Comparative Review of the Role and Authorisations of Investigative Judge According to Previous Criminal Procedure Code and the Role and Authorisations of Preliminary Proceedings Judge According to the Current Criminal Procedure Code of the Republic of Serbia – A Step Forwards or a Step Backwards?

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Abstract

The reform of the criminal procedural legislation in the Republic of Serbia was commenced in 2001, by adopting the Criminal Procedure Code used until the current CPC entered into force. Through this reform, the legislator wanted to create a normative basis for a more efficient criminal procedure by incorporating simplified forms and a different concept of processing criminal matters. However, this process did not go as smoothly. During all these years, the amendments to the procedural norms happened very frequently, which is not, and should not be characteristic for regulations of this kind. The extent of wandering in the process of finding the solution in this matter can be best exemplified by the fact that during the year 2006, a completely new Criminal Procedure Code has been made but has never been applied. Apart from that, the current CPC was adopted in September of 2011, and it initially started to be applied as of January 15, 2012 in the procedures for criminal acts of organized crime and war crimes conducted before special departments of competent court, while in other procedures conducted for "classic" criminal offenses, it was applied only as of October 1, 2013, after several consecutive postponements and amendments.

As a result of all this, according to the novelties introduced while approaching the regulation of the problem of criminal procedure, the current CPC has made a fundamental break away from Serbian criminal procedural tradition.

Among the numerous radical novelties introduced into the criminal procedure legislature of Serbia, what stands out is that the investigation, as one of the phases of criminal procedure, is exempt from the supervision of the court and is placed in the competency of the public prosecution.

The essence of the changes in the investigation phase according to the concept of the current CPC, whether new legislative solutions are better than those before, whether they are in opposition to the Constitution of the Republic of Serbia or other basic principles of criminal procedure, are all only some of the issues we will attempt to address in this paper.

Key words: *investigative judge, preliminary proceedings judge, public prosecution, investigation, Criminal Procedure Code of the Republic of Serbia.*

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1. Introduction – the most important changes in the criminal procedural legislation of the Republic of Serbia in terms of investigation

The day of application of the Criminal Procedure Code[1], October 1, 2013, marks revolutionary changes in the criminal-procedural legislation of the Republic of Serbia. The concept of criminal proceedings was radically changed, and one of the most important changes is that the investigation, as one of the phases of criminal proceedings, was placed into the competency of the public prosecution (instead of being in the competency of the court as has previously been the case). In this way, the function of investigative judge has ceased, and in its place a completely new institution has been created – preliminary proceedings judge. "This is an essential turn in domestic criminal-procedural legislation, which has, even before passing the Code, during its creation, been recognized in public as the most characteristic novum that in a certain measure symbolizes this entire legal project."[2]

Therefore, through these amendments, the public prosecutions have taken over the authorizations previously in competency of the investigative judge, but not completely as the preliminary proceedings judge was left with a part of the authorizations previously in competency of the investigative judge related to decision-making regarding the limitation of human rights and liberties, or, the decisions regarding the measures employed to limit such freedoms and rights, as well as a part of evidence gathering procedures during by the use of which human rights and liberties are restricted.

In a narrower sense, the basic changes in the investigation phase introduced by the application of the new Criminal Procedure Code could be listed in seven points:

1. The investigation is placed in the competency of the public prosecutor, and unlike in the previous model it is not initiated by a court decision upon the motion of the public prosecutor, but it is formally initiated by an order of the public prosecutor.
2. Appeal is not allowed against the order of the public prosecutor regarding the initiation of an investigation.
3. The investigation can be initiated with the existence of the lowest level of suspicion, i.e., when there are grounds for suspicion that a specific person has committed a criminal offense, or grounds for suspicion that a criminal offense has been committed – which is a lower level of suspicion compared with previous legal solution where grounded suspicion was necessary to initiate an investigation.
4. According to the new legal solution, an investigation can be conducted both against a known suspect, and an unknown perpetrator of a criminal offense, unlike in the previous legal solution when investigation could be conducted only against a specific person.
5. The role of the court in the investigation is reduced to a very limited number of competencies, or actions that the preliminary proceedings judge can take. As previously stated, such actions include, for example, deciding upon certain measures of procedural coercion (where temporary arrest is particularly important as a measure of deprivation of liberty, or some other measure for ensuring the presence of the accused and an unhindered conducting of criminal procedure listed in Art. 188 of CPC), measures which

[1] "Official Gazette of RS", no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013.

