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Review Paper

THE REFORM OF THE CRIMINAL PROCEDURE LEGISLATION: THE CONCEPT OF INVESTIGATION

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Abstract. *The basic requirement underlying the reform of the Serbian criminal procedure legislation is to create and normatively regulate an efficient criminal procedure. The key issue in meeting this requirement is the choice of the criminal investigation concept: should the legislator retain the judicial investigation model predominant in the inquisitorial system of the European-Continental legal tradition, or follow in the footsteps of many other countries which have opted for the adversarial criminal investigation system underlying the Anglo-Saxon legal tradition? There is no doubt that this choice will determine not only the efficiency of criminal investigation but also the entire criminal procedure. On the other hand, the creators of the reform have to take into account the obligation to observe human rights and freedoms, enshrined not only in the Serbian Constitution but also in the ratified international law documents. By using a comparative method, this paper aims to present the advantages and disadvantages of the two criminal investigation concepts (the inquisitorial and the adversarial), to draw attention to the observed characteristics of the prosecutorial investigation in the Serbian criminal procedure law, and to propose possible modifications in light of observing the principles of procedural fairness. In particular, the author discusses whether the the selection of the adversarial model has been justified, and whether the envisaged criminal procedure framework has struck a balance between the need for procedural efficiency and the principle of procedural fairness in criminal investigation.*

Key words: *reform, efficiency, investigation, Serbian Criminal Procedure Code, procedural fairness.*

1. INTRODUCTION: THEORETICAL FRAMEWORK

In 2011, having adopted the Criminal Procedure Code (CPC) [1], Serbia abandoned the European-continental legal tradition embodied in the inquisitorial criminal procedure, and opted for the accusatory criminal procedure, which is based on the adversarial proceedings

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[1] The Criminal Procedure Code, *Official Gazette of the Republic of Serbia*, 72/11; 101/2011; 121/2012; 32/2013; 45/2013, 55/2014

pertinent to the Anglo-Saxon legal tradition. Yet, it is not fully justifiable to designate the European-Continental system as inquisitorial and the Anglo-Saxon as accusatory because neither of them strictly contains the autochthonous elements of one model without having the elements of the other. For this reason, the doctrine includes the third type of legal system, which is designated as the contemporary or mixed one. In the accusatory procedure, the accused person has a relatively more favourable position as compared to the accused person in the inquisitorial criminal procedure, whereas the contemporary (mixed) system tends to strike a balance between the efficient criminal procedure and the protection of human rights and freedoms (Knežević, 2007:20-26).

The heritage of the accusatory procedure is embodied in the following features: the procedural functions (investigation, prosecution and adjudication) are separated, and they are vested in separate authorities; the procedure is regulated on the principle of accusation, which implies that the accused person subjected to the procedure has the right to defend himself/herself during the investigation proceedings. The main hearing (in trial proceedings) predominantly contains the elements of the accusatory procedure.

The heritage of the predominantly inquisitorial investigation procedure is reflected in the following features: the criminal procedure is divided into stages (preliminary proceedings and main hearing/trial proceedings; the officiality principle; the legality principle; the investigation principle, including the right of the court, the prosecutor and the defence counsel to examine the defendant in the main hearing (trial proceedings), the right of the defendant to remain silent. The contemporary criminal procedure has been modified; therefore, in some countries, in the reform of criminal procedure legislation, the principle of truth has been cancelled, and the investigation principle and the main hearing are built primarily on adversarial principles (Đurđić, 2014a: 28).

There is no doubt that these legal systems impacted the development of our criminal procedure system and its normative framework. Therefore, we will comparatively present the summary of the most important characteristics of both systems in the investigation phase (Škulić, 2013:180).

