*Marina Carić**

PENAL ORDER IN THE LIGHT OF LIMITATIONS AND EXCLUDING THE APPLICATION OF CERTAIN FUNDAMENTAL PRINCIPLES OF CRIMINAL PROCEDURE

Abstract

The subject of observation of this paper are the problem areas of penal order from the aspect of the limitations and exclusion of the application of certain fundamental principles of criminal procedure. Actualization of this topic is contributed to by two parallel processes within the framework of practice and theory of criminal procedural law which takes place in the second half of the 20th century and the first decade of the 21st century- overburdening of the judiciary and functional changes in procedural maxims. After introductory observations linked to the aforementioned issues, an analysis of the issuing of penal order is given. Then there is an analysis of refraining from the principle of a public hearing and of the principle of the immediacy of court assessment of evidence when dealing with a written procedure. Complete exclusion from the principle of publicity of court hearing is observed given that the judicial decision is reached in camera. Temporary limitation of the principle of contradictoriness is explained which is postponed for hearing upon complaint. Finally, it is concluded that the existing legal solutions, thanks to their consensual nature and prescription by a complaint to a sufficient extent protects the fundamental rights of the defendant. At the same time, the tendency for efficacy is satisfied which justifies penal order and makes it an acceptable institute.

Keywords: *penal order, principle of orality of court hearing, principle of immediacy of court assessment of evidence, principle of publicity of court hearing, principle of contradictoriness principle of just procedure*

I. INTRODUCTORY OBSERVATIONS

The second half of the 20th century and the first decade of the 21st century have brought many significant social, economic and political changes which have partly been reflected in the general increase in crime and the change in its structure. The substantial and sudden influx

*Marina Carić, PhD., Assistant Professor, Faculty of Law – University of Split, Croatia, e-mail: marina.caric@pravst.hr

of criminal cases in the judicial system has threatened the suffocation and paralysis of the work of one of the three pillars of governmental powers. Changes to the structure and physiognomy of modern criminal procedure have also contributed to this danger. The complex structure of this procedure with its emphasis on contradictory, oral and direct hearing has had a negative influence on its length. The lengthy duration of the procedure is unacceptable both from the view of the defendant and the perspective of society. The defendant has the right to speedy and rational criminal procedure [1] because procrastination means lengthening the uncertainty of the legal situation. Society needs certain and efficient prevention of crime.

Given the aforementioned problems, as well as the possible factors influencing the efficacy and speed of the procedure, the need to model procedure according to the category and type of criminal act emerges. That need is, in particular, emphasized in the case of summary offences according to the criteria for the assessment as a summary offence which can be abstract or specified.[2] Criminal procedural law finds the way of adapting the procedure to summary criminal acts in the application of simplified procedural forms which in the USA are achieved with the application of criminal bargaining while in Europe more often various forms of shortened trials and penal order are applied.[3] Such simplified forms of procedure are prescribed in Recommendations Of the Council of Europe R(87)18 on simplification of the criminal judiciary.[4] The European Court of Human Rights – ECHR has also in its practice accepted simplified procedural forms including penal order as under article 6. ECHR, on the condition that the defendant willingly consented to such a form of procedure.[5]

The next important issue to be considered is the complex process which has been going on for some time both theoretically and practically in the direction of functional changes to the principle of criminal procedural law. Theoretically, there are various perspectives in the physiognomy of the principle of criminal procedural law but it can be said that consensus has been achieved on its general conception. Thus, under the principles of criminal procedural law, the general rules reached by the synthesis of procedural rules are implied which can originate from internal sources (e.g. constitution, law) or international law. Those rules are addressed to the legislative and criminal procedure bodies.[6] Although theoreticians have disputes over the classification of principles and about which of them constitute sources of law, they do concur that the principles can only be executed in combination with legal rules.[7]

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[1] Right to trial within reasonable time-frame guaranteed by art. 6. st. 1. European Convention for the Protection of Human Rights and Fundamental Freedoms (4. 11. 1950.) - ECHR, and article 14. sec. 3. subsec. c International Covenant on Civil and Political Rights (19. 12. 1966.) – ICCPR.

[2] Pursuant to the abstract model decisive is the punishment prescribed by law, or special category of an act, that is, (neon) prescribed prison sentence. According to a certain model decisive is the stated sanction in special cases e.g.: monetary fine up to a certain limit. See: Stefan Trechsel, *Human Rights in Criminal Proceedings*, (first published 2005, Oxford University Press 2006.) 369.

[3] See: Trechsel, o.c., 114.

[4] Recommendation of the Committee of Ministers concerning the simplification of criminal justice R(87)18 (17. 9.1987.) OJ. Comp. Marina Carić, "Preporuka Vijeća Europe o pojednostavljenju kaznenog pravosuđa i njezin utjecaj u pojednostavljenim procesnim formama u hrvatskom kaznenom procesnom zakonodavstvu", *Zbornik radova s međunarodnog znanstvenog savjetovanja* „*Europeizacija kaznenog prava i zaštita ljudskih prava u kaznenom postupku i postupku izvršenja kaznenopravnih sankcija*", Anita Kurtović Mišić, Matko Pajčić, Damjan Korošec, Borislav Petrović (ed, Pravni fakultet Sveučilišta u Splitu, 2017.) 181-187.

[5] Dewer v. Belgium, 27. February 1980., §49, Series A no. 35.

[6] See: Davor Krapac, *Kazneno procesno pravo, prva knjiga: Institucije* (VI. izmijenjeno i dopunjeno izdanje, NN, 2014.) 84.

[7] See: Steiner, D., *Das Fairnessprinzip im Strafprozess* (Peter Lang, 1995.) 133-135.

Newer philosophical and social teachings have influenced changes in the system of criminal procedural law principles as well as certain principles within the system of criminal law procedural principles. Here, we will refer to only those principles which are in a specific way linked to penal order. The principle of publicity, immediacy and orality came into being under the wing of enlightened-liberal thought which at the time determined their essence and aims. So was the public understood as a way of avoiding secret procedures and as a guarantee of formal correctness of judicial decisions,[8] while the principles of immediacy and publicity were interpreted as a means of avoiding the bad side of procedural literacy, especially the negative effects of sending case files.[9] Reception of the mentioned principles in national legislation led to a modification in the interpretation of certain principles. The content and aim of the principles of orality and publicity spread from subjection to the concrete criminal procedure of „public opinion "to achieve „correct perception on respecting procedure which must be just, impartial, humane, considerate...." which will lead to the victory of truth and the law.[10] Further modifications go in the direction of limiting the principle of publicity in the interests of the victim while the principles of immediacy and orality perceive inevitable limitations right from the start.[11]

