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REVIEW OF THE DRAFT TEXT OF THE CRIMINAL CODE AND THE CRIMINAL PROCEDURE CODE AMENDMENTS

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Introductory remarks

Since the enactment of the existing codes until now, criminal law has undoubtedly been one of the most dynamic legal areas in the Republic of Serbia. One gets the impression that this is a normative construction site where existing legal institutes are not only being "built" or "amended", but also where new solutions make certain fundamental provisions of substantive and procedural criminal law meaningless or questionable. This is to some extent a consequence of theoretical discussions about legal institutes which, according to some doctrines, represent a departure from our traditional solutions, with particular emphasis on the necessity of introducing, or rather restoring, the investigative function of the court in criminal proceedings. The "reformist" contribution of the legislator in the field of substantive criminal law is also very important, based, contrary to the *ultima ratio societatis* nature of criminal law, on the understanding that criminal legislation is *bonne à tout faire* for solving most social issues.

The Criminal Code[1] was passed in 2006, and in the same year it was followed by two corrections and then eight amendments, the last of which, from 2024, resulted in the strike of the attorneys-at-law in Vojvodina on November 27, 2024.[2] Following the example of their Vojvodina colleagues, attorneys from Belgrade, Šabac, Zaječar, Leskovac, Kragujevac, Požarevac and Čačak suspended their work, prompting the Serbian Bar Association to decide on a one-day strike,[3] on December 11, 2024, due to the fact that the Criminal Code was amended without participation of attorneys-at-law.[4] Unlike other bar associations on strike, the Bar Association of

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1 Criminal Code – CC, *Official Gazette of the Republic of Serbia* 85/05, 88/05 – corr., 107/05 – corr., 72/09, 111/09, 121/12, 104/13, 108/14, 94/16, 35/19 and 94/24.

2 Advokatska komora Vojvodine obustavila rad na jedan dan – signal vlasti da nešto nije u redu u ovom društvu [The Bar Association of Vojvodina suspended work for one day - a signal to the authorities that something is wrong in this society], https://n1info.rs/vesti/advokatska-komora-vojvodine-obustavila-rad-na-jedan-dan-signal-vlasti-da-nesto-nije-u-redu-u-ovom-drustvu/ (accessed on 20 January 2025).

3 Advokatske komore Beograda i Šapca obustavile rad zbog izmena Krivičnog zakonika [The Bar Associations of Belgrade and Šabac suspended their work due to Criminal Code amendments], https://www.slobodnaevropa.org/a/srbija-advokati-obustava-rada-krivicni-zakonik/33223694.html (accessed on 20 January 2025); President of the Bar Association of Serbia: I support the strike of attorneys; a meeting of the management board is pending, https://novimagazin.rs/vesti/340481-predsednik-advokatske-komore-srbije-podrzavam-strajk-advokata-ceka-se-sastanak-upravnog-odbora (accessed on 20 January 2025).

4 Obustava rada advokata: AKS protestuje zbog izmena Krivičnog zakonika bez učešća advokature [Strike of the attorneys-in-law: BAS protests as CC was amended without the participation of the attorneys], https://www.euronews.rs/srbija/drustvo/149074/obustava-rada-advokata-aks-protestuje-zbog-izmena-krivicnog-zakonika-bez-ucesca-advokature/vest (accessed on 20 January 2025).

Vojvodina (BAV) pointed out that not only the adopted amendments to the Criminal Code but also the *upcoming* amendments to the Criminal Code and the Criminal Procedure Code were problematic.[5] According to the Vice President of the BAV, Mr. Laszlo Jozsa, at the meeting of the BAV Management Board on 22 November 20204, it was determined that "(…) Draft laws that have not undergone the analysis of the experts are being prepared… or are already in the parliamentary procedure. (…) What we see in the Draft Amendments that are now on the agenda of the National Assembly is a regression in the protection of fundamental human rights…" since "(…) the fundamental rights to express one's opinion and to express one's position… will be under the scrutiny of criminal prosecution." The attorney-at-law, Mr. Jozsa, pointed out that the planned amendments to the Criminal Procedure Code represented a step back because instead of "(...) the prosecutor's office having the role to propose evidence that should prove the validity of the indictment, the role would apparently return to the court. Therefore, we are going back to the old times when the main actor in providing evidence was not the parties to the proceedings, namely the prosecution and the defence, but the court based on the investigative principle."[6]

There has long been uncertainty among the professional community about the members of the working groups for drafting the text of the amendments to the Criminal Code and the Criminal Procedure Code. The Ministry of Justice has been silent about this, and the members of the working groups have not mentioned the affiliation at professional gatherings or in public. Therefore, based on a request to access information of public importance by the Judicial Research Centre,[7] the Ministry of Justice submitted copies of the decisions: on the formation of the working group for the Draft Law on Amendments to the Criminal Code, on the formation of the working group for the Draft Law on Amendments to the Criminal

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5 Criminal Procedure Code – CPC, *Official Gazette of the Republic of Serbia* 72/11, 101/11, 121/12, 32/13, 45/13, 55/14, 35/19, 27/21 – Constitutional Court Decision and 62/21 – CC Decision. When it comes to amendments to the Criminal Procedure Code, it is worth noting the initiatives submitted to the Constitutional Court with a request for an assessment of the constitutionality and compliance with a ratified international treaty of certain provisions of the Criminal Procedure Code. The Constitutional Court, by its Decision IUz-62/2018 of 18 April 2019, rejected the initiatives to assess the constitutionality and compliance with the ratified international treaty of the provisions of Article 51 CPC (*Official Gazette of the RS* 37/19). Subsequently, by Decision IUz-96/2015 of 2 July 2020, it initiated proceedings to determine the unconstitutionality of the provisions of Article 363, point 5, and Article 366 CPC, and at the same time rejected initiatives to assess the constitutionality and compliance with the ratified international treaty of about fifty legal provisions. See: Slobodan Beljanski, Goran P. Ilic, Miodrag Majic, "Preface", *Criminal Procedure Code*, fourteenth amended edition, according to the state of regulations as of 10 May 2023, Official Gazette, Belgrade 2023, 12.

6 The Bar Association of Vojvodina had a one-day strike - a warning to the authorities that something is wrong in this society.

7 The request was registered on 25 October 2024 in the registry of the Administration for Joint Affairs of Republic Bodies.

Procedure Code, and on the amendment to the decision on the working group for the amendments in the Criminal Procedure Code.[8] In addition to these copies, the "Analysis of the Effectiveness of the Criminal Justice System" was also submitted, prepared by Prof. Zoran Stojanović, the Chairman of the Working Group for Drafting the Text of the Law on Amendments to the Criminal Code.[9] The working group for drafting the Criminal Code amendments was established by the decision of the Minister of Justice of 12 May 2021, with the task to analyse the effectiveness of the criminal justice system based on completed cases with the aim of identifying and eliminating weaknesses and shortcomings by 30 September 2021, and to prepare a draft text of the Criminal Code amendments based on the analysis. The working group for drafting the text of the CPC amendments was established by the decision of the Minister of Justice of 12 May 2021,[10] and its task was to conduct an

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8 Letter from the Ministry of Justice, number: 7-00-284/2024-05, 28 October 2024.

9 By the decision of the Minister of Justice, number: 119-01-125/2021-05 of 12 May 2021, in addition to Prof. Zoran Stojanović, retired professor at the Faculty of Law, as the chairman, the following were appointed as members of the Working Group: Mr. Jovan Ćosić, Assistant Minister of Justice, Mr. Vladimir Vinš, Senior Advisor at the Ministry of Justice, Mr. Zlatko Petrović, Senior Advisor at the Ministry of Justice, Ms. Biljana Sinanović, Judge of the Supreme Court of Cassation, Dr. Jasmina Kiurski, Deputy Republic Public Prosecutor, Ms. Vesna Đorđević, Deputy Prosecutor for Organized Crime, Mr. Duško Milenković, Judge of the Supreme Court of Cassation and President of the Appellate Court in Belgrade, Ms. Zorica Avramović, Judge of the Higher Court in Belgrade, Ms. Leposava Vujanović Porubović, Deputy Higher Public Prosecutor in Belgrade, Ms. Marina Barbir, Judge of the First Basic Court in Belgrade, Ms. Milica Bondžić, Deputy Secretary of the Ministry of Interior, Ms. Dunja Leković, Chief Coordinator at the Criminal Police Directorate of the Ministry of Internal Affairs, Mr. Vladimir Beljanski, attorney-at-law in Novi Sad, Mr. Krsto Bobot, attorney-at-law in Belgrade, and Mr. Živorad Lekić, attorney-at-law in Kragujevac. This and other decisions that will be listed (unless otherwise noted) are available at: https://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa (accessed on 20 January 2025).

10 By the decision of the Minister of Justice, number: 119-01-126/2021-05 of 12 May 2021, Mr. Dragomir Milojević, judge of the Supreme Court of Cassation, was appointed the chairman of the Working Group, and the members were: Mr. Jovan Ćosić, Assistant Minister of Justice, Mr. Vladimir Vinš, Senior Advisor at the Ministry of Justice, Mr. Zlatko Petrović, Senior Advisor at the Ministry of Justice, Prof. Tatjana Bugarski, professor at the Faculty of Law in Novi Sad, Ms. Tatjana Lagumdžija, Deputy Senior Public Prosecutor in Novi Sad assigned to the Republic Public Prosecutor's Office, Mr. Vojislav Isailović, Deputy Prosecutor for Organized Crime, Ms. Milena Rašić, Deputy President of the Appellate Court in Belgrade, Ms. Jelena Škulić, Judge of the Higher Court in Belgrade, Mr. Miroslav Filipović, Deputy Higher Public Prosecutor in Belgrade, Ms. Bojana Stanković, Judge of the First Basic Court in Belgrade, Ms. Milica Bondžić, Deputy Secretary of the Ministry of the Interior, Mr. Radomir Popović, Head of the Anti-Drug Forces of the Ministry of the Interior, Mr. Nebojša Stanković, attorney-at-law in Belgrade, Ms. Zora Dobričanin Nikodinović, attorney-at-law in Belgrade, and Ms. Biljana Dunjić, attorney-at-law in Kuršumlija. The composition of the working group changed in early 2024, following a decision of the Minister of Justice, number: 119-01-126/2/2021-05 of 9 February 2024. On that occasion, Mr. Nebojša Stanković, an attorney-at-law in Niš (the decision on his appointment mentions that he is an attorney in Belgrade), and Ms. Biljana Dunjić, an attorney in Kuršumlija, were dismissed, and Mr. Momčilo Bulatović, President of the Bar Association of Belgrade, Mr. Milan Petrović, President of the Bar Association of Niš, and Mr.

analysis of the criminal procedure by 30 September of the same year with the aim of identifying and eliminating its weaknesses and based on that, to develop a draft text of the CPC amendments.

The conclusion of the Committee for the Legal System and State Bodies of 24 September 2024, [11] determined that a public debate on the Draft Law on Amendments to the Criminal Code would take place from 1 October to 1 November 2024, and another conclusion of the same body determined that a public debate on the Draft Law on Amendments to the Criminal Procedure Code would be held during the same period.[12] As part of the public debate, four roundtable discussions took place (Niš, Kragujevac, Novi Sad and Belgrade) on the draft texts of the Criminal Code and Criminal Procedure Code amendments.[13] In addition to the inappropriately short deadline for the public debate and the small number of simultaneous round table discussions on amendments related to the substantive and procedural criminal codes, the work on amending the Criminal Code is also evidenced by the statements of the chairman and members of the working group.

First, on 25 October 2024, attorney Mr. Krsto Bobot, a member of the working group for amending the Criminal Code, sent a letter to the Bar Association of Serbia stating that "the current proposal for amendments to the Criminal Code is not the outcome of the work of the working group" and that "the last meeting of that body was held on 29 June 2022".[14] And the chairman of the working group, Prof. Zoran Stojanović, in a statement carried by the media on 31 October 2024, confirmed that the working group "(…) last met in 2022 and we have not had any meetings since then. At least I don't know that there have been any". He also pointed out that he did not "(…) participate in drafting the final provisions that are now the official proposal

Vladimir Beljanski, President of the Bar Association of Vojvodina, were appointed as members of the working group.

11 Conclusion of the Committee for the Legal System and State Bodies, 05. Number: 011/9144/2024, 24 September, 2024, https://www.mpravde.gov.rs/files/Закључак - Јавна расправа о Нацрту закона о изменама и допунама Кривичног законика.pdf (accessed on 20 January 2025).

12 Conclusion of the Committee for the Legal System and State Bodies, 05. Number: 011/9154/2024, 24 September, 2024, https://www.mpravde.gov.rs/files/Zakljucak javna rasprava o Nacrtu zakona o izmenama i dopunama Zakonika o krivicnom postupku.pdf (accessed on 20 January 2025).

13 Information on the dates and venues of the roundtable discussions within the framework of public debates on the Draft Law on Amendments to the Criminal Code and the Draft Law on Amendments to the Criminal Procedure Code, https://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa (accessed on 20 January 2025).

14 OTKRIVAMO Vlast uhvaćena u laži: Dokaz da predloge drakonskih izmena Krivičnog zakonika nije pisala Radna grupa [WE UNCOVER The Government caught in a lie: Evidence that proposals for draconian amendments to the Criminal Code were not written by the Working Group], https://nova.rs/vesti/hronika/otkrivamo-vlast-uhvacena-u-lazi-dokaz-da-predloge-drakonskih-izmena-krivicnog-zakonika-nije-pisala-radna-grupa/ (accessed on 20 January 2025).

for amendments to the Criminal Code. So, I was the chairman of that working group and it is possible that the legislator adopted some of our guidelines, but they did not concern substantive changes in terms of increasing penalties or adding new criminal offenses, but rather they were of a general type".[15] Finally, it is also important that Ms. Leposava Vujanović Porubović, Acting Chief Public Prosecutor in Mladenovac, confirmed her membership in the working group, indicating that "(…) only a few meetings were held at the beginning, and since 2022 we have not met again nor has anyone contacted us after that".

There were no similar developments in the working group for drafting the text of the Criminal Procedure Code amendments, so the scope of the envisaged amendments to the Criminal Procedure Code, which exceeds a third of the total number of articles of the current Criminal Procedure Code (more precisely, it is 128 articles), can be partly explained by the stabile membership, the presumably regular meetings and an undoubtedly clear vision of what should be amended in the existing Criminal Procedure Code. Although the scope of the draft text of the amendments was sufficient for the new Criminal Procedure Code to get enacted, it is questionable why the working group did not opt for such a solution. Furthermore, given that the current CPC, according to the position expressed in the explanatory memorandum to the draft text of the amendments[16] "(…) represents the most criticised legal text not only in Serbia, but also much wider (…)" and that "the subject of scholarly and expert criticism (…) relates to both legal and technical as well as substantive deficiencies (…)", it remains unclear why the working group did not fulfil its task of analysing the criminal procedure by 30 September 2021 in order to identify and eliminate the weaknesses.

Perhaps the answer lies in Prof. Stojanović's position, presented in an analysis of the effectiveness of the criminal justice system based on completed cases with the aim of identifying and eliminating its weaknesses and shortcomings.[17] In his opinion, "(…) a complete, detailed and serious analysis of the effectiveness of the criminal justice system is almost impossible to be carried out in such a short period of time, as it would require a research that would involve the engagement of multiple collaborators over some time". In the area of substantive criminal law, an additional

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15 Članovi Radne grupe tvrde da nisu učestvovali u pisanju izmena Krivičnog zakonika koje su u žiži javnosti [Members of the Working Group claim that they did not participate in writing the amendments to the Criminal Code that are in the public eye], https://www.danas.rs/vesti/drustvo/ministarstvo-pravde-krivicni-zakonik-izmene/ (accessed on 20 January 2025).

16 Draft Law on Amendments to the Code of Criminal Procedure, Explanatory Memorandum (Explanatory Memorandum of the Draft Text of the CPC Amendments), 47, https://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa (accessed on 20 January 2025).

17 Zoran Stojanović, *Analiza efektivnosti krivičnopravnog sistema – Ocena potrebe izmena i dopuna Krivičnog zakonika Srbije*, Belgrade, 26 July 2021, 1 (The Ministry of Justice submitted this analysis to CEPRIS enclosed to letter number: 7-00-284/2024-05 of 28 October 2024).

issue is that "(…) the latest amendments to the Criminal Code entered into force on 1 December 2019, so the courts predominantly worked on cases in which the criminal offense had been committed before the amendments entered into force". Since this was not the case with the CPC, the Ministry of Justice had more reason to expect that the working group would fulfil its task and do an analysis of the criminal procedure in order to identify and eliminate its deficiencies. Instead of a relevant analysis, [18] the working group summarised the main objectives for amending the CPC in seven points and presented them on less than one page.[19] In a word, the working group's position can be summarised as a pointless waste of time, as evidenced by the *Urbi et Orbi* reminder of the decade-long criticisms directed, by the doctrine and practice, to the solutions contained in the Criminal Procedure Code. Although this *coup de grâce* is directed towards the current CPC, we should not forget that there are two sides to everything. The position of the legislator could be understood as an attempt to distract attention from the fact that there is a lack of research into the application of the CPC (which would, for example, offer an answer to the question of whether this is a technical deficiency or whether the problem lies in the uneven or incorrect application of the norm), disregard of the positions of the Constitutional Court when rejecting initiatives for the assessment of the constitutionality and compliance with ratified international treaties of about fifty provisions of the Criminal Procedure Code, unreliable presentation of claims about unconstitutionality or contradiction with European human rights standards, or as an irrevocable response to opinions different from those contained in the draft text of the CPC amendments. The fervent advocacy for ending the decade-long procedural scourge testifies at the same time to the oblivion of the members of the working group that ill-conceived solutions cannot be rectified, including the ones in criminal matters. A present-day reminder is the inglorious fate of the 2006 Criminal Procedure Code[20] and the criticism of the code by the professional community.[21]

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18 An example of such an analysis could be: Tijana Karić et al., Analiza uticaja primene Zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica u periodu od 2006. do 2020. godine, Institute for Criminological and Sociological Research in cooperation with the Organization for Security and Co-operation in Europe OSCE Mission to the Republic of Serbia, Belgrade 2021, https://www.iksi.ac.rs/pdf/analiza_ iksi_osce_2021.pdf (accessed on 20 January 2025).

