. 1 items 2 and 3 of the CPC, whereas the stay of criminal proceedings was applied to the following criminal offences: endangerment of public traffic under Art. 195 of the CC of RS, failure to pay support under Art. 119 of the CC of RS, endangerment of safety under Art. 187 of the CC of RS, the criminal offence under Art. 159 of the Law on Energy and Art. 23 of the Law on Public Peace and Order etc. During the cited period, 27,653,139.00 RSD was paid into the accounts of humanitarian organisations. Thirty hours of community service, i.e. charitable work was performed at the Institute for the Transfusion of Blood and 120 hours in total at the Centre for the Protection of Infants, Children and the Youth of Belgrade. Treatments pursuant to Art. 236, Par. 1 items 5 and 6 of the CPC were completed at the Institute for Mental Health of Belgrade, Palmoticeva St. 37.

In the reporting period from 1 Jan 2003 to 31 Dec 2007 branches of municipal public prosecutor's offices of the District Public Prosecutor's Office in Belgrade dismissed criminal charges using prosecutorial discretion in 10% to 11% of cases except in 2007 when this percentage fell to 8.38%. Namely, during 2003 out of 14,862 filed criminal charges in total, 3,382 resulted in a dismissal (22.75%) out of which 388 cases were subject to prosecutorial discretion (11.47%). In 2004 14,021 were filed, 3373 (24.05%) were dismissed, in 358 (10.61%) prosecutorial discretion was used. In 2005 14,575 were filed, 3,542 (24.81%) were dismissed, in 373 (10.53%) prosecutorial discretion was used. In 2006 16,244 were filed, 3,899 (24.00%) were dismissed, in 436 (11.18%) prosecutorial discretion was used. In 2007 16,276 were filed, 3,780 (23.22%) were dismissed and in 317 (8.38%) prosecutorial discretion was used.

8. Criminal Procedure Code from 2009 and Prosecutorial Discretion

The Criminal Procedure Code from 2009[28] finally eliminated the authorisation by the court as a requirement for the application of prosecutorial discretion principle in cases involving criminal offences punishable by a fine or a term in prison of up to three years (Art. 236, Par. 1). Moreover, this Code introduced some justified and important innovations regarding prosecutorial discretion principle as well. Primarily, the possibility of its application was expanded to include criminal offences punishable by a term in prison of 3 to 5 years (Par. 2). Moreover, the catalogue of measures which may be imposed on the suspect was expanded in the case of prosecutorial discretion principle: to fulfil the obligation established by a final court decision, i.e. honour restrictions imposed by a final court decision (Par. 7) and to pass a driver's test, get additional driving lessons or complete some other appropriate course (Par. 8). A significant innovation was Par. 6 of the said article, allowing the public prosecutor, with the authorisation of the court before which the main hearing for a criminal offence punishable by a fine or a term in prison of up to three years was to be conducted, to desist from criminal prosecution if the suspect had complied with one or more measures imposed under Par. 1 of this article. When it comes to measures under Par. 1 items 2 and 3 of this article the consent of the injured party was necessary, i.e. the rule under Par. 5 of this article was applied. The public prosecutor could desist from criminal prosecution until the end of the main hearing even when the proceedings were being conducted for a criminal offence punishable under law by a term in prison of over three years, and up to five years if this is approved by

28 Official Gazette of RS, no. 72 of 3 Sept 2009

a chamber under Art. 24 Par. 6 of this Code. The main objection to this article was that the legislator had eliminated the court's authorisation under Par. 1 of this article and then introduced it under Par. 6 and 7, so all of the remarks on the judicial review of the work of the prosecutor's office when applying prosecutorial discretion remained valid. There was no real difference, except that the court's authorisation was required at different stages of the proceedings. We still hold that the review of the public prosecutor's decision on using prosecutorial discretion is necessary but it has to be secured within the public prosecution's organisation not by the court as has been already mentioned. In addition, there is the issue of different jurisdiction of the court authorising the application of the said principle at the main hearing. The importance of Par. 9 of this article has already been mentioned in terms of the increase in the use of the prosecutorial discretion principle. However, the question is raised if the said provision is in compliance with the legal content, i.e. the substance of prosecutorial discretion principle. Specifically, Par. 9 stipulated that the public prosecutor had an obligation i.e. the duty to examine if there was a possibility for a stay of criminal proceedings, while the purpose of the said principle was to authorise the public prosecutor to decide, at his discretion, in each individual case if this principle should be applied. We believe that the justification of its application should be an issue, but it seems that the legislator introduced this provision solely for practical reasons with a view to increasing the application of prosecutorial discretion principle. Namely, the said provision imposed a duty on the public prosecutor to examine the possibility of applying Art. 236 of the CPC, i.e. the stay of criminal proceedings when formal requirements for applying prosecutorial discretion were met but not to apply this principle as well. It is interesting to note that the legislator did not mention Art. 237 of the CPC, only the possibility of the stay of criminal proceedings.

9. Criminal Procedure Code from 2011[29] and the Prosecutorial Discretion Principle

This Code provides for two forms of prosecutorial discretion. The first is the stay of criminal proceedings. According to Art 283 of the said Code the public prosecutor may defer criminal prosecution for criminal offences punishable by a fine or a term in prison of up to five years if the suspect accepts one or more of the following obligations:

1) to remove the detrimental consequence caused by the commission of a criminal offence or to compensate the damage incurred;
2) to effect a payment into the account of a humanitarian organisation, fund or a public institution;
3) to perform community service of some kind or charitable work;
4) to meet the obligations regarding overdue support;
5) to undergo a rehabilitation treatment for alcohol or drug abuse;
6) to undergo psycho-social therapy in order to address the cause of violent behaviour;
7) to meet the obligation imposed by a final court decision, i.e. to honor the restrictions imposed by a final court decision.

In the order on the stay of criminal proceedings the public prosecutor shall set a deadline within which the suspect must fulfil the imposed obligations but the said deadline must not exceed one year.

29 Official Gazette of RS, no. 72/ 2011

The fulfillment of the obligations is supervised by a representative of the administrative authority competent for administration of criminal sanctions.

If the suspect meets the imposed obligation within the set deadline, the public prosecutor shall render a ruling dismissing the criminal charges and shall inform the injured party of this, while the provision of Art. 51, Par. 2 of the Code shall not be applied.

The second possible form of prosecutorial discretion principle is a dismissal of criminal charges. According to Art. 284 of the Code the public prosecutor shall dismiss criminal charges in a ruling if the criminal charges themselves suggest:

1) that the reported act is not a criminal offence which is prosecuted *ex officio*;
2) that the statute of limitation has expired or the offence in question is subject to amnesty or pardon or other circumstances exist which permanently exclude prosecution;
3) that there are no grounds for suspicion that a criminal offence which is prosecuted *ex officio* has been committed.

On the dismissal of charges as well as on the reasons for it, the public prosecutor shall inform the injured party within 8 days and instruct him on his rights (Art. 51, Par. 1), and if criminal charges have been brought by the police, the police shall be informed as well.

In the case of criminal offences punishable under law by a term in prison of up to three years, the public prosecutor may dismiss criminal charges if the suspect has prevented due to genuine remorse the occurrence of damage or has already compensated the damage incurred in full, so the public prosecutor based on the circumstances of the case decides that the imposition of a criminal sanction would not be fair. In such a case the provision of Art. 51, Par. 2 of the said Code shall not be applied.

As usual those drafting the law have not taken into account the suggestions and objections made by experts since the Code does not stipulate anything new or relevant under cited provisions of Art. 283 and 284 certain paragraphs have been omitted which has to a certain extent contributed to the use of prosecutorial discretion principle not only in terms of frequency but also in terms of quality which is evident from the annual reports of the basic and High Public Prosecutor's Offices. The issue of the position and rights of the injured party has not been additionally regulated nor harmonised with the aforementioned recommendations, although a greater care for the interests of the injured party is exceptionally important for the proper understanding and application of prosecutorial discretion principle. It should be stressed that this position has remained the same since the Code from 2002 introduced the prosecutorial discretion principle. That is why it is important that the citizens and the public do not see prosecutorial discretion or other new, important institutes such as plea agreements as an exclusive privilege of the suspect especially not as a "secret" agreement between the public prosecutor and the suspect. Therefore, it is necessary to secure or to put it even better restore trust of the public in the work of Public Prosecutor's Office and criminal justice system in general. This requires not only amendments to the law but raising awareness and a change in mentality both of the public and of the judicial authorities especially when it comes to applying the said institutes.

On the other hand, a good solution is used under Par. 1 of the Art. 283 which expands the stay of criminal proceedings to all criminal offences punishable by a fine or a term in prison of up to five years without the authorisation of the court at the main hearing, i.e. the chamber under Art. 24, Par. 6 of the CPC. We also approve of the omission of the measure under Art. 236, Par. 1 item 8 of the CPC according to which the suspect was allowed to agree to pass a driver's test, get additional driving lessons or complete some other appropriate course.

Compared to Art. 237 of the CPC, the legislator has taken a step in the wrong direction because the prosecutorial discretion principle, which is insisted on so much, is lost under new Art. 284 and it is turned into just one of the common legal grounds for a dismissal of criminal charges. It is utterly unclear as to the reasons behind this and unjustified to make a distinction according to the types and seriousness of criminal offences to which the principle may be applied since the public prosecutor may decide the issue of whether the criminal prosecution serves any purpose or if it is fair only in cases for criminal offences punishable by imprisonment of up to three years. This raises the question once again of the trust in and responsibility of the public prosecutor.

10. The Application of the Prosecutorial Discretion Principle in the territory of the Republic of Serbia for the period from 1 Jan 2010 to 31 Dec 2010

One of the significant innovations is that the report of the Republic Public Prosecutor's Office from March 2011 on the work of Public Prosecutor's Office on combating crime and protecting the constitution and legality in 2010 for the first time contains data on the application of prosecutorial discretion and plea agreements. Introducing a separate column in the reports of Basic, High and Appellate Public Prosecutor's Offices in the territory of the Republic of Serbia on the application of prosecutorial discretion and plea agreements clearly points to the relevance of these institutes. It should be stressed that the report by the Republic Public Prosecutor's Office as a title uses "Application of the Institute of the Stay of Criminal Proceedings" (underneath it in parentheses Art. 236 and Art. 237 of the CPC), while the text deals with the application of Art. 236 and Art. 237 although the stay of criminal proceedings is related solely to Art. 236 of the CPC.

The submitted reports show that the basic and high public prosecutor's offices in the Republic of Serbia during the reporting period applied prosecutorial discretion principle in 5268 cases, while the amount paid into the accounts of humanitarian organisations, funds or public institutions totaled at 138,052,838.49 RSD. Based on the submitted data, the principle of prosecutorial discretion was applied the most in the territory of the Appellate Public Prosecutor's Office in Novi Sad where the Basic and High Public Prosecutor's Offices dismissed criminal charges or desisted from prosecution in 1910 cases through the application of Art. 236 and Art. 237 of the CPC effecting payments in the total amount of 54,596,262.18 RSD pursuant to Art. 236 Par.1 item 2 of the CPC into the accounts of humanitarian organisations, funds and public institutions. In the territory of the Appellate Public Prosecutor's Office in Belgrade Basic and High Public Prosecutor's Offices dismissed criminal charges or desisted from prosecution in 1489 cases through the application of the said principle effecting payments in the total amount of 46,563,236.31 RSD. The Public Prosecutor's Offices in the territory of the Appellate Public Prosecutor's Office in Kragujevac dismissed criminal charges or desisted from prosecution in 1089 cases through the application of the prosecutorial discretion effecting payments in the total amount of 21,893,340.00 RSD. In the territory of the Appellate Public Prosecutor's Office in Nis, Basic and High Public Prosecutor's Offices dismissed criminal charges or desisted from prosecution in 780

cases through the application of Art. 236 and Art. 237 of the CPC effecting payments in the total amount of 15,000,000.00 RSD.

The Prosecutor's Offices most often imposed payments of a certain sum of money into the accounts of humanitarian organisations as one of the measures stipulated by the provision of Art. 236 Par.1 of the CPC which , for instance, in the First Basic Public Prosecutor's Office in Belgrade was 40,000.00 RSD minimum and in the territory of the Appellate Public Prosecutor's Office in Kragujevac the requested sum ranged from 15,000.00 to 100,000.00 RSD. The submitted statistical data shows that regardless of the changes in the text of the Code, prosecutorial discretion principle in most cases is applied to the same criminal offences as in the previous period and those are: endangerment of public traffic under Art. 289, Par. 3 of the CC, failure to pay support under Art. 195 of the CC, theft under Art. 203 of the CC, petty theft under Art. 210 of the CC, counterfeiting documents under Art. 355 and 356 of the CC, the criminal offence under Art. 159 of the Law on Energy, criminal offence of construction without a building permit under Art. 219 of the CC and Art. 149 of the Law on Planning and Construction, fraud under Art. 208 of the CC, issuing and using payment cards with no funds under Art. 228 of the CC and illegal logging under Art. 275 of the CC.

The submitted data on criminal offences show that the principle of prosecutorial discretion was mainly used by the Basic Public Prosecutor's Offices, while the High Public Prosecutor's Offices used it only exceptionally while the High Public Prosecutor's Office in the territory of the Appellate Public Prosecutor's Office in Belgrade during the reporting period did not pass a single decision based on the principle of prosecutorial decision. The report of the Republic Public Prosecutor's Office contains the total number of individuals who were subject to the principle of prosecutorial discretion, as well as the total amount of funds paid into the accounts of humanitarian organisations, funds or public institutions, but the individual reports that were submitted by the Basic and High Public Prosecutor's Offices in the territory of Appellate Public Prosecutor's Offices in Belgrade, Novi Sad, Nis and Kragujevac contain detailed data on the application of the said principle along with the suggestions and objections relevant to the practical application of the prosecutorial discretion principle. With regard to that, it is important to mention that the prosecutorial discretion principle was applied in 2010 in the territory of the Appellate Public Prosecutor's Office in Kragujevac in 1603 cases but the procedure was unsuccessful in 567 cases due to the failure of the reported persons to meet the imposed obligations. This piece of information is important from several aspects. First of all, this is a very high number of individuals who failed to meet the imposed obligations, which puts at risk the significance of this institute, and on the other hand the question is raised if failure to meet an obligation is every failure to meet the obligation within the set deadline, which has already been discussed, since this piece of information is not discernable from the submitted reports.

To compensate the lack of more detailed criteria, instructions or guidelines for the application of the principle of prosecutorial discretion, some Prosecutor's Offices independently set rules in terms of the amounts to be paid, types of criminal offences subject to the said principle etc. In terms of activities related to the application of the prosecutorial discretion principle the First Basic Public Prosecutor's Office in Belgrade should be especially noted. At the meeting of the department heads and first deputies with the First Basic Public Prosecutor in Belgrade held on 25 Jan 2010 a conclusion was adopted containing a list specifying criminal offences with regard to which the application of the institute of the stay of criminal proceedings should always be

attempted: failure to pay support under Art. 195 of the CC, obtaining loans under false pretences under Art. 209 of the CC, minor bodily injury under Art. 122 of the CC, embezzlement under Art. 207 of the CC if there is a leasing contract signed, and the defendant returns the vehicle during the proceedings, detainment of a minor under Art. 191 of the CC (it is necessary to first request the collection of the needed information or undertake investigative actions), construction without a building permit under Art. 219a of the CC in cases where the investors or contractors are natural persons and the construction in question is minor in scale and Art. 159 of the Law on Energy, as well as the criminal offences that cannot be subject to this institute: tax evasion under Art. 229 of the CC, avoidance of withholding tax under Art. 229a of the CC (restrictive application), counterfeiting documents under Art. 355, Par. 2 related to Par. 1 (in certain cases the application is justified, for instance, when licence plates are used from another car as false licence plates), domestic violence under Art. 194 of the CC, endangering the public traffic under Art. 289, Par. 1 and Art. 289, Par. 3 related to Par. 1, serious offences against the safety of public traffic under Art. 297 of the CC, grievous bodily harm under Art. 121 of the CC notwithstanding when it is the same criminal offence under Art. 121, Par. 4 of the CC or the injuries are serious but by their nature are borderline minor (e.g. fracture of a finger) and illegal possession of narcotics under Art. 246a of the CC and the criminal offences against government authorities and against public peace and order (potentially a stay of criminal proceedings may be used for criminal offences under Art. 23 of the Law on Public Peace and Order of the Republic of Serbia).

The First Basic Public Prosecutor's Office in Belgrade has signed a Protocol on Cooperation with the City of Belgrade agreeing to transfer the payments effected by the suspect solely to the account of Treasury Department of the Ministry of Finance into a special sub-account entitled the City of Belgrade – Health Secretariat – funds related to the use of prosecutorial discretion, under the consolidated account of the treasury of the City of Belgrade. The purpose of this protocol is the efficient and fair distribution of financial funds between health institutions in the territory of the City of Belgrade, while the City of Belgrade, based on the financial funds collected through the application of the institute of the stay of criminal proceedings, makes a financial plan for each calendar year of income and expenditure for the funds in the special sub-account and adjusts it to the inflow of financial funds paid. The signing of this protocol is of great importance since it has been an enduring criticism for years that there is no feedback on how the funds paid pursuant to Art. 236 of the CPC into the accounts of humanitarian organisations, funds and public institutions by the Public Prosecutor's Offices have been spent.

In addition, the First Basic Public Prosecutor's Office in Belgrade has signed protocols on cooperation with the Public Utility Company "Zelenilo Beograd" (park maintenance company) and the PUC "Gradska čistoća" (garbage disposal company) on 22 Feb 2010 which will allow the suspects to perform community service there pursuant to Art. 236, Par. 1 item 3 of the CPC. According to the said protocols, the duration of the community service is determined by the First Basic Public Prosecutor's Office in Belgrade for each individual, and PE "Zelenilo Beograd" and PE "Gradska čistoća" have undertaken to ensure that the individuals performing community service according to the said protocols are subject to all work safety measures according to the Labour Law and other regulations regulating the labour sphere. Furthermore, the parties to the protocol have undertaken an obligation to inform the First Basic Public Prosecutor's Office in Belgrade upon the start and the completion of the community service of the individuals referred to them in writing and on all relevant facts related to the enforcement of the decision of the Public Prosecutor's Office.

In our opinion, such actions by the First Basic Public Prosecutor's Office in Belgrade are commendable since they prove that serious work and successful organisation may achieve considerably better results in the application of prosecutorial discretion principle but also in the application of all of the other institutes which are important for the operation of the Public Prosecutor's Office.

The key issue in the application of the prosecutorial discretion principle is the unstandardised procedure of the Basic and High Public Prosecutor's Offices in the territory of Serbia. We believe that mandatory instructions of the Republic Public Prosecutor would certainly contribute not only to a uniform but broader application of prosecutorial discretion principle in the practice of the public prosecution which would also be of better quality.

The analysis of the submitted reports by the Basic and High Public Prosecutor's Offices in the territory of the Republic of Serbia shows that all of the Prosecutor's Offices have stressed the importance of the application of the principle of prosecutorial discretion, that a relative increase was registered in the number of cases where the said principle was applied compared to previous reporting periods, but it must be noted that the said principle is not used as much as it is allowed by law. Specifically, the catalogue of criminal offences remained almost identical to the one that existed when the principle of prosecutorial discretion was first introduced in our current legislation, regardless of the amendments to the Criminal Procedure Code from 2009 and the possibility of applying the principle of prosecutorial discretion to the criminal offences punishable under law by a term in prison of up to five years with a caveat that this principle is mainly applied before the criminal proceedings are initiated and much more rarely after the indictment stage, i.e. at the main hearing pursuant to the provision of Art. 236, Par. 6 and 7 of the CPC.

Conclusion

The purpose of this paper is to show the application of prosecutorial discretion in our practice in the period just short of ten years which raises a lot of questions and provides the opportunity to write creatively and extensively in the attempt to search for and offer some answers. Bearing in mind the limited scope of this paper we have tried to point out, yet again, the significance of the prosecutorial discretion and problems in its application. The importance of prosecutorial discretion must be viewed from the aspect of modern criminal procedure legislation which has been introducing an increasing number of new institutes, prosecutorial investigation as well in which the public prosecutor is assigned a primary role. Therefore, the question which arises is whether the public prosecutors in Serbia are ready to face this serious task and accept such responsibility. If we look at the situation and the problems we are faced with realistically, we must not exempt ourselves from criticism and admit, at least when it comes to the application of prosecutorial discretion, that the problem is not just the (poor) quality of legal regulations but that considerable responsibility for insufficient application of this institute falls on the public prosecutors themselves. This is supported by the statistical data proving that certain Public Prosecutor's

Offices showed that despite all of these flaws and ambiguities of the text of the Code we have pointed out, the prosecutorial discretion may be successfully applied.[30]

It is a fact that many of the public prosecutors who are overworked and pressed for deadlines, regardless of the level of quality of work, think it much simpler and faster to file a motion to indict without the obligation to attend the main hearing and let the court decide rather than invest additional effort, and which is more important, assume responsibility if prosecutorial discretion is to be applied. This applies to judges as well when it comes to proceedings for the imposition of criminal sanctions without scheduling the main hearing. It is evident that when alternative resolutions are applied, old "tested" provisions of the Code rather than the modern ones are used in practice. It is indisputable that the prosecutors have not assumed a managing role in the pretrial proceedings according to the provision of Art. 46 of CPC and have not used their numerous other powers stipulated by the Code thus improving the efficiency of the criminal proceedings. The reasons for this could be insufficient training and organisation of the existing personnel of the Public Prosecutor's Offices, but also constant pressure of frequent elections which result in passive approach to work and a lack of enthusiasm of public prosecutors. Insufficient application of the principle of prosecutorial discretion public prosecutors attribute to their unfavourable position in the proceedings in the justice system and numerous, often unfounded, accusations of corruption. Therefore, we hold that for adequate application of prosecutorial discretion, apart from the willingness of the public prosecutors to overcome the current situation with their resolution and knowledge, it is also necessary to educate the public on the advantages of this institute.

In order for the prosecutors to use their legal powers, it is first necessary to create the conditions for their work and motivate them to apply the principle of prosecutorial discretion with regard to lesser criminal offences so that the caseload in courts is reduced on the one hand, and on the other so that greater care and time are invested in the processing of complicated and complex cases thus enabling full efficiency of the justice system.

30 After the principle of prosecutorial discretion has been introduced in our current legislation most of the Public Prosecutor's Offices have used it just symbolically. However, the Fourth and the Fifth Municipal Public Prosecutor's Office in Belgrade have clearly stood out according to the number of persons who were subject to the application of the said institute and the sum of money from effected payments. This is why the Society for the help of mentally disabled persons from New Belgrade on 12 March 2004 presented an "acknowledgment for understanding, warmth, cooperation and assistance of the mentally challenged persons" to the Fourth Municipal Public Prosecutor's Office in Belgrade because on several occasions the reported persons have effected payments into the account of the said society according to the rulings of this Prosecutor's Office. In the analysis of the statistical data for the following period a lack of uniformity in the procedure of Public Prosecutor's Offices is identified again and a completely unjustified variation in the application of prosecutorial discretion principle which has resulted in an unequal treatment of citizens before the law.

Radomir Prelević, PhD[1]

Prosecutorial Discretion as a Simplified Form of Resolving Criminal Matters in Montenegro

Introduction

Prosecutorial discretion as a form of diversion of the criminal proceedings was present in the criminal procedure law even before, when our state was under socialist system of government, but it was applied only in cases involving juvenile offenders. It was not until 2003[2] that the rules on the prosecutorial discretion of adult offenders in Montenegro were introduced for the criminal offences prosecuted *ex officio*.

Bearing in mind the purpose of writing this paper, the theoretical considerations on the prosecutorial discretion as a principle that has been widely accepted in criminal proceedings will be left out, and instead a detailed analysis of the legal framework for the application of the said institute in Montenegro and the data on its application will be provided.

1. Legal framework

As was already mentioned, the said institute was introduced into the legal system of Montenegro through Articles 244 and 245 of the Criminal Procedure Code in 2003, these provisions were updated in 2006[3] and again when the new Criminal Procedure Code was finally passed in 2009[4] and the subject of the prosecutorial discretion was moved to Articles 272 and 273 of the new CPC.

1 Attorney-at-Law, Podgorica
2 Criminal Procedure Code (Official Gazette of the Republic of Montenegro, no. 71/03), in application since 29 March 2004, Articles 244 and 245 of the CPC
3 The Law on Supplements and Amendments to the Criminal Procedure Code (Official Gazette of the Republic of Montenegro, no. 47/2006)
4 Criminal Procedure Code (Official Gazette of the Republic of Montenegro, no. 57/2009 and 49/2010)

Furthermore, the matter of the prosecutorial discretion against juvenile offenders is regulated by a separate law in 2011 which has been in application since 1 September, 2012.[5]

In addition, acting on its authority granted by the Code, the Ministry of Justice has passed a by-law entitled *Rules on the Stay of Criminal Prosecution.*[6] In addition to this, another by-law was passed on the subject of the prosecutorial discretion, namely *the Instructions on the Stay of Criminal Proceedings* which was passed by the Supreme State Prosecutor in September 2005.

1.1 *The Criminal Procedure Code* under Article 272 introduces the so-called conditional discretion whereby it is allowed to dismiss criminal charges under the condition that the suspect meets the imposed requirements.

Pursuant to the said provision the public prosecutor may stay criminal prosecution if the criminal offence in question is punishable by a fine or a term in prison of up to five years, in which case two requirements must be met cumulatively:

- firstly, the state prosecutor must find that the criminal proceedings would not serve any purpose, given the nature of the committed offence and the surrounding circumstances, as well as the past history of the perpetrator and his personal attributes and

- secondly, the suspect must accept to fulfil one or more obligations prescribed by the Code.

The obligations imposed on the suspect are characterised as basic measures that can be divided into:

a) those that can be ordered without the involvement of the injured party and
b) those whose imposition requires consent of the party injured through commission of the criminal offence.

The first group, i.e. measures that may be ordered independently of the attitude of the injured party include those whose fulfilment is accepted by the suspect, as follows:

a) Measure of reparatory nature, where the suspect has to accept to rectify the damages occurring due to commission of the criminal offence or to compensate for damages done;
b) Measure of alimentary nature, where the suspect accepts to fulfil the duty to support which has become due, i.e. other obligations determined under final court decision.

The first category of measures, which can be imposed without the consent of the injured party, offers an option to the state prosecutor to conduct first the mediation proceedings between the injured party and the suspect if he deems it necessary due to the particular circumstances of the case.

The situation is quite different when it comes to the second category of measures whose imposition requires, by law, mandatory consent of the party injured by the said criminal offence, since

5 The Law On The Criminal Proceedings Against Juvenile Offenders (Official Gazette, no. 64/2011), Articles 66 and 69
6 Official Gazette of the Republic of Montenegro, no. 60/ 2010

in such a case it is necessary to obtain express consent of the injured party, in which case the suspect must undertake one or more of the following obligations:

a) To pay a certain amount of money in favour of a humanitarian organisation, fund or public institution and/or
b) To perform certain type of community service or charity work.

The obligation the suspect undertakes must be performed within a time period that may not exceed 6 months. The obligations of the suspect are determined by a decision made by the competent state prosecutor, which is delivered to the suspect, the injured party if there is one, and the humanitarian organisation or the public institution which will be the beneficiary of the said measure.

The said provision introduces the so-called conditional stay of proceedings since the charges may be dismissed only under the condition that the suspect fulfils the imposed obligations. If the suspect fulfils the imposed obligations within the deadline set by the decision, the state prosecutor shall dismiss the charges, in which case the injured party will lose the right to take action, i.e. pursue further the prosecution as the subsidiary prosecutor. It follows that this represents a final dismissal of charges.

In addition to this case of the conditional stay of proceedings, there is a case of the so-called pure principle of opportunity of criminal prosecution[7], whereby the state prosecutor may dismiss the charges in the interest of justice for criminal offences that are punishable a fine or a term in prison of up to three years.

The requirement for the dismissal of charges in the interest of justice is that the suspect has, out of true remorse, prevented the occurrence of damage or has fully compensated the damage incurred, and the state prosecutor, based on the circumstances of the case, decides that the imposition of any criminal sanctions would not be in the interest of justice. When the decision on the dismissal of criminal charges in the interest of justice is taken, the injured party does not have recourse to the rule from the Criminal Procedure Code that allows the injured party to act as a subsidiary prosecutor.

1.2 *The Law on Criminal Proceedings against Juvenile Offenders* recognises the conditional stay of proceedings, as well as the pure principle of opportunity of criminal prosecution against juvenile offenders. Unlike the conditional stay of proceedings against adults, the state prosecutor for juvenile offenders may decide not to institute the criminal proceedings for a criminal offence for which the law prescribes as the main penalty a fine and/or a prison sentence of up to 10 years even if the requirements for the instituting of the proceedings are met, provided that the decision imposes one or more of the following disposition orders:

a) settlement with the injured party
b) regular attendance at school or workplace
c) participating in some sports activities
d) performing community service or charity work

7 Art. 273 of the CPC (Official Gazette of the Republic of Montenegro, no. 57/2009 and 49/2010)

e) payment of a certain amount of money into the account of a humanitarian organisation, fund or a public institution
f) undergoing appropriate examination and treatment for the addiction caused by alcohol and drug abuse
g) joining individual or group therapy programme at an appropriate health institution, counselling centre or some other appropriate organisation
h) attendance of a course for professional development or preparation for and taking of the exams
i) restraining from visiting certain places or from contacting certain individuals.

Moreover, the necessary condition is that the state prosecutor for juvenile offenders concludes that the criminal proceedings against the offender in question would serve no purpose, given the nature of the criminal offence and the circumstances under which it had been committed, also the past history and personal attributes of the juvenile offender in question.

In order to establish the aforementioned circumstances the state prosecutor for juvenile offenders may request information from the legal representative of the juvenile offender in question, from other persons, authorities and institutions, and when it is necessary the prosecutor may summon these persons and the juvenile offender for direct interview. The state prosecutor may request a report on the offender's character and his living circumstances from the authority in whose care the offender is and from professional services.

During enforcement of criminal sanction against the juvenile offender, the state prosecutor for juvenile offenders may decide not to institute criminal proceedings for another criminal offence which the defendant has committed if due to the seriousness of the said offence, as well as the penalty and/or correctional measure being enforced, it would not serve any purpose to conduct new criminal proceedings and impose new criminal sanctions for that offence. While selecting the disposition order, the state prosecutor for juvenile offenders will take special care to adapt the disposition order to the character of the said offender and his living circumstances, taking into account his willingness to cooperate in the application of the said disposition order. Should the juvenile offender fully complete the said order, the state prosecutor for juvenile offenders shall make a decision to dismiss the criminal charges.

The state prosecutor for juvenile offenders may dismiss the criminal charges when the juvenile offender completes the disposition order only in part as well, if considering the nature of the criminal offence and the circumstances under which the offence has been committed, past history of the juvenile offender, and the personal traits of the said offender and the reasons for not completing the disposition order, he finds it would not serve any purpose to do so.

If the juvenile offender does not complete the disposition order or does it only in part, to the extent that it merits the instigation of the proceedings, the state prosecutor for the juvenile offenders shall instigate and conduct the preliminary proceedings.

When the state prosecutor decides not to instigate the proceedings and issues the decision imposing one or more disposition orders, such decision is not appealable.

The state prosecutor for juvenile offenders notifies the injured party about the dismissal of the criminal charges and the injured party may request from the judge for juvenile offenders of the competent court to decide on the instigation of the proceedings against the juvenile, i.e. within three months from the day they find out about the dismissal of criminal charges if the said party was not informed of the dismissal of charges.[8]

Unconditional prosecutorial discretion in criminal proceedings against juveniles in the form of the dismissal of criminal charges in the interest of justice is stipulated for criminal offences for which the main penalty is a fine or a term in prison of up to five years. In such a case the state prosecutor for the juvenile offenders may dismiss criminal charges if the said offender has prevented the damage out of true remorse or has fully compensated the damage incurred, so the state prosecutor for juvenile offenders finds that imposing criminal sanctions would be unjust.

When the state prosecutor for juvenile offenders dismisses the criminal charges in the interest of justice, the prosecutor shall inform of this decision the authorities that have custody of the offender, the injured party and the police, if they are the ones who brought the charges, while the injured party may not request of the judge for juvenile offenders of the competent court to decide on the instigation of the proceedings against the juvenile.[9]

The specific nature of the criminal prosecution of juvenile offenders is especially pronounced in the provision on the settlement for the criminal offences that are prosecuted by private lawsuit[10], which extends the prosecutorial discretion to include the actions undertaken by the police in the proceedings against juvenile offenders. According to the said provision the police officer in charge of juvenile offenders, upon learning of the criminal offence prosecuted in a civil suit, with the consent of the state prosecutor for juvenile offenders, informs the said offender and the injured party of the possibility of settlement and, if they consent, delegates the settlement proceedings to a mediator.

If the juvenile offender and the injured party do not consent to the settlement proceedings or if the said proceedings do not come to a conclusion within 30 days, or they do not reach a settlement, or the juvenile offender does not fulfil in full or to a great degree the obligations set out in the agreement, the injured party has the right to file a request to instigate the proceedings to the competent state prosecutor for juvenile offenders before the deadline set for filing a civil lawsuit expires.

1.3 The original provision under Article 244, Par. 5 of the Criminal Procedure Code in 2003, which introduced for the first time the principle of prosecutorial discretion for adult offenders, authorised the state prosecutor to further regulate the procedure of rendering the decision on the stay of criminal prosecution and its contents using the instructions. In accordance with this authority, the state prosecutor issued the **I***nstructions on the Stay of Criminal Proceedings*[11] in September 2005. Since this authority of the state prosecutor for the issuing of the said instructions was not included in the new Criminal Procedure Code in 2009, and instead the passing of a

8 The Law On The Criminal Proceedings Against Juvenile Offenders (Official Gazette, no. 64/2011), Article 69
9 Ibid., Art. 66
10 Ibid, Art. 68
11 Instructions on Proceedings to the State Prosecutors with regard to the application of the provisions under Art. 244 of the Criminal Procedure Code on the stay of the criminal proceedings.

by-law by the Ministry of Justice was ordered (this by-law is analysed under the item 1.4 of this paper), it follows that the aforementioned Instructions on the Stay of Criminal Proceedings that the state prosecutor had passed in 2005 ceased to be valid on the day the new CPC came into force. Although upon comparison certain similarities may be identified between the content of the Instructions on the Stay of Criminal Proceedings issued by the state prosecutor in 2005 and the By-laws on the Stay of Criminal Proceedings passed by the Ministry of Justice in 2010, it seems to us that it is useful to note that the state prosecutor in his Instructions provided a kind of register of the criminal offences which he deems suitable for the use of prosecutorial discretion in Montenegro. Article 7 of the said instructions stipulates that the stay of criminal proceedings is especially appropriate for the following criminal offences listed in the Penal Code of the Republic of Montenegro passed in 2003:

Criminal offences against marriage and family:

- Neglect and abuse of a minor referred to under Art. 219, Par. 1
- Denying the support referred to under Art.221, Par.1
- Violation of family obligations referred under Art.222, Par.1

Criminal offences against labour rights:

- Failure to fulfil work duties and infringement of labour rights under Art 224
- Infringement of the rights related to social security under Art. 229
- Criminal Offences against property: Theft referred to under Art.239 (if the value of the stolen property does not greatly exceed the amount necessary to constitute such an offence – 150 €, and the perpetrator aimed at appropriating the said value (up to 250€))Embezzlement referred to under Art 243, Par. 1 (if the embezzled object is not property of private citizens)
- Fraud referred to under Art 244, Par. 1 and 2 (if the value of the taken objects does not exceed the amount necessary to constitute a criminal offence (150 €) through which the perpetrator was aiming at appropriating the said value, i.e. incur such damage (of up to 250€))
- Petty larceny, embezzlement or fraud referred to under Article 246, Par. 1 (if the offence was not committed to the detriment of the property of citizens)
- Misappropriation of other people's property referred to under Art. 247, Par. 1 and 2 (if the property in question is not private property)
- Misappropriation of a vehicle referred to under Article 248
- Destruction and damage of other people's property referred to under Art. 253, Par. 1 and 2 (if the damaged property is not the property of private citizens)

- Unlawful misappropriation of land referred to under Art. 254, par. 1

Criminal Offences against payment operations and business transactions:

- Failure to perform business transactions in good faith as referred to under Art. 272, Par. 1

Criminal offences against public road safety:

- Endangerment of public transport referred to under Art. 339, Par. 1 and 3

Criminal offences against the judiciary:

- Failure to comply with the court decision referred to under Art. 395

Criminal offences against official duties:

- Failure to perform official duties in good faith referred to under Art. 417, Par. 1

1.4. The Rules on the Stay of Criminal Proceedings have been passed by the Ministry of Justice of the Republic of Montenegro based on the authority given under Art. 272, Par. 5 of the Criminal Procedure Code.[12] These by-laws regulate actions that are to be taken when applying the stay of criminal proceedings, as well as certain methods of fulfilling the obligations and the content of the decision on the stay of criminal proceedings.

As far as the activities connected to the application of the stay of the criminal proceedings are concerned, the Rules contain the provisions on the state prosecutor's assessment whether or not the criminal proceedings would serve any purpose, on the summoning of the suspect and entering his plea, summoning the injured party and obtaining the consent of the injured party, on the mediation and agreement resulting from the said mediation, as well as the provisions on the content of the decision on the stay of the criminal proceedings.

The Rules specify the methods of fulfilling the obligations related to the stay of the criminal proceedings as follows:

a) repairing the damage incurred as a consequence of the committed criminal offence or compensating the damage incurred
b) fulfilling the obligations with regard to the support owed, or any other obligations set out in a final court decision
c) paying a certain amount of money into the account of a certain humanitarian organisation, fund or public institution.

The Rules also stipulate how community service or charity work is to be performed under the provisions on the legal entities where the said work is to be performed, provisions on the agreement with a legal entity that is signed by the Supreme State Prosecutor's Office, provisions on the criteria used to determine the type of service that is to be assigned, as well as the characteristics

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of the community service or charity work. When it comes to the characteristics of the said work it is stipulated that it must not be financially compensated, that it may be performed in the period that does not exceed three months and is not shorter than 40 hours, nor longer than 120 hours, in addition to which it must not interfere with regular employment or fulfilment of any other obligations the suspect might have.

The Rules also stipulate that the State Prosecutor decides on the dismissal of the criminal charges upon receiving the proof of the fulfilment of the undertaken commitments specified in the decision on the stay of criminal proceedings, and it is also stipulated a separate record to be kept of the cases involving the stay of the criminal proceedings.

2. The Application of the Prosecutorial Discretion

This chapter will provide some statistical data and tables from the Report on Activities of the Supreme State Prosecutor in the previous seven years, which has been published on the official web site of the Supreme State Prosecutor's Office, which contains information on the frequency and degree of application of prosecutorial discretion in the practice of Montenegrin judiciary as a means of influencing the reduction of the number of cases before the courts, i.e. the shortening of the proceedings before the said courts.

The data has been presented in a chronological order starting with the data on the application of the principle of prosecutorial discretion from 2005 until 2011.

2.1. The Application of Prosecutorial Discretion in 2005

As mentioned above the state prosecutor issued in September 2005 the "Instructions on the Stay of Criminal Proceedings", the purpose of which was to finally see increased application of the principle of prosecutorial discretion in practice in the coming period, thus allowing criminal matters to be resolved more quickly without opening the criminal proceedings.

According to the statistical data contained in the 2005 Report on Activities of the State Prosecutor's Office, out of 9,482 submitted criminal charges in total, 2,106 criminal charges brought against offenders were dismissed, i.e. 22.21% of the total number of the submitted charges, which is 2% more of dismissed charges than in 2004.

The principle of prosecutorial discretion, according to this data, was mostly used in the cases where the charges had been brought against younger adults and against juvenile offenders. More precisely, out of the total number of the submitted criminal charges, the state prosecutors made the decision to dismiss the charges against 74 juvenile offenders, out of which the criminal charges against 19 juvenile offenders were dismissed due to the fact that the juvenile offenders or children could not be held criminally responsible, while 18 were dismissed based on prosecutorial discretion, whereas in 2004, 28 criminal charges against juvenile offenders had been dismissed based on the principle of prosecutorial discretion.

2.2. The Application of Prosecutorial Discretion in 2006

Out of the total number of resolved cases of criminal charges against 11,679 persons, the competent authorities dismissed the criminal charges against 3266 persons, i.e. 27.96% (which is 5.75% more than in 2005). In all of these cases where a dismissal of charges occurred, although the requirements for misdemeanour liability were met, requests for the instigation of the misdemeanour proceedings were submitted. In 2006, 620 juvenile offenders were reported for committing criminal offences, which is 19.23% more than in the previous year when 520 juvenile offenders had been reported. 53 cases against juvenile offenders remained unresolved by the courts, which means 673 reported juvenile offenders were processed or 10.14% more than in the previous year.

Out of the total number of filed criminal charges, the charges were dismissed against 75 juvenile offenders through decisions by the state prosecutors, out of which the charges were dismissed against 49 juvenile offenders due to the fact that these were not criminally responsible offenders – i.e. they were children, whereas in 2005, the charges were dismissed against 19 individuals under 14 years old, which in terms of percentages means 157.8% more dismissals of charges due to the fact that the offenders were not criminally responsible. Criminal charges were dismissed against 9 juvenile offenders based on the principle of prosecutorial discretion (in 2005, based on this principle, charges had been dismissed against 18 juvenile offenders) and against 17 other juvenile offenders charges were dismissed for other reasons.

The stay of criminal proceedings under Art. 244 of the CPC was fully in application in 2006, however, the Report on Activities of the State Prosecutor's Office laid out plans to use this institute to a greater extent in the coming period, which was meant as an order to the state prosecutors considering that there is a duty to give progress reports every six months to the Supreme State Prosecutor's Office about the number of the instigated proceedings and the results of the conducted proceedings.

2.3. The Application of Prosecutorial Discretion in 2007

According to the statistics, the State Prosecutor's Office dismissed criminal charges against 2,705 individuals out of 16,275 criminal charges filed in total in 2007, out of which 2,644 fell under the jurisdiction of basic state prosecutor's offices, 41 under the jurisdiction of the higher state prosecutor's offices. The percentage of the dismissal of criminal charges is 16.62%, which is compared to the previous year lower by 11.34%.

The state prosecutor's office directed their activities in 2007, more than before, towards the stay of criminal proceedings as one of the forms of the so-called alternative resolution of criminal disputes. The state prosecutors attempted to resolve criminal disputes in such a way in 254 cases in accordance with the law. This was successful in 164 cases or 64.57% of the cases, which ended in a dismissal of the criminal charges after indemnifying the injured party by settling a debt or after ordering the defendant to give a certain amount of money to charity.

In 2007, acting on the filed criminal charges, the state prosecutors rendered decisions on the dismissal of charges against 80 juvenile offenders.

2.4. The Application of Prosecutorial Discretion in 2008

The State Prosecutor's Office in 2008 dismissed, out of 15,255 filed criminal charges in total, 3,121 criminal charges, out of which 3101 fell under the jurisdiction of the basic state prosecutor's offices, whereas 20 cases fell under the jurisdiction of higher state prosecutor's offices. The percentage of the dismissed criminal charges is 20.46% which is compared to the previous year by 9.12% more.

The fact that out of the total number of dismissed criminal charges only 20 were against persons reported to the higher state prosecutor's offices in Montenegro, is enough to draw a conclusion that the criminal charges resolved by the dismissal of charges were related to the cases of minor criminal offences that fall under the real competence of the basic state prosecutor's offices and where charges were not filed by the Police Directorate.

Most of the dismissed criminal charges were charges brought against perpetrators of the criminal offence of theft, minor criminal offences against public road safety, domestic violence and the criminal offences against official duties. In most cases, the criminal charges were filed by private citizens, the foundation of which could not be proven.

The increased percentage of the dismissed criminal charges reflects the more frequent use of the stay of proceedings. The statistics on the activities of the basic state prosecutor's offices in 2008 shows that the application of the stay of proceedings institute resolved 240 criminal disputes in the prosecutor's office, by conducting settlement proceedings with the suspect, provided the suspect met the requirements stipulated by law.

Acting on filed criminal charges in 2008, the state prosecutors rendered decisions on the dismissal of charges against 70 juvenile offenders.

