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MONITORING

PRAVOSUDNOG SISTEMA

CRNE GORE

Septembar 2012.

EUROPEAN UNION
DELEGATION TO MONTENEGRO

Ovaj projekat je finansiran od strane Evropske unije, a njime upravlja Delegacija Evropske unije u Crnoj Gori.

FINALNI IZVJEŠTAJ O MONITORINGU SUĐENJA ZA PERIOD 1. APRIL 2011- 31. JUL 2012.

IZDAVAČ:
Centar za demokratiju i ljudska prava - CEDEM

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PREPRESS I GRAFIČKI DIZAJN
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ŠTAMPA:
Studio Mouse

TIRAŽ:
150

FINALNI IZVJEŠTAJ
O MONITORINGU SUĐENJA
ZA PERIOD 1. APRIL 2011 - 31. JUL 2012.

Monitoring tim:

Vladan Đuranović, šef tima (za period 01. 04 - 30. 09. 2011)
Daliborka Knežević, šefica tima (za period od 01 .10. 2011 - 31. 07. 2012)
Marija Vuksanović, članica
Andrej Popović, član

Ovaj Izvještaj je pripremljen uz podršku Evropske unije. Sadržaj ovog Izvještaja je isključiva odgovornost Centra za demokratiju i ljudska prava (CEDEM) i ni na koji način ne odražava stavove Evropske unije.

SADRŽAJ

PREDGOVOR

Reforma pravosuđa nesumnjivo predstavlja jedan od najvažnijih političkih, pravnih i društvenih zadataka Crne Gore. Bez efikasnog pravosudnog sistema, nije moguće uspostaviti potpunu vladavinu prava, niti sprovesti potrebne ekonomske reforme. Osim toga, uspješnost ove reforme čini *conditio sine qua non* pristupanja Crne Gore Evropskoj uniji. Praćenje/monitoring zakonodavne i sudske prakse predstavlja jedan od načina na koji se može doprinijeti uspješnijim reformama i bržem ispunjavanju uslova za članstvo u EU.

Izvještaj koji je pred Vama predstavlja ključni rezultat projekta „Monitoring pravosudnog sistema Crne Gore" koji ima za cilj da podstakne izgradnju odgovornog, efikasnog i transparentnog pravosuđa u Crnoj Gori. Projekat je finansiran od strane Evropske unije, posredstvom Delegacije Evropske unije u Crnoj Gori. Polazeći od toga da je funkcija suđenja, kao primjena prava na konkretan slučaj, po prirodi stvari središte koncepta reforme pravosuđa, monitoringom je bilo obuhvaćeno više od stotinu krivičnih postupaka vođenih pred crnogorskim sudovima u proteklih šesnaest mjeseci. Opredijelili smo se upravo za krivično zakonodavstvo, jer njegova primjena ilustruje gotovo sve izazove i ograničenja reformskog procesa i otvara rješavanje nekih od ključnih pitanja koja treba da dovedu do ostvarivanja vidljivih rezultata u pravosuđu.

Imajući u vidu složenost i broj posmatranih predmeta, dinamiku rada sudova, te okolnosti pod kojima se odvija primjena prava, zadatak praćenja suđenja nije bilo jednostavno podvesti pod jedinstvenu metodologiju, a posebno obezbijediti da se istim ne zadire u nezavisnost sudstva. Pri tome smo se rukovodili činjenicom da se uloga civilnog društva u monitoringu suđenja može posmatrati samo u sklopu procesnih pravila, a da se posmatrani predmeti mogu komentarisati jedino po njihovoj pravosnažnosti. Međutim, posmatranjem pojedinačnih predmeta može se steći određena slika o indikatorima pravičnog suđenja i funkcionisanju pravosudnog sistema, tim prije što primjena zakona mora biti utemeljena na načelu vladavine prava i primjerena legitimnim očekivanjima stranaka na koje se zakoni primenjuju. U tom smislu i naizgled benigna povreda procesnih pravila može podstaći osjećaj pravne nesigurnosti kod stranaka i doprinijeti negativnoj percepciji o radu sudova.

Ovaj Izvještaj je nastao sa ciljem da se identifikuju osnovni problemi i izazovi u vezi sa primjenom inoviranog krivično-pravnog zakonodavstva. Pored eventualnog ukazivanja na pristranost ili korupciju, koje je danas najučestaliji vid komentarisanja sudskih postupaka u javnom diskursu, naš cilj je bio da pažnju javnosti usmjerimo i na druga, jednako važna pitanja, poput materijalno-tehničke opremljenosti sudova i odgovornosti drugih aktera za kvalitet suđenja. Izvještaj sadrži i preporuke koje se odnose na određene promjene zakonodavnog okvira, ali i prakse njegovog sprovodjenja, koje smatramo potrebnim kako bi proklamovana pravosudna reforma bila izvorište stabilne i prosperitetne društvene zajednice.

Mr Nenad Koprivica, izvršni direktor, CEDEM
Biljana Braithwaite, program menadžerka AIRE Centra za Zapadni Balkan

UVOD

U proteklih petnaest godina, Crna Gora je preduzela značajne napore na planu reforme pravosudnog sistema. Poslednja sveobuhvatna reforma iz 1999-2000.godine, imala je za cilj da se uprava i lokalna samouprava transformišu u servis građana; da nezavisno pravosuđe bude garant vladavine prava, te da ova dva segmenta, zajedno sa zakonodavnom vlašću, budu efektivan i efikasan pravni i organizacioni okvir za ekonomske, socijalne i druge procese u Crnoj Gori. Reforma koja je započeta 2000.godine, intenzivirana je nakon obnove državne nezavisnosti 2006.godine. Ustavom iz 2007. godine ojačana je nezavisna pozicija sudstva i državnog tužilaštva. Usvojena je Strategija reforme pravosuđa 2007-2012 sa Akcionim planom za njenu implementaciju, kao i brojne zakonske izmjene koje su se odnosile na institucionalno uređenje pravosudnog sistema, međusobne odnose i ovlašćenja nosilaca funkcija u pravosuđu. Osnovni organizacioni propis u dijelu pravosuđa koji je donijet 2002.godine i koji je sa određenim izmjenama i sada na snazi je Zakon o sudovima. Osim toga, donijeti su i Zakon o Sudskom savjetu i Zakon o krivičnom postupku, kao i nekoliko novela Krivičnog zakonika.

Uprkos preduzetim naporima, planirani dometi reforme nisu u potpunosti ostvareni, što je konstatovano i u Izvještajima o napretku Evropske komisije za 2008. i 2009. godinu, Mišljenju Evropske komisije o zahtjevu Crne Gore za članstvo u Evropskoj uniji i Izvještajima monitoring misije Savjeta Evrope. Naime, sistem finansiranja sudova je i dalje pod velikim veliki uticajem izvršnih i zakonodavnih organa; uslovi u kojima sudovi i sudije rade objektivno nijesu takvi da garantuju nezavisnu poziciju što dovodi do odliva sudijskog kadra u druge profesije, dok sistem permanentne obuke novih kadrova, posebno u odnosu na nove propise, nije razvijen. Osim toga, pravosuđe u Crnoj Gori se suočava sa veoma ozbiljnim izazovima, kao što su organizovani kriminal, korupcija, terorizam i ratni zločini, ali i neriješeni socijalni problemi i narastajuća ekonomska kriza.

Sa druge strane, stanje u pravosuđu nikada ranije nije okupiralo toliko prostora u javnim medijima, niti je interes međunarodne i domaće javnosti za probleme primjene prava bio toliko intenzivan. Dodatna potpora za takve ocjene ogleda se i u činjenici da se pravosuđe sve češće nalazi na meti otvorenih napada i kritika, ali i drugih, suptilnijih uplitanja u njegovu nezavisnost. Uprkos nominalnom zalaganju za reformu pravosuđa, interesi političkih stranaka nerijetko su u sukobu sa pozicijom nezavisnog pravosuđa. Partije često djeluju na način kojim se osporava ustavno načelo podjele vlasti, a autonomija sudske vlasti dovodi u pitanje. Posebno zabrinjavajuća je i nemogućnost postizanja političkog konsenzusa oko neophodnih ustavno-pravnih promjena koje treba da doprinesu jačanju nezavisne pozicije sudstva u odnosu na druge grane vlasti. Iako uticaj civilnog sektora raste, što se ogleda u broju krivičnih prijava podnijetih od strane NVO, te reakcijama sudova i tužilaštava na inicijative za krivično gonjenje, uticaj civilnog sektora još uvijek nije takav da može bitnije uticati na rješavanje naprijed navedenih problema. Naime, na društvenoj sceni nedostaju osposobljena nepartijska tijela ili nevladine organizacije koje bi u kontinuitetu radile na afirmaciji nezavisnog pravosuđa i imale kapaciteta da prate stanje u pravosuđu; predlažu reformske projekte i učestvuju u izradi relevantnih propisa.