19 Explanation of the draft text of the new CPC, 47, 48.

20 Criminal Procedure Code – CPC/2006, *Official Gazette of the RS* 46/06.

21 According to Prof. Grubač, this is a criminal procedure code in which "(…) based on unverified ideas and personal impressions of the members of the working group, many amendments to existing procedural provisions, of unequal value, are provided, scattered throughout the entire text of the current Code. Many of these changes were completely unnecessary, and some were completely wrong. It seems as if many were made simply to increase the number of interventions and thereby create an appearance that it was a new Code". Momčilo Grubač, Kritika „novog" Zakonika o krivičnom postupku, *Glasnik Advokatske komore Vojvodine* 78(5), Novi Sad 2006, 270. Beljanski also points out: "(…) The astonishing speed and worrying superficiality in the

The doctrine[22] rightly points out that when amending criminal legislation, one should not simply resort to changes to current solutions because the new solution may not necessarily be better. Judicial practice should exercise its creative role and, by applying all methods of interpretation, and relying on the positions of the European Court of Human Rights, we should reach a correct meaning and scope of a legal norm. This also applies to substantive criminal law, but it is more important in procedural criminal law.

In the following text the solutions of the draft text of the CC amendments will be analysed, followed by the draft text of the CPC amendments. Within each amendment, individual institutions and solutions in the general and in the special parts of the CC and the CPC will be tackled.

process of passing such an important law, but no less so the fact that the entire working group, the Government, the competent parliamentary committees, the National Assembly, the President of the Republic and his advisors failed to notice major errors, raise suspicions that the reasons for the adoption of the law are less of a legal nature and more of a political one." Slobodan Beljanski, Krivični postupak između prava i politike Povodom novog Zakonika o krivičnom postupku, *Glasnik Advokatske komore Vojvodine* 78(9–10), Novi Sad 2006, 577.

22 Z. Stojanović, *Analiza efektivnosti krivično pravnog sistema*, 2.

1. Draft text of the CC amendments

As a rule, when amending substantive criminal legislation, the provisions of the general part are amended less often than those in the special part.[23] The explanatory memorandum to the draft text of the Criminal Code amendments states that the amendments to the general part of the Criminal Code were necessary "(…) to improve existing provisions, standardise practice and remove ambiguities in its application, as well as to harmonise penal policy with the contemporary needs of society and international obligations". The draft law provides for the specification of important institutes, such as necessary defence and release on parole, additional protection for sensitive groups, but also specifies certain terms to align them with current trends, as well as international and national regulations. When it comes to the special part of the CC, the amendments "(…) especially emphasise (…) stricter penal policy in relation to certain criminal offenses".[24] This applies to sexual offences, such as rape, sexual intercourse with a child and sexual intercourse with a helpless person, as well as the crime of domestic violence. "(...) As a result of the increase in crime and the events that occurred in the Republic of Serbia in 2023 (...)" the amendments "(...) provide for a number of new criminal offenses, such as Publishing materials that advise the commission of a criminal offense, (...) Negligent possession of a firearm and Training a minor to use a firearm".[25]

1.1. Draft text of the general part of the CC amendments

First, we should point out **Article 3 of the draft text of the Criminal Code amendments**, which refers to the institute of self-defence. It is proposed that in Article 19, para 2 CC, after the word "simultaneous", the words "or immediately subsequent" be added, so that the new provision reads:

"(2) A necessary defence shall be the defence that is absolutely necessary by the actor in order to repel a simultaneous or *immediately subsequent* unlawful attack on his property or the property of another person."

The explanatory memorandum states that thus "(…) the persons in potentially threatening situations are protected and greater flexibility is provided in the application of self-defence, while maintaining strict proportionality criteria, thus

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23 *Ibid*., 3.

24 Draft Law on Amendments to the Criminal Code, Explanatory Memorandum (Explanatory Memorandum of the Draft Text of the Criminal Code), 14, 15, https://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa (accessed on 20 January 2025).

25 *Ibid*., 16.

ensuring the protection of the legitimate interests of citizens and preventing abuse in the application of self-defence". (…) harmonisation with international standards is also being carried out in accordance with contemporary legal trends in European countries that recognise the need to expand the concept of self-defence".[26]

This is a clear example of an unnecessary change to existing solutions, as it is indisputable in the doctrine and case law that simultaneity also applies to an attack that is immediately subsequent. The term "immediately" indicates a very short time before the attack, which, taking into account the circumstances of a specific case, is necessary to enable the attacked person to initiate an effective defence.[27] It is important that the attacker is at a stage where the actual attack could occur at any moment.[28] Whether an attack was imminent is concluded from an *ex post* perspective (after the event), and not according to the judgment of an objective observer at the time of the commission of the crime.

Article 4 of the draft text of the CC amendments defines Article 42 CC (more precisely, point 4 of the Article), "(…) by replacing the term 'criminal sanctions' with the word 'penalties', in order to clearly indicate that in the context of the purpose of punishment, it is exclusively about penalties, and not about other sanctions".[29] This provision of the CC expresses retribution as the purpose of punishment, the content of which is determined based on the principles of justice and proportionality. Given that Article 42 CC regulates the purpose of punishment, it is clear that the retributive element can only be linked to punishments, while the purpose of some other criminal sanctions (e.g. certain security measures or educational measures) is not – and cannot be – the achievement of justice and proportionality.[30]

Article 6 of the draft text of the CC amendments provides for an alteration to Article 46, para 5 CC. This involves expanding the ban on suspended sentences in such a way that, instead of the most serious forms of certain criminal offenses,

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26 *Ibid*., 19. The proposal for this amendment was submitted by the Ministry of the Interior, prompted by an incident when a shot was fired at a burglar who broke a window in a house, burst into the room carrying an axe and was about to attack an elderly man and his disabled wife. The old man was detained for a while, and about ten days later he died. The then Minister of the Interior, Mr. Aleksandar Vulin, announced that due to such cases, self-defence should be expanded. "Milutinov zakon" menja granice nužne odbrane ["Milutin's Law" Changes the Boundaries of Self-Defence], https://www.politika.rs/scc/clanak/519058/milutinov -zakon-menja-granice-nuzne-odbrane (accessed on 20 January 2025).

27 Zoran Stojanović, *Komentar Krivičnog zakonika*, 10th amended edition, according to the Criminal Code as of 1 December 2019 and according to the legislation as of 21 May 2019, Official Gazette, Belgrade 2020, 117.

28 Igor Vuković, *Krivično pravo Opšti deo*, Univerzitet u Beogradu – Pravni fakultet, Centar za izdavaštvo, Beograd 2021, 133.

29 Explanatory memorandum of the draft text of the CC amendments, 19.

30 Zoran Stojanović, *Komentar Krivičnog zakonika*, 227.

release on parole would be impossible for any form of criminal offenses, including rape (Article 178 CC), sexual intercourse with a helpless person (Article 179 CC) and sexual intercourse with a child (Article 180 CC). This is "(…) in line with the stricter penal policy for these criminal acts. This clearly defines the situations in which this institute cannot be applied, especially in the case of the most serious criminal offenses, which is in line with international human rights standards, and the protection of society from dangerous perpetrators of criminal offenses".[31]

The mention of compliance with international human rights standards could be understood as complete ignorance of those standards, although this is unlikely after the criticism, by the professional community, of the 2019 CC Amendments, which provided for such a solution in our criminal legislation.[32] So, the abolition of the right to be released on parole under Article 46, para 5 CC applies to any prison sentence imposed on the perpetrator of any of the aforementioned criminal offenses committed against a child, pregnant woman, minor or incapacitated person. Since our positive criminal law has had the Law on Special Measures for Preventing the Commission of Sex Crimes against Minors (LSM) for more than a decade,[33] which in Article 5, para 2, provides that a person sentenced to imprisonment for a crime under Article 3 LSM cannot be released on parole, the solution in Article 6 of the draft text of the CC amendments follows the aforementioned prohibition contained in the LSM.

The imposition of a life sentence on an adult perpetrator of a crime is not prohibited by Article 3 or any other provision of the European Convention on Human Rights.[34] This sentence may fall under Article 3 of the ECHR if the convicted person has no prospect of release, which means that there is no mechanism in national law for reviewing a life sentence with the aim of commuting it *in melius*, early or conditional release. In order to meet the standard set by Article 3 of the ECHR, it is necessary, according to the view expressed in the judgment in *Vinter and Others v. the United Kingdom*,[35] that a life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under

31 Explanatory memorandum of the draft text of the CC amendments, 19.

32 The ban on conditional release provided for in the 2019 amendment is contrary to European standards and is criminally and politically questionable. Zoran Stojanović, *Komentar Krivičnog zakonika*, 248; I. Vuković, 452.

33 Law on Special Measures for Preventing the Commission of Sex Crimes against Minors – ZPM, *Official Gazette of the RS* 32/13.

34 Law on the Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms with Additional Protocols, with amendments and supplements - ECHR, *Official Gazette of Serbia and Montenegro - International Treaties* 9/03, 5/05 and 7/05 – corr. and *Official Gazette of the RS - International Treaties* 12/10 and 10/15.

35 ECHR, Grand Chamber, *Vinter and Others v. the United Kingdom*, 66069/09, 130/10 and 3896/10, 9. July 2013, § 122, https://hudoc.echr.coe.int/fre?i=001-122664 (accessed on 20 January 2025).

what conditions, including when a review of his sentence will take place or may be sought. If national law does not provide for any mechanism or possibility of reviewing a life sentence, the incompatibility of that sentence with Article 3 of the ECHR on that ground arises at the outset and not while the sentence is served.

One may conclude that the reference to human rights standards is a fig leaf intended to cover the nakedness of penal populism and the retributive direction that is increasingly evident in our criminal legislation.

The provision of **Article 8 of the draft text of the CC amendments** refers to the institute of repeated offences provided under Article 55a CC. Following the 2019 Amendments, the repeated offences were introduced into our criminal legislation, and certain doubts appeared in court practice regarding the application of Article 55a CC. The problem arose when determining half of the prescribed penalty range,[36] so Article 8 of the draft text of the CC amendments provides that para 1 of Article 55a CC reads:

"(1) For a criminal offense committed with premeditation, for which imprisonment has been defined, the court shall impose a sentence above half of the prescribed sentence range, starting from the minimum measure of that sentence, under the following conditions: (…)".

Since the 2019 Amendments, the repeated offences have no longer been a (optional) basis for a stricter sentence. However, the decision to impose a sentence above half of the prescribed sentence range has narrowed the range for punishment. The doctrine expresses the opinion that the provision on mandatory imposition of a sentence above half of the prescribed range will have a major impact on the imposition of more severe sentences for repeat offenders.[37]

The *ratio legis* of amendments to Article 55a para 1 CC by inserting the words that the court shall start from *the minimum measure of the prescribed sentence* is based on the method of calculating half of the prescribed sentence range. Half of the range is not half of the prescribed maximum, but rather the so-called arithmetic mean, calculated by adding the minimum and maximum of the prescribed penalty and dividing by two.[38]

Another significant alternation in **Article 8 of the draft text of the CC amendments** concerns special recidivism. "(…) Multiple recidivism, which implies that the perpetrator has been convicted twice for any premeditated crime, is not specific enough and does not allow for adequate individualisation of the sentence, because this approach does not distinguish between recidivists who repeat similar

36 Z. Stojanović, *Analiza efektivnosti krivičnopravnog sistema*, 13.

37 Z. Stojanović, *Komentar Krivičnog zakonika*, 282.

38 I. Vuković, 486.

or identical crimes from those who commit different offenses. On the other hand, special recidivism, i.e. when a person is convicted twice for the same or similar crime, allows for a fairer approach to sentencing. Here, repetition of the same type of criminal behaviour is sanctioned, which indicates a greater danger to society and the need for stricter sanctions".[39]

Hence, the words: "the same or similar" should be added to Article 55a para 1 point 1 CC, so the provision would read:

"1) if the perpetrator has previously been convicted twice for the same or similar criminal offense with premeditation to imprisonment for at least one year (…)."

This would limit one of the conditions for imposing a more severe sentence on multiple returnees to the special recidivism, which is in line with the case law that the special recidivism is in principle considered *more strictly* than repeated offences.[40] The amendment of Article 55a para 1 point 1 CC seeks to exclude the possibility of legal or judicial mitigation of the sentence in the case of special recidivism. The court may not pronounce a mitigated penalty to person who is previously convicted for the same or similar crime (Article 57, para 3 CC). However, when the court has powers of remittance from punishment, it may reduce the penalty without limitations stipulated in para 3 of this Article (Article 57, para 4 CC).

Article 9 of the draft text of the CC amendments provides that "(…) a suspended sentence may not be imposed in cases where the minimum penalty prescribed is imprisonment for a term of two years or a more severe sanction, while previously the focus was on prohibiting the imposition of a suspended sentence for the crimes with prescribed prison sentence of eight years or a more severe sentence".[41] To better understand the *ratio legis* of this amendment, it should be recalled that the positive solution under Article 66, para 2 of the Criminal Code, which excludes the possibility of imposing a suspended sentence for criminal offenses punishable by eight years of imprisonment or a more severe punishment, was introduced into the Criminal Code by the 2019 Amendments. The previous solution linked the prohibition on imposing a suspended sentence to criminal offenses punishable by a prison sentence of ten years or more. Therefore, the content of Article 9 of the draft text of the CC amendments should be viewed as acceleration in the direction already taken, which means extreme narrowing of the possibility of imposing a suspended sentence. It has been argued that as a result of the 2019 Amendments, "(…) it should be expected that the share of prison sentences in the overall imposed criminal sanctions will increase significantly. Instead of trying to reduce the scope of the application of suspended sentences by applying some

39 Explanatory memorandum of the draft text of the CC amendments, 20.

40 I. Vuković, 486.

41 Explanatory memorandum of the draft text of the CC amendments, 20.

other sanctions (primarily fines, which are underused), since these are relatively serious crimes, the point here is that the narrowing of the application of conditional sentences will go in the direction of expanding the application of prison sentences".[42] There is nothing to add to this opinion except that Article 9 of the draft text of the Criminal Code amendments does not target relatively serious crimes, but rather its primary goal is to reduce the imposition of a suspended sentences to the level of an exception.

1.2. Draft text of the special part of the CC amendments

Article 14 of the draft text of the CC amendments stipulates that for the crime of murder (Article 113 of the Criminal Code), instead of the current provision that stipulates a prison sentence of five to fifteen years, a minimum sentence of five years or life imprisonment may be imposed. Thus, "(…) mutual harmonisation of the criminal sanctions system is achieved in the context of stricter penalties for individual criminal offenses".[43] It is not clear what is meant by the mutual harmonisation, because stipulating an almost identical sanction for ordinary murder as for aggravated murder disregards all the rules on the gradation of the social danger of certain behaviours.[44] It seems that it is completely irrelevant whether a serious murder was committed, accompanied by one or more qualifying circumstances, or an ordinary murder. The only harmonisation that the solution under Article 14 of the draft text of the CC amendments may bring about, would be reflected in the non-statutory nature of the crime of murder (Article 113 CC) and aggravated murder (Article 114 CC). Namely, criminal prosecution and execution of sentences are not subject to a statute of limitations, among other things, for the crimes for which a life sentence is stipulated (Article 108 CC). Given the direction taken in 2019, followed by the draft text of the 2024 CC amendments, the question may be raised as to what the future holds for the penalties prescribed for manslaughter (Article 115 CC), infanticide at childbirth (Article 116 CC), mercy killing (Article 117 CC) and negligent homicide (Article 118 CC).

One of the proposals that has attracted considerable negative public criticism is contained in **Article 18 of the draft text of the CC amendments**. It was proposed to delete the criminal offense of extortion of confession (Article 136 CC), which was explained by the overlap of the basic forms of the criminal offense of extortion of confession (Article 136 CC) and the criminal offense of ill-treatment and torture (Article

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42 Z. Stojanović, *Komentar Krivičnog zakonika*, 334.

43 Explanatory memorandum of the draft text of the CC amendments, 21.

44 Dragana Kolarić, Kaznena politika i reforma krivičnog materijalnog zakonodavstva Republike Srbije, *Kaznena politika i adekvatnost reakcije na kriminalitet*, ed. V. Turanjanin, D. Čvorović, LVIII regular annual counseling of the Serbian Association for Criminal Law and Practice, Intermex, Zlatibor, September 2024, 16.

137 CC).[45] "(…) Both crimes involve similar actions and require participation of officials. This overlap leads to unequal practice of public prosecutor's offices and courts in qualifying the criminal offense and imposing penalties. Deleting the crime of extortion of confession is in line with the concluding observation of the UN Committee against Torture (CAT) to formulate a single legal description that encompasses both crimes".Leaving aside the fact that the correct name of the criminal offense is – ill-treatment and torture (Article 137 CC), the overlap of the basic forms can be discussed *in principle* only when it comes to Article 136, *para* 1 CC and Article 137, *para* 2 CC. In the first case, there is an intent to extort a confession or another statement from an accused, a witness, an expert witness or other person (Article 136, para 1 CC), while the *anguish to another* is undertaken with the aim of, among other things, *obtain from him or another a confession, statement or another information* (Article 137 para 2 CC). Such an intent is not mentioned in Article 137 para 1 CC, which criminalises ill-treatment of another or acting in a manner that offends human dignity. In addition, the use of force, intimidation or other inadmissible means or method (Article 136, para 1 CC) applies to the person who is required to give a statement, while the use of force, threat or other unlawful means causing great pain or suffering (Article 137, para 2 CC) may be directed at a person who is required to make a confession, statement or other information, but also at another person in order to persuade them to confess, give a statement or provide certain information.