[2] Ilić Goran, Majić Miodrag, Beljanski Slobodan, Trešnjev Aleksandar, *Komentar Zakonika o krivičnom postupku,* sixth and revised edition, Belgrade, The Official Gazette, 2013, pg. 685.

cannot be independently ordered by the public prosecution even with the fact that it is competent to conduct the investigation, but it is only authorized to propose those measures that are decided upon by the preliminary proceedings judge in the investigation phase. Furthermore, the court retained the competency to make decisions that are exclusively in the competency of the court, such as issuing a search order of apartments, other facilities or persons. In evidence gathering during the investigation, practically the largest authority that a preliminary proceedings judge can have to influence the evidence material would be accepting a complaint by the defense counsel and issuing an order to the public prosecutor to conduct a certain evidentiary action.

6. According to the new legal solution, in an investigation formally conducted by the public prosecution, certain evidence gathering procedures in favor of the defense can be done by the defendant and the defense attorney, with the obligation of notifying the public prosecutor of this in a corresponding manner. According to the previous legal solutions, the defense had only the possibility of proposing the obtaining of certain evidence in the investigation, while the investigative judge had the final say in this matter.

7. Finally, it is necessary to point out that, according to the new Criminal Procedure Code, the investigation is not an obligatory procedural phase, not only because it is not conducted in terms of the criminal offenses that are the subject of shortened procedure, as it was the case earlier as well, but also due to the fact that the prosecutor, instead of conducting the investigation, can always and without special conditions provided raise indictments, which was not possible according to the previous legal solution considering that that required either the consent of the investigative judge, or special conditions to be met from Art. 244, para.6 of the "old" CPC[3].

2. Investigative judge – authorities and competencies according to the previous Criminal Procedure Code

According to the previously valid Criminal Procedure Code[4], the basic function of the investigative judge was to commence and conduct an investigation. Apart from this function, the investigative judge decided upon appealing to the decision regarding temporary arrest by the police (now under the jurisdiction of the preliminary proceedings judge – which is one of the similarities of these two institutions), but they also had the authority to punish and give out parole sentences in a special kind of procedure.

Therefore, all authorities in the investigation phase and all competencies were given to the investigative judge. According to the earlier concept of criminal proceedings, the investigative judge was the central figure of the investigation, without whom no evidence could be gathered, nor any measure limiting human rights and liberties could be ordered, even, as we mentioned before, the investigative judge had the right to give out punishments and parole sentences in certain conditions. Through such solutions, the investigative principle contained in the provision of art. 17 of the previously valid Criminal Procedure Code was met. In accordance with this principle,

[3] See more: Bejatović Stanko, Škulić Milan, Ilić Goran, (ed.), *Priručnik za primenu zakonika o krivičnom postupku,* Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, Belgrade, 2013, pg. 104.

[4] "Official Gazette of FRY", no. 70/2001 and 68/2002 and "Official Gazette of RS", no. 58/2004, 85/2005, 115/2005, 85/2005 – st. law, 49/2007, 20/2009 – st. law, 72/2009 and 76/2010.

the investigative judge was obliged to gather evidence for the purpose of discovering absolute truth in an objective and impartial manner (even though the absolute truth in real life is practically impossible and is more of a philosophical category), both the facts against the defendant and those in favor of the defendant. In this way, the principle of material truth was also met as the basic principle of the former criminal procedure to which all other principles were subject. The procedural parties had only the option of proposing evidence, meaning evidential means, but the investigative judge was the one who made the final decision regarding this matter.

3. Preliminary proceedings judge according to the new Criminal Procedure Code

In the introductory section of this paper we generally described the authorities of the preliminary proceedings judge, and in this subtitle we will decidedly list all their authorities and competencies by paraphrasing legal provisions.