Table 1
Stay of Criminal Proceedings in 2007 and 2008

The Prosecutor's Office	No.KTO cases in 2007	No.KTO cases in 2008	Collections in 2007	Collections in 2008	Injured in 2007	Injured in 2008
Podgorica	23	86	3.870 €	18.050 €	3.870 €	5.300 €
Nikšić	25	39	4.940 €	7.350 €		
Ulcinj	5	1	750 €	200 €		
Bar	5	6	600 €	850 €		
Kotor	7	11	1.400 €	2.300 €		
Herceg Novi		25		2.950 €		3.093 €
Kolašin	4			250 €		1.095 €
Bijelo Polje	6	34	750 €	1.600 €		8.920 €
Pljevlja	17	20	1.250 €	1.300 €	600 €	750 €
Berane	6	2	1.200 €	300 €		

The data presented in the table above show that the use of the stay of criminal proceedings was increased in 2008 compared to the previous year, by 105%.

2.5. The Application of Prosecutorial Discretion in 2009

In 2009 the State Prosecutor's Office dismissed, out of 9,751 filed criminal charges in total, 3,330 criminal charges, out of which 3,280 fell under the jurisdiction of the basic state prosecutor's office, whereas 50 cases fell under the jurisdiction of higher state prosecutor's office. The percentage of the dismissed criminal charges is 34.15%, which shows an increase of 13.69% compared to the previous year.

The fact that out of the total number of dismissed criminal charges only 50 were against persons reported to the higher state prosecutor's offices in Montenegro, is enough to draw a conclusion that the criminal charges resolved by the dismissal of charges were related to minor criminal offences that fall under the real competence of the basic state prosecutor's offices and where charges were not filed by the Police Directorate.

Most of the dismissed criminal charges were filed against perpetrators of the criminal offence of fraud, minor criminal offences against public road safety, theft, the abuse of power, domestic violence.

In most cases, the criminal charges were filed by private citizens, the foundation of which could not be proven in the proceedings. The increased percentage of the dismissed criminal charges reflects the more frequent use of the stay of proceedings.

The statistics on the activities of the basic state prosecutor's offices in 2009 shows that the application of the stay of proceedings institute resolved 339 criminal disputes in the prosecutor's office, i.e. 10.18% out of the total number of the dismissed charges or 3.48% out of the total number of filed charges. By applying the said institute, the state prosecutors have collected from the suspects 84.565€ which was paid into the accounts of humanitarian organisations and public institutions and 3,530.72€ to cover the damage incurred to the injured parties.

Such activity of the state prosecutors' offices has considerably improved the efficiency of the resolution of a great number of criminal cases as they did not enter ordinary judicial procedure.

Acting on filed criminal charges in 2009, the state prosecutors rendered decisions on the dismissal of charges against 64 juvenile offenders.

Table 2
The Stay of Criminal Proceedings in 2009

The Prosecutor's Office	Successful Cases	Paid to Charities	Paid to the Injured Party
Podgorica	159	48.750	690
Nikšić	44	8.450	270
Ulcinj	4	1.200	
Bar	8	2.000	
Kotor	22	4.500	
Herceg Novi	33	8.300	
Kolašin	3	300	
Bijelo Polje	17	2.300	607
Pljevlja	21	4.450	1.913,72
Berane	7	1.000	
Rožaje	11	1.600	50
Plav	5	800	
Cetinje	5	915	
TOTAL	339	84.565	3.530,72

The data presented in the table above show that the use of the stay of criminal proceedings was increased in 2009, compared to the previous year, by 70.79%.

2.6. The Application of Prosecutorial Discretion in 2010

In 2010, the State Prosecutor's Office dismissed criminal charges against 2,815 persons, out of 10,036 criminal charges filed in total, out of which 2,780 fell under the jurisdiction of basic state prosecutor's office, 35 under the jurisdiction of the higher state prosecutor's office. The

percentage of the dismissed criminal charges is 28.05%, which is compared to the previous year lower by 6.1%.

The fact that out of the total number of the dismissed criminal charges only 35 were against persons reported to the higher state prosecutor's offices in Montenegro, confirms that the criminal charges resolved by the dismissal of charges fell under the real competence of the basic state prosecutor's offices.

Most of the dismissed criminal charges were filed against perpetrators of the criminal offences against property, minor criminal offences against public road safety, against marriage and family – i.e. domestic violence. In these cases the criminal charges could not be proven as well-founded upon investigation. When looking at this data one should take into account that the total number of the dismissed criminal charges includes those cases where the stay of criminal proceedings was granted.

By using the stay of criminal proceedings, the state prosecutors resolved 382 criminal disputes, i.e. 13.57% of the total number of the dismissed criminal charges, or 3.8% of the total number of the filed criminal charges, which is an increase of about 13% compared to the previous year, settling the case with the suspect if the suspect met the requirements stipulated by law. By applying this institute the prosecutors collected 127,339.00 € from the suspects and paid it into the accounts of humanitarian organisations and public institutions and 17,056.42 € was collected as indemnity of the injured party. In addition, the prosecutors attempted to resolve 165 cases by using the stay of criminal proceedings, but were unsuccessful.

The statistics show that the number of cases resolved by a stay of the criminal proceedings instute increases every year. Such actions by the state prosecutors have considerably improved the efficiency in resolving a great number of cases as they did not enter ordinary judicial procedure.

In the second quarter of 2010, the application of the part of the new Criminal Procedure Code related to the plea agreement began. Since this institute as an alternative form of resolution of disputes represents one of the biggest innovations in the state prosecutor's practice, as it includes agreement between the prosecutor and the defendant on the most important issues of the criminal proceedings, the state prosecutors have started using it very tentatively. Consequently, only three plea agreements were entered into in 2010.

In 2010, the state prosecutors rendered decisions on the dismissal of criminal charges in cases against 76 juvenile offenders.

Table 3
The Stay of Criminal Proceedings in 2010

The Prosecutor's Office	Successful Cases	Paid to Charities	Paid to the Injured Party
Podgorica	178	81.649	583
Nikšić	38	9.100	405
Ulcinj	3	900	
Bar	8	1.800	
Kotor	22	7.200	
Herceg Novi	37	9.420	6.218,42
Kolašin	12	3.500	
Bijelo Polje	13	1.600	8.000
Pljevlja	22	4.250	200
Berane	14	2.500	
Rožaje	16	3.300	50
Plav	11	2.020	300
Cetinje	8	100	1300
TOTAL	382	127.339	17.056,42

The data presented in the table above show that the use of the stay of criminal proceedings was increased in 2010, compared to the previous year, by 12.68%.

2.7. The Application of Prosecutorial Discretion in 2011

In 2011, the State Prosecutor's Office dismissed criminal charges against 3,608 persons, out of 9,480 criminal charges filed in total, out of those 3,582 fell under the jurisdiction of basic state prosecutor's offices, including 571 cases in which the stay of criminal proceedings had been granted, while 25 charges were dismissed by the higher state prosecutor's offices. The percentage of the dismissed criminal charges in 2011 was 38.06%, which is compared to the previous year higher by 10.55%.The statistics show that out of the total number of the dismissed criminal charges only 25 were against persons reported to the higher state prosecutor's offices, confirming that the criminal charges resolved by the dismissal of charges fell under the real competence of the basic state prosecutor's offices. Most of the dismissed criminal charges were filed against perpetrators of the criminal offences against property, official duties, freedom and human and civil rights – threats to security, against state authorities, criminal offences against public road safety, against marriage and family – i.e. domestic violence. In other words, in the cases where criminal charges could not be proven as well-founded upon investigation.

By using the stay of criminal proceedings, the state prosecutors resolved criminal matters in 571 cases by reaching a settlement with the suspect if the suspect met the requirements stipulated by law, which was 15.82%% of the total number of the dismissed criminal charges, or 6.02% of the total number of the filed criminal charges, which is an increase of 33.50% compared to the previous year. By

applying the said institute, the prosecutors collected 199,620.54 € from the suspects and paid it into the accounts of humanitarian organisations and public institutions and 26,748.98 € was paid to the injured party as compensation. In addition, the prosecutors failed to resolve 187 cases by using the stay of criminal proceedings, and at the end of 2011 there were 88 cases in the process of being decided on.

The statistics show a tendency toward increasing the number of cases resolved by a stay of the criminal proceedings instute. In 2008, 240 criminal disputes were resolved in such a way by the prosecutor's office, then in 2009 - 339 disputes, whereas in 2010 - 382 criminal disputes were so resolved, all of which has improved the efficiency in resolving a great number of cases, since they did not enter ordinary judicial procedure.

In 2011, the state prosecutors entered into 13 plea agreements, which is 10 more than in the previous year.

The stay of criminal proceedings represents the greatest innovation in the practice of the prosecutor's office. Although the prosecutors are still cautiously using it, the progress in its use as an alternative form of resolving criminal matters is evident.

In 2011, the state prosecutors rendered decisions on the dismissal of criminal charges in cases against 114 juvenile offenders.

Table 4
Stay of Criminal Proceedings in 2011

The Prosecutor's Office	Successful Cases		Paid to Charity		Paid to the Injured Party	
	2010	**2011**	2010	**2011**	2010	**2011**
Podgorica	178	**208**	81.649	**101.115,54**	583	
Nikšić	38	**56**	9.100	**12.600**	405	**300**
Ulcinj	3	**43**	900	**1.440**		
Bar	8	**36**	1.800	**17.000**		**1.000**
Kotor	22	**58**	7.200	**18.250**		**2.890**
Herceg Novi	37	**34**	9.420	**6.705**	6.218,42	**4.895.76**
Kolašin	12	**12**	3.500	**3.100**		**375**
Bijelo Polje	13	**38**	1.600	**9.700**	8.000	**4.945**
Pljevlja	22	**23**	4.250	**4.000**	200	**4.710**
Berane	14	**11**	2.500	**3.300**		
Rožaje	16	**12**	3.300	**2.000**	50	**2.433,22**
Plav	11	**14**	2.020	**2.450**	300	
Cetinje	8	**26**	100	**5.000**	1.300	**5.200**
TOTAL	382	**571**	127.339	**199.620,54**	17.056,42	**26.748,98**

The data presented in the table above show that the use of the stay of criminal proceedings was increased in 2011, compared to the previous year, by 33.50%.

3. Assessment of the Current Situation

When it comes to positive legislation of the principle of the stay of criminal proceedings in Montenegro, it may be concluded that it corresponds with the optimal models in comparative law. In our opinion, the possible paths for improvement of the legal regulations on the stay of criminal proceedings that could be taken are the insistence that all of the criminal offences for which a prison sentence of up to 5 years or a monetary fine are prescribed as criminal sanctions are included in the list of criminal offences to which this principle is applied. Admittedly, the Criminal Procedure Code, under Art.272, contains expressly such a provision, however, we can see that the state prosecutor, under Art.7 of his Instructions from 2005, "reduces" this provision just to "appropriate criminal offences", thus considerably narrowing the scope the Code has defined for the application of this principle. The author of this paper holds that the said issue should be regulated using by-laws, either by amending the existing By-laws on the Stay of Criminal Proceedings, or by a completely new by-law passed by the state prosecutor's office.

As far as the issue of the application of the principle on the stay of criminal proceedings in practice in Montenegro is concerned, the main observation is that the Reports on activities of the state prosecutor show a steady increase in the number of rendered decisions on the stay of criminal proceedings. It seems that it can reasonably be expected that the number of cases where the criminal proceedings will end by means of the said institute is going to be considerably higher in the future.

Conclusion

The above analysis of the positive legal regulation of the prosecutorial discretion and analytical data on its application in Montenegro allow the following conclusion to be drawn:

a) that the provisions of the Criminal Procedure Code passed in 2009, as well as the Law on the Criminal Proceedings against Juvenile Offenders passed in 2011, and the By-Laws on the Stay of Criminal Proceedings issued in 2010 provide an optimal legal framework for proper application of the principle of prosecutorial discretion;
b) that the State Prosecutor's Office of the Republic of Montenegro has been continuously applying the legal provisions on prosecutorial discretion and that the statistics on the application of the said principle show a steady increase.

Tadija Bubalović, PhD[1]

Summary Proceedings in Croatian Criminal Legislation

1. Introduction

A comprehensive reform of the criminal procedure legislation in the Republic of Croatia started in 2002 and lasted until 2008. An important document of this reform is the Platform for the Drafting of a new Criminal Procedure Act, which was adopted by the Government of the Republic of Croatia on 9 February 2007.[2] Three main goals that should be achieved by the said reform are set by this document: 1) structural change of the pre-trial proceedings by abolishing the judicial and introducing the State Attorney's (prosecutorial) investigation, 2) the simplification and acceleration of the criminal proceedings which would result in: wider application of the summary proceedings, deciding on the criminal prosecution based on the principle of prosecutorial discretion, more frequent use of criminal orders and the introduction of the new requirements and institutes for the conclusion of the proceedings before (and outside) of the main hearing, 3) general improvement of procedural rules.[3] The new Criminal Procedure Code was passed on 15 December 2008 (CPC/08).[4] Despite different opinions on its reach, it is believed that this Code represents the most radical reform of the criminal procedure legislation in the previous century. One of the main reasons for the said reform was long-lasting inefficiency of

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2 The Platform for the Drafting of a new Criminal Procedure Act of the Republic of Croatia of 9 Feb 2007 was published in: Pavišić, B. et al., *Kazneno postupovno pravo*, Rijeka, 2010, pp. 482-495. (hereinafter: Pavišić, B., KPP, 2010).

3 More on the objectives of the reform of the Croation criminal procedure see in: Pavišić, B., *Novi hrvatski Zakon o kaznenom postupku*, HLJKPP, 2/2008, pp. 511-519. (hereinafter: Pavišić, B., Novi hrvatski ZKP, 2008).

4 Criminal Procedure Code, Official Gazette of the Republic of Croatia no. 158/08, 76/09, 80/11, 121/11, 91/12 – the Decision of the Constitutional Court of the Republic of Croatia no. U4-448/2009 of 9 July 2012, Official Gazette no. 143/12. It came into force in part on 1 January 2009, for the cases under the jurisdiction of USKOK (Bureau for Combating Corruption and Organized Crime) on 7 July 2009 and in full on 1 September 2011. Numbers of the articles and paragraphs in this paper are referring to the Criminal Procedure Code of the Republic of Croatia – Consolidated Text of 11 October 2011, Official gazette no. 121/11.

the criminal justice system in the fight against crime.[5] Leaving aside other significant innovations introduced by the CPC/08, this paper will focus on the overview and analysis of the new regulation of the summary proceedings, which are structurally different from the ones provided for in the CPC/97.

2. The Concept and the Structure of the Modern Criminal Proceedings

The general social changes that occurred at the end of the 20th century have led to a considerable increase in crime rates but also in their structure. Simultaneously, a significant polarisation appears in criminal behaviour into petty (mass) crime and the more serious and complex crime. No matter which type of crime is being dealt with, the society needs an expeditious and efficient way of combating it. Prolonged criminal proceedings are unacceptable both for the defendant and the society as a whole. Prolonged duration of the criminal proceedings may be justified when it comes to the most serious criminal offences, but not if the offence in question is minor and less complex. Equal treatment of the most and least complex cases is not justified nor is it permissible. Therefore, it is necessary to differentiate the forms of the criminal proceedings by adapting them to the nature and the degree of seriousness of different categories of criminal cases.

Modern criminal procedure, from a structural point of view, is based on an adversarial, oral and direct trial. International and supranational institutions which have started increasingly to deal with the structural issues of the criminal proceedings at the international level, especially of late, have contributed to this.[6] Fundamental values of such a new modern criminal procedure are understood to be: a) a more comprehensive protection of human rights in the criminal proceedings, b) a more effective cooperation of different national systems, c) the speed and economy of the criminal procedures.[7] Three main features of the modern criminal proceedings are the result of these values: active participation of the defendant in the proceedings, adversarial structure of the criminal proceedings and procedural equality of the parties involved ("equality of arms") at the main hearing stage.[8]

3. The Concept of the Summary Criminal Proceedings

Several different terms are used for the abbreviated forms of the criminal proceedings: *summary, simplified, urgent*. Furthermore, one should distinguish between these and other similar institutes which are similar in terms of their concept or content or are closely related to each other. First of all, there is a distinction between the *summary* and *accelerated* proceedings. Accelerated proceedings are not a special form of the criminal proceedings, but ordinary criminal proceedings that are accelerated, which is manifested in the shorter amount of time that expires between the commission of the criminal offence and the final court ruling (for instance, by eliminating

5 Đurđević, Z., *Suvremeni razvoj hrvatskog kaznenog procesnog prava s posebnim osvrtom na Novelu ZKP iz 2011*, HLJKPP, 2/2011, pp. 311-313.

6 More on this in: Pavišić, B., *Novi hrvatski ZKP*, 2008, p. 492; Pradel, J., *Droit penal compare*, 2-e ed., Paris, 2002, pp. 773-783. On the EU legislation see also: Pradel, J. - Corstens, G., *Droit penal europeen*, 2-e ed., Paris, 2002

7 More on this in: Bayer, V., *Kazneno procesno pravo – odabrana poglavlja*, volume II, Zagreb, 1995

8 Council of Europe's Recommendation R(87)18 is related to the simplification of the criminal justice system, and the Recommendation R(99)19 is related to the mediation in criminal matters.

certain stages of the proceedings etc).[9] In some legal systems (e.g. German) a principle of "time concentration" (or principle of continuity) is applied, which dictates that all of the procedural actions must, from the first hearing to the pronunciation of the judgment, be executed in a "coherent continuity".[10] In some systems criminal procedures with an accelerated main hearing are prescribed,[11] or procedures applied to flagrant criminal offences. The term *simplified forms of proceedings* has a broader meaning than the term *summary proceedings* although these terms are related to each other and may be justly seen as synonymous. A simplified form includes the rules applied to the accelerated proceedings, but also the rules of summary proceedings. The characteristics of the simplified procedural forms are reflected in the abandonment of the general form of procedural structure (by eliminating entirely or in part certain stages of the proceedings, for instance, the pre-trial proceedings) or in the departure from the general procedural principles.[12]

Abbreviated or summary criminal proceedings are specially regulated proceedings which represent a departure from the ordinary criminal proceedings which manifests itself in the simplification of the form of criminal proceedings and the elimination of certain stages of the said proceedings and which allows simpler, faster and shorter proceedings involving minor criminal offences and offences of medium-level seriousness.[13] Summary proceedings are conceptually regulated as a faster, simpler and more cost-effective procedure compared to the ordinary form of proceedings.[14] An important feature of such proceedings is that there is no investigation stage.[15] Summary proceedings are characterised by a more or less simplified structure of the procedure, which is accomplished by abbreviating the proceedings, omitting certain stages of the proceedings or the segments of the said stages, accelerating the proceedings by setting shorter or preclusive deadlines, eliminating the unnecessary formalities from the proceedings as well as by limiting the catalogue of procedural guarantees provided for the defendant.

There is a distinction between the summary proceedings in its *proper* and *broader* sense. Proper summary proceedings are a special form of the criminal proceedings in which certain abbreviations of the criminal proceedings are prescribed. These are: the procedure for issuing a criminal order, the procedure for pronouncing a judicial reprimand and the use of prosecutorial discretion by the State Attorney. Summary proceedings in a broader sense include the bypassing and omitting certain stages of the proceedings, regardless of the form of criminal proceedings. These include: acting on a direct indictment, making a ruling based on the agreement entered into by the parties involved or acting on an oral indictment for the offences that have been committed at the main hearing. In comparative law the summary criminal proceedings in a broader sense are understood to mean the proceedings in which it is easier to prove the commission of the criminal offence and the guilt of the offender, i.e. in which the competent ruling is rendered faster

9 On the different criteria based on which various kinds of accelerated ordinary criminal proceedings are distinguished see: Pavišić, B., *KPP*, 2010, pp. 193-194.

10 As cited in: Pradel, J., *Droit penal compare*, Paris, 2002., p. 603

11 On these procedures see: Bouloc, B., *Procedure penale*, Paris, 2006, pp. 576-580, 780-783

12 On the main characteristics of the simplified forms of criminal proceedings see: Brkić, S., *Racionalizacija krivičnog postupka i uprošćene procesne forme*, Novi Sad, 2004, p. 108.

13 Modern forms of summary proceedings appeared immediately after the French Revolution as a reaction to the mixed form of the criminal proceedings codified in the *Code procedure penal* passed in 1808. Namely, the obligation to conduct an investigation in all of the proceedings regardless of the nature or seriousness of the criminal offence in question or whether the suspect had confessed, needlessly resulted in the prolongation of the criminal proceedings, which was irrational in the cases of minor and less complex criminal offences. Consequently, already at that time, there was increasing awareness that the ordinary criminal proceedings for serious criminal offences were not necessary in trials for minor criminal offences.

14 Pavišić, B., *Novi hrvatski ZKP*, 2008, note 10 on p. 517

15 Pavišić, B., *Novi hrvatski ZKP*, 2008, p. 517

(e.g. the proceedings for flagrant criminal offences and criminal offences committed at the main hearing).[16]

There are three groups of summary criminal proceedings in theory.[17] The first group includes summary proceedings which are characterised by the subjective elements, i.e. the ability of the parties involved to exercise their procedural rights. This is a typical model of "consensual trial". This group includes the English *summary trial*, Italian abbreviated trial (*giudizio abbreviato*) and imposing the sanctions at the request of the parties involved (*applicazione della pena su richiesta delle parti*).[18] The second group of the summary proceedings is characterised by the objective element, which is determined by the nature and degree of seriousness of certain (minor and less complex) criminal offences. The requirement for the application of the rules of the summary proceedings is, therefore, the criminal offences to be classified as minor. The third group of the summary criminal proceedings are characterised by combined subjective and objective elements. The proceedings for the issuance of a criminal order are typical of this group of summary proceedings.[19]

There is another model, the so-called *economy model*, of the criminal proceedings in comparative law, which coincides with the summary criminal proceedings in terms of its content. Such is the original form of the English *summary trial*, on which the German accelerated proceedings (*beschleunigtes Verfahren*) have been based. Among the economy models English guilty plea may be included, as well as the German criminal order (*Strafbefehlsverfahren*) and the French penal order (*ordonnance penale*), but also the English *formal caution*. For all types of the economy model proceedings, the main issue is who decides whether or not the summary proceedings will be conducted (the court, public prosecutor, defendant, the injured party)? In different legislations it is regulated differently.[20]

Although it is a special form of the general form of criminal proceedings, there are significant differences between the ordinary and the summary proceedings. The general forms of procedure provide for a typical resolution of the most complex and the most serious criminal cases in which the procedural rules have a general meaning, most often this procedure is referred to as the ordinary criminal procedure.[21] The main characteristic of the ordinary procedure is that it contains the most comprehensive rules of procedure. These very same rules in other forms of the proceedings have a subsidiary application. Ordinary proceedings include different stages of the proceedings, most commonly the pre-trial proceedings (the investigation), the indictment procedure, the main hearing and the procedure related to the legal remedies. The summary criminal proceedings differ from the ordinary criminal proceedings in the following: 1) the length of the proceedings is shorter – due to omitting certain stages of the proceedings entirely or in part, 2) the acceleration of the proceedings – achieved by setting short and preclusive deadlines, as well as 3) the reduction of formalities during the proceedings – achieved by waiving certain redundant

16 Cf. *Skraćeni kazneni postupak*, in: *Pravni leksikon*, Zagreb, Leksikografski zavod Miroslav Krleža, 2007, pp. 1458-1459

17 More on the distinctions of different types of summary criminal proceedings and their main characteristics see in: Orlandi, R., *Procedimenti speciali*, published in: Conso, G. - Grevi, V. *Compendio di procedura penale*, Seconda edizione, Cedam, Padova, 2000, pp. 521-529.

18 As cited in: Orlandi, R., *Procedimenti speciali*, op. cit., pp. 521-529.

19 Most criminal procedure codes of the continental Europe use this very type of summary proceedings (e.g. German accelerated proceedings - *beschleunigtes Verfahren*).

20 More on this in: Pesquie, B., *Introduction to Part I*, published in: Delmas-Marty, M./ Spencer, J. R. (ed.), op. cit., p. 80

21 On different terms for individual types of criminal proceedings, see: Grubač. M., *Krivično procesno pravo*, Beograd, 2008, pp. 32-33.

formalities and 4) limiting the catalogue of procedural guarantees provided for the defendant.[22] All of the main subjects of the proceedings (authorised prosecutor, the defendant and the court) participate in the summary proceedings as well, although in some cases the court has a supervisory role (e.g. in the proceedings with a consensual element). The injured party's rights are also legally regulated in such proceedings. The objective of summary proceedings is the same as of the ordinary proceedings, it is just attained in a different, more expedient and abbreviated manner.

There are forms of the out-of-court settlement of the dispute that has arisen from the criminal offence in question. These include the agreement between the offender and the victim outside of the criminal proceedings, i.e. the procedure for compensating the victim (restorative justice), which is achieved through a reconciliation, settlement etc, and through certain types of mediation. In modern understanding of the concept of summary proceedings, classic, traditional form of the summary proceedings is distinguished from the abbreviated forms of proceedings with consensual elements and those with a diversion concept.

One of the issues in this matter is related to the dilemma whether or not the summary proceedings are real criminal proceedings or is it just a case of proceedings conducted before a criminal court? To answer this question, it is perfectly acceptable to claim that the summary proceedings are in fact actual criminal proceedings as well, in which the criminal offence and the guilt of the perpetrator are decided on in accordance with the general and special legal rules.

The summary proceedings are in their entirety regulated by special provisions. Specifically, the provision of Art. 520 stipulates subsidiary application of the provisions for the ordinary proceedings unless there are special rules that apply, and the provision of the Art. 203, Par. 2 stipulates that the provisions on the ordinary proceedings are applied to the summary proceedings unless it is otherwise prescribed.[23] In terms of structure, the summary proceedings are regulated by the general, joint provisions on the summary proceedings (Chapter XXV), by the provisions on the issuance of the criminal order and the pronunciation of the judicial reprimand (Chapter XXVI), as well as by certain articles related to the summary proceedings. In addition to the aforementioned Art. 203, Par. 2, the summary proceedings are also referred to in the provisions of Art. 19.a and 19.b on the jurisdiction and composition of the municipal courts, of the Art. 216, Par. 2 which stipulates that the investigation is not conducted for criminal offences that are subject to summary proceedings,[24] Art 304, Par. 2 on the crime scene investigation for the offences subject to the summary proceedings, and of the Art. 365, Par 2 referring to the time set for the issuance of an amended indictment which was withdrawn before its confirmation.[25]

22 On this topic, see: Brkić, S., *op. cit.*, p. 166

23 On the normative regulation of the summary proceedings in comparative law see Pavišić, B., *Komentar Zakona o kaznenom postupku*, Rijeka, 2011, pp. 909 – 934. (hereinafter: Pavišić, B., *Komentar ZKP*, 2011). Tomašević, G., *Kazneno procesno pravo*, Split, 2011 (hereinafter: Tomašević, G., KPP, 2011.), Bejatović, S., *Krivično procesno pravo*, Belgrade, 2008, pp. 511-519, Đurđić, V., *Krivično procesno pravo – Posebni dio*, Niš, 2011, Škulić, M., *Krivično procesno pravo*, Belgrade, pp. 475-481.

24 The provisions on the summary proceedings do not explicitly stipulate that the investigation is not to be conducted, but it is concluded *argumentum a contrario* based on the provision of the Art. 216, Par. 2 of the CPC.

25 Cf. Pavičić, A. / Bonačić, M., *Skraćeni postupak prema novom Zakonu o kaznenom postupku*, HLJKPP, Zagreb, 2/2011, pp. 489-520

4. The Rationale and the Objective of the Summary Proceedings

Classic mixed type of the criminal proceedings at the end of the 20th century went through significant changes. They are reflected in the increasing presence of accusatory elements in the proceedings, consistent application of the principle of adversarial arguments and equality of arms as an important component of the principle of a fair trial, greater guarantees of fundamental human rights of the defendant in the criminal proceedings as well as in efficient protection of the victim's rights during the proceedings. This new type of the criminal proceedings has been proven to be successful in combating serious and complex forms of crime. However, at the same time it has been proven to be inefficient even uneconomical in the fight against minor and less complex offences, which has led to the introduction of new, simpler and faster procedural provisions into many different legislations. The resolution of such cases by conducting entire ordinary proceedings encumbered and clogged up the criminal judiciary. This was the initial reason for, but also the rationale behind the introduction of simpler and faster forms of criminal proceedings, specifically, summary forms of the criminal proceedings, into modern criminal legislations. Criminal justice system overload, which is due to the increase in the commission of all types of criminal offences, has resulted in slow, inefficient processing of cases that is behind schedule. One of the possible solutions to this problem was the adoption of simpler and more expedient forms of criminal proceedings. Less formal and expedient proceedings in cases of minor criminal offences would result in the processing of a greater number of cases, from which both the individual citizen and the society as a whole may benefit.

Main objectives of the summary criminal proceedings are accelerated, simplified and more efficient criminal proceedings when it comes to minor and less complex criminal offences, This may be achieved by avoiding the procedural forms that are not necessary, omitting certain stages or their segments as well as by reducing the duration of the proceedings as a whole. Final goal of the summary proceedings is to increase the efficiency of the criminal proceedings, i.e. achieving better efficacy of the criminal proceedings, but also securing the procedural guarantees of all of the defendant's rights, and the rights of the victim in the criminal proceedings.[26]

5. Types of Summary Forms of Criminal Proceedings

Summary forms of criminal proceedings in the Croatian criminal procedure law are:

1) discretionary prosecution by the State Attorney (principle of prosecutorial discretion) (Articles 521-523);
2) summary proceedings pursuant to CPC/08 (Art. 520, Articles 524-539),
3) plea-bargaining and a settlement with regard to the criminal sanctions to be imposed (Art. 360 – 364),
4) the procedure for the issuance of a criminal order (Art. 540 – 545),
5) the procedure for the pronouncement of a judicial reprimand, (Art. 546 – 548).

26 The protection of the victim's (injured party's) rights is regulated better and more comprehensively in some legislations (for instance, in the case of Swiss summary proceedings), and elsewhere it is less regulated or it is done just sporadically.

According to their structure, their simplified procedural rules and more expedient procedure for the conclusion of such proceedings, the listed proceedings may be labeled abbreviated forms of proceedings in criminal matters or summary criminal proceedings.

5.1. State Attorney's Prosecutorial Discretion

The application of the principle of *prosecutorial discretion* is allowed only in summary proceedings through the use of the unconditional or conditional suspension of the criminal prosecution by the State Attorney, when the criminal offences in question are punishable by a term in prison of up to five years, the purpose of which is to relieve the case-load in the criminal justice system. Unconditional suspension of the criminal prosecution represents a new legal institute in Croatian Criminal Procedure Code. Conditional suspension of the criminal prosecution was provided for in the CPC/97 as well, but now the scope of its application has been broadened to include the criminal offences punishable under law by a term of up to five years in prison. In its legal nature it is similar to the Austrian institute of *"diversion"*. Both forms of the suspension of criminal prosecution are in accordance with the Recommendation of the Council of Europe R(87)18.[27]

Article 522, Par.1 of the CPC prescribes unconditional suspension of the criminal prosecution by the State Attorney. Pursuant to the said provision, the State Attorney may dismiss criminal charges by a decision or desist from criminal prosecution, despite the fact that there is a reasonable suspicion that a criminal offence has been committed which is prosecuted *ex officio* and for which a fine or a term in prison of up to five years is prescribed if:

1) it is likely that the defendant shall be acquitted (Art.58 of the Criminal Code),
2) the defendant is already in the process of serving a sentence or is subject to security measures, so initiating criminal proceedings for another criminal offence would serve no purpose,
3) the defendant has been extradited or turned over to a foreign country or the international criminal court in order to be tried for another criminal offence,
4) the defendant has been reported for several different criminal offences which constitute the elements of two or more criminal offences, but it serves no purpose to convict the offender for more than one.[28]

The State Attorney renders this decision in the form of a ruling which is served on the defendant, the injured party and the person who has filed charges, with an instruction that the injured party may pursue a restitution claim in a lawsuit. An appeal against such a ruling made by the State Attorney is not allowed.

27 According to the amendment to the Austrian Criminal Procedure Code passed in 2004, conditional suspension of the criminal prosecution by the State Attorney is allowed (*"diversion"*) as is the use of alternative measures instead of a penalty. The *"diversion"* is a non-repressive reaction to the criminality and it consists of diverting the criminal proceedings, i.e. avoiding them.

28 A separate law may stipulate that the State Attorney does not have a duty to initiate criminal proceedings even though there is reasonable suspicion that a criminal offence has been committed (Art. 521, Par.1). This rule should be distinguished from the prosecutorial discretion.

Art. 522, Par. 1 of the CPC prescribes a *conditional suspension* of the criminal prosecution by the State Attorney. According to this provision, the State Attorney may dismiss the criminal charges in a ruling and desist from further criminal prosecution, even though there is a reasonable suspicion that the criminal offence which is prosecuted *ex officio* has been committed if the said offence is punishable by a fine or a term in prison of up to five years and if prior consent of the victim or the injured party has been obtained, and the defendant agrees to:

1) undertake certain actions in order to repair or compensate the damage incurred by the offence in question,
2) make a payment of a certain amount of money to the account of a public institution, for humanitarian cause or to charity, or a fund for the compensation of damage to crime victims,
3) pay overdue legal support and regularly settle obligations that are due,
4) perform community service,
5) undergo rehabilitation programme for drug abuse or other addictions in accordance to special regulations,
6) undergo psychological and social treatment for the purpose of eliminating violent behaviour with the consent of the suspect to leave his family for the duration of the treatment (Art. 522, Par.1).

The State Attorney sets the deadline in his ruling within which the defendant must complete the assumed obligations, the said deadline must not exceed one year. This ruling, which cannot be appealed, is served on the defendant, the injured party and the person who has filed charges, together with the instruction to the injured party that he can file a restitution claim to be settled in a lawsuit.

CPC/08 has significantly broadened the application of the *prosecutorial discretion* in the summary criminal proceedings, by prescribing that it may be used with regard to the criminal offences punishable by a fine or a term in prison of up to five years, which means the offences that fall under the municipal court's jurisdiction and are dealt with in the summary proceedings. Consequently, the State Attorneys with municipal jurisdiction have been given broad authority by these provisions on the extended prosecutorial discretion with regard to deciding whether offenders shall be processed or not.[29]

5.2. Summary Proceedings according to CPC/08

5.2.1. The Concept and the Structure of the Summary Proceedings

Summary proceedings[30] are a form of criminal proceedings conducted before a municipal court, as a rule, for the offences for which as the main penalty a fine or a term in prison of up to twelve years is prescribed. Summary proceedings are conceptually designed to be a faster and less

29 On this topic see: Pavišić, B., *Komentar ZKP*, 2011, p.911

30 In this section of the paper the term *"summary proceedings"* is understood to mean classic, traditional summary proceedings, regulated by the Articles 520, 524-539 of the CPC.

complex procedure compared to the ordinary criminal proceedings.[31] Several provisions of the CPC/08 regulate the summary proceedings. For instance, under Art. 520 it is stipulated that "the proceedings before a municipal court are governed by the provisions of the Articles 521 – 548 (summary proceedings)". Pursuant to Article 19.a, Par. 1, item 1, it is stipulated that the municipal courts have jurisdiction to "try at the first instance for the offences for which as the main penalty a fine or a term in prison of up to twelve years is prescribed, unless it is otherwise provided for by law". The provision under Art. 203, Par.1 also makes a distinction between the summary and ordinary proceedings, since it stipulates that the provisions on the ordinary criminal proceedings are to be applied to the criminal offences which fall under the jurisdiction of the county court.

The Croatian criminal procedure law has been characterised by a steady expansion of the jurisdiction of the single judges since 1993. According to the CPC/93 the single judge had jurisdiction over the cases involving offences punishable under law by a term of up to one year in prison, according to the CPC/97 over the cases involving the offences punishable by a term of up to three years in prison,[32] according to the Amendment to the CPC passed in 2002 the offences punishable by a term of up to five years in prison,[33] with the exception of the criminal offences that fall under the jurisdiction of the indictment panel, and if the parties involved give their consent for those punishable under law by a term of up to ten years in prison,[34] according to the CPC/08 the cases involving the offences punishable under law by a term of up to five years in prison, or up to ten years in prison if the parties to the proceedings consent, except in cases that fall under the county courts jurisdiction, and finally the according to the Amendment to the CPC passed in 2011, for the offences punishable under law by a term of up to eight years, and if the parties involved consent, up to twelve years in prison.[35] According to the Criminal Code RC (CC/2011),[36] which has been in application since 1 January 2013, summary proceedings are to be applied to a great majority of the criminal cases before courts. Specifically, out of 797 types of criminal offences in total listed in the CC/2011 (basic, qualified and privileged types), for 594 criminal offences (i.e. 74.2%) a fine or a term in prison of up to eight years were prescribed, while for 95 criminal offences (i.e. 12.0%) the prescribed penalty was up to twelve years in prison, and only 111 of the criminal offences (i.e. 13.8%) the prescribed penalty was over twelve years of imprisonment.[37] In addition to the aforementioned indicators, it should be noted that minor criminal offences and those of medium-level seriousness are most commonly committed in practice, whereas serious criminal offences are rarer. All of the aforementioned leads to a conclusion that it is the summary proceedings that are in the everyday judicial practice "ordinary", usual, proceedings and the ordinary criminal proceedings are actually "extraordinary".[38] This is an emerging trend[39] in other national legislations as well. Therefore, it is necessary to regulate as comprehensively and as pre-

31 Cf. Pavišić, B. et al., *Kazneno postupovno pravo*, Rijeka, 201, p. 375 (Hereinafter: Pavišić, B., *KPP*, 2011).
32 See Art. 18 Par. 2 and Art. 430 of the CPC/97, Official Gazette, 110/97.
33 See Art. 3 and Art. 157 of the Law on Amendments and Supplements to the Criminal Procedure Code, Official Gazette, 58/02.
34 It was the first time that certain criminal offences and their forms have been excluded from the jurisdiction of the single judge "because of their complexity, relevance or more frequent pronouncement of the unconditional prison sentences", cf. Tripalo, D., *Novosti u posebnim postupcima i skraćenom postupku*, HLJKPP, Zagreb, 2/2002, p. 303.
35 Cf. Mazalin, S., *Skraćeni postupak i ostali posebni postupci u Prijedlogu Zakona o kaznenom postupku*, HLJKPP, Zagreb, 2/2008, pp. 753-773.
36 Criminal Code, Official Gazette, 125/2011
37 As cited in: Pavišić, B., *Novi hrvatski* ZKP, note 10, p. 580
38 See also on this topic: Novosel, D./ Pajčić, M., *Državnik odvjetnik kao gospodar novog prethodnog kaznenog postupka,* HLJKPP, Zagreb, 2/2009, p. 444-445.
39 It has been pointed out in the past that the traditional, ordinary type of proceedings provided for the most serious criminal offences is going to be marginalised. On this topic see: Pesquie, B., *Introduction to Part 1*, published in: European Criminal Procedures, (Delmas-Marty, M. / Spencer, J. R. (eds.) Cambridge, 2002, p. 80.

cisely as possible all of the key issues of the summary proceedings, preferably in a separate chapter of the Code.

Proper summary proceedings appear in two forms depending on the severity of the prescribed penalty for the criminal offence in question:

1) the form of the summary proceedings conducted before a single judge, as a rule, for the criminal offences for which as the main penalty a fine or a term in prison of up to eight years is prescribed, and
2) the form of the summary proceedings conducted before the indictment panel of the municipality court as a rule for the criminal offences for which a term in prison of more than eight and up to twelve years is prescribed, with the application of certain provisions for the ordinary proceedings.[40]

Both of the above cases use the summary proceedings, only with certain variations.

1) Summary Proceedings for Criminal Offences under Single Judge's Jurisdiction

Summary proceedings for the criminal offences under the jurisdiction of a single judge are provided for minor criminal offences and during such proceedings not all of the rules of ordinary proceedings apply.[41] According to the provision Art. 19.b, Par. 2, the single judge tries only before municipal courts, as a rule, for the criminal offences for which a fine or a term in prison of up to eight years is prescribed as the main penalty. Certain specified criminal offences are exempt from this rule.[42] The law has allowed the presiding judge of the indictment panel to conduct the main hearing, with the consent of the parties involved, as the single judge in cases under the jurisdiction of the municipal court as well, unless the law explicitly stipulates the composition of the indictment panel (Art. 19.b, Par. 3).

There are three groups of provisions for the summary proceedings for the criminal offences that are under the jurisdiction of the single judge: a) provisions that stipulate avoiding the conduct of a part of the criminal proceedings or the entire proceedings, which include the rules of the State Attorney's use of prosecutorial discretion, issuance of a criminal order, but also settlements between the parties involved on the type and extent of the sanction (Art. 535, Par. 6); b) provisions that simplify the rules of the ordinary proceedings, and c) provisions on the criminal proceedings as a result of private prosecution.[43]

The main hearing in the summary proceedings before the single judge is different from the main hearing before the indictment panel. When the main hearing is held before a single judge, the defendant is questioned at the beginning of the evidentiary proceedings regardless of his plea (Art. 535, Par.2), during which the single judge is the one who asks the questions first (535, Par.3), and it is different from the main hearing of the ordinary proceedings in terms of its con-

40 See more in : Pavišić, B., *Novi hrvatski* ZKP, 2008, pp. 511-512.
41 Krapac, D., *Zakon o kaznenom postupku i drugi izvori hrvatskog kaznenog postupovnog prava*, Zagreb, 2006, p. 618.
42 The following criminal offences are exempt: Art 93, Art. 94, Art. 95, Art. 96 Par. 2, Art. 189 Par.1, Art.190, Art. 191 Par. 2, Art. 196 Par. 1, Art. 249 Par. 4, Art. 272 Par. 4 as well as the criminal offences for which the composition of the indictment panel is stipulated by a separate law.
43 Cf. Pavičić, A. / Bonačić, M., *Skraćeni postupak prema novom Zakonu o kaznenom postupku* HLJKPP, Zagreb, 2/2011, p. 495.

cept. With regard to that, a valid point is raised, whether or not the defendant is discriminated against compared to those who are giving their testimony at the end of the proceedings while the defendant must give his testimony at the beginning, before he learns the content of the evidence that the opposing side is presenting. This question remains open to further debate and possible re-regulation of this particular legislative provision. The proceedings before a single judge of the municipal court should be regulated comprehensively and as a whole.[44] Although the extended jurisdiction of single judges is in compliance with the Constitution of the RC (Art.121, Par. 2) and the European Convention on the Protection of Human Rights and Fundamental Freedoms (Art. 6, Par. 1), it is still questionable whether it is right to prescribe such a broad jurisdiction of the single judge in criminal matters. In this respect, there are various provisions in foreign legislations.[45]

2) Summary Proceedings for Criminal Offences under the Jurisdiction of the Indictment Panel of the Municipal Court

Pursuant to the provision of the Art. 19.a, Par. 1, item 1, as well as Art. 19.b, Par. 2, the indictment panel of the municipal court, which consists of a judge and two lay judges unless it is otherwise provided for, has jurisdiction over cases (*argumentum a contrario*) as a rule, involving criminal offences for which imprisonment of over eight and up to twelve years is prescribed,[46] as well as over other criminal offences which are placed under its jurisdiction. The summary proceedings conducted before an indictment panel of the municipal court differ from the summary proceedings conducted before a single judge in the following aspects: a) the use of prosecutorial discretion by the State Attorney is not provided for;[47] b) there is no issuance of the criminal order; c) the proceedings for these criminal offences are never initiated based on private prosecution; and d) not all of the provisions on the summary proceedings are applied. This is achieved through the use of special provisions that exclude the application of the provisions on the summary proceedings with regard to the criminal offences that fall under the jurisdiction of an indictment panel while at the same time prescribing the application of the provisions on the ordinary proceedings. For instance, it is so provided by the special provisions that the indictment should contain everything the indictment in the ordinary proceedings contains, along with the type and severity of the criminal sanctions which are requested (Art. 524, par.2). With regard to the review of the indictment for a criminal offence punishable under law by imprisonment of over eight years, it is referred to the provisions for the ordinary proceedings on the proceedings conducted before an indictment panel (Art. 526, Par. 1). If the main hearing is conducted before an indictment panel, the presiding judge may hold a preparatory hearing according to the rules of the ordinary proceedings (Art.529, Par. 1), while the main hearing itself is conducted in accordance with the provisions for the ordinary proceedings (Art. 536). However, it should be emphasised that the proceedings for the criminal offences which are under the jurisdiction of the indictment panel of the municipal court are nevertheless different from the ordinary proceedings.