First, the purpose of investigation in the Continental legal system is to collect the evidence in order to raise charges or dismiss the allegations, as well as to obtain the evidence that may not be put forward later in trial proceedings or the evidence that would be difficult to adduce later in the proceedings. The purpose of investigation in the adversarial legal system is to collect the evidence which will be sufficient for raising charges and submit the indictment. Second, in the Continental system, it is possible to engage the court during the prosecutorial–police investigation, as the court has to adduce the evidence that cannot be obtained later in the proceedings. On the other hand, in the adversarial system, the court is completely passive in the investigation stage. The complete passivity of the court imposes the need to present adduce the same evidence again in trial proceedings. Third, in the Continental legal system, the investigation involves a formal procedure, conducted *ex officio* by the competent investigating judge), while in the Adversarial system there is the prosecutorial-police investigation, and the (unknown) suspected offender who is subjected to investigation need not know about it). Fourth, in the Continental legal system, the confession of the suspected person must be supported by additional evidence; by contrast, in the Adversarial system, the confession must be supported by substantial evidence. If there is no other conflicting evidence, then it is considered to be the ultimate evidence. Fifth, in the Continental legal system, the defendant must be represented by a defence counsel while in the Adversarial system he/she is entitled to self-representation, without any professional assistance, if so

wanted. Sixth, in the Continental legal system, the defendant may not be heard as a witness, while in the Adversarial system, he/she may appear as a witness and testify under oath that he/she will "tell the truth and nothing but the truth". The most outstanding difference between the two legal systems is to do with the obligation to establish the truth. In the Continental legal system, it is the obligation of the court; in the Adversarial, the primary duty of the court is to ensure fair criminal proceedings (due process of law). In the Adversarial legal system, the procedure comes down to as a dispute between the opposing parties (adversaries) and it is similar to litigation (Škulić, 2013:178).

In order to characterize one criminal procedure as predominantly Continental (inquisitorial) or adversarial, it is necessary to consider all the phases of that procedure. As already noted, the criminal procedure in Serbia is largely adversarial. The main stage in the procedure (trial proceeding) is built on adversarial elements, but the investigation is not consistently adversarial as it contains some elements of the inquisitorial system.

In the criminal procedure theory, there are several different investigation models. The classification was made according to the key elements which determine the nature of investigation. These elements are as follows: the *subjects* conducting the investigation, *the form* of investigative actions, and *the goal* of investigation. According to the first criterion, involving the subjects who conduct the investigation and undertake investigative actions, the investigation may be judicial, prosecutorial and police investigation. Regarding the form, it may be *formal (judicial*) and *informal (prosecutorial-police*) (Đurđić, 2014b:139).

When investigative actions are undertaken by the (pre-trial) investigating judge, or the judge for the preliminary procedure, such actions have a judicial probative force; they need not be repeated in the main hearing and the court decision may be based on them. In the judicial investigation, the evidence is *presented* as the basis for the bill of indictment and the judicial decision. When the prosecutor is *dominus litis* of the investigative phase, the collected *evidence* is the ground for the prosecutor's decision on whether the indictment shall be raised or whether further prosecutions shall be abandoned.

The theory and practice have different answers to the question whether the prosecutorial investigation[2] is part of the criminal procedure. The investigation is initiated by the prosecutor's order and, when no appeal can be filed with the court against the order, the prosecutor is the authority conducting the procedure, whereas the role of the court is to protect the human rights and freedoms. According to the criminal procedure theory, when no relationship is established between the parties, there is no criminal procedure; in such a case, it implies one-party procedural legal process. In fact, it is only when the indictment is confirmed that the three-party procedural relation starts among the court, the prosecutor and the defendant. According to the legal provision contained in the Serbian Criminal Procedure Code (CPC), the legislator has not recognized this theoretical standpoint; therefore, it has been provided that a regular criminal proceeding begins when the prosecutor issues an order to conduct investigation or when the indictment is confirmed (in case it was not preceded by investigation)[3]. Therefore, it follows that all probative (evidence-gathering) actions undertaken before establishing the parties' procedural relations have not been undertaken within the criminal procedure (Đurđić, 2014b:146). Hence, the court judgment must not be based on such evidence. The legislator neglected the traditional concepts of criminal

[2] Since the prosecutor entrusts certain actions to the police, it is more correct to speak about prosecutorial–police investigation, but the term "prosecutorial investigation" is commonly used in the legal literature.
[3] Art.7 (par.1, items 1 and 2) of the Criminal Procedure Code (CPC) of the Republic of Serbia

procedure law and regulated the prosecutorial investigation as a constituent part of the general criminal procedure (Brkić, 2015:563).