1. In the pre-investigation proceedings and the investigation, the preliminary proceedings judge adjudicates in cases specified in this Code (Art. 22, para. 2 of CPC);
2. The preliminary proceedings judge motions the Supreme Court of Cassation to designate other court of jurisdiction to conduct the criminal proceedings if it is obvious that this will facilitate the conduct of the proceedings, or if other important reasons exist (Art. 33 of CPC);
3. A person that has been arrested without a court decision, or a person that was arrested and not interrogated, must be, without delay, within 48 hours at the latest, surrendered to the competent judge for preliminary proceedings, and if this does not occur, they are to be released (Art. 69, para. 2 of CPC);
4. The preliminary proceedings judge appoints a defense counsel at the expense of the state based on a request of a poor defendant – they decide regarding the validity of the request, while the defense counsel is appointed by the president of the court by a court ruling (Art. 77 of CPC);
5. The preliminary proceedings judge decides upon relieving the defense counsel in the investigation phase and the pre-investigation procedure (Art. 81 of CPC);
6. The preliminary proceedings judge receives unlawful evidence excluded from the case file records by the public prosecution, keeps them until the criminal proceedings are concluded, after which they are destroyed in accordance with the law (Art. 84, para.2 of CPC);
7. The preliminary proceedings judge decides upon granting protected witness status until the confirmation of the indictment (Art. 107 of CPC);
8. When the ruling determining protected witness status becomes final, the preliminary proceedings judge issues a special order that presents a secret, confidentially notifies the parties - the defense counsel and the witnesses about the date, hour and location of the questioning of the witness (Art. 108, para. 1 of CPC);
9. The preliminary proceedings judge governs the protected witness interrogation in the investigation phase (Art. 109 of CPC);
10. The preliminary proceedings judge keeps the data about the protected witness (Art. 110, para. 1 of CPC);
11. The preliminary proceedings judge decides upon the appeal against the ruling of the public prosecutor rejecting the request for the exemption of an expert in the investigation phase (Art. 116 of CPC);

12. The preliminary proceedings judge decides upon the appeal against the ruling of the public prosecutor that rejects the motion of the defendant during the investigation, or that of their defense counsel to order an expert examination (Art. 117 of CPC);

13. The preliminary proceedings judge, on the motion of the public prosecutor, issues a reasoned order regarding the order to monitor suspicious transactions (Art. 145 of CPC);

14. The preliminary proceedings judge can order a bank or other financial organization to temporarily suspend the execution of a suspicious transaction, upon the written and reasoned request of the public prosecutor (Art. 146 of CPC);

15. In the investigation phase, the preliminary proceedings judge makes a decision regarding temporary confiscation of assets that are the subject of a suspicious transaction and decides upon their placement on a special account for safekeeping (Art. 147 of CPC);

16. The preliminary proceedings judge decides upon the appeal against the ruling of the public prosecutor that sets forth a monetary fine to a person refusing to enable the access to suspicious items, refusing to give the necessary information, or refusing to hand them over, and who id obliged to do so based on the request of the public prosecutor (Art. 148 of CPC);

17. In the investigation phase and the pre-investigation procedure, the judge for preliminary proceedings, upon the reasoned request of the public prosecutor, issues a search order (Art. 155 of CPC);

18. The public prosecutor and the police are obliged to submit a report to the preliminary proceedings judge if the search of apartment, other facilities or a person was conducted without a search order. The judge evaluates if all the conditions for the search were met (Art. 160 of CPC);

19. The preliminary proceedings judge makes a minutes on the destruction of the material obtained by special evidentiary actions if the public prosecutor does not initiate criminal proceedings within 6 months from the day of becoming familiar with the material, or if they decide to not use it in the proceedings, meaning, that the prosecutor will not initiate a procedure against the suspect (Art. 161, para.1 of CPC);

20. The preliminary proceedings judge conducts surveillance over the destruction of the material from the previous paragraph and makes a record of it (Art. 163, para 2 of CPC);