Navedeni nedostaci u funkcionisanju pravosudnog sistema svakako sežu dalje u prošlost i mogu se tražiti u zaostavštini nekadašnjeg birokratsko-hijerarhijskog modela uređenja pravosuđa, ali i u političko-pravnim previranjima koja su obilježila razvoj demokratije u regionu. U takvoj konstelaciji odnosa, pravosuđe nije imalo uticaj koji mu pripada, jer se većina društvenih problema rješavala izvan institucija sistema, kroz partijske mehanizme i druge vaninstitucionalne kanale. Nasleđe velikog broja neriješenih predmeta; ratno i pararatno stanje u okruženju koje je uzrokovalo institucionalnu krizu i uticalo na kvalitet i efikasnost

pravosuđa, kao i nastojanje da se u uslovima djelovanja više centara moći, uspostavi autonoman pravosudni legitimitet, samo su neki od činilaca koji su presudno uticali na ostvarene rezultate.

Polazeći od navedenog, može se konstatovati da reforma pravosuđa u Crnoj Gori nikada nije bila dinamičnija, a zadatak sudije kao pojedinca kojem je povjereno ovlašćenje da sudi (*iurisdictio est etiam iudicis dandi licentia*) i obezbijedi garancije za zakonito i pravično suđenje, kompleksniji. I nedavna odluka Evropske unije da se pregovori otvore i zatvore poglavljima 23 i 24, naglašava koliko je reforma pravnog sistema važna za pristupanje Crne Gore Evropskoj uniji. Zbog toga praćenje suđenja predstavlja poseban izazov ne samo za kreatore politika u pravosuđu i nosioce funkcija u pravosuđu, već i za druge društvene aktere, prevashodno medije i organizacije civilnog društva koje se bave demokratizacijom i ljudskim pravima.

Izvještaj koji je sačinjen kao dio projekta "Monitoring pravosudnog sistema Crne Gore" sadrži zapažanja o krivičnim predmetima, posmatranim u svjetlu člana 6 Evropske konvencije o ljudskim pravima, koja je ugrađena u domaće zakonodavstvo i koja sama po sebi predstavlja prihvaćeni profesionalni standard. Međutim, ovaj Izvještaj se ne bavi svim pitanjima koja su od značaja za fukcionisanje krivičnog pravosuđa prema standardima Evropske konvencije (poput izvršenja sudskih odluka) niti pretenduje da pruži ocjenu nezavisnosti, nepristrasnosti, efikasnosti i transparetnosti cjelokupnog pravosudnog sistema. Svrha Izvještaja je da doprinese uspostavljanju takvog sistema kroz identifikovanje određenih normativnih i faktičkih prepreka koje utiču na puno poštovanje prava na pravično suđenje i definisanje preporuka za njihovo otklanjanje. Naime, Izvještaj se temelji na metodologiji neposrednog prisustva suđenjima, koja sama po sebi ima izvjesna ograničenja, budući da se jednim dijelom zasniva na utvrđenim činjenicama, a drugim dijelom na subjektivnim procjenama /percepcijama i informacijama koje su predočili sami učesnici postupka tokom aktivnosti na projektu. Vodeći računa o tome da zapažanja i ocjene monitora utoliko prije mogu postati predmetom političkih i drugih ocjena, sprovođenje monitoringa je bilo primarno usmjereno na objektivne pokazatelje i rezultate, a ne na ličnost sudija i drugih aktera u postupku.

Izvještaj sadrži i pregled relevantne prakse Evropskog suda za ljudska prava, koja služi da se na određeni način napravi paralela između crnogorskog zakonoskog okvira i prakse i evropskih standarda u pogledu prava na pravično suđenje. Imajući u vidu da ne postoje univerzalna rješenja koja će se automatizmom primjenjivati na sve slučajeve u praksi, presude Evropskog suda za ljudska prava su važne jer pružaju dodatna tumačenja odredbi Evropske konvencije. Konačno, praksa Evropskog suda za ljudska prava, pored pravne, ima i političku težinu, zbog jurisdikcije ESLJP-a i prava na individualne zahtjeve u odnosu na države članice Savjeta Evrope koje su prihvatile nadležnost ovog suda, a koji omogućavaju poređenje kvaliteta i obima poštovanja ljudskih prava koje ostvaruju njihovi nacionalni pravosudni sistemi.

OSNOVNE NAPOMENE O PROJEKTU

Projekat ''Monitoring pravosudnog sistema Crne Gore'' finansira Evropska unija posredstvom Delegacije Evropske unije u Crnoj Gori, a implementira NVO Centar za demokratiju i ljudska prava (CEDEM) u partnerstvu sa AIRE Centrom iz Londona, u periodu od 1. februara 2011. do 31. jula 2012. godine.

Osnovni ciljevi projekta su:

1. Povećati kapacitet organizacija civilnog društva da vrše monitoring krivičnih postupaka i da iniciraju promjene;
2. Uticati na pravosudnu politiku i praksu tako što će se prikupiti, analizirati i distribuirati ažurne, visoko pouzdane informacije o krivičnopravnoj praksi u cilju identifikacije polja reforme, uključujući i preporuke za promjene;
3. Potpomoći bezbolnu tranziciju u novi sistem uspostavljen Zakonikom o krivičnom postupku od 2009. godine i to kroz analizu i monitoring dosadašnjih aktivnosti;
4. Da posluži kao platforma za saradnju između Vlade i civilnog društva sa ciljem da se olakša i potpomogne reforma pravosuđa.

Kako u crnogorskom društvu još uvek postoji izvjestan nivo nepovjerenja javnosti u sudski i tužilački sistem, projekat je imao za cilj i da doprinese boljoj informisanosti javnosti o radu sudova, polazeći od premise da se mogućnosti eventualnog uticaja na nosioce funkcija u pravosuđu smanjuje kako raste društvena svijest o njegovoj važnosti.

Za sprovođenje monitoringa, bio je zadužen monitoring tim, izabran od strane CEDEM-a, kojeg su sačinjavali:
Vladan Đuranović, šef tima (za period 01.04-31.09.2011)
Daliborka Knežević, šefica tima (za period od 01.10.2011-31.07.2012)
Marija Vuksanović, članica
Andrej Popović, član

Monitoring suđenja započeo je 1. aprila 2011. godine. Prethodno su potpisani Memorandumi o razumijevanju sa:

- Vrhovnim sudom Crne Gore;
- Vrhovnim državnim tužilaštvom Crne Gore;
- Ministarstvom pravde Vlade Crne Gore;

Monitoringom su obuhvaćeni svi učesnici u postupku:

- prvostepeni sudovi pred kojima se vodi postupak, u konkretnom slučaju: viši sudovi u Podgorici i Bijelom Polju, uključujući i specijalna odjeljenja, kao i osnovni sudovi u Podgorici, Bijelom Polju, Rožaju, Baru i Kotoru;
- tužioci koji zastupaju optužnice, uključujući i specijalnog tužioca;
- Uprava policije, u dijelu u kojem se odnosi na primjedbe na njihov rad iznešene u toku postupka, kao i u djelima u kojima se radi o prekoračenju službenih ovlašćenja i nepoštovanju ljudskih prava za koja je podignuta optužnica.
- branioci okrivljenih;
- punomoćnici koji zastupaju oštećene;
- vještaci;
- mediji koji izvještavaju o suđenjima.

Ukazujemo takođe da je monitoring obuhvatio i kontrolu primjene pojedinih instituta Zakonika o krivičnom

postupku u praksi, te ocjenu pojedinih pravnih normi. Mišljenja u vezi sa ovim pitanjima navedena su u preporukama.

Monitoring se vrši u odnosu na postupanje suda u fazi od podignute optužnice do donošenja prvostepene presude.