2. Prosecutorial and Judicial Concept of Investigation: Advantages and Disadvantages

The prosecutorial investigation concept is a trend and a dominant concept in the contemporary (mixed) type of the criminal procedure, which increasingly becomes universal (Bejatović, 2014:13). In the countries of expressly Continental legal tradition, such as Germany, the prosecutorial investigation concept supersedes the judicial investigation concept. The criminal law literature shows that all the ex-Yugoslavia countries turned to prosecutorial investigation concept, except for Slovenia, which resisted the "general trend". The matters indicated in the legal literature as advantages of the prosecutorial investigation concept usually imply the lack of judicial investigation, and vice-versa.

The primary goal of the criminal procedure legislation reform is to lay grounds for establishing an *efficient criminal procedure*. Efficient investigation is the basic requirement for accomplishing this general and primary goal. Hence, the transition from the judicial investigation to the prosecutorial investigation is indispensable because it is to contribute to achieving the procedural efficiency. The justification for such a thesis may be found in the assertion that the countries which had introduced the prosecutorial investigation before Serbia had good results and reached a significant measure of efficiency (Bejatović, 2014:15).

The critics of the prosecutorial investigation assert that the efficiency requirement contributes to neglecting human rights and freedoms. When speaking about good results and experiences of the countries which introduced the prosecutorial investigation concept, the fact which is often ignored is that such efficiency is the result of the ever-increasing application of the opportunity principle.

As compared to the judicial investigation which was predominantly office-like work conducted by the investigating judge, the supporters of the prosecutorial investigation concept emphasize the active role of the prosecutor and better knowledge of the case which facilitates his/her work in the main hearing. The investigation is conducted by the prosecutor, and supported by the police. The tendency of entrusting an increasing number of probative actions to the police (which has been observed in other countries) is expected in the domestic practice as well; therefore, the investigation is expected to increasingly attain the character of prosecutorial-police investigation (Grubač, 2014:218).

The critics of prosecutorial investigation outline that the role of the court in the investigation is reduced to a minimum, in spite of the fact that its role is irreplaceable because it is only "the independent court that is the best guarantor of civil rights and freedoms, which are more and more frequently limited in the investigation than in the later stages of the criminal procedure" (Brkić, 2015:560). The proponents of the judicial investigation concept emphasize that judicial authorities must be active in the investigation, too. Given the fact that the court is as a guarantor of human rights and freedoms in the investigation, they point out that it necessarily leads to dividing the investigation in two parts. To prevent that, the investigation must be entirely judicial (Brkić, 2015:560).

The prosecutorial investigation precludes multiple repetition of the same kind of evidence in the criminal procedure (in the investigation stage and in the main hearing) and the likelihood of "hiding" the police evidence and presenting it as evidence adduced

by the court. The judicial investigation may put witnesses into a very difficult position because they have to be inquired several times. The opponents of this thesis state that the inexpedience of judicial investigation is very intriguing and that "it comes down to a general impression which is not verified"; they also assert that there are no empirical studies establishing that the prosecutorial investigation is faster than the judicial investigation (Brkić, 2014:561).

The prosecutorial investigation removes the burden from the court but, at the same time, there is a danger that the prosecutor may unwarrantedly assume all the authorities that used to belong to the investigating judge. On the other hand, the supporters of the prosecutorial investigation assert that it strengthens the responsibility of the prosecution in case of inefficient investigation. Namely, according to the former legal solution envisaged in the 2001 CPC, the investigation could not have been taken against an unknown perpetrator; by contrast, the prosecutorial investigation provides for such a possibility.

The court is independent and impartial, which cannot be said for the prosecutor who acts in the name and on behalf of the state. While the proponents of judicial investigation consider that the public prosecutor is inadequate for collecting data about a person, the supporters of prosecutorial investigation underline that the legal nature of prosecution is extrajudicial. The evidence presented in the judicial investigation has a more powerful probative force as compared to the evidence presented in the prosecutorial investigation.

The proponents of prosecutorial investigation admit that Prosecution Offices in Serbia have not been sufficiently prepared for the transition from the judicial investigation to the prosecutorial investigation concept, particularly in terms of personnel and technical aspects. While noting that it is not an unrecoverable disadvantage, they point out that it makes the reform quite expensive.