21. The preliminary proceedings judge issues an order of covert communication surveillance, based upon the reasoned motion of the public prosecutor and receives reports of the results of the surveillance from the bodies that had conducted the covert surveillance (Art. 166, Art. 167, and Art. 168 of CPC);

22. The preliminary proceedings judge decide upon the motion of the public prosecutor to expand the covert communication surveillance within 48 hours after receiving the motion, and makes a note regarding this in the report (Art. 169 of CPC);

23. Upon the completion of covert communication surveillance, the bodies conducting the surveillance deliver the recordings of the communication, letters, and other packages, as well as a special report to the preliminary proceedings judge. The judge makes a minutes regarding the opening of the materials, inspects the material, and then delivers the material in its entirety to the public prosecutor (Art. 170 of the CPC);

24. The preliminary proceedings judge issues an order regarding covert surveillance and recording, upon a reasoned motion by the public prosecutor and receives daily reports by the bodies conducting covert surveillance and recording (Art. 147, Art. 172, and Art. 173 of CPC);

25. Upon the reasoned motion of the public prosecutor, the preliminary proceedings judge issues an order regarding the conclusion of simulated affairs (simulated purchase, sales and providing business services, and concealment of bribe), and gathers daily reports from the bodies conducting the order, and after the completion of those actions, they collect the entire documentation regarding the conducted evidentiary action, visual, audio, or electronic recordings and other evidence, as well as a special report, and then deliver the material and the report to the public prosecutor (Art. 174, Art. 175, Art. 176, and Art. 177 of CPC);

26. Upon the reasoned motion of the public prosecutor, the preliminary proceedings judge issues an order regarding computer search of data, and upon the completion of the order, the body conducting the order delivers a report to the judge, who delivers it to the public prosecutor (Art. 178, Art. 179, and Art. 180 of CPC);

27. Upon the reasoned motion of the public prosecutor, the preliminary proceedings judge issues an order regarding the use of an undercover investigator appointed by a minister of Internal Affairs, the director of the Security Information Agency, or the director of Military Security Agency, takes reports from a superior official of the body conducing the order, and then delivers the entirety of the material from the report to the public prosecutor (Art. 184, Art. 185, and Art. 186 of CPC);

28. In the investigation phase, the preliminary proceedings judge examines the investigator as an undercover witness (Art. 187 of CPC);

29. If the public prosecutor does not call for a witness, an expert or another participant in the procedure during the investigation, the judge for preliminary proceedings conducts the calling upon the request of the defendant and their defense counsel (Art. 193 of CPC);

30. During the investigation, upon the motion of the public prosecutor, the preliminary proceedings judge issues a resolution ordering the measure of prohibition of approaching, meeting or communicating with certain persons to the defendant (Art. 197, and Art. 198 of CPC);

31. The preliminary proceedings judge issues an order prohibiting the defendant to leave the place of temporary residence during the investigation upon the motion of the public prosecutor (Art. 199, Art. 200 of CPC);

32. The preliminary proceedings judge issues an order regarding temporary suspension of driver's license of the defendant upon the motion of the public prosecutor during the investigation (Art. 201 of CPC);

33. The preliminary proceedings judge issues an order regarding ordering, confiscation or repealing a bail (Art. 202-207 of CPC);

34. During te investigation, the preliminary proceedings judge issues an order regarding ordering, extension or repealing the prohibition of leaving a dwelling (Art. 208, and Art. 209 of CPC);

35. During the investigation, the preliminary proceedings judge issues an order regarding detention of the defendant upon the motion of the public prosecutor (Art. 210-215, and Art. 294, para. 4 of CPC);

36. During the investigation, the preliminary proceedings judge decides upon the rights and duties of the detainees, visitations, written communication, pronounces disciplinary penalties and monitors the detainee (Art. 217-222 of CPC);

37. Upon official duty, or upon the motion of the parties and the defense counsel, the preliminary proceedings judge issues a resolution on the exclusion of transcripts that cannot be used in the proceedings before the termination of the investigation (Art. 237 of CPC);