On the other hand, social and technical development in a special way has influenced the principle of publicity. Initially established as a principle of rule of law working in both the interests of the defendant and victim and at the end of public opinion, with the development of today's mass media, it has turned into a circumstance which can seriously threaten personal rights of participants in proceedings that of the defendant, victim or witness.[12] Namely, those participants in criminal proceedings are only protected regarding „direct public at main hearing" by excluding the public at hearings to protect interests from their private life. That does not, however, protect from media reports before and after hearings. The public itself cannot become a burden for the defendant.[13] That negative effect, and maybe the aim of the procedure, especially is dubious when stigmatization caused by the unproportionate insignificance of the wrongdoing which is the subject of the accusation.[14] At the same time, it should not be forgotten that stigmatization of the defendant as a consequence of the publicity of the procedure also has a general-preventive effect, as if the stigmatization in the essence of the very punishment has a socio-ethical rebuke.[15] However, one must bear in mind that reporting the procedure, that is a public hearing, can have the effect of anticipated conviction of the public which is unjust and harmful, both for the defendant (due to the existence of presumption of innocence) and also for the victim.[16]

The issue arises of the possibility of refraining from fundamental criminal procedure law principles. From the perspective of the defendant, this is permissible, but only with certain reservations that can be double-edged: considering the superior state interest in a functional judiciary, or in the interest of the defendant to ensure their willingness. However, it should be mentioned that a functional judiciary does not need to be threatened by partially refraining

[8] Schmidt, E., *Lehrkommentar zur Strafprozeßordnung und zum Gerichtsverfassungsgesetz, s. 1*, (2. edn, 1964), rubni broj 401.
[9] Schmidt, E., Lehrk, o.c., rubni broj 425 d. i d, 427.
[10] Glaser, J., *Handbuch des Strafprozssezs, I* (1883) 257
[11] See: Schmidt, E., o.c., rubni broj 425 i d, 436, 446. i 456.
[12] See: Albin Eser, "Funkcionalne promjene procesnih maksima krivičnog prava: Na putu k 'reprivatiziranju' krivičnog postupka", (1992.) 42(2) ZPFZ, 177.
[13] As the title by Feeley, M.M. (1979) – „The process is the punishment". – cit. prema Eser, o.c., 179.
[14] It is precisely in this that the success of non-public mandate procedure. – See: Dahs, H., *Handbuch des Strafverteidigers* (5. izd. 1983), rubni broj 95.
[15] Eser, o.c., 180.
[16] Ibidem

from inquisitional maxims.[17] At the same time, it is much more difficult to establish the willingness of the defendant to refrain from certain fundamental principles.[18]

II. PROCEDURE OF ISSUANCE A PENAL ORDER

The institute of penal order as a simplified procedure is prescribed by Recommendation R (87)18, Subsection c, for summary offences which are insignificant due to the case's circumstances and in which the foundation of the request is derived from the gathered evidence that the person charged has committed a criminal offence. The fact that a legal act by the Council of Europe reached in the second half of the 20th century regulated this legal institution as one of the possible solutions to the complex state in the judicial system, can be understood as confirmation of the acceptability and contemporaneity of this institution. We need to, however, remember that in question is the procedure which in 1830 for the first time applied in Prussia and in 1877 became part of the German Empire's law [19] and with time spread to the legislation of other European countries.[20]

As an example of the procedure of singling out penal order, the solution in the Criminal Procedure Act in the Republic of Croatia[21] shall be shown together with pointing out interesting differences in some other legislations.

The procedure of issuance a penal order is implemented for summary offences by the single judge's authority for criminal offences for which a fine or a prison sentence of up to five years is prescribed. The State Attorney who finds out about that offence based on credible contents from the criminal report can in the indictment seek singling out of penal order without holding a hearing and can in the indictment suggest concrete sentencing (from among the by law taxatively stated punishments or measures) types and measures or other legal criminal sanctions including a suspended prison sentence. German[22] and Slovene law[23] prescribe almost identical legal criminal sanctions and measures, while Swiss[24] and Serbian law[25] also, prescribe unconditional prison sentence and work for the public good or community work. In certain legislations, for example, Lithuanian, the public prosecutor is obliged to, in filing a proposal to issue a penal order to the judge, notify the victim who has the right to appeal the investigative judge (judge of the previous procedure), whereby s/he is obliged to decide on the victim's appeal before deciding on the penal order.[26]

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[17] Example of that is mandate procedure in which „maybe only a part of the truth comes out, and independent of whether in a certain case it is at the burden of one or the other party e“.- Eser, o.c., 188.

[18] Ibid

[19] Leipold, K., Wojtceh, M., „*Strafbefehl bis zu zwei Jahren Freiheitsstrafe*“, *Zeitschrift fur Rechtspolitik* (2010) 43, 243

[20] Erhard Blankenburg, „Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany (1998) 46, AJCL, 27.

[21] NN, 152/08, 76/09, 80/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19 (further: ZKP).

[22] Strafprozeβordnung in der Fassung der Bekanntmachung vom 7. April 1987 (BGBl.I S. 1074, 1319), die zuletzt durch Artikel 2 Absatz 3 des gesetzes vom 21. Januar 2015. (BGBl.I S. 10) geändert worden ist. – http://www.gesetze-im-internet.de/stpo/(15.11.2020) - §407. st. 2. StPO.

[23] Zakon o kazenskem postopku Uradno prečišćeno presedilo (Uradni list RS, št. 32/2012 – art. 445a, p. 2 ZKP Sl.

[24] Strafprozessordung (StPOCH) – http://www.admin.ch/ch/d/sr/3312.0.de.pdf) – članak 352.1.StPOCH.

[25] Zakonik o krivičnom postupku Republike Srbije (Službeni glasnik RS, broj 72/2011 – članak 512. st. 3. ZKP Srbije.

[26] Robertas Rocyc, „Problems of Applying of the Court's Penal Order's Institute (2016) The Criminal Procedure Law of Lithuania, 1(13), 129-130.

If the individual judge accepts the state prosecutor's request by judgement[27] s/he will issue a penal order and sentenced the defendant to the requested punishment or measure. In Slovenian law, penal order is issued by way of judicial decision (art. 445 sec. 1. CPA *ZKP* Sl), as is in Bosnian-Herzegovinian Law (art. 338 CPA *ZKP* B and H)[28], as well as in Serbian law which has opted for that form of decision.[29] Pursuant to German legislation, penal order is only issued (§408.sec. 3StPO).[30] In Switzerland, penal order is issued by the State Attorney. [31] The judicial decision by which penal order is issued must contain a message to the defendant on the right to appeal against the judicial decision in written form. A Penal Order can be understood as an "offer "to the defendant which s/he can or does not have to accept. The tacit consensual nature of this procedure can be observed in the fact that the defendant by accepting the State Attorney's offer expresses his/her non-statement of an appeal against the judicial decision by which the penal order is issued. Lodging an appeal makes the judicial decision by which the penal order was issued no longer enforceable and the criminal procedure continues with the implementation of a hearing. When issuing a new judicial decision, the individual judge is not bound by the requested legal criminal sanction nor by forbidding *reformatio in peius*.