The total number of public prosecutors in Serbia[4] in the year 2012 was 659 (or 9.2 prosecutors per 100,000 inhabitants), while the average in the Council of Europe (CoE) member states in the same period was 11.8 public prosecutors per 100,000 inhabitants. According to the number of inhabitants in Serbia for the year 2016 and considering the fact that the total number of public prosecutors was reduced to 627, in 2016 Serbia has the average of 8.8 prosecutors per 100,000 inhabitants. Since 2013 when the prosecutorial investigation was introduced, the number of prosecutors per 100,000 inhabitants has dropped, while the workload has actually increased. Since the number of prosecutors in this period was smaller than the number of systematized prosecutor posts, the Analysis states that even if all the posts had been filled, there would have been 10.4 public prosecutors per 100,000 inhabitants in Serbia, which is less than the average in CoE member states. In the year 2012, the average number of cases per prosecutor was 344 cases; in the year 2016, the total number of cases amounted to 1,197 cases; if all the posts had been filled, the average would have been 860 cases per prosecutor. According to the total number of cases, the workload (particularly in the basic prosecution offices) increased for more than three times as compared to the 2012 average. Such an influx of incoming cases is simply impossible to manage if the number of prosecutors remains the same.

The need to harmonize the domestic legislation with the contemporary comparative criminal procedure legislations and the international criminal law has been underscored as an argument in favor of transition from the judicial investigation to the prosecutorial

[4] The Analysis of the necessary number of deputy public prosecutors in the Public Prosecution Offices in the Republic of Serbia, Work Group of the State Prosecutors Chamber, available at www.dvt.jt.rs /.../

investigation concept. Otherwise, it has been pointed out that there is no international document obliging countries to introduce prosecutorial investigation. The European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter: the European Convention or the ECHR)[5] acknowledged both the Continental-European legal system and the Adversarial model, recognizing the right of the defendant to examine or to have the witnesses against him examined, or to make their examination feasible (Art. 6 par. 3d ECHR). Thus, the defendant may examine the witnesses either alone or through his/her defence counsel (in the Adversarial model), but also allows the court to examine the witnesses (in the Continental-European model). The Constitution of the Republic of Serbia[6] has adopted only the Adversarial elements (Đurđić, 2008:198).

There is no doubt that the prosecutorial investigation has an advantage as compared to the judicial investigation, but only provided that there are normative guarantees on the full protection of human rights and freedoms and full observance of the principle of fair procedure. The current Serbian CPC should be reformed in that direction.

3. Characteristics of the Prosecutorial Investigation in Serbia: A Critical Review

The prosecutorial investigation is preceded by the pre-investigation (police) procedure. This procedure is exclusively conducted in case of criminal offences which are prosecuted *ex officio*. As a rule, the evidence collected in the pre-investigation procedure does not have a probative value unless it involves exceptional cases. The pre-investigation procedure has the same character as the investigation procedure; the prosecutor is in charge of both the pre-investigation and the investigation proceedings. The doctrine considers it illogical that the criminal investigation procedure should include two phases: the informal one and the formal one, both of which require the same level of probable cause (grounds for suspicion). The legislator split these two phases although they both have the same legal nature. It is preferable to regulate them together, and to separate them from the judicial procedure (Brkić, (2015:563). In the pre-investigation procedure, the court may be vested with relevant authorities, for example, to decide on detention.

The doctrine has also observed some special *characteristics* of the investigation procedure. First, the investigation procedure is the action of the public prosecutor in which the court's role is limited (Nikolić, 2014:37). Second, the formal condition for initiating criminal investigation is the order issued by the competent public prosecutor (or his/her deputy), and the suspect subject to investigation is not entitled to file an appeal against the order with a competent court. Third, the substantive requirement for initiating the investigation is the existence of probable cause (reasonable grounds to suspect that a person has committed a criminal act or that a criminal offence has been committed by an unidentified offender. Fourth, the criminal investigation may be conducted against the known (indentified) offender and the unknown (unidentified) one. Fifth, the evidence in favour of the defence may be collected by the public prosecutor and the deputy public prosecutor, the defendant and/or his/her defence counsel. Sixth, the investigation is not obligatory, but optional (Grubač, 2014:218).