38. Upon the motion of the authorized parties, the preliminary proceedings judge issues a resolution ordering temporary measures during the investigation, ensuring a claim for restitution which arose due to the commission of a criminal offense, or wrongful act designed by law as a criminal offense (Art. 257 of CPC);

39. The preliminary proceedings judge decides upon the appeal against the resolution of the public prosecutor pronouncing a monetary fine to the state and other bodies, and legal entities that did not cooperate with the public prosecutor in the investigation (Art. 282, para. 3 of the CPC);

40. The preliminary proceedings judge, upon the motion of the public prosecutor, issues an order on obtaining telephone communication records, authorized base stations or locating the places of the communication (Art. 286 of CPC);

41. The preliminary proceedings judge issues the approval to the police to obtain intelligence from detainees in their supervision with a mandatory presence of the defense counsel (Art. 288, para. 7 of CPC);

42. The preliminary proceedings judge decides upon the appeal to the resolution of the public defendant and the police regarding detaining the suspect, within 4 hours after receiving the appeal (Art. 294 of CPC);

43. During the investigation, the preliminary proceedings judge issues the approval to the public prosecutor to interrogate the witness or experts in cases when the summon to the defendant or their defense counsel was not delivered in accordance with CPC provisions, or if the investigation is conducted against an unknown perpetrator (Art. 300, para. 6 of CPC);

44. On the motion of the defendant or the defense counsel, the preliminary proceedings judge orders the public prosecutor to the undertake evidentiary actions within a certain date that the public prosecutor had refused to take. The order is issued on the motion of the defendant or the defense counsel within 8 days (Art. 302, para.2, and para.3 of CPC);

45. The preliminary proceedings judge decides upon the objections of the defendant or the defense counsel regarding irregularities during the investigation committed by the public prosecutor (Art. 312 of CPC);

46. During the investigation, the preliminary proceedings judge decides upon a plea agreement on the motion of the public prosecutor – first they make a written record, then decide with a verdict in case the plea is accepted, or with a resolution in case the plea is dismissed or rejected (Art. 313-319 of CPC);

47. During the investigation, the preliminary proceedings judge decides upon the testimony agreement of the defendant (Art. 320-326 of CPC);

48. During the investigation, the preliminary proceedings judge decides upon the agreement on testimony of a convicted person (Art. 327-329 of CPC);

49. The preliminary proceedings judge decides upon inquiries - examines the witnesses or experts outside the main examination upon the motion of the president of the panel (Art. 357 of CPC).

According to the aforementioned, all authorities and competencies of the preliminary proceedings judge can be divided into several groups:

- decides upon the rights and duties of the parties during the investigation, as well as the measures ensuring the presence of the defendant and the measures for unhindered conducting of criminal proceedings;
- issues orders to obtain and secure the evidence exclusively in the domain of judicial jurisdiction (official activities that would intrude into citizen privacy, or would infringe upon their freedom of communication, movement, and similar);
- decides upon defense counsel appeals to the decisions of the public prosecution made during the investigation that concern evidentiary actions, as well as defense counsel appeals on the decisions made by the police regarding detaining the defendant;
- issues approvals to the public prosecution when such is proscribed by law;
- decides upon inquiries – examines the witnesses or experts outside the main examination, upon the motion of the president of the panel;
- decides upon defense complains to the acts of the public prosecutor during the investigation; and
- decides on a plea agreement.

4. Comparison and analysis of the authorities and competencies of the investigative judge compared with the preliminary proceedings judge

Taking into consideration all that was stated in previous items, we can draw the conclusion that the preliminary proceedings judge is in fact an institution extracted from the institution of the investigative judge, with an important difference being that with the application of the Criminal Proceeding Code adopted in the autumn of 2013, practically half of the authorities and competencies previously given to the investigative judge according to previous legal solutions have been taken away from the preliminary proceedings judge, and those authorities and competencies have been transferred to the public prosecution. We specifically refer to the authorities and competencies related to conducting of the investigation and evidence gathering. This is a logical consequence of the legislator trying to place conducting of the investigation into the hands of the public prosecution. The preliminary proceedings judge had thus retained the authorities and competencies regarding limitation of human rights and liberties, which is a logical solution taking into consideration the constitutional provisions regulating that they are exclusively in the competency of the court. However, the preliminary proceedings judge cannot make any initiative nor has any authorities concerning the direction of the investigation by making decisions regarding the necessity of the investigation to be conducted, nor regarding the results of the investigation, but instead, the preliminary procedure judge is practically a kind of controller or supervisor that controls and supervises public prosecutions for the purpose of preventing the overstepping of authorities and the abuse of authorities and competencies against the defendants, or their basic human rights and liberties.