Deleting the extortion of confession (Article 136 CC) as a separate criminal offense would result in decriminalisation of the use of another *inadmissible means* or *inadmissible method* with the intention of extorting confession or another statement. The doctrine emphasises that other inadmissible means or inadmissible methods, in addition to means and methods prohibited by law or other regulation, are those means and methods that can influence the will of the person making the statement to an extent that significantly affects the consciousness and will of the person making the statement (e.g. misleading the person, use deception to get a statement, etc.).[46] The question could be raised whether ill-treatment or inhuman treatment can be interpreted as an inadmissible means or inadmissible manner. After all, the provision of Article 137, para 2 CC provides for another unlawful method of inflicting great pain or anguish, which was necessary to standardise torture as the method of obtaining a confession, statement or information. The scope of the inadmissible method under Article 136, para 1 CC is *broader* than the unlawful method under Article 137, para 2 CC, because extortion of a statement exists if the consciousness and will of the person giving the statement are significantly influenced, while torture presupposes the infliction of great pain or anguish. If the ill-treatment and inhuman treatment were understood as an inadmissible/unlawful method, doubts would arise regarding the interpretation of paras

45 Explanatory memorandum of the draft text of the CC amendments, 21.

46 Z. Stojanović, *Komentar Krivičnog zakonika*, 512.

1 and 2 of Article 137 CC. Namely, linking ill-treatment or inhuman treatment to causing great pain or anguish is questionable considering international human rights standards. And precisely the observation of the UN Committee against Torture on the need of a single formulation of a legal description that would encompass both criminal offenses was mentioned as one of the arguments for the abolition of the crime of extortion of confession (Article 136 CC).

The positions of the European Court of Human Rights are of particular importance for the legal system of the Republic of Serbia and the amendments to legal solutions, especially if they relate to cases in which a complaint was filed against our state. One such case is *Habimi and Others v. Serbia*, which ended with a judgment finding a violation of the procedural aspect of Article 3 ECHR.[47]

According to the established case-law of the European Court of Human Rights, an *ill-treatment* must attain a minimum level of severity if it is to fall within the scope of Article 3 ECHR. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.[48] *Inhuman treatment* can involve, among other things, a premeditated conduct that lasted for hours and caused either bodily injury or severe physical and mental suffering.[49] A treatment is considered *degrading* when it induces a feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.[50] The European Court of Human Rights considers that *torture* consists of acts of physical or mental violence committed against a person, which considered as a whole, caused severe pain and suffering and was particularly serious and cruel.[51] Above all, a few years ago, the position was taken that if a statement accepted as evidence was obtained by means of torture by members of a criminal group (i.e., private individuals), this automatically makes the criminal proceedings as a whole unfair.[52]

Based on the above, it can be said that there is no justification for decriminalising the extortion of confession (Article 136 CC) because the level of

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47 ECHR, *Habimi and Others v. Serbia*, 19072/08, 3 June 2014, § 83, https://hudoc.echr.coe.int/fre?i=001-144353 (accessed on 20 January 2025).

48 *Ibid*., § 85.

49 ECHR, Court (Plenary), *Ireland v. United Kingdom*, 5310/71, 18 January 1978, § 167, https://hudoc.echr.coe. int/eng?i=001-57506 (accessed on 20 January 2025).

50 ECHR, *Habimi and Others v. Serbia*, § 85.

51 ECHR, Grand Chamber, *Selmouni v. France*, 25803/94, 28. July 1999, § 105, https://hudoc.echr.coe.int/fre?i=001-58287 (accessed on 20 January 2025); Grand Chamber, *Jalloh v. Germany*, 54810/00, 11. July 2006, § 105, https://hudoc.echr.coe.int/eng?i=001-76307 (accessed on 20 January 2025).

52 ECHR, *Ćwik v. Poland*, 31454/10, 5 November 2020, §§ 63, 67, 89, 90, 93, https://hudoc.echr.coe.int/fre?i=001-205536 (accessed on 20 January 2025).

punishment for involuntary statements would be significantly changed. Namely, obtaining of a confession, statement or another information would constitute a criminal offense if it resulted from torture, while ill-treatment or inhuman treatment as unlawful means of obtaining a statement or information cannot be discussed within the framework of Article 137 para 2 CC, but such treatment should be the subject of the provision of para 1 of the Article. This means that for a criminal offense to exist, it is sufficient to ill-treat another or treat them in a manner that offends human dignity (therefore, the intention to obtain a confession, statement, or another information is not required). The first form of the offence (ill-treatment) is punishable by imprisonment of up to one year (Article 137, para 1 CC), while the second form (torture) can be punished by imprisonment of six months to five years (Article 137, para 2 CC). On the other hand, the basic form of extortion of confession is punishable by imprisonment from three months to five years (Article 136, para 1 CC). There is also a difference between the stipulated penalties for qualified forms of these two criminal offenses. If ill-treatment is committed by an official while performing his duties, he is liable to a prison sentence of three months to three years, and if he commits torture, he may be sentenced to imprisonment of two to ten years (Article 137, para 3 CC). When it comes to extorting confession that is accompanied by severe violence or if particularly serious consequences have occurred for the defendant in criminal proceedings, the official may be sentenced to imprisonment of two to ten years (Article 136, para 2 CC).

Article 20 of the draft text of the Criminal Code amendments provides for a change in the name of the criminal offense of unauthorised disclosure of secret (Article 141 CC) to *unauthorised disclosure of a professional secret*. At the same time, in para 1, in addition to expanding the scope of potential perpetrators to include notaries and public bailiffs, instead of the incriminated act of unauthorised disclosure of a *secret* learned in the performance of a duty, the secret is reduced to "*information about personal or family life*" learned during the performance of one's duty. In this way, the concept of professional secrecy is significantly narrowed and defined completely beyond the legal and ethical norms of relevant professions. Article 20, para 1 of the Law on Legal Profession,[53] for example, stipulates that a secret is everything that a party or their authorised representative has entrusted to an attorney or that the attorney has learned or obtained in another way in the case in which he provides legal assistance, in the preparation, during and after the termination of representation. The same is stipulated in Rule 14.1 of the Code of Professional Ethics of Attorneys-at-Law.[54] Similar is stipulated in Article 58 para 1 of the Law on Notary Public Office:[55] "A notary

53 Law on Legal Profession, *Official Gazette of the RS* 31/11 and 24/12 – Decision CC.

54 Code of Professional Ethics of Attorneys-at-Law, *Official Gazette of the RS* 27/12 and 159/20 – Decision CC.

55 Law on Notary Public Office, *Official Gazette of the RS* 31/11, 85/12, 19/13, 55/14 – other law, 93/14 – other law, 121/14, 6/15, 106/15 and 94/24.

public shall keep confidential the information he has learned in the performance of his duties (...)". Article 23, para 1 of the Code of Professional Ethics of the Medical Chamber of Serbia[56] regulates that all knowledge of a doctor about a patient and his/her personal, family and social status, as well as all information about the diagnosis, treatment and monitoring of diseases that he/she acquires while performing his/her duties, shall be considered a professional secret.

The legislator may, certainly, prescribe that a criminal offense covers only part of what constitutes a disciplinary offense. Criminal law protection, however, requires proportionality between different levels of unlawfulness to the extent that it is considered that a disciplinary offense with greater social danger than other disciplinary violations is considered a criminal offense. Information about personal or family life can often be far less important than other confidential information whose unauthorised disclosure would no longer be subject to criminal law protection. Such a reduction, instead of protecting the trust, as stated in the explanatory memorandum to the draft text, would lead to a breach of trust in the professions in which the trust between a beneficiary and a provider is one of the basic prerequisites for effective legal or other assistance.

Although public bailiffs are also included as potential perpetrators of the unauthorised disclosure of a professional secret, the fact is neglected that under Article 494, para 2 of the Law on Enforcement and Security[57] in the case of a public bailiff, it is a *business* secret, not a *professional* secret, and that the disclosure of a business secret is a separate criminal offense under Article 240 of the Criminal Code, for which no amendments are planned.

In **Articles 24 to 28 of the draft text of the CC amendments**, sanctions for sexual offences have been tightened. The *ratio legis* for this move, more precisely for determining a sentence of life imprisonment for the basic form of the criminal offense of rape (Article 178, para1 CC), the basic and qualified form of sexual intercourse with a helpless person (Article 179, paras 1 and 2 CC) and sexual intercourse with a child (Article 180, paras 1 and 2 CC), reads: "(...) The criminal-political justification of the significantly stricter sanctions and the stipulated life sentence is that it should undoubtedly represent the expected consequence that will befall each perpetrator of this extremely serious crime. (...) Interventions related to sexual offences are in line with Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography".[58] Given that life imprisonment can be imposed for all forms of the aforementioned criminal offenses,

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56 Code of Professional Ethics of the Medical Chamber of Serbia, *Official Gazette of the RS* 104/16.

57 Law on Enforcement and Security, *Official Gazette of the RS* 106/15, 106/16 – Authentic interpretation, 113/17 – Authentic interpretation, 54/19, 9/20 – Authentic interpretation and 10/23 – other law.

58 Explanatory memorandum of the draft text of the CC amendments, 22.

the only difference is in the lower limit of the prison sentence provided for the basic or qualified forms. The stricter penalties, although lesser than the previously mentioned offences, have also been imposed to the basic and qualified forms of the criminal offence of sexual intercourse through abuse of position (Article 181, paras 1, 3 and 4 CC) and the basic form of the criminal offence of prohibited sexual acts (Article 182, para 1 CC).

This has continued the trend started by the 2016 Amendments, which tightened repression against these criminal offences. Already then, the legislation of the Republic of Serbia was ranked among the strictest criminal legislations in this area.[59] This direction was underlined by the 2019 Amendments and was taken to its extreme by the draft text of the 2024 CC Amendments. This means that life imprisonment has been established as a rule for basic and serious forms of criminal offenses under Articles 178 to 180 CC, and special minimum prison sentences have become stricter. The fact that the difference was kept in the lower threshold of the penalty range between basic and qualified forms of criminal offenses does not deserve a commendation. This was expected because the difference in the specific maximum penalty no longer exists.

Article 55 of the draft text of the CC amendments provides for the introduction of Article 343a, which would contain a new criminal offense entitled *publishing the materials that advise the commission of a criminal offense*. Thus, the following is being incriminated: making the material available, facilitating access, and even accessing material containing instructions to commit criminal offenses. The content containing instructions or advice to use means to commit a criminal offense is being considered such material. Unlike the complicity charge of inciting or aiding, which implies intent, a specific act and a specific potential perpetrator, here an abstract criminal information is being incriminated. The criminal offence is defined so broadly that it could ultimately refer to daily press, crime novels or other literary works in which the crime is the subject, not excluding textbooks or professional and scientific studies in the field of criminal law, criminalistics, forensic medicine and criminology. The author of the draft text states, in the explanatory memorandum, the need to protect society from "(…) dangerous content that may encourage criminal conduct".[60] Such a proper society did not exist even during the Inquisition, nor is it realistically possible to establish one. There was, therefore, no acceptable reason to build on the terrain of incitement and aiding and abetting and to prescribe such a criminal offense.

59 Z. Stojanović, *Komentar Krivičnog zakonika*, 585.

60 Explanatory memorandum of the draft text of the CC amendments, 24.

2. Draft text of the CPC amendments

In theory, it is assumed that more than 30% of new provisions are needed to replace an existing law with a new one.[61] The draft text of the CPC amendments has 218 articles, with some of them adding two paragraphs to the existing article (for example, Article 84 of the draft text of the CPC amendments modifies Article 214 CPC, which regulates the duration of detention during investigation), there are cases where an article from the draft text of the CC amendments contains two new articles (Article 6 of the draft text of the CPC amendments defines Articles 11a and 11b, which regulate the translation and interpretation, as well as the translation of documents, minutes, decisions and other materials), and it is planned to introduce a new subsection with three articles (Article 202 of the draft text of the CPC amendments, which provides for the introduction of an extraordinary legal remedy - a request to examine the legality of a final judgment).

The authors of the draft text of the CPC amendments also note that "(…) The scope of amendments to the Criminal Procedure Code (…) is determined by the scope of its deficiencies and the number of insufficiently adequate solutions, (…) which is why this Law on Amendments to the Criminal Procedure Code represents a very extensive but also highly required normative intervention".[62] There is, therefore, no answer to the question of why this normative work remained within the framework of the draft text of the CPC amendments, and was not elevated to the appropriate level of the draft text of the new CPC. One can only speculate whether it is a matter of the authors' modesty, or a need to consider decades of theoretical and practical jeremiads for the common good and regulate criminal proceedings *lege artis*, or whether it is something else that must not be named.

2.1. Draft text of the general part of the CPC amendments

Article 2 of the draft text of the CPC amendments provides for the amendment of the title and the deletion of para 2 of Article 5 CPC, which regulates the initiation of criminal prosecution. The justification is that "(…) Legal solutions relating to the formal determination of the moment of initiation of criminal prosecution are not only incorrectly determined, but are also difficult to logically explain, distinguishing the moment of initiation of criminal prosecution from the

61 M. Grubač, 270.

62 Explanatory memorandum of the draft text of the CRC amendments, 48.

moment of initiation of criminal proceedings (…).”[63] This would require the deletion of para 2 of Article 5 CPC, which reads:

„ Criminal prosecution shall be initiated:

1) by the first action of the public prosecutor, or authorised police personnel based on a request of a public prosecutor, undertaken in accordance with this Code for the purpose of investigating the grounds for suspicion that a criminal offence has been committed or that a certain person has committed a criminal offence;

2) by the submission of private prosecution”. The provision of Article 2 of the working text of the CPC amendments contradicts the position of the Constitutional Court expressed regarding the constitutionality of Article 5, para 2 CPC. Whether this is a matter of *ignorance* or *conscious disregard* of the position of the Constitutional Court is a question that will not be discussed here. It should be noted that the Constitutional Court, “(…) Considering the contested provision of Article 5, para 2 of the Code (…)”, recalled its legal position expressed in the constitutional appeals procedure that “(…) the action of the public prosecutor upon a filed criminal report before initiating criminal proceedings, in order to verify the grounds for suspicion that certain life event constitutes a criminal offense or that a certain person has committed a criminal offense (which is the essence of the contested legal provision), equally to filing a private (criminal) lawsuit, does not constitute a decision on one's right or obligation, and therefore cannot be constitutionally and legally considered as a constitutionally defined content of either the right to a fair trial under Article 32 of the Constitution, or the right to a legal remedy guaranteed by Article 36, para 2 of the Constitution”.[64]

Article 4 of the draft text of the CPC amendments, in addition to certain terminological harmonisation, envisages that paras 3 and 4 of Article 10 CPC are deleted. These are provisions that regulate the issue of the procedural moment from which the consequence of the restriction of certain freedoms and rights occurs due to the initiation of criminal proceedings, as well as the court's obligation to provide this information to relevant natural and legal persons. The justification for this intervention was found in the artificially defined procedural moment when the order to investigate is issued (Article 296, para 2 CPC). “The new legal solutions clearly distinguish the degrees of suspicion between the pre-trial procedure (grounds for suspicion) and the first phase of the general criminal procedure – the investigation (grounded suspicion), with a complex mechanism for verifying the conditions for opening an investigation in accordance with the Constitution RS[65] (Article 32 para

63 *Ibid*., 49.

64 Constitutional Court, *IUz-96/2015*, July 2, 2020, https://ustavni.sud.rs/sudska-praksa/baza-sudske-prakse/pregled-dokumenta?PredmetId=16460 (accessed on 20 January 2025).

65 Constitution of the Republic of Serbia – Constitution of the RS, *Official Gazette of the RS* 98/06, 115/21 and 16/22.

1). The provisions of Article 10, paras 3 and 4 CPC do not correspond to the other proposed amendments, which is why their deletion is proposed".[66]

It is worth recalling that the initiative challenging the compliance of the provision of Article 10, para 2 CPC stated that "(…) such a legal solution is not in accordance with the requirements for acts arising from the rule of law, especially with the requirements of legal certainty and certainty in relation to the right to a fair trial. (…) It further states that the order to conduct an investigation is issued and the investigation is conducted without any knowledge of the person against whom it is being conducted, nor is the person familiar with his/her rights, and cannot exercise the right to review the files and the right to propose the initiation of evidentiary proceedings, and that the right to access the court and the right to a reasonable time are violated". Although the Constitutional Court found that the allegations and reasons of the initiative had no connection with the content of Article 10, para 2 of the CPC,[67] there is an unusual *coincidence* between the reasons of the applicants and the reasons presented in the justification of Article 4 of the draft text of the CPC.

The provision relating to language and script in proceedings (Article 11 CPC) in Article 6 of the **draft text of the CPC amendment**s is divided into two articles: *Translation and Interpretation* (Article 11a) and *Translation of documents, minutes, decisions and other materials* (Article 11b). From a systemic and nomotechnical point of view, it is not appropriate that in the *Basic Provisions*, where each of the 20 articles is about a specific topic (principle or content), two articles refer to language and script. Furthermore, in the *Basic Provisions* it would be sufficient to stay within limits of general rules, the elaboration of which could have remained of a blanket nature, either by referring to another law or to other provisions of the CPC.