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[5] The ECHR was adopted in 1950, and the State Union of Serbia and Montenegro ratified this international document in 2003. Protocol 7 to the Convention was passed in 1984.

[6] Art. 33, par.5 of the Constitution of the Republic of Serbia, *Official Gazette of RS*, No.98/2006

(1) Investigation is the activity of the prosecutor and it is initiated upon his/her explicit order. The order is issued before or immediately after the first probative (evidence-gathering) action, undertaken by the public prosecutor or the police in the preliminary investigation procedure, within a period of 30 days at the latest from the date when the public prosecutor was informed about on the first probative action undertaken by the police (Article 296, para. 1 and 2, CPC). Due to the limited personnel and technical possibilities, the prosecutor will frequently have to address the police in order to check the probative value of evidence; therefore, the question may be posed if the investigation is the prosecutorial or the police activity. As a result of probative activities undertaken by the police, the prosecutor may be placed in a *fait accompli* position. Consequently, the Prosecutor loses the independence in decision making which is guaranteed by the Constitution. It entails the suspension of the norms of the Public Prosecution Act,[7] which prohibit any interference and influence of the executive and legislative authorities on the prosecution (Nikolić, 2014: 38). There is also the viewpoint that the public prosecutor is entitled to authorize the first probative (evidence-gathering) activity of the police. If the authorization is rejected, such evidence has no probative value and may not be used in the procedure; if it is accepted, the probative action shall be included in the order and such evidence will be admissible in the criminal procedure (Ilić, Majić, Beljanski, Trešnjev, 2014: 718). The new prosecutorial investigation concept does not imply pre-determined sequence of probative actions; therefore, the suspect need not be heard at the beginning of the investigation, and it may be postponed for the time when most of the evidence is collected (Ilić et al. 2014:718). Since the suspect may see the probative material only after the first (pre-trial) hearing, the prosecutor has a great deal of latitude for developing strategies and tactics, whereas the time for preparing defence by the suspected offender and his/her counsel has been reduced. The prosecutor's strategy may first include the possibility of initiating the probative actions which the defence does not have to be informed about. If the suspect is not heard at the opening stage of the investigation, he/she will be denied the rights guaranteed to him/her under Article 68 of the CPC. In case of more than one suspect, the viewing of documents and acts will be postponed until every single suspect is heard by the prosecutor (Art. 303, para.1 CPC). Upon the proposal of the defence, the judge in charge of the preliminary procedure may order the public prosecutor to undertake a probative (evidence-gathering) action, but such a court order is not accompanied by substantive and procedural guarantees. Therefore, the legal provision should be supplemented so that the judge in charge of the preliminary procedure shall be authorized to undertake, on his own initiative, the probative action justifiably proposed by the defence (Brkić, 2015:569) or, in case the public prosecutor has ignored the court order, the judge will threaten that the probative action shall be undertaken by the court. In the doctrine, there is another standpoint on this issue. The court may not be involved in the investigation but its role in the investigation phase would be that of the guarantor of human rights and freedoms only. According to the current criminal procedure regulations, the role of the court in the investigation phase is limited to deciding about some procedural measures for securing the suspects' appearance in court, which that limit the rights and freedoms of an individual.

The purpose of investigation is to collect evidence and data, on the basis of which the public prosecutor could decide whether to raise charges and issue the indictment or to

[7] The Public Prosecution Act, *Official Gazette of R.S., nos.*116/2008, 104/2009, 101/2010, 78/2011 – other law, 101/2011, 38/2012 – Constitutional Court Decision, 121/2012, 101/2013, 111/2014 – Decision US, 117/2014, 106/2015 and 63/2016 – CC Decision.

