REFORM OF THE CRIMINAL PROCEDURE IN THE REPUBLIC OF MACEDONIA

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1. Introduction – New type of criminal procedure

The basic feature of the criminal procedure reform in the Republic of Macedonia is full desertion of the judicial paternalism based on the traditional comprehension that the court can determine the material truth and the belief that it shall be impartial and successful thereby, thus taking into account both the interest of the state in the efficiency, and the rights of the defendant. The procedure becomes adversarial and the role of procedural fairness and the principle of contradiction at the main hearing are emphasized. In that manner, the new Code on Criminal Procedure fully alters the concept of one essentially inquisitorial procedure designed as an official investigation of the judge. Such criminal procedure was lengthy and expensive, and the court, burdened with the obligation of resolving the case objectively, was not in the position of impartial decision-maker. The reform focuses on core modification of the basic postulates forming the foundation of the existing "mixed type" procedure, which brings about entirely new objectives of the stages of the procedure and the role of the major players therein. It is therefore important to understand that the new system is much more than a simple replacement of the court investigation with a prosecutorial one.[3]

The major models we considered throughout the process of reform were the codes of criminal procedure of Italy, Austria, Germany, the USA, Bosnia and Herzegovina, Croatia and Serbia. It is now obvious that the Italian model, in particular, was imposed as especially inspirational and suitable for a state willing to grow its continental criminal procedure organized as an official court investigation into a modern European adversarial criminal procedure. This is expressed into almost all key elements in the reform: prosecutorial investigation with the judicial police (*police judiciaire*) reporting thereto, investigations of the defence, cross examination without a jury system, developed forms of summary procedures with possibilities of settlement, etc. We shall discuss these issues hereinafter so as to explain the *ratio* behind them.

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2. Reform of the investigation

2.1. Deserting the court investigation is one of the main focuses of the reform.[4] A little unexpectedly, abolishing the investigatory judge did not encounter almost any resistance by the local experts and academics.[5] If the predominant aim of the investigation really is the *collection* of evidence for purposes of making a decision whether the prosecutor will file charges or not, then it is illogical for the evidence to be collected by the investigatory judge for the public prosecutor. This helps *to accelerate* the procedure significantly, which suits both the prosecution authorities (the state) and the suspect because these will not endure anticipation and uncertainty, especially if they have been imposed measures limiting their rights and freedoms.[6]

Reducing the court to the role of controller of the lawfulness and a warrant of the rights and freedoms instead of an active investigator (inquisitor) provides the court with the possibility of deciding impartially regarding issues relevant for the rights and freedoms (detention, special investigation measures, search, etc.). Without an obligation of actively investigating the case itself, this protective role shall be better played by the judge of the pre-trial procedure (named by some as "the judge of freedoms") than by the investigatory judge, as it is currently done, who has the burden of the investigation principle and the obligation for solving the case. To be honest, it was in the investigatory judge's favour to have the suspects detained, eavesdropped, searched, etc. On the other hand, it must be said that the defence shall, however, now lose one important assistant in the collection of evidence in favour of the defence. The defence does not have such capacities, nor will it be helped by the public prosecutor, in spite of all its declarative commitment for impartiality. Moreover, the adversarial model which is to be introduced now does not provide for court control over the decision of the prosecutor to undertake prosecution at an early stage of the procedure (as it has been so far).

In addition to this, as we will see below, the opinion of the defendant not being informed at all that an investigatory procedure is initiated against him prevailed for the commission preparing the new Code on Criminal Procedure.[7] That is undoubtedly more favourable for the public prosecution office due to a simple reason that it will reduce to a minimum the possibility of condemning the investigation by the

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[4] See: В. Pavišić, „Europski sustavi kaznene istrage na početku trećeg milenija", во *Зборник на трудови на Правните факултети во Скопје и Загреб*, Скопје/Zagreb, 2007, pp. 321-341.

[5] The lonely opponent of the judicial investigation is prof. Nikola Matovski (see: Н. Матовски, "Моделот на истрагата (судски или обвинителски)", *Зборник трудови на Правниот факултет,* Скопје/ Zagreb, 2007, 99-111). On the contrary, in Serbia the new Serbian Code of Criminal Pprocedure was severely criticised (see: M. Grubač, "Treba li sudsku istragu zameniti nesudskom istragom", *Зборник на Правниот факултет „Јустинијан Први"во чест на Панта Марина*, Скопје, 2007, p. 48; С. Бејатовиќ, "Нови Законик о кривичном поступку Републике Србије и тужилачки концепт истраге", *Македонска ревија за кривично право и криминологија,* Скопје, 2/2007, pp. 297-321).

[6] See: Г. Калајџиев, "Замки и заблуди на реформата на истрагата", *Зборник трудови на Правните факултети во Скопје и Загреб*, Скопје/Zagreb, 2009.