One of the "key" innovations contained in the **draft text of the CPC amendments** is found in **Article 7**, which provides for amendments to Article 15. First of all, it relates to the amendment of Article 15, para 4 CPC, which would read as follows:

"Exceptionally, the court may present evidence to establish facts in the proceedings if it finds that the presented evidence is unclear, contradictory or inconsistent with other evidence and when this is necessary to comprehensively discuss the subject of the evidence".

In addition, **Article 7 of the draft text of the CPC amendments** provides new paragraph 5 to be added, which would read:

"The court shall base its decision on the facts that are relevant to the decision".

66 Explanatory memorandum of the draft text of the CRC amendments, 49.

67 Constitutional Court, *IUz-96/2015*, July 2, 2020

If the proposed amendment to Article 15 para 4 CPC is compared with the current solution, the changes are insignificant. The possibility that the court orders a party to propose additional evidence has been omitted. As an additional reason for the exceptional *ex officio* presentation of evidence by the court, the *contradiction with other evidence* has been provided, in addition to ambiguity or contradiction. It seems that para 5, which would supplement Article 15 CPC, is an unnecessary addition because it is indisputable that decisive or legally relevant facts constitute grounds for the application of law and the adoption of a court decision.

The answer to the question of what was intended by the amendment to Article 7 of the draft text of the CPC amendments should be sought in the explanation relating to this article. It is stated that "(…) The proposed amendments to Article 15 CPC aim to align it with the provision of Article 32, para1, of the Constitution of the RS. Namely, according to the provision of Article 32, para 1 of the Constitution of the RS (right to a fair trial), everyone has the right to a public hearing before an independent and impartial tribunal established by the law within reasonable time that will pronounce judgement on their rights and obligations, grounds for suspicion resulting in initiated procedure and accusations brought against them. Based on the above, every defendant against whom criminal proceedings are being conducted has the constitutional right to have the court discuss the merits of the suspicion, or rather the accusation against him, and not to have it discussed before the court, as it is *essentially stipulated* (*italics* – authors of the review) in the valid CPC". On the other hand, "(…) According to Article 6, para 1, of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR), in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. (…) Therefore, the relevant provision of the ECHR, which concerns the fundamental element of the right to a fair trial, is significantly different from the previously mentioned and cited provision of the Constitution of the RS (Article 32, para 1). Unlike the ECHR, which allows for an adversarial type of evidentiary procedure at the main hearing, the Constitution of the RS strictly allows the court and not the parties to dominantly discuss the subject matter of the procedure. This means that in our criminal proceedings, and in accordance with Article 32, para of the Constitution of the RS, evidence should primarily be presented by the court, not by the parties ".[68]

The presented argumentation and the insignificance of the interventions contained in Article 7 of the draft text of the CPC amendments, while maintaining the provisions that the burden of proof lies with the authorised prosecutor and that the court presents evidence at the proposal of the parties (Article 15, paras 2 and 3 CPC), imply that the whole matter can be reduced to the saying – *The mountain*

68 Explanatory memorandum of the draft text of the CRC amendments, 50

labours and brings forth a mouse. However, it is necessary to refer to some of the reasons presented in support of Article 7 of the draft text of the CPC amendments.

First, a few words about the difference between the way in which the right to a fair trial is regulated in Article 32, para 1 of the Constitution of the RS and Article 6, para 1 of the ECHR. The explanatory memorandum deals with an important difference, which is reflected in the fact that the ECHR also allows for an adversarial type of evidentiary procedure at the main hearing, while the Constitution of the RS strictly allows the court and not the parties to dominantly discuss the subject matter of the procedure. This view is contrary to the position of the Constitutional Court, which considers that Article 32 of the Constitution of the RS "comprises the guarantees that are also contained in para 1 of Article 6 of the Convention", but that "(…) there are certain substantive differences between them. Namely, while according to the Convention, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, the constitutional provision links the aforementioned rights to the determination of rights and obligations, the grounds of suspicion which was the reason for initiating the proceedings, and the indictment".[69] In other words, *there are substantive differences*, but they *are not related to the manner of presenting evidence and the discussion* at the main trial.

The authors of the explanatory memorandum rely on the official Serbian translation of Article 6, para 1 of the ECHR in explaining their reform initiatives, and they do not bother to look at the original English and French texts of Article 6, para 1 ECHR. And if they had done so, they could have noted that the first sentence of Article 6 para 1 ECHR reads:

„In the determination of his civil rights and obligations or of any criminal charge against him, *everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*".[70]

„*Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera*, soit des contestations sur ses droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle".[71]

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69 Constitutional Court, *IUz-96/2015*, July 2, 2020

70 The Convention for the Protection of Human Rights and Fundamental Freedoms, https://www.echr.coe.int/ documents/d/echr/convention_eng (accessed on 20 January 2025).

71 Convention de sauvegarde des droits de l'homme et des libertés fondamentales, https://www.echr.coe.int/ documents/d/echr/Convention_FRA (accessed on 20 January 2025).

The imprecision of the official translation has already been pointed out by the experts[72] and the position has been expressed that the true meaning of the first "(…) part of the sentence 'everyone is entitled to a fair and public hearing (…) by an independent and impartial tribunal' is that everyone is entitled to a fair and public procedure conducted by an independent and impartial court". To understand the role of the court in a fair trial correctly, the French original of Article 6, para 1 ECHR should also be taken into account, as it refers to his case (*sa cause*) and there is a certain nomotechnical difference in the specification of the characteristics of the hearing. A bilingual analysis of the original of Article 6, para 1 ECHR leads to the conclusion that both versions refer to a *court hearing*. Translation (into Serbian-*translator's note*) of the English source could read: "(…) *svako ima pravo da nezavisan i nepristrasan sud ustanovljen zakonom pravično i javno raspravi u razumnom roku*", while the French source could be translated: "*Svako ima pravo da njegovu stvar raspravi pravično, javno i u razumnom roku, nezavisan i nepristrasan sud, ustanovljen zakonom (...)".*

The constitutional provision provides for the right of the court to hear a case (Article 32, para 1 of the Constitution of the Republic of Serbia), while the original texts of Article 6, para 1 ECHR refer to the right to a *court hearing*, and not, as the official translation incorrectly states, to a *hearing before a court*. Based on the above, it can be said that the argumentation of Article 7 of the draft text of the Criminal Procedure Code is written in accordance with the saying - *If your train is on the wrong track every station you come to is the wrong station*.[73]

The explanatory memorandum states that the current CPC *basically* adopts the solution that the grounded suspicion, or the indictment against the perpetrator, is discussed before the court. In other words, the possibility of acting differently is not excluded, which would mean that the court has the appropriate powers regarding the taking of evidence. This is primarily about the court's obligation to complete certain evidence, make it clearer, or try to eliminate contradictions.[74] The court also plays an active role in determining the method of presenting evidence. "In addition to these obligations, Article 15, para 4, allows the court to request a party to propose additional evidence, or to exceptionally order such evidence to be presented, if it

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72 Dušan Ignjatović, Mihailo Pavlović, Život i priključenija člana 15 Zakonika o krivičnom postupku, 23. novembar 2024, https://mihailolawblog.wordpress.com/2024/11/23/zivot-i-prikljucenija-clana-15-zakonika-o-krivicnom-postupku/ (accessed on 20 January 2025).

73 Perhaps the result would have been different if the authors had read Chekhov's story about a newly married man who went on the honeymoon. Anton Pavlovič Čehov, Srećan čovek (translation M. Babović), Sabrana dela, Knjiga treća, Jugoslavijapublik – Zrinski, Beograd – Čakovec 1989, 291–295.

74 Slobodan Beljanski, ed: Goran P. Ilić *et al., Komentar Zakonika o krivičnom postupku*, dvanaesto izmenjeno i dopunjeno izdanje, prema stanju propisa od 1. decembra 2024. godine, Službeni glasnik, Beograd 2024, 153.

finds that the presented evidence is contradictory or unclear and that this is necessary in order to comprehensively discuss the subject of the evidentiary action. The request to a party to propose additional evidence must arise from logical and meaningful weaknesses of the evidence presented. The term 'discussion' should not be associated with the debatable principle, but exclusively with the logical structure of the presented content and with a method for better consideration and understanding. The court does not get involved in the contradictory positions of the parties".[75] Thus, the principle of *court's responsibility for investigating evidence and establishing facts*[76] is in line with the guarantees of the right to a fair trial.

As an additional reason for the proposed amendments, the explanatory memorandum to the draft text states the need to harmonise the provisions of the CPC relating to the possibility of filing an appeal due to incorrectly or incompletely determined factual situation and emphasizes: "(…) It is completely incomprehensible how a judgement can be challenged on factual grounds without the court having previously been given the opportunity to establish all the relevant facts necessary to render a lawful and correct judgement".[77]

There is either a surprising misunderstanding of the term "factual situation" or an equally strange disregard for the difference between the procedural phenomena related to the presentation of evidence and the establishment of facts. Although the arguments of the authors of the draft text will be discussed in the following text,[78] it should be noted that the ground for filing an appeal in connection with facts (Article 437, item 3 CPC) refers to the factual situation that the court established or failed to establish in the judgment, and not to the possibility of proposing or presenting evidence *ex officio*. From the evidence presented, due to its incorrect assessment, the court may determine the factual situation either incorrectly or incompletely, or partly incorrectly and partly incompletely, just as it may determine it incompletely because it rejected a proposal that certain evidence is presented. It is therefore quite understandable that this ground for refuting the judgement does not relate to the burden of proof or the evidentiary initiative, but to the obligation and ability of the court to establish relevant facts from the evidentiary material, in the acquisition of which it may have not been involved, in a complete, clear and consistent manner and to draw a conclusion as to whether the accusation is or is not proven.

The analysis of Article 7 of the draft text of the CPC amendments is not complete without asking the question of the discrepancy between the final version

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75 *Ibid*., 154.

76 Tihomir Vasiljević, *Sistem krivičnog procesnog prava SFRJ*, treće izmenjeno i dopunjeno izdanje, Savremena administracija, Beograd 1981, 66.

77 Explanatory memorandum of the draft text of the CRC amendments, 51.

78 See review of Article 153 of the draft text of the CPC amendments.

of the amendments and the fundamental importance of the issues considered and the arguments presented in defence of the inquisitorial role of the court and the search for "material" truth. One of the answers is contained in the starting platform for participation in the public debate on the Draft Law on Amendments to the CPC, which was adopted by the Management Board of the Bar Association of Serbia in October 2024.[79] The document expressed the view that a solution acceptable to attorneys would be that "the court has the right to independently present evidence 'only in favour of the defendant', which would significantly contribute to the equality of the parties, especially in the proceedings where defence is not mandatory and that would certainly result in fairer trials".[80] The second, and probably the essential answer, is contained in Cicero's dictum *Consuetudo quasi altera natura est*, i.e. in the fact that even after the entry into force of the 2011 CPC, the majority of judges continued, consistently using the inquisitorial principle, to search for the material truth. Thus, instead of preserving their impartiality, by questioning the allegations of the indictment, they often prove to be greater believers than the competent prosecutor.

Article 8 of the draft text of the CPC amendments contains certain amendments to Article 16 CPC, which regulates the issue of assessing evidence and determining facts. It was proposed, first of all, to delete para 1 of Article 16 CPC, which refers to illicit evidence (as a result, Article 9 of the draft text of the CPC amendments provides for the introduction of a new Article 16a CPC, which would regulate the matter of illicit evidence), and in paragraph 3 of Article 16 CPC, a second sentence is added, which reads:

"The right of the court and state authorities participating in criminal proceedings to assess the existence or non-existence of facts shall not be bound or limited by any special formal evidentiary rules".

An amendment has been made to the current Article 16 para 5 CPC because, instead of the previous words – *In case it has any doubts about the facts* …, the new provision would commence:

"When after all evidence has been obtained and presented, a doubt remains about the facts (…)."

No specific reasons were given for the proposed amendments, but, in relation to the principle of *in dubio pro reo*, it was emphasized that it "(…) applies when the court, even after all evidence has been obtained and presented, remains in doubt

79 Decision of the Management Board of the Bar Association of Serbia, No. 1008-7/2024 of October 19, 2024, cited below: D. Ignjatović, M. Pavlović, Život i priključenija člana 15 Zakonika o krivičnom postupku.

80 *Ibidem*.

regarding the facts (…)".[81] The proposed legal wording may be criticised for not considering the difference between obtained and presented evidence. In procedural doctrine, it is indisputable that the factual situation relating to a criminal case is determined, as a rule, exclusively based on the hearing, while in the stage of the preliminary procedure, evidence and facts are found and collected, so the legal provisions do not speak of establishing facts and presenting evidence.[82] Therefore, the principle of *in dubio pro reo* should not be linked to the evidence obtained, nor even to the evidence presented, and it is especially meaningless to emphasise that this applies to all evidence. This obscures the essence of the principle that is applied when *evaluating* evidence and *drawing conclusions* about the existence of facts.

Article 9 of the draft version of the CPC amendments provides that a new Article 16a is introduced, which would regulate the issue of illicit evidence. The content of this legal provision is as follows:

"Illicit evidence
Article 16a

Court decisions shall not be based on evidence that is directly or indirectly, in itself or by the manner of its acquisition, illicit, except in court proceedings in connection with the obtaining of such evidence.

Illicit evidence comprise:

1) the evidence obtained by violating the provisions of Article 9 of this Code;

2) those obtained by violating the provisions of criminal procedure explicitly provided for in this Code.

Court decisions shall not be based on evidence derived from the evidence referred to in paras 1 and 2 of this Article".

The justification for prescribing the new article could be reduced to listing the cases in which evidence is considered illicit and to explicitly stipulating that evidence derived from unlawful evidence is illicit. When it comes to the first reason, it was emphasized that "(…) interventions were made (…) of the provisions regulating individual evidentiary actions, while the procedural consequence of grounding the court decision on unlawful evidence is an absolutely essential violation of the provisions of criminal procedure and a basis for filing an appeal".[83]

81 Explanatory memorandum of the draft text of the CRC amendments, 51.

82 Mladen Grubiša, *Činjenično stanje u krivičnom postupku*, drugo izmijenjeno i dopunjeno izdanje, Informator, Zagreb 1980, 32.

83 Explanatory memorandum of the draft text of the CRC amendments, 51.

Instead of the wording of the provision of Article 16, para 1 CPC, which derives the illicitness of evidence from its contradiction with the Constitution, the CPC, other law or generally accepted rules of international law and ratified international treaties, the proposed solution links the illicitness of evidence primarily to the prohibition of torture, inhuman treatment and extortion (Article 9 CPC), and then with the *collection* of evidence in violation of the provisions of criminal procedure explicitly provided for in the CPC. There are no objections to the first case, especially considering the case law of the European Court of Human Rights, which holds that the illicitness of a single piece of evidence does not automatically lead to unfair treatment. This is assessed in the light of the following criteria: the right of the defence in relation to the illicit evidence, the circumstances under which the evidence was obtained and the fact of whether the conviction is based solely on the illicit evidence.[84] The only exception in this regard is a violation of the rights under Article 3 of the ECHR, provided that a person's statement was obtained by *torture*. A court decision cannot be based on such evidence.[85] Torture has long been associated with representatives of state authorities, and since a few years ago, private individuals may also have the role of torturers.[86]

Another case of the illicitness of evidence is defined differently than it is in the current provision of Article 16, para 1 CPC. If the provision of Article 9 of the draft text of the CPC amendments were adopted, evidence would be inadmissible if it has been obtained contrary to the provisions of criminal procedure explicitly provided for in the CPC. However, the term "explicitly provided for" is not appropriate for two reasons. First, because *envisaged* is not the same as *stipulated*, because it can mean covered by a regulation, but also only planned, reserved, announced, projected. If the meaning is "stipulated", everything that a law contains is explicit, although the norm may be of a dispositive or directive nature or comprise a limited list. Furthermore, the proposed wording creates uncertainty regarding evidence that would be obtained contrary to the Constitution, other law or generally accepted rules of international law and ratified international treaties. Certain provisions of the draft text of the CPC amendments explicitly stipulate that a court decision cannot be based on the evidence, generated or obtained contrary to the provisions of the CPC or *other law*.[87] Even with the best intentions of the working group to include all such

84 ECHR, Court (Plenary), *Schenk v. Switzerland*, 10862/84, 12 July 1988, §§ 46-48, https://hudoc.echr.coe.int/ fre?i=001-57572 (accessed on 20 January 2025-); Grand Chamber, *Bykov v. Russia*, 4378/02, 10 March 2009, §§ 89, 90, https://hudoc.echr.coe.int/eng?i=001-91704 (accessed on 20 January 2025).

85 ECHR, Grand Chamber, *Jalloh v. Germany*, 54810/00, 11 July 2006, § 105.

86 ECHR, *Ćwik v. Poland*, 31454/10, 5 November 2020, §§ 63, 67, 89 *et passim*. Goran P. Ilić, in: G.P. Ilić *et al.*, 357, 358.