III. REFRAINING FROM THE PRINCIPLE OF ORALITY IN COURT HEARINGS

Contemporary criminal law requires that the criminal court may reach a verdict solely based on facts and evidence presented at hearings. Achieving this request is implemented by applying the principle of orality of the court hearing by which verbal presentation before the court flows so as all statements are given and evidence presented in oral form.[32] Confirmation of this is in the numerous provisions of the CPA (*ZKP*).[33] The principle of orality is linked to the concept of „hearing" because if the verdict can be brought solely based on hearing results, the oral presentation makes sense if it is verbal. Oral presentation makes sense if the parties understand it completely. This is ensured with the use of the official language in court, that is, right to translation.[34] Verbal undertaking in working procedures enables the party immediate clarification of the opposing party's claims and clarification of misunderstandings and unclarities and speedy reaction from the court and procedure direction. It can be said that it is

[27] In theory, various viewpoints exist that it is about many forms of convicting judicial decision – See: Krapac, o.c., 290. In opposition, some authors believe that penal order is not crucial to guilt, but proof of the probability by which punishment is made possible based on doubt. – That Raluca Enecus, „Simplified Procedures in Criminal Matters and the Risk of Judicial Errors: The Case of Penal Orders in Germany (2019) JEHL, 10(2) 187.

[28] Criminal Procedure Act (*Zakon o krivičnom postupku*) Bosnia and Herzegovina, Official Gazette (*Službeni glasnik*) BandH no. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 72/13.

[29] Final Amendments CRA (*ZKP)*Sr form of decision is from solutions changed in convicting verdict. – See: Snežana Brkić, „Povodom decenije postojanja mandatnog krivičnog postupka u Srbiji", (2011), vol. XLV(3), vol. 1, Journal of Papers ZRPFNS, 421-422.

[30] Some authors propose arguments for suggestion that penal order be issued as a special kind of judicial order. – See: Marin Bonačić, „Kritički osvrt na hrvatsko zakonodavno uređenje instituta kaznenog naloga", (2015), 22(17) HLJKPP, 192; Carić, o.c., 224.

[31] See: Mark Pieth, *Schweizerisches strafprozessrecht,* (Helbing Lithtenhahn Verlag, Basel**,** 2009), 191-196.

[32] Goran Tomašević, *Kazneno procesno pravo, Opći dio: Temeljni pojmovi* (Pravni fakultet u Splitu, 2011), 230.

[33] E.g. Defendant's statement on basis of claim which is read, verbal explanation and reading of property claims of the victim, parties' introductory speech, oral statements by witnesses and experts, reading document contents, dictating out loud written report of Council President to recorder, verbal changes to the indictment, Parties' closing speeches, public reading of the verdict.

[34] Krapac, o.c., 118-119.

the principle of orality is a necessary presumption for application of the principle of the immediacy of court, assessment of the evidence and principle of public hearings.[35] It also makes the application of the principle of contradictoriness easier.[36] The principle of orality is wider in scope and content narrower than the principle of immediacy,[37] but in any case, it is necessary to distinguish them.

The principle of orality as a presumption to achieving application of the principle of a public hearing[38] is part of a pivotal principle of the legal procedure from article 6 sec. 1 ECHR.[39] Thereby the ECHR in many of its judicial decisions has made a statement on (non)obligatory application of the principle of orality.

So it took the stance that: Nevertheless, refusing to hold an oral hearing may be justified only in exceptional cases.[40] The character of the circumstances with may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be dealt with by the competent court – in particular, whether these raise any question of fact or law with could not be adequately resolved based on the case file. An oral hearing may not be required where there are no issues of credibility or contested facts with necessitating an oral presentation of evidence or cross-examination of witnesses, and where the accused was given an adequate opportunity to put forward his case in writing and to challenge the evidence against him. In this connection, it is legitimate for the national authorities to have regard to the demands of efficiency and economy concerning tax-surcharge proceedings;[41] concerning a summary procedure for road traffic offences;[42] concerning an administrative fine on a hotel owner for using the premises for prostitution.[43] Whoever in cases where the impugned offence has been observed by a public officer, an oral hearing may be essential for the protection of the accused person's interests in that it can put the credibility of the officers' findings to the test.[44]

Moreover, in some instances, even where the subject matter of the case concerns an issue of a technical nature, with could normally be decided without an oral hearing, the circumstances of the case may, warrant, as a matter of fair trial, the holding of an oral hearing.[45]

The procedure of issuing a penal order deviates from a larger number of fundamental principles of criminal procedure. Above all, it is an exception to the principle of an oral hearing. Sentencing the offender to legal criminal sanctions is a fundamental form of criminal procedure[46] and, in principle, is preceded by oral hearing during which legally regulated examination of the defendant whereby s/he can present their defence. In opposition to this, the individual judge based on a request from the state attorney, without holding a hearing, can reach a verdict by which a penal order is issued, sentencing a precise legal criminal sanction. The court bases its decision on the request of the state attorney and that request has as its basis

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[35] Ibid, 119.

[36] Tomašević, o.c., 230.

[37] Principle of orality relates to overall communication on implementation and assessment of evidence at a hearing

[38] The entitlement to a „public hearing“ in Article 6 §1 necessary implies a right to an „oral hearing.“ See: Döry v. Sweden, App no. 28394/95, 12 November 2002, §37.

[39] Article 6 ECHR – the right to a fair trial: „1. In the determination 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."

[40] Grande Stevens and Others v. Italy, App no. 18640/10 and others 4 March 2014, §§121-122.

[41] Jussila v. Finland (G.c.), App no. 73053/01, ECHR 2006 – XIV, §§41-43, 47-48.

[42] Suhadolc v. Slovenia (dec.), App no. 57655/08, 17 May 2011.

[43] Sancakli v. Turkey, App no. 1385/07, 15 May 2018, §45.

[44] Produkcija Plus Storistveno podjetje d.o.o., v. Slovenia, App no. 47072/15, 23. October 2018, §54.

[45] Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v. Turkey, App no. 48657/06, 28 November 2017.§37.

[46] Procedure for offences subjected to the punishment of prison sentence of up to five years.

credible contents of the criminal charge. Therefore, the stated syntagma must be more thoroughly interpreted.

The state attorney will not in principle exclusively base the decision to request issuing a penal order, that is, requesting it in the indictment, on text contents from the criminal charge. The basis for the stated actions will be, for example, the victim's statement, a report from the scene of the crime, the expert's findings and opinion, drawings of the crime scene, photographs, credible documentation, public and private documents, notes on the statements presumed witnesses and suspects. The state attorney can implement emergency evidence actions and individual evidence actions within the investigation which result in reports on witness examination. Apart from that, s/he must collect necessary data on the accused, previous criminal record and criminal procedures already taking place and question the accused before indictment with penal order.[47] Thus, the charge must be credible, if its contents are pursuant to collected and presented evidence.[48] The verity of the presented interpretation of the syntagma „credible contents of criminal charge" confirms the fact that the judge if s/he agrees with the state attorney's request, issues penal order by judicial decision, whereby s/he must explain the decision citing evidence which justifies issuing a penal order. The court must take and assess this when reaching a decision only if delivered with the criminal charge.[49]

Most foreign legislations, apart from Kosovo,[50] do not recognize this syntagma as a normative condition for issuing penal order. So, does §407 sec. 1 of the German StPO prescribes that the state attorney can request issuing penal order if according to the results of the investigation, the main hearing is not considered to be necessary.[51] Pursuant to article 445 sec. 1 CPA (ZKP*)* Sl, the state attorney may suggest issuing penal order without holding the main hearing. CPA (*ZKP*) B and H in article 334 sec. 1 as a presumption for issuing penal order requests that the prosecutor collects „enough evidence which offers the basis for the claim that the suspect has committed the criminal offence ".