[7] See: Д. Илиќ, *Реформата на истрагата во Република Македонија*, Магистерски труд, Правен факултет, Скопје, 2009.

suspects. Still, this handicaps the defence to a large extent, which will practically never be compensated later in the procedure. It must not be forgotten that this solution has its advantages for the suspects: it is thus possible to disturb citizens who may never be filed an indictment; there is lesser probability for them to be put in detention (which may occur in case they are informed of the investigation conducted against them for fear of their fleeing or affecting the course of the procedure by hiding or destroying evidence, etc.), and other.

One of the principal reasons for abandoning the concept of the investigatory judge is the fact that it has proven to be inefficient in both roles: they did not fundamentally collect a lot of new evidence different from that already gathered previously by the bodies for detection and prosecution, nor did they efficiently protect the rights and freedoms of the individual. In point of fact, the fixation of evidence with their valid *presentation* already in the investigation itself ensures a speedier trial and the risk of withholding or modification of the evidence given in the investigation at trial is decreased, which is perceived as important so as to obtain a conviction of criminals. However, it is exactly this last point that is especially controversial, since the court investigation with the presentation of evidence as early as in the investigation is a "trial before trial" of sorts, thus undoubtedly influencing the final outcome of the procedure. As a result, the main hearing and the whole concept of a fair trial before an impartial court loses its importance, since almost all statements from the investigation have been validly used as grounds for judgment (as a rule the judges consider them to be even more credible!). Indeed, in informal discussions, judges admit that, having examined the investigation documents, they form an opinion on whether a criminal act has been committed and whether the defendant is criminally responsible even before the beginning of the trial, an opinion which is then only checked at the hearing! That is precisely why, in spite of the extensive scepticism in relation to the capacity of the public prosecution office to handle all new tasks,[8] the vast majority of people view favourably the strengthening of the adversarial nature and the contradiction of the procedure advocated by the reform.

These are the reasons behind the significant *de-formalizing* of the investigatory procedure – the evidence is not presented, but only *collected,* and it is presented for the first time at the main hearing, with the exception of certain cases where a separate evidentiary hearing may be organized (when it is expected that a witness shall not be able to appear at the main hearing). This speeds up the pre-trial procedure significantly, emphasizing also the significance of the trial (the main hearing) as the central part of the criminal procedure where the evidence is tested in a public and adversarial hearing, which is essential for a fair trial. This likens the new Macedonian criminal procedure to the contemporary democratic penal procedures which justly balance the interests of the state to have an efficient criminal prosecution and the

[8] See: Г. Калајџиев, „Предизвици пред јавното обвинителство во реформата на казнената постапка", *Билтен за организиран криминалитет на ФИООМ*, Скопје, 1/2006.

right of the defendant to a fair trial. As a result, the pre-trial procedure shall no longer be a "trial before trial"[9].

In this respect the rules of evidence are not comprehensively regulated in the investigation, and the evidence means are elaborated in a separate chapter. Yet, the concept of "investigative actions" remains to be re-examined, since the appropriate implementation of the basic concept which has been mentioned earlier does not include a questioning or examination of suspects and witnesses in terms of presentation of evidence. Namely, if the public prosecutor only collects information and the evidence is not presented, we can not really talk about investigative actions such as "hearing of a witness", "questioning of a defendant" etc.

There have been many misunderstandings in these reforms regarding the nature of the reformed investigation in almost all countries of former Yugoslavia. We would therefore like to clarify some issues which are apparently oversimplified and create confusion in this part of the world.

Firstly, the fact that the procedure becomes adversarial does not mean that the investigation shall be adversarial in the sense that the "equality of arms" between the prosecution and the defence shall be enabled in the earliest stages of the procedure.[10] Namely, an "adversarial investigation" only exists in a mixed continental criminal procedure. In the accusatory (adversarial) procedures there is no formal investigation of the kind we are used to at all. On the contrary, the adversarial procedures in most developed legal systems which we used as models include "equality of arms" after the conclusion of the investigation as well.[11] The parties must then disclose the evidence they have at their disposal and test them at an adversarial public hearing before an independent and impartial court. The foundation of a fair trial and the "equality of arms" as its essential element are not accomplished in the investigation which is informal and during which the parties only gather evidence for the main hearing (as a "day in court").

Secondly, should the distinction between pre-investigation and investigatory procedure remain? It was the foreign experts in particular who viewed unfavourably this type of approach to the investigation which supposedly unnecessarily divided the investigation into two stages. This is somewhat surprising, since the procedure begins with detecting and the initial checks by the police and other state bodies with similar authorizations. The draft of the new Code on Criminal Procedure with the difference of these (sub) stages of the investigation envisages when this initial police investigation must turn into a prosecutorial one,

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[9] Differing from the reforms in Croatia and Serbia, which abandon the investigatory judge, but a rather formal investigatory procedure is conducted by the public prosecution office with the assistance of the police, and all evidence collected by the prosecution office in the investigation (where the defence clearly does not have opportunities equal to those of the prosecution office) are fixated (the statements of the suspect and the witnesses are recorded) and are easily used as valid grounds for judgment!