87 This is the case with Article 65 of the draft text of the CPC amendments, which contains a new Article 139a. This Article would regulate the issue of providing evidence by photography, audio, or audio and visual recording, with paragraph 9 stipulating that a court decision cannot be

situations in the draft version of the CPC amendments, it seems that in certain cases this was an impossible mission. An example could be evidence obtained, contrary to the rules on mutual legal assistance in criminal matters,[88] from the requested state and, as it does not violate the CPC, there would be no obstacle for its admissibility in criminal proceedings

The working group believed that the doctrine of "fruits of the poisonous tree" should be explicitly stipulated, which was done in the proposed Article 16a para 3 CPC. This provision stipulates that court decisions may not be grounded on evidence derived from unlawful evidence. Along the same lines, Article 16, para 1 CPC, more precisely the wording on *indirectly* illicit evidence, should have been amended. Namely, by citing evidence that is indirectly, by the manner in which it was obtained, in contradiction to the Constitution, this Code, other law and human rights standards in criminal proceedings, the legislator explicitly accepted the position of "fruits of the poisonous tree".[89]

Finally, it should also be noted that the draft text of the CPC amendments does not contain any amendments that would eliminate the existing inconsistency or at least ambiguity between Article 16, para 1 CPC, Article 84, para 1 and Article 438, para 2, item 1. The first situation refers to the prohibition of grounding *court decisions* on illicit evidence, the second to the prohibition of using illicit evidence in *criminal proceedings*, and the third to the evidence on which a *verdict* may not be based. The doctrine presents the following view: "(…) Although the Code uses two expressions: 'evidence that may not be used in the proceedings' (Articles 84 and 237) and 'evidence on which, a judgement may not be based' (Article 438, paragraph 2, item 1), it is a causal relationship from which it clearly follows, although the first concept is broader than the second, that inadmissible evidence in criminal proceedings may not be a basis for a judgement. Thus, it should be noted that not all evidence has the same procedural value for all types of decisions".[90]

In **Article 23 of the draft text of the CPC amendments**, the provisions on the rights of the injured party (Article 50 CPC) have been amended. Among other things, in para 1, item 15, the following right of the injured party has been added:

"(…) 15) to be examined as a witness without unnecessary delay, a minimum number of times and only if necessary for the conduct of the proceedings (…)".

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grounded on documents under this Article if they have been created or obtained contrary to the provisions of this Code or *other law*.

88 Law on Mutual Legal Assistance in Criminal Matters, *Official Gazette of the RS* 20/09.

89 Goran P. Ilić, in: G.P. Ilić *et al.*, 361.

90 A decision on detention, for example, may be based on a report in a police station, although the report may not be evidence to ground a verdict on. S. Beljanski, In: G. P. Ilić *et al.*, 168.

The explanatory memorandum states that the changes were made to align with Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.[91] However, there is no such wording in that directive. In paragraph 20 it is stated that the role of victims in the criminal justice system and whether they can participate actively in criminal proceedings vary across member states, including the question of whether they are required or obliged to be witnesses or to claim the right to actively participate in the proceedings where they are not considered a party. Member states should determine the methods by which victims are guaranteed the rights provided for in the Directive. At the same time, paragraph 41 states that the right of victims to be heard should be considered to have been fulfilled where victims are permitted to make statements or explanations in writing.

The CPC recognizes the injured party's right to participate in criminal proceedings, including the right to present facts and propose evidence, to review documents and examine cases, and to participate in the presentation of evidence (Article 50, para 1, items 2, 4, 9), to be examined as a witness before other witnesses (Article 396, para 3), to directly, with the approval of the presiding judge, ask the defendant, witness, expert witness and expert advisor questions (Article 398, para 2 and Article 402, para 2). It follows that the proposed amendment is not only clumsily worded and redundant, but also restrictive in relation to existing legal solutions because it sets an unspecified condition for interrogation of the injured party as a witness, as being "necessary for the conduct of the proceedings".

All victims or all injured parties cannot be placed under the same umbrella. This is why the CPC separately regulates the protection of especially vulnerable and protected witnesses (Art. 102–112 CPC). Finally, re-examination may occur only due to a fault by the injured party, or due to evidence subsequently produced that contradicts the injured party's statement, so the proposed standard limitation to a "minimum number of times" for all injured parties and all procedural situations without distinction is unnecessary, if not harmful.

Article 65 of the draft text of the CPC amendments provides a new Article 139a to be added, the title of which would read:

"Proving by means of photography, sound recording, or sound and video recording"

"(…) The *ratio legis* for introducing this evidentiary act is the increasing importance of recordings and photographs produced by third parties as evidence in criminal proceedings due to contemporary living conditions and the intensive development of technology, as well as uneven case law in using and assessing this evidence in criminal proceedings".[92] This practically takes over the provision of

91 Explanatory memorandum of the draft text of the CRC amendments, 52.

92 Explanatory memorandum of the draft text of the CRC amendments, 56.

Article 145 CPC/2006, the title of which was: "Reviewing photographs, listening to sound recordings and reviewing sound and video recordings". Unlike the *source* from 2006, where Article 145, para 1 CPC/2006 stipulated that photographs, sound and/or video recordings were involved in *conducted evidentiary actions*, the *transcript* contained in the proposed Article 139a, para 1 CPC states that these are photographs or sound, or sound and video recordings *created and obtained in accordance with the CPC*. The provisions of the proposed paras 2 to 7 of Article 139a CPC are entirely or with minor editorial changes identical to the solutions contained in paras 2, 3, 5, 6, 7 and 9 of Article 145 CPC/2006. The new paras 8 and 9 of Article 139a CPC read:

"The records referred to in this Article shall be obtained by order of the public prosecutor's office, or the court, *ex officio* or at the proposal of the parties, and in urgent cases the public prosecutor's office, or the court, may orally order their acquisition with the obligation to issue a written order within three days.

A court decision may not be based on records referred to in this Article if they have been created or obtained contrary to the provisions of this Code or other law".

In support of the introduction of this evidentiary measure, it was emphasised, among other things, that recordings and photographs made by third parties are of increasing evidentiary importance in criminal proceedings. The fact that a solution from two decades ago was adopted almost literally gives the *impression,* to the members of the working group, that the authors of the CPC/2006 were foresighted. Therefore, the proposed Article 139a CPC can be understood as an homage to the normative demiurge.

Leaving aside the dilemma of whether it was the master or the apprentice, certain shortcomings in the proposed Article 139a CPC should be pointed out. Para 1 stipulates that photographs, or audio and video recordings, obtained in accordance with the Code, may be used as evidence and that a court decision may be based on them. However, para 3 allows the use of such evidence even if it has been obtained contrary to the provisions of the CPC, that is, if it has not been obtained in accordance with the Code, provided that the defendant is on the video, photograph or his voice is on the audio recording. Para 4 further states that if such recordings contain only certain objects, events or persons who do not have the status of a defendant, such materials may be used as evidence provided that they were not created by committing a criminal offense. Using an *argumentum a contrario* we may conclude that the evidence under the proposed Article 139a, para 3 CPC may not only be *contrary to the provisions of the CPC,* but may also be *obtained by committing a criminal offense.* All of this is contrary to the previously discussed provision of para 9 of the Article, that a court decision cannot be grounded on the records under this Article, if they have been created or obtained contrary to the provisions of this Code or other law.

Article 83 of the working text of the CPC amendments contains an amendment to Article 211, para 1, point 4 CPC and point 5 is added. This would mean that point 4 is amended to stipulate that detention may be ordered against a person for whom grounded suspicion exists, indicating that he/she has committed a criminal offence if:

"4) serious circumstances exist under which the criminal offence was committed or the gravity of the consequences of the criminal offence justifies it, if the defendant is charged with a criminal offence punishable by a term of imprisonment of over five years with elements of violence or a criminal offence punishable by a term of imprisonment of ten years or a more severe penalty".

In addition, the new Article 211, para 1, point 5 CPC would allow for detention if:

"5) a term of imprisonment of five years or a more severe penalty has been imposed by a judgement of the first instance court, and the manner of execution, the circumstances under which the offence has been committed or the gravity of the consequences of the criminal offence justify this".

The idea is to amend the current Article 211, para 1, point 4 CPC, which provides for the possibility of ordering detention if "(…) the criminal offence with which he/she is charged, is punishable by a term of imprisonment of more than ten years or a term of imprisonment of more than five years for a criminal offence with elements of violence, or he/she has been sentenced by a court of, first instance to a term of imprisonment of five years or more, and the way of commission or the gravity of consequences of the criminal offence have disturbed the public to such an extent that this may threaten the unimpeded and fair conduct of criminal proceedings" and divide it into two separate reasons, the first of which would relate to the case of the prescribed sentence, and the second to the sentence imposed. Both process situations imply deletion of part of the sentence on *disturbing the public to such an extent that this may threaten the unimpeded and fair conduct of criminal proceedings*. The *ratio legis* for this amendment is "(…) conditioned by uneven judicial practice and difficulties in applying the existing solution (…)",[93] while it is not clarified whether the shortcomings are the result of incorrect judicial application or whether it is a legal technical omission that resulted in a poor legal wording of the reason for ordering detention.

There is an opinion that "(…) the provision contained in Article 211, para 1 CPC, in the part relating to disturbing the public as a reason for the detention of the defendant (…) is poorly formulated in legal and technical terms". This is an extremely *rubbery norm*, which is in fact a 're-emerging' provision from the time of socialist Yugoslavia. Even at the time this reason for detention (although, better

93 Explanatory memorandum of the draft text of the CRC amendments, 57.

defined than the current similar basis for detention) was often criticized as extremely undemocratic and subject to very 'elastic' interpretations.[94]

In order to properly interpret the concept of disturbing the public, we need to go back to the dark past and, risking a close encounter with vampires or otherworldly forces, we should recall that Article 191, para 2, point 4 of the CPC/1976[95] provided that detention may be ordered "if the crime is sanctioned by the law with a term of imprisonment of 10 years or a more severe penalty, and if due to the manner of commission, consequences or other circumstances of the crime, it disturbs the citizens to such an extent that for the sake of a proper conduct of the criminal proceedings or the safety of people, the detention must be ordered".[96] The Federal Constitutional Court declared this point unconstitutional[97] because it concerns reasons of an extra-procedural nature that are not in line with the requirement that detention may only be a measure necessary for the proper conduct of criminal proceedings.

A decade later, the Constitutional Court faced a similar issue, and rejected the applications to assess the constitutionality of the provisions of Article 142, para 1, points 3, 5 and 6 CPC/2001.[98] It is true that those provisions of the CPC/2001 did not mention public disturbance, but the amendments of 2004 added a new point 5 to Article 142, para 2, which provided for ordering detention if "a criminal offense is punishable by a term of imprisonment of more than ten years and if this is justified by the manner of commission or other particularly serious circumstances of the criminal offense".[99] When considering applications to assess the constitutionality of certain grounds for detention, the Constitutional Court presented some significant positions, which will be briefly discussed.[100]

The Constitutional Court's position is that the contested provisions of the CPC/2001 contain reasons for ordering detention that may be reasons of a *preventive*

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94 Concurring separate opinion of Judge Dr. Milan Škulić on the Decision of the Constitutional Court, IUz-96/2015, May 20, 2021, on the determination of the inconsistency of Article 363, point 5, and Article 366 CPC with Article 32, para 3, and Article 20, para 1, of the Constitution of the RS, https://ustavni.sud.rs/sudska-praksa/baza-sudske-prakse/pregled-dokumenta?PredmetId= 17879 (accessed on 20 January 2025).

95 Criminal Procedure Code – CPC/1976, *Official Gazette of the SFRY* 4/77, 14/85, 74/85, 57/89 and 3/90 and *Official Gazette of the FRY* 27/92 and 24/94.

96 Miodrag Majić, in: G. P. Ilić *et al.*, 653, 654.

97 Federal Constitutional Court, *IU No. 112/00*, 7 December 2000

98 Criminal Procedure Code – CPC/2001, *Official Gazette of the FRY* 70/01 and 68/02 and *Official Gazette of the RS* 58/04, 85/05, 85/05 – other law, 115/05, 49/07, 122/08, 20/09 – other law, 72/09 and 76/10. The initiative challenged the reasons for ordering detention to prevent future criminal activity, as well as the grounds for detention based on a prescribed or imposed sentence.

99 M. Majić, in: G. P. Ilić *et al.*, 654.

100 Constitutional Court, IUz-1490/2010, March 13, 2013, https://ustavni.sud.rs/sudska-praksa/baza-sudske-prakse/pregled-dokumenta?PredmetId=8592 (accessed on 20 January 2025).

nature, since they are determined to be necessary for the conduct of criminal proceedings. Their common characteristic is a *preventive nature* that aims to achieve the *purpose of a special prevention* (e.g. in the case of preventing the defendant from continuing to commit criminal offences), or broader *preventive action to protect public safety and the safety of citizens*. In other words, the proper conduct of criminal proceedings cannot *imply only reasons of a procedural nature* that ensure the presence of the defendant in the proceedings or eliminate his possible obstruction of the proceedings by preventing the presentation of evidence. These *reasons may also be of a preventive nature because* they *protect public safety* from potential (based on special circumstances) criminal activity by *a person* (*italics* – authors of the review).

In interpreting the *existence of public disturbance*, it is necessary to determine several cumulatively criteria. "In addition to the objective element (the amount of the prescribed or imposed penalty), it is necessary to establish that the manner of commission or the severity of the consequences of the criminal offence caused public disturbance. In other words, the existence of public disturbance must be established, it must objectively happen. After all, public disturbance alone is not enough. For detention to be ordered, the court must determine that such public disturbance may jeopardise a proper and fair conduct of criminal proceedings".[101]

Articles 107 and 110 of the draft text of the CPC amendments contain amendments to the provisions of the current CPC on deferring criminal prosecution (Article 283 CPC) and also provide for the introduction of a new Article 284a, entitled "Dismissal of criminal charges for reasons of fairness". Without going into a more detailed review of the content of the proposed provisions of the draft text of the CPC amendments, we should focus on one thing that is common to both cases of application of the principle of opportunity. The proposed Article 283, para 7 CPC stipulates:

"A defendant against whom a criminal charge has been dismissed shall not be prosecuted again for the criminal offense for which a decision has been made to dismiss the criminal charge referred to in paragraph 3 of this Article".

The proposed Article 284a, para 2 CPC contains a slightly different wording:

"When the Chief Public Prosecutor decides in terms of paragraph 1 of this Article, the person against whom the criminal charge has been dismissed shall not be prosecuted again for the criminal offense referred to in paragraph 1 of this Article".

Doubts about the meaning of the proposed solutions are eliminated by the position that "(…) formally (…) defined principle of *ne bis in idem* is with regard to a criminal complaint that has been dismissed according to the principle of

101 M. Majić, in: G.P. Ilić *et al.*, 655.

opportunity in its [102] conditional form. Important changes also relate to the introduction of a new Article 284a CPC, relating to the dismissal of a criminal complaint for reasons of fairness and which also formally defines the principle of *ne bis in idem*".[103]

Given the keen emphasis on the difference of the manner in which the right to a fair trial is regulated in Article 32, para 1 of the Constitution of the RS and Article 6, para 1 of the ECHR, the laconic conciseness of the reasoning is surprising, and especially the absence of any reference to the constitutionality of the solutions contained in the proposed Article 283, para 7 and Article 284a, para 2 CPC. Namely, Article 34, para 4 of the Constitution of the RS guarantees that no one may be prosecuted or punished for a criminal offense for which he or she has been acquitted or convicted by a final judgment, or for which the charges have been finally dismissed or the proceedings have been finally suspended, nor may a court decision be changed to the detriment of the defendant in proceedings under an extraordinary legal remedy. In addition, the draft text of the CPC amendments does not provide for amendments to Article 4, para 1 CPC, which, following the constitutional solution, stipulates that no one may be prosecuted for a criminal offense for which they have been legally acquitted or convicted by a court decision, or for which the charges have been legally dismissed or the proceedings have been legally suspended. The authors remained silent about the reasons why, in addition to the court decision, they brought under the umbrella of the *ne bis in idem* principle, the public prosecutor's decision to dismiss the criminal charges. It is not out of place to say a few words about this issue.

Our highest regular court, which followed in the footsteps of the European Court of Human Rights has the "credits" for expending *ne bis in idem* principle. The Supreme Court's position is that the decision to dismiss the criminal charges in accordance with Article 283, para 3 CPC has the significance of a *res judicata*.[104] The public prosecutor at that stage is an authority in the proceedings and an integral part of the criminal justice system, so this decision must be considered a *res judicata*.[105]

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102 The *italics* in brackets are a "contribution" of the authors of this review, because the authors of the explanatory memorandum, guided by creative zeal and the awareness that they were essentially writing a *new* criminal procedure code, got laid back and overlooked some linguistic rules. *Lapsus calami*, one would say. (This refers to the original text in Serbian – *translator's note*).

103 Explanatory memorandum of the draft text of the CRC amendments, 58.

104 Supreme Court of Cassation, *Kzz. No. 46/17*, February 6, 2017.

105 Supreme Court of Cassation, *Kzz. No. 740/20*, 2 November 2020; *Kzz. No. 248/21*, 24 March 2021. This position was also accepted at the session of the Criminal Department of the Supreme Court of Cassation (*Sentence adopted at the session of the Criminal Department of the Supreme Court of Cassation*, 1 March 2021).

"Extensive interpretation relies, first, on the provisions of Articles 16 and 18 of the Constitution and the direct application of other sources of law, including, as an auxiliary means for interpreting human rights provisions, the practice of international institutions responsible for supervising their implementation. In this case, the source would be a decision of the European Court of Justice, based on the position that a legally final procedure is achieved not only by a court decision but also by another authority that, according to national law, forms an integral part of the criminal justice system, including the decision of the public prosecutor to dismiss criminal prosecution when the defendant meets certain obligations (…)."[106] This judgment influenced the European Court of Human Rights, which in the case of *Mihalache v. Romania*[107] underlined Article 4, para 2, of Protocol No. 7 to the ECHR and referred to its broader meaning. "The conditions that were mainly associated with the repetition of criminal proceedings, with a more flexible approach to the meaning of the terms used in the ECtHR and national law, according to the understanding of the ECtHR also relate to the right of the public prosecutor to reopen a case that he himself had previously closed. If these conditions are not met, with the interpretations given in the case, there would be no obstacle to applying the principle of *ne bis in idem* to decisions by which the public prosecutor, within the scope of his competence, terminates the proceedings".[108]

2.2. Draft text of the special part of the CPC amendments

Significant novelties are contained in **Articles 119 and 120 of the draft text of the CPC amendments**. First, an amendment is envisaged to Article 295 CPC, which reads as follows:

"An investigation shall be initiated against a specific person for whom there is a grounded suspicion that he has committed a criminal offense prosecuted *ex officio*.