abandon the prosecution. But the prosecutor may also undertake some probative actions which could not be taken or which would be difficult to adduce during the main hearing. Besides, the prosecutor may collect the evidence which may be useful in the procedure and whose presentation is considered to be purposeful. The minutes on the adduced extrajudicial evidence may be used in trial proceedings and made part of the judgment. Thus, the extrajudicial evidence has been equalized with the judicial evidence, which implies a violation of the principles of contradiction, immediacy and orality in trial proceedings. The criminal procedure literature includes concerns that such a solution is not in accordance with the Constitution and the ratified internationally norms (Brkić, 2014:176). In the investigation phase, the probative actions (which could not be adduced again or would be more difficult to adduce in the main hearing) may only be adduced by the judge in charge of the preliminary procedure, provided that the judge has ensured the presence of the suspect and the counsel. Only in a such case can the collected evidence be indirectly adduced in the main hearing. Some writers do not agree with the use of the notion "probative" actions and they think that it is more appropriate to call them "investigative actions" of the prosecutor (Brkić, 2015:572).

(2) Formally, criminal investigation is initiated upon an investigation order issued by a public prosecutor. The legislator does not envisage the suspect's right of appeal against this order; as the defence is denied the possibility to challenge the decision of the public prosecutor, there is a lack of judicial control in this phase of the procedure. Yet, the Constitution guarantees that everybody is entitled to pursue a court discussion which will establish whether there is probable cause for initiating the criminal procedure. By enacting such a solution in the CPC, the legislator has prevented the suspect's access to court (justice) and the right to legal remedy, thus violating the principle of fair procedure. If there was the right of appeal, the judge in charge of the preliminary procedure would have the authority to decide on the appeal filed by the defence. Some authors assert that introducing the right to appeal interferes with the sovereignty of the prosecutor, claiming that the right to appeal may exist only if the reasons for filing an appeal have been specified (Nikolić, 2014: 38).

(3) The grounds for suspicion is the level of suspicion which is required to initiate criminal investigation. In the field of criminal procedure, the suspicion is subject to gradation and the Serbian CPC (Art. 2) distinguishes three levels of suspicion: *grounds for suspicion* (a set of facts indirectly pointing to the committed crime or offender), *probable cause* (a set of facts directly pointing to the committed crime or offender), and *justified suspicion* (a set of facts directly substantiating the probable cause and justifying the raising of charges against the offender). To verb *suspect* means to doubt the existence or non-existence of certain facts and circumstances (Brkić, 2015:564). In criminal procedure law, it means uncertainty in terms of the probability that a person has committed the offence he/she is charged with.

The Serbian legislator defines suspicion as indirect or direct "set of facts", but it is not a matter of a "set of facts"; in fact, it is the matter of the subjective conviction of the prosecutor whether certain facts exist or not. Thus, the grounds for suspicion represent such a level of suspicion where the reasons for non-existence of some fact or circumstance prevail in relation to the prosecutor's conviction that they exist (Brkić, 2015:565). This level of suspicion implies that the probability that the person has not committed the offence he/she may be charged with is much higher that the probability that he/she has committed the crime. In such a case, the ground for suspicion is obviously insufficient for initiating the

criminal investigation. Therefore, in order to initiate criminal investigation, it is necessary to adhere to the standard of probable cause.

(4) The investigation may be conducted against an unidentified offender (Art. 295, para.1, item 2 CPC), even though most legal scholars believe that such a solution is unjustifiable. The procedure against an unidentified person is contrary to the substantive criminal law, which embodies the principle that "there is no crime without guilt" (Nikolić, 2014:39). In the comparative criminal procedure literature, one may rarely find the standpoint that the public prosecutor may initiate the investigation against an unidentified offender (Grubač, 2014:227). The prosecutor and the police will focus on discovering the offender, which is the primary feature of the pre-investigation phase of the procedure, but some actions may also be undertaken as formal (on-site) inquiry. There is no doubt that investigative actions must be undertaken because there is no other way to discover the offender. The investigation against the unidentified offender has been taken over from the criminal procedure legislation of Croatia, which abandoned such a solution in subsequent amendments (Grubač, 2014:229).