[10] See: D. Krapac, "Reforma mješovitog kaznenog postupka: potpuna zamjena procesnog modela ili preinaka prethodnog postupka u stranački oblikovano postupanje?" *Зборник на трудови на Правниот факултет во чест на проф. д-р Фрањо Бачиќ*, Загреб/Скопје, 2007, p. 177.

[11] USA and Italy, for example. Similarly, in Germany the defence stands aside until the conclusion of the investigation, and then the procedure goes on as an official investigation of the court in a way very similar to our current procedure.

in other words-when the Public Prosecutor must actively get involved in the case. This is not insignificant, especially taking into consideration that the German and many other criminal procedures suffer from this weakness of discrepancy between the laws and the theory which assign a leading role to the prosecution office on one hand, as opposed to the practice on the other, with a passive prosecutor who is confined to their office and who, most of the time, stands aside until the conclusion of the investigation.

Thirdly, the Public Prosecutor shall by no means perform the same functions in the reformed investigation as the ones carried out by the investigatory judge so far. Namely, the police and prosecutorial investigation in the new system complement each other and fuse, and the court investigation is practically passed by rather than replaced with some new (formal) prosecution investigation.[12] This means that the police investigations in terms of detecting, gathering and initial check of evidence remain as such.[13] Once the case is handed over to the public prosecutor, instead of him/her performing superficial checks in terms of so called "prior collection of notifications" and prosecuting by firstly submitting an initial indictment in the form of a request for a court investigation, in order to truly prosecute upon a supposedly thorough and objective court investigation, the Prosecutor shall now gather the necessary information and evidence so as to decide whether to file an indictment. In this respect, it is more accurate to talk about the abolishment of the court investigation instead of introducing some new prosecutorial investigation!

2.2. ***The new relationship between the public prosecution office and the police and the establishing of the judicial police and investigatory centres of the public prosecution office*** is the second important novelty in the pre-trial procedure.[14] In order for the public prosecution office to truly play a dominant role, the new Law on the Public Prosecution Office dated 2008 contains, besides the principal provision that the public prosecution office *handles* the pre-investigation procedure, more explicit provisions regarding the relationship between the public prosecution office and the police. Following the example of the majority of European countries, the public prosecution office itself may undertake any action necessary to detect and prosecute a criminal act and its perpetrator for which the police, the financial police and the customs administration are authorized by law. Finally, so as to be clear on who is "the boss"- in case of a clash of authority between them, the public prosecution office shall undertake the actions entrusted to the police or another state body. Still, the principal idea is establishment of a judicial police similar to the Italian judicial police. The aim of this reform is to distance the Police from the political influence of the top

[12] See: Калајџиев, Замки и заблуди на реформата на истрагата, op. cit.

[13] It is peculiar that the draft envisages that the police investigations shall begin with *reasonable suspicion,* and shall again conclude with *reasonable suspicion* after all undertaken actions!

[14] See in detail in the project research: Новите односи меѓу полицијата, јавното обвинителство и судот во претходната постапка и Преуредување на претходната постапка во Република Македонија (*Македонска ревија за кривично право и криминологија,* Скопје, 1/2008 и *Македонска ревија за кривично право и криминологија,* Скопје, 2-3/2008).

officials in the Ministry of Interior and to subordinate it to the public prosecution office for which it investigates in the first place at the very beginning of the criminal procedure and to which it should serve as the principal tool in gathering and securing the evidence material. With this purpose, a twofold availability of the Police and other bodies for detection is established. On the one hand, the heads of those MOI departments dealing with detection and reporting (criminal police, criminal technique etc.), as well as the Financial Police and parts of the Customs Administration of the Republic of Macedonia which fall under the jurisdiction of the Ministry of Finance are now immediately under the Public Prosecution Office. On the other hand, (just in case) the Public Prosecution Office shall now have criminal inspectors in its team itself. Unlike Italy where each prosecutor has their team of inspectors which have been taken over from the Carabinieri, the state and the financial police, in our country investigation centres of the public prosecution office are established, comprising, in part, members of the judicial police.

The idea isn't to paralyze the police and other bodies of detection, nor is it to achieve the opposite-to have them relax in the sense that the public prosecution office shall now conduct the investigations itself.[15] The Police certainly must have certain autonomy in the police investigations and a clear responsibility which would not stifle its initiative. The procedural provisions of the Code on Criminal Procedure and the Law on Police should, in this respect, determine more precisely the obligation of the Police and others to inform the public prosecution office in a timely manner and the obligation to follow its directions and warrants. The public prosecution office, on the other hand, in the future shall have to be more active in playing this part, which certainly does not depend solely on its will and ambition, but on the realistic capacities (sufficient number of trained staff, equipment etc.) as well.