The evidence and data necessary to decide on filing an indictment, discontinuing the investigation, as well as the evidence that may not be possible to repeat at the main hearing or that may be difficult to acquire shall be collected in the investigation".

It is also planned to amend Article 296 CPC, and basically it would change the type of decision on initiating an investigation – the order would be replaced by a resolution, which would allow for an appeal.

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106 CJEU, *Hüseyin Gözütok (C-187/01) and Klaus Brügge (C-385/01)*, Joined cases C-187/01 and C-385/01, 11 February 2003, https://curia.europa.eu/juris/liste.jsf?language=en&num=C-187/01 (accessed on 20 January 2025). S. Beljanski, in: G. P. Ilić *et al.*, 105.

107 ECHR, Grand Chamber, *Mihalache v. Romania*, 54012/10, 8 July 2019, §§ 97, 98, 101, https://hudoc.echr.coe.int/eng?i=001-194523 (accessed on 20 January 2025).

108 S. Beljanski, in: G. P. Ilić *et al.*, 105, 106.

The *ratio legis* of the planned amendments to these CPC articles arises, according to the understanding of the working group members, from the necessity to eliminate the unconstitutionality of Articles 295 and 296 CPC. Namely, given that "(…) it is the constitutional right of a citizen to have the court decide on the merits of the suspicion that was the reason for initiating the procedure (Article 32 of the Constitution of the RS), the current CRC provision, by which an investigation is initiated by an order when there are grounds for suspicion that a person has committed a criminal offense and against the decision of the public prosecutor no appeal is allowed, is unconstitutional. Furthermore, a criminal proceeding starts by the decision to initiate an investigation pursuant to Article 7 CPC, and it cannot imply the lowest degree of suspicion, given the restrictions on the freedom of rights[109] that arise for the accused. The possibility to start an investigation against an unknown perpetrator has also been eliminated, as criminal proceedings must be conducted against an identified and known perpetrator in order to ensure a fair trial and the defence function from the very beginning of the proceedings. (…)."[110]

The reason is unconstitutionality, at least according to the authors of the amendments. This attitude shows superficiality or ignorance of the matter which is being discussed. The unconstitutionality of a legal provision cannot be judged based on an "arbitrary impression" of the members of the working group or an isolated opinion of a single judge of the Constitutional Court. The similarity between the arguments presented in the explanatory memorandum related to Articles 295 and 296 of the draft text of the CPC amendments and the position from the separate opinion is striking: "(…) the public prosecutor, during an investigation, independently discusses and decides on the existence/non-existence of the suspicion that was the reason for initiating the procedure, although the Constitution, in Article 32, para 1, establishes that 'everyone shall have the right to a public hearing before an independent and impartial tribunal established by the law (…) to decide (…) on the grounds for suspicion resulting in the initiated procedure'. (…) This is clearly an unconstitutional provision, the unconstitutionality of which cannot practically be 'corrected' by a decision of the Constitutional Court, (...) which in this specific case means that the Constitutional Court cannot stipulate that an appeal is filed to the court against the decision to conduct an investigation (...)".[111]

The surprise turns into a concern about the fact that the members of the working group are not familiar (it is hard to accept an opposite view, as this would

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109 This is one of the grammatical errors found in the Explanatory Memorandum to the draft text of the CRC Amendments. Apart from the intervention indicated in footnote 102, the authors of the review did not do the editing elsewhere. Hence, the argumentation of the draft text of the CRC amendments remained *tel quel*. (This refers to the original text in Serbian – *translator's note*).

110 Explanatory memorandum of the draft text of the CRC amendments, 58.

111 Concurring separate opinion of Judge Dr. Milan Škulić on the Decision of the Constitutional Court, *IUz-96/2015*, May 20, 2021

imply a hidden intention) with the position of the Constitutional Court expressed when rejecting the initiative for the assessment of the constitutionality of Article 296 CPC. This is a decision that had been made almost a year before the decision that was accompanied by a separate concurring opinion. Hence, it is necessary to refresh the knowledge and have a vague hope and belief that *repetitio est mater studiorum*.

In the initiatives challenging the constitutionality of Article 296 CPC, it was pointed out that Article 32, para 1 of the Constitution of the RS provides for the judicial review of the correctness of a decision to initiate criminal proceedings, i.e. a legal remedy against the act initiating the procedure, while the legislator did not do so. The Constitutional Court analysed this claim in light of the relationship between Article 32, para 1 of the Constitution of the RS and Article 6, para 1 of the ECHR and concluded that "(…) the question is (…) whether the constitutional provision guarantees the aforementioned rights to a broader extent than the Convention, and in this regard, the meaning of the term 'accusation' in the constitutional provision".[112]

An analysis of Article 27, para 2 and Article 33, para 1 of the Constitution of the RS led to the conclusion that the term accusation is used in the sense of "a criminal offense someone is charged with". Based on this, the Constitutional Court expressed the view that the constitutional concept of accusation differs from the substantive understanding of accusation advocated by the European Court of Human Rights, but also from the formal concept accepted in the CPC. "(…) Given the aforementioned use of the term accusation in constitutional provisions, the question arises whether the purpose of the provision of Article 32, para 1, is to establish the right to judicial review of the formal act initiating the procedure, as claimed by the applicants, or whether it has a different, more general meaning". Especially considering that, according to the provision of Article 18, para 3 of the Constitution, the provisions on human and minority rights are interpreted in favour of advancing the values of a democratic society, in accordance with applicable international standards of human and minority rights, as well as the practice of international institutions that monitor their implementation (Article 18), and that the European Court of Human Rights, in applying Article 6 of the Convention, does not require judicial review of the act by which the public prosecutor's office initiates an investigation".[113]

The position of the Constitutional Court is "(…) that even the Constitution-makers, in the provision of Article 32, para 1 of the Constitution, did not have in mind an act by which, in a procedural sense, criminal proceedings are formally

112 Constitutional Court, *IUz-96/2015*, July 2, 2020

113 *Ibidem*.

initiated and that the *meaning of the aforementioned constitutional provision is not to ensure the right to a fair trial*, with all the guarantees it includes (that the court fairly, within a reasonable time, publicly deliberates and decides), *by judicial control of the formal act initiating the procedure*. (…) The meaning of the provision of Article 32, para 1 of the Constitution is precisely to guarantee to everyone that an independent and impartial tribunal established by the law, fairly and within a reasonable time, will publicly hear and decide on his rights and obligations, the (non)existence of a criminal offense and the (non)existence of his criminal liability for that offense. The Constitutional Court recalls that in its previous practice, in cases of constitutional appeals, it has consistently expressed the view that the *act on the conduct of an investigation 'does not decide on the grounds for the suspicion* that was the reason for initiating criminal proceedings, that is, *does not decide on the existence of a criminal offense and the criminal liability* of the person against whom the investigation is being conducted. (…) In accordance with all the above, the Constitutional Court finds that the disputing reasons *do not substantiate the applicant's claim that Article 296 of the Code is inconsistent with the provision of Article 32, para 1 of the Constitution (italics* - authors of the review), due to the absence of a court decision regarding the order to conduct an investigation".[114]

So much for the working group members' understanding of the constitutionality of certain provisions of the CPC. Although the lack of knowledge about the constitutionality is the main deficiency of Articles 295 and 296 of the draft text of the CPC amendments, there is another problem that will arise if the proposed amendments are adopted.

In the proposed Article 296, para 2 of the draft text of the CPC amendments, along with the changed terminology (decision instead of order and pre-trial procedure instead of pre-investigation procedure), the provision that links the initiation of an investigation to the moment before or immediately after the first evidentiary action undertaken by the public prosecutor or the police in pre-trial procedure, no later than 30 days from the date on which the public prosecutor was notified of the first evidentiary action taken by the police, would remain essentially unchanged. When it comes to the valid solution contained in Article 296, para 2 CPC, the doctrine contains the understanding that the possibility of issuing an order "(…) not only before, but also immediately after the first independently undertaken evidentiary action or action taken by the police, is envisaged … for exceptional cases of particular urgency. These are situations when the insisting on drafting of an order in advance would represent unnecessary formality, which could cause loss of an evidence. (…) Issuing an order before undertaking evidentiary action will constitute regular action by the public prosecutor. *This is particularly important in the situations when the public prosecutor entrusts an evidentiary action to the police*

114 *Ibidem*.

or requests the conduct of a specific evidentiary action from the pre-trial judge".[115] Given that the public prosecutor may entrust the police with the undertaking of evidentiary actions, and that the police may undertake certain evidentiary actions that cannot be delayed independently in the pre-investigation procedure, "(…) the public prosecutor (*shall*) in such cases issue an order to conduct an investigation no later than 30 days from the date on which he was notified of the first evidentiary action taken by the police".[116]

This procedural situation would be almost impossible if the proposed Articles 295 and 296 CPC were adopted. The *ratio legis* of the current solution under Articles 295 and 296 CPC stems from the idea that "(…) the investigation must fully encompass activities to collect evidence – that is, the so-called evidentiary actions (…). Although formally it begins with an order issued by the public prosecutor, in essence the investigation begins with the first evidentiary action undertaken by the public prosecutor or the police".[117] The idea that the investigation covers as much of the pre-trial procedure as possible, and this goal is very difficult to achieve by applying the proposed Articles 295 and 296 CPC, primarily due to a higher degree of suspicion that would be required to initiate an investigation, but also an impossibility of conducting an investigation against an unknown perpetrator.

While in the positive legal solution the material condition for deciding to initiate an investigation is limited to grounds for suspicion, the draft text of the CPC amendments raises the bar to the grounded suspicion, although it retains the possibility of issuing a decision to initiate an investigation before the first evidentiary action is undertaken, immediately after the first evidentiary action or at the latest within 30 days from the date when the public prosecutor was notified of the first evidentiary action undertaken by the police. To issue a decision to initiate an investigation before undertaking the first evidentiary action would be practically impossible, and this possibility would be reduced to an exception in the event that it is decided to initiate the investigation immediately after the first evidentiary action, and it could be, more or less, achieved within 30 days from the date of receipt of the notification of the first evidentiary action.

When it comes to the draft text of the CPC amendments, which envisages that the possibility of initiating an investigation against an unknown perpetrator is cancelled, in addition to the difficulties that will arise from the necessity to establish grounded suspicion, it should also be noted that the public prosecutor is largely dependent on the actions of the police, and in some cases this may lead to disruption of process activity. It is sufficient to mention the current case of the missing girl

115 M. Majić, in: G. P. Ilić *et al.*, 871, 872.

116 *Ibid*., 872.

117 *Ibid*., 871.

from Ćuprija. An indictment has been filed against the defendants, but the identity of the police officers who interrogated the brother of one of the defendants, as a suspect, and on that occasion injured him, which led to his death, has not yet been established. Furthermore, an autopsy determined that the suspect died due to torture. The first evidentiary action was taken in April 2024 and since then no decision has been made to launch an investigation, nor has the public been informed of any progress in identifying the suspects.[118]

Article 123 of the draft text of the CPC amendments contains an amendment to Article 300 CPC, which regulates the issue of attending evidentiary actions. Due to the length of the article itself and the amendments that would apply to most of the provisions of Article 300 CPC, the draft text of the amended Article 300 CPC will not be cited. The reasons justifying the proposed amendments could even be omitted, as this is essentially a *déjà vu* intervention of the authors. Some of the arguments will, however, be presented, but it should be noted that the constitutionality of the provisions to be amended was unsuccessfully challenged before the Constitutional Court.

In support of the proposed amendments, it was stated: "(…) Although the public prosecutor must inform the defence attorney about evidentiary actions, the current Article 300 CPC only lists evidentiary actions such as questioning witnesses, experts and on-site inspections. By limiting the right to the presence of a defence attorney and the defendant's right to question a co-defendant, the *defence is denied* the right to confront the co-defendant, and thus *the right to equality of arms in criminal proceedings*.(…) The amendments to this article *contribute to the realisation of the right to a fair trial of the defendant* at this stage of the proceedings, which is *in line with the case law of the European Court of Human Rights and the realisation of the guarantees under Article 6, para 3 (e)* of the ECHR. A particularly significant novelty is the proposed amendment to Article 300 CPC, which relates to the deletion of paragraph 2 of the Article. By deleting the provision, which had far-reaching consequences for the position of the defendant in criminal proceedings, *the rights of the defendant are ensured in accordance with the law, the Constitution and the ECHR*" (*italics* - authors of the review).[119]

In this case too, the members of the working group relied on a separate opinion[120] in which para 1 of Article 300 CPC was criticised as "(…) It is not the

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118 Brat osumnjičenog za ubistvo male Danke umro nasilnom, a ne prirodnom smrću [Brother of the suspect in the murder case of little Danka died due to violence, and not natural causes], https://radar.nova.rs/drustvo/ brat-osumnjicenog-za-ubistvo-male-danke-umro-nasilnom-a-ne-prirodnom-smrcu/ (accessed on 20 January 2025).

119 Explanatory memorandum of the draft text of the CRC amendments, 59.

120 Concurring separate opinion of Judge Dr. Milan Škulić on the Decision of the Constitutional Court, *IUz-96/2015*, May 20, 2021

same in any formal procedure, let alone in criminal proceedings – 'to issue a summons' and 'to summon', and this really does not need to be specifically explained, at least for now..., and it is quite clear that this potentially violates the constitutionally guaranteed right to defence in criminal proceedings". The key flaw of Article 300, para 2 CPC is that "(…) a statement given to the public prosecutor, therefore, to the entity in charge of criminal prosecution/indictment, and which, by his own free judgment, 'excluded the defence', can later, i.e. in the further course of the proceedings, be evidence, regardless of the fact that the judgement cannot be based solely on such a statement. In practice, there is always another evidence, it can even be an extract from the criminal record and the like, so this kind of 'restriction' is essentially meaningless, and it is also contrary to the evidentiary concept of 'fruits of the poisonous tree' accepted in the CPC". The solution contained in Article 300, para 4 CPC "(…) is potentially disputable because the party is the suspect, not his defence attorney, just as the suspect originally has the constitutional right to defence, and the defence attorney only assists him in this, so it is constitutionally 'ambiguous' that the summoning of a defence attorney (even as a rule), 'validates' the failure to summon the suspect." The provision of Article 300, para 6 allows "(…) that any statement of a witness thus interrogated during the investigation, without the possibility for the defence to be present at such examination, may be later used at the main hearing and considered an exception to the principle of immediacy, so this possibility is clearly a potential, but also a serious violation of the constitutionally guaranteed right to defence in criminal proceedings". A similar objection was made about Article 300, para 7 CPC.

It even seems unnecessary to point out that the positions of the Constitutional Court are contrary to the stated views. However, the persistence of the members of the working group on the imaginary unconstitutionality requires that the reasons should be stated why the application to assess the constitutionality of Article 300, paras 1, 2, 4, 6 and 7 CPC has been rejected.[121]

"(…) The Constitutional Court, first of all, found that the provision of paragraph 1 establishes the rule that the public prosecutor shall summon the suspect and his defence attorney to attend the examination of witnesses and experts (while only informing the injured party of the time and place of the examination), so that this provision cannot in any case be inconsistent with the Constitution and a ratified international treaty. Secondly, it is true that the contested provision of Article 300 para 2 of the Code allows an exception to the previously established rule, but only in the proceedings for criminal offenses for which a special law has determined that the public prosecutor's office of special jurisdiction shall act, and only in the event that the public prosecutor assesses that the presence of the suspect and his defence attorney may influence the witness being examined. When assessing whether the

121 Constitutional Court, *IUz-96/2015*, July 2, 2020.

envisaged exception violates the suspect's constitutional right, it should be considered, on the one hand, that this exception applies only to the investigation phase, and not to the presentation of evidence at the main hearing and, on the other hand, that the contested provision itself explicitly stipulates that a court decision cannot be based exclusively or to a decisive extent on the testimony of a witness who has been examined without summoning the suspect and his defence attorney, which implies that the use of the witness statement record (as per the meaning of Article 406 of the Code) is limited when the suspect is prevented from participating in the evidentiary action during the investigation. Thirdly, with regard to the contested provision of Article 300, para 4 of the Code, which stipulates that, if the suspect has a defence attorney, the public prosecutor shall, as a rule, summon only the defence attorney, the Constitutional Court finds that the fact that the summons to attend the evidentiary actions is, as a rule, addressed only to the suspect's defence attorney does not call into question the exercise of the suspect's constitutional rights, because not only is the purpose of a defence attorney in criminal proceedings to provide the defendant with an adequate professional defence, but the summons to a defence attorney does not imply that a suspect is deprived of his liberty to personally attend the performance of the evidentiary action. Fourth, regarding the contested provision of Article 300, para 6 of the Code, the Constitutional Court points out that the proper delivery of the summons is a prerequisite for the performance of an evidentiary action, and in the event that the summons is not delivered in accordance with the provisions of the Code, the evidentiary action may be performed only upon a prior approval of the court. Finally, based on the aforementioned obligation to properly serve a summons, the contested provision of Article 300, para 7 of the Code, according to which an evidentiary action can be taken if the person to whom the summons was sent is not present at the action, cannot be disputed from a constitutional point of view, since this provision is envisaged to benefit the efficiency of criminal proceedings and to prevent procedural obstruction. Based on all the above, *the Constitutional Court assessed that the reasons given did not confirm the applicant's allegations that the contested provisions conflicted with the Constitution and the Convention" (italics* - authors of the review).