5. Evaluation of the investigative judge and the preliminary proceedings judge institution from the standpoint of respecting the equity principle of criminal proceedings, constitutionality, impartiality, and eficiency in the investigation and the overall quality of the investigation

When comparing the institution of the investigative judge with the institution of the preliminary proceedings judge, it is impossible to do so without analyzing the concept of an investigation that is not conducted by the public prosecutor and the concept of the investigation that has previously been conducted by the investigative judge, all in relation to the basic principles that the current and the previously valid criminal procedure code are based on.

Taking into consideration that the principle of a fair and legal trial is the most important procedural principle, meaning that it is an essential principle of criminal proceedings that is superior to all other principles, it is important to mention that its importance stems from two basic reasons:

- this principle coordinates the effect of all other criminal-procedural principles for the purpose of an equitable solution of a specific criminal matter that is the subject of the proceedings;
- this principle is the only principle with a pronounced ethical character, which is of essential importance for modern democratic countries that respect basic human rights and liberties.

Considering that the principle of equity is founded on another principle, with which it is often equated – the principle of party equality, or the principle of "equal arms", this raises the question of the possibility of respecting this most important principle according to the current legal solutions, considering that a very important phase of the criminal proceedings is placed into the competency of a state body which is at the same time a party in the proceedings?!

Often in literature[5] such solution of the legislator is justified as a necessary efficiency and speed of conducting the proceedings. However, this raises the question – is all that is fast at the same time of high quality, and is all that is efficient at the same time fair? The right to a fair trial is explicitly proscribed by the provision of Art. 6 of the European Convention on Human Rights and Basic Liberties. According to this article of the Convention, when deciding upon their citizen rights or duties, or upon a criminal accusation, each person has the right to a fair trial within a reasonable time limit before an impartial and independent court, educated on the law.

According to our opinion, the current concept of Serbian criminal proceedings is a serious step backwards – opposite to the cited Convention. We are of the opinion that it is difficult to imagine in practice that until making the accusation the defense has an equitable position in the criminal proceedings with the prosecuting body as another party in the proceedings. The public prosecution, despite being a constitutionally designated independent state body[6], is however a state body that has access to the

[5] Zoran Pavlović, Nada Bjekić, Aleksandar Bošković, *Preparatory Hearing in Criminal Proceedings according to the Criminal Procedure Code of the Republic of Serbia from 2011*, in „Journal of Eastern-European Criminal Law", no. 2/2016, Law Faculties of the West University of Timişoara and the University of Pécs, Universul Juridic Publishing House, 2016, p. 162; Goran Ilić, et al., *op. cit.*, p. 685.

[6] Art. 156 of the Constitution of the Republic of Serbia.

entire government apparatus and the state force. On the other hand, because a large number of criminal offenses is "not covered" by mandatory defenses, very often the defendants who do not have sufficient funds defend themselves in the evidentiary actions proceedings before the public prosecution. This raises the question if it is even possible to talk about equality when on one side there is a state body with all the power of educated attorneys, and on the other side there is a layman without the possibilities or resources as the other party. Precisely the solutions of the earlier Criminal Procedure Code prevented this situation from happening, as the court, or the investigative judge, would definitely be a more substantial guarantee of impartiality then the public prosecution is now – a party in the procedure, even though the public prosecution, as previously the investigative judge, is obliged to also gather the evidence in favor of the defendant.