(5) The evidence in favour of the defence may be collected by the prosecutor, the defendant and the defence counsel. The public prosecutor and the police are obliged to act *impartially;* in the process of gathering evidence, they have to pay equal attention to the facts important for raising charges against the defendant and to the facts which may be favourable to the defendant. The suspect and his/her defence counsel are also allowed to collect the evidence and materials in favour of the defence on their own, but in the context of preparing for defence and gathering data which may be useful when checking the credibility of evidence and the other party's witness statements in the further course of the procedure (Art. 301 CPC). Yet, under the current legislation, the evidence collected by the defence is regarded as informal evidence, while the evidence provided by the prosecutor and the police is recognized as having been adduced by the court. That fact sufficiently illustrates the "(in)equality of arms" in this phase of the procedure. On the other hand, after the pre-trial hearing, the suspect and the defence counsel are obliged to inform the public prosecutor about the collected evidence and materials in favour of the defence, and to enable the prosecutor to inspect the documents and examine the objects (Art. 303, para.3 CPC). First of all, such a provision is incompatible with the principle of the presumption of innocence and, second, it is inconsistent with the obligation of the public prosecutor to prove the charges.

The criticism concerning the alleged introduction of "parallel investigation" could not be justified because there is no real parallel investigation (Škulić, Ilić, 2012:49). Under the new CPC, the suspect and the defence counsel are for the first time given the right to collect evidence and materials for the defence but, in fact, it implies only some forms of "free and voluntary communication with natural and legal persons" (Brkić, 2015:570), such as: talking to a person who may offer them data useful for the defence and acquiring written statements and information from such persons with their approval; entering private premises with the permission of the owner/holders; taking objects and documents from natural or legal persons, with the obligation to issue to a confirmation including a list of objects and documents.

In regard to the principle of equality and particularly the "equality of arms", it is justified to pose the following question: what does the provision on the defendant's right to collect evidence in favour of the defence mean if he/she is in detention? Evidence obstruction risk is one of the reasons for detention which is incompatible with the right to collect evidence. This remark is justified because it is only the suspected offender who actually has to defend himself, while the counsel is obliged to render professional assistance.

The prosecutor has a dual role. In the procedure before initiating the indictment, he/she should be an impartial participant in the pre-trial proceedings but, after the indictment has been confirmed, he/she acts as a partial subject whose duty is to prove the existence of a criminal offence and seek relevant sanction for the committed crime. However, the prosecutor's impartiality is highly disputable; the doubts raised by the doctrine include arguments concerning the procedure for prosecutors' appointment and election, the length of the prosecutor's term of office, and the prosecutor's dependence on the executive and legislative authorities. As long as these dependence mechanisms are in force, it is more appropriate to speak about the state prosecutor, rather than the public prosecutor, as proclaimed by the applicable law. Subordination to the executive authority and impartiality do not go hand in hand.

(6) The investigation procedure is not obligatory but it is only a possibility in terms of offences which are punishable by the sentence of imprisonment exceeding eight years. In that case, the prosecutor has to decide if criminal investigation will take place, and he/she is not obliged to ask the court (the judge in charge of the preliminary procedure) to approve his/her decision. If the prosecutor estimates that the sufficient evidence has been collected, he/she may submit a direct bill of indictment. Such a solution poses a risk for the court to be "flooded" with a huge number of unfounded indictments (Grubač, 2014:231). Investigation is excluded from the simplified procedure. In order to decide about raising charges (indictment), in some situations the prosecutor will have to undertake corresponding probative (evidence-gathering) actions in the shortest possible period of time (Art. 499, para.2 CPC). If a person is detained, it could be a term of 60 days, as prescribed in the provision regulating the detention of suspects (Art.498, para. 2 CPC); if a person is not placed in custody, the period could be even longer (Ilić, et al., 2014:1110). The criminal procedure is initiated by issuing a decision on detention, whereas the indictment has not been lodged yet, which is an unacceptable solution (Đurđić, 2014b: 148). If there is no indictment, there is no procedure (*nemo iudex sine actore*). The criminal procedure may not start by a court decision (on detention).

4. CONCLUSION

There are both legal and political reasons for abandoning the European-continental legal tradition (based on the inquisitorial criminal procedure) and accepting the Anglo-Saxon/American legal tradition (based on the adversarial criminal procedure).