2.3. The investigation of the defence is the third novelty requiring special note. The new concept of adversarial or prosecutorial investigation points to date even more the participation of the defence in the pre-trial procedure. As much as the prosecutor is obliged to investigate the case objectively and lawfully, he is still a party in the procedure and is pressed, if it may be said so, by the desire of confirming the thesis for which he has stood with the decision of instituting an investigation that the suspect has really committed the crime he is charged with. This is source of some of the most delicate traps of the new concept. Namely, there is obvious tendency (and the danger arising thereof) of keeping the defendant as far from the investigation as possible (inform him later, provide him with more restricted inspection in the files, etc.). This complicates even more his possibility of dismissing any unfounded indictments right from the start or preparing adequate defence.

The new Code on Criminal Procedure now stipulates for the defence counsel to be able to undertake investigatory actions for the purpose of finding and collecting evidence in favour of the defence as of the beginning of the performance of his duty. For purposes of collecting

[15] See: Г. Калајџиев, Замки и заблуди на реформата на истрагата, op.cit.

the necessary information, the counsel or a private investigator authorized thereby may discuss with persons who can present circumstances helpful for the aims of the investigatory actions. The counsel may directly present the information and evidence in favour of the person he represents to the public prosecutor and the judge of the pre-trial procedure.

What is different from the initial versions,[16] the draft of the new Code on Criminal Procedure reduces the participation of the defence in the course of undertaking process actions led by the public prosecutor, which reduces the possibility of "equality of arms" in the investigation. While some professionals think that its participation unnecessarily reduces the efficiency of the procedure, others believe that if the non-presence of the defence is not a condition for undertaking investigatory actions, it will not unnecessarily stall the procedure. For the defence it is still important to be able to at least inspect the files, and not be invited to attend the actions, therefore its presence and the formal approach towards the investigatory actions seems inappropriate if we take into consideration that evidence will only be collected and not presented during this stage.

3. Accusation

The concept of the investigation is not of critical importance for the system of control of the indictment. Prior to selecting the concept of control of the indictment, we analysed several comparative solutions and experiences with regards to the court control of the indictment, however, the idea of accepting the Italian indictment control concept prevailed.[17]

This concept is supported by numerous arguments.

Namely, the solutions according to which the assessment of the indictment is performed by a judge member of the panel conducting the main hearing (e.g. in Germany,[18] where there has been investigation of the prosecution for more than thirty years; as in the newly amended Austrian Code on Criminal Procedure having introduced the investigation by the prosecution; the new Serbian Code on Criminal Procedure[19]) were held as a system which does not allow for a real control of the indictment because it serves to prepare the judge for the commencement of the main hearing, and said judge undoubtedly forms an opinion with regards to the criminal case to be discussed as early as in the assessment stage of the indictment ex officio, or upon complaint.

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[16] See: Г. Калајџиев /Д. Тумановски/ Д. Илиќ, "Правичното судење и еднаквоста на оружјето во новиот ЗКП", *Македонска ревија за кривично право и криминологија,* Скопје, 4/2008.

[17] See: Г. Бужаровска/ Б. Мисоски/ В. Анастасова, "Компаративно истражување на контрола на обвинението во споредбеното право", *Македонска ревија за кривично право и криминологија,* Скопје, 2-3/2008. Codice di Procedura Penale, http://www.studiocelantano.it/codici/. A. Perrodet, "The Italian System", *European Criminal Procedures*, (Eds. M. Delmas-Marty / J.R. Spencer), Cambridge University Press, 2002, 371-374. Službeni glasnik Bosne i Hercegovine, br. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07.

[18] Strafprozeßordnung, StPO, http://www.iuscomp.org/gla/statutes/StPO.htm.

[19] Sl. glasnik RS, бр. 46/2006.

The system of control of the indictment under circumstances of having a special judge or a panel for the assessment of the indictment, who are not included in conducting the main hearing and who decide on the foundation of the evidence as impartial arbiters as opposed to what is stated in the indictment as a prerequisite for further conduct of the criminal procedure without thus getting into prejudging the outcome of the criminal procedure, was found to be acceptable and was incorporated in the Macedonian draft Code on Criminal Procedure. With regards to the advantages of such concept, the manner of its implementation into the practice and other practical aspects, the meetings with the Italian experts within the Twinning Project of the Public Prosecution Office were of great assistance.

This concept was evaluated as a more consistent one considering the fact that the assessment is assigned to a special judge, i.e. a panel independent of the chamber competent to govern the main hearing.[20] Thus there is consistency in the application of the principle of impartiality of the judge throughout every stage of the procedure.

It also introduces the possibility for the defendant to present their confession and bargain with the public prosecutor at the hearing for the assessment of the indictment, which largely contributes to the acceleration of the procedure and it simplifies the actions preceding the reaching of a judgment satisfying both parties.

It abandons the possibility of a direct accusation, which is justified by expanding the list of acts for which a summary procedure may be conducted (acts punishable by fines or imprisonment of up to five years).

The control of the indictment is performed by a judge for the assessment of the indictment if the indictment refers to criminal acts for which sentence of imprisonment of up to ten years is stipulated, i.e. a panel for the assessment of indictment for criminal acts for which sentence of imprisonment of ten years or more severe punishment is stipulated.