From the aspect of constitutionality of the basic key norms of the new Criminal Procedure Code, we can point to serious irregularities of the legislative solutions compared with the provisions of the Constitution of the Republic of Serbia[7]. Namely, the Constitution guarantees a high level of protection of basic human rights and liberties, but some key provisions in the Criminal Procedure Code, in our opinion, have an unconstitutional character, which from a wider aspect can be considered a violation of the right to a fair trial. According to the provision of Art. 32, para. 1 of the Constitution (the right to a fair trial) "everyone shall have the right to a public hearing before an independent and impartial tribunal established by the law within reasonable time which shall pronounce judgement on their rights and obligations, grounds for suspicion resulting in initiated procedure and accusations brought against them."

In accordance with this, the Constitution guarantees the right of the citizen, i.e. the defendant who is the subject of criminal proceedings, *for the court to enable a public hearing* on the grounds for suspicion, and not only *for the public hearing to be done before the court* as is the solution of the new Criminal Procedure Code. Therefore, all the provisions of the CPC that regulate the trial proceedings are against the Constitution, as well as providing evidence being primarily transferred to the parties, and therefore, evidence gathering, while the court is mostly excluded from that process.

When making these statements, we primarily refer to the unconstitutionality of the concept of the main trial, but at the same time, we believe that the provisions regulating the investigation phase are also unconstitutional. Regarding this topic, the investigation is now in the competency of the public prosecution and is initiated by an order, without the possibility of the court (in a functional sense, this should be the preliminary proceedings judge) to decide upon the grounds for suspicion that was the reason to initiate the criminal proceedings, and in the light of the aforementioned provision of the Constitution of the Republic of Serbia, Art. 32, para. 1, which guarantees that the *court* also conducts a hearing on the grounds for suspicion resulting in initiated procedure. This particularly relates to the legal provisions regulating the formal designation of the moment of initiating the criminal proceedings and ordering of criminal prosecution, which, in our opinion, cannot be logically explained nor can a reasonable explanation be given why this was proscribed. (The Criminal Proceedings Code differentiates the beginning of the criminal prosecution from the beginning of the criminal proceedings, which practically means that there is the possibility to criminally prosecute without

[7] "Official Gazette of RS", no 98/2006.

criminal proceedings, which in turn raises the question of how can criminal prosecution be initiated without it initiating the criminal proceedings?!).

From the aforementioned, we can draw the conclusion that the legislator is of the opinion that the investigation is not a criminal proceedings phase, even though it has formally regulated it to be so, as without a court session and opposition of parties before court there is no procedural relationship and therefore, no criminal procedure.

Within the evaluation of constitutionality, our opinion is that by violating the principle of constitutionality, or the principle of hierarchy of general legal acts, generally acclaimed rights of the citizens to legal security has also been violated, considering that this is an inevitable result of infringing upon the Constitution.

In earlier statements we said that the *ratio legis* of the new legislator was to improve the efficiency, or, the speed of criminal proceedings. In essence we can agree that it is definitely necessary to speed up the procedure and to work on its efficiency, as previously, the proceedings have lasted for too long and have often led to obsolescence, or to a nonsensical ruling after several years of the procedure due to altered circumstances. However, we are of the opinion that the speed itself of conducting the proceedings cannot be equated with the idea of efficiency of the criminal procedure. We believe that the speed of the proceedings is a relative term that can and must be evaluated in each procedure individually (in practice there are no two identical proceedings, they are differ depending on a series of factors such as the complexity of the evidence material, the number of defendants, objective circumstances, severity of the criminal offense, the presence or the lack of one or more of the defendants, the number of committed criminal offenses in the proceedings etc.). We are of the opinion that, even though there was a realistic need to implement more efficient criminal proceedings, this should not have happened at the expense of the material truth principle or the equity principle. Starting from the fact that the result of the criminal proceedings is not the truth in the sense that all that should have or could have been done has been done to prove the truth, and that in doing so, no right of defense or the party equity principle in the proceedings has been violated, this is hardly fair criminal proceedings. For this reason, from an ethical standpoint, this raises the question whether the principle of efficiency and speed make sense if they are placed above the principle of material truth and the equity principle.