PREDMET MONITORINGA

U skladu sa članom 6.Evropske konvencije o ljudskim pravima i osnovnim slobodama, monitoring se vršio u odnosu na poštovanje sledećih prava:

1. Pravo na nezavisan sud
2. Pravo na nepristrasnog sudiju
3. Pravo na javnu raspravu
4. Pristup sudu
5. Pravo na upotrebu jezika koji se razumije
6. Pretpostavka nevinosti
7. Pravo na efikasnu odbranu
8. Pravo na suđenje u razumnom roku
9. Ravnopravnost stranaka-efikasnost oružja

Pored navedenih prava, monitoring tim se bavio i:

1. Pravno nevaljanim dokazima
2. Poštovanjem prava oštećenih-žrtava, odnosno njihovih porodica

ZAKONODAVSTVO

Propisi od značaja za krivično pravnu oblast su:

1. Ustav Crne Gore
2. Krivični zakonik
3. Zakonik o krivičnom postupku
4. Zakon o odgovornosti pravnih lica za krivična djela
5. Zakon o zaštiti svjedoka
6. Zakon o sudovima
7. Zakon o sudskim vještacima
8. Zakon o državnom tužiocu
9. Zakon o advokaturi
10. Zakon o zaštiti prava na suđenje u razumnom roku
11. Zakon o Sudskom savjetu
12. Zakon o staranju o privremeno i trajno oduzetoj imovini

Sudsku funkciju vrše Vrhovni sud, Apelacioni sud, dva viša suda, 15 osnovnih sudova, Upravni sud i Privredni sud. Krivični postupak vodi se pred osnovnim sudovima koji su u svim predmetima sudovi prve instance, a o žalbama na presude ovih sudova odlučuju viši sudovi. Viši sudovi su sudovi i prve i druge instance. Po žalbama na presude ovih sudova, kada postupaju kao sudovi prve instance, odlučuje Apelacioni sud. Vrhovni sud u krivičnom postupku odlučuje po vanrednim pravnim ljekovima, uvijek kao sud poslednje instance. S obzirom na to da je predmet monitoringa krivični postupak ovdje ćemo se, u onoj mjeri u kojoj je to potrebno za shvatanje aktivnosti monitoringa, pozabaviti Zakonikom o krivičnom postupku.

Krivični postupak uređen je Zakonikom o krivičnom postupku („Sl. list Crne Gore", br. 57/09 od 18.08.2009, 49/10 od 13.08.2010) koji je u punom kapacitetu stupio na snagu 1. avgusta 2011.godine. Kako ocjena ovog zakona nije predmet monitoringa, ovdje ćemo se osvrnuti na nekoliko glavnih karakteristika.

Osnovna razlika u odnosu na dosadašnje propise kojima je bio uređen krivični postupak ogleda se u tome što je istraga (čl. 275.) povjerena Državnom tužiocu, umjesto sudu, kako je bilo propisano do stupanja na snagu ovog Zakonika. Polazeći od činjenice da istraga ima značajan uticaj na dalji tok postupka, ovdje treba ukazati na nekoliko okolnosti:

a) prenošenje istrage u nadležnost tužioca u suštini znači da državni organ koji nije nezavisan (tužilaštvo je po Ustavu (čl. 134) jedinstveni i samostalan organ, a Zakon o državnom tužilaštvu predviđa situacije kada tužilac nije nezavisan) može značajno ograničiti prava i slobode građana, jer i samo stavljanje pod istragu, čak i kada je bez pritvora, predstavlja značajno ograničenje prava i sloboda. Prema ranijem Zakoniku, odluku o sprovođenju istrage donosio je sudija, nezavisno i na osnovu ocjene ispunjenosti uslova za sprovođenje istrage. Sada, istragu naređuje tužilac, dakle, hijerarhijski organizovan organ u kojem (na osnovu čl. 110 Zakona o Državnom tužilaštvu) viši tužioci daju obavezna uputstva za rad nižim tužiocima. Ovo znači da u krajnjoj liniji o sprovođenju istrage uvijek može odlučivati Vrhovni Državni tužilac- dakle, umjesto nezavisnosti postoji hijerarhijski odnos. Po ZKP-u istraga se otvara naredbom tužioca protiv koje nije dozvoljeno pravo žalbe. Nejasno je zbog čega je ta žalba zabranjena. Raniji propisi dopuštali su žalbu protiv rešenja o sprovođenju istrage donešenog od strane istražnog sudije, a sada takva žalba nije dozvoljena. Vjerovatno se željela unaprijediti efikasnost istrage i ubrzati njen tok što je u suštini pozitivno. Stajao bi takođe argument da ako je istraga povjerena državnom tužiocu koji je strogo hijerarhijski organ, da nije logično da se protiv naredbe o otvaranju istrage izjavljuje žalba, osim ukoliko se ta žalba ne bi

izjavljivala sudu, a onda bi se dovela u pitanje ovlašćenja tužioca koji sprovodi istragu- istraga se ne bi vodila iako tužilac smatra da treba. Konačno, pri činjenici da se istraga vodi da bi tužilac odlučio da li će podići optužnicu ili ne (čl. 274.) ima razloga da mu se ta faza krivičnog postupka potpuno povjeri. Sigurno je da će praksa pokazati prednosti i nedostatke ovog rešenja, ali smo mišljenja da je trebalo uključiti sud u otvaranje istrage, makar kroz određeni period. Ono što je posebno bitno je i pitanje pritvora, jer su ponovo uspostavljeni pritvorski osnovi koji nijesu bili predviđeni ranijim Zakonikom (od 2003.) Tako je došlo do nelogične situacije da postojeći Zakonik koji naglašava izuzetnost pritvora, dozvoljava više mogućnosti za njegovo određivanje od ranije važećeg. Nadalje, sa aspekta zaštite ljudskih prava postavlja se pitanje da li treba dopustiti takvo značajno ograničenje ljudskih prava bez odluke suda.

b) Takođe, nejasno je zbog čega je ukinuto pravo okrivljenog na podnošenje prigovora protiv optužnice. Prema sadašnjim rješenjima, osumnjičeni ne može intervenisati u određivanju istrage, a takođe ne može intervenisati ni na podnijetu optužnicu, barem ne u onom obimu u kojem je ranije mogao. Da napomenemo: prema ranijem zakonskom rešenju, okrivljeni je imao pravo prigovora protiv optužnice i to iz niza razloga predviđenih u članu 282 tadašnjeg Zakonika: da li je djelo za koje se goni krivično djelo; da li postoje okolnosti koje isključuju krivicu; da li je došlo do zastare, abolicije, pomilovanja; da li postoje dokazi koji opravdavaju sumnju dovoljnu za podizanje optužnice. Prema sadašnjim rešenjima (čl. 293, 294, 296 i 297) vanpretresno vijeće (čl. 24. st. 7) kada nađe da je sud nadležan da sudi po konkretnoj optužnici (čl. 293. st. 4.) odnosno kada utvrdi da nema uslova za odbacivanje optužnice (čl. 294. st. 1.) donosi rešenje o potvrđivanju optužnice. Okrivljeni se može žaliti na tu odluku jedino iz razloga nenadležnosti suda (čl. 293. st. 4.) dok se državni tužilac i oštećeni kao tužilac može žaliti po svim tačkama iz čl. 294. st. 1. Dakle, okrivljeni koji nema nikakav pravni lijek tokom istrage, na optužnicu se može žaliti samo iz razloga nenadležnosti- da ne treba da sudi jedan sud nego drugi. Ovo i pored toga što se njegova prava nakon stupanja optužnice na pravnu snagu još više ograničavaju nego tokom istrage- da samo pomenemo nemogućnost konkurisanja na niz poslova. S druge strane, i državni tužilac i oštećeni kao tužilac mogu osporiti odluku o odbacivanju iz suštinskih razloga i izdejstvovati potvrđivanje optužnice, iako je od strane prvostepenog vijeća optužnica odbačena. Dakle, okrivljeni je u neravnopravnom položaju, jer nema djelotvorni pravni lijek protiv optužnice.

Rješenje o kažnjavanju bez glavnog pretresa moguće je za krivična djela za koje je predviđena kazna zatvora do tri godine ili manja, novčana kazna i druge blaže krivične sankcije i kao takvo predstavlja novinu u krivičnom postupku.

Konačno, značajna novina je i sporazum o priznanju krivice (čl. 300. do čl. 303 ZKP-a). Za djela zaprijećena kaznom do 10 godina na predlog okrivljenog odnosno državnog tužioca može se zaključiti i sporazum o priznanju krivice tako da će, ako se taj sporazum postigne, sud donijeti presudu u skladu sa sporazumom. Radi se o potpuno novom institutu u našoj praksi. Ovdje sud praktično samo konstatuje postojanje sporazuma i dužan je da donese presudu u skladu sa tim sporazumom. Dakle, presudu suštinski donose okrivljeni i tužilac.