The public prosecutor has the obligation of enclosing all material evidence with the indictment and is to propose a list of evidence to be presented at the main hearing by stating the exact facts and circumstances thereof to be proposed. The novelty is that the indictment shall not present the statements obtained by the public prosecutor throughout the investigation procedure, i.e. the verbal evidence are not enclosed with the indictment (statements from witnesses and other persons given before the public prosecutor). They shall remain with the public prosecutor and may serve throughout the main hearing for placing attention to a previously given statement if the person having given it, at the hearing, presents a statement differing from the one they previously gave.

The assessment of the orderliness of the filed indictment solely refers to removing the detected obvious technical errors. The practice so far of returning indictments that fail to contain any of the mandatory elements is abandoned and the detected shortcomings lead to refusing the indictment as unfounded. However, if it is found that the indictment

[20] See: B. Pavišić, *Talijanski Kazneni Postupak*, Insolera G., Giostra G., (eds.) Pravni Fakultet Sveučilišta u Rijeci, 2002.

contains obvious technical errors, it shall be returned to the public prosecutor, who is obliged to provide an orderly indictment within three days.

After receiving the indictment, the suspect may file an appeal against the indictment to the judge, i.e. the panel competent for assessing the indictment; provide a confession within eight days as of receiving the indictment, or provide a list of evidence they propose to present at the main hearing, whereby it is allowed that this be done either in the appeal to the indictment or upon receiving the decision assessing the indictment as founded.

The assessment may be performed at a hearing differing depending on the existence of a confession.

The judge or the panel for assessing the indictment assesses the foundation of the indictment and reaches a decision on its approval, whereas the decision whereby the judge or the panel for assessing the indictment approves the indictment in full or in part must be explained, and the explanation must not prejudge the resolution of issues to be subject of the examination and assessment at the main hearing. The indictment shall be rejected as unfounded by means of a special decision with regards to all or certain criminal acts if it is found there are grounds for termination of the procedure. The provisions of the Code on Criminal Procedure stipulate the introduction of an indictment approval clause in case no appeal is filed against the indictment, and the judge, i.e. the panel for assessing the indictment has not found the need of holding a trial. In such a case, the judge or said panel may approve the indictment by means of an approval clause upon the expiry of the eight-day term as of providing the suspect with the indictment.

The indictment enters into force on the day of reaching the decision for its approval, i.e. by activating the indictment approval clause.

4. Adversarial main hearing

4.1. New model of trial. The current regulation of the main hearing is systemically a consequence of the compromise between the elements of the criminal procedure of the accusatory (adversarial) and inquisitorial type, established in the mixed type of criminal procedure of XIX century, that has given, within that compromise, the advantage to the inquisitorial maxim and the right of the president of the panel to examine the defendant so as to obtain his statement as evidence (inquisitorial elements). Moreover, the systemic changes which occurred in the pre-trial procedure rendering that stage of the criminal procedure a dominant one, led numerous theoreticians conclude that the main hearing had turned into a controlling stage of the procedure, where only the accuracy and reliability of evidence earlier collected by the police or investigatory judge are being checked. That is particularly seen in the process system such as the French or the Dutch one, where only minutes of previous process stages are read at the trial as a rule, while evidence are presented only as an exception.

The aim of the reform is for the court to be unloaded the duty of clearing the case on its own, *ex officio*. This role should be fully

undertaken by the public prosecution office, which also takes over the conduct of the pre-trial procedure, as well as the burden of proving the guilt beyond any reasonable suspicion, which shall, in a way, leave the court as an independent and impartial arbiter.

The provisioning of greater initiative by the parties when proposing and presenting evidence is primarily important. The court should be activated only when the defence demonstrates itself as incompetent for its role. The model of the new Italian criminal procedure seems optimal, exactly because it leaves the initiative for proposing and presenting evidence to the parties, and leaves the court, at the end, with the possibility of asking questions itself, presenting other evidence, etc, when it considers it necessary. [21]

4.2. Evidentiary procedure. Most part of the solutions proposed in the draft of the new Code on Criminal Procedure in this segment are taken over from the Codes on Criminal Procedure of Bosnia and Herzegovina and Italy.[22] It is proposed that the evidence be presented as a rule in the following order: a) evidence of the prosecution; b) evidence of the defence; c) evidence from the indictment for repudiation of the evidence of the defence; d) evidence of the defence as an answer to the repudiation, and e) evidence relevant for assessing the criminal sanction.

When presenting the evidence, direct, cross and supplementary examination will be permitted. Direct examination is performed by the party calling the witness as evidence. Cross examination is performed by the opposed party. Supplemental examination is performed by the party calling the witness and the questions put in the course of this examination are limited to the questions put throughout the examination of the opposed party.

What is unresolved is to what extent the court itself would get actively involved in the questioning at the main hearing. If the president of the panel and other panel members are enabled to ask the witness, the expert witnesses or the defendant questions at any time, there is a real danger of the judges to occupy this space in practice and impose themselves (i.e. stay) as the main holder of the examination at the hearing. This is a real danger, especially at the beginning of the new system application, considering the (un)preparedness of the parties to assume the new role.