It is necessary to explain another issue arising in practice. Not wanting to breach the fundamental imperative norm of article 341 sec. 4 CPA (*ZKP*) by which a suspect must be interrogated before an indictment, state attorneys interrogate suspects even before indictment with the request to issue penal order and the record on the interrogation of the suspect with recording is listed as evidence on which the indictment is based.[52] The given solutions from the practical side have both advantages and disadvantages and can also be viewed from the theoretical standpoint. Such examination of the procedure pursuant to the principle of contradictoriness and the state attorney more completely becomes familiar with the facts and more easily reaches a decision on penal order and decreases the possibility of untimely requests.[53] One can also mention letting the suspect become familiar with the state attorney's

[47] Dragan Novosel (ur.), *Priručnik za rad državnih odvjetnika, Državno odvjetništvo Republike Hrvatske, radna verzija trećeg izdanja*, 2016, 584, 586; See: Presuda VSRH br. Kzz 1/14-3 od 28. 01. 2014.

[48] Constitutional Court of the Republic of Croatia's held that in the procedure of issuing penal order, to the criminal charge was added properties of the evidence on the basis of which a judicial decision issuing penal order was reached – See: *Rješenje Ustavnog suda Republike Hrvatske*, U-I-448/2009, U-I-602/2009, U-I-1710/2009, U-I-18153/2009, U-I-5813/2010, U-I-2871/2011.

[49] Comp. Berislav Pavišić i sur., *Komentar Zakona o kaznenom postupku s prilozima* (II. izdanje, knjiga 1., Pravni fakultet Sveučilišta u Rijeci, 2001.) 691-692.

[50]See: članak 493. Zakona o krivičnom postupku, Službeni list Republike Kosovo, br. 37/2012).

[51] See: Karsruher Komentar zur Straffrozessordnung mit GVGEGGVG und EMRK Herausgegeben von Rolf Hannuh, 7. neu bevarbeitete (Auflage, Verlag C.H. Beck, München, 2013), 2264.

[52] See: *Priručnik za rad državnih odvjetnika*..., 589.

[53] See: Bonačić, o.c., 197.

intentions and evidence at their disposal which can result in not submitting an appeal. On the other hand, interrogating the suspect inevitably lengthens the duration of the procedure.[54]
While providing answers to the question of whether the examination of the suspect before issuing penal order really necessary and thought out one needs to start with the legal nature of the penal order. It is indisputable that it concerns a consensual form of procedure, therefore a party bargaining to avoid or finalize a procedure.[55] the suspect thereby can state, that is, not submit an appeal against the judicial decision with penal order. By lodging an appeal, a court is created to act pursuant to provisions for criminal procedure. Starting from understanding that by interrogating the suspect this would ensure contradictoriness of the procedure thereby protecting the rights of the suspect while respecting the principles of justice, one should point out the standpoint of the ECHR taken in the case of Hennings v. Germany,[56] from which it emerges that the institution of penal order does not represent a violation of article 6 sec. 1 ECHR – rights to a fair trial before an authorized court if the suspect is ensured legal means against the judicial decision which leads to a hearing in the same procedure before the same court.[57] The same view was taken by the ECHR in several other judicial decisions.[58] On the other hand, interrogation of the suspect by the state attorney in itself does not ensure procedural justice for the suspect[59] Supporting the non-existence of obligation to interrogate the suspect by the state attorney before establishing the request for issuing penal order in Croatian law *lex specialis*[60], as if no procedural sanctions are prescribed for omitting such interrogation.[61] For an indisputable normative solution to this issue before Croatian, as with other legislation, there are two possibilities. One is exclusive exclusion from the obligation to interrogate the suspect by the state attorney before indictment with a request for penal order. The other is a mandatory prediction of interrogation of the suspect before reaching the decision on penal order, be it authorize the state attorney before the indictment,[62] or that interrogation is given to the court at a special hearing. The latter option is accepted in certain legislations.[63]
Given all of the above, there is no doubt that the judicial decision with penal order, reached descriptively is exclusively based on written acts.

IV. REFRAINING FROM THE PRINCIPLE OF IMMEDIACY OF COURT ASSESSMENT OF THE EVIDENCE

The principle of immediacy which applies to the hearing stage, demands that the parties' statement of the facts linked to the criminal occurrence so that the facts are always presented in original and in that way prevent the loss of direct contact between the hearing court and that evidence. The hearing court, therefore, implementing the evidence procedure, must alone

[54] Comp. Anamarija Pavičić – Marin Bonačić, „Skraćeni postupak prema novom Zakonu o kaznenom postupku, (2011) 18(2) HLJKPP, 543
[55] See: Supra.
[56] Hennings v. Germany, App no. 68/1991/320/392/ECHR, 23.
[57] Croatian law satisfies the stated conditions postponed by contradictoriness
[58] ECHR tell „...Judicial discretion will not undermine the effectiveness of proceedings before a court..." – Smith, Grady, v. United Kingdom, App no. 33985/96, 27 September 1999., Thatton v. United Kingdom, App no. 36022/97, 8 July 2003
[59] This can be concluded from a judicial decision of Mevlüt Kaya v. Turkey, App no. 1383/02, 12 April 2007.
[60] Comp. Pavičić – Bonačić, o.c, 513; Natalija Petković – Matko Pajčić, „Kazneni progon, istraga i optuženje – nova iskustva“ (2011) 18(2) HLJKPP, 438-349
[61] Carić, o.c., 220.
[62] Bonačić suggests similar, o.c., 197.
[63] See: Infra.

achieve contact with the original evidence and must not leave the presentation of the evidence to another body (so-called formal immediacy or the principle of immediacy in a narrower sense). At the same time, it must always try to collect and at the hearing present that original evidence and must not replace one piece of original evidence with another original piece of evidence on the same content (so-called material immediacy or the principle of immediacy in a wider sense).[64] The principle of immediacy of court assessment of evidence can be regarded from two perspectives. Firstly, as an evidence principle, which demands that original evidence is presented at court, so that the judge can found the decision exclusively on evidence which can be looked at given their quality and credibility, doing this via by their own observation, re-examining and comparing and contrasting with other evidence or with the defence.[65] Secondly, as an organizational principle which has implications for systematic organization of criminal procedure. Namely, violation and refraining from the principle of immediacy have the same effect as a violation of the principle of a public hearing, principle of court independence and the contradictory character of criminal procedure.[66]

Even though the principle of immediacy is not expressly mentioned in principles of CPA (ZKP), it emerges from several of its provisions. So the defendant, the witnesses and the experts must, in principle, be called before the court and questioned again at court, even though have already been done so in a previous procedure, because their earlier statements cannot be read.[67] Documents and other written forms, like technical recordings of facts, are submitted for hearing in their original form, and not photocopied in any way, and the original (verifies), or reproduces. The hearing must be held with great concentration uninterrupted so that between individual hearings,[68] and between the end of the hearing and handing down, formulation and delivery of the decision a longer period of time does not elapse. The hearing must take place before the council of judges in their regular constitution because alternatively, violation of formal immediacy would occur.