44 Certain legislations provide for the application of the provisions on the summary proceedings only for criminal offences that are under the jurisdiction of a single judge, e.g. Criminal Procedure Code RS passed in 2011 (Art.495 and Art. 22, Par. 1), Official Gazette of RS, 72/2011

45 For instance, the Criminal Procedure Code of Montenegro stipulates that the single judge has jurisdiction over cases involving criminal offences punishable by ten years of imprisonment, Official Gazette of the Republic of Montenegro, 57/09

46 With the exception of the aforementioned criminal offences which fall under the jurisdiction of the county court.

47 This refers to the conditional and unconditional suspension of criminal prosecution by the state attorney.

5.2.2. Initiating Summary Proceedings

Summary proceedings are initiated: a) based on the indictment by the State Attorney, i.e. the injured party as the prosecutor or b) based on private prosecution (Art. 524, Par.1). Therefore, it follows that there are two types of accusatory instruments in the summary proceedings: 1) the indictment and 2) private prosecution initiated by a plaintiff. The indictment, as a rule, must contain everything that the indictment in the ordinary proceedings contains. It must contain an indication of the type and extent of the criminal sanction that is being requested. The indictment contains the grounds for it as well, except for the criminal offences which are punishable under law by a fine or a term in prison of up to eight years, in which case it is sufficient to list in brief the reasons for issuing the indictment. The content of private prosecution is also specified (Art. 342, Par. 1, items 14, CPC). Pursuant to Art. 17, Par. 1 of the CPC, summary proceedings start with: a) the confirmation of the indictment, b) scheduling the main hearing based on private prosecution, c) the decision on the issuance of a criminal order (Art.541, Par.1).[48]

5.2.3. The Examination (Review) of the Indictment in the Summary Proceedings

There are two reviews of the accusatory instrument in the summary proceedings: 1) the pre-trial examination of the indictment and 2) review of the indictment before the indictment panel. The first one is done by a single judge, or the presiding judge for the criminal offences that fall under the jurisdiction of the indictment panel of the municipal court in the form of a pre-trial examination of the indictment or the private lawsuit pursuant to Art. 525, Par. 1. The second review is conducted by the indictment panel, which examines the indictment (not the private lawsuit) at a session of the indictment panel. The innovation is that the indictment panel examines every indictment, regardless of the fact whether or not an objection was filed. The purpose of this is to prevent the unfounded charges from ever reaching the main hearing stage (which is in the interest of the citizens) and also to enable fast and expedient hearing (which is in the interest of the state).

Pre-trial examination of the indictment. On the receipt of the indictment or a private lawsuit, the single judge or the presiding judge shall first examine: a) if the court has jurisdiction over the criminal offence in question and b) if the requirements for the dismissal of the indictment, i.e. the lawsuit, have been met (Art. 344). If these requirements are met, a decision to dismiss the charges or the private lawsuit is to be rendered. This decision is delivered to a State Attorney, the injured party as the prosecutor or to the plaintiff, and to the defendant. If such a decision is not rendered, then the judge has the indictment or a private lawsuit served on the defendant.

The review of the indictment before an indictment panel. Based on the indictment for a criminal offence punishable under law by more than eight years of imprisonment, the indictment panel shall proceed in the same manner it would proceed in the ordinary proceedings (Articles 348-367). For the criminal offences which are punishable under law by a fine or a term in prison of up to eight years, the indictment panel reviews the indictment at a panel session without the partici-

48 Cf. Pavišić, B., *KPP*, 2011, p. 375

pation of the parties involved (non-adversarial session).[49] If the indictment is deemed to be well-founded, the indictment panel shall render a ruling confirming the indictment and compiles a case file which is then submitted to the registry office of the competent court.

5.2.4. The Main Hearing in the Summary Proceedings

The main hearing in the summary proceedings is discriminately regulated. The provisions of the Articles 521- 548 of the CPC are applied to the proceedings conducted before a municipal court. Unless there are special rules that regulate these proceedings, the provisions on the ordinary proceedings are applied.

Preparatory hearing in the summary proceedings. If the main hearing is to be held before a single judge, the preparatory hearing is not held. If the main hearing is being held before a indictment panel, the preparatory hearing may be held, but it is not mandatory.

Scheduling the main hearing. Upon the receipt of the indictment, the main hearing is scheduled within a month at the latest, and if the defendant is in pre-trial detention, within 15 days. In case of private prosecution the judge shall schedule the main hearing within a month from receiving a private lawsuit. Prior to scheduling the main hearing, the single judge may summon the plaintiff and the defendant to a hearing in order to clarify matters prior to the trial, if he deems it useful for the faster resolution of the case. At such a hearing the parties involved may reconcile and the charges may be withdrawn, or the charges may be dismissed. Otherwise, the single judge may start the main hearing immediately, or at a later time. In places where there is a conciliation panel, the court may refer the case to the said panel in order to attempt to secure reconciliation. If the reconciliation does not succeed, the proceedings continue.

Holding the main hearing without the parties to the proceedings is possible only if it is likely that the charges shall be dismissed. It is not possible to hold the main hearing without the State Attorney, not even in the summary proceedings. In such a case the hearing is adjourned.

The defendant is summoned to the hearing, and the summons will instruct him on his rights and he will be cautioned that the main hearing may be held in his absence if legal requirements for this are met (Art. 531, Par.2). The main hearing may be held in the absence of the plaintiff who has residence away from the court's location if he has filed a motion for the main hearing to be held in his absence.[50]

The main hearing. The main hearing in the summary proceedings commences with the briefing on the content of the indictment or the lawsuit. If the main hearing is conducted before the indictment panel, it proceeds pursuant to the provisions for the ordinary proceedings on the course of the main hearing. After the opening of the session, the personal details of the defendant are

49 It is not the best legal solution to hold a non-adversarial session of the indictment panel with regard to the minor criminal offences punishable under law by a term in prison of up to eight years (Art. 526, Par. 2 of the CPC), since it prevents (due to the absence of the parties to the proceedings and the defence counsel) reaching a consensual ruling at the indictment stage in the cases of minor criminal offences.

50 The judge who has reviewed the indictment or a private lawsuit is not recused from the main hearing and may participate in it as a presiding judge or a single judge.

taken, it is checked if the instruction on the defendant's rights was received, the witnesses are escorted out of the courtroom until they are called to testify and the restitution claim by the present injured party is filed. The main hearing starts with the reading of the indictment. Subsequently, the defendant makes a statement on the foundation of the indictment and the filed restitution claim. This is followed by the opening statements of the parties involved, first the prosecutor's and then the defence counsel's and the defendant's. After that, the defendant is immediately interrogated at the beginning of the evidentiary proceedings regardless of his plea in the case.[51] During the evidentiary hearing before the single judge, the defendant, the witnesses and the expert witnesses are questioned by the judge first, then by the parties to the proceedings but the defendant is questioned at that point first by his lawyer, if he has one, and then by the prosecutor while the witnesses and expert witness are first questioned by the party who has put them on the stand.[52] The defendant who has pled guilty to all charges, at the end of his testimony shall state if he consents to the proposed type and extent of the criminal sanctions.[53] If the defendant has pled guilty to all charges, and the court has decided it is in accordance with the collected evidence, in the continuation of the evidentiary proceedings only the evidence related to the decision on the criminal sanctions are going to be presented.[54] This is followed by the closing arguments and the conclusion of the main hearing.[55]

The judgment. The law does not prescribe special rules for rendering the judgment in the summary proceedings, which means that the general provisions on judgments in the ordinary proceedings are applicable. However, it is especially provided for the judgment that includes a prison sentence to include reasoning, while the judgment that does not include a prison sentence to contain a brief explanation just at the request of the parties involved. If the parties to the proceedings do not request a written rendering of the judgment, and if the defendant has pled guilty and accepted the proposed criminal sanction, a brief explanation is entered into the minutes of the main hearing, which means that the transcript of the judgment does not have to contain reasoning.

5.2.5. Right to an Appeal in the Summary Proceedings

An appeal may be filed against the judgment passed in the summary proceedings within eight days from the day of the delivery of the transcript of the judgment. If the judgment pronounces a prison sentence, the transcript of the judgment must always contain the introduction, the pronouncement of the judgment and the elaboration (Art. 538). The parties and the injured party who have the right to an appeal against the judgment (Art.464, Par.4) may waive the right to an appeal immediately after the pronouncement of the judgment. In such a case, the judgment is delivered to them within three working days.

51 With respect to the interrogation of the defendant at the beginning of the evidentiary proceedings in the summary proceedings, regardless of his plea, it seems that it would be a better legal solution to tie in the defendant's questioning to the way he pleads in the summary proceedings, which would mean that if the defendant pleads not guilty to all or some of the charges, he should be questioned at the end of the evidentiary proceedings, unless he otherwise requests.

52 See Art. 45 of the Law on Amendments and Supplements to the Criminal Procedure Code, Official Gazette, 80/11.

53 Until this defendant's statement, the State Attorney may amend the type and the extent of the criminal sanctions specified in the indictment.

54 There is a special rule that if the defendant agrees to the type and extent of the proposed criminal sanctions, the court must not pronounce a different type of the criminal sanction nor a more severe sanction than the one proposed in the indictment.

55 Cf. Mazalin, S., *Skraćeni postupak i ostali posebni postupci u Prijedlogu Zakona o kaznenom postupku*, HLJKPP, Zagreb, 2/2008, p. 767.

The law prescribes a special right to an appeal as well. If the course of the main hearing has been recorded, the parties to the proceedings and the injured party may file an appeal within three days of the delivery of the transcript of the judgment. In such case, the time set for the appellants to file an appeal starts running from the day of the receipt of the said transcript of the recordings. If the sound recording of the main hearing has not been transcribed, or if the transcript of the judgment has not been written and delivered within the set deadline, the judge shall inform of this the president of the court.

When deciding on the appeal against the judgment of the first instance court passed in summary proceedings, the second instance court shall notify both of the parties of the session of the indictment panel if in the first instance judgment a prison sentence was pronounced and if the parties involved have requested to be informed of the session, or if the presiding judge or the indictment panel of the second instance court consider that the presence of the parties or just one of them might be helpful for the clarification of the matter. The decisions of the second instance court on the appeal against the first instance court according to its content and legal effect might be the same as the ones rendered in the ordinary proceedings.

5.3. Plea Agreements on the Conditions of the Admission of Guilt and the Settlement on the Criminal Sanctions

5.3.1. The Defendant's Plea

Pursuant to the Articles 359 and 360 two different procedural forms are provided for: 1) the plea of the defendant to the charges and 2) negotiations between the parties involved on the conditions for the admission of guilt and the settlement on the sanctions to be imposed. Pursuant to the provisions of Art. 350, Par. 4, the defendant may give a statement before an indictment panel that he pleads guilty to all or some of the charges against him.[56] This is the defendant's plea, i.e. a full or partial admission of guilt. If the defendant has pled guilty before an indictment panel, and the agreement on the sanction has not been reached, the indictment panel shall confirm the indictment and immediately forward it with the case file to the court registry for the purpose of scheduling the main hearing, unless there are reasons for the suspension of the proceedings under Art. 355 of the Code. A guilty plea has been newly introduced into the Croatian criminal procedure law. The defendant actually has two options when it comes to his plea: guilty or not guilty.[57] The defendant's plea to the charges before the indictment panel in terms of the Art. 359 does not imply the sentencing agreement. The plea is one-sided and unconditional. On the other hand, the defendant's guilty plea in terms of the Art. 360 is the result of plea-bargaining on the conditions under which the defendant shall admit his guilt, which includes the settlement on the criminal sanction.

56 Cf. Pavišić, B., *Komentar ZKP*, 2011, p. 745.

57 However, the legal consequences of a guilty plea or the admission of having committed a criminal offence in different legal systems vary.

5.3.2. General Comments on the Plea Agreements

A special aspect of the indictment stage, and, as a part of it, the judicial review of the indictment, is the possibility of an agreement between the parties involved on the admission of guilt and the sanctions to be imposed as well as rendering a judgment based on the plea agreement.[58] The judgment based on the plea agreement may be rendered in the ordinary criminal proceedings for all criminal offences regardless of the prescribed penalty, as well as in the summary proceedings for the criminal offences that fall under the jurisdiction of the municipal court, which means for the criminal offences for which eight to twelve years in prison is the prescribed penalty. Mandatory review of the indictment is conducted at the session of the indictment panel. The defendant at that stage is given the opportunity to enter his plea before the indictment panel in the summary proceedings, but he does not have such an option when it comes to the offences for which the prescribed penalty is up to eight years in prison. *Ratio legis* behind this legal provision is in the simplification, acceleration and efficiency of the criminal proceedings. Exactly for these reasons, it is a special, independent form of the summary proceedings, with a consensual element of the decision. Such an agreement between the parties involved on the guilt and sanctions and the passing of the judgment based on such an agreement is most commonly reached in the pre-trial proceedings, i.e. before the criminal proceedings start.

The provision of the Art. 360 of the CPC stipulates that the parties to the proceedings may negotiate the conditions of the admission of guilt and agree on the criminal sanction to be imposed. Due to the sensitive nature of plea-bargaining, the Code has prescribed that the defendant must have a defence counsel present during such proceedings. Successful plea-bargain negotiations result in the signing of a *statement* by the State Attorney on the one hand,[59] and the defendant and his lawyer on the other hand, asking a judgment to be made based on the agreement entered into by the parties involved. Only the conditions of the defendant's admission of guilt and the type and extent of the criminal sanctions that are going to be imposed may be the subject of the negotiations and the settlement. A signed statement is submitted to the indictment panel. The statement based on which the settlement is reached should contain: 1) the description of the criminal offence in question, 2) the statement of the defendant on the admission of guilt for the said offence, 3) an agreement on the type and extent of the penalty or some other sanction or measure, 4) an agreement on the costs of the criminal proceedings, 5) a statement of the defendant on the restitution claim, as well as 6) the signature of the both parties and the defence counsel. The State Attorney has to immediately upon signing the statement notify the victim about it or the injured party. Such a notification and putting the settlement of a restitution claim before the seizure of material gain indicate that the injured party is in a better position than according to the previous CPC/97 during the proceedings.

58 The possibility of reaching a plea agreement and sanctions was stipulated by the amendments and supplements to the CPC/97 passed in 2002, through the of rendering a judgment at the investigation stage at the request of the party involved (Art. 190.a of the CPC/97). See more on this in: Mrčela, M., *Presuda na zahtjev stranaka u istrazi*, HLJKPP, Zagreb, 2/2002, pp. 360-370, and particularly in: Krstulović, A., *Nagodbe stranaka u suvremenom kaznenom postupku*, Zagreb, 2007, pp. 172-187.

59 Deputies of the State Attorney also have the authority to negotiate the admission of guilt and the sanctions, but they must inform the State Attorney prior to the signing of the statement for the rendering of the judgment based on the agreement. In these proceedings the State Attorney acts pursuant to Articles 74-75 of the Law on the State Attorney's Office. Cf. Novosel, D. / Pajčić, M., *op.cit.*, p. 470

5.3.3. Plea Bargaining

The process of plea-bargaining itself, the conditions under which the defendant admits the guilt and the settlement on the criminal sanctions to be imposed, is not prescribed in detail by the CPC/08. Basically, it is a matter of reconciling the actions and counter-actions.[60] The defendant's action is the guilty plea, and the State Attorney's counter-action is a mitigated type of offer or a less severe criminal sanction.[61] A settlement on the criminal sanctions is always conditioned by a prior guilty plea. In the procedure of admitting guilt and settling on the sanction, the defendant must have a defence counsel (Art. 66, Par. 2, item 6). Plea-bargaining is governed by the principles of legal proceedings[62] and fair treatment of the defendant by the State Attorney, and the negotiating on the sanction is based on the principle of prosecutorial discretion.[63] The agreement between the parties to the proceedings may not change the legal regulations on the seizure of proceeds from crime. The State Attorney is not allowed to amend the indictment after the defendant pleads guilty to his detriment. It is necessary to look at the plea-bargaining and the settlement on the sanction as a single whole (sentence bargaining).[64] Therefore, the settlement between the parties is based on mutual concessions the result of which is achieving a common goal: the conclusion of the criminal proceedings in a way that is acceptable for both sides.

5.3.4. Rendering the Judgment Based on the Plea Agreement

The plea-bargaining process and rendering the judgment based on the plea agreement is a type of consensual proceedings. It is specific due to the fact that in such proceedings the defendant may be pressured to a certain extent, and on the other hand, certain principles of the criminal procedure law are not adhered to. This is why the law stipulates strict requirements for a judgment based on the agreement. These requirements are formal and substantive. Formal requirements are: a) the obligation to indicate the type and extent of the criminal sanction the imposition of which is requested in a written statement, b) mandatory presence of the defence counsel during the negotiations, c) signing of a written statement, d) the possibility given to the parties of withdrawing the motions until the judgment is passed, as well as e) the binding nature of the proposal of the parties with regard to the requested criminal sanctions when the court is passing a guilty verdict. Substantive requirements are: a) the compliance of the agreement with the legally prescribed penalty, b) legality of the agreement, as well as c) certain additional requirements on the part of the State Attorney.[65]

The judgment based on a plea agreement in the summary proceedings may be passed in the cases of criminal offences for which the prescribed penalty is eight to twelve years in prison.[66] The indictment panel renders the judgment based on the plea agreement and the submitted statement for such a judgment. If the court determines that the parties to the proceedings have agreed on

60 On this topic see: Krapac, D., *KPP, 2010*, p. 89
61 The State Attorney must record the assessment that there are circumstances that merit the acceptance of the initiative for the start of the negotiations in an official note, which shall remain in the case file and enable internal control.
62 On this topic see: Krapac, D., *Zakon o kaznenom postupku i drugi izvori hrvatskog kaznenog postupovnog prava*, Zagreb, 2008, p. 373
63 Cf. Tomašević, G., *KPP 2011*, p. 203
64 Cf. Pavišić, B., Komentar *ZKP 2011*, p. 690
65 On this topic see: Krapac, D., *KPP 2010*, pp. 269-270
66 According to the Art. 190.a of the CPC/97 the judgment could be passed at the request of the parties involved during the investigation only for the criminal offences for which the prescribed penalty was up to ten years in prison.

the content, it decides on granting the agreement: 1) to grant the agreement, and pronounce the sentence, a criminal sanction or other measure as was proposed in the statement by the parties involved (Art. 361, Par. 2), or 2) reject the agreement if it does not comply with the legally prescribed penalty, or the agreement is not otherwise legal, in which case the indictment panel rejects the agreement in a ruling and proceeds with the review of the indictment. The aforementioned implies that the judgment that is based on the plea agreement is passed without prior confirmation of the indictment, i.e. prior to the criminal proceedings. Although this increases efficiency and the economy of the proceedings, since the most complex stage of the proceedings – the main hearing, is avoided, such a legal provision, according to some is not the best.[67]

The said judgment may pronounce only those criminal sanctions and measures that the parties have proposed in the statement for the judgment based on the plea agreement. Therefore, the indictment panel must review the legality of the agreement (e.g. for certain criminal offences a suspended sentence is not allowed),[68] but also the severity of the proposed sanction or penalty (which may be found to be too harsh or too lenient). This means that the court is not authorised to assess the facts of the case with regard to the criminal offences being dealt with.

The parties may negotiate the conditions of the admission of guilt and the settlement on the sanction even after the indictment is confirmed. If the criminal offences in question are punishable under law by a term in prison of eight to twelve years, the presiding judge of the municipal court's indictment panel may schedule a *preparatory hearing*, at which it is possible to pass a judgment based on the plea agreement.

If the agreement is rejected, the indictment panel submits the indictment together with the case file to the court's registry in order to schedule the main hearing (Art. 361, Par.4). Until the judgment is passed the parties may withdraw from the submitted agreement proposal (Art. 362, Par.1). In such a case, the proposed agreement and all the related data are excluded from the case file by a ruling and are turned over to the secretary of the court and may not be examined nor used as evidence during the criminal proceedings.

The judgment passed based on the plea agreement must contain everything that a conviction judgment contains (Art. 455). This is a special type of a conviction. The written rendering of the judgment must contain the introduction, the pronouncement and a brief explanation, in which the agreement based on which the judgment is passed is specified (Art.363, Par. 2). Such a judgment is announced immediately, and the transcript of it is delivered to the parties involved within eight days from the day of the announcement.

Pursuant to Art. 363, Par. 3 it is prescribed that in a judgment based on the plea agreement with a prison sentence and a cautionary measure, *natural persons* may be subject to the following security measures: a) mandatory psychiatric treatment (Art. 75 of the Criminal Code), b) mandatory treatment for addiction (Art, 76 of the CC), c) a ban from exercising a profession or performing a duty (Art. 77 of the CC), d) the expulsion of a foreigner from a country (Art. 79 of the CC) and e) confiscation of objects (Art. 80 of the CC). The security measures that may be imposed on *legal entities* according to the Law on the Liability of Legal Entities for Criminal Offences (hereinafter:

67 On this topic see: Tomašević, G., *KPP 2010*, note 823 on p. 189

68 Cf. Tripalo, D., *Tijek kaznenog postupka - kontrola optužnice, rasprava, pravni lijekovi*, HLJKPP, Zagreb, 2/2008, p. 736.

LLLECO),[69] are: a) a ban to participate in certain activities or operations (Art. 16 LLLECO), b) a ban on acquiring licences, authorisations, concessions or subsidies (Art.17 of LLLECO), c) a ban on doing business with the beneficiaries of the state or local budget funds Art. 18 of LLLECO) and d) confiscation of objects (Art. 19 of LLLECO), as well as confiscating material gain.[70] In terms of the costs of the criminal proceedings, the indictment panel may decide that the defendant is fully exempt from paying for the costs of the proceedings.

The judgment rendered based on the plea agreement cannot be appealed with regard to the criminal sanction imposed, confiscation of material gain, costs of the proceedings and restitution claim (Art.364, Par 1). Such a judgment may not be appealed with regard to erroneously or incompletely established state of the facts (Art. 470), unless the defendant has learned of the exculpatory evidence or evidence excluding any wrongdoing after the judgment was passed. The judgment based on the plea agreement may be contested only on the grounds of: a) substantial violation of the provisions on the criminal procedure (Art. 468) and b) violation of the Criminal Code (Art. 469).

5.3.5. Restrictions on Some of the Fundamental Principles of the Criminal Proceedings

The consensual character of the proceedings in which the judgment is passed based on a plea bargain agreement results in a departure from certain principles of the criminal proceedings. First of all, a settlement between the State Attorney and the defendant does not consistently adhere to the application of the principle of legality of criminal prosecution, the accusatory principle and the principle of official prosecution.[71] The defendant's admission of guilt does not comply with the presumption of the defendant's innocence, the rules on the burden of proof as well as with the principle of free (judicial) evaluation of the evidence. It is also a departure from the application of rules prescribing that the judgment is based on the facts and the evidence presented at the main hearing and that the main hearing must be direct, public, oral and adversarial, and that the judgment must offer the grounds for it.[72] The right to an appeal that includes everyone's right to request from the higher instance court to review the judgment and the penalty is also not completely adhered to. The rationale for these departures from the said principles is found in the legal nature of the plea-bargain agreements which are based on mutual (voluntary) concessions with positive and useful effects on the both parties.[73]

69 The Law on the Liability of Legal Entities for Criminal Offences, Official Gazette, 151/2003, 110/2007, 45/2011.

70 The motion to impose a measure of confiscation of material gain is filed in accordance with the Law on the Procedure for Seizure of Proceeds from Criminal and Misdemeanor Offences , Official Gazette, 145/2010

71 Cf. Krapac, D., *KPP 2010*, p. 91-93

72 A judgment that provides grounds for it completely and accurately achieves: better quality of the judgment, offers informative foundation of the judgment in addition to showing respect for the honour and dignity of the subject whose rights are being decided on. Cf. Galligan, D. J., *op.cit.*, p. 431 etc.

73 One of the methods of consensual resolution of disputes arising from criminal offences are the reconcilliation or the mediation which are also encountered in some legislations.

5.4. The Procedure for the Issuance of the Criminal Order

5.4.1. The Concept and the Legal Nature of the Criminal Order

Criminal orders are court decisions which, at the request of the State Attorney, impose a legally prescribed criminal sanction on the perpetrator of certain offences, without holding the main hearing, in a special, abbreviated criminal procedure. The procedure of issuing the criminal order is also a type of the summary criminal proceedings. A criminal order, which is a measure of acceleration of the criminal proceedings, represents a kind of an offer to the defendant, which he may accept, but does not have to, by not filing an objection to it, which creates a "tacit agreement" between the State Attorney and the court on the one hand, and the defendant on the other.[74] Thus, not only the parties involved, but the court as well, satisfy their interests. The State Attorney's Office gets a competent (final) ruling, the court does not have to conduct the ordinary summary proceedings, and the defendant is spared the inconvenience and stigma of a public trial. The criminal order is present in almost all modern legislations and is considered to be the most economical form of abbreviated criminal proceedings.

Criminal order as an institute has its *fundamental* and *procedural* components. Fundamental component consists of a sufficient amount of the evidentiary material, i.e. such a state of facts that it is reasonably believed it would not change even if the main hearing were to be conducted, which means it is sufficient for the issuance of a criminal order as a conviction of the criminal offence in question. The procedural component consists of complete agreement of all three subjects to the criminal proceedings. The judge must accept the request of the State Attorney without any additional amendments to issue a criminal order. The defendant must agree to the criminal order ruling by not objecting to such a ruling.[75]

This procedure is specific inasmuch that: a) such a ruling is rendered before the main hearing starts, b) the said ruling is based on the data from the filed criminal charges that normally are not used as evidence, c) the data used as evidence has not been presented in a direct, oral and adversarial manner.[76] The said specificities indicate that the procedure for the issuance of a criminal order is a special type of the summary proceedings.[77] The innovations in the CPC/08 related to the criminal orders are also reflected in the fact that the prison sentence that may be pronounced as a suspended sentence is increased (Art. 540, Par. 2), the criminal order may be issued against a legal entity, and also the rights of the injured party during the plea hearing are prescribed in greater detail (Art. 540, Par. 4).[78]

74 Cf. Krapac, D., *KPP 2010*, p. 90

75 On the procedure of issuing a criminal order see: Simović, N. M., *Krivično procesno pravo*, Banja Luka, 2009, pp. 244 – 248, Sijerčić-Čolić, H., *Krivično procesno pravo*, Sarajevo, 2012, pp. 167-174.

76 On this topic see: Pavišić, B., KPP 2011, p. 381 cf. Ivičević Karas, E. / Novosel, D., *Vrsta i mjere kazne primjenjive u instrumentu kaznenog naloga i njihov odnos prema izrečenim kaznama*, HLJKPP, Zagreb, 2/2004., Novosel, D., *Primjena kaznenog naloga u radu državnih odvjetnika*, HLJKPP, Zagreb, 1/2002

77 Pavišić, B., *KPP 2011*, p. 381

78 Mazalin, S., *op. cit.*, note 19 on p. 768

5.4.2. General Pre-requisites for the Issuance of a Criminal Order

Pursuant to Art. 540, Par.1, the State Attorney may request in the indictment that the court issues a criminal order for the criminal offences punishable under law by a fine or a prison term of up to five years, over which the indictment panel has no jurisdiction, and in such an order request the following sanctions or measures to be imposed: 1) a fine in the amount of ten to one hundred average daily wages in the Republic of Croatia (Art.51, Par.4 of the Criminal Code), 2) a suspended sentence with the pronouncement of a sentence of up to one year in prison or a fine, or a judicial reprimand, 3) seizure of proceeds from crime, 4) the publication of the ruling issuing the criminal order in the public media, 5) a ban to operate a vehicle for up to two years and 6) confiscation of objects. The said article lists all of the penalties and measures the imposition of which the State Attorney may request in the request for the issuance of a criminal order,[79] which means that other sanctions or measures may not be imposed by a criminal order.[80]

Pre-requisites under *substantive* and *procedure* law for the issuance of a criminal order result from the wording of the aforementioned provision of the Art. 540. Substantive pre-requisites are: a) that the committed criminal offence is the offence for which the prescribed penalty is a fine or a term in prison of up to five years, and which falls under the jurisdiction of a single judge rather than the indictment panel and b) that the State Attorney has learned of the said criminal offence based on the credible content of a criminal charge. Procedural pre-requisites are: a) that the request for the issuance of a criminal order has been filed by the State Attorney as an authorised prosecutor, b) that the requested criminal sanctions and measures are the ones that are legally prescribed, and c) that the request is for the issuance of the criminal order without the main hearing.[81]

A special requirement for the issuance of the criminal order is the circumstance that the State Attorney has learned of the said offence based on "the credible content of filed criminal charges". Although the data from the filed criminal charges is not evidence during the criminal proceedings, it is only the initial reason and grounds for the criminal prosecution by the State Attorney,[82] it would not be right to talk of the "credible content" of the filed text of the criminal charges. However, since the criminal charges most commonly submit the statements of the injured party, a record of the crime scene investigation, expert findings and the evaluation, a sketch of the crime scene, photo-documentation etc, it is quite clear that the State Attorney in not going to base his indictment just on the text of the criminal charges, but on the said statements the most and material evidence submitted with it. In any case, any initiation of the criminal prosecution must be based on the principle of legality. Finally, the state of the facts resulting from the criminal charges and the enclosed documents must be such that even if the main hearing were to be conducted the defendant would be sentenced to a certain penalty or criminal measure.[83]

79 Croatian provisions prescribe a considerably long catalogue of sanctions and measures which the State Attorney may request in a criminal order request. German and Slovenian law also prescribe almost identical criminal sanctions and measures, and Swiss and Serbian law prescribe, in addition, an unconditional prison sentence.

80 On the types and severity of penalties and other measures that the State Attorney's Office has requested and which have been pronounced in criminal orders, cf. the research Ivičević, E. / Novosel, D., *Vrste i mjere kazne primjenjivane u instrumentu kaznenog naloga i njihov odnos prema izrečenim kaznama*, HLJKPP, Zagreb, 2/2004, pp. 698-699.

81 On the pre-requisites under substantive and procedure law for the requests and issuance of the criminal order, see more in: Novosel, D., *Primjena kaznenog naloga u radu državnih odvjetništava*, HLJKPP, Zagreb, 1/2002, p. 60

82 Cf. Pavišić, B., *KPP 2011*, pp. 200-201

83 Krapac, D., *ZKP 2008*, p. 678.

The law regulates the victim's or the injured party's position in such proceedings by prescribing for the State Attorney to propose in the criminal order to the court to decide on the filed restitution claim.

5.4.3. The Indictment in which the Issuance of the Criminal Order is Requested

The law under Art. 540, Par. 1 stipulates that the State Attorney, if the prescribed legal requirements are met, may request in the indictment from the court to issue a criminal order and sentence the defendant to a certain sanction or a measure without holding the main hearing. Therefore, this is not an "ordinary", "general" indictment. Such an indictment contains a special request that does not exist in general bills of indictment. The law does not stipulate special content of such an indictment, although it should. However, the essential elements of such an indictment would be: a) explicit request for the issuance of criminal order, b) the issuance of the criminal order without holding the main hearing, c) a proposal that the defendant should be found guilty for the criminal offence he is charged with and should be convicted, and d) sentencing of the defendant to a certain type and/or extent of one or more criminal sanctions (Art.540, Par. 2 and 3). On the other hand, motions related to the main hearing do not have to be filed since it is not going to be held in such proceedings. Considering that the ruling issuing the criminal order is passed without the main hearing, and the main hearing begins with the reading of the indictment, the State Attorney might amend the original indictment until that stage and include the request for the issuance of a criminal order, but not later.[84]

Accurate and complete formulation of the indictment which proposes the issuance of the criminal order is also necessary because the court must grant such a request in terms of its content and form exactly how the State Attorney laid it out and is not allowed to change it in any way. Therefore, the content of the indictment must be such that it allows the judgment issuing the criminal order as a sub-type of a conviction judgment to be rendered.

The court does not have to agree with the request for the issuance of the criminal order. In such a case, the single judge shall deliver the indictment to the defendant together with an instruction on the right to a response and the notification on the rejection of the request to issue a criminal order (Art. 543, Par.2). In such an indictment the request to issue a criminal order would no longer exist in a legal sense. However, such an indictment would not contain motions related to the main hearing, including the proposed evidence. Thus, the defendant is deprived of the information on the proposed evidence against him, which objectively may limit the preparation of his defence for the main hearing. Consequently, it would be a better solution, since the single judge cannot do that, for the State Attorney to list all the proposals for the main hearing in the indictment in which the request for the issuance of a criminal order is made in case it is rejected. Only such an indictment would be suitable both for passing a judgment issuing the criminal order and for holding the main hearing, if it comes to that stage.[85]

Article 341, Par. 3 stipulates that the defendant must be interrogated prior to issuing the indictment unless trial is to be held *in absentia*. The question arose in practice whether this provision

84 Cf. Krapac, D., *ZKP, 2008*, p. 678.
85 Cf. Pavišić, B., *Komentar ZKP 2011*, pp. 692-693

binds the State Attorney's Office even if the indictment is issued with the request for the issuance of a criminal order. Consistently complying with the said legal provision, the State Attorneys interrogate the suspect prior to issuing the indictment in which the issuance of a criminal order is requested. However, judging from a point of view of theory of law, it is not necessary to interrogate the suspect prior to issuing such an indictment, which should be explicitly prescribed. To be exact, through a more all-round interpretation of several related legal provisions of the CPC (Art. 520 and Art.540, Par.1) it might be concluded that mandatory interrogation of the suspect prior to issuing the indictment in which the issuance of a criminal order is requested is not an explicit legal obligation.[86]

The procedure for the issuance of a criminal order does not adhere to the following fundamental principles of the criminal proceedings: a) the principle of oral and adversarial main hearing, c) the court decision on the criminal order is based only on written documents,[87] d) the principle of direct judicial evaluation of the evidence, e) the principle of a public judicial hearing, as well as some other principles.[88]

5.4.4. Court decisions on the Request for the Issuance of Criminal Orders

If the court approves the request, the single judge shall in a ruling issue a criminal order. In the ruling on the criminal order the court shall specify that it accepts the request made by the State Attorney and shall sentence the defendant to a sanction or measure from the request. If the State Attorney has proposed the seizure of the proceeds from crime, and the injured party has filed a restitution claim, the court shall rule on the restitution claim, or refer the injured party to pursue the claim in a lawsuit.

A criminal order is a sub-type of a conviction.[89] By rendering a judgment that issues a criminal order the criminal proceedings start (Art,17, Par. 1, item 3).[90] The content of the judgment on the criminal order includes the data under Art. 455 and Art. 459, Par. 1-3. It must say that the State Attorney's request for the issuance of the criminal order is granted. In the pronouncement of the sentence the defendant is declared guilty for the criminal offence he is charged with. In addition, the factual and the legal description of the criminal offence and its legal qualification must be included. The judgment contains a sentence to a certain criminal sanction or measure as requested, the decision on the restitution claim, if it has been filed. The rationale for the judgment lists only the evidence that justifies the issuance of the criminal order (Art. 541, Par.2).[91]

86 Cf. Petković, N. / Pajčić, M., *Kazneni progon, istraga i optuživanje – nova iskutva*, HLJKPP, Zagreb, 2/2011, p. 438.
87 Krapac, D., *KPP 2010*, p. 108
88 With regard to the position that the interrogation of the suspect ensures the adversarial proceedings, protects the rights of the suspect while observing the principle of fairness, the European Court for Human Rights took a stand in the case *Hennings vs. Germany* according to which the criminal order does not constitute a violation of the right to a fair trial before a competent court pursuant to Art. 6, Par.1 of the European Convention on Human Rights, if the defendant is provided with a legal remedy against the court's decision, which results in the opening of the main hearing in the same proceedings before the same court. See the verdict of the ECHR *Hennings v. Germany*, 12129/86 of 23 Nov 1992.
89 Krapac, D., *KPP 2010*, p. 268
90 Tomašević, G., *KPP 2010*, note 763 on p. 261
91 On the form and the essential elements of the judgment issuing a criminal order see more in: Mrčela, M., *Sporazumna presuda i druga problematika skraćenog kaznenog postupka*, published in: Aktualna pitanja kaznenog zakonodavstva, Inžinjering, Zagreb, 2005, pp. 280-287.

The judgment which issues the criminal order must contain the instruction to the defendant on the right to an appeal against the judgment within eight days from the receipt thereof, as well as a warning that the criminal order shall become final and that the said sanction shall be imposed if an appeal is not filed within the set deadline (Art. 541, Par.4).

The single judge shall *reject* the request for the issuance of a criminal order: 1) if there are reasons for the suspension of the proceedings pursuant to Art. 380,[92] 2) if the criminal offence in question is such that the said request is not allowed and 3) if the State Attorney has requested a sanction or a measure to be imposed that are not legally allowed (Art. 543). A distinction should be made between the rejection of the indictment and the rejection of the criminal order, in which case the single judge rejects the request for a criminal order, not the indictment.

Pursuant to Art. 543, Par. 2, the single judge shall not grant the request for the issuance of a criminal order if he decides: a) that the data in the indictment does not provide sufficient grounds for the issuance of a criminal order, or b) that according to the said data the imposition of some other sanction or measure might be expected rather than the ones the State Attorney has proposed.[93] In such cases, the court shall proceed according to Art. 542, Par.4, i.e. review the indictment according to the rules that are applicable in summary proceedings.[94] If the indictment panel confirms the indictment, the single judge shall schedule the main hearing in accordance with the provisions for the summary proceedings. If the indictment panel does not confirm the indictment, they will declare the criminal order null and void by a ruling with regard to the defendant who has filed an appeal. The single judge shall do the same when rendering the new judgment as well. The single judge is not bound by the request filed by the State Attorney pursuant to Art. 540, nor by the ban pursuant to Art. 13.

5.4.5. Appeal against a Criminal Order

Pursuant to Art. 542, Par. 1, the judgment that issues a criminal order is delivered to the defendant and his defence counsel if he has one, as well as to the State Attorney and the injured party. If the defendant does not have a defence counsel, while the judgment cannot be delivered to his last known address, a defence counsel is appointed *ex officio* until the time the defendant's address is learnt. The judgment is delivered to him, against which an appeal may be filed.

The defendant and his counsel may file an appeal against a criminal order within eight days from the day of receipt of the said judgment (Art.542). An *appeal* should be understood as a refusal to accept the offer, not as a special kind of an actual legal remedy. By filing an appeal, the consensual relationship between the parties involved is broken off, and it imposes an obligation on the court to conduct the proceedings according to the provisions that apply to the summary criminal proceedings. The defendant may waive the right to an appeal. After the main hearing is opened, the defendant may not withdraw the appeal that has been filed. The evidence for the defence may be proposed within the appeal, but the appeal does not need to be elaborated on.

92 Cf. Pavišić, B., *Komentar ZKP 2011*, p. 694

93 Cf. Pavišić, B., *Komentar ZKP 2011*, pp. 694-695

94 In the proceedings for the issuance of a criminal order the judgment is passed without the confirmation of the indictment. Judicial review of the indictment shall be conducted only if the defendant files an appeal against the judgment containing the criminal order. On this topic see more in: Ivičević Karaš, E. / Kos, D., *op. cit.*, p. 457

If the appeal was filed in due time and was submitted by an authorised person, the court shall deliver the indictment to the indictment panel which shall review it in accordance with the Art. 562, Par 2. The indictment panel reviews the indictment at a panel session without the participation of the parties involved in accordance with the Art. 344, and decides whether the indictment is issued based on credible criminal charges (Art. 542, par.5). It is also determined whether the indictment has been issued by an authorised prosecutor, if it is properly written, and if it has been submitted within the prescribed deadlines. If the indictment panel does not confirm the indictment, it declares the criminal order imposed on the defendant who has filed an appeal null and void in a ruling.[95] The court does the same when rendering a new judgment after the hearing on the filed appeal has been conducted.

5.4.6. The Main Hearing and the Ruling on an Appeal

An appeal by the defendant against a criminal order results in a mandatory scheduling of the main hearing according to the rules for the summary proceedings.[96] The single judge conducts the main hearing upon a granted appeal by presenting the evidence enclosed with the criminal charges, as well as the evidence that the defendant has proposed in his defence in the appeal. The main hearing is conducted according to the regulations for the main hearing in the summary proceedings for the criminal offences for which up to eight years of imprisonment is the prescribed penalty.

If there is insufficient evidence of guilt, the single judge shall acquit the defendant from all charges. In such a case, the issued criminal order is declared null and void. The court shall render the judgment declare the defendant guilty of the criminal offence from the indictment and sentence him if the charges from the indictment have been proven by the presented evidence. In such a case, the earlier judgment is confirmed in terms of its content and it remains in force. It is also possible to commute the earlier ruling, e.g. in a decision on sentencing. In the aforementioned cases the single judge is not bound by the request made by the State Attorney pursuant to Art. 540 (in terms of the proposed sanction and measure) nor by the ban *reformatio in peius* pursuant to Art. 13, which means that the court may pass a judgment on the defendant's appeal that is less favourable for the defendant than the one in which the criminal order was issued, which could constitute a considerable violation of the defendant's fundamental rights in the criminal proceedings. On the other hand, by stipulating the ban *reformatio in peius* the criminal order would lose its main purpose, and that is the simplification, acceleration and the economy of the criminal proceedings. Such a ban might stimulate the defendants to file appeals without any fear that they could receive a stricter sentence if they do so than the one already pronounced in the judgment issuing a criminal order.[97]

95 When the indictment panel does not confirm the indictment, it must at the same time reject the indictment issued by the authorised prosecutor, as it cannot any longer exist, which is not stipulated by the law. On this topic see: Pavičić, A./ Bonačić, M., op. cit., p. 515.
96 Cf. Tomašević, G., *KPP 2010*, p. 190
97 Ivičević, E. / Novosel, D., *op. cit.*, p. 678

5.4.7. An Appeal against the Judgment Issuing a Criminal Order

The CPC/08 has introduced a new institute, the right to an appeal by the State Attorney against the judgment on the criminal order. Pursuant to Art.545, the State Attorney has the right to an appeal against the judgment on the criminal order which is decided by a higher court. Such an appeal was not provided for in the CPC/97. Now, the right of the State Attorney to an appeal against the judgment on the criminal order is explicitly prescribed, due to e.g. possible procedural and substantial violations in the judgment on the criminal order.[98] However, if the defendant files an appeal against the same judgment, the State Attorney's appeal becomes redundant.

5.4.8. The Advantages and Disadvantages of Criminal Orders

The main advantage of the proceedings for the issuance of the criminal order is the economy of the process. The main disadvantage is the fact that it is possible in such proceedings to pronounce a suspended prison sentence of up to one year, without questioning the defendant first before the court,[99] which goes against his right to be heard by the court. Furthermore, the possibility of issuing a criminal order for numerous criminal offences could potentially result in the defendants' lack of understanding of how grave and dangerous is the said criminal offences. The reality of the fact is that for most of these offences lenient criminal sanctions are proposed and pronounced.[100] For instance, for the criminal offence punishable under law by a term in prison of up to five years, the most severe penalty that might be pronounced in a criminal order is a suspended prison sentence of up to one year. The legal provision whereby the single judge is bound by the State Attorney's request in terms of the type and extent of the sanction or other measure pronounced in a judgment issuing a criminal order is rather questionable. This is contrary to the general rule on the selection of the type and severity of the penalty by the court.

5.4.9. The Injured Party's Position during the Proceedings for the Issuance of a Criminal Order

The State Attorney, in his request for the issuance of the criminal order, in addition to the imposition of certain criminal sanctions, should propose a decision to be made on the restitution claim that has been filed by the injured party and on the seizure of proceeds from crime. It is on such claims and rendered decision that the position of the injured party depends during the proceedings of the issuance of a criminal order. Specifically, pursuant to Art. 540, Par. 4 of the CPC the State Attorney shall propose to the court, if the injured party has filed a restitution claim, to decide on the said claim. With regard to that, it should be noted that in cases where seizure of proceeds from crime is applicable, the State Attorney has a duty to inform the injured party of this, thus allowing him to state his restitution claim.[101]

Art. 541, Par. 1 prescribes that if the filed restitution claim (by the injured party) is competing against the seizure of proceeds from crime (by the State Attorney), the court is authorised to set-

98 Cf. Pavišić, B., *Komentar ZKP 2011*, p. 697

99 Some legislations, for instance, in BiH, Serbia and Poland stipulate the interrogation of the defendant before the court prior to rendering the judgment issuing a criminal order.