OPŠTI PRINCIPI ZAKONIKA

Zakonik u Opštim odredbama, Glavi I i Osnovnim pravilima utvrđuje cilj Zakonika kao i principe krivičnog postupka. Ukazujemo na principe direktno vezane za materiju ovog izvještaja:

a) **Predmet i cilj zakonika:**
Osnovni cilj Zakonika je da se obezbijedi da niko nevin ne bude osuđen, a da se učiniocu krivičnog djela izrekne odgovarajuća kazna (čl. 1.);

b) **Načelo zakonitosti:**
Krivičnu sankciju može izreći samo nadležni sud u postupku koji je sproveden po ovom Zakoniku (čl. 2.);

c) **Pretpostavka nevinosti i in dubio pro reo:**
Svako se smatra nevinim dok se krivica ne utvrdi pravosnažnom odlukom suda[1]. Ustanovljava se obaveza svih, posebno javnih ličnosti i medija da poštuju pretpostavku nevinosti (čl. 3.)

d) **Prava osumnjičenog, odnosno okrivljenog:**
Obavještenje o krivičnom djelu i osnovima sumnje na prvom saslušanju. Obavještenje da ne mora davati nikakav iskaz, kao i da mu se omogući da se izjasni o dokazima koji su protiv njega, odnosno da predloži dokaze koji mu idu u prilog (čl. 4.)

e) **Prava lica lišenog slobode:**
Obavještenje na jeziku koji razumije o razlozima lišenja slobode, o pravu na branioca, o pravu na obavještavanje porodic, odnosno diplomatsko konzularnog predstavništva, ako je strani državljanin, odnosno odgovarajuće organizacije, obaveza sprovođenja nadležnom tužiocu (čl. 5.);

f) **Zabrana ponovnog suđenja (Ne bis in idem) :**
Ne može se ponovo suditi za isto djelo, ali se dozvoljava ponavljanje postupka u skladu sa ovim Zakonikom (čl. 6.)

g) **Službeni jezik u krivičnom postupku:**
Crnogorski jezik je službeni jezik, u područjima gdje je manjinsko stanovništvo u većini u službenoj upotrebi je i jezik manjne. Stranke u postupku upotrebljavaju svoj jezik ili jezik koji razumiju, a ako nijesu u mogućnosti obezbijediće se tumač. Pismena komunikacija je na crnogorskom jeziku, s tim što lice u pritvoru može upotrebljavati svoj jezik ili jezik koji razumije, a takođe, pozivi i odluke dostaviće mu se na tom jeziku (čl. 7,8 i 9)

h) **Zabrana primjene nasilja i iznuđivanja priznanja:**
Zabrana nasilja i iznuđivanja, kao i zabrana da se sudska presuda temelji na iskazu pribavljenom putem nasilja ili iznuđivanja (čl. 11)

i) **Pravo na odbranu :**
Obuhvata pravo okrivljenog da se brani sam ili uz pomoć slobodno izabranog branioca, pravo da se sa braniocem dogovori o načinu odbrane, upozorenje da sve što izjavi može biti upotrijebljeno protiv njega kao dokaz, branilac po službenoj dužnosti u skladu sa Zakonikom (čl. 12).

j) **Pravo na rehabilitaciju i naknadu štete:**
Neosnovano osuđeno lice ima pravo na naknadu štete i druga prava u skladu sa zakonom (čl. 13)

1 Presuda je pravosnažna kada se protiv nje više ne može izjaviti redovni pravni lijek.

k) Pouka o pravima okrivljenog ili drugog lica koje učestvuje u postupku:
Svi državni organi koji učestvuju u postupku dužni su poučiti okrivljenog o njegovim pravima kako zbog neznanja ne bi koristilo svoje pravo ili bi propustilo da izvrši određenu radnju, a dužni su ga poučiti i o posledicama propuštanja (čl. 14.).

l) Pravo na suđenje bez odlaganja :
Pravo okrivljenog da bude izveden pred sud u najkraćem roku, da mu se sudi bez odlaganja, te zabrana zloupotrebe prava u cilju odlaganja. Pritvor se mora svesti na najkraće potrebno vrijeme (čl. 15)

m) Načelo istine i pravičnosti uključujući i jednakost oružja:
Obaveza suda i drugih državnih organa koji učestvuju u postupku da savjesno cijene sve dokaze, kao i da sa jednakom pažnjom cijene dokaze koji idu u prilog okrivljenog i one koji ga terete. Sud je dužan da braniocu okrivljenog obezbijedi jednake uslove u pogledu predlaganja dokaza, i pristupa dokazima i njihovom izvođenju (čl. 16.)

n) Slobodna ocjena dokaza i pravno nevaljani dokazi:
Postojanje odnosno nepostojanje činjenica cijeni se na osnovu slobodnog uvjerenja (nema formalnih dokaznih pravila)a presuda se ne može temeljiti na dokazima pribavljenim povredama ljudskih prava, Ustavnih normi i odredaba krivičnog postupka.

VRŠENJE MONITORINGA

OPŠTE NAPOMENE:

Monitoring se vrši putem neposrednog prisustva posmatrača na suđenjima. U skladu sa dogovorom sa predsjednicima sudova, posmatrači najavljuju svoje prisustvo i može se reći da se, osim prolaznih tehničkih nerazumijevanja, posmatrači nisu suočili sa ozbiljnijim problemima u pogledu prisustva suđenjima. U skladu sa svojom ulogom, posmatrači bilježe svoja zapažanja, komuniciraju sa svim učesnicima u postupku, ali se uzdržavaju od davanja bilo kakvih komentara. Uporedo sa praćenjem suđenja, prati se i izvještavanje medija o suđenjima. Nadalje, izvještaji sa suđenja dostavljaju se CEDEM-u i AIRE Centru jednom nedjeljno, a analitički izvještaji jednom mjesečno.

Podaci o suđenjima pribavljaju se iz različitih izvora: nedjeljni rasporedi suđenja u sudovima uključenim u projekat; mediji; neposredna saznanja o suđenjima.

Selekcija predmeta vrši se u skladu sa uputstvima projektnog menadžmenta: prioritet je dat predmetima organizovanog kriminala i korupcije, zatim krivičnim djelima protiv čovječnosti i međunarodnog prava, zatim ostalim predmetima sa elementima kršenja službenih ovlašćenja, posebno sa elementima torture, predmetima porodičnog nasilja, krivičnim djelima protiv časti i ugleda, predmetima koji se vode protiv stranih državljana, a posmatraju se i predmeti tzv. klasičnog kriminala kao što su krivična djela protiv imovine i krivična djela protiv života i tijela.

Najveći broj krivičnih djela koja su bila obuhvaćena monitoringom su krivična djela protiv službene dužnosti gdje su obuhvaćena krivična djela sa elementima korupcije i organizovanog kriminala. Pored krivičnih djela iz ove grupe, krivična djela sa elementima organizovanog kriminala prate se u još 17 predmeta (zločinačko udruživanje, krijumčarenje, dogovor za izvršenje krivičnog djela, trgovina opojnim drogama)

U odnosu na krivična djela protiv čovječnosti i međunarodnog prava praćena su u dva postupka - radi se o jedinim postupcima zbog krivičnih djela iz te grupe koji su vođeni u izvještajnom periodu.

Krivična djela protiv platnog prometa i privrednog poslovanja praćena su u 10 predmeta, i to zloupotreba ovlašćenja u privredi, zloupotreba položaja u privrednom poslovanju, pranje novca i utaja poreza i doprinosa.

Krivična djela mučenja i zlostavljanja praćena su u 4 predmeta, a jedan predmet se odnosio na napad na službeno lice u vršenju službene dužnosti.

Krivična djela uvrede i klevete praćena se u 11 predmeta, u početnom periodu monitoringa, tačnije do dekriminalizacije ovih krivičnih djela, pri čemu se radilo o krivičnim postupcima u kojima nijesu tuženi novinari.

U 8 predmeta praćeno je krivično djelo nasilja u porodici ili porodičnoj zajednici.

U ostalim slučajevima, predmet monitoringa su bila tzv. klasična krivična djela, kao što su ubistvo, teška tjelesna povreda, nasilničko ponašanje, krađa.

U izvještajnom periodu, posmatrački tim je prisustvovao na ukupno 240 pretresa, a monitoringom je bilo obuhvaćeno ukupno 124 predmeta.