Finally, in this section we can look back at the quality of the investigations conducted by the public prosecutions in practice. Without particularly justifiable reasons, the public prosecutions have hastily and without adequate preparations taken as their competency to conduct investigations. The deputies of public prosecutors had no necessary experience or the necessary infrastructure as the investigative judges used to have until time the new CPC started to be applied. We also believe that the method of organizing the investigations by the public prosecutions is wrong where "all people do all things", meaning that there are no specialized and trained public prosecutor deputies that would exclusively conduct the investigation, but instead all deputies perform all tasks in the criminal proceedings, from the start of the criminal prosecution to the moment of possible appealing of legal remedies. Would it not be better to model their work based on the court organization in so far (investigative judge – judge arbitrating the main trial), where individual deputies would be specialized and would conduct investigations, while other public prosecutor deputy would make the indictment and represent the public indictment before court?! In this way, the public prosecutor deputies could deal with individual phases of the procedure in more detail, and would work faster and more effectively without damaging the quality of the investigations.

6. Conclusions and suggestions on amending the current legal solutions

Even though we stand behind the opinion that it is necessary to thoroughly change the current Criminal Procedure Code, or to pass a completely new one, in this chapter we will retain only the opinions regarding the necessary amendments to the provisions regulating the investigation.

In previous section, we mentioned the reasons why we believe that the new legal solutions are worse than the solutions contained in the previous Criminal Procedure Code in terms of regulating the investigation. This results in our opinion which is that it would be adequate and good to return the investigation into the competency of the courts, which would ensure the principle of equity, or the equality of parties in proceedings, it would ensure the principle of material truth and the principle of impartiality, all of which would certainly improve the quality of the investigation as well. At the same time, *a priori*, we wish to distance ourselves from the claim that after four years the public prosecutions did not advance in raising the quality of the investigation to a higher level. On the contrary, the improvement is obvious in practice, however, we only claim that the current solution is not applied adequately in practice – that all deputies of public prosecutors, as we stated, "do all actions" instead of individually specializing for specific phases of the procedure.

Most probably, this argument will be met in opposition argumenting that it is not good practice to go back to the old solutions when the new solutions are already used in practice and have shown that, by applying the new Code, the criminal proceedings have become more efficient and faster, which we do not dispute. However, on the other hand, as we previously stated, we believe that a step backwards has been made in terms of respecting the principle of material truth and the equity principle at the expense of favoring the principle of efficiency, which we deem to be impermissible.

Returning the institution of investigative judge into the criminal legislature would enable for the defendant, as a weaker party in the criminal proceedings, to have guarantees that an impartial body which is not a party in the procedure – investigative judge, without any possibility (with rare exceptions), interests, or habits, acts in accordance with the principle of the presumption of innocence as one of the basic principles of criminal proceedings, that they would fully respect the universal principle of conducting an investigation, which is that all evidence are gathered, both those in favor and those at the expense of the defendant.

Considering that "the theoretical knowledge always precedes legislative solutions"[8], we finally want to make our opinion clear that it is very easy to find a compromise solution to the amendments, or to passing a new Criminal Procedure Code, which is to return the investigation into the competency of the court, thus meeting the principle of constitutionality, material truth and fairness, and retaining the adversarial system in the main trial modeled on the Anglo-Saxon system (of course, with respect towards the uniqueness of the continental criminal-legal tradition and absolute ensuring of the right

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[8] Darian Rakitovan, *Definition of Organized crime – squaring the circle!?*, in „Security concepts and policies – new generation of risks and threats", International scientific conference, 04-05 June 2017, Vol. II, Ohrid, Skopje, Faculty of Security Skopje, "St. Kliment Ohridski" University, Bitola, 2017, p. 346.

to defense), all of which would improve the principle of efficiency. This is particularly the case now when we know that "in the last two decades the Continental System and the Common Law System have succeeded to get significantly closer[9]". We are of the opinion that these amendments would in any case be in the spirit of the Constitution of the Republic of Serbia and the European Convention on Basic Human Right and Liberties, meaning the provision in Art. 6 of the aforementioned Convention.

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