Application of the principle of immediacy enables the court to more securely establish the facts, and the parties to the procedure to learn about what evidence the opposing party has and to enable more successful opposing argumentation to achieve procedural interests. It can be said the principle is an expression of so-called general elements of the principle of „just procedure".[69] Directly collected evidence of persons also enables logical and psychological assessment of the evidence. Direct interrogation of persons can rectify some errors and unclarities which occurred during interrogation in the previous procedure just as we can provide answers to newly formed questions.[70] Thereby court impartiality and contradictoriness of hearing are guaranteed.

ECHR has in many judicial decisions presented various standpoints related to the application of the principle of immediacy as a constitutive element of the principle of just procedure.

So it is that an important factor of just criminal procedure is the possibility that the defendant is confronted by a witness in the presence of a judge who will finally decide on the case. If a

[64] See: Krapac, o.c., 120.

[65] Garé, *Het onmiddellijkheidsbeginsel in het Nederlandse strafproces*, (Amhem, 1994), 77. – cit. according to: Marc.S. Groenhuijsen und Hatite Selçuk „The Principle of Immediacy in Dutch Criminal Procedure in the Perspective of European Human Rights Law“ (2014), 126(1) ZSTW, 250-251; Geppert, Der Grundsatz der Unmittelbarkeit im deutschen Strafverfahren (1979), 136-145.

[66] See: Garé, o.c., 77-78.

[67] By law, taxatively enumerated cases when because of economically and justifiable reasons one can refrain from that, and exceptions are prescribed.

[68] The exception is postponed and cancelling hearing under legal conditions

[69] Krapac, o.c., 166-176.

[70] Tomašević, o.c., 222-223.

change of judge occurs, the witness must be questioned again.[71] The court believed article 6 was violated when key witnesses were not interrogated at hearing, because they did not turn up, and the accused did not manage to interrogate them in a previous procedure. In that case, the court decision could not be founded exclusively or in a crucial part of that evidence.[72] The court also confirmed the stated viewpoint in the next court decision.[73] Three years later, ECHR established that the use of witness evidence which was not listened to and the evidence was gathered in an earlier phase was not on its own unconnected to article 6 sec. 3 subsec. d). It is only demanded, therefore, that the accused be able at some stage of the procedure to argument and interrogate the witnesses.[74] On the other hand, direct confrontation is not acceptable when the defence examines police officials or public prosecutors who have interrogated anonymous (protected) witnesses.[75] After wandering for some time, ECHR takes the clear standpoint that interrogating witnesses in a previous procedure, if not repeated at a hearing, is not in accordance with the principle of immediacy.[76] In one verdict, the court was of the opinion that allowing the defendant to demand interrogation of witnesses at the hearing can be equated with forfeiting the right to article 6, that is, to direct presentation of evidence at court. In one case, the court was of the opinion that a verdict founded exclusively on or to a decisive extent on the evidence of an absent witness does not automatically lead to do violation of article 6. The court in such cases must view the procedure as a whole, taking into account the right of the defence and also the interests of the public and victims.[77]
The procedure of singling out penal order undoubtedly deviates from application of the principle of immediacy of court assessment of evidence. The individual judge does not present the evidence directly and in original form at the hearing because the hearing is not held at all. On the contrary, reaching a judicial decision with the issue of penal order, not only is a criminal charge only read and y the evidence contributions that were collected at the time of police investigation used exclusively, therefore, evidence which another body has implemented. So, only a logical not also a psychological assessment of evidence is possible which constitutes part of the reports of persons. That kind of direct assessment of evidence increases the possibility of incorrect establishment of facts which also contributes to the possibility of reaching the wrong decisions. [78]

V. EXCLUDING THE PRINCIPLE OF A PUBLIC COURT HEARING

The principle of publicity is a constitutional principle (article 117 sec. 1 Constitution of the Republic of Croatia) and applies to all procedures in our legal system. It is also a constitutional part of the right to just proceedings (article 6 sec. 1 ECHR) and is also prescribed in article 14 sec. 1 ICCPR. In criminal proceedings, the principle of publicity means that, in a hearing in a proceeding against adult offenders, previously unspecified adult persons can be present, dependent upon spatial court capacity.[79] Accepting this principle allows the transmission of what was heard at the hearing, and publication thereof both by

[71] P. K. v. Finland (dec.), App no. 37442/97, 9. July 2002.
[72] Unterpertinger v. Austria, App no. 9120/80, 24. November 1986, §§31, 32-33.
[73] Barberà, Messegue and Jabardo v. Spain, App no. 10588/83, 6. December 1988, §78.
[74] Kostovski v. The Netherlands, App no. 11454/85, 20. November 1989.
[75] Saidi v. France, App no. 14647/89, 20. September 1993, §44.
[76] Windlsch v. Austria, App no. 12489/86, 27 September 1990, §29.
[77] Al Khawaja and Tahery v. United Kingdom, App no. 26766/05; 22228/06, 15. December 2011, §118-119, 131.
[78] Raluca Enescu, points out that fact o.c., 186.
[79] Spatial capacity practically limits the principle of publicity. This can also be inappropriate public behaviour and procedural participants, who can be removed from the court. See: Krapac, o.c., 133, bilj. 76.

means of public publication of data and of the hearing process and of reached court decisions. The public nature of the hearing is also related to the publication of the verdict. Namely, statement of the court decision, handed down at the hearing in proceedings against the adult defendant must always be read in a public session.[80]

Although Romans from the time of Hadrian were familiar with public proceedings in certain situations and in Anglo-Saxon law the public nature of proceedings systematically characterizes *common law* since the middle of the 17th century, the concept of the publicity of hearing in a contemporary sense, just as the principle of publicity, was developed in the form of a postulate of a liberal state in the 19th century. With this, it was intended to combat self-volition and arbitrariness in a court judgment in the secret inquisitorial criminal proceedings of the absolute monarchy.[81] That principle became a constitutional class of principle in many institutions, and was, in the 20th century, regulated by international agreements on human rights. On the high political importance of this principle speaks the fact that the legal consequence of its violation, that is, illegal exclusion of publicity, is an absolutely important breach of criminal procedure provisions followed by obligatory quashing of the verdict.[82]