Article 124 of the draft text of the CPC amendments contains amendments to Article 302 CPC, i.e. the provision regulating the gathering of evidence in favour of the defence. The novelty is that the defendant and the defence attorney, in the event that the public prosecutor rejects or does not decide within three days on the proposal to take evidentiary action, would be authorised to propose to the pre-trial judge to undertake the evidentiary action. "(…) Thus, the defendant is provided with greater guarantees that evidence in favour of the defence will be presented, his position is strengthened, and hence previously 'disrupted' balance of the parties' is restored at the stage in which the public prosecutor is the authority of the proceedings, which enables the exercise of

the defence function."[122] There are opinions in the doctrine that it would be logical for the pre-trial judge to have the right to himself conduct the evidentiary action that he had unsuccessfully ordered. There have also been some opinions about introducing the so-called evidentiary hearing with the purpose of securing evidence that potentially could not be presented at the main hearing, but also for the purpose of undertaking evidentiary actions that the public prosecutor did not undertake despite the order of the pre-trial judge. [123] Would this, then, create a parallel between prosecutorial and judicial investigations and is there a need to amend the wording of Article 22, para 2 CPC and provide that the competence of the judge for preliminary proceedings shall include, in addition to the adjudication, also the undertaking of evidentiary actions? These questions need to be answered.

The provision of **Article 135 of the draft text of the CPC amendments** shows the intention to amend Article 314 CPC. The amendment would primarily relate to one mandatory element of a plea agreement – the agreement on the type, extent or scope of the penalty or other criminal sanction (Article 314, para 1, point 3 CPC). In addition, an optional element of the agreement (Article 314, para 2, point 3 CPC) would be amended as follows:

"3) an agreement in respect to the proceeds from the crime which shall be confiscated under a special law".

It is interesting that the explanatory memorandum contains only a few words about amending the mandatory element of a plea agreement, that is, "(…) to eliminate uneven treatment in practice and dilemmas about whether the public prosecutor is authorised to negotiate the imposition of a cumulative sentence and the manner of execution of the prison penalty".[124] There is no single mention of Article 314, para 2, point 3 of the draft text of the CPC amendments, although it is both a valid and somewhat differently formulated provision in the draft text of the amendments, *which should be deleted*. Given that the authors mentioned that the proceeds from the crime can be confiscated under a special law, it would be logical for them to have read the provisions they are referring to. Obviously, they either did not do it, or they misinterpreted it. In any case, they are not familiar with the practice of the European Court of Human Rights or the Supreme Court on this issue, nor with theoretical perspectives on this matter.

Given that Article 38, paragraph 1 of the LCPDCA[125] stipulates that the public prosecutor shall submit a request for the permanent seizure of property derived from

122 Explanatory memorandum of the draft text of the CRC amendments, 60.

123 S. Beljanski, in: G. P. Ilić *et al.*, 892.

124 Explanatory memorandum of the draft text of the CRC amendments, 61.

125 Law on Confiscation of Property Derived from Criminal Activity – LCPDCA, *Official Gazette of the RS* 32/13, 94/16 and 35/19

criminal activity within six months from the date of delivery of the final judgment about a crime being committed, "(…) the question may be raised whether the plea agreement may also contain an element relating to the property derived from criminal activity". It is clear that this issue, although non-criminal in nature, can be of great importance when concluding a plea agreement between the public prosecutor and the accused. However, the judicial practice[126] shows that regardless of whether the waiver of the right to appeal by the parties and the defence attorney is an integral part of the accepted plea agreement and the rendered judgement, the six-month deadline for submitting a request by the public prosecutor for the permanent seizure of property referred to in Article 38, para 1 of the LCPDCA starts on the date of the delivery of the final judgment to the public prosecutor upon the expiration of the deadline for an appeal prescribed under Article 319, para 3 CPC".[127]

The European Court of Human Rights expressed its position on this issue in the case of *Ulemek v. Serbia*.[128] The current legal wording[129] shows that the system is directed against property, not against a person. This is evident as even seizure of property of a third person may be ordered, if such property derives from a crime. It is also possible that the property of a deceased person who has never been accused or convicted of any crime is seized, if the suspicion that such property derives from a crime arises from facts established in criminal proceedings against a third party. In the case of seizure of proceeds from a crime, unlike in the case of fines under criminal law, the degree of culpability of the perpetrator is irrelevant for determining the extent of the confiscated property. The good side of the solution in Serbian legislation is that the decision to seize proceeds from criminal activity cannot be conditioned by imprisonment for non-payment, which is an important element of fines in criminal law. Given that Serbian courts may decide to award part or all of the confiscated property to the benefit of victims, if civil claims are established by final court decisions, this is more comparable to the restitution of property acquired through unjust enrichment under civil law than to a fine of a criminal nature. Moreover, the *decision on the permanent confiscation of the property* was made by a special chamber of the criminal court *in a special confiscation procedure and after the final conviction* of the applicant.

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126 Supreme Court of Cassation, *Kzz. Ok. No. 32/20*, January 20, 2021

127 M. Majić, in: G. P. Ilić *et al.*, 918.

128 ECHR, *Ulemek v. Serbia*, 41680/13, 2 February 2021, §§ 53-57, https://hudoc.echr.coe.int/eng?i=001-208855 (accessed on 20 January 2025). Previously, the Constitutional Court, by decision *Už-4945/2010* of 26 November 2012, rejected the constitutional appeal of Mr. Ulemek.

129 This is a provision of the original Law on Confiscation of Property Derived from Criminal Activity, *Official Gazette of the RS 97/08*. Given that the current solution is identical to the previous one, the arguments also refer to the positive legal text.

When it comes to agreements between the public prosecutor and the defendant, reference should be made to **Article 138 of the draft text of the CPC amendments**, which provides for certain amendments to the agreement on testifying of the defendant (Article 320 CPC). The explanatory memorandum only mentions that an significant amendment to Article 320, para 5 of the CPC "(…) refers (…) to potential introduction of audio, or audio and video recording of the statement, of the defendant as a witness, on relevant facts he has knowledge on, and of which a record should be made".[130] It should be noted that the doctrine states: "Although this agreement may only be used in proceedings against perpetrators of criminal offenses precisely defined in Article 162, para 1, point 1, a significant novelty is that the public prosecutor may conclude an agreement not only with a person charged with any of the aforementioned criminal offenses, but also with a person accused of any other criminal offense."[131] Given the increase in the number of crimes punishable by maximum or life imprisonment, the question of the justification for using plea agreements for the defendant testifying may be raised, not just in organised crime or war crimes, but in other crimes, too. The authors have not tackled this issue.

It is important to mention **Article 150 of the draft text of the CPC amendment**s because it provides for the deletion of all provisions (Articles 345-351 CPC) relating to the preparatory hearing. Apart from the note that it was proposed to delete the relevant provisions regulating the preparatory hearing,[132] no reason was given to justify such a stance by the authors. Hence, the answers should be sought elsewhere, and those are primarily the statements from the initiative to start the procedure for the assessment of constitutionality of Article 350, para 1 and Article 395, para 4, point 1 CPC. "The constitutionality of the provision of Article 350, para 1 (and Article 395, para 4, point 1) of the Code is contested by one of the applicants in relation to the provision of Article 33, para 2 of the Constitution, stating that the defendant has the right to defend himself in the manner he considers most favourable to him, including the right to remain silent, and that the aforementioned provisions limit that right and prevent the establishment of the truth to which criminal proceedings must aspire. It further states that reasons of procedural economy must not limit the defendant's right to defence, and that it is illogical to prohibit the presentation of new evidence at the first-instance main hearing, when it can be presented in an appeal against the judgement regardless of whether the party has previously known them".[133]

The aforementioned separate opinion emphasised that "(…) the basic *ratio legis* of the preparatory hearing (which is mandatory for serious criminal offenses),

130 Explanatory memorandum of the draft text of the CRC amendments, 61.

131 M. Majić, in: G. P. Ilić *et al.*, 930, 931.

132 Explanatory memorandum of the draft text of the CRC amendments, 61.

133 Constitutional Court, *IUz-96/2015*, July 2, 2020

is to limit the party's evidentiary initiative, or in general, the possibility of proposing and presenting new evidence (…)".[134] When it comes to Article 350, para 1 and Article 395, para 4, point 1 CPC, the following understanding was presented: "(…) Contrary to the constitutionally guaranteed right of the defendant to defend himself in any manner he deems adequate, and even 'not defend himself', and be completely passive in the criminal proceedings, the legislator, by means of the rules on the mandatory presentation of evidence that the defence knew about at the preparatory hearing, makes the defendant 'cooperate with the court in providing evidence' in criminal proceedings (…)."

The position of the Constitutional Court is completely different from the presented understanding because the initiative to assess the constitutionality of Article 350, para 1 and Article 395, para 4, point 1 CPC has been rejected. "Starting from the initiative's allegations challenging the constitutionality of the provision of Article 350, para 1 of the Code, the Constitutional Court has found that there are no constitutionally substantiated reasons for challenging the aforementioned provision[135] of the Code, which is the basic ground for the Court's action, but only general allegations of a violation of the right to defence. Regarding the applicant's reference to the defendant's right to remain silent, the Constitutional Court points out that this is the right of the defendant who is being heard, that is, who is making a statement, the essence of which is to protect the defendant from forced testimony and self-incrimination, and that it has no connection with the content of the contested provision".[136] Challenging of the constitutionality of provision of Article 395, para 4, point 1 CPC by the applicants, was also assessed by the Constitutional Court as a general claim of violation of the right to defence (of course, this did not sway the members of the working group from proposing the deletion of Article 395, para 4, point 1 CPC in Article 163 of the draft text of CPC amendments).

The provision of **Article 153 of the working text of the CPC amendments** provides for a change of the title and content of Article 356 CPC. The title of the Article would read: "Proposing and Obtaining New Evidence". Compared to Article 356, para 3 CPC, which stipulates that the president of the panel may even without a proposal by the parties and injured party order gathering of new evidence for the main hearing (Article 15 para 4), of which he shall notify the parties before the commencement of the main hearing, the proposed Article 356, para 3 of the draft text of the CPC amendments provides:

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134 Concurring separate opinion of Judge Dr. Milan Škulić on the Decision of the Constitutional Court, *IUz-96/2015*, May 20, 2021

135 Instead of "navedene odredaba" it should read: "navedene odredbe" (Authors' note re. a spelling error in the Serbian text – *translator's note*).

136 Constitutional Court, *IUz-96/2015*, July 2, 2020.

"The president of the panel may, without a proposal by the parties, order the gathering of new evidence for the main hearing in accordance with Article 15, para 4 of this Code".

The explanatory memorandum states that these are the most important amendments "(…) which represent compliance with the amendments from Article 15, para 4 CPC, in terms of amendments to Article 356 CPC, which relate to proposing and gathering new evidence". This article stipulates that the parties and injured parties may, even after the main hearing has been scheduled, propose that new witnesses or experts be called to the main hearing or that other new evidence be gathered. In their reasoned proposal, the parties must indicate which facts should be proven and by which of the proposed evidence. In addition, the presiding judge may, without a motion from the parties, order the gathering of new evidence for the main hearing in accordance with Article 15, para 4 of this Code, of which he shall inform the parties before the commencement of the main hearing".[137]

By comparing the wording of the current Article 356, para 3 CPC and the proposed Article 356, para 3 CPC, no major difference can be observed, except that the amended provision does not mention the duty of the presiding judge to inform the parties about the evidence the collection of which he has ordered. This has been done in para 4 of Article 356 of the draft text of the CPC amendments, which stipulates that the parties shall be notified of the decision on ordering the gathering of new evidence before the main hearing starts.

The rationale of the proposed amendment should be sought in Article 15, para 4 CPC, or in the explanatory memorandum related to the amendments to Article 15, para 4 of the draft text of the CPC amendments.[138] "(…) The proposed amendments reintroduce the principle of truth into our criminal procedure, but in a rather limited manner (…)" and "(…) the contradictions of the currently valid para 4 in relation to para 3 of Article 15 CPC have been corrected (…). Another reason for the proposed amendment is to align it with the provisions of the CPC, which relate to the possibility of filing an appeal due to incorrectly or incompletely determined facts. It is absolutely unclear how a judgement may be challenged on factual grounds without the court having previously had the opportunity to establish all the relevant facts necessary to render a lawful and correct judgement".[139] And in the separate opinion it is stated that "It can (...) be assumed that in practice the criminal court

137 Explanatory memorandum of the draft text of the CRC amendments, 61.

138 The proposed Article 15, paragraph 4 CPC provides for the court's jurisdiction to present evidence that establishes the facts in the proceedings, while the current Article 15, para 4 CPC, in addition to the court's *ex officio* evidentiary activity, also prescribes that the court may order a party to propose additional evidence. See the review of Article 7 of the draft text of the CPC amendments.

139 Explanatory memorandum of the draft text of the CRC amendments, 51.

will still attempt to get as close as possible, perhaps even beyond strict legal rules, to the truth or even try to establish the truth in criminal proceedings, because, like previously, the provisions of the current CPC also allow for filing an appeal due to *incorrectly or incompletely determined facts.* Hence, incorrectly and incompletely determined facts are falsehood, or *falsely established factual situation*. (…) The court can certainly, although exceptionally, order the presentation of certain evidence itself, if this is necessary in order to comprehensively discuss the subject of the evidence, but the question is why the court would do this if it is not formally obliged to truthfully and completely establish[140] the facts that are important for making a lawful decision (…)".[141]

The expert community has pointed out the ambiguous nature of these arguments. "(…) The allegations about the 'reintroduction of the (limited) principle of truth into criminal proceedings' are particularly interesting. The authors of the draft explain this by asserting that 'the principle of truth is introduced in a rather limited way, so as not to deviate from the basic rule that the prosecutor proves the indictment and bears the risk of not proving it', which, to start with, seems ambitious and likely to be linked to many challenges. The return of the principle of material truth is a burden under which the rule that the prosecutor proves the indictment can hardly persist without being transformed into the rule that ' also the prosecutor shall prove the indictment'". [142]

"The question of how a judgement may be challenged on factual grounds without the court having previously been given the opportunity to determine all the relevant facts necessary to render a lawful judgement, one could try to answer the following: The parties in the proceedings propose evidence for certain factual claims, and the court may accept or reject each evidentiary proposal. If some relevant evidence or a piece of evidence is not presented (because the court refused to present it), we could end up with an incompletely established factual situation. If the court, however, were to present all the proposed relevant evidence and draw incorrect conclusions, there would be an incorrectly determined factual situation".[143]

In other words, an incorrectly established factual situation exists when the first instance court draws an *incorrect conclusion* about the existence or non-existence of a decisive fact (which is a consequence of an incorrect assessment of the evidence when the decisive fact is being positively or negatively established, i.e. failure to use all evidentiary means or failure to have a sufficient amount of evidence), while

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140 *Lapsus calami*. (This refers to the original text in Serbian – *translator's note*).

141 Concurring separate opinion of Judge Dr. Milan Škulić on the Decision of the Constitutional Court, *IUz-96/2015*, May 20, 2021.

142 D. Ignjatović, M. Pavlović, Život i priključenija člana 15 Zakonika o krivičnom postupku.

143 *Ibidem*.

an incompletely established factual situation exists if the first-instance court *fails to establish* the existence of a *decisive fact* (which can occur due to an oversight by the court or a legal error that resulted in the application of the wrong law, i.e. a misinterpretation of the legal provision that should have been applied).[144] There is a significant difference in the method of assessing deficiencies in the factual situation[145] as *an incorrect factual situation* is determined according to subjective criteria – *by assessing the evidence*, while *an incompletely established factual situation* is assessed by an *objective* criterion – *the interpretation of a legal norm.*

The previous presentation dealt with the court's duty to complete an evidence, clarify it or try to eliminate contradictions, to determine the manner of presenting an evidence, order a party to present an evidence or, if necessary, itself present an evidence in order to comprehensively discuss the subject of evidence.[146] A comprehensively discussed criminal case is a condition *sine qua non* for establishing the correct and complete factual situation in criminal proceedings, and it is up to the court to assess at which point a particular criminal case can be considered to have been comprehensively discussed. Finally, Article 155, para 1 of the draft text of the CPC amendments proposes an amendment to Article 367, para 2, point 4 CPC, which would stipulate that the president of the panel at the main hearing shall ensure "(…) a *comprehensive examination of the case*, elimination of anything that delays the criminal proceedings or does not contribute to the *clarification of the matter*" (*italics* - authors of the review). And it is precisely the court's failure to comprehensively discuss the case and clarify the criminal matter that constitute the ground for overturning the judgement due to incorrectly or incompletely established facts.