ZAPAŽANJA POSMATRAČKOG TIMA

U ovom dijelu izvještaja, sadržana su ključna zapažanja monitoring tima u vezi sa pojedinim aspektima poštovanja prava na pravično suđenje prema Evropskoj konvenciji o zaštiti ljudskih prava i osnovnih sloboda, koja pruža garancije svakom licu kome se stavlja na teret izvršenje krivičnog djela da će njegova prava i slobode u toku krivičnog postupka biti zaštićeni. Bez ovih temeljnih garancija nijedan sudski postupak ne može imati potreban kvalitet. Pomenuta zapažanja se odnose na načelo javnosti, i to javnosti samih suđenja, kao i javnosti rada sudova; načelo suđenja u razumnom roku; poštovanje pretpostavke nevinosti; ravnopravnost stranaka u postupku (tzv.jednakost oružja); zatim pravo na efikasnu odbranu; pravo na upotrebu jezika koji stranke razumiju; pravo na nezavisan i nepristrasan sud; pristup sudu, kao i druga pitanja koja mogu biti od značaja za održavanje suđenja, poput obavještavanja o pravima i transparentnosti rada sudova. Kod činjenice da je u postupcima koji su praćeni od strane monitoring tima, izrađen mali broj presuda, te da je i u tim slučajevima riječ o nepravosnažnim odlukama, slobodna ocjena dokaza će biti analizirana u narednom periodu. Svako dalje zalaženje u komentarisanje nepravosnažnih postupaka predstavljalo bi miješanje u nezavisan rad sudova. Iz istih razloga kao i kod slobodne ocjene dokaza i pravno nevaljani dokazi biće predmet posebne analize u narednom periodu, a s obzirom na to da se pitanje pravne valjanosti dokaza često postavljalo tokom glavnih pretresa, posebno u vezi sa primjenom mjera tajnog nadzora.

NAČELO JAVNOSTI

Načelo javnosti suđenja

U predmetu **M. R. i dr., Viši sud u Podgorici, K.br.162/11**,[2] glavni pretres održan je u kancelariji sudije predsjednice vijeća, koja nije bila dovoljno velika da primi zainteresovanu javnost, tako da sestra okrivljenog nije mogla prisustvovati suđenju.

Isti problem uočen je i u predmetu **D.R. i dr., Osnovni sud u Podgorici, K.br. 904/11**,[3] gdje zainteresovani za praćenje suđenja nisu imali mjesta da sjede, a novinarki dnevnog lista dozvoljeno je da stoji u sudnici kako bi pratila glavni pretres.
Glavni pretres u predmetu okrivljenog **Z.D., Viši sud u Podgorici, K.br.140/95**,[4] prema rasporedu suđenja Višeg suda Podgorica, na internet sajtu Sudovi Crne Gore, koji se i dalje nalazi u fazi izrade, nije objavljen. Ovakva praksa je primjetna i na primjeru ostalih sudova, koji takođe parcijalno objavljuju ovu vrstu informacija za jedan broj suđenja.

U predmetu **B.V. i dr., Viši sud u Podgorici, Ks.br.29/11**,[5] glavni pretres je održan u kancelariji sudije predsjednika vijeća, koja nije bila dovoljno velika da primi zainteresovanu javnost, tako da majka jednog od okrivljenih nije mogla prisustvovati, a zbog toga što je velika sudnica bila zauzeta, jer je postupanje u drugoj krivično-pravnoj stvari trajalo duže od predviđenog vremena. Predsjednik vijeća je pitao stranke u postupku da li su saglasne da se glavni pretres održi u kancelariji, pa kako nije bilo primjedbi, glavni pretres je održan.

Glavni pretres u predmetu **K.br. 416/11**,[6] u Osnovnom sudu u Kotoru održan je dan ranije u odnosu na

2 Krivično djelo; Neovlašćena proizvodnja, držanje i stavljanje u promet opojnih droga u pokušaju iz čl.300 st.2 u vezi st.1. čl.20. KZ CG - Krivična djela protiv zdravlja ljudi
3 Krivično djelo: Mučenje i zlostavljanje iz čl. 167 st. 3 u vezi st. 2 u vezi sa čl. 25 KZ
4 Krivično djelo; Ubistvo u pokušaju iz čl.30.st.2.tač.6. KZRCG u vezi čl.19. KZSRJ - Krivična djela protiv života i tijela
5 Krivično djelo: Kriminalno udruživanje iz čl. 401 st. 2 KZ CG - Krivična djela protiv javnog reda i mira
6 Osnovni sud u Kotoru, predmet je zaveden pod poslovnim brojem K.br.416/11

raspored suđenja istaknut na zvaničnom internet sajtu www.sudovi.me. Ovakva nepodudarnost, da informacije sa rasporeda suđenja istaknutog na zvaničnom internet sajtu sudovi.me ne odgovaraju rasporedu suđenja kod postupajućih sudija, uočena je i na primjerima ostalih sudova, a ne samo Osnovnog suda u Kotoru.

Kada su u pitanju zahtjevi za isključene javnosti, u posmatranom periodu, bilo je dva zahtjeva. U predmetu **I.R., Viši sud u Podgorici, K.br.28/12,**[7] punomoćnici oštećenih porodica stavili su predlog da se isključi javnost sa glavnog pretresa, obrazlažući taj zahtjev potrebom da se zaštite prava i interesi malodobne djece oštećenih, pok. R. i D.. Punomoćnici su u obrazloženju naveli da se postupak vodi pod budnim okom javnosti, te da je veoma mala vjerovatoća da će ostati "pošteđeni" navoda o načinu i motivima izvršenja predmetnog djela. Posebno su se pozivali i na čl.6 Evropske konvencije po kojem se štampa i javnost mogu isključiti sa cijelog suđenja ili sa dijela suđenja, između ostalog, kada to zahtijevaju interesi maloljetnika ili zaštita privatnog života stranaka. Nakon pauze, vijeće je donijelo odluku da se isključi javnost iz daljeg toka postupka, nakon čega su svi prisutni, osim stranaka u postupku, napustili sudnicu**.** Nekoliko dana kasnije, sud je i formalno-pravno donio odluku kojom je odbijen predlog odbrane za isključenje javnosti. Kod činjenice da pretresno vijeće isključuje javnost kada ocijeni da postoji neki od, u ZKP-u alternativno propisanih razloga, i da ta odluka mora da sadrži konkretna objašnjenja, o konkretnim razlozima, odnosno konkretnom razlogu, postavlja se pitanje, na kojim činjemicama je sud temeljio odluku da se isključi javnost i uz koje obrazloženje, odnosno, koje od tih činjenica su se promijenile ili su nastale nove koje su uticale da isti predlog bude odbijen, samo par dana kasnije.

U predmetu **K.Ž., Viši sud u Podgorici, br. K.br.86/11**[8]**,** predstavnik porodice oštećenog obratio se sudu sa predlogom da se isključi javnost sa suđenja, uz obrazloženje da je nezadovoljan izvještavanjem medija. S obzirom na to da predstavnik oštećenog u procesnom smislu, ne može staviti ovaj predlog, to je sud pozvao istog da svoj predlog detaljnije obrazloži na sledećem zakazanom pretresu, a da sud isti uzme u razmatranje i o njemu odluči po službenoj dužnosti. Kako se punomoćnik oštećene porodice nije pojavio na zakazanom pretresu, niti ponovio predlog za isključenje javnosti u daljem toku postupka, o ovom pitanju sud nije odlučivao.

PRAVO NA SUĐENJE U RAZUMNOM ROKU

U predmetu **P. S. i dr. Viši sud u Bijelom Polju**[9] **Ks.Br.1/08**, prije svega ukazujemo da suđenje nije sprovedeno u zakonskom roku, a da su optuženi koji su bili u pritvoru oslobođeni, jer je protekao rok od 3 godine a da se postupak nije završio tako da su pušteni. Ne ulazeći u opravdanost pritvora, ukazujemo da se radi o kršenju prava na suđenje u razumnom roku bez obzira na svu složenost predmeta i broj predloženih dokaza. Ovo posebno kod činjenice da su odredbe ZKP-a, posebno čl. 15. koji govori o hitnosti postupka kada su okrivljeni u pritvoru, jasne.

U predmetu **L. R. i dr. Osnovni sud Podgorica,**[10] **K.br. 1266/07**, uočeno je da četiri uzastopno zakazana ročišta nisu održana, jer nisu bile ispunjene procesne pretpostavke. Naime, prvo ročište nije održano zbog nedolaska optuženog Đ.D. za kog je bila neuredna dostava poziva za glavni pretres, kao i njegovog branioca koji je bio uredno obaviješten. Drugo ročište nije održano jer je sudija bio na seminaru. Na sljedeće ročište pristupili su optuženi kao i jedan branilac, a drugi branilac je obavijestio sud da ima sudjenje pred drugim sudom. Kako je optuženi Đ. D. odbio da iznese odbranu bez prisustva branioca, zakazano je novo ročište na koje je pristupio optuženi L. R. njegov branilac, kao i branilac drugooptuženog, ali ne i optuženi Đ.D.