100 This view is shared by: Roxin, C., *Strafprozessordnung*, Munchen, 1998, pp. 371-372

101 Cf. Pavičić, A. / Bonačić, M., *op. cit.*, p 515

tle the restitution claim in favour of the injured party. If it does not settle the claim, the proceeds from crime shall be seized, while the injured party shall be referred to settle the claim in a lawsuit. Therefore, the injured party's restitution claim has precedence over the measure of seizure of proceeds from crime, which indicates that the position of the injured party is more advantageous in the proceedings for the issuance of the criminal order.

5.5 The Proceedings for the Pronouncement of the Judicial Reprimand

Pursuant to Art. 546 of the CPC, the judicial reprimand is pronounced in a judgment. In the proceedings in which it is being issued, unless otherwise stipulated, the provisions of the Code relating to the conviction judgment are applied. It is explicitly stipulated that in the pronouncement of the judgment issuing a judicial reprimand, in addition to the personal data of the defendant, it must be stated that the defendant is found guilty of the offence he is charged with and the legal qualification of the said offence must be included. In the rationale of the judgment, the court shall state the reasons for the judicial reprimand. The judgment in which the judicial reprimand was issued is announced immediately after the conclusion of the main hearing. With the relevant reasons for it, as well as the warning against committing any more criminal offences. Waiving the right to an appeal and the written rendering of the judgment are regulated by the provision under Art. 537, Par. 2.

The judgment which issues a judicial reprimand may be contested on the grounds listed under Art. 467. The decision on the security measures, costs of the criminal proceedings, seizure of proceeds from crime or the restitution claim, may be contested on the grounds that the court has not applied properly a security measure or seizure of proceeds from crime, or that the decision on the costs of the criminal proceedings or the restitution claim is contrary to the legal provisions.

CONCLUSION

Summary criminal proceedings in Croatian criminal procedure law have been regulated under the new CPC/08 based on the regulation of this matter under the CPC/97, but with considerable innovations which are reflected in the broadened scope of their application, introduction of the new procedural institutes in such proceedings, the change in the position and authority of certain subjects to the proceedings (e.g. the judge), broader application of a criminal order, as well as the regulation of the summary criminal proceedings in a different manner, which is especially important. In addition to the simplified and the summary proceedings, there are other mechanisms that may accelerate the proceedings, such as the broadened scope of use of prosecutorial discretion by the State Attorney, as well as allowing the consensual forms of proceedings with regard to the defendant's plea, plea agreements and settlements on the sanctions. When it comes to the compliance of the local legislation with the current trends in this field, it may be stressed that the Croatian criminal procedure legislation has an increased number of abbreviated forms of proceedings that are, in terms of normative regulation, legislated in compliance with the Recommendation R (87)18 of the Council of Europe on the simplification of criminal justice system. Finally, it may be concluded that the Croatian criminal procedure legislation has embraced widely-accepted legislative standards introduced earlier into the European national legislations and international law. Existing legal provisions on the abbreviated forms of proceedings strike a good balance between the efforts aiming at the efficient criminal proceedings and the need to observe the fundamental human rights of the defendant in such proceedings.

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Some Issues Concerning Summary Criminal Proceedings in European Criminal Law

1. The Concept and General Observations on the Summary Criminal Proceedings in respect to Regular Criminal Proceedings

In this discussion the subject matter are the regular criminal proceedings which are defined by four questions: 1. if the criminal offence has been committed, 2. if the accused is the offender, 3. if the accused is guilty and 4. whether the conditions are met for the imposition of a sanction and/or another measure. The method of meeting these requirements in the summary criminal proceedings (also referred in the text as summary proceedings) is discussed. The summary criminal proceedings have emerged due to the increase of criminal offences in substantive criminal legislation and the desire to render the criminal proceedings shorter and less costly.

Summary criminal proceedings are prescribed in cases in which the special conditions have been met. Usually these are related to the degree of seriousness of the criminal offence reflected in the prescribed penalty for which the summary criminal proceedings are stipulated. The first forms of summary criminal proceedings appeared when the criminal proceedings had become so complex and costly and/or in cases in which the criminal situation (and in turn the procedural problems) was accompanied by special features.[2] These proceedings are meant to simplify the criminal proceedings and impose a sanction or other measures stipulated by the Criminal Code.

The main question raised in connection with the summary criminal proceedings is: do guarantees under Art. 6 of the Convention for the Protection of Human Rights and Fundamental

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2 Due to the differences among national systems it is difficult to say at which point the summary proceedings appeared. This is possible to determine for the particular national system. For a historical overview cf. Carić, *Skraćeni oblici kaznenog postupka* (dissertation) Split, 2012, pp. 7 - 89

Freedoms[3] apply to the summary criminal proceedings whenever they may start and whenever they may end, or on the contrary these guarantees apply discriminately only to a certain kind of the proceedings? In comparative analysis it is necessary to make a distinction between the systems of criminal law which distinguish between criminal and non-criminal unlawful conduct and systems that use the term punishable act.

Grosso modo of distinguishing between the criminal and non-criminal unlawful conduct in legislation is recognised primarily in the countries in transition in modern law.[4] The traditional democracies usually do not have this distinction.[5] The discussion at hand concerns the summary criminal proceedings according to the national system.[6]

The national system determines which cases are subject to the summary criminal proceedings. In this respect under present conditions a different approach is out of the question. For that approach under current conditions there are no appropriate mechanisms. Cooperation in cases subject to summary proceedings is primarily a question of cooperation of a particular country in terms of criminal law.[7] In principle, the guaranties of fair proceedings apply to the summary criminal proceedings as well. The summary criminal proceedings depend on the regulation in the national system. However, this should not exceed the guarantees of Art. 6 of the Convention.

The treatment of the offenders who are not criminally responsible due to their condition or age is not dealt with in this paper.

2. The Concept of a Criminal Offence in the Practice of the European Court for Human Rights

Due to the differences that exist between the systems the term criminal offence is understood as autonomous according to its elements specified by the European Court for Human Rights (ECHR). In order for a certain act to be classified as a criminal offence, ECHR uses three criteria. These are the so-called Engel criteria according to a decision *Engel et al. v. The Netherlands*: 1. the domestic classification 2. the nature of the offence and 3. the severity of the potential penalty which the person concerned risks incurring (ECHR: *Jussila v. Finland; Dewer v. Belgium; Eckle v. Germany*).

In principle, the starting point of the ECHR (the first criterion) is that the state freely determines in its domestic law if a certain act constitutes a criminal offence, a misdemeanor or a disciplinary offence as long as it complies with the Convention. This is the first criterion according to

3 ETS 005, Official Gazette – International Agreements 18/1997, 6/1999, 14/2002, 9/2005, 13/2003, 1/2006 hereinafter: the Convention (including the protocols)

4 This is the case with, for instance, the legislation of Croatia, Republic of Serbia and Russian Federation.

5 The term reato in Italian legislation includes the terms delitto and contravvenzione, while the term Straftat in German (Austrian and Swiss) law includes Verbrechen and Vergehen. In French legislation there is a well-known division into *crimes, delits* and *contraventiones*.

6 In some systems, summary criminal proceedings are allowed for the criminal offences which are in other systems processed in ordinary proceedings.

7 Until recently the national criminal justice systems have been governed by the principle of distrust and intolerance. Due to the mobility of people, the criminal offences have become international (and universal), so the protection from such events must be (as much as possible) equally regulated. Cf. e.g. Convention on the International Validity of Criminal Judgments of the Council of Europe (ETS 70) and the additional protocol.

the ECHR: classification under the domestic law, i.e. is the act subject to criminal law within the said legal system. The views on whether a certain institute belongs under a certain branch of law (e.g. whether the misdemeanor falls under administrative or criminal law) according to national state law are relative. If under the domestic law the offence is classified as a criminal offence, Art. 6 of the Convention is to be applied. However, this criterion is for the ECHR preliminary, since the state in question may classify it so in order to avoid applying Art. 6 of the Convention. In such a case the ECHR examines if the said act is indeed a criminal offence according to its elements (actually, punishable act). When the rule is applied only to a limited group (e.g. profession, participants of the proceedings, members of an association), it directs the members to observe certain regulated rules for that group (ECHR: *Demicoli v. Malta*). However, if the rule is such that it applies regardless of the group affiliation, then it is a criminal offence pursuant to the said article (ECHR: *Weber v. Switzerland*). The described approach does not exclude the possibility of a cumulative approach in cases in which separate checks according to certain criteria do not produce a clear conclusion (ECHR: *Bendenoun v. France*). The nature of the measures that may be applied is also taken into account, which in a particular case may lead to a change of the legal nature of the case (ECHR: *Adolf v. Austria*). In the decision *Öztürk v. Germany*, ECHR has taken a firm stand that the states are not allowed to "disguise" the criminal cases (e.g. a traffic violation) treating it as if it were an administrative or civil case. ECHR examines if the regulation stipulating it is general in character and what is the purpose of the punishment. Should the regulation have at least potentially a general application, as a rule it will constitute a criminal regulation (ECHR: *Weber v. Switzerland*). Actually, two sub-criteria are used: scope of the violated rule and the purpose of the punishment which must be met cumulatively. Indemnification as the punitive purpose as a rule leads to the conclusion that it is not a criminal provision. Alternatively, if the provision aims at deterring from repeating the offence, the regulation is classified as a criminal provision (ECHR: *Öztürk v. Germany*). Therefore, if the norm is generally applied (as is the fine for a traffic violation) and if it has a punitive and correctional purpose, it must be treated as the penalty pursuant to Art. 6 of the Convention.

The second criterion is the nature of the offence. According to this criterion the nature of the offence is examined, i.e. if the offence is from the point of view of the Convention a criminal offence in its nature, so its substantive seriousness, place in the system etc. are examined.

The third criterion is the nature, severity and the purpose of the sanction. The sanction must be a deterrent and general in application (ECHR: *Weber v. Switzerland; Demicoli v. Malta*). Such is not the case with the procedural fines (ECHR: *Ravnsborg v. Sweden*). If the offence is punished by imprisonment, as a rule this constitutes a criminal case. ECHR holds that a society, which is founded on the observance of the principle of the rule of law, deems the cases in which the penalty may include imprisonment as a part of the criminal sphere, with the exception of those in which given the nature, duration and the manner of the commission, the imprisonment does not carry a certain weight (ECHR: *Engel and Others v. the Netherlands*; Adolf v. *Austria; Demicoli v. Malta*; Garyfallou AEBE v. *Greece; Lauko v. Slovakia*).

The examination of the second and third criteria is necessary if the first criterion is not sufficient to determine whether the said offence belongs under criminal law sphere, and for the application of the Art. 6 of the Convention it is sufficient to meet one of the said criteria.

The described position of the ECHR suggests that in the administrative cases in which it is possible to impose imprisonment the requirements pursuant to the said article must be met, but this is not precluded even if the sanction is related to property (ECHR: *Air Canada v. the United Kingdom*; *A.P., M.P. and T.P. v. Switzerland*).

3. The Concept of a Criminal Offence Charge in the Practice of the European Court for Human Rights

In the practice of the European Court for Human Rights the position on the criminal offence charge (referred to as a criminal charge, being charged with a criminal offence) has been formulated. The term charge should be interpreted based on its substance and according to its autonomous meaning in the context of the Convention, not in terms of a particular national law (*Campbell and Fell v. the United Kingdom*).

The official translation into Croatian means "indictment" (optužnica) and actually applies to all of the accusatory instruments in the criminal proceedings and it would have been more appropriate to use a more general term "optužba" for the translation of "charge". Pursuant to this article the charge is defined as official information provided by the competent authority to an individual claiming that the said individual has committed a criminal offence (*Eckle v. Germany*). The said Court, therefore, understands the criminal offence charge in terms of a criminal charge seen as an indication of measures which may affect the position of an individual as a suspected perpetrator of a criminal offence (*Foti v. Italy*). The condition of a substantial effect on the position of the said individual as a suspect is also taken into account. Such a position of the Court implies that the measures which do not have the said effect, but are used (e.g. interviewing witnesses), do not constitute a criminal charge.

The state legislation is certainly significant, but does not represent more than a starting point, the first stop in the examination if a criminal charge had existed at some point. The prominent position that the right to a fair trial holds in a democratic society dictates a substantive rather than a formal criterion (*Delcourt v. Belgium*) when assessing whether a criminal charge exists or not. A charge in terms of the Convention is official information supplied by the competent authority and served on the individual containing allegations that he has committed a particular criminal offence (*Eckle v. Germany*).

It must be held that the charge exists where *the situation of the suspect has been substantially affected*, which is the case if the prosecutor has offered a settlement (*Deweer v. Belgium*).

As is described above, in order to determine autonomous concept of a criminal charge in terms of the Convention it is crucial that the position of the person in question is substantially affected even if it is not in the form of a charge but some other measure which has essentially the same effect (*Fotti v. Italy; Lauko v. Slovakia*).

The term charge covers measures such as searches and temporary seizure of objects as well (*Eckle v. Germany*), the request to revoke immunity (*Frau v. Italy*), the decision on ordering or extending detention (*Lüdicke, Belkacem and Koç v. Germany*).

It bears no relevance at whose request the criminal proceedings are being conducted (*Minelli v. Switzerland*), however, according to the practice of the Court, the injured party does not have the right to the continuance of the criminal prosecution protected under the Convention if the State Attorney desists from prosecution (*Helmers v. Sweden*). Namely, generally it should be noted if the rights of the third party are restricted due to the measures undertaken against the persons who are being criminally prosecuted, the third parties may not invoke the guarantees pursuant to Art. 6 since there is no criminal charge against them (*Air Canada v. the United Kingdom*).

The concept of the criminal charge as described above does not include exclusion orders or expulsions of illegal immigrants, or the decisions on extraditions.

4. Summary Criminal Proceedings are Stipulated for Lesser Criminal Offences

The summary proceedings are provided and regulated for the criminal offences which are classified as lesser according to the degree of seriousness and the prescribed penalty.[8] Such criminal offences are expected to be less complex in terms of procedure which means primarily in terms of evidentiary proceedings. The proceedings prescribed for such offences are in terms of economy less expensive. Last but not the least, the criminal proceedings are more effective.[9] In some systems the summary proceedings are prescribed for quite different forms of criminal unlawful conduct.

In systems that recognise criminal and non-criminal unlawful conduct, summary proceedings relate to the least serious forms of criminal offences. If there is no difference between criminal and non-criminal unlawful conduct, the set of criminal offences which are subject to summary proceedings includes numerous punishable acts which constitute actions.[10] The systems which have not been founded on this distinction and treat all of the criminal offences the same, summary proceedings are applied to the forms of criminal offences classified as minor. In any case, the feature of criminal offences that are subject to summary proceedings is their high incidence.

The summary criminal proceedings may be mandatory (obligatory) and optional (allowed). In the latter case, special conditions may be stipulated.

This discussion does not deliberate reductions and accelerations of the ordinary proceedings whether due to the elements of the criminal offence,[11] or due to the wishes of the subject of the proceedings.[12] Specifically, ordinary criminal proceedings may be accelerated or reduced, but the acceleration is excluded in some proceedings whereas in others special requirements need to be met.[13] In certain situations some legislations allow the possibility of conducting summary proceedings in cases of serious criminal offences. This is also outside of the scope of this paper.

8 The criminal offences for which the summary proceedings are prescribed in systems which differentiate between the criminal and non-criminal unlawful conduct account for 80% of concrete cases. In other systems, this share is even greater.
9 Cf. Jean Pradel, *Droit pénal comparée*, 2. Éd. Paris, 2006, pp 381 – 510
10 This primarily refers to traffic violations.
11 This is the case with the flagrant criminal offences. For such offences several of the legal systems prescribe special proceedings. Cf. for instance Art. 53, 54 of the French *CPP* and Art. 18, 379, 380, 382 etc. of the Italian CPP.
12 For instance, the defendant waives the preparatory hearing or does not resort to a legal remedy.
13 For instance, French and Italian law stipulate special proceedings for flagrant criminal offences while the seriousness of such offences is seen as secondary.

Therefore, none of the listed forms of the proceedings related to the criminal offences is not dealt with in this discussion. In order for a certain rule to be included in this analysis the source of law it is related to was taken into consideration. Different rules are often applied to the same forms, so the forms of consensual resolutions are also regulated differently.

5. The Definition of the Subject of the Analysis

The analysis at hand is limited to three questions: 1) which forms of summary proceedings are provided for in several of the national systems, 2) what is eliminated from the proceedings, 3) how should the criminal proceedings be abbreviated.

Depending on the particular legislation the summary criminal proceedings are applicable in over 85% of cases.[14] It is intended for certain criminal offences which have certain characteristics in terms of the manner they were committed in, the degree of seriousness, type, offender, the victim etc. The summary proceedings differ from the ordinary criminal proceedings according to the special rules which are applied in such proceedings. These proceedings may be analysed from different aspects and with regard to different issues.[15]

It should be reiterated that this analysis considers only the summary criminal proceedings, not the procedures regulated by the rules outside of the criminal law or which are not legally regulated at all. What these have in common with the summary criminal proceedings is that they are prompted by a criminal offence and that the goal of such procedures is to reach a fast, cost-effective and simple solution. Everything else can be (and is) different such as the form, type of the decision, subjects etc. (e.g. if it is a settlement between the offender and the victim, plea bargaining, conciliation, arbitration etc).[16] Consequently, this paper is restricted to the aforementioned three issues and only the institutes under criminal law which appear in the summary criminal proceedings.

This analysis does not deal with the cases involving certain types of offenders (e.g. juvenile offenders, i.e. the children who are criminally responsible for a criminal offence, people with mental issues) where the summary proceedings may be consequently excluded due to *ratione personae.* It also does not deal with the cases involving certain criminal offences which preclude such a form of proceedings due to *ratione materiae*, e.g. criminal offences against the economy, or terrorist acts.

6. Sources of Law Included in the Analysis

The analysis at hand includes several European national codes.[17] Namely, the existing summary criminal proceedings in Austria, Bosnia and Herzegovina, France, Italy, Spain, Sweden,

14 It depends on the definition of a criminal offence although this number generally applies. Cf. notes 2 and 4.

15 Pradel, op. cit. p. 367 still emphasises the importance of the organisation of the justice system, especially in complex states which have a federal and local levels of jurisdiction.

16 In the summary proceedings there is not only a difference in the type of charge (indictment, motion to indict, private prosecution), but in the content as well (e.g. the content of the indictment for the least serious offences is shorter).

17 Cf. Procedure penali d'Europa, Deleuze B., Delmas Marty Mireille, Dervieux V., Jung H., Juy-Birmann R., Lemonde M., Mathias E., Perrodet A., Pesquie B., Salas D., Spencer J. R., Tulkens F. (a cura di Chiavario Mario), Milano, 2001

Germany, Poland, Russian Federation, Switzerland, and the United Kingdom of Great Britain and Northern Ireland are the subject of this analysis, In addition to the listed national systems, the recommendations of the Council of Europe R(87)18 and R(99)19 are analysed.

7. The Most Important Forms of Summary Criminal Proceedings under National Systems

Under Austrian *Strafprozessordnung* there are several special proceedings (*Besondere Verfahrensarten*).[18] However, this category includes the procedures in cases for which ordinary proceedings are conducted.[19] Summary criminal proceedings are undoubtedly proceedings in private claims (*Verfahren über privatrechtliche Ansprüche*. &366 - 379) and some others. *Strafverfügung* or *Strafmandat* corresponds with the term *Bussgeld* under German law. These provisions regulate the criminal orders. The State Attorney under the institute of *diversion* may desist from criminal prosecution in four cases (&& 200 – 204). This is the case when criminal proceedings are replaced with non-criminal proceedings, but they are mentioned here because this is regulated by the criminal procedure regulations. In Austria, administrative criminal law is very significant (*Verwaltungstrafrecht*).[20] This is not the subject of this analysis.

Bosnia and Herzegovina has a multi-level structure of rules for criminal proceedings. The procedure for the issuance of a criminal order is regulated under the Criminal Procedure Code of Brčko District of Bosnia and Herzegovina under Articles 308-313, and special proceedings under Articles 340-400. The Criminal Procedure Code of the Federation of Bosnia and Herzegovina from 1998 specifies the rules for the criminal orders and the pronouncement of judicial admonition contained under Articles 412-473, and the provisions on the special proceedings under Articles 475-536. According to the Criminal Procedure Code of Republika Srpska from 2002, the summary proceedings are regulated under the provisions which contain the rules on the issuance of the criminal order and those regarding the pronouncement of a judicial admonition.[21]

The French *Code pénale* is based on the division of the criminal offences into three categories.[22] Under French *Code de procédure pénale* several forms of the summary proceedings are stipulated in addition to the option of reducing the ordinary criminal proceedings in cases of flagrant criminal offences. These are the proceedings for the issuance of criminal orders (*l'ordonance pénale*), imposition of a fine (*l'amende forfaitaire*), and the proceedings before the *tribunal de police*.[23] The procedure for the issuance of a criminal order has been prescribed ever since 1972. Its main characteristic is that it is prescribed for minor criminal offences (*contraventions*) and that it is conducted without the main hearing. The said procedure is possible in all cases involving minor cri-

18 Austrian Strafprozessordnung is actually originally the text dating from 1873, and as a federal law it was published in 1975. It has been amended and supplemented several times (an important amendment was passed in 2004, and last amendment dates from December 2013). It may be noted that the same proceedings have been accepted in Lichtenstein. Cf. Bertel. C. – Venier, A., Grundriss des österreichischen Strafprozessrechts, 7. Aufl., Wien, 2002, pp. 181 – 183, 248 – 262

19 E.g. the proceedings against an absent defendant (*Verfahren wegen Abwesende*).

20 Cf. for instance Austrian *Verwaltungstrafgesetz* BGBL 52/1991etc.

21 Cf. Miodrag N. Simović, *Krivično procesno pravo*, 3rd Edition, Banja Luka, 2009, p. 413 and onwards and a paper by the same author about the criminal proceedings in Brčko District of Bosnia and Herzegovina published in *Le altre procedure penali* Torino, 2002, pp. 37 – 73.

22 Cf. note 2

23 Some include in this category appearance after a guilty plea as well (*comparution sur reconaisance prealable culpabilite*) or *plaide culpable*. Cf. Carić, op. cit. pp. 192 – 196. This institute has been in application since 2004, and it was introduced under the influence of the corresponding provisions in Portuguese, Spanish and Italian law. The proceedings before the *tribunal de police grosso modo* may be treated as the proceedings before the magistrates' court cf. Stefai, G. – Levasseur, G. – Bouloc, B, *Procédure pénale*, Paris, 1984, 12. Éd. pp. 424 – 428

minal offences except in those that are expressly precluded. The procedure has been introduced in 1958 for the first time and it was considerably expanded in 2002. In the proceedings of imposing fines, elements of the administrative law may be noticed today, while the proceedings may be continued before the authorities competent for criminal proceedings. It is important for these proceedings as is for the pre-trial proceedings to classify the offences into several categories so that more serious offences (e.g. category 5 offences) or certain types of offenders (e.g. children) preclude the application of the said regulations. By imposing a fine the criminal proceedings are avoided. The response as well as the appeal is submitted to the State Attorney who forwards it to the criminal court or decides on it (if grounds are not provided). The criminal court may not pronounce a lighter sentence from the one already imposed.

The German *Strafprozessordnung* was originally passed in 1877 but it was amended and supplemented several times over the subsequent years.[24] The provisions for the summary proceedings are stipulated in the sixth volume under four sections (*besondere Arten des Verfahrens*). Only the proceedings for the issuance of a criminal order (*Strafbefehlsverafhrens*), primarily & 408, are considered here the summary proceedings. In addition, it should be remembered that this system provides for the imposition of a fine (*Bussgeldbescheid*). A caution (*Verwarnung*) may contain a request for payment (*Zahlungsaufforderung*) which is usually featured in cases related to a series of minor criminal offences in traffic.

In the Polish Criminal Procedure Code (*Kodeks postepowania karnego*) from 1997, special provisions on the summary proceedings are under & 468-517. Under these provisions the Code regulates the issuance of a criminal order, private prosecution proceedings and petty offence proceedings.

The Criminal Procedure Code of the Russian Federation from 2000 under the provisions on jurisdiction (Art. 31, item 1) lists a catalogue of criminal offences for which the justice of the peace is competent.[25] This applies to the offences punishable by up to three years of imprisonment. Special proceedings before the justice of the peace are regulated by the regulations under Art. 318 and 319 for cases privately prosecuted, whereby the justice of the peace may proceed in such proceedings according to the general rules. The same applies for the cases conducted based on the motion to indict. District courts have similar jurisdiction.[26]

Summary proceedings according to *Ley de Enjuiciamento Criminal* of Spain are stipulated under title II (*Del Sumario*) under Art. 757-794, but the provisions on the summary proceedings are also under the titles III and IV.[27] Under Art. 795 a catalogue of criminal offences is listed (but the criminal offences in question are punishable by a term of no more than five years in prison).

The criminal proceedings of Sweden are divided into the investigation proceedings (*förundersökning*) and the trial (*rätegang*) which includes the indictment (*åtals väckande*). The rules of the criminal proceedings are otherwise in this and other Scandinavian countries regulated as the

24 This decree was passed as a law and it has such content. Cf. Hans-Heiner Kühne, *Strafprozeßrecht, 3. Aufl.*, Heidelberg, 2004, pp 12 and onwards

25 These are e.g. criminal offences related to lesser forms of violence, public drunkenness, serious traffic violations etc. The justices of the peace were introduced into the Russian system in a judicial reform conducted by the tsar Alexander II. Formally, this subject was reintroduced in 1996 by the Constitutional Law on the Judiciary.

26 These courts have been called since 1996 the people's courts.

27 The law was passed in 1882.

rules of the judicial proceedings (rättegångsbalk, RB 1942). There are no special sources of law for the criminal proceedings.

The first Swiss unified Criminal Procedure Code (*Strafprozessordnung, Code de procédure pénale, Codice di procedura penale*) was passed in 2007, and has been applied since 2010. The Code regulates under the eighth title the proceedings based on an indictment order and the proceedings for petty offences (*Besondere Verfahren, Procédure spéciales, Procedure speciali*). Summary proceedings are undoubtedly: the private prosecution proceedings (*Privatklageverfahren*) and the criminal order proceedings (*Strafbefehlsverfahren*). The latter is regulated by the Art. 352.[28]

The Italian *Codice di procedura penale* prescribes several types of summary proceedings.[29] Generally, there are two approaches to avoiding a costly accusatory procedure with guarantees legislated by the Code: special proceedings and the proceedings before the single judge. This is the original approach of the Italian legislator. Special proceedings have certain features of the mixed proceedings (e.g. *giudizio direttissimo and giudizio imediato*), and they are divided into the proceedings which eliminate (just) the main hearing (e.g. *giudizio abbreviato*) and the proceedings in which the agreement has a prominent role (e.g. *applicazione della pena su richiesta delle parti – the so-called patteggiamento*) or it is proceeded based on an order (e.g. procedimento per decreto). The proceedings before the single judge (*procedimento davanti al tribunale in composizione monocratica*) are a set of rules which represent *lex specialis*, and if there are no special rules the regulation under the previous titles are applied.[30] Actually, the criteria of the summary proceedings in terms of this paper are met only by the plea agreement and the proceedings before the single judge if the criminal offence is in that category and the proceedings based on an order.[31]

Summary proceedings in the United Kingdom are conducted before the *Magistrates' Courts* as summary trials. They may be used for the two sets of criminal offences: a) those which may only be tried in such proceedings and b) those which may be tried in these or ordinary proceedings. The features of the summary criminal proceedings with regard to the criminal offences here analysed are: the judge has no prior knowledge, the evidence is presented before the court, guilt is decided on and after a certain period of time the imposition of certain sanctions is decided on.[32]

Some of the recommendations of the Committee of Ministers of the Council of Europe (also) deal with the summary criminal proceedings. Recommendation R(87)18 on the simplification of the criminal justice must be mentioned, in the part concerning the fact that the criminal justice is slow regardless of the resources that are being invested in it, the need to expand the area of deciding according to prosecutorial discretion, related to dismissing the criminal charge and referring the case to alternative proceedings with or without special conditions, the expansion of the application of the criminal order, investigation during the main stage of the proceedings, plea agreements, the composition of the court. In addition, Recommendation R(94)12 should be mentioned which deals with the role of the judges which is generally related to their independen-

28 Prior to this Code, the criminal order as *Strafmandatexisted* had existed only in cases conducted before the military court.
29 This Code regulates as many as five such reduced proceedings. Cf. a detailed overview of individual proceedings Carić, *op. cit*. pp. 199 – 224.
30 The rules of the original text have been replaced with this. The regulation has been altered (supplemented) several times.
31 With the *patteggiamento* reform in 2003 a limit has been set of up to 7.5 years in prison. There are actually two forms of the said settlement (*tradizionale* and *allargato*) according to the imposed penalty.
32 A detailed overview of the trial before the magistrates' court is provided in: Carić, *op. cit*. pp. 147 – 159

ce, authority, working conditions, association, accountability as well as recommendation R(95)12 on the management of the criminal justice system. Item 3 on the role of the State Attorney in the criminal justice system is especially important, listing some of the most important tasks of the State Attorney in some systems. Item 5 of the said Recommendation concerns the issues which are especially important for the recruitment and training of the State Attorneys. The said Recommendations especially deal with the relationship of the State Attorney with the legislature, the executive, the judge and the police.

The aforementioned shows that the summary criminal proceedings are stipulated by many European procedure sources of law. The connection between the substantive and procedural law is evident. The criminal offences in question are mostly prosecuted *ex officio*. However, it should be kept in mind that there is a considerable number of criminal offences which are privately prosecuted. Typical forms of summary criminal proceedings are the proceedings for the issuance of a criminal order with a specified type and severity of the penalty, and also the issuance of admonition (with or without a stipulated payment to be effected) etc.

8. Characteristics of the Summary Criminal Proceedings Relevant to the Present Discussion

There are three options prescribed for the criminal offences which are subject to summary criminal proceedings: a) conducting the criminal proceedings, b) proceedings which replace the conduct of the criminal proceedings and c) imposing special sanctions in the judgment including a criminal order and a judicial admonition. In the present discussion an overview of the second type is omitted although it is exceptionally important in practice.[33]

The guarantees of the right to a fair trial may apply, but do not have to, to the proceedings which end in decisions cited under c).[34] Furthermore, the existence of these two decisions challenges the claim that the guilt for a criminal offence must be established by the court. Specifically, the said decisions establish the culpability for the commission of the criminal offence. The judgment is rendered before the main hearing. The main hearing is not held at all. In view of all this, the right to a fair trial cannot be asserted in its full capacity.

If this situation is carefully examined, it may be concluded: a) that the proceedings related to the criminal orders and judicial admonitions are regulated by the criminal law regulations and b) that in such decisions the culpability for the committed criminal offence is established. The defendant is either tried or he waives the guaranteed right to a fair trial of his own accord, thus accepting (assuming) guilt for the criminal offence in question as well the imposed criminal or other measure.

33 It should be noted here that these include various types that might be classified under diversion. Some conciliation proceedings and settlements are conducted according to the criminal procedure rules, and others are not. On this topic in detail see: Marina Carić, *op. cit*., pp. 310 - 362.

34 Some hold that all guarantees cannot apply to all criminal offences. Cf. for instance Stephen C. Thaman, *Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases*, Electronic Journal of Comparative Law (December 2007), http://www.ejcl.org/113/article113-34. (vol. 11.3, December 2007).

Summary criminal proceedings may unfold the same way ordinary criminal proceedings do. If the summary proceedings go through all of the stages the ordinary proceedings have, apart from the particular case being decided on there are no other special qualities unless the national system prescribes them. In such proceedings all of the guarantees which exist in the ordinary proceedings apply. This discussion does not refer to such cases.

Summary criminal proceedings may abbreviate: a) the rules related to the pre-trial proceedings, b) rules that regulate the main hearing, c) rules related to the evidence, d) rights of the persons involved in the proceedings and some other issues. Typical characteristics of the summary proceedings are specified below. Only the most important ones are mentioned.

The jurisdiction over the summary criminal proceedings is regulated discriminately. Minor criminal offences are tried before the single judge. The national systems stipulate the prescribed penalties in different ways for the criminal offences subject to such proceedings. Taking into account the increase in the number of criminal offences it is likely that the jurisdiction of the single judge shall be expanded.

Summary criminal proceedings are conducted only for certain criminal offences. The category of such criminal offences is always classified according to how serious they are. Seriousness (social threat) of the criminal offences is defined by the severity of the prescribed penalty. Summary criminal proceedings are intended for minor, i.e. lesser criminal offences. Depending on whether the national system has a division into criminal and non-criminal unlawful conduct the summary proceedings are regulated accordingly. If such a distinction does not exist in the systems which use a single term of a punishable act, the State Attorney as well as some other authorities may issue a criminal order or an admonition for minor criminal offences.[35]

Discretionary prosecution is important in the summary criminal proceedings.[36] This applies to all systems. Special attention is paid to two sets of criminal offences in the proper sense of the term. The first set consists of minor criminal offences which do not represent an interpersonal conflict between the offender (*is qui fecit*) and the victim (*qui passus est*). The other set includes criminal offences which entail an interpersonal conflict.

With regard to the first set of offences, the State Attorney uses prosecutorial discretion if he deems that there are legal grounds for it. For such proceedings concerning the second set, as a rule, must have the consent of the victim. This is the first procedural issue which distinguishes the summary proceedings regarding the criminal prosecution. The State Attorney decides independently whether he should proceed with the prosecution or abandon it after the defendant performs certain acts in cases involving criminal offences prosecuted *ex officio*. Such an obligation is imposed on the State Attorney regarding the criminal offences in their proper sense.

In the second case, the State Attorney proceeds so with the consent of the victim. It may be a legal obligation or the State Attorney's approach to the proceedings. The consent of the victim usually affects the restitution claim filed by the victim. Such a claim may be stated as *l'action civile*

35 This is the case with most punishable acts related to traffic etc. Cf. for instance Italian, German and Swiss law.

36 Summary criminal proceedings involve primarily the cases which constitute the so-called *Massenkriminalität*, first of all, traffic violations, minor bodily injuries, property crime etc. It should be noted that these are not just criminal offences in their proper sense, but also the conduct that is related to non-criminal unlawful conduct.

or the said person may join the criminal proceedings as the injured party with a restitution claim (in some systems become a subsidiary prosecutor). With regard to this right of the victim of the said criminal offence, legal systems prescribe a settlement with the offender and a statement that the injured party's claim is fully satisfied by this. Due to this, the consent of the victim must be formally given.

The second characteristic of the summary proceedings is the omission of the pre-trial proceedings. This has both positive and negative effects. The most significant positive effect is that the legislator is trying to ensure certain dynamics and a reasonable duration of the criminal proceedings. Criminal proceedings without the pre-trial stage are inevitably (or should be) faster- paced and more dynamic.

Summary criminal proceedings often incline to avoiding the main hearing as the central and most important part of the criminal proceedings. The main hearing in the summary criminal proceedings may be differently regulated from the main hearing in the ordinary proceedings. During the summary criminal proceedings maintaining continuity is imperative since it is aimed at conducting the main hearing in a single hearing, the order of actions is rearranged because the defendant is giving testimony in a different manner than in the ordinary proceedings, the records of the main hearing are kept differently from the records in the ordinary proceedings, i.e. it is recorded, the minutes record everything differently, the requirements for the court reporter are different etc.

Among the negative effects of the elimination of the main hearing in the summary criminal proceedings it should be noted that it is impossible to apply all of the principles which regulate the criminal proceedings since the said principles are fully applied only during the main hearing (e.g. the presumption of innocence), while some may only be applied at that stage (e.g. adversary argumentation). The most serious negative effects of the summary proceedings without the pretrial proceedings are related to the evidentiary proceedings. For instance, the perception of the officer in charge, the use of various devices in order to establish certain circumstances if there are no clear stipulations with regard to the conditions of the working order of the said devices, or a credible criminal charge. In such a case the decision in the summary criminal proceedings is based on the evidence which has not been subjected to the adversarial examination. This is certainly a negative effect of the summary criminal proceedings.

Summary criminal proceedings which do not include the main hearing have the characteristics of a settlement under criminal law. The defendant does not usually appeal or object to the imposed sanction and/or other measure. However, in such criminal proceedings the most important principles of the proceedings are not applied. The elimination of the main hearing is especially important for the evidence since the decision (as a rule, a criminal order or a judicial admonition) is founded on the sources of information taken as the "evidence" which cannot be used at the main hearing.[37]

The fourth characteristic, especially important for the defendant is the decision passed in the summary proceedings. The summary criminal proceedings with regard to the form of the decision comply with the general provisions of the criminal proceedings. Therefore, even in such

37 E.g. a criminal charge

proceedings the decisions are passed in the form of judgments and rulings. Summary criminal proceedings discriminately regulate the legal remedies bearing in mind the authority which has rendered the decision and whether the decision includes a certain criminal or other measure.

9. Summary criminal proceedings *de lege ferenda*

a) The Reform of the Substantive Criminal Law

Preliminary task is related to the substantive criminal law. Firstly, the existing incriminations should be considered. Today substantive criminal law provides for a lot of punishable acts but also a lot of criminal offences. This swelling mass of punishable acts is something the existing procedural system (with high guarantees) certainly cannot cope with. Therefore, with regard to substantive criminal law, the criminal offences and other punishable acts should be filtered down first. The summary proceedings must leave intact the efficiency and the most important guarantees of the criminal proceedings.[38]

It is a separate issue if the national system differentiates between the criminal and non-criminal unlawful conduct? Under modern circumstances it is hard to find a justification for such a distinction. There is no valid reason for the aforementioned differentiation if we consider that the misdemeanors are often more severely sanctioned than criminal offences. There seems to be a discrepancy between the assessment of the legislator and the judicial practice on how serious certain proceedings are. As long as there are these discrepancies it is hard to expect plea agreements will play a greater role.[39]

The national criminal procedure systems have to review if certain criminal offences are compatible with the cooperation under criminal law. In this respect, three categories of criminal offences may be identified. The first includes the criminal offences which are subject to regulation by international law. Such criminal offences must comply with the international source of law and may vary only to the extent recognised by the international law. The second category includes criminal offences which have been traditionally represented among the transnational criminal offences. Here the requirement for dual criminality of the norm is a more sensitive issue and requires to be examined from case to case. The third category includes criminal offences which are peculiar to particular national systems. Unlike the previous two categories, this one mostly does not meet the requirement for dual criminality of the norm.

b) The Reasons for the Existence of Summary Criminal Proceedings

The next question which arises is whether there are reasons for the summary proceedings to exist? When searching for an answer to that question it should be remembered that the summary criminal proceedings are a set of rules which regulate the proceedings involving the majority of

38 Cf. Art. 6 of the Convention.
39 *Sentencing* as defined in the USA is a factor which certainly contributes to the number of agreements resolving the disputes arising from the criminal offences.

cases and that is why it is extremely important how the rules of the said proceedings are being regulated. Summary criminal proceedings contain roughly three sets of rules: a) the rules on the plea agreements, b) on the prosecutorial discretion and c) rules on the criminal proceedings in the proper sense of the term.

The defendant may give consent to the imposition of a certain sanction or other measure in the judgment which imposes a criminal order or a judicial admonition. The judgments in both cases must be subject to judicial review. The court is definitely not allowed to act *ultra petita partium*. The court must supervise the plea agreements at this stage as well. In this respect there are two major restrictions. The first is that the decision rendered based on the proposal must not be unlawful, and the second is that it must not violate the rule ne *ultra petita partium*. The defendant as a party to the proceedings may consent to the imposition of a certain sanction stipulated by the criminal law provided it is done under the supervision of the court. The party involved (especially the defendant) must be given the opportunity to address the court. However, the court's decision may just be a referral to the criminal proceedings.

The decision according to the prosecutorial discretion in certain cases is definitely appropriate in order to meet the objectives of criminal policy. The requirements for this must be clearly determined by the law. The State Attorney must be trained to assess when this approach is appropriate.

Summary criminal proceedings in the proper sense of the term mean reduced proceedings, fast pace, while at the same time observing certain rights. The remainder of this presentation elaborates on this.

c) Summary Criminal Proceedings Must Comply with the International Standards

Summary criminal proceedings may become a model procedure for most criminal cases provided that certain conditions are met. Is the way forward to eliminate certain procedural guarantees for some criminal offences? The answer should be in the negative. The criminal proceedings should always be proceedings of certain quality. This absolutely applies to the ordinary proceedings. It should apply to the summary proceedings as well. Summary proceedings are still criminal proceedings.

Generally speaking, deciding based on the prosecutorial discretion should be used more broadly. In these cases all criminal offences should be divided into two categories. The first category would include criminal offences which do not represent an interpersonal conflict. The State Attorney's decision is here not bound by the victim's consent. In all of the criminal offences accompanied with an interpersonal conflict the view of the victim of the said offences must be taken into account. Out-of court resolutions must find their place here and it must be considered that such offences are primarily violations of the rights and when it comes to such forms, restitution of the violated rights must be paramount. This means that the State Attorney is undertaking some completely new and complex duties.

d) National Systems of Summary Criminal Proceedings Must be Communicable

The aforementioned shows that the modern criminal proceedings are largely conducted as the summary criminal proceedings. National systems of criminal proceedings must be communicable. This means at least two things. Firstly, substantive criminal law must be harmonised. This requirement is primarily related to the substantive criminal law. The said law must be similar. For criminal offences criminal and other measures must be similar. Second requirement is related to the area of criminal proceedings, specifically, the area of international cooperation. National systems must have flexible perimeters in order to allow joint actions when detecting and suppressing criminal activities.[40] This is especially important in the field of mass crimes, which means in the field of summary criminal proceedings. There should not be any *forum shopping* in cases subject to the summary criminal proceedings.

e) Stable Practice and Summary Criminal Proceedings

In the summary criminal proceedings the central place might be occupied by the admission of the offence or guilt (*the guilty plea*) on the part of the offender – defendant. It is a fundamental right of each person to admit a certain fact regardless of the effect this has on the establishment of the truth. This is a circumstance relevant to all criminal proceedings. However, it must be made sure that the admission is made freely and must not be motivated by some special reasons, in addition, it must not be the place for the revenge of the victim, but a place where the defendant can take a stand stating that he is aware of the criminal offence and the violation of the right caused by it. The admission of the defendant must be the basis of the agreement. An effort should be made in order to turn plea bargaining into a mechanism of implementing the criminal policy. The requirements should be especially thoroughly stipulated in cases where the other side is the State Attorney and the plaintiff. In this respect a distinction must be made according to the type of the criminal offence and depending on this distinguish between the victim and the injured party. Plea agreement may conclude the criminal proceedings which have started or may replace the said proceedings.

Summary criminal proceedings may end in the agreement before the main hearing only with a clearly defined stable practice. The said practice does not need to become the source of the law as is the case in certain accusatory proceedings, but without high probability that certain sanctions and other measures shall be imposed and without a more or less accurate assessment of the aggravating or extenuating circumstances it is difficult to expect any greater success in the area of plea agreements.

f) The Course of Summary Criminal Proceedings

It is hard to accept abbreviation of the criminal proceedings which eliminate the main hearing stage. In support of this view we may cite the fact that the principles of the proceedings are fully applied only at the main hearing. This especially applies to the evidence which may be used as the basis for a judgment. Abbreviations of the criminal proceedings must primarily refer to

40 Cf. Jean Pradel, *La mondialisation du droit pénal: enjeu et perspectives*, Revue Juridique Themis, Montreal 2001

the pre-trial stage. They can be shorter, faster and simpler. However, the right to a fair trial should not be called into question in the summary proceedings. Even in the summary proceedings, the defendant should be allowed to enjoy the guarantees under Art. 6 during the main hearing. Without these guarantees the said proceedings are not criminal proceedings and do not comply with the international standards. This applies to the summary proceedings as well.