According to theoreticians, reasons for accepting the principle of publicity represent at the same time its advantages. It enabled citizen supervision of the court's activities and of other bodies in criminal proceedings. Namely, citizen supervision at hearings influences the court so that in presenting evidence it strictly adheres to procedural rules and faithfully implements contradictory statements, strictly respecting hearing principles and the principle of direct assessment of the evidence. In this way, an elementary basis is created for the so-called legitimacy of court decisions, as well as a constructive guarantee of objective conduct in criminal procedure.[83] On the other hand, citizens present, following the hearing, see how by trying and sentencing offenders, legal protection is offered attacked by legal good. By this, it also serves as a warning that it will always be acted in this way. It can therefore be spoken of upbringing and preventative activities. Some authors believe that the public affects confidentiality, that is, the truth of witnessing because of witnesses' fear it will be detected if they lie. The possibility of „discovering "a new witness in the public is also mentioned.[84]

The principle of publicity can also have negative consequences. So, it is possible that, instead of positive court activity on present citizens, citizens present exert strong pressure on the court and that can negatively impact on court objectivity and impartiality. At the same time, the presence of citizens can affect individual witnesses that they are constrained while giving evidence. This can cause incorrect or incomplete establishment of the facts. The public can cause the defendant and other procedure participants acting inappropriately. In some cases, the public can lead to unjustified and irreparable damage to the reputation of the defendant or of other court procedure participants.[85]

Precisely because of negative consequences of the principle of publicity, the constitution of the Republic of Croatia has prescribed that due to conditions necessary to a democratic state in certain circumstances the public is excluded from hearings.[86] Based on that provision of

[80] The public can be excluded during a reading of the verdict's ratio. Only in proceedings against minors is a proclamation of the verdict not public.

[81] On the historical foundations of the principle of publicity see: Harold Shapiro, „Right to a Public Trial" (1951), 41(6) JCLC, 782; Thomas S. Schattenfield, „The Right to a Public Trial" (1955), 7(1) CWRLR, 78-80.

[82] See: Krapac, o.c., 135.

[83] Ibid.

[84] See: Schattenfield, o.c., 84.

[85] Krapac, o.c., 136.

[86] This provision is founded on and pursuant to article 6 sec. 1 ECHR which expressly prescribes: „...but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties

CPA (*ZKP*) obligatory[87] and optional[88] reasons for excluding the public are prescribed. Excluding the public is never applied to the parties, victim, injured parties, their representatives or defence.

The principle of publicity at hearings is part of the principle of legal proceedings which expressedly emerges from the diction of article 6 sec. 1 ECHR. Therefore the court in many verdicts has analysed that principle.

Thus, in several verdicts, ECHR emphasizes that the public nature of the procedure protects parties against the course of justice secretly. In that way, at the same time, the public's confidence in the judiciary is strengthened, which is exceptionally important, also contributes to the achievement of legal proceedings.[89] The court has furthermore taken the stance that the principle of publicity of hearings includes two aspects. These are an implementation of public hearings and public publication of verdicts. [90] Regarding interpreting the syntagma of „public proclamation" of the verdict, the Court holds that it is not necessary to insist on reading out loud in a publically open court but it should be interpreted in the context of justice of the overall procedure.[91] In this sense, publishing the executive part of a verdict in procedure led *in camera* is not contrary to article 6, if the verdict is noted in the court register.[92] In one verdict, the court points out the difference between rights at the main hearing and rights to proclaim the verdict while emphasizing that violation of each of those rights should be particularly assessed. Therefore, a correctly published public publication of verdicts cannot be corrected by incorrectly implemented hearings *in camera*.[93]

Another specific must be emphasized of the right to the publicity of hearings. This is the only „sub right" of legal proceedings that can come into conflict with other human rights (right to privacy, right to freedom of expression) – external conflict, or with the other „sub right" of article 6 (two aspects of rights of legal proceedings given the two parties) – internal conflict. In such a conflict, balance and compromise must be found in the solution where both rights will be protected maximally. Of particular interest is the conflict between the right to a public hearing and the right to trial within a reasonable timeframe[94] Such conflict is brought about precisely in written procedures. These are for example penal order which is achieved without an oral hearing. This undoubtedly contributes to the efficacy of the judiciary, but at the same time violates the right to a public hearing, that is, principle of publicity as well as the principle of orality.[95] However, the ECHR accepts the written procedure in the first instance in certain

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so require, to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

[87] Excluding the public to protect minors and upon request of victim crime against sexual freedom during interrogation as a witness.

[88] Excluding the public is done protection of safety and defence of RH, for purposes of protecting secrets that would damage publicity of hearing, protecting law and order, protection of personal and/or family life of the defendant, victim, injured party or other participants in the procedure. The court does this at their own imitative or upon the suggestion of the parties, but always after interrogation.

[89] Riepan v. Austria, App no. 35115/97 ECHR 2000-XII, §27; Krestovskiy v. Russia, App no. 14040/03, 28 October 2010, §24; Sutter v. Switzerland, 22 February 1984, Series A No. 74, §26.

[90] Ibid, §27; Tierce and Others v. San Marino, App no. 24954/94 and 2 others, ECHR 2000-IX, §93.

[91] Welke and Białek v. Poland, App no. 15924/05, 1 Mart 2011, §83.

[92] Sutter v. Switzerland, §34.

[93] Artemov v. Russia, App no. 14945/03, 3 April 2014, §109.

[94] See: Eva Brems, "Conflicting Human Rights: An exploration in the context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms" (2005) 27(1) HRFU, 307-309.

[95] In court practise of ECHR the right to a public hearing in principle also includes the right to an oral presentation of the case before a court of first instance – See: *Law of the European Convention on Human Rights* (David J. Harris et all. eds., 1995), 2018.

cases if the right to an oral hearing is guaranteed in the appeal- second instance. That is e.g. cases when the parties directly or indirectly relinquish the right to an oral hearing or when the case does not include something of public interest so that orality is not important. The ECHR has set three criteria when in exceptional cases the procedure can take place before the first and only instance without oral hearing: 1) must not be a real or legally disputable issue which demands oral hearing 2) issue on which the court demands an answer must be limited in scope, 3) no public interest must exist.[96]

Given that the individual judge reaches a verdict issuing penal order without oral hearing *in camera* the principle of publicity of court hearing is completely excluded. Here this is not about limited party publicity, because the parties are not present at the judge's decision making when reaching a verdict.

VI. LIMITING THE PRINCIPLE OF CONTRADICTORINESS

The right to legal proceedings from article 6 of ECHR is a complex right from which emerge a large number of fundamental principles of criminal proceedings and significant rights in criminal proceedings. That right is not „closed", because its content is open to judicial interpretation and adding certain other rights which are not expressly enumerated in article 6.[97] For us, for the purposes of this article, of particular interest are the following principles or rights: the principle of contradictoriness (parties' right to be present at procedures and heard before a decision is reached), the principle of equality of weapons, and confrontational rights.