The president of the panel shall control the method and order of the examination of witnesses and the presentation of evidence taking into consideration the fairness, efficiency and the cost-effectiveness of the procedure. He/she shall forbid questions and answers to a question which has already been asked. The judge or the president of the panel shall refuse the presentation of evidence he/she considers to be unnecessary and of no significance to the case. He/she shall forbid the asking of questions containing both the question and the answer.

In the course of the entire procedure the president of the panel shall take care of what questions are allowed, of fair examination and of

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[21] See: Г. Калајџиев/ Л. Раичевиќ-Вучкова/ З. Димитровски/ Т. Витанов/ В. Трајановска, "Преуредување на главниот претрес во Република Македонија", *Македонска ревија за кривично право и криминологија,* Скопје, 2-3/2009.

[22] See: Р. Барберини/ А. Џорџети, "Акузаторна главна расправа", *Материјали од Твининг проектот на јавното обвинителство за организиран криминал*, Скопје, 2009.

justification of the answers. The judge shall immediately decide upon the verbal objections at the main hearing in the course of the examination of the witnesses, experts and the damaged party. The court shall refuse with a decision the motion to present evidence which is clearly directed towards delaying the procedure.

The issue which caused especially extensive controversy is that regarding the status and treatment of experts, which, like in other continental European procedures, have traditionally been treated as impartial and as a kind of aides to the court. The European Court of Human Rights does not oppose openly this model in which the experts are determined as impartial and unbiased by the Court. Yet, when the indictment is actually based on the expert findings and opinion, they are treated as "witnesses against the defendant" from the point of view of the right of the defendant to a fair trial, which is why the defence must get the adequate and fair opportunity to question them, as well as to present an alternative expert analysis in its defence[23]. This problem which is currently one of the most controversial in European criminal procedures has been dealt with by the draft following the example of the Italian Code on Criminal Procedure, which envisages the possibility of engaging so called "technical advisors" who shall assist the defence with expert matters for which the defence council as a practitioner of the law is not qualified.

5. Judicial remedies

The need of rearranging the system of judicial remedies in the Macedonian criminal procedure, i.e. their rationalization is one of the basic benchmarks of the reform of the criminal procedure the objectives stated in the Strategy for the reform of the criminal law.[24] The modification of the provisions with regards to the regular and extraordinary judicial remedies would be a combination of the theoreticians' efforts for accelerating the proceeding, rationalization of the judicial remedies (above all of the extraordinary judicial remedies), as well as emphasizing the need of holding hearings before the second-instance court more frequently instead of cancelling the judgment and remanding the case for retrial before the first-instance court on one hand, and overcoming the problems observed by the practitioners which could be solved by further precising, modifying or amending certain provisions.[25]

The judicial remedies deserve special attention because they enable the correction of errors or irregularities with regards to the established actual state of affairs, i.e. in the application of the law,

[23] The European Court of Human Rights in Stoimenov v. the Former Yugoslav Republic of Macedonia, Application No. 17995/02, dated 5.04.2007. Compare with: *Bönisch v. Austria*, judgment of 6 May 1985, Series A no. 92, § 32 и *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, § 44.

[24] See: Стратегија за реформа на казненото право, op.cit., 2007.

[25] See: Г. Бужаровска/ Б. Мисоски/ Ј. Митриновски/ А. Груевска, "Компаративно истражување на редовните и вонредните правни лекови", *Македонска ревија за кривично право и криминологија,* Скопје, 2-3/2008.

committed throughout the first or second-instance procedure.[26] The current reform of the Macedonian penal-process legislation could not have failed to intervene on the subject of issues related with the status of judicial remedies in general, and within that term of the extraordinary judicial remedies.

The modifications of the regular judicial remedies refer to the bases and the procedure upon appeal. With regards to the bases for filing an appeal, the draft Code on Criminal Procedure stipulates appealing against the judgment only due to miss determined actual state, and not because of incompletely determined actual state. There is a miss determined actual state when a decisive fact has been wrongfully established or has not been established at all, i.e. when a wrongfully established actual state is indicated by new facts or new evidence.

At the same time, a preclusion is introduced for the first time in the proposal of evidence with the appeal in the sense that the appeal must not state new facts or evidence other than the ones that the parties will prove they could not present until the completion of the evidentiary procedure throughout the main hearing because they were not informed thereof or these were not available thereto. This eliminates the possibility of acting tactically, mostly by the defence, by means of providing evidence which significantly affect the outcome of the procedure and are not presented throughout the first-instance procedure.

For the purpose of speeding up the proceeding, the terms for providing an answer to the appeal have been corrected, and so have been the terms wherein the reporting judge acts upon receiving the case. At the same time it is insisted on holding a hearing before the panel of the court of second instance so as to prevent the cancellation of the judgments and retrials.