The court must first confirm the charges and only when they are confirmed they may be subject to the main hearing. This applies to all forms of charges (indictment, motion to indict and private prosecution) and to all cases of committed criminal offences. Also to the category of criminal offences which are subject to summary criminal proceedings under the jurisdiction of the single judge. With regard to summary proceedings there is no investigating judge since there is no investigation (pre-trial proceedings). When it comes to cases subject to summary criminal proceedings the question which arises is related to the recusal of the judge who has decided on the confirmation of the charges. None of these cases for such criminal offences should reach the stage of the main hearing if the charges have not been confirmed first. For criminal offences in cases under the jurisdiction of a panel in the summary criminal proceedings the procedure for the review of the indictment must be equated to the appropriate stage of the ordinary proceedings.

In the summary proceedings it is not necessary for the parties to be present provided that the stipulated requirements are met. First of all, a distinction should be made if the criminal offence in question is being prosecuted *ex officio* or privately. In the first case the State Attorney must be present at the main hearing. The judge before whom the criminal proceedings are conducted must never become the prosecuting judge. It is never acceptable that the judge has two roles. The judge must be a neutral third party, equidistant from both parties to the proceedings. The reasons such as lack of human resources must not call into question this basic rule. Authorised prosecutor should not be absent from the main hearing even when it comes to the category of criminal offences prosecuted privately.

With regard to the criminal offences for which summary criminal proceedings are prescribed the rights of the victim and the injured party must be observed. The defendant does not have to be present at the main hearing, but only if he has been informed of this right upon which he has expressly waived it. And if he has been provided the opportunity to present his defence with all of the guarantees of the defence. He must always be notified about the main hearing except if it is obvious that he is avoiding to be served or if he has not reported a change of address. The court must make sure that all of the requirements have been met cumulatively and only than can the main hearing be held.

The main hearing in the summary criminal proceedings may be conducted in the court building or as is stipulated by law elsewhere. Special requirements may be stipulated for the decision on holding the main hearing outside the court building.

Summary criminal proceedings must be efficient and fast. This primarily is related to the method of keeping the minutes of the main hearing. The minutes should be kept without the usual dictation so the main hearing is either recorded or it is kept by a person with special qualifications. The minutes of the main hearing in the summary criminal proceedings must be brief and contain just certain items.

The course of the main hearing in the summary criminal proceedings may be regulated differently from the one of the ordinary proceedings. Especially the interrogation of the defendant.

The written rendition of the judgment must depend on the imposed sentence. If a term in prison has been imposed (imprisonment) the written judgment should have to meet all of the requirements generally stipulated for judgments. If this is not the case, and the penalty is not as severe, the judgment may be brief without an elaboration but has to contain the pronouncement of the judgment. This is a matter of national legislation. In the latter case special regulations on the delivery are possible.

Conclusion

Summary criminal proceedings in the current criminal law have a great significance. In order for these proceedings to have an effect on suppressing criminal offences the reform of the substantive criminal legislation is crucial. Without it the procedural criminal legislation shall constantly lag behind the enormous number of criminal offences. In the summary criminal proceedings substitution institutes of the criminal law should be developed. Similarly, the said proceedings should prescribe an option to plead guilty to a certain criminal offence. This is in any case a fundamental right of every person to admit a certain fact regardless of the fact that it may influence the establishment of the truth.

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The Procedure for the Issuance of a Criminal Order: Procedural Legislation in Bosnia and Herzegovina as Compared to the Legislations in the Region

1. Introduction

The simplification of the proceedings in dealing with criminal offences and their perpetrators may be traced back to a distant and ancient emergance of the criminal proceedings and their development. Historical documents, legal texts, theoretical debates all testify to the fact that even in the distant past abbreviated forms of proceedings and various forms of negotiations between the prosecutor and the defendant existed in the criminal proceedings. Rationalisation of the criminal proceedings was more prominent during the 19th century, which is understandable, since that was the time of powerful reforms in the criminal jusice system, especially in the system that was emerging after the French Revolution in Europe. Nowadays, there are many types of abbreviated forms of proceedings and simplified trials in the national criminal procedure systems, in addition to which there are various forms of consensual legal institutes. Regardless of the manner in which they are legislated and what their legal definitions are, they are paving the way to the rationalisation of the criminal proceedings and criminal justice system, they are eliminating the prolonged duration of the criminal proceedings and accelerating them, they are relieving the caseload in the criminal justice system, enabling the defendant, esspecially after he has pled guilty, to quickly conclude the criminal proceedings and render a court decision.

The simplification of the procedural forms and institutes through which the criminal proceedings are developed is not considered exclusively within the national legislations. Actions are taken at the international level considering that the idea of deliberating on a criminal matter

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in the summary proceedings is supported through various documents. Let us mention the Recommendation of the Council of Europe of 17 Sept 1987 (R(87) 18) on the simplification of the criminal justice system, in which member states are advised to, within their constitutional principles and legislative traditions, build into their respective national criminal justice systems summary and simplified criminal procedures, thus allowing the caseload in the criminal justice system to be reduced and increasing the efficiency of the detection and resolution of the most complex forms of crime. These demands are repeated in the Recommendation of the Council of Europe on the criminal justice system management of 11 Sept. 1995 (R (95) 12), which contains quite useful instructions to the member states on how to adapt their legal systems to face an increasing number of, often more and more complex, criminal offences. Holding that fair and effective criminal justice system is a prerequisite for the rule of law, this Recommendation, among other things, proposes by not initiating the criminal proceedings for minor criminal offences, through mediation and simplification of the criminal proceedings, to open the door for a more efficient application of the criminal law and a more adequate response to the difficulties the criminal justice systems are facing at the national level.[2] In terms of rationalisation of the criminal proceedings and various alternatives to criminal prosecution, it is important to note the Recommendation of the Council of Europe of 15 Sept 1999 (R(99) 19) which emphasises the active role of the victim and the offender, as well as the participation of the community in the process of the creation of a less repressive criminal justice system. Finally, these valid requirements are supported by the European Court for Human Rights (ECHR), which in its rulings, especially those pertaining to the duration of criminal proceedings judging from the aspect of the right to a fair trial, emphasises that the fair and efficient justice system is *conditio sine qua non* of the rule of law in any country.

Taking into consideration that the *simplicity, speed* and *efficiency* are keywords that influence debates on the effects and results of the criminal justice systems,[3] we must underline that there are various and special forms of the simplified criminal proceedings. They may be divided in different ways, but mostly the classification comes down to: a) simplified forms of proceedings based on the admission of guilt before the court (a guilty plea) and the negotiations on the plea and the agreement of the prosecutor and the defendant (plea agreement, plea bargaining); b) rendering a judgment without holding the main hearing (criminal order) and the imposition of sanctions without holding the main hearing; c) accelerated forms of proceedings for flagrant criminal offences; d) summary proceedings that do not include the investigation stage; e) proceedings that do not include a judicial review of the indictment or f) various forms of abbreviated and simplified forms of hearings and court sessions.[4]

2 Bavcon, Lj. (2000). *Novejše težnje in modeli za obravnavanje bagatelne kriminalitete*. Published in: *Uveljavljanje novih institutov kazenskega materialnega in procesnega prava*. Ed. Ljubo Bavcon. Uradni list Republike Slovenije. Ljubljana, p. 21; Sijerčić-Čolić, H. (2008). Evropsko krivično procesno pravo – regionalna pravna pravila o krivičnom postupku. Pravo i pravda, vol. 7, no. 1, pp. 26- 27

3 Bavcon, Lj. (2000), op. cit., p. 22

4 More in: Bavcon, Lj. (2000), op. cit., pp. 7–25; Brkić, S. (2004). *Racionalizacija krivičnog postupka i uprošćene procesne forme*, Faculty of Law, Novi Sad; Brants-Langeraar, C. H. (2007). *Consensual Criminal Procedures: Plea and Confession Bargaining and Abbreviated Procedures to Simplify Criminal Procedure, Electronic Journal of Comparative Law*, vol. 11.1 (May), http://www.ejcl.org; Herrmann, J. (1997). *Modeli reforme glavne rasprave u kaznenom postupku u Istočnoj Europi: usporednopravna perspektiva*. Hrvatski ljetopis za kazneno pravo i praksu, vol. 4, no. 1, pp. 255-278; Stojanović, Z. (2009). *Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije*. Published in: *Alternativne krivične sankcije i pojednostavljene forme postupanja* /Zoran Stojanović… et al../. Serbian Association for the Theory and Practice of Criminal Law : the Association of Public Prosecutors and Deputy Public Prosecutors. Belgrade, pp. 15–38; Thaman, S. C. (2007). *Plea-bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases. Electronic Journal of Comparative Law*, vol. 11.3 (December), http://www.ejcl.org.

2. What is the situation when it comes to simplified and consensual forms of proceedings in Bosnia and Herzegovina?

Introduction. When trying to offer an answer to the above question, one must start with the examination of the criminal procedure theory, subsequently, express (dis)agreement with the positions held by the legislature, and, finally, turn to planning certain content in terms of criminal law and criminal policy. What are the results of such activities? Firstly, in criminal procedure theory, the legislators are strongly encouraged to introduce various forms of alternative criminal sanctions and alternative measures, as well as to regulate consensual models, to eliminate, avoid or circumvent the criminal proceedings, i.e. diverting or deflecting from the criminal proceedings. Therefore, the simplified forms of proceedings and possibilities of alternative resolution of criminal disputes are being discussed in conferences, seminars, trainings of participants in the criminal justice system, and some relevant research, albeit of modest scope, has been conducted.[5] Secondly, the legislator is still reserved on some of these issues, especially with regard to such proposals that aim at eliminating the criminal proceedings in terms of wider application of prosecutorial discretion.[6] So far, only the content that enables the summary proceedings to be conducted in the cases involving minor criminal offences has been introduced into the procedure legislation, which allows ordinary criminal proceedings to be avoided and renders the criminal proceedings into being more efficient in view of the reality of social relations. Thirdly, when offering recommendations for the formulation of criminal policies, the simplified forms of proceedings are not often discussed nor the elimination of the criminal proceedings in terms of wider application of the prosecutorial discretion. The focus is still on supressing and combating more complex forms of modern crime, action plans for the fight against terrorism, corruption, organised crime, human trafficking are especially "under public scrutiny" as well as other criminal offences that are in the public eye. If it is necessary to single out certain activities, within the rationalisation of the criminal justice system and criminal proceedings, then it would have to be at this point the action plan for conducting the Strategy for the Reform of Justice Sector in Bosnia and Herzegovina, within which the needs and the possibilities for the introduction of the new measures of criminal prosecution are examined with a view to reducing the number of cases before the courts of BiH.[7]

5 More on this in: Sijerčić-Čolić, H. (2011). *Otklanjanje krivičnog postupka kroz načelo oportuniteta krivičnog gonjenja*. Annals of the Faculty of Law in Sarajevo, LIV, 2011, pp. 301–329; Simović, M. N. (2009). *Načelo oportuniteta u krivičnom procesnom zakonodavstvu Bosne i Hercegovine i Republike Hrvatske*. Published in: Oportunitet krivičnog gonjenja (Vojislav Đurđić et al.), Serbian Association for the Theory and Practice of Criminal Law, Belgrade, pp. 145–170; Vranj, V. (2009). *Alternativne mjere i sankcije u krivičnom zakonodavstvu i praksi u Bosni i Hercegovini*, Faculty of Law at the University of Sarajevo, Sarajevo. Taking into account the research efforts, EU project *"Restorative Justice in Penal Matters in Europe"* should be mentioned here, led by Professor Frieder Dünkel, PhD and the research team at the University in Greifswald (Germany) conducted in the period between 2011 and 2013.The project covers 37 countries (among them Bosnia and Herzegovina; from this region, Croatia, Macedonia, Slovenia and Serbia are also included) the purpose of which is to analyse models that represent alternatives to traditional criminal proceedings and criminal justice system.

6 Referring to Sijerčić-Čolić, H. (2011), op. Cit.

7 Cf. annual Report on the Implementation of the Strategy for the Reform of Justice Sector in Bosnia And Herzegovina in 2009, Ministry of Justice of Bosnia and Herzegovina.

Over the past ten years or so of the development of criminal legislation and criminal justice system in Bosnia and Herzegovina,[8] a door has been opened to the following abbreviated forms of proceedings and negotiations between the parties: plea hearing, plea bargaining, the right of the witness not to answer certain questions (witness immunity) and the proceedings of the issuance of a criminal order. These various options for more efficient and simpler criminal proceedings are not limited just to minor criminal offences. On the contarry, only the last listed form of the abbreviated proceedings is limited to such offences, since it is applied if there is sufficient evidence to prove the suspicion that the suspect has committed the offence in question for which the prescribed penalty is a fine as the main penalty or a prison term of up to five years. In any case, the first three options have been introduced precisely to simplify the response of the criminal justice system to more serious and complex offences as well. A brief description of the plea hearing, plea bargaining and witness immunity is provided below, whereas a more detailed overview is provided of the abbreviated or summary criminal proceedings conducted in minor criminal offence cases, in the course of which it is possible to impose on the defendant a legally prescribed sanction or measure without holding the main hearing (the proceedings for the issuance of the criminal order).

Plea hearing. Before the preliminary hearing judge, after the confirmation of the indictmeent, the defendant may accept the charges thus eliminating the option of conducting the main hearing. By the plea hearing, which consists of a formal response before the court to the charges listed in the accusatory instrument, the aim is to establish if the defendant accepts the charges or is contesting them. If the defendant accepts what he is charged with in the indictment, he faces a (different) judge, i.e. the panel, in order to confirm a guilty plea. Laws on procedure define the issues that are ''tested" at the said hearing (for instance, whether the guilty plea was voluntarily entered, knowingly and with full understanding; whether the defendant was cautioned prior to his plea that by a guilty plea the right to a trial is waived, since the main hearing is not sheduled in such cases, just the sentencing hearing; whether there is sufficient evidence on the guilt of the defendant). If this test is passed, the court shall accept a guilty plea and proceed to hold a hearing in which the criminal sanctions are imposed. Therefore, the sentencing hearing must be held immediately after the court has accepted a guilty plea. At the hearing during which the criminal sanction should be imposed, the evidence which is relevant to the type and extent of the criminal sanction is presented.[9]

Plea Bargaining. The suspect, i.e. the defendant, may during the course of the entire criminal proceedings negotiate with the prosecutor on the admission of guilt for the offence he is charged with, i.e. on the type and severity of the criminal sanction for the said offence. The plea agreement must be prepared in writing and it must be submitted to the court for review and decision. The activities of the court while reviewing the agreement include, in addition to the questions that are asked as a test of the guilty plea (in the plea hearing proceedings, as aforementioned),

8 This refers to: 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: CPC BiH; Criminal Procedure Code of Brčko District of Bosnia and Herzegovina ("Official Gazette of 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: CPC BDBiH; 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, 8/2013), hereinafter: CPC FBiH and the Criminal Procedure Code of the Republika Srpska ("Official Gazette of 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: CPC RS.

9 Art. 229 and 230 CPC BiH, Art. 229 and 230 CPC BD BiH, Art. 244 and 245 CPC FBiH, Art. 244 and 245 CPC RS

taking the defendant's statement with regard to the fact that he is not allowed to appeal against the imposed criminal sanction, as well as establishing whether the criminal sanction (in terms of type and severity) complies with the criminal code, and whether the injured party was given the opportunity to file a restitution claim. If the court accepts the plea agreement, the defendant's plea is entered into records and the court proceeds with the sentencing, imposing the criminal sanction requested by the accepted agreement.[10]

The right of the witness not to answer certain questions (witness immunity). Abandoning the principle of the legality of criminal prosecution and applying prosecutorial discretion is encountered when the prosecutor offers immunity to the witness so that the witness would agree to cooperate with the prosecutor. Our criminal procedure law recognises the possibility of giving immunity to the witness when the said witness agrees to answer questions which he has the right not to answer, because a truthful answer may expose him to criminal prosecution. Since the witness in question is exercising his right not to answer certain questions if a truthful answer would expose him to criminal prosecution, i.e. the said witness shall answer those questions if he is granted immunity by the prosecutor, it may be concluded that this is a witness who has agreed to cooperate with the prosecutor. The assessment whether it is justified to grant immunity is made by the chief prosecutor whose decision it is to grant immunity to the witness. In the said decision by the chief prosecutor it must be emphasised that the witness who has been granted immunity and who has testified shall not be criminally prosecuted except for giving false testimony. Therefore, it may be concluded that this procedural institute imposes obligations both on the chief prosecutor and the witness: the prosecutor must desist from criminal prosecution and the witness must give truthful testimony.[11]

The situation prior to the criminal procedure codes from 2003. After this outline, and before the proceedings for the issuance of the criminal orders are tackled, it would be useful to mention the institutes which were accepted in Bosnia and Herzegovina about 20 years ago through the process of ''inheriting" the Criminal Procedure Code of SFRY (Official Gazette of SFRY, no. 4/77 and 26/86) and which have been omitted from the new Criminal Procedure Codes from 2003. The following forms of simplified proceedings are referred to here. Summary proceedings before the municipal court which used to be conducted before the first instance court for the criminal offences for which the prescribed penalty was a fine or up to three years of imprisonment as the main penalty and which was different from the ordinary criminal proceedings because it was instituted based on the accusatory instruments for the summary proceedings (a motion to indict or a private lawsuit) and according to the legal provisions on the omission of the investigation stage. Furthermore, there was the *amendment of the indictment* in cases where the defendant had committed a criminal offence during the session of the main hearing and if during the said hearing another criminal offence committed at an earlier time was uncovered (the latter reason "vanished" from the Criminal Procedure Code of the Federation of BiH, which came into force on 28 Nov 1998 [Official Gazette of FbiH, no. 43/98 and 23/99], but it was kept in the Criminal Procedure Code of the Republic of Srpska [Official Gazette of RS no. 43/98 and 23/99] until 2003). Thirdly, there was also the issuance of the indictment without conducting the investigation or the *direct indictment*, if the collected data and evidence relating to the criminal offence and the offender provided sufficient grounds for the indictment to be issued.

10 Art. 231 CPC BiH, Art. 231 CPC BD BiH, Art. 246 CPC FBiH, Art. 246 CPC RS
11 Art. 84 CPC BiH, Art. 84 CPC BD BiH, Art. 98 CPC FBiH, Art. 149 CPC RS

3. The Proceedings for the Issuance of the Criminal Order in Criminal Procedure Codes in Bosnia and Herzegovina

General observations on criminal orders and the legal requirements for their issuance. The proceedings for the issuance of a criminal order are basically summary proceedings and these are criminal proceedings involving minor criminal offences which are intended to be conducted and concluded expediently. In such proceedings, the main hearing is not scheduled. It is evident that by eliminating the said stage of the criminal proceedings, the process of rendering a court decision on certain criminal offence and the offender in question is simplified and rendered more efficient. Simultaneously, during the proceedings for the issuance of a criminal order procedural rights must be ensured, especially the right to a defence. Towards the end of 2004 the OSCE Mission completed its research in Bosnia and Herzegovina, which drew the attention of the public to the weaknesses in practical application of the newly introduced procedural provisions on the said summary proceedings, especially the restriction of the right to a defence assisted by a defence counsel in the proceedings for the issuance of criminal orders. In addition, it was noted that these summary proceedings are faced with difficilties due to the passive approach of the prosecutor, which jeopardises the rights of the defendants. Finally, it was stressed that due to the absence of the prosecutor during the criminal procedure actions in the proceedings, i.e. due to the prosecutor's passive approach to the proceedings, the courts would take over their role (for instance, the judge would read the indictment, or present evidence against the defendant). Due to the identified weaknesses and the recommendations of the OSCE, certain activities have been undertaken, at two different levels. On the one hand, the training of the judges and prosecutors has been encouraged. The training of the judges on the issue of standards and procedures applied when appointing a defence counsel to the persons with lower income status or if it is in the interest of justice, as well as on the rules on notifying the defendant during the proceedings for the issuance of a criminal order. The training of the prosecutors with the aim to emphasise their rights and duties in the proceedings for the issuance of criminal orders, such as presenting the indictment and the evidence that supports it, filing a request for the issuance of a criminal order and providing the rationale behind the requested criminal sanction. On the other hand, the previous legal provisions on the issuance of the criminal orders have been amended in order to eliminate certain contradictions that were present in the wording of the law, especially with regard to the right to a defence (in a broader sense of the term) and the roles of subjects of the proceedings (especially the prosecutor and the single judge).[12]

Regardless of the identified weaknesses, the criminal order proceedings have been yielding good results ever since they were introduced into our criminal procedure legislation, in terms of the frequent use of such proceedings that have been proven to be an efficient model for dealing with criminal cases for which the law allows such proceedings to be used in order to decide on the criminal offence in question. According to the conducted research, over a half of all cases end the hearing on the criminal matter in proceedings for the issuance of a criminal order, in addition,

12 The Law on Amendments and Supplements to the CPC BiH (Official Gazette of BiH, no. 58/2008) The Law on Amendments and Supplements to the CPC BD BiH (Official Gazette of the BD BiH, no. 17/2009) , The Law on Amendments and Supplements to the CPC FBiH (Official Gazette ofFBiH, no. 9/2009), The Law on Amendments and Supplements to the CPC RS (Official Gazette of the Republika Srpska, no. 119/2008). Cf. also Simović, M. (2007). *Osvrt na nova rješenja predložena u Zakonu o krivičnom postupku Bosne i Hercegovine koja se odnose na glavni postupak, postupak pravnih lijekova i posebne postupke*. Pravo i pravda, vol. 6, no. 1, pp. 63–64.

these criminal proceedings have been concluded within less than 60 days from the day the indictment was confirmed.[13]

The proceedings for the issuance of a criminal order are counducted before the Court of BiH, the Basic Court of Brčko District of Bosnia and Herzegovina, and before Municipal (in the Federation of BiH), i.e. Basic Courts (in Republika Srpska). In terms of jurisdiction, these proceedings are conducted in criminal cases under the jurisdiction of a single judge. Procedure Codes legislate such proceedings by special provisions, whereas the application of the provisions that regulate the ordinary criminal proceedings is stipulated when appropriate.[14] These special legal norms aim at avoiding the main hearing, setting shorter deadlines compared to the ordinary criminal proceedings, not applying all of the provisions related to a written elaboration of the judgment issuing a criminal order. Thus, the criminal proceedings are simplified and made more efficient with a view to expedite the proceedings and make them more efficient. The prerequisites for initiating the issuance of the criminal order are the nature of the criminal matter of the criminal proceedings and the type and severity of the prescribed criminal sanction, and whether the prosecutor can provide sufficient evidence which would support the prosecution's request for the issuance of a criminal order in the indictment.[15]

Legal requirements for the conduct of the proceedings for the issuance of criminal orders without holding the main hearing are as follows: - the offence in question should be punishable under law by a term in prison of up to five years or a fine as the main penalty; - the prosecutor must provide sufficient evidence that can support the claim that the suspect has indeed committed the criminal offence he is charged with; - the prosecutor must request in the indictment the criminal order to be issued by the single judge; - the prosecutor must request the imposition of one or more criminal sanctions or measures that are specified in a list. The listed criminal sanctions and measures are: a fine (the amount of the requested fine may not exceed 50,000 KM), a suspended sentence, a ban on performing certain professions, activities or duties or the seizure of items, as well as seizure of proceeds from crime.[16] It may be concluded that the prosecutor may not propose the pronouncement of a prison sentence even though the prescribed criminal sanction for the offence in question is imprisonment.[17]

Granting the prosecutor's request for the issuance of a criminal order. As has been aforementioned, the indictment which contains the request for a criminal order to be issued is decided on by a single judge, who may grant the said request or not.

13 This refers to the research conducted by the OSCE Mission in Bosnia and Herzegovina that was entitled: The Report on the Application of the Criminal Procedure in the Courts of Bosnia and Herzegovina (2004). OSCE, Sarajevo, pp. 24-30, see also the annual reports of the High Judicial and Prosecutorial Council where it refers to the application of criminal orders.

14 Articles 334–339 CPC BiH, Articles 334–339 CPC BD BiH, Articles 350–355 CPC FBiH, Articles 358–363 CPC RS

15 Sijerčić-Čolić, H. (2003). *Konsenzualni modeli u novom procesnom zakonodavstvu BiH*. Pravo i pravda, vol. 2, no. 1–2, pp. 84–89; Sijerčić-Čolić, H., Hadžiomeragić, M., Jurčević, M., Kaurinović, D., Simović, M. (2005). *Komentari zakona o krivičnom/kaznenom postupku u Bosni i Hercegovini*. Joint project of theCouncil of Europe and the European Commission, Sarajevo, pp. 831–832; Simović, M. N. (2009). *Pojednostavljene forme postupanja u krivičnom procesnom zakonodavstvu Bosne i Hercegovine (zakonska rješenja i iskustva u dosadašnjoj primjeni)*. Published in: *Alternativne krivične sankcije i pojednostavljene forme postupanja* /Zoran Stojanović… et al./ Serbian Association for the Theory and Practice of Criminal Law: the Association of Public Prosecutors and Deputy Public Prosecutors. Belgrade, pp. 223–226

16 Art. 334 CPC BiH, Art. 334 CPC BD BiH, Art. 350 CPC FBiH, Art. 358 CPC RS

17 Sijerčić-Čolić, H., Hadžiomeragić, M., Jurčević, M., Kaurinović, D., Simović, M. (2005), op. cit., p. 831

When granting the request for the issuance of a criminal order,[18] the single judge shall first confirm the indictment, and then schedule the defendant to be heard without any further delay, within eight days from the day the indictment was confirmed at the latest. This hearing is conducted in the presence of the defendant, the prosecutor[19] and the defence counsel, if the defendant is represented by a counsel in the case at hand. In the event of somebody's absence at the said hearing, it is proceeded as if it were the main hearing, meaning, certain measures of coercion and other measures are ordered as provided by the law, and the hearing itself is postponed by the single judge. Based on the aforementioned, it may be concluded that the (changed) procedure norms set the deadline (eight days from the confirmation of the indictment at the latest) within which the defendant shall be summoned before the judge after the indictment has been confirmed and delivered in order to enter statements on the very important aspects both of the indictment and request made by the prosecutor for the termination of the criminal proceedings. Therefore, taking into account specific characteristics of the summary criminal proceedings, the importance of the right to a defence in the proceedings for the issuance of the criminal order as well, and the position that the suspect, i.e. the defendant, has the right to face the court as soon as it is reasonably possible and to be tried without delay, the legislator insists on the shorter deadline than the one prescribed in the ordinary criminal proceedings which deals with the criminal offences for which the prescribed penalty is more than five years in prison and that is 15 days from the day of the receipt of the indictment.

During the defendant's questioning the single judge shall determine if the rights of the defendant to a counsel have been observed, if the defendant understands the charges and the prosecutor's request for the the sentencing to an appropriate criminal sanction or measure. Then the prosecutor shall be asked to inform the defendant about the content of the evidence and ask the defendant to make a statement on the presented evidence. Finally, the single judge shall invite the defendant to enter his plea of guilt and his statement on the criminal sanction or measure which are requested.

Plea hearing at which the defendant shall enter his plea and state whether he accepts the prosecutor's request for the issuance of a criminal order dictates how the said criminal proceedings shall continue. Specifically, if the defendant enters a guilty plea and states that he accepts the criminal sanction or measure requested by the prosecutor, the judge shall first ascertain the guilt, and then issue a criminal order in accordance with the indictment. Therefore, the judgment pronounces him guilty and a criminal order is issued as requested by the prosecutor in the indictment. The judgment issuing the criminal order should contain the legally prescribed data for a conviction. Such a judgment provides the grounds for it as a brief list of reasons for the issuance of a criminal order.[20] In addition, the judgment issuing a criminal order must contain an instruction on the legal remedy, since an appeal against this judgment is allowed within eight days from the day of its delivery. A violation of the law (substantial or procedural), the decision on the costs of the criminal proceedings or on the restitution claim give grounds for appeal.[21] If a criminal order includes a fine, the payment of the said fine before the deadline for filing the appeal expires is

18 Art. 337 Par. 2 CPC BiH, Art. 337 Par. 2 CPC BD BiH, Art. 353 Par. 2 CPC FBiH, Art. 361 Par. 2 CPC RS

19 In place of the prosecutor, the hearing may be attended by a staff member of the Prosecutor's Office who is authorised by the chief prosecutor, see Art. 360, Par. 2 of the CPC RS.

20 Art. 338, Par. 1 and 2. CPC BiH, Art. 338, Par. 1 and 2 CPC BD BiH, Art. 354, Par. 1 and 2 CPC FBiH, Art. 362, Par. 1 and 2 CPC RS.

21 Art. 338, Par. 3 CPC BiH, Art. 338, Par. 3 CPC BD BiH, Art. 354, Par. 3CPC FBiH, Art. 362, Par. 3 CPC RS

not interpreted as a waiver of the right to an appeal. The judgment issuing a criminal order is delivered to the defendant, his defence counsel, the prosecutor and the injured party.

Criminal Procedure Codes regulate the defendant's right to enter a not gulty plea at the plea hearing or file an objection to the indictment. Regardless of the fact which of these procedural situations occurs (a not guilty plea, or an objection to the indictment), the single judge shall forward the indictment in order to schedule the main hearing. The main hearing shall be scheduled within 30 days. Since the indictment has been confirmed earlier (when the judge agreed with the prosecutor's request for the issuance of a criminal order), the continuation of the proceedings depends on whether or not the objection was filed. Appropriate application of the procedural rules for the ordinary criminal proceedings allows the objections to be filed on the following grounds: -if the jurisdiction of the court is being contested, -if there are reasons that preclude criminal prosecution, -if formal flaws in the indictment are identified, -if the legality of the evidence is contested, -if joining or separating criminal proceedings is being requested and –if the decision which rejected the request for the appointment of a defence cousel due to lower income status of the defendant is being contested.[22] If the objections to the indictment have been filed, they must be decided on before the main hearing.

Rejecting the request for the issuance of a criminal order. The single judge shall reject the request for the issuance of a criminal order if he finds: -that there are grounds for the joinder of the proceedings, - the offence in question is punishable under law by a prison term of more than five years, and –that the prosecutor has requested a criminal sanction or measure to be imposed which is not legally allowed. The rejection of the criminal order does not entail the rejection of the accusatory instrument, since the flaws are found in the request for the issuance of a criminal order and not in the accusatory instrument, therefore, when the request for the issuance of the criminal order has been rejected, the indictment is treated as if it had been submitted for the confirmation. The prosecutor has the right to appeal the ruling by which the criminal order request was not granted. A panel composed of three judges decides on the prosecutor's appeal against the single judge's decision within 48 hours. In addition to the above mentioned formal defects of the request for the issuance of a criminal order, legal provisions recognise also substantial defects in the motion to indict itself which results in the rejection of the request for the issuance of a criminal order as well. Specifically, if the single judge considers that the data in the indictment does not provide sufficient grounds for the issuance of a criminal order or that according to the said data the imposition of different criminal sanctions or measures might be expected, not the ones requested by the prosecutor, the judge shall treat the indictment as if it had been submitted for confirmation.[23]

4. The procedure for the issuance of criminal orders and other simplified forms of proceedings – a comparison of the legislations in the region

Upon comparison of the criminal procedure codes built on the legacy of the procedural legislation of the former SFRY, it may be noted that in terms of their dynamics, criminal proceedings

22 Art. 233 CPC BiH, Art. 233 CPC BD BiH, Art. 248, Par. 3 CPC FBiH, Art. 248, Par. 3 CPC RS

23 Art. 335 CPC BiH, Art. 335 CPC BD BiH, Art. 351 CPC FBiH, Art. 359 CPC RS. See: Sijerčić-Čolić, H., Hadžiomeragić, M., Jurčević, M., Kaurinović, D., Simović, M. (2005), op. cit., pp. 832–833.

go through appropriate stages, i.e. depending on the seriousness of the criminal offence, some stages of the proceedings "disappear" which leads to the simplification and consensual forms as requested. Therefore, criminal procedure codes in the region recognise simplified and consensual forms of the proceedings. In this sense, it is possible to identify classic summary criminal proceedings, proceedings for the issuance of a criminal order or the imposition of sanctions without holding the main hearing, the sentencing proceedings and the pronouncement of a suspended sentence by the investigating judge, entering a plea at the preliminary hearing or at the main hearing, the plea agreement of guilt and acceptance of a criminal sanction. Such a great number of simplified and consensual forms of proceedings in criminal cases reflects the peculiarities of the national systems of procedure, and their comparison in terms of legislation reveals some similarities as well as some differences.

A comparison of the legislations in the region is given below with regard to the simplified forms in which there is no main hearing, but the criminal sanction or measure is imposed outside of this procedural stage. Bearing in mind the above described proceedings for the issuance of the criminal order in Bosnia and Herzegovina, this overview may reveal similarities and differencies in the national criminal procedure codes.

Criminal Procedure Code of Montenegro (Official Gazette of the Republic of Montenegro, no. 57/2009 and 49/2010) came into force on 26 August 2009. Its gradual application started on the 26 Aug 2010 in the criminal proceedings involving organised crime, corruption, terrorism and war crimes, while the full application started on 1 Sept 2011.[24] In terms of simplified and summary proceedings for minor criminal offences this Code has special provisions on the summary proceedings (Art. 446-460) and the *sentencing proceedings without the main hearing* (Art. 461-464). So far, the legislation has been evolving to allow the summary proceedings to include criminal offences punishable under law by a term of up to five years in prison, and the sentencing proceedings without holding the main hearing to include the criminal offences for which the prescribed penalty is up to three years in prison.

Sentencing proceedings without holding the main hearing are conducted at the state prosecutor's initiative, and with the consent of the defendant. The judge renders a ruling on the sentencing without holding the main hearing. The state prosecutor proposes such a decision to be rendered in his motion to indict, after having assessed that the main hearing does not need to be held. If the restitution claim has been filed, the injured party is referred to private prosecution. Sanctions and measures that may be imposed are: a fine (up to 3000 €), community service, suspended sentence or a judicial reprimand together with the seizure of proceeds from crime, seizure of objects and a ban from operating a motor vehicle (for up to two years).

Prior to ascertaining whether the prerequisites for the decision on the sentencing have been met, the judge shall review the motion to indict and if he determines that the prerequisites for the decision on the sentencing have not been met, he shall deliver the indictment to the defendant and schedule the main hearing forthwith. If the judge grants the state prosecutor's request, the information on the prior convictions shall be obtained, and if necessary on the defendant's character, and after the defendant is heard and with his consent, a ruling on the sentencing shall be rende-

24 Information on the Application of the Criminal Procedure Code (2012), Montenegrin Government, Ministry of Justice, Podgorica, p. 2

red. The ruling on the sentencing is delivered to the prosecutor and the defendant. Such a ruling may be appealed within eight days.[25]

Criminal Procedure Code of Croatia (Official Gazette, no. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12) under Chapter XXV sets out the provisions on the summary proceedings (Art, 520-548), and under Chapter XXVI adds the provisions on issuing criminal orders (Art 540-545). The provisions on the summary proceedings apply to criminal offences, as a rule, for which the prescribed penalty is a fine as the main penalty or up to twelve years of imprisonment.[26] (according to the previous Criminal Procedure Code, summary proceedings were applied to criminal offences punishable under law by a fine or a term in prison of up to five years). Summary proceedings were cited in the hearing for the assessment whether the Criminal Procedure Code was in compliance with the Constitution of the Republic of Croatia (Official gazette, no. 152/08, 76/09, 80/11). During this hearing, it was noted that certain provisions (this refers to Art. 530, Par 3, Art. 531, Par.2, Art. 532,Par.2) were unconstitutional because they challenge basic hypotheses of the right to a fair trial, especially when it comes to exercising the right to a defence assisted by a defence counsel, the right to attend the main hearing and the right to a trial before an impartial court. As it is stressed in the Decision of the Constitutional Court of the Republic of Croatia of 6 Aug 2012 (Official Gazette, no. 91/12) not adhering to these rules of procedure may bring into question other principles in the summary proceedings such as equality before the law, legal certainty and rule of law.

Let us turn back to current legal provisions (Official gazette, no. 121/11 and 143/12) and briefly note that the proceedings for the issuance of a criminal order are regulated in terms of their concept as a faster and simpler type of procedure compared to the ordinary criminal proceedings, during which the main hearing is not held, while other rules of ordinary criminal procedure have been simplified at different stages of the proceedings.[27] Legal provisions indicate that such proceedings are conducted in cases involving criminal offences for which the prescribed penalty is a fine or a term in prison of up to five years. The State Attorney shall request in the indictment for such a criminal offence, provided that he has learned of the said offence through credible content of the criminal charges, from the court to issue a criminal order in which a certain penalty or a measure shall be imposed on the defendant without holding the main hearing. The State Attorney shall request one or more of the following sanctions or measures: - a fine amounting from ten to one hundred average daily wages in the Republic of Croatia, i.e. thirty to one

25 Radulović, D. (2009). Komentar Zakonika o krivičnom postupku Crne Gore. Pravni fakultet. Podgorica, pp. 599-603.

26 The legislation on procedure related to the summary proceedings actually refers to two forms of proceedings according to the degree of seriousness of the criminal offence in question. On the one hand, there are the proceedings that fall under the jurisdiction of a single judge for the offences punishable by a fine or a term in prison of up to eight years. The literature on this subject identifies within the summary proceedings conducted before the single judge three sets of provisions on the summary proceedings: -the rules for the use of prosecutorial discretion by the competent prosecutor, the issuing of a criminal order and settlement of the parties as to the type and severity of the criminal sanction; - provisions which simplify the rules of the ordinary criminal proceedings and – the provisions on the criminal proceedings based on private prosecution. On the other hand, there are provisions on the summary proceedings for the criminal offences punishable under law by a term of prison of more than eight and up to twelve years and which are under the jurisdiction of the judicial panel of the municipal court (one judge and two lay judges). Such a form of the summary proceedings differs from the one conducted before a single judge, and these differences are as follows: - the public prosecutor may not use prosecutorial discretion; - the criminal prosecution may not be based on a civil suit; - a criminal order may not be issued and – not all of the provisions on the summary proceedings before the single judge are applied. See in more detail: Pavičić, A., Bonačić, M. (2011). *Skraćeni postupak prema novom Zakonu o kaznenom postupku*. Hrvatski ljetopis za kazneno pravo i praksu, vol. 18, no. 2., pp. 489–520 cf. also Đurđević, Z. (2011). *Suvremeni razvoj hrvatskog kaznenog procesnog prava s posebnim osvrtom na novelu ZKP iz 2011*, Hrvatski ljetopis za kazneno pravo i praksu, vol. 18, no. 2, p. 353. Pavišić, B. et al.. (2010), *Kazneno postupovno pravo*, Third Edition, Faculty of Law at the University of Rijeka, Rijeka, pp. 428, 430–434.

27 See in more detail in the literature listed in the preceding note.

hundred day-fines in the Republic of Croatia; - a suspended sentence of up to one year in prison or a fine, or a judicial reprimand; - seizing the proceeds from crime and the publication of a judgment issuing a criminal order in the media; - a ban to operate a motor vehicle for up to two years, or seizure of items.

A criminal order is issued by a judgment, after the single judge has granted the State Attorney's request. The criminal order is delivered to the defendant, the defence counsel if there is one, the State Attorney and the injured party. When the sanction or measure is being imposed the judge has a duty to inform the defendant (or the defence counsel if there is one) that he has the right to file an appeal in the written form within eight days from the receipt of the court decision. The appeal does not have to be elaborated on, it may propose evidence in favour of the defence, whereas the defendant may waive his right to file an appeal. In addition to the aforementioned instructions, the defendant must be cautioned that if there is no appeal the criminal order shall become final and the imposed sanction shall be executed. Filing an appeal and and its acceptance if it has been filed in due time and by an authorised person directs the proceedings towards the judicial review of the indictment and, as is prescribed by the code, to the scheduling of the main hearing of the said case. With regard to the restitution claim of the injured party, the code sets certain rules through which it is attempted to resolve the potential conflict of interests between this subsidiary issue of the criminal proceedings and the measure of seizing the proceeds from crime.

One of the possible situations in terms of procedure in these summary proceedings is the right of the single judge to reject the request for the issuance of a criminal order, as prescribed by law, i.e. he may assess that the information provided by the indictment does not offer suficient grounds for the issuance of a criminal order or that according to such information another type of sanction or measure might be expected rather than the one requested by the State Attorney. This results in the referral of the indictment to the indictment panel which reviews the indictment at a panel session without the participation of the parties involved, followed by the delivery of the indictment to the defendant with the instruction on the right to respond along with the notice that the court has rejected the State Attorney's request for the issuance of a criminal order.

Finally, the issuance of the criminal order is prescribed for legal entities as well, in which case the following sanctions may be imposed by a criminal order: - a fine of up to 2,000,000.00 HRK; - a suspended sentence and a fine; - seizure of proceeds from crime and – publishing the judgment issuing a criminal order in the public media.

The Criminal Procedure Code of Macedonia (Zakonot za krivičnata postapka, Official Gazette of the Republic of Macedonia, no. 15/1997, 44/2002, 74/2004, 83/2008, 67/2009, 51/2011) contains special provisions on the summary proceedings for the criminal offences punishable under law by a fine as the main penalty or a term in prison of up to three years (Art.416-431) and the provisions on rendering judgement without main hearing (Art. 431-a – 431-d). Similarly to some other procedure codes in the territory of former SFRY, these provisions on the summary proceedings stipulate as well the accusatory instrument to be in the form of a motion to indict or private prosecution, then the ommision of the investigation and, thirdly, scheduling of the main hearing at which a criminal sanction or measure shall be imposed.

Given the topic of this paper, we shall continue with an overview of the provisions on issuing a judgment without holding the main hearing for the criminal offences under the jurisdiction of

the single judge. Specifically, for the criminal offences punishable under law by a fine as the main penalty or a term in prison of up to three years, the public prosecutor may, if he can provide sufficient evidence in his motion to indict propose to the court to pass the judgment without holding the trial. By filing such a motion, the public prosecutor may propose certain criminal sanctions and measures (one or more) to be imposed, specifically: - a fine in the amount of 10 to 100 day-fines; - suspended sentence imposing a prison sentence of up to three months or a fine; - a ban from operating a motor vehicle of up to two years; - confiscation of property and proceeds from crime and – seizure of items. It is interesting to note that the motion for the summary judgment without holding the main hearing may be filed by the injured party as the prosecutor or a plaintiff as well.

The single judge may grant or reject the prosecutor's motion. If the judge agrees to the said motion and grants it, he passes a judgment imposing the requested sanction or measure. The defendant and his cousel may appeal such a judgment within eight days, in writing, orally or enter the objection into the court record. The appeal does not have to be elaborated on, it may contain evidence in favour of the defendant. If the appeal is filed in due time and is allowed, the main hearing shall be scheduled as a consequence of that and it shall be conducted according to the rules for such a hearing in the summary criminal proceedings. By scheduling the main hearing the earlier judgment is vacated. Finally, the single judge may reject the prosecutor's request for the imposition of a sanction or a measure outside of the main hearing. The reasons for this may be that for the criminal offence in question it is not possible to file such a motion, that another sanction or measure may be expected rather than the one requested by the prosecutor, or that the data from the elaborated request does not provide sufficient grounds for the summary judgment without holding the main hearing.