7 Krivično djelo: Teško ubistvo iz čl.144, st.1, tačka 8 KZ CG Krivična djela protiv života i tijela

8 Krivično djelo: Ubistvo iz čl.143, st.1, tačka 8 KZ CG Krivična djela protiv života i tijela

9 Ratni zločin protiv civilnog stanovništva iz čl. 142. st. 2. KZ SRJ

10 Krivično djelo: Zloupotreba službenog položaja iz čl.416. st.5 KZ CG

Poslednje od ova četiri ročišta nije održano jer je zastupnik optužbe izmijenio činjenični opis optužbe i pravnu kvalifikaciju djela. Glavni pretres je stoga odložen, jer su okrivljeni iskoristili svoje zakonsko pravo, da se obzirom na to da je doslo do izmjene optužnice, pripreme za davanje završnih riječi.

Tokom intervjua obavljenog nakon odloženog ročišta sa braniocem okrivljenog u predmetu **R. D. Osnovni sud Podgorica,**[11] ukazano je da u ovoj krivično pravnoj stvari Osnovni sud u Podgorici postupa kao prvostepeni od 31.12.2004. kada je usled promjene zakona predmet dat u nadležnost Osnovnom sudu u Podgorici nakon istražnog postupka, vodjenog od strane Višeg suda u Podgorici. U višegodišnjem postupku koji se od tada vodi pred Osnovnim sudom u Podgorici u ovom predmetu, došlo je do izmjene više postupajućih sudija, ali postupak nije okončan do danas. Nadalje, radnje izvršenja krivičnog djela za koje se optuženi tereti u optužnici, po riječima njegovog branioca datiraju iz perioda od 1998 -2003. godine.

U predmetu **D. V. i dr. Viši sud Podgorica**[12] **K.br.7/10**, pretres se dva puta odlaže zbog nepostupanja Uprave policije po naredbi za dovođenje svjedoka, pri čemu Uprava policije ne obavještava sud u razlozima nepostupanja. Ovdje se takođe radi o neopravdanom odlaganju, jer se jednostavno ne daju nikakvi razlozi zbog čega se ne postupa po naredbi za dovođenje.

Glavni pretres u predmetu **A.M. i dr. Viši sud Podgorica**[13] **Ks.Br.6/11**, odložen je zbog toga što su braniocima okrivljenih određeni dokazi dostavljeni tek dan prije pretresa i to bez obzira na činjenicu što je sud više puta urgirao kod Uprave policije da se ti dokazi dostave. Kao što je ukazano i ranije odlaganje je uzrokovano nepostupanjem drugog državnog organa i kao takvo neopravdano, bez obzira što je sud morao odložiti pretres.

U predmetu **D.A i dr. Viši sud u Podgorici**[14] **Ks.Br.6/11**, ukazujemo na odlaganje usled nedolaska branioca koji je angažovan u drugom predmetu, pri čemu je sud pravilno reagovao obavještavajući okrivljenog da je takav razlog neprihvatljiv. Navedeni predmet smatramo interesantnim i zbog toga što se po sličnim pitanjima raspravlja i u parničnom postupku koji, prema tvrdnjama braniocima ide u prilog optuženih. Posmatrački tim će nastaviti sa praćenjem ovog postupka, posebno u cilju konstatovanja reakcija učesnika u postupku na eventualne odluke parničnih sudova koje mogu dovesti u pitanje opravdanost optužnice, odnosno do moguće situacije da dva državna organa postupaju različito po istom pitanju.

Pretres u predmetu **C. N. i dr. Osnovni sud u Kotoru**[15] odložen je zbog zauzetosti branioca na kongresu političke partije kojoj pripada. Ovakvo odlaganje je po mišljenju monitoring tima neprihvatljivo.

U predmetu **B. M. i dr. Osnovni sud u Baru**[16] ukazujemo na činjenicu da se optuženi nijesu pojavili pred sudom zbog toga što su na suđenje zaboravili. Sudija je naredio njihovo privođenje. Ističemo da se radi o krajnjem nepoštovanju suda i da takva ponašanja treba strožije sankcionisati.

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11 Krivično djelo: Zloupotreba službenog položaja iz čl.416.st.5 u vezi st. 4 i 1 KZ CG

12 Krivična djela zloupotrebe službenog položaja i pronevjere iz grupe krivičnih djela protiv službene dužnosti čl.416, st.1-3 i čl. 420 KZ CG

13 Krivična djela primanja mita, davanja mita i zloupotrebe službenog položaja iz grupe krivičnih djela protiv službene dužnosti čl.416, čl. 423, st.1-3 i čl. 424, st.1 i 2 KZ CG

14 Krivično djelo Zloupotreba ovlašćenja u privredi u pokušaju odnosno postrekavanju iz čl. 276 st. 2 u vezi st. 1 tač. 5 u vezi čl. 20 i 24 KZ CG

15 Krivična djela protiv službene dužnosti: krivično djelo: Posluga iz čl.421. KZ i krivično djelo: Prevara iz čl.244.st.3. u vezi st.1 KZ CG

16 Krivična djela protiv braka i porodice - Krivično djelo nasilje u porodici ili u porodičnoj zajednici iz čl.220. st. u vezi st.1. KZ u sticaju sa krivičnim djelom ugrožavanje sigurnosti iz čl.168. st. 2 u vezi st. 1. KZ. kao i krivično djelo sprečavanje službenog lica u vršenju službene radnje iz čl.375. st. 3. u vezi sa st. 2. i st. 1. KZ CG

U predmetu **V.N. Osnovni sud u Podgorici,**[17] Sud je donio rješenje kojim se krivični postupak protiv V.N za krivično djelo Nasilničko ponašanje iz čl.399.KZ razdvaja u odnosu na ostale, zato što je procesno neodrživo da se isto lice u istom predmetu saslušava i u svojstvu oštećenog i u svojstvu okrivljenog. Kod V.N je u krivičnom djelu krađa nastupila apsolutna zastarjelost.

Ukidanje presude u slučaju **D. V. i dr., Viši sud u Podgorici, K.br.7/10,** [18] i neodlučivanje, odnosno odlaganje suda da odluči o zahtjevima okrivljene i odbrane, može uticati na suđenje u razumnom roku, posebno kod činjenice da se radi o predmetu iz 2006.godine, da se dokazi uglavnom nalaze kod državnih organa ili institucija, svi okrivljeni redovno dolaze na glavni pretres, svjedoci su dostupni sudu, pa su opravdane mjere koje sud preduzima shodno ZKP-u, a kako bi krivični postupak bio efikasniji.

U predmetu u kojem je okrivljeni **M. M., Osnovni sud u Podgorici, K.br.11/516** [19] svjedok – oštećeni E.K. na prethodni glavni pretres nije pristupio, zbog čega je isti odložen. Isti svjedok – oštećeni nije se pojavio ni nakon odloženog pretresu, pa je sud, preduzeo mjeru predviđenu ZKP-om i izdao naredbu o prinudnom dovođenju svjedoka – oštećenog u krivičnom postupku.

U predmetu okrivljenih **Z.D. i dr. Viši sud u Podgorici, K.br.140/95,**[20] glavni pretres je odložen zbog nedolaska svjedoka, ali i nedolaska sudskog vještaka medicinske struke. U saznanju smo da Viši sud u Podgorici u navedenom predmetu postupa kao prvostepeni od 21.09.1995. godine. U šesnaestogodišnjem postupku koji se od tada vodi pred Višim sudom u Podgorici u ovom predmetu, došlo je do izmjene više postupajućih sudija, ali postupak nije okončan do danas. Radnje izvršenja krivičnog djela za koje se optuženi terete u optužnici, preduzete su 22. jula 1995. godine. Napominjemo da se okrivljenom Z.D. sudi se u odsustvu.

Glavni pretres u predmetu okrivljenog **S.M., Osnovni sud u Podgorici, K.br.05/1225,**[21] odložen je, jer ni okrivljeni ni zastupnik optužbe nisu pristupili sudu u zakazanom terminu. U odnosu na okrivljenog sud je na prethodnom glavnom pretresu izdao naredbu za prinudno dovođenje, a ovlašćeni pripadnici UP PJ Bijelo Polje, su obavijestili sud da istog nisu pronašli na datoj adresi. Konstatovano je da na glavni pretres nije pristupio zastupnik optužbe, zamjenik ODT Podgorica, ali je isti sa zakašnjenjem pristupio, pravdajući svoje odsustvo zastupanjem optužbe u drugoj krivičnopravnoj stvari, u kojoj je postupak bio istovremeno u toku.