Article 173, para 1 of the draft text of the CPC amendments states that point 1, para 1 of Article 438 CPC is deleted. In this way, "(…) The previous absolutely substantive violation of the provisions of criminal procedure, which concerned permanent obstacles to criminal prosecution (amnesty, statute of limitations, pardon, etc.), (…)" would again "(…) be classified among violations of criminal law, as it had been for decades before".[147] In addition to referring to decades of procedural tradition, Article 438, para 1, point 1 CPC has been challenged with the argument that the provisions of the procedural law cannot change the criminal law.[148] The wording of the violation of the procedural code has also been criticised because it leads to the conclusion "(…) that there would always

144 G. P. Ilić, in: G. P. Ilić *et al.*, 1209.

145 M. Grubiša, *Činjenično stanje u krivičnom postupku*, 130.

146 S. Beljanski, u: G. P. Ilić *et al.*, 153, 154.

147 Explanatory memorandum of the draft text of the CRC amendments, 62.

148 Momčilo Grubač, Tihomir Vasiljević, *Komentar Zakonika o krivičnom postupku*, trinaesto izdanje – prema Zakoniku iz 2011, PROJURIS, Beograd 2014, 775.

be an absolutely substantive violation of the provisions of criminal procedure, whenever there is a statute of limitations, etc., which is nonsense. That is a reason for a declining judgement and not a substantive violation of the provisions of criminal procedure".[149]

The common feature of the circumstances listed in Article 438, para 1, point 1 CPC is the procedural effect on the course of criminal proceedings, which is reflected in not allowing criminal prosecution. That is why they are called legal or procedural impediments. The content of statute of limitations, amnesty and pardon is undoubtedly of a substantive law nature, while a legally adjudicated matter is characterised by a procedural law content. Due to the identical *procedural effect*, that is, the *permanent exclusion of potential of criminal prosecution*, they are classified as absolutely substantive violations of the provisions of criminal procedure.[150]

The position on the impossibility of amending the criminal law by the provisions of procedural legislation does not consider the order of examining legal and factual errors in the appeal procedure. "A first-instance judgment review begins by considering whether and in what manner the criminal procedure regulations have been applied. If the second-instance court establishes that there are no significant violations of the criminal procedure, it shall proceed (provided that an appeal has been filed on that basis) to examine the correctness or completeness of the factual situation. The review must take precedence over violations of criminal law, since the question of the correct application of a criminal law norm can only be raised if the factual situation has been correctly established, that is, if the second-instance court considers it as such due to the lack of an appeal on that ground. If the appeal on this ground is assessed as unfounded or if the appellant has not challenged the judgement on this basis, the review of violations of criminal law follows, and then the review of legality and regularity of the criminal sanction and other decisions that can be challenged by an appeal".[151] Related to deficiency in wording of Article 438, para 1, point 1 of the CPC, it was emphasized that "(…) the correct wording should read: an absolutely substantive violation of the provisions of criminal procedure exists if the law has been violated due to the expiry of the statute of limitations for criminal prosecution (…)".[152] So it is about *lacking* of violations of the law. This understanding *lacks* consistency in the interpretation of procedural violations, because the same objection could refer to the violation under Article 438, para 1, point 2 CPC. Namely, just as the issue of the statute of limitation is regulated by the

149 Snežana Brkić, Tatjana Bugarski, *Krivično procesno pravo II*, drugo izmenjeno izdanje, Pravni fakultet Univerziteta u Novom Sadu – Centar za izdavačku delatnost, Novi Sad 2024, 178.

150 G. P. Ilić, in: G. P. Ilić *et al.*, 1171.

151 *Ibid*., 1209.

152 S. Brkić, T. Bugarski, 178.

provisions of the CC, the actual jurisdiction of the court is regulated by the Law on Regulation of Courts.[153]

The provision of **para 4 of Article 173 of the draft text of the CPC amendments** proposes an amendment to point 1, para 2 of Article 438 CPC:

"1) the court, when preparing the main hearing or during the main hearing or when rendering the judgment, failed to apply or incorrectly applied a provision of this Code, which affected or could have affected the correctness and legality of the judgment".

If the draft text of the CPC amendments is compared with the positive legal provision, it is noted that *preparing the main hearing* and *rendering of the judgement* are part of the amendment, while instead of *decisive importance of issuing a lawful and proper judgment* (Article 438, para 2, point 3 CPC) the former formulation on *influence or potential influence on the correct and lawful judgement* has been reinstated. The proposed expansion of procedural situations can be assessed as correct, whereby the cases with a relatively significant procedural violation, even after the first-instance decision has been made, should be mentioned.[154] On the other hand, the authors' determination to reinstate the former legal solution on influence or potential influence of a relatively significant procedural violation on the judgement is questionable.

The provision of **Article 181, para 1 of the draft text of the CPC amendments** contains a novelty in terms of an addition of a new para 2 in Article 449 CPC. It reads:

"A hearing before the second-instance court shall also be held if it is necessary to remedy substantive violations of the provisions of criminal procedure, and the case may not be returned to the first-instance court due to the prohibition under Article 455, para 2 of this Code".

The question is whether this amendment is needed because, due to the limitation to only one annulment of the first-instance judgment in the same case (Article 455, para 2 CPC), the only possible solution is that the violation of the procedural code be remedied at the hearing. If it were a procedural violation in relation to which the first-instance judgment could be reversed, the appellate court would, at the panel session, *instead of annulling*, apply Article 459, para 1 CPC and reverse the first-instance judgment. However, in Article 185, para 1 of the draft text of the CPC amendments, it is proposed to delete from Article 459, para 1 CPC the absolutely substantive violations of the provisions of criminal procedure (points 1, 7, 9 and 10, para 1, Article 438 CPC) due to which the second instance court was

153 Law on Regulation of Courts, *Official Gazette RS* 10/23.

154 Higher Court in Belgrade, *Kž2. No. 1460/20*, January 11, 2021

authorised to reverse the first instance judgement according to the state of affairs. This has been done with the intention of "(…) through the proposed amendments, eliminate (…) the identified weaknesses of existing solutions in judicial practice".[155] It is debatable whether this will be thus achieved, as the draft text of the amendments allows that *any* absolutely substantive violation of the provisions of criminal procedure becomes the sole basis for the first annulment of the first-instance judgement.

Related to appeals against a decision, there is an idea to limit the number of annulments and referrals to re-trails, like with the first-instance adjudication. Hence, **Article 190, para 2 of the draft text of the CPC amendments** provides for adding para 5 to Article 467 CPC, which reads:

"The second-instance court shall decide on its own if, regarding the same decision, the first-instance decision has already been overturned twice and returned for re-trail".

The authors have searched for a valid legal solution regarding an appeal against a first-instance judgement. There are, however, other examples, such as **Article 183 of the draft text of the CPC amendments**, which contains changes regarding the limits of reviewing the first-instance judgment. The new provision would stipulate:

"The second-instance court shall review the judgment in the part contested by the appeal, within the grounds of the challenge set out in the appeal but shall always *ex officio* examine (…)".

It is noticeable that the *direction* of the challenge referred to in the current Article 451, para 1 CPC has been omitted. Although it would be logical to proceed in the same way when regulating the limits of examining the decision, this has not been the case, so the court reviews the decision within the framework of the grounds, the offence and the direction of the challenge specified in the appeal (Article 467, para 1 CPC).

The authors' position is that in the area of extraordinary legal remedies, a *restitutio in integrum* should be carried out. This implies returning requests for the protection of legality to the exclusive jurisdiction of the public prosecutor, and the equality of arms would be achieved by granting the right for the defence to submit a request to examine the legality of a final verdict. As a justification for this intervention, it was stated that "(…) This is (…) an extraordinary legal remedy that has existed in our country for decades, and before 2001, under the name – the request for an extraordinary review of a final judgment". This extraordinary legal remedy (…) is an equivalent to the request for the protection of legality, which is an exclusive public prosecutorial legal remedy. (…) The new extraordinary legal

155 Explanatory memorandum of the draft text of the CRC amendments, 62.

remedy and its distinction from the request for the protection of legality is of great importance both for the better exercise of the defence function in criminal proceedings and for the unification of judicial practice, given that it is decided by the highest court in the Republic of Serbia."[156] Before considering the draft text of the CPC amendments relating to this legal remedy, it is necessary to refer to a provision concerning the request for the protection of legality.

The analysis of the draft text of the CPC amendments has so far indicated, among other things, the traditionalism of the members of the working group, which is often manifested as a messianic need to resurrect procedural institutions from previous criminal procedure laws. Such an example is contained in **Article 201 of the draft text of the CPC amendments**, which provides for the amendment of the existing legal regulation of requests for the protection of legality with the provision of Article 493a, which reads:

"Judgment quashing a decision
493a

If, when deciding on a request for the protection of legality filed in favour of the defendant, substantial doubt arises regarding the truthfulness of the decisive facts established in the decision against which the request was filed, and therefore it is not possible to decide on the request for the protection of legality, the court shall, by its judgment on the request for the protection of legality, revoke that decision and order a new main hearing before the same or another competent first instance court".

In theory, there is an understanding that it is a repeated procedure (although such a phrase is not used) with no new evidence in order to re-assess old evidence.[157] "The institute represents a double exception: the review of the factual situation is initiated *ex officio* (while in the procedure of regular legal remedies it is only upon an appeal), and the repetition is carried out for the purpose of re-assessing the same factual material, which is otherwise completely excluded in a repeated procedure. This basic idea was not understood when the law was amended in 1985, so it was stipulated that the provision would only be applied if significant doubt regarding the decisive facts prevented a decision on the request for the protection of legality, which completely distorted the meaning of the institute, or rather, it lost all the meaning".

156 *Ibid*., 63.

157 Tihomir Vasiljević, Momčilo Grubač, *Komentar Zakonika o krivičnom postupku*, sedmo izmenjeno i dopunjeno izdanje, Službeni glasnik, Beograd, 2002, 805.

The original wording of the provision was included in the CPC/1953,[158] and was then taken over in the CPC/1976, and represented "(…) an expression of fairness, the ultimate safety valve against judicial errors regarding the truthfulness of the established facts on which court decisions are based, so the court deciding on a request for the protection of legality was authorised - when deciding completely independently on the request, i.e. on the violation of the law on which it is based - to annul the final verdict (decision) and return the case for a re-trial (adjudication), if it doubts the truthfulness of the decisive facts established therein. (…) However, according to the Amendments/85, this extraordinary institute is completely changed, rather, its physiognomy and character: it transforms into a means for obtaining a different factual situation that would correspond to the needs of correcting the violated law, that is, to the needs of deciding on the request itself".[159]

Amendments/85 added the sentence "*therefore, it is not possible to decide on the request for the protection of legality*" to the existing wording. As a result, the meaning of the amended provision was changed, and it got the following meaning: "(…) if the court, when deciding on a request, suspects that a decisive fact has been incorrectly determined and that *it may not therefore decide on the request*, it shall revoke the final decision… etc. (…) it is theoretically untenable that the court, which decides on a violation of the law, is given the authority, in connection with the need to decide on the request itself, to quash the contested judgment due to incorrectly (untruly) established facts".[160]

These are just some of the problems related to the proposed Article 493a CPC. The question can be legitimately raised as to whether they were considered when deciding to reinstate this procedural institute to our criminal procedure, or whether in this case again the "tradition" (*socialist*, to be clear) prevailed. Thus, the Supreme Court, in addition to the jurisdiction to decide on an appeal filed against a second-instance judgment (Article 188 of the draft text of the CPC amendments), would be granted the authority to deal *ex officio* with facts when deciding on an extraordinary legal remedy filed due to legal errors.

Article 202 of the draft text of the CPC amendments comprises three articles (Art. 494a, 494b and 494c) which, in the subsection entitled "Request to examine the legality of a final verdict", would regulate this extraordinary legal remedy. In addition to pointing out that this is a solution that existed for decades, it was stated that "(…) The new extraordinary legal remedy and its distinction from the request for the protection of legality (…)" is of great importance "(…) both for

158 Criminal Procedure Code – CPC/1953, *Official Gazette of the FPRY* 40/53, 43/53, 5/60 and 30/62 and Official Gazette of the SFRY 12/65, 23/67, 50/67 – consolidated text, 54/70 and 6/73.

159 Mladen Grubiša, *Krivični postupak Postupak o pravnim lijekovima*, Informator, Zagreb 1987, 413, 414.

160 *Ibid*., 414.

better implementation of the defence function in criminal proceedings, and for the *unification of judicial practice*, given that the decision is made by the highest court in the Republic of Serbia" (*italics* – authors of the review).[161]

Given that the *ratio legis* mentioned was a better implementation of the defence function, it is unusual that the authors have disregarded the tradition so dear to them (in fact, a *post-socialist* one), or rather a solution from the CPC/2001: "(…) Unlike Article 71, para 4 CPC/2001, which, in the event that the defendant was sentenced to forty years in prison, provided for the appointment of a defence attorney *ex officio* and for proceedings under extraordinary legal remedies, Articles 74 and 76 do not contain such a provision".[162] This was an opportunity to provide that at least some of the listed cases of *ex officio* defence also apply in proceedings based on a request to review the legality of a final verdict.

The existing solutions regarding the conditions, reasons and deadlines for submitting a request to review the legality of a final verdict have been retained, which is due to the effort to ensure that, allowing the defence to use this extraordinary legal remedy, it does not transform (given potential number of requests submitted) into a regular legal remedy.[163] As in the case of the request for the protection of legality, this extraordinary legal remedy also provides for the corresponding application of Article 493a of the draft text of the CPC amendments. The introduction of the request to review the legality of a final verdict was accompanied by a dubious explanation about the unification of judicial practice. Namely, currently the Supreme Court decides on a "single" request for the protection of legality, while in the future it would be competent for two extraordinary legal remedies filed with the aim of challenging legal errors in final decisions. So, the question is what the authors wanted to say

161 Explanatory memorandum of the draft text of the CRC amendments, 63.

162 G. P. Ilić, in: G. P. Ilić *et al.*, 1315.

163 M. Grubiša, *Krivični postupak Postupak o pravnim lijekovima*, 404.

Concluding remarks

The above analysis of the draft text of the CC and CPC amendments may serve as a reason for omitting the final remarks, as it is not difficult to draw a conclusion about the value of the reform effort in the field of substantive and procedural criminal legislation. In support of this, we may say that the "twin amendments" have suffered from the same bug, more precisely from the inappropriately short timeframe for public debate and the simultaneous (as befits twins) debates at four round-table discussions on both draft texts. There were, however, certain differences between the two sets of amendments, so it would be useful to briefly point them out.

The draft text of the CC amendments proved to be controversial, even in a formal sense, because the chairman and two members of the working group publicly announced that, except for the first few meetings, they were no longer invited, and therefore did not participate in drafting the text of CC amendments. The professional community was also upset by the CC amendments that were sent overnight and adopted without debate in the Parliament of the Republic of Serbia. The consequence was the strike of the Serbian attorneys-at-law, along with the SBA's Board pointing out the problematic nature of the upcoming CC and CPC amendments.

In the explanatory memorandum to the draft text of the CC amendments, it is emphasised that the amendments are being undertaken to harmonise penal policy with modern social needs and international obligations. The examples of self-defence and parole can be used to see how the members of the *reliquiae reliquiarum* of the working group envisioned it. One life event and the Minister of the Interior's statement on the matter were enough to determine, despite the unified position of doctrine and court practice, that the attack was imminent, and all of this was wrapped up in the veneer of compliance with international standards and the need to expand the institute of self-defence in the European space. Even the justification for extending the ban on parole was referred to as compliance with international standards. In essence, this is a tendency that began in 2016, continued in 2019, and has fully accelerated by the draft text from 2024, inclining to intensified repression, primarily against perpetrators of sexual offences, but also of offences against life and limb. In the CC amendments, the extent has been such that the sentence of life imprisonment becomes common for most criminal offenses from these groups, which means that these offenses would not fall under the statute of limitations. On the other hand, the idea of abolishing the criminal offence of extortion of confession (Article 136 CC) has not been received with approval by the expert community, nor have the arguments been convincing from the explanatory memorandum to the draft

text of the CC amendments that there is an overlap with the criminal offence of ill-treatment and torture (Article 137 CC), which results in uneven judicial practice.

The working group for drafting the text of CPC amendments was "steady as a rock", except for the change concerning attorneys-at-law, that had been made before the draft was presented to the public. The question is to what extent the renewed articles could have influenced the sublime task, because the draft text of the CPC amendments contained 218 articles, and there was little time for a more serious discussion of the adopted solutions. The key arguments presented in support of the provisions contained in the draft text of the CPC amendments were based on domestic legal tradition, the unconstitutionality of the provisions of the current CPC, and their inconsistency with the provisions of the ECHR and the case law of the European Court of Human Rights. Even a cursory glance at the draft text of the CPC amendments is enough to notice superficiality of the claims about the unconstitutionality of positive procedural solutions. A more detailed examination confirms that the reference to unconstitutionality as the *ratio legis* represents an arbitrary interpretation by the members of the working group or a reliance on a single concurring opinion that remained isolated concerning the unconstitutionality of the provisions of the CPC. It is not disputed that the members of the working group have a different understanding of certain provisions of the CPC from the Constitutional Court, but it is unacceptable that, when pointing to the unconstitutionality of certain decisions, they do not indicate that this is their interpretation of the provisions of the Constitution of the RS or at least the view contained in a separate opinion of one of the twelve judges of the Constitutional Court, which decided on the issues.

The fact that the authors do not have the best understanding of international human rights standards has been confirmed by the interpretation of the right to a fair trial. Instead of examining the original texts in English and French, they adhered to the incorrect official translation of the ECHR into Serbian, while not knowing the position of the Constitutional Court on the meaning of Article 32, para 1 of the Constitution of the Republic of Serbia and Article 6, para 1 of the ECHR, and relying exclusively on the aforementioned separate opinion. It is obvious that the members of the working group do not mention any of the significant cases in which the European Court of Human Rights ruled on solutions in Serbian law, so it is not surprising that certain provisions from the draft text of the CPC amendments are in conflict with the Strasbourg standards. Furthermore, the draft text of the CPC amendments does not refer to the practice of the European Court of Human Rights or the Supreme Court, even though these are grounds for proposing the solutions that cannot be directly derived from the Constitution of the Republic of Serbia. The members of the working group do not have good knowledge of domestic legal tradition, because, in their efforts to reinstate the criminal procedures for some institutes from previous legal texts on criminal procedure, they opt for the solutions

that were criticised in procedural theory and created problems in interpretation and application in practice.

The tightening of penal repression and reducing the criminal law to the status of a servant - that is, in short, a description of the draft text of the CC amendments. On the other hand, many provisions cloaked in the cape of constitutionality and tradition, with the intention to present individual positions as generally accepted, is a characteristic of the draft text of the CPC amendments. *Nihil novi sub sole*.

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