The new criminal procedure legislation – Criminal Procedure Code (Official Gazette of the Republic of Macedonia, no. 150/2010) which should enter application in November 2013, recognises summary proceedings (Art. 468-482) for the criminal offences punishable under law by a fine as the main penalty or a term in prison of up to five years. These proceedings are the same as the ones in the procedure code currently in application that omit the investigation stage, and for the imposition of the sanction or a measure the main hearing is scheduled based on the motion to indict or private prosecution.[28]

Another form of the simplified proceedings shall be taken as a starting point of this overview, the proceedings for the issuance of a criminal order (Art. 497-500), which actually replace the summary judgment rendered without holding the main hearing from the existing procedure law. The proceedings for the issuance of a criminal order are conducted for the criminal offences under the jurisdiction of a single judge, i.e. for the criminal offences punishable under law by a fine as the main penalty or a term in prison of up to five years. Compared to the procedure code currently in application, the new regulations are expanding the jurisdiction of the court represented by a single judge, so the proceedings for the issuance of a criminal order are conducted in cases for criminal offences that carry a sentence of over three years (see above). In addition to the level of seriousness of the offence in question, the prerequisites for such proceedings to be conducted are that there is sufficient evidence on the said offence and the offender, as well as that

28 Kalajdžiev, G., Buzarovska, G. (2009). *Ključne novine u Zakonu o krivičnom postupku Republike Makedonije*, published in: Đorđe Ignjatović (ed.). *Stanje kriminaliteta u Srbiji i pravna sredstva reagovanja*, Part III, Faculty of Law Belgrade, pp. 349–367.

the motion has been filed by the prosecutor. The content of such a motion is prescribed by law and it includes the defendant's personal data, factual account of the offence, legal qualification, prosecution's evidence, and the type and extent of the sanction or measure proposed to the court. In the motion to issue a criminal order the public prosecutor may propose criminal sanctions or measures to be imposed as listed below: - a fine in the amount of 10 to 100 day-fines; - suspended sentence imposing a prison sentence of up to three months or a fine; - a ban from operating a motor vehicle of up to two years; - confiscation of property and proceeds from crime and – seizure of items. By granting such a motion, the single judge imposes the requested criminal sanction or a measure (one or more) and lists the evidence that justify the issuance of a criminal order when providing the grounds for the judgment. The subjects of the criminal proceedings who receive the said judgment are the public prosecutor, the defendant and his lawyer, with the instruction to the defendant that he may appeal the decision. The grounds for filing an appeal are the same as in the existing law, as are the legal repercussions in terms of scheduling the main hearing in accordance with the specific provisions on the main hearing in the summary proceedings if the appeal has been filed in due time and is allowed. Finally, the new regulations legislate the procedure for denying the motion to issue a criminal order as well as the rendering of the judgment on scheduling the main hearing. With regard to these, it should be noted that the legal provisions are identical to the regulations on the aforementioned decisions of the single judge which are still in application.

The Criminal Procedure Code of Slovenia (Zakon o kazenskem postopku, offical consolidated text, Official Gazette ("Uradni list RS"), no 32/2012) under section D includes, among others, the provisions on the summary proceedings (Art. 429-445) and the proceedings for the issuance of criminal orders (Art. 445a-445e). Both of the proceedings are applied to criminal offences punishable under law by a fine as the main penalty or a term in prison of up to three years.

What are the conditions for the issuance of a criminal order and what rules regulate the simplified proceedings? The inititative for the institution of such proceedings is, as in the previously listed criminal procedure codes, in the hands of the state prosecutor. The fact that the criminal offence in question is minor is sufficient for the prosecutor to propose to the court upon filing the motion to indict to issue the criminal order and impose the criminal sanction or measure without holding the main hearing. The state prosecutor may propose the following sanctions and measures to be imposed: - a fine; - a ban from operating a motor vehicle; - a suspended sentence imposing a fine or a term in prison of up to six months; - a judicial reprimand; - seizure of items and – seizure of proceeds from crime.

The single judge is the first to respond to the prosecutor's initiative and either grants the motion or denies it. To be precise, if he grants the motion, the judge shall issue a criminal order in a judgment, the grunds for which include only the evidence from the motion to indict which justifies the imposition of the criminal sanction or measure without holding the main hearing. The criminal order must contain the instruction to the defendant on the right to appeal, i.e. on the repurcussions if the appeal is not filed which leads to the court decision becoming final and the criminal sanction or measure shall be imposed. Certified transcript of the judgment containing the criminal order is delivered to the defendant and the defence counsel, if there is one, and the state prosecutor. An appeal must be filed within eight days from the delivery of the judgment containing a criminal order, it may be filed in writing or orally entered into the court record, and may propose evidence to be presented at the main hearing. If the appeal is filed in due time and is allowed,

the judgment containing the criminal order shall be vacated and the criminal proceedings shall be continued according to the provisions aplied to the main hearing in the summary criminal proceedings. There is another option to look at and that is when the judge does not grant the prosecutor's motion to issue a criminal order based on the content of the proposed evidence, as well as on the motion to impose adequate criminal sanction or measure. Generally speaking, in such a situation in the proceedings, the judge schedules the main hearing, the defendant receives the motion to indict without the motion to issue a criminal order.

The Criminal Procedure Code of Serbia (*Official Gazette of FRY*, no. 70/2001 and 68/2002 and *Official Gazette of the Republic of Serbia*, no. 58/2004, 85/2005, 115/2005, 49/2007, 20/2009, 72/2009 and 76/2010) recognises the *summary proceedings* (Art.433-448), the *sentencing proceedings before the main hearing* (Art. 449-454) and the *proceedings for the sentencing and pronouncment of a suspended sentence by the investigating judge* (Art. 455–458). The new procedure code – the Criminal Procedure Code (Official Gazette of the Republic of Serbia 72/2011, 101/2011, 121/2012) which is scheduled to start application on 1 Oct 2013 (except in the proceedings for criminal offences for which it is prescribed by a special law that the public prosecutor's office with special jurisdiction is competent since 15 Jan 2012) regulates under Chapter XX *summary proceedings*, which are conducted in the cases involving criminal offences punishable under law by a fine as the main penalty or a term in prison of up to eight years (Art. 495-511). Under these legal provisions, if the public prosecutor based on the collected evidence considers that the main hearing does not need to be held, may add the request to his motion to indict to schedule the hearing for the imposition of a criminal sanction for the offences for which as the main penalty a fine may be imposed or a term in prison of up to five years (Art. 512-518).

What are the peculriaties of the legal provisions still in application, i.e. of those provisions which are yet to enter the application? In the current Criminal Procedure Code, under the common title – proceedings for the imposition of criminal sanctions without the main hearing – the sentencing before the main hearing is referred to in connection with the criminal offences which are punishable under law by a fine as the main penalty or a term in prison of up to three years, i.e. the accelerated proceedings for the pronouncement of a suspended sentence when the criminal offences in question are punishable under law by a fine as the main penalty or the term in prison of up to five years.

Sentencing before the main hearing is conducted at the public prosecutor's motion, and the ruling on the sentencing without holding the main hearing is passed by a judge. The prosecutor shall include such a motion in the motion to indict, when he assesses that the main hearing does not have to be held. The judge may impose by the said sentencing ruling the following sanctions: - a fine; -community service; -revoking a driver's licence or – a suspended sentence which includes one or more of the following measures: seizure of items, a ban from operating a motor vehicle and a seizure of proceeds from crime. Such a ruling is rendered after the defendant has been heard, as well as after the information on the previous convictions and his character has been obtained. The sentencing ruling must contain an indication that the prosecutor's motion has been granted, the personal details of the defendant, the offence the defendant is found guilty of, specifying the facts and circumstances which characterise the criminal offence, and upon which the application of certain criminal code provisions depend, legal qualification of the said offence and the provisions of the criminal code and other laws that have been applied, the decision on the imposed sanction or measure, as well as the decision on the referral of the authorised

person to settle a restitution claim through private prosecution, grounds for the imposed sanction or a measure, an instruction on the right to an appeal, as well as the warning that if the appeal has not been filed until the expiry of the set deadline for an appeal, the sentencing ruling shall become final. The sentencing ruling is delivered to the public prosecutor and the defendant, who may file the aforementioned appeal against the sentencing ruling within eight days from the receipt of the ruling. By filing the appeal in due time, the law prescribes, the proceedings continue towards scheduling the main hearing based on the public prosecutor's motion to indict. During the proceedings based on the motion to indict, the judge is not bound by the sentencing motion filed by the public prosecutor. Quite expectedly, the legislator has stipulated that if the judge determines the prerequisites for the sentencing ruling have not been met, he shall deliver the indictment to the suspect and proceed to schedule the main hearing forthwith.

The sentencing proceedings and the pronouncement of the judgment by the investigative judge relies among other things on the full confession of the offender, which has been given in the presence of the defence counsel before the investigating judge, or the police officer. Such a confession must be supported by other evidence collected during the investigation as well. A motion to schedule a separate public hearing before the investigating judge, the public prosecutor includes in the indictment immediately upon closing the investigation, or within eight days at the latest. The judgment may be rendered after the parties to the proceedings have been heard and with the express consent of the defendant. Application of these proceedings is precluded by the filing of an appeal by the defendant or the defence counsel within eight days from the receipt of the indictment. The sentencing by the investigating judge may occur at the defendant's motion if the public prosecutor and the investigating judge agree to that. Such a judgment may be contested by an appeal within eight days from the day of the delivery thereof.[29]

New relations in the criminal procedure have affected the concept of the simplified forms as well. Consequently, when the new Criminal Procedure Code was passed, firstly, the *summary proceedings* were expanded to include the criminal offences for which the prescribed penalty is a fine as the main penalty or a term in prison of up to eight years, secondly, instead of the *sentencing before the main hearing*, a *sentencing hearing* is stipulated and, thirdly, the proceedings for sentencing and pronouncement of a suspended sentence by the investigating judge have been abolished. We shall now focus on the sentencing hearing, leaving aside general provisions for the summary proceedings, which among other things is reflected in the scheduling of the main hearing based on the motion to indict, or private prosecution.[30]

What are the prerequisites for holding a *sentencing hearing*? Firstly, the degree of seriousness of the criminal offence, considering that the law stipulates that the public prosecutor may in the motion to indict include the request for the sentencing hearing for criminal offences punishable under law by a fine as the main penalty or a term in prison of up to five years. Secondly, such a request may be filed if the prosecutor holds that the main hearing is not necessary based on the complexity of the case and the collected evidence, and especially if the defendant has been

29 Bejatović, S. (2009). *Pojednostavljene forme postupanja u krivičnim stvarima i njihov doprinos efikasnosti krivičnog postupka* published in: *Alternativne krivične sankcije i pojednostavljene forme postupanja* /Zoran Stojanović… et al./, Serbian Association for the Theory and Practice of Criminal Law: the Association of Public Prosecutors and Deputy Public Prosecutors, Belgrade, pp. 95–98; Vasiljević, T., Grubač, M. (2005). *Komentar Zakonika o krivičnom postupku*. 10th revised edition, Justinijan, Belgrade, pp. 777-782.

30 More in: Ilić, G. P., Majić, M., Beljanski, S., Trešnjev, A. (2012). *Komentar Zakonika o krivičnom postupku. Prema Zakoniku iz 2011. godine sa izmenama i dopunama iz 2011*, Službeni glasnik. Belgrade, pp. 997-1005

arrested while commiting a crime or has confessed that he has committed a criminal offence. Thirdly, the sanctions that the public prosecutor may request from the court to impose are listed as follows:1) a term in prison of up to two years, a fine in the amount of 240 day-fines, i.e. up to 500.000 RSD or a suspended sentence imposing a term in prison of up to one year or a fine in the amount of up to 180 of day-fines, i.e. u to 300.000 RSD and up to five years of probation period; 2) a term in prison of up to one year, a fine of up to 180 day-fines, i.e. 300.000 RSD, up to 240 hours of community service, revokation of a driver's licence for up to one year, a suspended sentence imposing a term in prison of up to one year or a fine of up to 180 day-fines, i.e. 300.000 RSD and a probation period of up to three years, with the option to put the defendant under supervision or issue a judicial reprimand – if the defendant has committed the criminal offence punishable under law by a fine as the main penalty or a term in prison of up to three years.

The request for a sentencing hearing is considered based on the above listed requirements and depending on the findings the judge shall schedule either the sentencing hearing or the main hearing. If the judge grants the request, he shall schedule the sentencing hearing. The hearing is held within 15 days from the day the order is issued. The parties to the proceedings and the defence counsel are summoned to the hearing, while the defendant and the defence counsel shall recieve along with the summons the motion to indict. The summons must be served to the defendant at least five days prior to the hearing date counting from the date of the receipt of the summons. The sentencing hearing is opened by a concise presentation made by the public prosecutor on the evidence he obtained and on the type and severity of the criminal sanction the imposition of which he is requesting. Subsequently, the judge asks the defendant to enter his plea and cautions him of the repercussions of accepting the public prosecutor's charges. The judge shall immediately upon the termination of the sentencing hearing pass the judgment declaring the defendant guilty or the order on the scheduling of the main hearing. Therefore, during such proceedings, the judge has the opportunity to schedule the main hearing twice. The first time, if he does not grant the prosecutor's request for scheduling the sentencing hearing, because, for instance, the criminal offence is more serious or if the complexity of the case and the collected evidence merit the main hearing to be held. The second time, at the hearing if the defendant objects to the public prosecutor's motion or if the judge does not grant the public prosecutor's motion. Therefore, the decisions which conclude the hearing may be a judgment declaring the defendant guilty or an order to schedule the main hearing.

Considering that the judgment declaring the defendant guilty is passed both when the defendant agrees to the public prosecutor's motion filed at the hearing and when he fails to appear at the hearing after being summoned, it is in the latter case that the regulations actually stipulate filing an appeal against the judgment convicting him, Therefore, the defendant does not have the right to an objection to or an appeal against the judgment imposing a sanction or a measure, which he is duly informed of by the judge. However, in the event of passing the judgment declaring him guilty at the hearing in the absence of the defendant, the defendant or his defence counsel may file an objection to the said judgment within eight days from the receipt of the judgment. If the appeal is allowed and filed duly, the judge must schedule the hearing based on the public prosecutor's motion to indict. At the main hearing, the judge is not bound by the public prosecutor's motion in terms of the type or severity of the criminal sanction. Finally, if the judgment is not appealed, it comes into legal effect.

5. Concluding observations on the summary and simplified forms of the criminal proceedings

In this overview of the simplified options of conducting the criminal proceedings a single tendency emerges – the acceleration of the process of deliberating on the criminal incident and the imposition of a sanction or a measure while observing the basic rights of the defendant in the proceedings. The selection of the model of summary criminal proceedings and their legal definitions, their organisation, departures from the general course of the ordinary criminal proceedings, the jurisdiction over the summary forms of proceedings, the scope of application of procedural guarantees, all these, as well as other issues that might be raised, depend on the organisation of the traditional model of the criminal proceedings, on the efficiency of the criminal proceedings conducted for certain criminal offences, the particular characteristics and the caseload of the specific criminal justice system, as well as on the decisions on the duration of the criminal proceedings in terms of removing those obstacles that are slowing down the criminal proceedings in question.

The tendencies to relieve the caseload of the criminal justice system by simplifying the forms of proceedings and institutes which are used during the criminal proceedings share the following characteristics:

1. The deciding factor with regard to legislating and applying the simplified forms of proceedings is the degree of seriousness of the criminal offences. Although the offered comparative overview does not provide a detailed description of various issues raised regarding that, it may be noted that the degree of seriousness of the criminal offence is critical for the formulation of the simplified forms of proceedings. Consequently, the proceedings for the issuance of a criminal order and the sentencing without the main hearing, i.e. the sentencing hearing, are provided for the criminal offences punishable under law by a fine as the main sanction or a term in prison of up to three, i.e. five years.[31] This goes to confirm long-held belief that the simplified forms of proceedings emerge in order to allow the criminal justice system to respond in a simpler more expedient manner when it comes to criminal offences which in substantive criminal law account for 2/3 of the prescribed incriminations and which dominate in the criminal justice system as well.
2. There is a discernable similarity between criminal sanctions and measures which may be imposed withot holding the main hearing, one might even say that they are identical. This comparative overview shows that all of the codes prescribe the imposition of a fine (in a certain amount of money), a suspended sentence (with or without a legal provision on the set amount of money to be paid as a fine), seizure of the proceeds from crime, seizure of items; also there are some options to impose community service, judicial reprimand, a ban on being involved in certain professions, activities and performing certain duties, publication of the judgment issuing a criminal order in the public media, a ban from operating a motor vehicle (for a set amount of time), revocation of the driver's licence, prison sentence (for a certain period of time) or a suspended sentence with supervision.

31 We shall leave aside here other forms of the simplified proceedings which are labeled in the legal texts as the summary proceedings and which are conducted for the criminal offences punishable by a term in prison of not only three, but up to five years, and even for more serious offences that carry a sentence of up to eight, and even twelve years in prison (e.g. in Croatia). See previous notes on this.

3. Whichever form of the summary proceedings is being discussed (whether it is the issuance of a criminal order, sentencing without the main hearing, the pronouncment of a judgment during or upon the conclusion of the investigation, sentencing hearing) each of them changes the structure of the ordinary criminal proceedings and the main hearing stage is "lost" in the organisation.
4. Considering that the court decision on the criminal sanction or measure is rendered without the main hearing, in terms of the evidentiary material there is a unanimous position that the prosecutor must offer sufficient evidence on the criminal offence and the offender.
5. In each of these cases, the public prosecutor's initiative is expected ex officio if there is sufficient evidence on the offence for which such a form of proceedings is allowed and on the offender. Some of the legal systems tie in such actions by the prosecutor with the arrest and the defendant's confenssion.
6. The right to a defence must be included among the shared characteristics. National regulations on the imposition of criminal sanctions or measures without holding the main hearing focus on the statement of the perpetrator of a criminal offence with regard to the prosecutor's motion, the acceptance of such a motion as a prerequisite for the conduct of such proceedings and passing the judgment declaring the defendant guilty outside of the main hearing, filing an appeal against or an objection to the judgment imposing a criminal sanction or a measure, as well as exercising the right to a defence assisted by a defence counsel.
7. In addition to the parties to the proceedings, it is inevitable to mention the single judge. His active role, rights and duties are clearly stipulated in the text of the law. They range from deciding on the prosecutor's motion for sentencing without holding the main hearing and rendering the judgment if the judge grants the prosecutor's motion, to denying such a motion and referring the case to the main hearing.
8. What is the injured party's position? The role of the injured party is not especially promiment. It is mainly referred to in connection with the restitution claim in terms of the right to file such a claim, or it is legislated in detail how to handle such claims (especially in connection with the seizing the proceeds from crime).

In conclusion of this regional overview in terms of comparative law, it may be said that the legislators are right in focusing on the simplified forms of proceedings thus emphasising the importance of summary proceedings for less complex and more economical proceedings within the criminal justice system, especially with regard to minor criminal offences.[32] As far as Bosnia and Herzegovina is concerned, bearing in mind the debates on the doctrine, and also the provisions in other legislations, it is clear that these issues are not properly addressed. Specifically, based on the comparison in the overview of different legislations it is possible to ascertain that the efficiency of the criminal proceedings is affected by stipulating various simplified forms of proceedings. All of the mentioned procedure codes, except procedure codes in Bosnia and Herzegovina, provide, in addition to the issuance of a criminal order or sentencing proceedings without holding the main hearing, the summary proceedings, initiated based on the accusatory instrument

32 On the possibility of replacing these proceedings, especially the proceedings for the issuance of a criminal order, with other mechanisms, e.g. the agreement between the prosecutor and the defendant, also with the reconciliation of the defendant and the injured party based on the decision of the prosecutor or the court, or the publication of such decisions, see Bošnjak, M. (2006), *Izbirni mehanizmi v kazenskem postopku*, published in: *Izhodišča za nov model kazenskega postpoka*, edited by: Katja Šugman, Inštitut za kriminologijo pri Pravni fakulteti v Ljubljani (The Institute for Criminology at the Faculty of Law in Ljubljana), Ljubljana, pp. 452–456.

by the authorised prosecutor when there is reasonable suspicion that certain individual has committed a criminal offence, during which the criminal sanction or measure is imposed at the main hearing. Furthermore, let us reiterate that at the legislation level in Bosnia and Herzegovina the requests for broader application of the prosecutorial discretion which would eliminate criminal prosecution have not been answered, consequently it should be underlined that our judicial system is encumbered with dealing with not only complex and serious criminal offences but also the criminal offences which are classified as minor or less complex.

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Summary Criminal Proceedings in Criminal Procedure Legislation of Serbia and Countries in the Region

1. General Remarks

Rising trends in crime rates and a resulting large influx of criminal cases have caused judicial authorities to become overburdened and working of the justice system to become more difficult. Consequently, simplified forms of criminal proceedings have been introduced into national legislations and used in practice with increasing frequency. In this context, the Council of Europe has continuously made recommendations to its member states concerning incorporation of summary proceedings and other forms of simplified proceedings into their criminal justice systems and consideration of different models of simplification of criminal procedure as a whole with a view to ensuring a reduction of the workload of the justice system and more efficient prosecution of criminal offences. The first among such recommendations was the Recommendation No. R (87) 18 of the Committee of Ministers of the Council of Europe concerning Simplification of Criminal Justice of 17 September 1987 which recommended the member States to consider, *inter alia*, introducing and developing forms of abbreviated procedure, in particular in respect of the offences which inherently or according to the circumstances of each specific case belong to the class of minor offences.[2]

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2 Recommendation No R (87) 18 of the Committee of Ministers to Member States concerning Simplification of Criminal Justice adopted on 17 September 1987, Paragraph II. Suggestions about the simplification of procedure and seeking alternatives to criminal prosecution were also put forward to member States in the 1995 Recommendation No. R (95) 12 on the Management of Criminal Justice as well as in the Recommendation No. R (99) 19 adopted on 15 September 1999 on Mediation in Penal Matters.

Summary criminal proceedings, as well as proceedings for the imposition of judicial admonition, have featured among simplified forms of procedure in Serbia's law as an already traditional and well-known form thereof. The concept of summary procedure can be understood in a wider or narrower context, depending on various theoretical classifications and national legislation. The proceedings which are analysed in this paper presuppose omitting of the preliminary phase, i.e. the investigation, they are characterised by abbreviation and substantial modification of the main hearing and they are contingent on the seriousness of a criminal offence, sometimes combined with well-established facts of the case or unambiguous body of evidence.[3] Various forms of this type of simplified proceedings have been recognised in a number of other national criminal justice systems for a long time.[4] According to some information from the comparative law, criminal offences processed in summary proceedings account for 80 percent of the all cases, whereas in some legal systems, those figures are even higher.[5]

Thus, summary criminal proceedings are a type of simplified criminal proceedings which, with some planned departures from ordinary criminal proceedings, have been conceived to be more efficient, effective and economical – faster and simpler and consequently less costly – but in such a manner that the public interest and fundamental rights of citizens, *i.e.* defendant's right to a fair trial, stay within the framework of mandatory or desirable standards.[6] They are introduced and used in the first place for the purpose of reducing the burden of the justice systems and the very citizens who appear before courts as defendants or injured parties. Criminal offences which pose a less serious danger to society and which are not so complex are tried in such proceedings. Therefore, criminal offences to which summary proceedings apply are most often limited by the type and duration of the penalty they carry (or, in some cases, by jurisdiction of the court, which in turn depends on the duration of a penalty). At the same time, the application of summary proceedings does not only result in faster prosecution of less complex and minor offences, but it also contributes to the suppression of more serious types of crime since courts and prosecutor's offices whose caseload has been eased have more time and resources to devote their efforts to handling more serious types of criminal offences.

2. Summary Criminal Proceedings and Criminal Procedure Legislation in Serbia

2.1. Summary Criminal Proceedings and the 2001 Criminal Procedure Code (CPC)

Special provisions which govern summary proceedings in the current CPC – the one passed in 2001 – are contained in Chapter XXVI (articles 433 through 448). Article 433 provides that criminal offences which are punishable by a fine or up to five years' imprisonment as their principal penalty are processed in such proceedings. If the provisions governing summary proceedings do not specify any particular issue, provisions which govern ordinary criminal proceedings shall apply accordingly. Before the 2009 amendments to the above Code were adopted, it had been provided that summary proceedings would be normally instituted for offences punishable

3 S. Brkić, Racionalizcija krivičnog postupka i uprošćene procesne forme, Novi Sad, 2004, pp.301-302.
4 For more information, you can consult: S. Brkić, *op. cit.*, p. 301-338.
5 See the article by B. Pavišić, "Some Issues Concerning Summary Criminal Proceedings in European Criminal Law" p.292 in this book.
6 In that regard, the rules contained in the European Convention on Human Rights are accompanied by the interpretations of the European Court of Human Rights (see: S. Brkic, *op. cit.*, pp. 295-298).

with a fine or imprisonment of up to three years. Under the 2004 amendments to the 2001 CPC,[7] it was possible that provisions which governed summary proceedings in connection with the main hearing, judgment, and appellate procedure applied to offences punishable by three to five years' imprisonment. The said possibility was allowed if an authorised prosecutor (public or subsidiary/private) filed a motion to that effect with explicit consent from a defendant and if the president of the Court granted the motion; in such cases, defendants could not be sentenced to three years' imprisonment.[8] Such a solution had been met with criticism from experts for being inefficient and unjustified from the aspect of criminal policy,[9] and the legislator opted to amend the Code in 2009 and adopt the same model of summary proceedings for all the offences which carried the penalty of imprisonment of up to five years.[10]

Pursuant to Article 434, proceedings are initiated when a motion to indict is filed by a public prosecutor or a subsidiary prosecutor (injured party) or by filing private prosecution. These proceedings are specific because neither the legal classification of a criminal offence nor grounds need to be cited in the motion to indict or in the private charges, all for the purpose of accelerating and simplifying the proceedings. Furthermore, another specific quality of theirs is also reflected in the omission of the investigation, which is one of the distinctive characteristics of summary proceedings, although the 2001 Code in its Article 435 allows for the possibility that the public prosecutor, prior to filing a motion to indict, proposes to an investigating judge that he/she should undertake specific investigative actions which are to be as prompt and as brief as possible.

Coercive measures are also subject to restrictions in summary proceedings. Thus, when compared to the grounds for ordering detention in ordinary proceedings, the current 2001 CPC has limited, within the framework of its Article 436, the grounds for ordering detention in instances when defendants are in hiding, or when there exists a flight risk, or the risk of repeating or completing a criminal offence or committing the criminal offence a defendant is threatening to commit. The latter ground refers only to criminal offences punishable with a term of imprisonment of three years. Also, the duration of detention ordered prior to filing of a motion to indict has been reduced but only to the amount of time needed to carry out investigative actions, although it may not exceed 8 days. Exceptionally, detention may last up to 30 days, but only in cases of criminal offences involving violence. The provisions governing ordinary proceedings apply accordingly from the moment of filing of the motion to indict to the delivery of a judgment by the court of first instance, providing that each month the panel is to review *ex officio* if there still exist grounds for detention. In respect of detention ordered after a prison sentence has been pronounced, the grounds include, as set out under Article 446, para. 9, that the prison sentence has been imposed and that there still exist grounds for detention in summary proceedings referred to in Article 436. In such cases, detention may last until the judgment has become final, but no longer than the sentence imposed on a defendant by the court of first instance.

Another specific quality of summary criminal proceedings when compared to the ordinary ones includes a requirement that the Court reviews an accusatory instrument of the prosecuting party

7 *Official Gazette of the RS*, No. 58/2004.
8 Article 433, paragraph 2-6 of the Criminal Procedure Code (*Official Gazette of the FRY*, No. 70/2001 and 68/2002)
9 S. Bejatovic, Pojednostavljene forme postupanja u krivičnim stvarima i njihov doprinos efikasnosti krivičnog postupka, proceedings of the conference „Simplified forms of proceedings in criminal matters and alternative sanctions", Serbian Association for Criminal Law Theory and Practice, Beograd, 2009, p. 69.
10 Article 114 of the Law on Amendments to the Criminal Procedure Code of August 31, 2009 (*Official Gazetted of the RS*, No. 72/09).

ex officio pursuant to Article 439, without referring it to the opposing party to file an objection. The charges are served on the accused and the main hearing is scheduled within time limits which are shorter than the ones in ordinary proceedings. As a rule, the main hearing is scheduled immediately, but if no trial is scheduled within one month of the reception of the motion to indict or private prosecution, the judge is obligated to notify the president of the court about the reasons of such a delay.[11]

The position of the injured party is also specific; thus, he/she is entitled to assume prosecution by filing a motion to indict with the Court in cases when a public prosecutor does not bring a motion to indict within a month of receiving criminal charges brought by the injured party or fails to notify the injured party that he/she has dismissed the charges (Article 437). Moreover, in situations governed by Article 445(1), when a duly informed public prosecutor fails to appear at the main hearing, the injured party shall proceed instead of him/her and represent the prosecution within the limits of the motion to indict and in such cases he/she is also entitled to file an appeal against a judgment on all existing grounds.

Summary proceedings are particularly specific because they allow for a possibility, provided for in Article 445, that the main hearing may be held even without the presence of the parties under conditions set out by the law, which is an exception to some fundamental characteristics of ordinary proceedings, such as adversariality and direct examination.

In summary proceedings prior to the main hearing conducted in connection with criminal offences prosecuted by a private prosecution, a judge may – if he/she deems it appropriate for reasons of efficiency – summon the private prosecutor and the suspect for the purpose of first settling the matter in dispute (reconciliation). In cases of unsuccessful reconciliation, the main hearing may be opened immediately thereafter if the judge deems it unnecessary to obtain further evidence and if there are no other reasons to adjourn the hearing (Article 447).

Judgments delivered immediately after the conclusion of the main hearing may be appealed within 8 days instead of within 15 days, which is a time limit set in ordinary proceedings. If the parties and the injured party waive the right to appeal and none of them requests to receive a copy of the judgment, the judgment drawn up in writing does not have to include a rationale (Article 446, paragraph 7).

In general, the manner in which the 2001 CPC provided for summary proceedings was favourably received both by theorists and practitioners, granted that some solutions drew criticism and certain alternatives or innovations were offered. Such alternatives were proposed, for instance, in the following direction: broadening the scope of application of summary proceedings to include offences punishable with imprisonment of up to eight years; that solely single judges should preside over such proceedings; that prosecutors should propose the type and duration of penalties – with consent from defendants – which would be binding upon the Court; that witnesses should be questioned in connection with specific circumstances instead of being examined in connection with everything they have knowledge of; that duly summoned parties who failed to appear at the main hearing should be denied the right to file an appeal on grounds of erroneous

11 Compare this to Art. 283, para. 2 of the 2001 CPC.

or incomplete finding of facts.[12] Some of the said proposals were incorporated in the new CPC passed in 2011.

2.2. Summary Criminal Proceedings and the 2011 CPC

a) Summary Criminal Proceedings

Provisions which govern summary proceedings are contained in Chapter XX of the new CPC of Serbia passed in 2011, namely in Articles 496 through 520. Naturally, if these provisions do not specify anything particular for this type of proceedings, other provisions of the Code are applied accordingly. The first and most important innovation is that the new Code has substantially broadened the range of criminal offences to which summary proceedings are applied since the criminal offences punishable by a fine or imprisonment of up to eight years shall be disposed of in such proceedings (Article 495). Even though there had been suggestions, as mentioned above, to broaden further the scope of application of summary proceedings, the manner in which the scope of application was provided for has been met with criticism following the adoption of the new CPC. Consequently, the Ministry of Justice and Public Administration's Working Group, who drafted amendments to the new CPC in the second half of 2012, proposed that on the one hand, all offences prosecuted by filing private prosecutions should be tried in summary proceedings, whereas on the other hand, offences which come under the so-called "special" jurisdiction – those prosecuted by the Prosecutor's Office for Organised Crime and Prosecutor's Office for War Crimes[13] - should be excluded from the category of offences processed in summary proceedings. Some of the reasons for excluding criminal offences which fall under the jurisdiction of special prosecutor's offices from the system of summary procedure are valid, owing to their seriousness and nature, which after all had motivated the lawmaker to set up specialized prosecutor's offices and court departments for such offences. However, even among such criminal offences there are those to which it would be appropriate to apply summary proceedings – based on their seriousness, degree of danger to society and complexity. An instance of such offence would be "Accessory after the Fact" (aiding the perpetrator after the offence) referred to in Article 333 of the Criminal Code as well as several other offences from the category of criminal offences against the judiciary. They come under the jurisdiction of the Prosecutor's Office for Organised Crime, whereas only the offence referred to in Article 333 comes under the jurisdiction of the Prosecutor's Office for War Crimes, but on condition they have been committed in connection with offences from the primary jurisdiction of these two prosecutor's offices. Nevertheless, in any case, since the draft amendments prepared by the above-mentioned working group have not yet been brought before Parliament, they are still only under advisement – de lege ferenda.

Pursuant to Article 499, proceedings are instituted either on the basis of a motion to indict filed by a public prosecutor or on the basis of a private prosecution when there are reasonable grounds to suspect that a certain person has committed a criminal offence. As a result of a changed role

12 S. Važić, Skraćeni krivični postupak (Dosadašpnja iskustva i predlozi *de lege ferenda*), in the collection of essays "Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije", Serbian Association for Criminal Law Theory and Practice, Beograd, 2009, pp.169-172.

13 Article 495 of the Draft Amendments to the Criminal Procedure Code dated November 16, 2012 can be accessed online, at the website of the Ministry of Justice and Public Administration, at http://arhiva.mpravde.gov.rs/cr/articles/zakonodavna-aktivnost/.

of the public prosecutor, who is under the new CPC the "master" of the investigation, the prosecutor now undertakes certain evidentiary actions if he/she deems them opportune prior to deciding whether or not to file a motion to indict or dismiss criminal charges, whereas under the 2001 CPC, the prosecutor could only bring a motion to that effect to the investigating judge or file a petition for adjudication by a panel if the investigating judge did not grant his motion. The new provision certainly has a potential to accelerate the proceedings. The fact that the accusatory instrument now includes another mandatory element, the legal classification of the criminal offence, is an innovation provided for in Article 500. A possibility has been afforded within the framework of the same Article that if the public prosecutor deems a main hearing unnecessary based on the collected evidence, he/she is entitled to request in the motion to indict that a sentencing hearing be scheduled. This is similar to the provision contained in Article 438, para. 3 of the 2001 CPC, under which the public prosecutor was entitled to propose, for the same reasons, that a decision on sentencing without scheduling of trial is issued, which was provided for as a special procedure for imposing criminal sanctions without the main hearing.

Pursuant to Article 7, para. 3 and 4 of the new Code, summary proceedings are initiated when a ruling ordering detention has been issued prior to filing of the motion to indict (Art. 498, para. 2) or when the main hearing or sentencing hearing has been scheduled (Art. 504, para. 1, Art. 514, para. 1, Art. 515, para. 21). One of the issues which emerged as imprecisely defined in the opinion of participants – judges and prosecutors – of a training course for trainers organized by the Judicial Academy in partnership with the OSCE Mission to Serbia and Resident Legal Advisor's Office of the US Department of Justice in April 2013 was the issue of detention ordered by a single judge prior to the bringing of the motion to indict in summary proceedings under Article 498, para. 2 of the new CPC. The participants took the position that the provisions which governed ordinary proceedings should be applied in such cases and that the preliminary proceedings judge should be the one who decided on remand. However, the new CPC itself defines in Article 7, para. 3 that issuing a ruling ordering detention prior to filing of the motion to indict constitutes the beginning of summary criminal proceedings, and the said ruling is issued by the judge who will preside over the proceedings and not the preliminary proceedings judge.[14]

The position of the injured party has also been changed pursuant to Article 499, which refers to cases in which the injured party brings criminal charges and the public prosecutor does not file a motion to indict within the now changed time limit of 6 months nor informs the injured party that he/she has dismissed the charges. Under such circumstances, instead of taking over prosecution by bringing a motion to indict to the Court, as provided for under the 2001 CPC (in Art. 437), the injured party may now file an objection to an immediately superior public prosecutor in the manner set out in Article 51 of the 2011 CPC. In case the public prosecutor abandons criminal prosecution or drops the charges, certain rights are guaranteed to the injured party under the provisions governing ordinary proceedings in Articles 51 and 52 – the right to file an objection and to take over prosecution.

Pursuant to Article 22, para. 1 of the new Code, a single judge presides over summary proceedings since they are instituted in connection with criminal offences that carry a prison sentence of up to eight years. However, if in the course of the main hearing a single judge finds that a panel is competent to adjudicate thereon, the main hearing must begin anew after the panel is formed

14 See P. Ilić, M. Majić, S. Beljanski, A. Trešnjev, *Komentar zakonika o krivičnom postupku*, Službeni glasnik, Beograd, 2012. p. 980.

(Art. 507, para. 3). The judge schedules the main hearing within 30 days or in case detention has been ordered, within 15 days of the date on which a motion to indict or a private prosecution is served on the defendant, the time limits which were not set in the previous CPC.[15]

Another innovation in comparison with the 2001 CPC is that prior to the scheduling of the main hearing in connection with criminal offences prosecuted by private prosecutions, single judges have a duty - not a possibility as they have had until now - to summon the private prosecutor and the defendant in order to advise them that their case can be referred to a mediation procedure (Art. 505).

In the new CPC, detention is governed by provisions contained in Article 498. In summary proceedings, detention can be ordered if there are reasonable grounds to suspect that a certain person has committed a crime if there exists one of the reasons for ordering detention in ordinary proceedings laid down in Art. 211, para. 1, items 1 through 3. Thus, grounds for ordering detention in summary proceedings have been broadened when compared to the 2001 CPC in the manner that now, detention can be ordered, in addition to previous reasons, in order to prevent interfering with evidence as well as if a defendant is obviously trying to avoid appearing at the main hearing; also, a restriction has been lifted from ordering detention in case of danger that a criminal offence may be completed, repeated, or committed, which previously was possible only in connection with offences punishable with a prison term of up to three years. Before a motion to indict is brought, detention may last only as long as it is needed to carry out evidentiary actions, but it may not exceed 30 days. Exceptionally, which is yet another innovation found in the new CPC, detention may be extended by another 30 days if proceedings are conducted in connection with a criminal offence punishable by imprisonment of five years or more and if a public prosecutor files a substantiated motion to that end. Grounds for extending the period of this measure include obtaining of evidence which has not been gathered for justifiable reasons. What is new is that a motion for detention is decided by a single judge or a judge who will preside over proceedings instead of an investigating judge, given the fact that the proceedings are considered to be opened when a ruling ordering detention is issued (Article 7, item 3 of the new CPC). Moreover, in case the public prosecutor decides to drop the charges, the single judge will make a decision concerning the termination of proceedings, so single judges have jurisdiction over the entire process of initiating and terminating criminal proceedings.[16] Provisions governing ordinary proceedings are applied accordingly to detention from the moment charges are filed until a final judgment is delivered, providing the panel has a duty to examine once every 30 days whether or not the reasons for detention have ceased to exist. Changes have also been made with regard to conditions under which detention may be ordered after sentencing. Namely, it is necessary that two conditions are met cumulatively: that a sentence of five or more years in prison has been pronounced and that there exist especially aggravating circumstances of the criminal offence (circumstances under which the crime was committed or to which it led, and which are established *in concreto*).[17]

15 The Ministry of Justice's Working Group who prepared the draft amendments to the new CPC believed that such circumstances called for shorter time limits, which was why they proposed a 15-day time limit or an 8-day time limit in case of detention (Art. 504 of the Draft Amendments to the Criminal Procedure Code dated November 16, 2012 can be accessed online, at the website of the Ministry of Justice and Public Administration, http://arhiva.mpravde.gov.rs/cr/articles/zakonodavna-aktivnost/).

16 G. P. Ilić, M. Majić, S. Beljanski, A. Trešnjev, op. cit., p. 980.

17 Ibid.

If a defendant pleads guilty at the main hearing, a judge may immediately proceed to the presentation of evidence on which depends a decision on the type and extent of a sanction. In such case the judge may, as laid down in Article 508, sentence the defendant to maximum three years in prison – if he is tried for an offence which carries a fine or imprisonment of up to five years, or to maximum five years in prison – if he is tried for an offence which carries imprisonment of up to eight years.

The new CPC has considerably limited the possibility of holding a main hearing in the absence of a public prosecutor. Something like that is now possible, but as opposed to previous Article 445, para. 1 of the 2001 CPC, only exceptionally and in defendant's interest – if a judge finds that a ruling dismissing the charges or a judgment of dismissal would obviously have to be issued in the light of evidence contained in the case file (Article 506, para. 6).

Under the new CPC, the time limit for drawing up a judgment in writing is 15 days (Art. 507, para. 4) instead of the previous 8 days. Time limits for filing appeals are set in Article 509. Thus, same as under the previous CPC, an appeal against a judgment may be filed within 8 days of the delivery of a certified copy of the judgment; also, a possibility has been introduced that in more complex cases and under specific conditions, the said time limit could be extended to 15 days upon request by the parties or a defence counsel.

b) Sentencing Hearing

Another important innovation is a sentencing hearing provided for in Articles 512 through 518, a procedural mechanism which, under the conditions set out by the law, omits the main hearing and thereby accelerates the proceedings. This mechanism has replaced a similar proceeding for sentencing prior to the main hearing referred to in Articles 449 through 454 of the 2001 CPC, which was introduced by the 2004 amendments and applied to offences punishable with a fine or imprisonment of up to three years.

A prerequisite for holding a sentencing hearing provided for in Article 512 is that the criminal offence in question belongs to the class of offences which carry as their principal penalty a fine or imprisonment of up to five years. Also, the public prosecutor should put forward a request for holding such a hearing in his/her motion to indict if he/she deems the complexity of the matter and evidence obtained, especially if a defendant was arrested in *flagrante delicto* or has pleaded guilty, imply that it is not necessary to have the main hearing. The public prosecutor also proposes in his/her motion that a specific criminal sanction selected among the ones listed by type and extent in Article 512 be imposed on the defendant; at the same time, the lawmaker has differentiated with regard to what may be proposed by the prosecutor between two categories of criminal offences in respect of the penalty they carried. Thus, the public prosecutor may propose to the Court to impose on a defendant:

1) a term of imprisonment of up to two years, a fine of up to two hundred forty day-fines or up to five hundred thousand RSD or a suspended sentence with ordering incarceration of up to one year or a fine up to one hundred eighty day-fines or up to three hundred thousand RSD and a probation period of up to five years – if the defendant has confessed to committing a criminal offence punishable by imprisonment of up to five years;

2) a term of imprisonment of up to one year, a fine of up to one hundred eighty day-fines, or up to three hundred thousand RSD, up to two hundred and forty hours of community service, revocations of his driver's licence for up to one year, a suspended sentence with ordering incarceration of up to a year or a fine of up to one hundred eighty day-fines, or three hundred thousand RSD and a probation period of up to three years, including a possibility of placing the defendant under protective supervision or imposing a judicial admonition – if he committed a criminal offence punishable by a fine or imprisonment of up to three years.

In the above context, it should be strongly emphasised that a requirement for imposing a sentence in the first case is that the defendant has confessed to a criminal offence. The sentencing hearing will not be scheduled and there will be a main hearing if the request of the public prosecutor does not fulfil the requirements cited in Article 512 or if the complexity of the case and evidence obtained indicate a need to hold the main hearing (Art. 514).

The sentencing hearing is now based on an adversarial model and the parties summoned to the hearing are afforded a possibility, limited to a certain extent, to plead on the circumstances of a case. Pursuant to Article 515, a sentencing hearing is held within 15 days from the date of the issuance of an order. The same article also lays down who is summoned to the hearing and under which conditions. Thus, a summons must be served on a defendant so as to allow for at least 5 days between the date of its service and the date of the hearing. Also, the defendant must be advised that the hearing will take place even if he fails to appear, if duly summoned, or if his defence attorney fails to appear in cases when the presence of a defence counsel is not mandatory. At the hearing, the public prosecutor will make a brief statement about evidence available to him, as well as about the type and extent of the sanction he proposes. Pursuant to Article 517, the hearing may be concluded in two ways: either with a judgment of conviction – if the defendant has agreed to the prosecutor's proposal at the very hearing or has failed to appear thereat; or by scheduling a main hearing – if the defendant does not agree with the prosecutor's proposal or if a judge does not accept the said proposal. An objection may be filed to the judgment within 8 days, but only if the judgment of conviction was issued due to defendant's failure to appear at the hearing (Art. 518). The judgment becomes final if no objection has been filed. Therefore, the prerequisite for applying this institute is that a defendant must agree with a prosecutor's proposal, whereas if he denies his assent, proceedings will return to their "regular course" in summary proceedings, i.e. there will be a main hearing.

In our final remarks on the manner in which the new CPC provides for this type of proceedings, we also emphasise that one of its innovations in this respect is that judicial admonition is imposed by means of a judgment and not a ruling as before and it is delivered immediately after the conclusion of a main hearing or a sentencing hearing (Art. 519).