U predmetu **P.M., Viši sud u Podgorici, K.br.97/11,**[22] svjedok N.V. nije pristupio na glavni pretres u određenom terminu, sa razloga što Uprava policije nije postupila po naredbi suda za privođenje svjedoka, niti je o razlozima nepostupanja obavijestila sud, iako se u spisima predmeta nalazi dokaz da je Uprava policije bila uredno i blagovremeno obavještena o predmetnoj naredbi.

Glavni pretres u slučaju **D.R. i dr. Osnovni sud u Podgorici, K.br. 904/11,**[23] odložen je zbog neispunjavanja procesnih pretpostavki, jer okrivljeni R. R. nije pristupio, iako je isti uredno obaviješten proglašenjem rješenja sa prethodnog glavnog pretresa.

Okrivljeni **S.H., Osnovni sud u Podgorici, K.br.716/11,**[24] nije pristupio na prethodnom glavnom pretresu u određenom terminu, a kako je dan prije drugog termina za glavni pretres, priveden u drugoj krivično pravnoj stvari, to je isti sproveden kako bi dao izjavu postupajućem sudiji i u ovom predmetu.

17 Krivično djelo: Zloupotreba službenog položaja iz čl.416. st. 5 KZ CG
18 Krivično djelo: Zloupotreba službenog položaja iz čl.416 st.3 KZ CG (Krivična djela protiv službene dužnosti)
19 Osnovni sud u Podgorici, predmet pod poslovnim brojem K.br.11/516
20 Krivično djelo; Ubistvo u pokušaju iz čl.30.st.2.tač.6. KZRCG u vezi čl.19. KZ SRJ - Krivična djela protiv života i tijela
21 Krivično djelo: Teška krađa iz čl.240. st.1 KZ CG - Krivična djela protiv imovine
22 Krivično djelo: Teško ubistvo iz čl.144, st.1, tačka 1-4 KZ CG - Krivična djela protiv života i tijela
23 Krivično djelo: Mučenje i zlostavljanje iz čl. 167 st. 3 u vezi st. 2 u vezi sa čl. 25 KZ
24 Krivično djelo: Krađa iz čl.239. KZ CG - Krivična djela protiv imovine

PRETPOSTAVKA NEVINOSTI

U predmetu **A.M . i dr. Viši sud u Bijelom Polju**[25] **Ks.br.16/10**, izjave sudije: '' od malog se počinje'' (iz koje proizilazi da okrivljeni sredstva za život obezbjeđuje kriminalnim aktivnostima) i izjave da optuženi ima problem ne samo sa drogom, već i sa omogućavanjem drugima da je uživaju predstavljaju i povredu pretpostavke nevinosti.

Tokom suđenja u predmetu **M. G. i dr. Viši sud Podgorica**[26] **Ks.Br.33/10**, pojedini mediji su prenijeli i u svojoj interpretaciji objavili sledeće navode: Da će suđenje biti okončano ,,zadovoljenjem pravde za žrtve"; da će se ovaj slučaj voditi na način kako bi se pojačalo povjerenje od strane hrvatskog društva i njihovog pravosuđa". Pomenute izjave mogu se okarakterisati kao pritisak na sud i kao sugestija javnosti da okrivljeni treba da budu osuđeni i njihovo objavljivanje ne ide u prilog poštovanju pretpostavke nevinosti.

U predmetu **D.A i dr. Viši sud u Podgorici**, pisanje jednog štampanog medija o suđenju u tekstu čiji naslov sugeriše da su optuženi pokušali da zarade više od tri miliona eura predstavlja kršenje pretpostavke nevinosti, s obzirom da iz teksta proizilazi da su tu zaradu pokušali da ostvare nezakonitim putem.

Izvještavanje medija u predmetu **Š.D. i dr. Viši sud u Bijelom Polju,**[27] generalno je takvo da samo pojedini mediji nijesu prekršili pretpostavku nevinosti, posebno dovodeći u vezu optuženog i njegovog brata koji u ovom postupku nije ni optužen. Takođe, i odbrana je više puta ukazivala da je izvještavanje medija koje generalno takvo da je stvorilo sliku o krivici optuženih, te da sud ne može da sudi nezavisno pod takvim pritiskom.

U predmetu **,,M" u kojem su okrivljeni B.B., B.J., A.M. i M. F., Viši sud u Podgorici** – Specijalno odjeljenje za suđenje za krivična djela organizovanog kriminala, korupcije i ratnih zločina, ova pretpostavka nije poštovana, jer je prejudiciran ishod postupka u odnosu na okrivljenog A.M. U obrazloženju rešenja o produženju pritvora stoji: ,, da je izvjesno da u narednom dijelu postupka bude osuđen za teška krivična djela koja mu se stavljaju na teret", a što predstavlja flagrantno kršenje pretpostavke nevinosti. Na ovaj način sud ,,proglašava" optuženog krivim prije nego što je njegova krivica dokazana u skladu sa zakonom. Navedeno rešenje je ukinuto odlukom Ustavnog suda Crne Gore Už-III br.464/11 kojom je usvojena ustavna žalba i ukinuto rješenje Višeg suda u Podgorici, Kv.br. 573/11, od 22. juna 2011. godine i rješenje Apelacionog suda Crne Gore, Kž.br. 497/11, od 5. jula 2011. godine u odnosu na podnosioca ustavne žalbe.

Pretpostavka nevinosti je prekršena i u predmetu **D.V. i dr., Viši sud u Podgorici, K.br.7/10**, [28] od strane sudskog vještaka, koji se više puta upustio u raspravu sa okrivljenom nakon što bi mu ista uputila pitanja, odgovarajući da je sve u nalazu napisao i da je ,,tu sve jasno". Nešto kasnije na pitanje odbrane da li je dao nalaz i mišljenje na osnovu originalne finansijske dokumentacije, vještak je odgovorio da nije, da u materijalu koji je dobi da bi sačinio nalaz i dao mišljenje, nisu bili sve originali, odnosno da su dio dokumentacije koja je vještačena bile kopije. Odgovarajući okrivljenoj da je ,,tu sve jasno", kod činjenice da je vještačen dio dokumentacije koja nije bila u originalu, a sto je izvan pravila struke, vještak je jasno iznio svoj stav, odnosno mišljenje u vezi sa odgovornošću okrivljene. U jednoj od brojnih rasprava vještaka sa

25 Krivična djela: Kriminalno udruživanje, stavarnje kriminalne organizacije, neovlašćeno držanje oružja i eksplozivnih materija iz čl.401 i 401a, st.1, čl.403 KZ CG

26 Krivično djelo: Ratni zločin protiv civilnog stanovništva iz čl. 142. st. 1. KZ SRJ i Ratni zločin protiv ratnih zarobljenika iz čl. 144. KZ SRJ

27 Krivična djela: Stvaranje kriminalne organizacije iz grupe krivičnih djela protiv javnog reda i mira; neovlašćena proizvodnja, držanje i stavljenje u promet opojnih droga iz grupe krivičnih djela protiv zdravlja ljudi i pranje novca iz grupe krivičnih djela protiv platnog prometa i privrednog poslovanja iz čl. čl.268, st.4 u vezi sa čl.49. st.1 KZ CG. čl. 416, st.1-5 KZCG, čl. 300 KZ CG i čl.268, st.4 u vezi sa čl.49. st.1 KZ CG.

28 Krivično djelo: Zloupotreba službenog položaja iz čl.416 st.3 KZ CG (Krivična djela protiv službene dužnosti)

odbranom i okrivljenom, isti je naveo ,,da ne postoji dokumentacija u Vrhovnom sudu za cijelu 2005. godinu, a iste osobe su nastavile i dalje da rade", rekao je da je to ,, isto kao da vežete kozu da čuva kupus ", aludirajući na okrivljenu D. V. Napominjemo da navedene izjave vještaka nisu zapisnički konstatovane, niti je vještaku izrečena opomena.

U predmetu ,,**M"**, **Viši sud u Podgorici, Ks.br.33/10**,[29] mediji - dnevne novine su kršile pretpostavku nevinosti objavljujući tekst o suđenju, a kršenje pretpostavke stoji u samom naslovu teksta "*Zlostavljali civile i ratne zarobljenike*".