The reform neither overlooked the extraordinary judicial remedies. It is undoubtedly serious to see in which direction and manner the current repertoire of extraordinary judicial remedies from our legislation will be reformed. It was considered regarding the effects caused by reducing the number of extraordinary judicial remedies and how the protection provided thereby would be assured. From a comparative aspect it may be concluded that the system of extraordinary judicial remedies is experiencing unequal modifications and reforms in the neighbouring countries and the legislator often faces extreme difficulties in selecting the most suitable concept.

If we part from the data regarding the practical application and the effects of using part of the existing extraordinary judicial remedies, we may see the insufficient effect of the extraordinary mitigation of the punishment and the request for extraordinary examination of the valid judgment in practice. The extraordinary mitigation of the punishment as a separate extraordinary judicial remedy was abandoned. Other than the failure in its practical use, the non-logicality of the Supreme Court of the Republic of Macedonia to rule on mitigating the sentence, instead of the court of first instance where the sentences are pronounced, goes in favour of the aforementioned solution. At the same time, and for the purpose of not losing the possibility of correcting the sentence, a new

[26]See: Т. Бубаловиќ, *Право на жалбу у казненом поступку*, Бемуст, Сарајево, 2006, p. 260 Recommendation Rec(2004) 6 of the Committee of Ministers to member states on the improvement of domestic remedies.

basis for repeating the procedure was introduced—the valid judgment will be able to be altered without repeating the criminal procedure (not real repeating) when following the validity of the judgment emerge circumstances absent at the time of pronouncing the judgment or unknown to the court notwithstanding their existence, which would obviously lead to a milder sentence and, according to the logic of re-opening the procedure as an extraordinary judicial remedy, the competent first-instance court having reached the judgment shall decide.

With regards to the other extraordinary judicial remedies, attention is to be paid to certain modifications as to the repetition of the procedure – there is limitation in the court's possibility of allowing retrial in the absence of a defendant whose petition for repetition of the procedure due to trial in his absence has been accepted if he becomes unreachable to the prosecution authorities in the course of the repeated procedure. This would overcome the detected cases of misuse of the procedural possibilities by the defendants as to the possibility of repeating the procedure when they had been previously tried in absence. In the frames of the international legal assistance in the criminal matter, the court is stipulated an obligation of allowing repetition of the procedure if there is an ongoing extradition procedure against the person who has been tried in absence and if the state where that person is located asks for guarantees that the person shall be granted the right to a retrial in his presence.

6. Summary procedures

The modern aspects of penal justice are characterized by dynamic developments and reforms in several directions in order for the penal justice to be equally available to all citizens and realized in as short a term as possible. Such endeavours lead to a constant quest for different solutions which would speed up the penal procedure. Comparative experience speaks that most states mainly employ institutes well established by the other states, thus leading to mixing the traditionally accepted institutes from the *common law* in the legal systems with the European continental tradition. The slowness of procedures has contributed for the traditionally mixed penal procedure to accept certain penal process solutions, often unknown and even disparate with the basic principles of this procedure. The inflow of institutes characteristic for the accusatory penal procedure is to be noted.

In this context we may emphasize the forms of possible bargaining (or settlement) between the public prosecutor and the defendant or settled justice, expansion of the frames of opportunism enjoyed by the public prosecutor for lighter criminal acts, respecting the position of the damaged party, his opinion and consent for receding from the regular course of the criminal procedure, the damages effectuated as an option for not initiating a criminal procedure, i.e. dispute resolution through mediation, introducing short and efficient terms for undertaking specific process actions and accepting special forms of summary procedures. Whereas, it is especially important to examine the nature of different forms of procedures for purposes of their speeding, which contain elements of the consent reached by the public prosecutor and the

defence, or the damaged party and the defence, that will help in understanding the reasons for the ascent of this new form of proceeding in the area of penal law.[27]

The reform must also encompass the recommendations of the EU and CE referring to speeding the criminal procedure, simplifying the penal justice and reshaping the procedure in other forms of resolving penal-legal cases. Taking into consideration the Recommendation No. R (87) of the Committee of Ministers of the CE from 1987 for simplifying the penal justice containing specific proposals on the forms of summary and simplified procedures,[28] Recommendation No. R (95) of the Committee of Ministers of the CE from 1995 for managing the penal judiciary instructing on the use of modern principles of handling penal cases,[29] and the application of new IT and similar techniques as a precondition for an efficient and effective operation of the penal justice, as well as the recommendations referring to the position of the victim, or damaged party, in the penal law and procedure,[30] the Code on Criminal Procedure stipulated several forms of special simplified proceedings.

The solutions were preceded by a comparative analysis which demonstrated that a pure continental penal procedure phases out and this results from the efforts for speeding and rendering the penal process proceeding, thus the penal justice, more effective.[31]

As opposed to the current procedures – summary procedure (extended to acts punishable by fine and imprisonment of up to five years), the procedure for reaching a judgment without holding a main hearing which is applied in a procedure for issuing a penal order and referring to the alternative measures, the Code on Criminal Procedure stipulated two new simplified procedures.