The principle of contradictoriness consists of the parties' right to be present at procedures and be heard before a decision is reached. Therefore, in criminal proceedings every party has the possibility to plead to the allegations and demands of the counter-party, that is, then right to dispute. The procedure thereby gains „party "characteristics and structure of contradictoriness, so it is a contradictory procedure.[98] Parties' right to be present at criminal procedure proceedings, the procedure of right to hearings before a decision is reached is also only achieved if the party is given adequate opportunity to plead to both the facts and the legal allegations of the counterparty. The presumption for this is correct summoning to court hearings before the court as well as ensuring valid linguistic communication with the court. However, whether the party will practically utilize their right, remains in the domain of being their choice. Namely, the court has no right to issue warnings or messages to the parties or to encourage them to act in criminal proceedings.[99]

A significant problem when applying the principle of contradictoriness can represent the institute of trial in the absence of the defendant, which is prescribed in many national legislations. Discussing this issue concretely, the ECHR has taken the stance that „from the provision of article 6 sec. 1" according to teleological interpretation" (§27).[100] However, this right in certain conditions can limit in public interest if it concerns a trial of a defendant who: a) knew about the beginning of a trial but voluntarily ignored all summons the court with due care of the defendant's interest attempted to send or the defendant voluntarily relinquished the right to be present at the trial b) or did not attend the trial but has the legal possibility to renew

[96] Göç v. Turkey, 11 July 2002, 2002-V.

[97] See: Harris, D., O'Boyle, M. & Wardick, C., *Law of the European Convention of Human Rights* (Oxford University Press, New York, 2009) 306.

[98] Presumption for successful implementation of such procedure is e.g... correct notification of defendant on the nature of indictment and evidence against him/her on which the verdict can be founded, how to dispute, „contradict". See: Trechsel, o.c., 85.

[99] Comp. Krapac, o.c., 167.

[100] Colozza v. Italy, 12 February 1985, Series A, No. 89.

criminal proceedings at the time when s/he learns of the convicting verdict in absence.[101] The European Commission sometimes went even further in its views, considering that it is not necessary that the defendant relinquish their presence but that it can be done through an attorney without previous permission.[102] This point of view was criticized because it concerned the personal rights of the defendant[103] due to which the ECHR demands that relinquishing the right to be present must be undoubtedly confirmed.[104][105]

Our law prescribes certain exceptions which limit the principle of contradictoriness. One type of exception emerges from the new regulation of the previous procedure founded on the model of a unilateral investigation by the state attorney via the implementation of investigations and evidence at the undertaking of which the defendant cannot be present.[106] There are other certain exceptions where contradictoriness is temporarily limited.[107]

The other right already mentioned is the party's right to undertake in the proceeding all actions that can be taken by the opponent by which equality of weapons is achieved. Equality of weapons means that the procedure must not be edited nor led to lead to unjustified discrimination between parties.[108] Namely, the term „equality of weapons "is not completely appropriate to continental criminal procedural law. Therefore, the content of that concept must be understood as in principle forbidding changes in the position of one of the parties in criminal proceedings when that change would not be justified by changes in their procedural position.[109] Realistically in practice, it is often difficult in the case of material inequality of citizens, to establish an effective concept of real equality in the use of procedural weapons.[110] The principle of equality of weapons is linked to the principle of contradictoriness and minimal rights to defence.[111]

Equality of weapons is different from the principle of contradictoriness in a wider scope but narrower content. Namely, equality of weapons is the parties' right in any part or stage of the proceedings to put forth their view under the condition that it doesn't put the party into a much less favourable position u in relation to the counterparty. The principle of contradictoriness is only related to certain actions in the proceedings about which the defendant must be advised in a regulated way so that they have the chance to counterargue. [112]

The confrontational clause is the defendant's right to interrogate or have interrogated witnesses to the accusation and to demand that the presence and interrogation of witnesses of

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[101] See: Trechsel, o.c., 252-254.

[102] Austria v. Italy, App no. 788/60.

[103] FCB v. Italy, 28 August 1991, Series A, No. 208-B, (1992) 14 EHRR 909.

[104] Barbera, Messegue and Jabardo v. Spain, 6 December 1988, Series A, No. 146; Poitrimol v. France, 23 November 1993, Series A, No. 277-A.

[105] On the problem of trial in absence See: Fawzia Cassim, "The accused's right to be present: a key to meaningful participation in the criminal process", (2005) 38(2) CILSA, 285-303.

[106] Exception to evidence hearing before investigative judge and hearing before state attorney in presence of defence, which is contradictory.

[107] That is se. g. limiting the right to view case file to the defendant and defence. See: Krapac, o.c., 168-169.

[108] Active discrimination thereby prevented – See: Tomašević, o.c., 209 (bilj. 215); Delcourt v. Belgium, 17 January 1970, Series A, No. 11.

[109] See: Schroeder, F. – C., *Strafprozessrecht* (2. Aulf, C.H. Beck, München, 1997) 32.

[110] So Šime Pavlović, *Tri načela kaznenog postupka, pravični postupak, Non bis in idem, in dubio pro reo* (Libertin naklada 2012), 246.

[111] See: Elizabeta Ivičević Karas, "Defendant's right to interrogate witnesses to the accusation in an investigative stage as an important aspect of the principle of equality of weapons of parties in criminal proceedings (upon the verdict of the European court of human rights in Kovač vs. Croatia case") (2007) 14(2), HLJKPP, 1000 and so on.

[112] Trechsel, o.c., 85.

the defence under the same conditions as witnesses to the accusation. [113] This clause can be found in the VIth amendment of the Federal Constitution of the USA, article 14. sec. 3 of ICCPR, article 6 sec. 3 subsec. d) of ECHR, as well as in article 29 sec. 2. chpt. 6 of the Constitution of RH.

The right of a defendant to interrogate or have interrogated witnesses to the accusation has been confirmed by the ECHR with the view where all evidence at the hearing must be presented in the presence of the defendant at public hearing linked to party confrontation.[114] As problematic is the issue of protected witnesses to the accusation whose evidence can only be used if the dense had „appropriate" and „real" chances to interrogate limiting the defence must be „strictly necessary".[115]

The standpoint of the ECHR on the confrontational clause has passed a developmental phase and the leading foundation is the Shcatschaschwili v. Germany case after which confrontational standards of so-called „Al-Khawaja test "were established[116]

In the procedure for issuing penal order temporary limitations to the principle of contradictoriness can be mentioned. Namely, the court hands down the verdict by which penal order is issued based on the very charges and evidence of the state attorney which emerge from the authenticity of documents, therefore, without previous hearing of the defendant.[117] Here, due to the more complete analysis, some foreign solutions related to this issue will be mentioned.

CPA (*ZKP)* Sr in article 512.prescribes the conditions for holding hearings for sentencing criminal sanctions. The public prosecutor can in the indictment request holding a hearing for sentencing criminal sanctions. If agreeing to the public prosecutor's request, the judge will by court order to determine to hold of court hearing which must take place within 15 days from the date of reaching that order. Parties and the defence are summoned to the hearing and the defendant and defence are delivered the summons and indictment. The defendant in the summons is warned that the court hearing will take place and in the event of non-attendance if summons correctly delivered, as is the non-attendance of the defence when the defence is not obligatory. The court hearing for sentencing criminal sanctions contains some elements of contradictoriness.[118] It begins with a summarized presentation by the public prosecutor on the evidence at their disposal and on the type and measures of the criminal sanctions suggested for sentencing. Then the judge calls the defendant to plead. Previously the defendant is warned about the consequences of agreeing to the charges of the public prosecutor and in particular about the impossibility of lodging an appeal against the first instance verdict. Immediately upon the conclusion of the court hearing for sentencing criminal sanctions, the individual judge reaches a convicting verdict or orders the main hearing. The convicting

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[113] Much literature on confrontational clause can be found in: Summers, S.J., *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing, Oxford and Portland, 2007), 146 i sl.