3. Summary Criminal Proceedings and Criminal Legislation of the Countries in the Region

3.1. *Croatia* is well ahead of all the other countries in the region when it comes to possibilities for application of summary proceedings, *i.e.* the number of criminal offences to which this type of proceedings may be applied. Croatia's Criminal Procedure Code passed in 2008 provides

that summary procedure is applied to matters disposed of before municipal courts, meaning in proceedings in connection with offences punishable with a fine or imprisonment of up to twelve years.[18] Provisions governing summary proceedings came into force on September 1, 2011. Contrastingly, under the Croatia's previous CPC, it was provided that summary proceedings applied to offences punishable by a fine or imprisonment of maximum five years.[19] Summary proceedings are the most frequently used type of criminal proceedings in Croatian practice and by far the greatest number of criminal offences as well as the greatest number of matters pending adjudication are processed precisely under the rules of summary proceedings.[20] There are two forms of summary proceedings in Croatia, depending on the duration of a penalty: the first is applied to offences punishable by a fine or imprisonment of up to eight years and a single judge presides over them, whereas the second form applies to offences punishable by imprisonment of eight to twelve years and they are conducted before a panel of judges.[21] In proceedings conducted before the panel, prosecutors may not exercise prosecutorial discretion, proceedings may not be instituted by bringing a private prosecution, and some provisions governing summary proceedings may not be applied and instead of them, the rules of ordinary proceedings apply, in particular with regard to the hearing of the case (Article 536 of the 2008 CPC).[22]

In the course of the reform of Croatian criminal procedure legislation, many provisions have been introduced among the rules of summary proceedings for the purpose of simplifying the procedure, such as: broadening the scope of prosecutorial discretion; reducing the number of accusatory instruments; issuing of direct indictments; simplified and differentiated procedure for the examination indictments; preparatory hearing which is conducted only in cases of offences tried before a panel and contingent on discretion of the presiding judge; simplification of the hearing in summary proceedings.[23] In 2012, the Constitutional Court of Croatia found that a number of provisions contained in the Croatian 2008 CPC were unconstitutional and contrary to Article 6 of the European Convention on Human Rights and among them, there were some articles, either whole or some parts thereof, pertaining to summary proceedings. The Constitutional Court found that those articles were problematic because of the violation of the right to professional assistance by a defence attorney of one's own choosing (Article 530, para. 3 of the 2008 CPC), the right to be present at the main hearing (Article 531, para. 2), as well the right to be tried before an impartial tribunal owing to the fact that a judge who examined an indictment co-

18 Criminal Procedure Code of the Republic of Croatia (*Official Gazette*, number 152/08, 76/09, 80/11, 121/11, 91/12, 143/12) – consolidated text of October 11, 2011, Article 520 in conjunction with Article 19a, para. 1, item 1).
The 2008 Code came into force partially on January 1, 2009 and then, on June 1, 2009 it began to be applied to matters which were under the jurisdiction of the Office for the Suppression of Corruption and Organised Crime, to come into force fully on September 1, 2011.

19 Article 447 of the Criminal Procedure Code (*Official Gazette*, no. 110/97, 27/98, 58/99, 112/99, 58/02 and 143/02).

20 Concerning the percentage of cases in which summary proceedings have been used in Croatia, see also B. Pavišić, Novi hrvatski Zakon o kaznenom postupku, "Hrvatski ljetopis za kazneno pravo i praksu", Zagreb, vol. 15, broj 2/2008, s. 580-581, as well as a paper by Tadija Bubalović, "Summary Proceedings in Croatian Criminal Legislation" iat p.269 in this book. According to information presented by Bubalović, 86,2 % of criminal offences provided for in the new Croatian Criminal Code, which entered into force on January 1, 2013, fulfil requirements for application of summary proceedings in respect of penalties prescribed for them. Similar information – that summary proceedings are applied to 83,5 % of all the criminal offences in Croatia, including as well those laid down in other special laws – are also cited by B. Pavišić, op. cit. and other authors who refer to Pavišić.

21 A. Pavičić, M. Bonačić, "Skraćeni postupak prema novom Zakonu o kaznenom postupku", Hrvatski ljetopis za kazneno pravo i praksu, vol. 18, br. 2/2011, p. 494.

22 Ibid., p. 495

23 T. Bubalović, "Novi koncept i nova zakonska rješenja u Zakonu o kaznenom postupku Republike Hrvatske od 15.12.2008", Anali Pravnog fakulteta Univerziteta u Zenici, p.30, and B. Pavišić, op. cit, pp. 581-585.

uld also participate at the hearing on the merits (Article 532, para. 2).[24] Some commentaries were critical of the solution according to which defendants were questioned immediately at the beginning of evidentiary proceedings conducted before a single judge, on account of the fact that defendants were thus placed at a disadvantage vis-à-vis persons tried in ordinary proceedings even though summary proceedings presided over by single judges may also involve more serious offences.[25]

As opposed to Serbia, where a hearing may take place in the absence of a duly summoned prosecutor (granted that under the 2011 CPC, as already mentioned, it is possible only if a judicial decision is in defendant's favour), in Croatia, the prosecutor must always be present at a hearing and if he fails to appear, the hearing is postponed (Article 534). Thereby, a possibility which used to exist in Croatia was eliminated, namely that the Court had accumulated procedural roles in the absence of the prosecutor and assumed a role which he should not have fulfilled.[26] Also, the possibility of holding a main hearing in the absence of the prosecutor has been altogether abandoned in the Montenegrin CPC.[27]

In Croatia there is also a penal order as another form of simplified proceedings very close to the traditional simplified proceedings we have discussed thus far. Penal orders are issued for offences punishable by a fine or up to five years' imprisonment. Conditions for imposing a penal order are very similar to those for imposing a sentence by way of a sentencing hearing under the new CPC of Serbia. It can be issued against a legal person as well and it is specified which sanctions may be imposed in such case (Article 540, para. 3). The Croatian CPC additionally protects the rights of injured parties by laying down within the framework of provisions governing the issuance of a penal order (Article 540, para. 4) that if an injured party puts forward a restitution claim, the prosecutor must move that the Court first decides on the claim and if the Court decides not to uphold the claim, it shall order that material gain obtained through a criminal offence be confiscated. What this implies is that the prosecutor has a duty to contact the injured party first in cases of potential confiscation of the proceeds from crime.[28]

3.2. The 2009 *Criminal Procedure Code of Montenegro* provides that summary proceedings are to be applied to offences punishable with a fine or imprisonment of up to five years.[29] Unlike the new CPC enacted in Serbia, neither the danger of collusion (interfering with evidence) nor defendant's obvious avoidance of appearing at the main hearing features among the grounds for ordering or extending detention in summary proceedings in Montenegro, although practitioners and commentators have taken different positions with regard to the latter in terms of whether or not it could still be applied to summary proceedings.[30] Neither is it possible to order detention on the grounds that a five-year or a longer prison sentence has been imposed along with es-

24 Decision by the Constitutional Court of the Republic of Croatia No. U-I-448/2009 and other dated July 19, 2012, (*Official Gazette* 143/12), p. 143-149, available at: http://sljeme.usud.hr/usud/prakswen.nsf/92b93a268fe63c89c1256e2f000538db/c12570d30061ce54c1257a40002a6523/$FILE/U-I-448-2009%20i%20dr.%20-%20ODLUKA.pdf (accessed on May 12, 2013):

25 A. Pavičić, M. Bonačić, op. cit, p. 510.

26 B. Pavišić, op. cit., p. 583.

27 CPC of Montenegro, Article 457. See also D. Radulovic, *Komentar Zakonika o krivičnom postupku Crne Gore*, Podgorica 2009, p. 593

28 A. Pavičić, M. Bonačić, op. cit., p. 515

29 Article 446 of the Montenegrin Criminal Procedure Code *Official Gazette of Montenegro*, No. 57/2009 and 49/2010. The Code came into force on August 26, 2009. After a year, it began to be applied to proceedings in connection with organised crime, corruption, terrorism and war crimes cases; it began to be fully applied on September 1, 2011.

30 See Article 448, para. 1 and 458, para. 9 of the Montenegrin CPC. The grounds of defendant's apparent avoidance of appearing at the main hearing are addressed in Radulović, op. cit., p. 585.

pecially aggravating circumstances of a criminal offence. In Montenegro, injured parties are entitled to initiate private prosecution if a prosecutor does not file a motion to indict nor informs the injured party that he/she has dismissed criminal charges within one month of their filing (Article 449, para. 1 of the Montenegrin CPC). Such a time limit, the same as provided under the Serbia's 2001 CPC but substantially shorter than the one set out in the new Serbian CPC (which is six months after the filing of the charges), offers better protection of the injured party's interests, accelerates the proceedings owing to the fact that it does not require any previous action by the prosecutor as in ordinary proceeding, but at the same time, it puts prosecutors in a position in which they may sometimes be forced to make a decision on criminal charges too quickly. Another difference in comparison to the Serbian CPC is that mediation (reconciliation) is not mandatory, but it is left to the discretion of a judge to assess whether or not the parties should be referred to mediation, provided he/she deems it opportune for the prompt disposition of the matter (CPC, Article 459), which is the same solution as the one that can be found in the reformed criminal procedure codes in Croatia and the FYROM.

Also, the Montenegrin CPC provides for a sentencing proceeding without the main hearing as a distinct type of summary proceedings conducted in connection with criminal offences which carry a fine or up to three years' imprisonment (Article 461). This form of proceedings, to which a defendant must give his consent, is initiated by a public prosecutor when he deems that available evidence concerning relevant facts could be sufficient to find charges well-grounded so that a need for the main hearing can be eliminated.[31] The judge who issues a decision on sentencing also bases his decision on the same evidence which supports the prosecutor's motion and it must be such as to lead to an inevitable conclusion that the defendant has committed the criminal offence with which he is charged.[32] Sanctions and measures which may be imposed in such proceedings include a fine up to EUR 3,000, community service, suspended sentence or judicial admonition with seizure of material gain and objects and a driving ban of up to two years (Article 462). Obviously, they do not include a prison sentence, as used to be the case with the sentencing procedure prior to the main hearing under the Serbia's 2001 CPC. Otherwise, provisions which govern this institute in the Montenegrin Code are very much alike or even identical to the provisions governing the sentencing procedure prior to the main hearing in the Serbia's CPC from 2001.

3.3. Summary proceedings and proceeding for the issuance of penal orders are also used in *Slovenia*.[33] As opposed to other countries in the region, these two proceedings are not distinguishable from one another in respect of the offences to which they apply. Both are applied to criminal offences punishable by a fine as their principal penalty or imprisonment of up to three years.

3.4. In *the FYROM (Macedonia)*, under their current Criminal Procedure Code, provisions governing summary proceedings are applied to criminal offences punishable by a fine as their principal penalty or imprisonment of up to three years. The new criminal procedure code in this country, which begins to be applied as of November 2013, lays down that summary proceedings

31 D. Radulović, op. cit., p. 600-601
32 Ibid. p. 602
33 Criminal Procedure Code, *Official Gazette of the RS*, No. 32/2012 – consolidated text. On summary proceedings in Slovenia, see the article of V. Jakulin, "Simplified forms of proceedings in the criminal procedure legislation in Slovenia" in this book.

are to be used in connection with criminal offences which carry a fine or imprisonment of up to five years.[34]

3.5. After the reform of their criminal procedure system in 2003, summary proceedings ceased to exist in *Bosnia and Herzegovina* in the form in which they exist in other countries in the region. Until then, summary proceedings had been conducted before municipal courts in connection with offences punishable by a fine as their principal penalty or imprisonment of up to three years. The current Criminal Procedure Code of BiH as well as the corresponding codes of both entities and the Brčko District have introduced the proceedings for the issuance of a criminal order as the most frequent form of simplified proceedings used in cases of offences punishable with a fine as the principal penalty or imprisonment of up to five years.[35] These proceedings are conducted in connection with offences which fall under the jurisdiction of single judges, namely before the Court of BiH, the Basic Court in the Brčko District, municipal courts in the Republic of Srpska and basic courts in the BiH Federation. Imprisonment may not be proposed and consequently it may not be imposed in such proceedings, but only the following prescribed criminal sanctions and measures: a fine (up to 50,000 KM), a suspended sentence, a ban on practising a certain profession, or on performing an activity or a duty, seizure of objects and seizure of material gain obtained through criminal offence.[36]

Conclusion

All the countries in the region, with the exception of Bosnia and Herzegovina, recognise summary criminal proceedings in their traditional form and have legislated them with certain variations. The majority of provisions which govern summary proceedings in this legislation are very similarly and sometimes even identically formulated based on the fundamental principles otherwise characteristic of this procedural form. Thus, all of the above-mentioned legal systems which include this institute provide for a subsidiary application of the rules of ordinary proceedings, the omission of the investigation, accusatory instruments such as motion to indict and private prosecutions, preparation of a defendant for the main hearing and his participation thereat or a possibility of his absence, the main hearing at which a sanction or measure is imposed, efforts to conclude the hearing of the case in the course of one hearing, as well as a possibility of omitting the main hearing, procedure and time limits for appeals (with the above-mentioned departure which exists in Serbia), etc.

34 Criminal Procedure Code (*Official Gazette of the Republic of Macedonia*, No. 150/2010). For more information on summary proceedings in the FYROM, see the article by Gordan Kalajdžijev and Gordana Lažetić Bužarovska "Acceleration of Proceedings – One of the Aims of Criminal Procedure Reform in Macedonia" in this book.

35 On the procedure for the issuing of a criminal order in BiH, you can consult the article by H. Sijerčić-Čolić, "The Procedure for the Issuance of a Criminal Order: Procedural Legislation in Bosnia and Herzegovina as Compared to the Legislations in the Region" in this book.

36 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) Article 334; Criminal Procedure Code of Bosnia and Herzegovina's Brcko District (*Official Gazette of the BiH Brcko District* No. 10/2003, 48/2004, 6/2005, 12/2007, 14/2007, 21/2007, 2/2008, 17/2009; consolidated text 44/2010), Article 334; Criminal Procedure Code of the Federation of Bosnia and Herzegovina (*Official Gazette of the BiH Federation*, No. 35/2003, 56/2003, 78/2004, 28/2005, 55/2006, 53/2007, 9/2009, 12/2010, 8/2013) Article 350, and Criminal Procedure Code of the Republic of 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), Article 358. You can consult: *Commentary on the Criminal Procedure Code in Bosnia and Herzegovina*, Prepared by: Hajrija Sijerčić Colic, Malik Hadžiomeragić, Marinko Jurčević, Damjan Kaurinović, Miodrag Simović, Project sponsored by the Council of Europe and the European Commission, Sarajevo 2005, p. 831.

Due to the introduction of prosecutorial investigation in national systems, the possibility of holding the main hearing in prosecutor's absence has been abandoned in some of the systems, such as in the Croatian one. Characteristics of summary proceedings – omitting or abbreviating certain stages in the procedure; shorter statutory time limits on essential procedural actions; prosecutorial and judicial discretion in making their decision on the merits and sentence based on a clear factual substratum supported by evidence; rules which encourage defendants to plead guilty to an offence or not to engage in evidentiary proceedings – with all their variations in national legal systems provide the government and citizens with tools for faster disposition of criminal matters.

Some of the most crucial innovations introduced in Serbia in connection with summary proceedings reflect the intention of relying even more on this type of proceedings when criminal matters are resolved: the range of criminal offences which may be processed in summary proceedings has been expanded and the sentencing hearing has been introduced instead of the previous sentencing procedure prior to the main hearing. Summary proceedings have traditionally been accepted in the national systems of criminal law in connection with less serious criminal offences (minor offences). In Serbia, the trend of broadening the scope of application of summary proceedings which began with amendments to the 2001 CPC continued with the new 2011 CPC by including criminal offences punishable with imprisonment of up to eight years. After Croatia, in which the upper limit has been set at twelve years, Serbia is the next country in the region in which the range of offences to which this type of proceedings can be applied is so broad. By thus increasing the number of offences, we have entered the territory in which penalties imposed in summary proceedings now include those which can be considered long-time prison sentences.[37] In practice, this will certainly result in lightening the caseload of ordinary criminal proceedings, but we also hope that it will be accompanied by all the necessary respect for the fundamental principles and standards which equally apply to both ordinary and summary proceedings. In that context, it would be desirable to prevent the limit on summary proceedings from being raised any further by some amendments in the future. It is expected that results of the use of summary proceedings in accordance with the Serbia's new CPC will be available only as of October 2013 and they will show to which extent the expectations created about this type of simplified proceedings are fulfilled in terms of how much they can contribute to a desired overall increase in the efficiency of criminal proceedings and suppression of crime, as well as if all of it is achieved at the expense of some rights guaranteed to defendants. For now, the solutions offered by the Serbia's new CPC provide a solid basis for favourable expectations in that regard.

37 For instance, according to the Council of Europe Recommendation No. (2003) 23, a prison sentence over five years is considered long-term imprisonment. Definition of life sentence and long-term prisoners, Appendix to Recommendation Rec (2003) 23 of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners, 9 October 2003.

Siniša Važić[1]

Detention in Summary Proceedings and in the Plea Agreement

1. Detention in the Summary Proceedings

Provision of Art. 443 of the Serbian Criminal Procedure Code in force (2001 Criminal Procedure Code) stipulates that summary proceedings are to be conducted when the criminal offences being dealt with are not particularly complex, too extensive and which are classified as minor offences. It is specified that such offences are less socially relevant criminal offences, specifically, that for such offences the prescribed penalty is a fine as the main penalty or a term in prison of up to five years.

These are simplified proceedings which are more expedient, shorter and more cost-effective than the ordinary or general criminal proceedings. The simplification is achieved by "skipping" certain phases of the ordinary criminal proceedings, by not adhering to some of the criminal procedure principles or by altering certain institutes used in the proceedings. The legislator has assumed that even in such abbreviated proceedings, which are not only expedient and clear but also legal, one of the currently most important objectives in the fight against crime, i.e. efficient criminal prosecution and expedient imposition of appropriate criminal sanctions, may be achieved. It is a widely accepted fact that the certainty that the perpetrator shall be found, quickly brought before the court and adequately punished in procedure under law has a greater effect in the prevention of crime than the severity of the prescribed sanction.

Undoubtedly, the issue of the detention as one of the measures used to secure the presence of the defendant during the criminal proceedings is one of the most difficult and most complex issues which represents a measure and action used by the state in order to protect the fundamental freedoms and human rights, but also the rights of the society – i.e. in order to protect the basic values guaranteed by the Constitution, criminal legislation and international law – whereby the state reacts in such a way as

1 Judge, Appellate Court in Belgrade

to deprive the individual who has violated those basic values (to be exact, who is suspected of such a violation) of this basic human right – liberty (temporarily, of course). In other words, this means that the state aiming to protect certain values intervenes and takes away from an individual – a member of the society in question, the right to one of his greatest values – the right to be free. This is a situation that has always required from all of those who are deciding or acting on this matter to proceed with extreme caution and with great care.

The Constitution of the Republic of Serbia places the right to liberty high up among the values it promotes and protects. The second part of the Constitution deals with the right to liberty where the issues of human and minority rights and freedoms are treated, particularly under Art. 27 (the right to liberty and security), then under Art. 28 (procedure for dealing with the detainee) and under Art. 29 (additional rights in the case of detention without the court decision). Under articles 30 and 31 the issue of detention and its duration is regulated. Art. 30 stipulates, among other things, that the person who is reasonably suspected of committing a criminal offence may be placed in detention only based on the court decision, if the detention is necessary in order to conduct the proceedings. Art. 31 stipulates the duration of the detention which the court "reduces to the shortest amount of time necessary, bearing in mind the reasons for the detention". Furthermore, it is stipulated that the "detainee is released to await trial as soon as the reasons for the detention cease to exist".

In the fourth part of the Constitution which deals with the jurisdiction of the Republic of Serbia it is stated under Art. 97 that, among other things, the Republic of Serbia regulates and ensures "the exercise and protection of the civil rights and liberties and legality; the proceedings before courts and other state authorities; the accountability and sanctions for the violation of civil liberties and rights established by this Constitution and for the violation of the laws and other regulations and enactments; amnesty and pardons for criminal offences".

The provision under Art. 436 of the CPC (from 2001) regulates the issues of ordering, extending and the duration of detention, the proceedings that are to be conducted in such cases, as well as the requirements that must be met when deciding on detention.

(1) A person who is reasonably suspected of having committed a criminal offence may be detained in order to secure the criminal proceedings are conducted without any obstruction:
1) if this person is in hiding or if his identity cannot be ascertained or if there are other circumstances which suggest he poses an evident flight risk;
2) if the criminal offence in question is punishable by three years in prison, while the particular circumstances suggest that the defendant would complete the attempted criminal offence or that he would commit a criminal offence he is threatening to commit or that he would reoffend.
(2) Prior to filing the motion to indict, the detention may last only as long as it is necessary to perform investigative actions, but not longer than eight days, and only exceptionally up to thirty days if the criminal offence contains elements of violence. The appeal against the ruling on detention is decided on by a panel (Art. 24, Par. 6).
(3) With regard to detention, the provisions of Art. 146 of this Code shall be applied accordingly, from the moment the motion to indict is filed till the first instance judgment is passed, but the panel must review each month if the reasons for detention still exist.
(4) When the defendant is in detention, the court must proceed with utmost urgency.

The previously listed reasons for ordering and extending detention are stipulated in the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is actually an order to the competent state authority to establish whether or not certain material facts which are relevant to the decision on the detention exist when deciding in legal proceedings on detention. The Convention requires the existence of reasonable suspicion, to be exact, of the facts and data based on which an impartial observer would believe that some person has committed a criminal offence. The degree of probability that certain individual is guilty of committing a certain crime which justifies the detention may be lower than the degree necessary to justify filing a motion to indict a person.

Pursuant to Art. 5, Par. 3 of the European Convention the reasons for detention are explicitly stipulated: the flight risk, prevention of reoffending (risk of recidivism). It is interesting to note that reasons of collusion (which admittedly are encountered only in the ordinary criminal proceedings) have been also recognized in the practice of the European Court of Human Rights. The reasons related to maintaining public order and to the protection of the defendant are allowed as extraordinary reasons for detention. Naturally, such reasons are not accepted for ordering and extending the detention in the summary proceedings in our Criminal Procedure Code.

In terms of ordering the detention, duration of the detention or releasing someone from detention, the provision under Art. 446, Par. 8 and 9 of the CPC should be mentioned. Paragraph 8 of the said article stipulates the provisions of Art. 358 of the CPC to be applied accordingly with regard to releasing someone from detention after the judgment has been passed. Article 358 of the CPC, under Par. 1 deals with ordering, extending and releasing from the detention in the ordinary criminal proceedings at the pronouncement of judgment. Paragraph 9 of the Art. 446 of the CPC stipulates that "when the court pronounces a prison sentence, the defendant may be placed in detention, or the defendant may remain in detention if the requirements pursuant to Art. 436, Par. 1 of this Code are met. The detention may last in such a case until the judgment becomes final, but not for a longer period of time than required by the sentence pronounced by the first instance court."

As far as jurisdiction is concerned, at the stage of investigative actions investigating judge decides on the detention. As it has already been mentioned, the detention at this stage may last for eight days at the most, i.e. if the criminal offence in question has elements of violence, the detention may last for thirty days at this stage. The appeal against the detention ruling is decided by the pre-trial chamber of the same court. This chamber must examine each month if the reasons for the detention still exist even if the parties to the proceedings do not file any motions to that effect and render a decision on extending the detention or the release from the detention.

Undoubtedly, detention is the most severe measure that can secure the presence of the defendant during the criminal proceedings and it represents the most intense and the most drastic form of infringement of somebody's right to liberty which is seen as the "necessary evil" and as the kind of infringement of the said right that is seen as justified in order to achieve a higher social goal.

The awareness of the fact that at the moment someone is detained, his freedom is practically taken away, as well as the awareness of the fact that this person is definitely going to spend a certain period of time in such a situation, implies the need to meet certain requirements that need to be in place as well as the criteria for ordering detention and its duration and the limitations and restrictions which should be imposed and which represent a guarantee that the freedom of an individual shall be restricted only to the extent that is necessary and sufficient.

In terms of the reasons or grounds for the detention, one should bear in mind the presumption of innocence in the first place. This presumption means that the defendant must be treated as an innocent person. He has the right to await trial at freedom and he must not be deprived of his liberty just because there is a reasonable suspicion that the defendant has committed a criminal offence, but only for the purpose of ensuring the criminal proceedings against the defendant to be unobstructed followed by a reasonable suspicion that the said person has committed a certain criminal offence.

Furthermore, it is necessary to establish the so-called legitimate reasons for detention, i.e. material facts, which must be established prior to deciding on detention upon which the detention is ordered or extended. This implies that there is a well-founded or reasonable suspicion, i.e. the facts or data based on which an impartial observer would believe that the individual in question has committed a criminal offence.

Placing someone in detention and especially extending the detention in the summary criminal proceedings in addition to meeting the aforementioned requirements should be carefully assessed by those who are deciding this matter, since, apart from the aforementioned, the nature and seriousness of the offence the defendant is charged with should be taken into consideration as well as the prescribed penalty (which in summary proceedings does not exceed five years in prison), the age, health condition, social circumstances of the defendant, the conduct of the defendant prior to the commission of the criminal offences and the conduct after the act etc.

The duration of the detention must not be disproportionate compared to the prescribed penalty for the offence in question and it must not infringe the defendant's right to a trial within reasonable time. The court must take into consideration based on the state of the case file, the stage of the criminal proceedings, the duration of the proceedings up to that point a particular criterion as well – the sanction that might be expected in that particular case and for that particular offence. This should help avoid the situation that has been known to happen in our courts which would pronounce a prison sentence that "covers" the detention, i.e. the imposed prison sentence matched the time which the defendant has spent in the detention.

2. Detention and Plea Agreement

With regard to the issue of detention in plea agreement, although the agreement on the admission of guilt is dealt with in other articles in this book, it is necessary to mention the basic elements of plea agreement for the purposes of this paper as well:

Pursuant to the provision of Art. 282 of the CPC it is stipulated:

(1) When criminal proceedings are conducted for a single criminal offence or concurrent criminal offences for which the prescribed penalty is a term in prison of up to 12 years, the public prosecutor may propose to the defendant and his defence counsel to enter into a plea agreement, i.e. the defendant and the defence counsel may propose to the public prosecutor to enter into such an agreement.
(2) Once the proposal pursuant to para. 1 of the said article is made, the parties and the defence counsel may negotiate on the conditions for the admission of guilt for the criminal offence in question, i.e. criminal offences he is charged with.

Pursuant to Art. 282-b of the CPC it is stipulated:

(1) In the plea agreement the defendant fully admits having committed the criminal offence he is charged with, i.e. admits one or more concurrent criminal offences, which are specified in the indictment, and the defendant and the public prosecutor agree:
1) on the type and severity of the sanction, i.e. other criminal sanctions that are to be imposed on the defendant;
2) on the public prosecutor's desistance from criminal prosecution for the criminal offences which are not included in the plea agreement;
3) on the costs of the criminal proceedings and on the restitution claim;
4) on the waiver of the right to an appeal against the court decision rendered based on the plea agreement by the defendant and his counsel, in cases where the court has accepted the agreement in full.
(2) In the plea agreement the public prosecutor and the defendant may concur on the imposition of a sanction on the defendant that, as a rule, may not be below the statutory limit prescribed for the criminal offence the defendant is charged with.

The court decides on the plea agreement and it may dismiss it, grant it or reject it. Criminal Procedure Code regulates in detail the proceedings and the court decisions when the plea agreement is being decided on, as well as when the rights of the defendant and the injured party in terms of rejecting or granting the agreement are being decided on. Finally, under Art. 282-d, Par. 1 of the CPC the subject of the final rulings on the plea agreement is dealt with, which is considered to be an integral part of the indictment, if it has already been issued, i.e. the prosecutor's duty is to draw up the indictment which includes the plea agreement within three days, and if the indictment has not yet been issued, the presiding judge without any delay passes a judgment by which the defendant is declared guilty and imposes a sentence on him, or some other criminal sanction and decides on other issues stipulated in the plea agreement under Art. 282-b of the CPC. Pursuant to Par. 2 of the said article it is stipulated that the judgment pursuant to Par. 1 in addition to the content of the plea agreement, contains the data referred to under Art. 356 of the CPC accordingly.

As it is often mentioned, Art, 282a, Par. 1 items 1-7 of the CPC deals with the content of the judgment of conviction which should include:

1) the criminal offence for which the defendant is found guilty, specifying the facts and circumstances which constitute the elements of a criminal offence, as well as those on which the application of certain provisions of the criminal code depends;
2) legal qualification of the criminal offence and which provisions of the Code have been applied;
3) what is the defendant sentenced to or if he is exempt from sanctions according to the provisions of the Criminal Code;
4) a decision on the suspended sentence, i.e. the revocation of the suspended sentence or a conditional release;
5) a decision on the security measures and the seizure of proceeds from crime;
6) a decision on including time spent in the detention or already served sentence in the received prison sentence;
7) a decision on the costs of the criminal proceedings and on the restitution claim.

It is clear from the aforementioned that the issue of detention is not included among the elements of the plea agreement which leads us to a conclusion that the detention (or to be exact, his release from detention) cannot be the subject of such an agreement when the defendant wants to enter into the said agreement with the public prosecutor.

The question which arises is what if the prosecutor deems the agreement in which the defendant admits guilt for committing one or more criminal offences to be important, that it renders the criminal proceedings considerably shorter and more cost-effective and finds that he essentially agrees the defendant should be released from detention when the judgment is passed. Should the court reject such an agreement which includes the parties' consent (the public prosecutor's as well) on the release from detention simply by applying the provision of the Art. 282-v, Par. 9 of the CPC, stating that the requirements under Par. 8 of the said article have not been met, i.e. noting that another requirement has been added which the law does not stipulate rendering the agreement illegal, i.e. unfounded or inadmissible?

The court is not allowed to grant the agreement in part by accepting those elements that are stipulated by law and rejecting the elements that do not comply with the law. Therefore, it is not possible to grant certain parts of the agreement, since it represents a whole and it should be decided on as such.

In my opinion, it is not impossible for the court to grant the plea agreement which includes in addition to the elements stipulated by law a plea agreement on the release from detention after the judgment becomes final. Such a decision by the court is justified, on the one hand, by the fact that this is not explicitly forbidden by the law (therefore it is allowed), and on the other hand, it is similar to the situation in the proceedings when the public prosecutor agrees with the motion of the defence at the main hearing to release the defendant from detention, as a rule, such a decision is subsequently passed by the court.

The decision to release the defendant from detention in such a case might refer to the fact that the reasons for ordering and extending the detention have ceased to exist, as well as to the fact that the public prosecutor has no objections to the defendant's release from detention. The court's rejection to release the defendant from detention due to finding such reasons to be inadmissible, which in turn results in the rejection of the entire plea agreement, considering that the release from detention was one of its elements and probably one of the defendant's reasons for entering into the said agreement may be justified by the position that "it is against the reasons of fairness" as is stipulated under Art. 282-v, Par.8 , item 5 of the CPC.

In any case, the release itself in such a case should be in compliance with the situation pursuant to Art. 358, Par. 1 of the CPC where among other things it is stipulated that the defendant who is held in detention shall be released if the reasons for placing him in detention have ceased to exist.

A dilemma has emerged in the judicial practice, what should be done with the detention in cases where the detention was not dealt with in the signed plea agreement, but the defendant, who has otherwise agreed to the imposed prison sentence as specified in the agreement, holds that he should be released from detention until the correctional institution summons him to serve the rest of his sentence. In my opinion, the provision under Art 358, Par. 6 of the CPC should be applied in such a case, i.e. that the defendant remains in detention until he is referred to a correctional institution, although, in truth, it may often be a relatively short period of time that the defendant is supposed to serve as the remainder

of his sentence. Moreover, quite often the defendant really has important reasons for wanting to be released for a certain period of time until he is called to serve the remainder of his sentence in order to resolve for instance some family and livelihood issues.

Conclusion

In conclusion, it should be noted that personal freedom is one of the fundamental requirements which should be generally enjoyed by everyone and to which everyone should be entitled. Restrictions of the right to liberty must be an exception and may be accepted only when there are clear, impartial and realistic reasons to justify them and it must be expounded on in detail rather than laid out as a cliché formulation containing just the legal definition without any critical analysis by the court in question. Detention as the most severe measure which secures the presence of the defendant during the criminal proceedings requires especially careful review and a responsible approach of the court when deciding on this matter.

Ljubinko Mitrović, PhD[1]

Types of Simplified Procedure Used in Misdemeanour Matters in BiH

a) Instituting Misdemeanour Proceedings – An Overview

"Procedure" in general is usually understood to mean a method of operation which is defined as consisting of actions undertaken in an identical manner in all the identical cases.[2] The notion of "misdemeanour proceedings" is differently construed and various meanings are attributed to it in theoretical approaches to misdemeanour procedural law, mainly depending on the notion's content as its basic element and on the author addressing the issue. Nevertheless, it seems unquestionable that misdemeanour proceedings represent proceedings provided for under the law as those conducted when misdemeanours are perpetrated and in which parties thereto take certain procedural actions and establish certain procedural relations in order that the competent court or an authorized body would pass a proper and lawful decision in a certain misdemeanour matter.[3]

Most commonly, current legislation governing misdemeanour procedure distinguishes between two types (forms of procedure) of misdemeanour proceedings depending on the type and gravity of the offence, as well as on the qualities of the perpetrator; namely, there are: 1) common or regular misdemeanour proceedings (these are common court proceedings conducted after it has been established that a misdemeanour has occurred; during those proceedings, but after it has been established that a certain person is the perpetrator, it is established whether they are liable for the misdemeanour or not, and if they are also found liable, an appropriate penalty is imposed) and 2) special misdemeanour proceedings (these are different from the common ones in terms of parties against which they are brought or in terms of authorities before which they are

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2 Mitrović, Lj. – Mandić, M.: *Upravni postupak i upravni spor*, Panevropski univerzitet APEIRON, Banja Luka, 2011
3 Mitrović, Lj.: *Prekršajno pravo – materijalno i procesno*, Panevropski univerzitet APEIRON, Banja Luka, 2010

conducted or in terms of specific issues resolved therein). The following must surely be included in these special or specific types of proceedings undertaken by competent authorities: a) proceedings against minors (these refer to special proceedings brought against juvenile offenders; as a rule, a minor is understood to mean any person who at the time of the commission of a misdemeanour has attained 14 years of age but has not attained 18 years of age; the law lays down special requirements for sentences and punishments imposed on minors, including even special misdemeanour proceedings which differ from the common proceedings brought against adult offenders; misdemeanour proceedings against minors are urgent and require that minors be treated with consideration and an opinion to be provided by a competent social care centre; minors are summoned through their parents or guardians; special duties are prescribed with regard to testifying in these type of proceedings, etc.); b) procedure for levying a fine at the place where a misdemeanour has been committed or the so called proceedings for the imposition of criminal sanctions without holding a trial (it refers to specific procedures in which officers authorised by the law may impose and levy on-the-spot fines on offenders, provided that those persons have been caught in the commission of a misdemeanour; authorized persons may not set the amount of a fine, they may only levy it; regulations stipulate the fixed amounts of fines levied by officers; officers issue receipts for levied fines in which they cite the misdemeanour which has been committed and the amount of the fine which has been imposed and levied; no legal remedies are allowed in cases of thus imposed and levied fines, etc.) and c) damages compensation claims or claims for restitution of money to persons who have been wrongly punished (this refers to proceedings conducted for compensation of damages to persons who have been punished for misdemeanours by final rulings, but the misdemeanour proceedings were discontinued based on an extraordinary legal remedy; persons who have been wrongly punished in misdemeanour proceedings are entitled to compensation of damage suffered as a result thereof; likewise, any person who has been wrongly punished is entitled to a restitution of the paid fine).

On the other hand, from the viewpoint of authority before which a misdemeanour matter or offence is disposed of, there are a) misdemeanour proceedings conducted by state administrative authorities (similarly, these proceedings may either be regular proceedings or a procedure for levying a fine at the place of the commission) which were very much commonplace in the states that made up the former Yugoslavia and b) misdemeanour proceedings that are launched, conducted, and closed by an authorized body by issuing a misdemeanour warrant.

A special type of proceedings in misdemeanour cases which had a number of favourable properties and was in use in the Republic of Srpska for a long time was the so-called misdemeanour summary proceedings. The essence of summary proceedings was that misdemeanours courts were given an opportunity to hand down rulings punishing persons pursuant to a motion to institute misdemeanour proceedings and based on documents and evidence which were filed even without holding an oral hearing, that is without summoning and examining a defendant. In these proceedings, only fines not exceeding those stipulated by the law could be imposed on a defendant for whom the court found to have been guilty of a misdemeanour (protective measures and decisions on damages compensation claims could not be imposed in summary proceedings). Defendants were entitled to file objections against decisions i.e. rulings made in such proceedings, after which the rulings had to be suspended and full or common proceedings had to be conducted. At that time, misdemeanour summary proceedings were widely in practice and according to statistical information, more than half the misdemeanour cases were settled in that way. Predominantly, defendants did not object to rulings on their punishments for the simple reason

that engaging in any common proceedings would entail losing time and incurring more costs as opposed to mild punishments most frequently handed out in summary proceedings. From a statistical point of view, road traffic misdemeanours were the ones which were most frequently disposed of in summary proceedings. At present, misdemeanour summary proceedings in which decisions i. e. rulings are handed down at an earlier stage in the proceedings without an oral hearing do not exist in the Republic of Srpska (to wit, Article 216 of the RS Misdemeanour Act published in the *Official Gazette of the Republic of Srpska* no. 12/1994 through 40/1998 was struck down as unconstitutional i.e. contrary to the RS Constitution pursuant to a decision by the RS Constitutional Court no. U-8/2000 dated December 27, 2000).[4] However, regardless of all its drawbacks, these proceedings stood for a very successful, efficient and suitable model for trying numerous misdemeanour offences. In its decision, the RS Constitutional Court found that statutory provisions governing these proceedings were contrary to the RS Constitution, under which no person who is available to the court may be punished unless they have been given an opportunity to be heard and to defend themselves, *i.e.* no proceedings may be conducted before a court of law against any offender without a summons and a hearing on condition that the offender has been available to the court (Article 19 of the RS Constitution).[5] In our opinion, the decision passed by the RS Constitutional Court was by all means too inflexible, in particular considering the fact that the above mentioned defendant's rights could not have be violated or denied by such summary proceedings since defendants were always able to gain access to common proceedings in which they could exercise their rights in the full.

Current legislation governing misdemeanour procedure in Bosnia and Herzegovina and the Republic of Srpska distinguishes two classes of misdemeanour proceedings, namely: a) misdemeanour proceedings initiated and conducted by means of a misdemeanour warrant issued by an authorized body and b) misdemeanour proceedings instituted by a party filing a motion to that effect with the competent court.[6]

Therefore, the final and the only type of a simplified model of settling misdemeanours (aside from the standard one taking place in a court of law after the filling of a motion to institute misdemeanour proceedings), which was introduced into the laws governing misdemeanours in the Republic of Srpska and Bosnia and Herzegovina in 2006, when the RS Misdemeanour Act and relevant BiH misdemeanour acts were passed, is the so-called misdemeanour warrant. According to legislator's words, a misdemeanour warrant was a significant, perhaps even the most significant novelty introduced into the misdemeanour practice in Bosnia and Herzegovina or in order words, it emerged as a result of a years-long reform of misdemeanour law and system. On the other hand, the lawmaker justified the introduction of this instrument by stating that in such a manner, the previous procedure for levying fines at the place of the commission as a special type of misdemeanour proceedings had been eliminated, thus making it more efficient and achieving judicial economy. Presently, it is also provided for as a special instrument for bringing

4 Decision by the RS Constitutional Court no. U-8/2000 dated December 27, 2000 (*Official Gazette of the Republic of Srpska*, number 4/2001)

5 Constitution of the the Republic of Srpska and its Amendments I to CXXII (*Official Gazette of the Republic of Srpska*, no. 3/92 through 19/2010)

6 Mitrović, Lj.: Komentar *Zakona o prekršajima Republike Srpske*, Comesgrafika, Banja Luka, 2006

and conducting misdemeanour proceedings in the laws of Slovenia,[7] Croatia,[8] and most recently in the Montenegrin Misdemeanour Act.[9]

b) Misdemeanour Warrant

Under the provision contained in Article 32, paragraph 1 of the RS Misdemeanour Act, an authorized body shall issue a misdemeanour warrant should they find that occurrence of any misdemeanour within their jurisdiction has been established in any of the following ways: 1) it has been directly observed by an authorized officer of the authorized body in the course of inspection, control, or survey which fall within their competence, as well as by inspecting official records of the competent authority; 2) based on information obtained by using monitoring equipment or measuring instruments; 3) during inspection or other type of controlling activity, by inspecting documents, checking premises or goods or in some other manner provided for in the law or 4) based on a guilty plea by a defendant before the authorized body at the place of the commission of a misdemeanour or in some other court or administrative proceedings. On the other hand, misdemeanour warrants may be issued only in the following cases: 1) when the relevant law or other regulation stipulates that a certain misdemeanour carries a fixed fine; 2) when a fine to be imposed by the authorized body by means of a misdemeanour warrant may be calculated applying a mathematical formula; or 3) when the authorized body decides to impose the minimum *i.e.* initial fine or a protective measure which is the shortest in duration or the protective measure of seizing the item as stipulated by such law or other regulation.[10]

In addition to fines, authorized bodies may impose protective measures by issuing misdemeanour warrants: namely the measure of seizure of items and the measure of a driving ban /disqualification from driving/ lasting the shortest period of time stipulated in the law. Misdemeanour warrants as a means of launching and conducting misdemeanour proceedings may not be used in relation to minors, *i.e.* in proceedings involving minors.

The contents and form of a misdemeanour warrant are defined in detail by the RS Misdemeanour Act and it is mandatory to issue it in writing. There is a place on the warrant for a defendant's signature in case he should request that the case be adjudicated by the court. Various authorized bodies may have their own forms for misdemeanour warrants, providing they are approved by the RS Ministry of Justice. Also, a misdemeanour warrant is made up of an original and at least two copies. The original is kept by the authorized body, while the two copies are served on the defendant.

Under the original law, misdemeanour warrants could be served in these three ways: 1. by serving them in person, 2. through the mail and 3. by attaching or leaving them at a safe and easily noticeable place on a motor vehicle. The last two ways of serving misdemeanour warrants on defendants had provoked a considerable discussion among legal practitioners and professionals, including frequent mentions of human rights, which had finally led to appeals and assessment of

7 Misdemeanour Act of the Republic of Slovenia (*Official Gazette of the Republic of Slovenia*, no. 7/2003 through 51/2006)
8 Misdemeanour Act of the Republic of Croatia (*Official Gazette*, number 107/2007)
9 Misdemeanour Act of the Republic of Montenegro (*Official Gazette of Montenegro*, no. 1/2011; 6/2011 and 39/2011)
10 Mitrović, Lj.: "Prekršajni nalog kao način pokretanja prekršajnog postupka", *Pravna misao, Časopis za pravnu teoriju i praksu*, br. 9-10, Sarajevo, 2005

whether those provisions were constitutional or not. Ultimately, it was found by the decision of the RS Constitutional Court number U-28/10 of September 27, 2011 that Article 34, paragraph 3 of the RS Misdemeanour Act which read "When a misdemeanour warrant is served through the mail, it shall be deemed delivered when five (5) working days have expired after the authorized body mailed it at the post office. When a misdemeanour warrant is left on a motor vehicle, the date of service shall be the date on which it is left on the vehicle" was not in accordance with the RS Constitution. Naturally, since a need arose to harmonize the provisions contained in the RS Misdemeanour Act with the said decision of the RS Constitutional Court, the RS Ministry of Justice proposed that a Law on Amendments to the RS Misdemeanour Act be passed.[11]

After receiving a misdemeanour warrant, a defendant may accept liability for the committed misdemeanour in two ways: 1) by paying a fine and settling any other liabilities that are specified in the misdemeanour warrant within a payment deadline stated on the warrant. By paying the fine, the defendant has renounced his right to file an objection against the misdemeanour warrant, which means that at no later date may he refuse or deny his liability or appeal against the amount of his fine i.e. type of his misdemeanour penalty or the cost of the proceedings. However, should the defendant pay the fine and other liabilities mentioned in the warrant within the given eight-day deadline and then reconsider his decision and move for the matter be adjudicated by the court, the court shall deny such a motion on grounds that the defendant has already accepted his liability; 2) by notifying the authorized body, after receiving a misdemeanour warrant, about accepting the misdemeanour penalty cited thereon, provided that such an option has explicitly been made available to the defendant in the warrant. The defendant is obliged to provide the authorized body with this notice by which he accepts his penalty as specified in the warrant in writing and he must accept the penalty or penalties (if there is more than one) in its/their entirety.