6.1 A procedure for reaching a judgment on the basis of the settlement of the parties in the investigation and the mediation procedure. Reaching a judgment on the basis of a settlement between the public prosecutor and the suspect in the investigatory procedure is accepted at the example of the Italian Code on Criminal Procedure. After meeting the Italian experts, we noted that the "pattegiamento" procedure is widely used, takes a load off the judiciary and came highly recommended as a form of procedure which may be useful in Macedonian circumstances as well. In the draft Code on Criminal Procedure, this procedure is permitted for crimes for which a sentence of up to 10 years of imprisonment is envisaged, and the subject of the settlement can only be the type and extent of the sanction to be proposed in the draft settlement. It derives that the concept of sentence bargaining

[27] See: F. Easterbrook, Criminal Procedure as a Market System, *Journal of Legal Studies*, 12/1983, стр. 289-332; S. Shavell, Foundation of Economic Analysis of Law, *Harvard University Press*, 2004; T. Miceli, The Economic Approach to Law, *Stanford University Press*, 2004.

[28] Recommendation No. R (87) 18 concerning the simplification of criminal justice.

[29] Recommendation No. R (95) 12 on the management of criminal justice

[30] Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure; Recommendation No. R (87) 21 on assistance to victims and the prevention of victimization.

[31] See: Г. Бужаровска/ Л. Нанев/ Б. Мисоски, "Компаративно истражување на решенијата за забрзување и поедноставување на казнената постапка", *Македонска ревија за кривично право и криминологија,* Скопје, 1/2008.

is accepted. The difference between the Macedonian and the Italian procedure is the obligation of the Public Prosecutor to enclose a written statement signed by the damaged party regarding the type and amount of the damage indemnification with the draft settlement, together with all evidence collected throughout the investigation. This solution was positively assessed by the Italian experts as a balance for protection of the damaged party.

In this procedure, the participation of the suspect's defence counsel is mandatory, whereas the participation of the court is explicitly forbidden. The draft settlement is reviewed at a special trial presided by the judge of the pre-trial procedure who may reach a decision refusing the draft settlement and reinstating the files to the public prosecutor, or accepting the draft settlement and pronouncing a judgment with elements of a conviction. At the suggestion of the highly esteemed Italian experts, the team that was working on the text of the Code on Criminal Procedure abandoned the solution for this judgment not to contain an explanation (as initially proposed) into a judgment containing an explanation in the final text.

The mediation procedure is also newly proposed and is envisaged only for acts prosecuted upon private charges.[32] With regards to the parties in the mediation procedure, and at the proposal of the Italian experts, we accepted the possibility of the damaged party, in addition to the suspect, his defence counsel and the damaged party, to be represented by a proxy. We also accepted the suggestion of having a control mechanism for fulfilling the signed settlement – we stipulated a term for meeting the obligations which may not be longer than three months and the individual judge to reach a decision on the termination of the procedure even after receiving evidence for the compliance with the obligation.

7. Conclusion

The reform seeks a modern criminal procedure, which would respect human rights and freedoms, but would also be efficient. This means re-thinking of the very foundations of the criminal procedure - its objectives, values, type and structure.

Reforming the criminal system can only be successful if based on a clear and consistent reforms concept and supported by solid comparative and empirical research. Overwhelming reforms can be

[32] Recommendation no. R (99) 19 on Mediation in Penal Matters. Г. Бужаровска, „Медијацијата и обештетувањето во законодавствата на европските држави", *Годишник на Правниот факултет "Јустинијан Први" - Скопје во чест на проф. д-р Тодорка Оровчанец,* том 42, Скопје, 2006, p. 540-565. Медијациските активности водат кон „приватизирана правда", Stuart Henry, "Justice on the Margin: can Alternative Justice be Different?", *The Howard Journal*, Vol. 28, 4/1989. http://www.vorp.com/articles/benefits.html. J.P. Bonafé - Schmitt, "*La Médiation Pénale en France et aux États-Unis*", Maison des Sciences de l'Homme, Réseau Européen Droit et Société, 1998. Првите идеи за облик на приватизирана односно спогодбена правда ги промовираше N. Christie,"Conflicts As Property", *The British Journal of Criminology*, Vol. 17, 1/1977.

successful only if planned and conducted on the basis of rational and reliable methods of establishing and removing dysfunctional elements in the organization and work of the prosecutor, police and the judiciary. Macedonia needs essential systemic changes of the criminal procedure model, which is currently burdened with judicial paternalism.

However, the relation between legislation making and institutional reforms is a complex one. Implementation problems are not endemic to countries in transition. Across the world, even well prepared laws are not always successfully implemented in practice. Institutional strengthening demands time and resources. Adopting laws which are not implemented is in the best scenario only an inadequate start, and in the worst scenario a counterproductive exercise which undermines public trust in the rule of law.

Past experiences with reforms indicate that everyday practices in the work of the police, the courts and the public prosecution follow unwritten rules and are difficult to change with administrative and legislative means. If new legislative solutions and organizational approach are imposed without appropriate preparations and realistic evaluation of the potential risks, the effort may result with inefficient procedures.

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