As there is no clear demarcation between the two systems, it may be more correct to speak about a mixed legal system which includes elements of both. In the process of reforming the criminal legislation in line with the adversarial model, the new organizational structure of the Serbian criminal procedure was justified by harmonization with the international norms. The requisite conformity with the international standards is inevitable. However, transition from the judicial investigation (pertinent to the Continental legal systems) to the prosecutorial investigation (pertinent to the Adversarial criminal procedure) has not been an obligation, but rather a change of predominantly political nature.

The legislator in Serbia has not been consistent in building the investigation on the adversarial bases, unlike the main hearing (trial proceedings), which resulted in constructing a criminal procedure which is "neither fish nor fowl". Investigation may be prosecutorial and judicial (depending on the subject conducting the investigation), and formal and informal (depending on the form of taken probative actions).

Pursuant to the Serbian CPC provisions, investigation is part of criminal procedure, which is not in accordance with the theoretical view on the criminal procedure. The fundamental problem in building the criminal procedure is to strike a balance between the efficiency requirement and the observance of human rights and freedoms. It may be concluded that the adversarial system shall have the advantage if the legislator finds and applies the solutions to confirm that the criminal procedure is fair and just. It is still not the case with the Serbian CPC. Besides, the personnel and technical assumptions have not been provided yet to ensure a successful implementation of the prosecutorial investigation concept.

Investigation is initiated upon the order issued by the prosecutor, which cannot be appealed against, which is contrary to the suspect's right of access to court and the right to pursue legal remedy. The evidence of the prosecution has been raised to the rank of the judicial evidence adduced by the court. The envisaged level of suspicion necessary for initiating the investigation is the ground for suspicion, which is not enough. The novelty in the Serbian CPC is the investigation against an unknown offender, which is not in accordance with the principle that there is no criminal offence without guilt.

The prosecutor has a dual role: in investigation, he/she should be an impartial subject in the procedure; in the main (trial) hearing, he/she is the state representative who has to prove the indictment. As the prosecutor still depends on the executive and legislative authorities, the term state prosecutor is still more adequate than the term public prosecutor.

The investigation is not an obligatory but an optional phase in criminal procedure, because the prosecutor may raise charges even without that phase and the court approval, if he/she has collected sufficient evidence. Investigation is not carried out in a simplified (summary) procedure. The legislator makes a serious mistake by prescribing that criminal procedure begins with a court-ordered detention, which constitutes a violation of the principle *nemo iudex sine actore*.

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REFORMA KRIVIČNO PROCESNOG ZAKONODAVSTVA – PITANJE KONCEPTA ISTRAGE

Reforma krivičnoprocesnog zakonodavstva Srbije trebalo je da ispuni osnovni zahtev - izgraditi i normativno urediti efikasan krivični postupak. Ključno pitanje u sprovođenju tog zahteva bilo je pitanje kom konceptu istrage se prikloniti: zadpžati sudsku istragu ili krenuti putem kojim su krenule mnoge zemlje kontinentalno–evropske tradicije opredelivši se, pod uticajem anglosaksonske pravne tradicije, za tužilačku istragu. Od tog izbora nesumnjivo zavisi, ne samo da li će istraga biti efikasna, već i da li će celokupan krivični postupak zavredeti takav epitet. Nasuprot zahtevu efikasnosti, pred kreatorima reforme i njene realizacije i oživotvorenja kroz normativni iskaz, stajao je zahtev poštovanja ljudskih prava i sloboda utemeljenih ne samo Ustavom Srbije, već i ratifikovanim međunarodnim pravnim instrumentarijem. Cilj ovog rada je da predstavi, uporednom metodom, predosti i nedostatke dva koncepta istrage (sudske i tužilačke), da skrene pažnju na uočene karakteristike tužilačke istrage u srpskom krivičnoprocesnom zakonodavstvu, i da predoči moguće modifikacije u svetlu poštovanja načela pravičnog postupka. Svrha rada je da ukaže da li je bio opravdan izbor adverzijalnog modela i da li je izgradnjom krivičnog postupka u Srbiji postignuta ravnoteža između zahteva efikasnosti i načela pravičnog postupka u istrazi.

Ključne reči: *reforma, efikasnost, istraga, Zakonik o krivičnom postupku Republike Srbije, pravični postupak.*