Accepting liability for a committed misdemeanour by omission is another possible situation that might occur after a defendant has been served with a misdemeanour warrant. According to the wording of the Act, a defendant is deemed to have accepted liability for a misdemeanour by omission providing that the following conditions have been satisfied: a) when a misdemeanour warrant has been duly served on the defendant in one of the ways provided for in the Act and b) when the defendant does not accept liability for the misdemeanour within the deadline specified in the warrant. Under these conditions, the warrant becomes final and enforceable since the defendant has accepted liability by omission and the authorized body that issued the misdemeanour warrant will order the defendant to pay an additional fee in the amount of BAM 20. As a matter of course, the fee will be registered in the Register of Fines and it will serve to defray the costs incurred by the authorized body for the service of the misdemeanour warrant through the mail.

A third possible situation occurs when a defendant on whom a misdemeanour warrant has been served wants the matter of misdemeanour proceedings to be decided by the competent court. In

11 The Law on Amendments to the RS Misdemeanour Act was discussed and adopted in the form of a Draft Law at a session of the RS National Assembly held on May 15, 2012. The following was highlighted in the Explanatory Memorandum to the Draft Law: The reason for passing this Draft Law can be found in the need to harmonize its provisions with the Decision of the RS Constitutional Court number U-28/10 of September 27, 2011 which by abrogating the provision found that a duly served misdemeanour warrant represents a prerequisite for defendant's further actions and that by laying down that a misdemeanour warrant is deemed served in the way stipulated in the contested provisions of Articles 35 through 37 of the RS Misdemeanour Act (*Official Gazette of the Republic of Srpska*, no. 34/2006; 1/2009; 29/2010 and 109/2011), the underpinning principle from Article 16 of the RS Constitution was being restricted. Namely, the said Article laid down that each person is entitled to equal protection of their rights before the court and other state authorities and organizations and that everyone is guaranteed the right to appeal.

such a case, the defendant is bound to: 1) request that the case be adjudicated by the court by placing his signature on a previously specified place on copies of the misdemeanour warrant, after which he is to return one of the two previously served copies, namely the signed one, to the competent court, naturally, in a manner specified in the warrant and prior to the expiry of the deadline specified in the warrant, 2) appear before the competent court on the day and at the hour for which the oral hearing on the warrant has been scheduled (providing the hearing was scheduled for a specific hour by the authorized body and the court) or, if the date has not been defined, on the day for which the oral hearing has been scheduled by the court. In this third possible situation, it is perfectly clear that a decision on adjudication, or in other words, the burden of filing an objection moving for adjudication is on the person who has received the misdemeanour warrant, that is, whose liability has been decided by the warrant (otherwise, the imposed fine is made final and enforceable). Should the defendant file for the case to be adjudicated by the court, misdemeanour penalties cited in the misdemeanour warrant are deemed null and void, which in turn means that his motion for adjudication, if filed on time, has a suspensive effect and stays the enforcement of the warrant. Only by filing for adjudication, the defendant becomes potentially subject to a higher fine or any penalty, even a stricter one, as permitted by the law (this also includes fines higher than those as per misdemeanour warrant, which should certainly be made a rule) and being ordered to paying court costs.

Misdemeanour warrants are mostly issued for traffic misdemeanours (in more than 95 percent of the cases), but they can also be used in cases of other types of misdemeanours, such as offences against public peace and order, violations of tax and customs laws, violence at sporting events, firearms and ammunition, etc.

c) Strengths and Weaknesses of this Type of Misdemeanour Procedure and Its Use In the Republic of Srpska

The above facts lead to a conclusion that the concept or instrument of the so-called misdemeanour warrant provided for in the most recently enacted legislation governing misdemeanours in the Republic of Srpska (and Bosnia and Herzegovina) has the following characteristics: a) providing for a misdemeanour warrant has resulted in eliminating the previous procedure for levying fines at the place of the commission as a special type of misdemeanour procedure to which a range of valid objections was made, in particular with regard to corruption among authorized persons who were in charge of levying such fines; b) procedure for issuing misdemeanour warrants is a subtype of summary or simplified misdemeanour proceedings by means of which the lawmaker, and this can be easily noticed, intended to decrease the workload of Basic Courts with regard to misdemeanour cases they handle; c) perhaps the greatest aim of the misdemeanour law reform has been attained by introducing the misdemeanour warrant; consequently, by adopting this manner of initiating misdemeanour proceedings, the reform of misdemeanour procedure has been carried through in such a way that it was turned in a brand new, more modern, more purposeful, more efficient and more economical penal procedure which is more successful in achieving balance between common i.e. social and individual interests; on the other hand, improving the efficiency of misdemeanour proceedings, while particularly emphasizing one of their fundamental principles, that of judicial economy, implicitly included that at the same time an appropriate level of defendant's rights had to be secured during misdemeanour proceedings; in any case, introducing the misdemeanour warrant has resulted in costly and protracted misdemeanour trials going

into history; d) introducing the misdemeanour warrant instead of payment of fines at the place of the commission has greatly contributed to successful application of the principle of legality to misdemeanour proceedings (a number of procedural instruments has been provided for to that end, for instance restoration to the previous state or legal remedies); e) by accepting such a concept, a considerably more significant role and powers have been given to authorized bodies since misdemeanour proceedings are simultaneously instituted by issuing a misdemeanour warrant and most frequently, proceedings are ended when the fine cited on the warrant is paid, over which solely misdemeanour courts used to have jurisdiction under the previous law; f) paying the fine cited on a warrant is more favourable for the defendant given the fact that adjudication in his misdemeanour matter, which makes him potentially subject to a heavier misdemeanour penalty and payment of court costs, is excluded[12] and g) certainly, the misdemeanour warrant provides authorized bodies with a possibility to impose lawful and proper misdemeanour penalties with minimum court costs.

With regard to the weaknesses of this manner of initiating and conducting misdemeanour proceedings, they can be brought down to the following: a) it happens fairly often in practice that after a misdemeanour warrant has been issued, certain circumstances occur which affect the effectiveness and efficiency of repressive actions taken by authorized bodies (which results in delaying, or in other words avoiding payment of fines), b) a relatively low number of levied fines poses a separate problem not only with regard to this procedure, but with regard to the common procedure as well, which ends with the ruling on a misdemeanour; c) the issue of human rights guaranteed under the Constitution and international legal documents also arises in connection with a number of procedural instruments provided for in BiH misdemeanour laws; d) maintaining the Register of Fines and keeping records of misdemeanours, or more precisely electronic registers of imposed fines and court costs, is also accompanied by considerable problems; namely, since the Register is owned by the Agency for Identification Documents, Registers and Data Exchange of Bosnia and Herzegovina or the IDEEA, problems that occur are primarily related to difficulties concerning data retrieval or even impossibility thereof, then inability to oversee the execution of misdemeanour warrants, i.e. decisions on motions for adjudication, as well as to the lack of promptness on the part of the Agency because it happens quite often in practice that there are cases in which a party pays a sum of money towards settling his misdemeanour fine and his payment is not registered in the database, so he is continued to be registered as a debtor and this is only found out when he needs to exercise one of his rights which is then denied to him because of a failure to record his payment in the Register; e) obviously, there are serious problems with regard to the fact that enforced collection is not functional since according to information available from the RS Ministry of the Interior, a large number of requests are forwarded to the RS Tax Administration for enforced collection and they remain unsettled;[13] enforced collection of fines imposed in misdemeanour proceedings on persons who neither have income nor property registered in their name poses a separate problem (currently, the number of such persons is rising, especially of those who belong in the category of the so-called irresponsible citizens, who precisely for those and some other crime-related reasons manage in various ways to stay *de jure*

12 According to available statistics, the right to have a matter adjudicated by the court following an issued misdemeanour warrant has been claimed by one in every ten citizens, which points to a fact that authorized persons have properly used their powers to issue warrants in a high percentage of cases.

13 According to information obtained from the "Centre" Police Station in Banja Luka, during 2011, 195 requests were forwarded to the RS Tax Administration to commence enforced collection of fines imposed by virtue of misdemeanour warrants which had not been paid within the time limit provided for in the law. The Administration executed no more than ten forwarded misdemeanour warrants, or in other words, enforced collection for ten misdemeanour warrants by which fines were imposed.

without any property, while *de facto* owning property of great value or other tangible assets); f) when misdemeanour warrants are issued against defendants falling into the category of people who do not have permanent residence in Bosnia and Herzegovina, a problem arises the moment they state that they do not have any financial assets to pay their fines and g) since misdemeanour warrants are printed on A4 sheets of paper, their content and format present a problem for an enormous number of authorized persons, in the first place policemen, in terms of their day-to-day practical use, carrying and filling out.

According to official data, in the period January 1, 2009 – April 30, 2011, authorized officers of the BiH Indirect Taxation Authority issued a total of 31,666 misdemeanour warrants and filed 1,281 motions to institute misdemeanour proceedings. Until now, the Authority has filed a total of 125 appeals against rulings made by the competent courts.

According to information from the RS Ministry of the Interior, the number of motions to institute misdemeanour proceedings was as follows:

a) public peace and order: 2007 – 4,319; 2008 – 3,887; 2009 – 3,392; 2010 – 3,108; 2011 – 2,931;
b) traffic violations: 2007 – 12,028; 2008 – 11,428; 2009 – 8,777; 2010 – 5,708; 2011 – 5,603;
c) firearms and ammunition: 2007 – 216; 2008 – 248; 2009 – 243; 2010 – 338; 2011 – 193.

During 2011, 681 motions to institute misdemeanour proceedings were filed for domestic violence offences (a total of 1,047 individual misdemeanours), 41 motions were brought on account of violence at sporting events (a total of 69 individual misdemeanours), 4 motions were brought on account of violations of the Public Gatherings Act (a total of 14 individual misdemeanours), 9 for violations of the Protection of Persons and Property Act (a total of 27 individual misdemeanours), and 196 motions to institute misdemeanour proceedings were brought in other cases which were within the jurisdiction of the police authorities (a total of 274 individual misdemeanours).

According to information from the RS Ministry of the Interior, the number of misdemeanour warrants was as follows:

a) public peace and order: 2007 – 3,448; 2008 – 3,905; 2009 – 4,523; 2010 – 4,671; 2011 – 5,424;
b) traffic violations: 2007 – 156,377; 2008 – 199,059; 2009 – 236,344; 2010 – 211,800; 2011 – 243,774;
c) firearms and ammunition: 2007 – 37; 2008 – 79; 2009 – 92; 2010 – 146 и 2011 – 112.

According to information from the Federal Police Administration of the BiH Federation, in 2010 there were 10,603 motions to institute misdemeanour proceedings and 441,114 misdemeanour warrants were issued for traffic violations, while 7,730 motions to institute misdemeanour proceedings were filed and 12,906 misdemeanour warrants were issued for violations of public peace and order.

Final remarks

Having considered and analysed the presented statistical indicators on the number of issued misdemeanour warrants, particularly with regard to the proportion of the number of issued misdemeanour warrants to the number of motions to institute misdemeanour proceedings and having stated the positive (and negative) aspects of this type of proceedings conducted in misdemeanour cases, after more that six years since the latest RS Misdemeanour Act began to be applied, it can most certainly be said that the idea of the misdemeanour warrant has achieved its primary aim. Because it is clear that by having introduced the misdemeanour warrant we have obtained an exceptionally efficient and purposeful misdemeanour and procedural instrument, which contributes to achieving judicial economy. On the other hand, introducing the misdemeanour warrant has resulted in the elimination of the previous procedure for levying fines at the place of the commission which was as a special type of procedure followed by authorities in charge of misdemeanour proceedings and it used to be very common in the region; certainly, it had a number of faults and a range of objections were made to it, the most important one being widespread corruption among those who were in charge of levying such fines. Naturally, after the introduction of the misdemeanour warrant, "ready money" has no longer been made available to authorized persons who work for authorized bodies (in other words, policemen and inspectors in the first place) and actions of a penalized person after they have been issued with a misdemeanour warrant and possible choices they are presented with, above all to file for their case to be adjudicated by the court, provide a guarantee that their fundamental rights and freedoms can be exercised.

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9. Misdemeanour Act of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, number 41/2007);
10. Misdemeanour Act of the Republic of Slovenia (*Official Gazette of the Republic of Slovenia*, no. 7/2003 through 51/2006);
11. Misdemeanour Act of the Republic of Croatia (*Official Gazette*, number 107/2007);
12. Misdemeanour Act of the Republic of Montenegro (*Official Gazette of Montenegro*, no. 1/2011; 6/2011 and 39/2011)

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Seizure of Proceeds from Crime and the Simplification of the Form of Proceedings in Criminal Matters

1. The Seizure of Proceeds from Crime and Criminal Legislation in BiH

One of the objectives of the provisions of the criminal legislation in RS and BiH[3] is to ensure the observance of the fundamental principle of the criminal law which states that no one is allowed to retain the material gain acquired through the commission of a criminal offence. Seizure of proceeds from crime implies the seizure of precisely determined material gain defined by the place and time of the commission of a certain criminal offence, except in cases in which the extended seizure of proceeds from crime is applied. The legal provisions related to the seizure of proceeds from crime in the Criminal Code of BiH may be found in a separate chapter (Chapter XII) under articles 110, 110a, 111 and 112. The provisions related to substantive law on the seizure of proceeds from crime are listed in the Criminal Code of RS, CC of the Federation of BiH and Brčko District BiH. CC RS regulates this matter in

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3 Criminal Code of Republika Srpska (Official Gazette of Republika Srpska, no 49/03; 37/06 ; 70/06 and 73/10), Criminal Code of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, no. 3/03; 32/03; 37/03; 54/04; 61/04; 30/05; 53/06; 55/06; 32/07 and 8/10); Criminal Procedure Code of Republika Srpska (Official Gazette no. 100/09 – Consolidated Text); Criminal Procedure Code of Bosnia and Herzegovina 3/03, 32/03, 36/03, 26/04, 63/04, 63/04, 13/05, 46/05, 48/05, 76/06, 27/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09); Criminal Code of FBiH (Official Gazette no. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11); Criminal Procedure Code of FBiH (Official Gazette of FbiH no. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 09/09, 12/10); Criminal Code of BD (Official Gazette of BD no.10/03, 45/04, 06/05, 21/10); Criminal Procedure Code (Official Gazette of BD no. 10/03, 48/04, 06/05, 12/07, 14/07, 21/07); Criminal Code of the Federation of BiH (Official Gazette of FbiH no. 36/03, 37/03, 21/04, 69/04, 18/05 and 42/10); Criminal Code of Brčko District (Official Gazette of BD no. 10/03, 45/04, 06/05 and 21/10). Hereinafter: Criminal Code of Republika Srpska Criminal – CC RS; Criminal Code of the Federation of Bosnia and Herzegovina –CC FBiH; Criminal Code of Brčko District – CC BD; Criminal Procedure Code of Republika Srpska – CPC RS; Criminal Procedure Code of the Federation of Bosnia and Herzegovina - CPC FBiH; Criminal Procedure Code of Brčko District – CPC BD; Criminal Procedure Code of Bosnia and Herzegovina – CPC BiH

Chapter VII, under articles 94, 95 and 96. CC of the Federation of BiH deals with this subject matter in Chapter XII, under articles 114, 115, 116; and CC of Brčko District in Chapter XII under articles 114, 115, 116. Upon closer inspection of the aforementioned codes certain distinctions may be identified when it comes to regulating this institute under criminal law compared to CC RS. Specifically, in terms of substantive prerequisites for the seizure of proceeds from crime there is a difference between the CC BiH, CC FBiH and CC BD and CC RS. The first three Codes have introduced an innovation – a provision in the substantive criminal legislation which refers to the "extended seizure of proceeds from crime" with a reversed burden of proof, "reduction of the standard of proof" (CC BiH, Art. 110, Par. 3, CC FBiH and CC BD, Art. 114, Par 3). CC RS[4] is an exception in this case since it does not contain such provisions. Such an approach complies with the international documents which have been signed and ratified by BiH.[5] This provision introduces legal prerequisites as a result of particular factual circumstances, as well as a transfer of the burden of proof.

According to the previous provision of the Article 110, Par. 3 CC BiH (Official Gazette BiH no. 03/03 it is stipulated that the court may seize the proceeds pursuant to Paragraph 1 "in separate proceedings if there are valid reasons to believe that the said proceeds have been acquired through the commission of a criminal offence, while the owner or the beneficiary is not capable of providing evidence proving the proceeds have been acquired legally". If interpreted consistently, this article of the Code which states that no one is allowed to retain the proceeds from crime fully justifies the introduction of the said legal provision which allows the seizure of proceeds from crime even when the criminal proceedings could not have been conducted and the decision could not have been reached establishing the criminal offence has been committed which in turn resulted in the proceeds in question. The provision under Paragraph 3, although according to the wording of the provision it refers to the proceeds under Paragraph 1 (the proceeds for which it has been determined that they are the result of a crime), offers the possibility of seizure of proceeds for which there is only "a valid reason to believe they result from a crime". The burden of proof that the said proceeds have been acquired legally is transferred to the owner or the beneficiary, who does not have to be the same individual reasonably suspected of having committed the said offence which resulted in the said proceeds.

The Criminal Procedure Code of BiH does not contain the provisions which would apply to a separate procedure of seizing the proceeds pursuant to Par. 3 of the Art. 110 of CC BiH, which has caused these provisions under the said article not to be applied in the judicial practice. The courts have not been applying the extended seizure of proceeds in cases in which, based on the particular facts, it is established that the proceeds in question are derived from the criminal activities of the convicted person in the period prior to the judgment declaring him guilty of the criminal offence in question or if there is no judgment on his guilt, based on the criminal activities of the said person which the court would deem reasonable under the specific circumstances of the case in question, also in cases in which the value of the determined assets is incompatible with legal income. Judicial practice of this region

4 Until the adoption of the new Law on the Seizure of Assets Acquired through the Commission of a Criminal Offence (Official Gazette of Republika Srpska, no. 12/10) in which separate proceedings, with the reversed burden of proof, are regulated.

5 The existence of knowledge, intent, or purpose which constitute an element of the criminal offence of money laundering or the offence in question, may be assumed on the basis of particular factual circumstances (Art.6, Par. 2, item c of the Strasbourg Convention 1999; Art. 9, Par. 2, item c of the Warsaw Convention, the Recommendations of FATF – Recommendation 2)
The reversal of the burden of proof – reduction of the standard of proof is stipulated in a series of the said international documents. (Vienna Convention of 2003; the EU Strategy for the Prevention and Control of Organised Crime 2000, recommendation 19; Recommendation 3 of FATF; Framework Decision of the Council of Europe from 2005 introduced the obligation of extended seizure; UN Model Law)

is not in compliance with the judgments of ECHR which are based on the international documents and standards.

The provision under Art. 110, Par. 3 of CC BiH (as well as CC FBiH and CC BD) only establishes the legal grounds for the proceedings that are not criminal to be conducted during which the guilt of the offender is not being determined, but the (il)legality of the proceeds in question. It may be concluded that this is not related to the principle of the presumption of innocence since the criminal liability is not being determined in such proceedings but the origin of assets. In terms of the current procedural provisions of the CPC, it may be said that it is not possible to conduct separate proceedings. Procedural provisions on the seizure of proceeds from crime refer exclusively to the situation when criminal proceedings are already in progress, i.e. when the court decision has been passed – which is contrary to CC of BiH, Art. 110, Par. 3.

The grounds for the seizure of material gain are a relevant court decisions.

The Amending Law to the CC BiH (Official Gazette of BiH, no. 8/10) has changed the provision on the extended seizure of proceeds from crime. Instead of Art. 110, Par. 3 a new article 110a has been adopted "the extended seizure of proceeds from crime", applicable to the criminal proceedings under chapters XVII, XVIII, XIX, XXI, XXI A, and XXII of the Criminal Code[6], "the court may pass a decision pursuant to Art. 110, Par. 2 to also seize the proceeds for which the prosecutor secures sufficient evidence proving the said proceeds are reasonably believed to be the result of the said criminal offences, while the offender has not been able to provide evidence to the contrary". The amendments to the CC omit in the provision the phrase "in separate proceedings", which is a setback, considering the aforementioned international standards and provisions under comparative law of European countries aiming to combat crime through the proceedings which are not about establishing criminal liability but the legality of the acquired assets.

The legal provision of the Art. 110, Par. 3 from 2003 allowed the extended seizure of illegal assets from the owners and beneficiaries, whereas in the amendments to the Code in 2010, under Art. 110a it is specified that the seizure is applied to the perpetrator of a criminal offence. Such a solution, it must be said, is also a setback in terms of the international standards.

Upon further analysis of the provision 111 of the CC BiH[7], it may be noted that with regard to the seizure of proceeds from crime the provision is legally binding, which follows from the phrase "from the perpetrator shall seize", whereas the said provision is optional with regard to the individuals they are

6 (a) crimes against humanity and values protected under international law, (b) criminal offences against economy and single market, criminal offences related to customs, (c) criminal offences of corruption, criminal offences against official or other duty, (d) criminal offences against armed forces of BiH, criminal offences referred to under a separate chapter of CC entitled "conspiracy, preparation, association and organised crime".

7 Art. 111 of the CC BiH regulates the method of seizure of proceeds from crime. These provisions show that the law does not specify what proceeds from crime means, so there is no definition of it, it just defines what it may consist of. In addition to the aforementioned Par. 2 and 3 of the Art. 111 of the CC BiH, Par. 1 of the said article stipulate that money, objects of value and any other proceeds from crime may be seized from the perpetrator, and if the seizure is not an option, the perpetrator shall undertake to effect a payment commensurate to the acquired material gain. Proceeds from crime may be seized from the persons the proceeds have been transferred to without any charge, or with a charge that does not match the actual value obtained, if such a person had known or could have known the said proceeds were obtained through the commission of a crime. Under Par. 1 of this article, the term proceeds from crime is not defined, only what it consists of. Specifically, it may be comprised of money, objects of value and any other proceeds. This provision is formulated quite broadly and it may be concluded that the proceeds from crime may consist of any type of assets, i.e. it may include objects or rights, it may be movable or real property, or it may consist of legal deeds or documents which prove the title or right to such property.

transferred to. The aforementioned gives rise to a certain dilemma in practice as to whether the norm is imperative due to the phrase "may seize". Pursuant to Art. 392 of the CPC, proceeds from crime are determined in the criminal proceedings *ex officio*. Consequently, the motion does not need to be filed by the prosecutor or the injured party in order to determine the said proceeds in the criminal proceedings, while the court must act on this matter *ex officio*. Paragraph 2 of this article states that the prosecutor must collect evidence during the proceedings and investigate the circumstances which are of importance for the determination of the material gain obtained through a criminal offence. In practice, the prosecutor and the court do not collect the potential evidence on the exact sum of material gain and the material gain is established *ex officio* without any pre-trial actions, which results in overturned judgments on appeal due to incomplete establishment of facts of the case or violations of the provisions of the criminal procedure.

The first instance judgment may not be overturned only in the part relating to the measure of seizure of proceeds from crime, since such a measure is imposed in a decision which determines whether the accused has committed the criminal offence he is charged with, and especially not by a special ruling after the decision becomes final on the criminal offence in connection to which the measure in question has been imposed. When the first instance court fails to pass a decision on the seizure of proceeds from crime, although it was under an obligation to do so, such an omission means that the court has overstepped the authority which has been vested in it by law. The second instance court must remedy such a violation of the Criminal Code by upholding the appeal filed by the prosecutor and impose the measure of seizure of proceeds. However, if the decision has become final, the violation of the code may be remedied by filing the request for the protection of legality. After the decision has become final, in which the seizure of proceeds from crime has been omitted, the said proceeds cannot be seized by a special ruling at a later time. It is also not allowed to partially overturn the judgment for the adjudicated criminal offence only due to the decision on the seizure of proceeds.[8]

In certain cases the juvenile offender is given neither a disposition order nor a penalty according to the principle of prosecutorial discretion,[9] although the court has determined that the offender has committed the criminal offence thus obtaining material gain. Since there is no disposition order imposed on the juvenile offender, the question is whether it is possible to impose a measure of seizure of material gain against the said offender if the said gain is acquired through the commission of the criminal offence. We hold that the juvenile offender in such a situation during the proceedings may be subject to the said measure in view of the provision stating that no one is allowed to retain the proceeds from crime and that such proceeds shall be seized.

When the court passes a judgment establishing that the accused has committed a criminal offence while in a state of mental incompetence or of significantly diminished capacity (Art. 383, Par.3 of the CPC RS) the judgment represents legal grounds for imposing on the accused the measure of seizure of the proceeds if they have been acquired through the commission of the criminal offence.

Material gain may not be seized in the event of the defendant's or suspect's death, also if the perpetrator is taken permanently ill, if he flees or the statute of limitation expires for the prosecution of the said offence. In addition, if the suspect i.e. the defendant has been given immunity from criminal

8 Ikanović, V., presentation, international scientific conference "Seizure of Illegally Gained Assets in Bosnia and Herzegovina – Present and Challenges for the Future", Banja Luka, 15-16 Nov 2012.

9 Art. 113, Par. 2 of the Law on Protection and Treatment of Children and Juveniles in Criminal Proceedings (Official Gazette of Republika Srpska", no. 13/10 of 25 Jan 2010)

prosecution, such a person cannot be subject to seizure of proceeds from crime according to the current provision. Such provisions are not in compliance with the international standards in terms of specifying "negative procedural prerequisites".

2. Plea Agreement and the Extended Seizure of Proceeds from Crime

In the part of the Code which regulates the conclusion of plea agreements, it is prescribed, inter alia, that the court must make sure that the accused has understood the potential repercussions related to the seizure of proceeds from crime when deciding on the plea agreement (Art. 231 of CPC BiH).

Judgment based on the plea agreement specifies the penalty – a criminal sanction, and a measure is imposed on the accused seizing the proceeds obtained through the commission of the criminal offence in question. The enforcement of such a measure is not specified or secured by the agreement, i.e. by the judgment, instead the accused is under an obligation in principle to effect the payment in the specified amount within a certain period of time that starts running from the day the judgment becomes final into the account of budgetary funds, under the threat of enforced payment. In these cases as well, if the courts find that the person in question has not effected the said measure, they only have an option to submit (or not) the case to the Public Attorney's Office for the purpose of enforcement, however, in most cases the convicted persons do not own the assets (it has been alienated) on which the measure could be applied. Failure to enforce the measure of seizure of proceeds from crime defeats the purpose and affects fairness and impartiality of the imposed sanction under the plea agreement.[10] In the judicial practice one can find cases in which the person was convicted for committing a criminal offence based on a plea agreement and exempt from sanction, but the measure of seizure of proceeds from crime has been imposed. The enforcement of the said measure is not specified and secured by the agreement, so the imposed measure has not been enforced according to the available data,[11] or based on the agreement a suspended sentence and a fine or just the fine, with the seizure of proceeds from crime have been imposed, but the enforcement of the said measures has not been secured by the agreement – i.e. judgment. Furthermore, in the judicial practice there are "faulty" plea agreements in which the measure for seizure of proceeds from crime (and the proceeds have been obtained) has not been included, such agreements do not have the statement of the accused stating that he has been informed of the potential repercussions related to the seizure of proceeds from crime prior to signing the agreement which is expressly prescribed as a condition for the acceptance of the plea agreement. By granting such faulty agreements the court has excluded the option of seizure of proceeds from crime committed by the accused in the judgment passed based on such a plea agreement.[12]

In accordance with the aforementioned, based on the statistical indicators and the analysis of court decisions, it may be concluded that the application of the plea agreement in the territory of BiH when

10 Zelenika, Branko, no. 011 0 K 004673 10 K-p, of 3 Sept 2010

11 See the judgment: Sead Akeljić KPV-09/05 of 14 Oct 2005

12 "Since the First Instance Court has passed a decision on the seizure of proceeds from crime from the accused under the contested judgment in the amount of 16, 160.00 KM, such a decision considering the facts related to the content of the concluded plea agreement, subsequently granted by the Court, is found to be erroneous. Since this is an error which cannot be remedied by the overturning of the contested judgment due to the fact that the cause of the said error is in a faulty plea agreement which was granted by the Court despite the fact that the Court had not made sure that the accused had been informed of the repercussions the plea agreement would have with regard to the seizure of proceeds from crime prior to the signing, this Court upholds the appeal of the Defence Counsel pursuant to Art. 329 of the CPC FBiH and passes the judgment commuting the contested judgment by reversing the decision on the seizure of proceeds of crime contained in the First Instance Judgment."The Judgment of the Supreme Court of FBiH, no. 07 0 K 004309 10 Kž of 10 Nov 2010.

it comes to the measure of seizing the proceeds obtained through the criminal offence established by the court as an element of the plea agreement is erroneous and inadequate.

In such a context, it is interesting to note the case Kž-45/06 of 26 Oct 2006. The convicted person in the said case filed an appeal with the Constitutional Court of BiH against the judgments rendered by the Court of BiH. Namely, the first instance judgment declared the appellant guilty of a continued criminal offence of human trafficking sentencing him to serve a single term of 11 years and 6 months in prison. Pursuant to Art. 110a with regard to Art. 111, Par. 1 of the CC BiH, the appellant's proceeds from crime were seized, specifically, a flat of 82 m2 in floor space, valued at 61,481.55 KM as a part of proceeds from crime. The appellant was also obliged to pay 45, 000 KM by way of compensating the proceeds obtained by the commission of a criminal offence. In his request the appellant has cited, inter alia, that his right to property under Art. II/3 of the Constitution of BiH and Art. 1 of the Protocol 1 of the European Convention, and the right to protection from retroactive application of the law under Art. 7 of the European Convention have been violated by the said judgments. The appellant cites that the seized flat was built in 2002, which means prior to the date the CC of BiH entered into force. He invokes the court's obligation to apply the law which is more favourable for the accused. In addition, the appellant is appealing the decision which ordered the seizure of proceeds from crime, namely a flat in Mostar and financial gain resulting from the said criminal offence, claiming that it has violated his right to property and that the prosecutor has not been able to establish a link between the said proceeds and the offences he is charged with. In response to the appeal the Court of BiH has upheld the judgment in its entirety and the established fact that the appellant has been registered at the Employment Agency from 2001 to 2006 while still obtaining a permit and building a flat in Mostar. Due to the lack of evidence (which was not provided by the appellant under Art. 110, Par. 3) that the appellant and his wife have had legal income, the Court reached a conclusion that the funding for the construction of the flat had come from prostitution, and that the accused has not offered any relevant evidence of legal sources of income which could have financed the said construction works on the flat.[13] With regard to this the Constitutional Court has concluded that there are no violations of the appellant's right to property from the Art. II/3 of the Constitution of BiH and Art. 1 of the Protocol 1 of the European Convention (since the interference with the appellant's property was in accordance with the law and that it was executed in the public interest and the principle of proportionality was observed).

13 In the decision of the Constitutional Court it is cited that out of the relevant regulations, among others, Art. 110, Par. 1, 2 and 3 of the CC BiH were applied (Par. 3 stipulates that proceeds may be seized if there are reasonable grounds to believe that they are the result of the commission of a criminal offence; the owner or the beneficiary is unable to provide the evidence to the contrary). With regard to the right to property and right to peaceful enjoyment of property, the Constitutional Court finds that the seized flat is undoubtedly property. The contested judgments have led to the seizure of the appellant's property. The Constitutional Court has examined whether the seizure of the appellant's property was justified. In order for the infringement of the right to property to be justified it has to: a) be prescribed by law; b) have a legitimate objective which is in the public interest; c) comply with the principle of proportionality. In this particular case the Constitutional Court finds that the property was seized pursuant to Art. 110 of the CPC BiH as well as pursuant to Art. II/3(e)of the Constitution of BiH, and Art. 6 , Par. 1 of the European Convention. The Constitutional Court also holds that it is in the general interest of the state to punish the perpetrators of criminal offences. The sanctions have a restrictive effect on the perpetrators, while the potential offenders are deterred by it. The Constitutional Court holds that the provisions under Art. 110 of the CC BiH stipulate mandatory seizure of proceeds from crime from the offenders, so the objective is to prevent the offender from "enjoying the results" of the committed offence, i.e. the unlawful gain. Therefore, the Appellant is deprived of his property in the public interest. The Constitutional Court has concluded in this particular case that the burden imposed on the appellant is proportionate to the set objective. The Constitutional Court has upheld the position of the Court of BiH in the cited judgments that the accused did not offer any relevant evidence of legal sources of income proving that the property in question had been acquired legally.

3. Seizure of Proceeds without a Criminal Conviction

This refers to the standard stating that if the requirements for the conduct of the criminal proceedings are not met due to death or absence (absconding) of the suspect, i.e. the accused, or other circumstances which preclude criminal prosecution, including the circumstance of granting the immunity, while the grounds for suspicion exist that the commission of the criminal offence has resulted in obtaining material gain or property, separate proceedings may be initiated for the seizure of such gain (also known as Confiscation without a Criminal Conviction). Several of the international agreements[14] impose such an obligation. Recommendations of FATF (Recommendation 3) suggest the seizure of proceeds without a criminal conviction (the person in question is granted immunity), whereas the burden of proof of the legal origin of the assets in question is transferred to the accused. According to the new EU Directive[15], as well, a new binding standard is established of "the absence of a criminal conviction" with the extended application of the measure ordering seizure of proceeds where criminal activity is suspected and the prevention of introducing criminal activity into legal economic flows. The Directive sets a minimal standard on basic principles:

a) Illegally acquired assets should be subject to seizure,
b) This principle should be applied as a minimal standard at least under special circumstances (when current criminal prosecution or any other future criminal prosecution of the suspect or the accused is precluded due to permanent illness of the person in question, due to illness or flight from criminal prosecution or from serving the sentence which has prevented effective criminal prosecution or when due to illness or flight the statute of limitation expires thus precluding efficient criminal prosecution, due to death of the suspect or the accused, if the immunity has been granted to the individual in question or when criminal prosecution is not possible in cases involving minors).
c) The methods of attaining the set objective may vary and the member states may pass regulations on the seizure of assets without the court judgments before the criminal courts or any other courts.

Sweden, as the current presiding state in the EU, has led the initiative to raise the minimal standard in this document as well to the civil seizure of assets.[16]

4. The Law on Seizure of Assets Acquired by the Commission of a Criminal Offence of Republika Srpska and the Simplified Criminal Proceedings

Prior to the analysis of the Law on Seizure of Assets Acquired through the Commission of a Criminal Offence[17], it is necessary to explain the difference between the two institutes that have similarities but are essentially different: the institute of proceeds from crime prescribed by the Criminal Code and Criminal Procedure Code in the territory of BiH and the institute of seizure of assets acquired by the commission of a criminal offence prescribed by the Law on Seizure of Assets Acquired through the Commission of a Criminal Offence.

14 For instance, UN Convention against Corruption –New York Convention, Art. 54, Par. 1 c.
15 On 13 March 2012 European Commission submitted for adoption to the European Parliament and the Council of Europe the Proposal for the Directive on the Temporary Seizure and Confiscation of Proceeds of Crime in the EU, Art. 3; Art. 4; and Art. 5 of the Directive.
16 See: Govedarica, M., *Oduzimanje imovine stečene izvršenjem krivičnog djela (preventivni - represivni aspekt)*, Internal Affairs College, Banja Luka, 2013, pp. 51-52
17 The Law on Seizure of Assets Acquired by the Commission of a Criminal Offence, Official Gazette of Republika Srpska, no. 12/10. Hereinafter: Law on Seizure of Assets

In order to seize the proceeds from crime it is necessary to prove cause and effect relationship between the particular criminal offence and the proceeds obtained. In cases of seizure of assets acquired through the commission of a criminal offence, criminal origin of the assets is assumed due to the evident discrepancy between the legal and illegal assets. It is essential that the committed criminal offence is listed in the Law on Seizure of Assets and it has no relevance when or through means of which particular criminal offence the said assets have been obtained. Assets included under the provisions of the said Law also refer to the period prior to the commission of the criminal offence in question which has led to the institution of the criminal proceedings.

The Court leaves the owner a portion of the assets obtained through the commission of a criminal offence by a ruling if the owner's ability to support himself or a person he is responsible for would otherwise be compromised. The proceeds from crime are seized in their entirety and the court is not allowed to leave a part of the proceeds to the convicted person regardless of his financial circumstances.

The seizure of assets is not mandatory when prosecuting a criminal offence in the criminal proceedings, whereas no one is allowed to retain proceeds from crime which are determined at the court's discretion *ex officio*.

The seizure of proceeds from crime does not have a statute of limitation, which is not the case with the assets acquired through the commission of a criminal offence (the request for permanent seizure of the assets acquired through the commission of a criminal offence must be filed within a year from the day the judgment on the committed criminal offence becomes final at the latest).

When seizing the assets obtained by a criminal offence, only the object under ownership rights may be seized, not the ownership rights itself. The ownership right itself may be subject to seizure of proceeds from crime.

The assets acquired by the commission of a criminal offence are seized by a ruling passed by the court and they may be seized from the legal successors of the testator if it has been established that the testator is the owner of the property acquired by the commission of a criminal offence, and the testator is a person against whom criminal proceedings have neither been initiated nor suspended due to his death, but in the criminal proceedings against other individuals it has been established that he owned property acquired through the commission of a criminal offence. Proceeds from crime are seized by a judgment which declares the accused guilty. The measure of seizure of proceeds from crime is executed according to the enforcement procedure; the ruling on the seizure of assets acquired through the commission of a criminal offence (temporary or permanent) is enforced by the Directorate for the Management of Seized Assets.[18]

The difference is not just in terminology, but in the substance as well. The first is the seizure of the concrete material gain, precisely determined and specified by the time and place of the commission of a certain criminal offence. The second is the seizure of all assets acquired prior to the commission of a particular offence, which are not proportionate to the income regardless of the particulars of the actions in a certain period of time and the amount obtained at that time. We hold that it is first

18 See: Govedarica, M., Oduzimanje imovine stečene izvršenjem krivičnog djela (preventivni - represivni aspekt), Internal Affairs College, Banja Luka, 2013, pp. 173-176

necessary to overcome the apparent confusion when distinguishing between these provisions which are substantially different with regard to the proceeds and the assets which are being seized. Only when the legal terms are accurately judged is it possible for the court to perform its role fully in the proceedings.[19]

By introducing the use of legal prerequisites and by transferring the burden of proof to the perpetrator of the criminal offence – in extended seizure, the Law on the Seizure of Assets has radically improved the previous system of seizure of proceeds from crime[20] since the determination of the origin of all assets in total has been made easier, as the prosecutor does not have to prove the cause and effect relationship between the committed criminal offence and the assets that are being seized. The system of seizure includes the assets that are not a direct result of the criminal offence for the commission of which the accused in question has been declared guilty. A conviction for one of the criminal offences stipulated under Art. 2 of the Law on Seizure of Assets does not mean that the assets are the result of that particular criminal offence, but that the existence of the said assets represents a prerequisite for the criminal origin of the assets, i.e. that it results from the commission of any other criminal offence which does not have to be proven. Such a provision paves the way for the efficient fight against organised crime, corruption and other serious criminal offences. This measure of seizure of assets serves as a deterrent rather than a punishment, considering that the said measure imposes the seizure of source of income from the person in question in order to prevent such assets from being used for criminal purposes. It is true that the use of these institutes requires great caution and assessment of the prerequisites for their use, but it is not restricted by the time of the commission of a criminal offence.

According to the new legal provisions, the efficiency of the seizure of assets in the plea agreement proceedings has been significantly increased. Primarily due to the timely securing of the assets. The criminal proceedings conducted against the perpetrator of the criminal offence stipulated under Art. 2 of the Law on Seizure, while a parallel financial investigation is being conducted (a report on the financial investigation is submitted and a clear discrepancy is established) may be concluded in a plea agreement according to CPC. A plea agreement must contain a decision – an agreement on assets. The Law on the Seizure of Assets and Criminal Procedure Code are applied *mutatis mutandis*. In a particular criminal case the acting prosecutor issues an order to conduct an investigation and simultaneously an order on the financial investigation. Among others, special investigative actions have been used which constituted the basis of the Report on the financial investigation (assets were transferred fictitiously to the third party or related persons). In that case, due to urgency, the prosecutor estimated that it is better to request from the competent court pursuant to Art. 138 of CPC a temporary measure to be imposed banning the use, abalienation or disposal of financial assets of the suspects and other persons in their accounts, held in several banks, and over their real property. The competent court granted the agreement and the assets valued at about 500,000.00 KM[21] which have been transferred to third par-

19 Ikanović, V., presentation, international scientific conference "Seizure of Illegally Gained Assets in Bosnia and Herzegovina – Present and Challenges for the future", Banja Luka, 15-16 Nov 2012

20 More on this: Govedarica, M., Oduzimanje imovinske koristi i usaglašenost sa međunarodnim standardima, Pravo i pravda, Sarajevo, no. 1/2012

21 Since 1 Sept 2010 when the Department for Financial Investigations and Detection of Assets Acquired through the Commission of a Criminal Offence acting according to the law (until 31 Dec 2012), 48 reports on financial investigations have been submitted to the competent prosecutor's offices, based on which the requests were filed according to which the presiding courts temporarily seized or froze assets valued at 38,375,575 KM. Out of this amount, 19,314,970 KM has been seized temporarily by the decisions of competent courts and turned over to the Directorate for Administration. Assets valued at 500,000 KM have been permanently seized and those assets (cars, computers, motor bikes etc.) by the decision of the Government of Republika Srpska have become the property of the Ministry of Interior of Republika Srpska. If statistical indicators are born in mind, the decisions of competent courts, executed cases, the decisions imposing the seizure of proceeds from crime in the territory of BiH from 2003 until the end of 2011 (735,914.24 KM seized) the practical effects of the Law on Seizure of Assets are evident.

ties as well, have been seized permanently and turned over to the Directorate for the Management of Seized Assets according to the Law on Seizure.[22]

According to the current provisions of the Law on Seizure of Assets (as well as under criminal legislation in the territory of BiH), due to negative procedural prerequisites i.e. inability to conduct criminal proceedings against the suspect or the defendant because immunity has been granted, the assets cannot be seized from such persons.

Conclusion

The plea agreement which includes the measure of the seizure of proceeds from crime which has been adjudicated is applied inadequately and erroneously. Judgments based on the plea agreements specify the sanction and the accused is subject to the measure of seizure of proceeds from crime he is charged with but its enforcement is not precisely defined and secured by the agreement so the defendant is obliged in principle to effect payment in the said amount within a certain period of time from the day the decision becomes final into the account of budgetary funds under the threat of enforced payment. In such cases, when it is determined that the person in question has not executed the imposed measure, the courts are just left with the option to refer the case to the Public Attorney's Office for enforcement, however, in most cases the convicted parties do not own any assets which could be subject to the said measure (they have alienated them). Failure to enforce the measure of seizure of proceeds from crime defeats the purpose and affects the fairness and impartiality of the imposed sanction under the plea agreement – judgment, while the sanction is minimal or below the minimum prescribed.

Bearing in mind the aforementioned, upon signing the plea agreement which includes the measure of seizure of proceeds from crime, it is necessary to specify and secure the enforcement of the said measure on which the finality of the plea agreement – the judgment shall depend. For instance, a special contract certified by a notary as an integral part of the agreement could specify the contractual relationship, e.g. transfer of ownership over real property, or an annotation on the enforcement in the event the convicted party fails to execute the imposed measure within a certain period of time. Only under such conditions shall the plea agreement – judgment imposing the measure of seizure of proceeds from crime become final under the pronounced sentence.

The four jurisdictions in Bosnia and Herzegovina should harmonise its legislation with the standard of "negative procedural prerequisites" and enable seizure of assets acquired through commission of criminal offence also in cases when criminal proceedings have been discontinued - before confirmation of indictment or during the criminal proceedings - due to death, permanent ailment, absconding, due to statute of limitation, or granting immunity from prosecution when there is probable cause that assets have been acquired through crime.

22 The judgment of the District Court of Banja Luka no. 11 0 K 009464 12 K ps-p of 26 June 2012. By the decision of the Government of Republika Srpska permanently seized assets have become the property of the MoI of RS.

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