[114] Barbera, Messegue, Jabardo v. Spain, §78.

[115] Kostovski v. Netherlands App no. 11454/85, 20 November 1984.

[116] Shcatschaschwili v. Germany, App no. 9154/10 (2015) – On confrontational clause see: Marin Mrčela, "Adversarial principle, the equality of arms and confrontational right – European Court of Human Rights recent jurisprudence" (2017) ECLIC, 1, 20-23; Marin Mrčela – Ivana Bilušić, "Konfrontacijska mjerila" (2016), 23(2) HLJKPP, 379.

[117] This action emerges from theoretical interpretation of presumptions for reaching a verdict issuing penal order, but as we have said, state attorney practice deviates from this, which to a limited extent „moves "contradictoriness in an earlier procedural stage.

[118] Brkić makes suggestions on how to make the principle of contradictoriness into real, see: Brkić, S. (2011), o.c., 420-421.

verdict is reached if the defendant agrees with the public prosecutor's suggestion presented at the hearing, that is if the defendant did not attend the hearing.
CPA (ZKP) of B and H also prescribes a special solution. The individual judge decides about the indictment which contains the request for issuing penal order. The judge, if s/he accepts the request, must first confirm the indictment, and then, without procrastination and no later than eight days of confirmation of the indictment, sets a time and date for hearing the defendant. At that hearing, apart from the defendant, the prosecutor and defence, if the defendant has one, are present. During a hearing of the defendant, the individual judge must confirm whether the defendant's right to an attorney has been respected and whether the defendant understood the indictment and familiarizes the defendant with evidence contents and the defendant gives a statement on the evidence presented and the defendant pleads and whether they agree with the legal criminal sanction. If the defendant pleads guilty and accepts the sanction suggested by the prosecutor, the judge firstly establishes guilt and hands down the verdict and in accordance with the indictment issues penal order. An appeal but not a complaint can be possible against the verdict. [119]
In German legislation, the state attorney can exceptionally request the issue of a penal order even after commencement of regular criminal proceedings when the court by examining the indictment and reaching a decision to open proceedings has called parties to the main hearing. The court will act in the described way if the legal conditions are met for the issue of penal order or absence of the defendant, or some other significant reason.[120]
The Polish legislation prescribes non-public hearing. The procedure is implemented based on a written request by the public prosecutor. The individual judge calls the defendant and their defence and the injured party and their power of attorney to a non-public hearing. The decision on issuing penal order is brought by the judge based on collected data in a previous procedure if s/he believes that the circumstances of the criminal offence are not compromised if in a concrete case the implementation of the main hearing is not necessary and if sentencing of a prison sentence is not necessary.[121]
However, in these cases, it is not about implementing contradictory hearings, but about non-public court hearings with contradictory elements which in our opinion does not compromise the basic, consensual nature of penal order and reaching a verdict mainly on written materials. And in the case of other penal orders where non-public hearing exists, where our solution exists, contradictoriness is achieved after when the defendant receives the verdict to which an appeal can be lodged and in which evidence to their defence can be included. Implementing hearing during appeal represents a complete achievement of the principle of contradictoriness.

VII. CONCLUSION

Contemporary problems of the overburdening of the judiciary have made a wide application of the institute of penal order a current issue. At the same time, the process of functional changes to process maxims of criminal procedure law is developing. These two processes have made the problem areas of penal order interesting. The problem areas of penal order from the aspect of limitation and exclusion of the application of certain fundamental principles of criminal procedure. Although in this paper the process topic is discussed in

[119] See: Hajrija Sijerčić-Čolić, *Krivično procesno pravo, knjiga II, Tok redovnog krivičnog postupka i posebni postupci*, (Pravni fakultet Univerziteta u Sarajevu, 2008), 167.
[120] According to §408a StPO in that case provisions is not applied on limiting sentencing of criminal sanctions or other measures.
[121] On the legal nature of the procedure of issuing penal order as a simplified procedure in more detail see: Agacka – Indecka: „Character prawny nakazu karnego“, (1997) Annalec Universitas Lodzencis.

principle, as a model for analysis, we have chosen the legislative solution of penal order in the Republic of Croatia, given that it only negligibly deviates from what is suggested in the Recommendation of the Council of Europe R(87)18 on the simplified criminal judiciary, together with comparative solutions.

The procedure of issuing penal order is implemented for summary offences as a written procedure for reaching judicial decisions without hearing at the request of the state attorney who in the indictment suggests sentencing concrete types and measures of legal criminal sanctions. The legal exception is of the principle of orality of hearing, given that the individual judge, reaching a judicial decision without implementing a hearing, bases his/her decision on the request of the state attorney, who has as a foundation documents of credible contents, which means that the court bases the decision exclusively on written acts. The procedure of singling out penal order also deviates from the principle of immediacy of court assessment of evidence. The individual judge, reaching a judicial decision only reads the criminal charge and its attachments exclusively using evidence already collected at the stage of a police investigation and does not present evidence directly at the hearing and om original form. The principle of publicity of court hearing is completely excluded given that the individual judge reaches the judicial decision *in camera*, without hearing. One can talk of temporary limitation of the principle of contradictoriness. Namely, the court reaches the verdict on the basis of very charges and evidence of the state attorney which emerge from credible documents, that is, without previous hearing of the defendant. However, contradictoriness can be achieved after if, during stated complaint against penal order, a hearing is held before the individual judge.

Refraining from the procedure of issuing penal order from the application of the principle of orality of hearing, immediacy of the assessment of evidence, publicity of court hearing and contradictoriness is compensated for in the legal nature of penal order. The simplified form of the criminal procedure which at the same time represents a form of tacit consensual procedure. Namely, penal order understood as an „offer "to the defendant by the state attorney and court, can be accepted by not voicing a complaint. In that way, it is tacit, by non-activity a bargain has been reached. The right to voice a complaint gives the defendant the possibility of a procedure with hearing, therefore, with the application of all the stated principles. The very possibility of voicing a complaint and in the opinion of the ECHR results in the conclusion that penal order does not deviate from justice. With penal order, an unconditional prison sentence cannot be handed down which is also an argument in favour of the application of that institute.

We believe that existing legal solutions adequately protect the fundamental human rights of the defendant and at the same time satisfy the tendency of the efficacy of criminal procedure due to the emphasized principle of being economical. By this, both tendencies of criminal procedure are satisfied which ensures penal order a future in the criminal procedure system making it justified and acceptable.

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