U predmetu **M. R. i dr. Viši sud u Podgorici, K.br.162/11**,[30] optuženi R.M. naveo je na glavnom pretresu da mu je člankom u dnevnim novinama dana 28.02.2012, čiji naslov glasi:"Uz tikovinu švercovali drogu", povrijeđena pretpostavka nevinosti od strane medija.

RAVNOPRAVNOST STRANAKA U POSTUPKU - JEDNAKOST ORUŽJA

U predmetu **Š.D. i dr. Viši sud u Bijelom Polju**[31] odbrana je na početku pretresa i više puta u toku glavnog pretresa, potencirala pitanje prava na efikasnu odbranu i na ravnopravnost oružja. Odbrana je u samom početku ukazala da joj nije dostavljen niz dokaza kojima tužilaštvo raspolaže i to još iz istrage. Takođe je ukazala da braniocima nije omogućen nesmetani kontakt sa branjenicima tokom trajanja pritvora- da se radi o neuslovnim prostorijama, da su razdvojeni staklom od branjenika i da im nije obezbijeđen nesmetan kontakt tokom postupka.

Predsjednik vijeća je odbio ovaj predlog i započeo sa postupkom. Ovo najviše na osnovu izjave samog okrivljenog D.Š. koji je na pitanje da li je spreman da iznosi odbranu, odgovorio potvrdno. Kada se ima u vidu potpuna neusaglašenost branilaca i ovog okrivljenog (branioci tvrde da okrivljeni ne može iznositi odbranu, a okrivljeni se o tome potvrdno izjašnjava) postavlja se pitanje ostvarivanja efikasne odbrane. Međutim, posmatrački tim smatra da je utemeljenost odluke suda da otpočne sa glavnim pretresom u najmanju ruku diskutabilna. Naime, okrivljeni koji je u pritvoru već 9 mjeseci očekuje da počne glavni pretres, a, s druge strane, on ne može poznavati odredbe krivičnog postupka, a posebno teško da može biti svjestan čemu se izlaže ukoliko počne da daje iskaz, a da makar njegovi branioci nijesu upoznati sa svim dokazima. Mišljenja smo da je sud morao uputiti okrivljenog da se konsultuje sa svojim braniocima, a to je bio dužan na osnovu čl. 14. ZKP-a. Ovo posebno stoga što je u nastavku glavnog pretresa predsjednik vijeća obavijestio odbranu da će im biti omogućen nesmetani kontakt sa okrivljenim u pritvoru, kao i da će im biti dostavljeni dokazi za koje je odbrana tvrdila da ih nije dobila, a dio tih dokaza im je uručen na samom glavnom pretresu, ali nakon saslušanja okrivljenog. Na ovaj način dovodi se u pitanje pravo na efikasnu odbranu i posebno pravilo ravnopravnosti stranaka u postupku odnosno jednakost oružja.

Nadalje, predsjednik vijeća je u više navrata oslovio okrivljenog njegovim (okrivljenog) ličnim imenom, govorio mu je ''ti'', miješao ime okrivljenog i ime brata okrivljenog. Kada je ovaj podatak objavljen, Viši sud u Bijelom Polju reagovao je saopštenjem koje je u najmanju ruku čudno. Naime, u prvom dijelu saopštenja (misli se na dio u kojem se govori o ponašanju sudije) navodi se da sudija ničim nije prekoračio ovlašćenja

29 Krivično djelo: Ratni zločin protiv civilnog stanovništva iz čl. 142. st. 1. KZ SRJ i Ratni zločin protiv ratnih zarobljenika iz čl. 144. KZ SRJ.

30 Krivično djelo; Neovlašćena proizvodnja, držanje i stavljanje u promet opojnih droga u pokušaju iz čl.300 st.2 u vezi st.1. čl.20. KZ CG - Krivična djela protiv zdravlja ljudi

31 Krivična djela: Stvaranje kriminalne organizacije iz grupe krivičnih djela protiv javnog reda i mira; neovlašćena proizvodnja, držanje i stavljenje u promet opojnih droga iz grupe krivičnih djela protiv zdravlja ljudi i pranje novca iz grupe krivičnih djela protiv platnog prometa i privrednog poslovanja iz čl. 268, st.4 u vezi sa čl.49. st.1 KZ CG. čl. 416, st.1-5 KZ CG, čl. 300 KZ CG i čl.268, st.4 u vezi sa čl.49. st.1 KZ CG

koja ima u postupku, profesionalizam i dobro ophođenje, a da se okrivljenom obraćao na naprijed opisan način zbog pritiska koji je stvoren u medijima. Međutim, odmah zatim, navodi se: ''Predsjednik Vrhovnog suda je odmah po saznanju o objavljivanju snimka suđenja u medijima, zatražio od predsjednika Višeg suda u Bijelom Polju da obavi razgovor sa sudećim sudijom i upozori ga da u nastavku suđenja koristi zakonsku terminologiju, što je u konkretnom slučaju i učinjeno, a koju sugestiju i kritiku je sudija i prihvatio''. Dakle, da nije bilo intervencije predsjednika Vrhovnog suda, ne bi bilo ni kritike, jer je očigledno da Viši sud u Bijelom Polju smatra da predsjednik vijeća nije ni u čemu pogriješio. Zakonska terminologija, pa dakle i termini: ''optuženi'' i ''okrivljeni'' ustanovljeni su upravo zbog načela jednakosti i svakom licu koje je u takvoj poziciji treba se obraćati ovim terminima. Iz ovakvog ponašanja sudije mogu se izvlačiti različiti zaključci, kao i u svakom slučaju kada se zakon ne poštuje.

Na kraju, i u ovom slučaju došlo je do rasprave oko unošenja iskaza u zapisnik, a branioci okrivljenog su insistirali na tome da se i pitanja unose u zapisnik što ima svoju logiku: kako će se u žalbi istaći da je sud dozvolio odgovor na nedozvoljeno pitanje, ako tog pitanja nema na zapisniku (glavni pretres od 19.07.2011).

Problem je uočen u predmetu ,,**M", protiv M. M.G., I. M.G., Špira S.L., B. M.G., I. D.M. i Z. M.T. , Viši sud u Podgorici, Ks.br.33/10**,[32] gdje je odbrana isticala zloupotrebu prava od strane zamjenika specijalnog tužioca za organizovani kriminal i ratni zločin, a koja postupanja su suprotna odluci Apelacionog suda, kojom je ukinuta presuda Višeg suda i predmet vraćen prvostepenom sudu na ponovno suđenje u dijelu koji se odnosi na krivično djelo ratni zločin protiv ratnih zarobljenika. Odbrana u navedenom predmetu smatra da zamjenik specijalnog tužioca, zloupotrebljava svoja prava i ovlašćenja kako bi okrivljeni bili optuženi i za krivično djelo ratni zločin protiv ratnih zarobljenika.

U predmetu ,,**Z", Viši sud u Podgorici, Ks.br. 8/11**,[33] odbrana je više puta isticala da je postupanjem suda stavljena u nepovoljan položaj u odnosu na optužbu, sa razloga što su gotovo svi dokazni predlozi odbrane odbijeni, pojašnjavajući, između ostalog, da je prvi nalaz vještaka finansijske struke sačinjen na predlog optužbe, za potrebe VDT i pokretanja istrage, da je dopunski nalaz sačinjen na predlog punomoćnika oštećene strane, a da je predlog odbrane da nalaz i mišljenje izrade nezavisna revizorska ustanova, odbijen. Smatramo cjelishodnim da ukažemo na navode odbrane o tome da je predmetni nalaz kontradiktoran. Naime, vještaku nisu dostavljeni bilans stanja i bilans uspjeha D.O.O."Z. I.", iako se isti u nalazu poziva upravo na ove izvore. Navedena praksa je nedopustiva i treba je strogo kažnjavati.

U istom predmetu, sud je upoznao stranke sa dopisom istražnog sudije Višeg suda u Beogradu od 20.marta 2012, po zamolnici Višeg suda u Podgorici, Ks.br.8/11 od 31.01.2012, u vezi sa saslušanjem svjedoka S.M., u kojem dopisu istražni sudija navodi da S.M. nije dostupan srbijanskim vlastima. U istom predmetu odbrana je ukazala na povredu prava na ravnopravnost stranaka – jednakost oružja, jer je tužilaštvo saslušalo u Moskvi tri svjedoka iz navedenog predmeta bez prisustva branilaca. Branioci su zahtijevali da se saslušanje obavi putem video linka, kako bi i odbrana mogla postavljati pitanja svjedocima,koji predlog je sud odbio usled nedostupnosti. Međutim, prema dopisu Generalnog tužilaštva Ruske federacije, dostavljenom po

32 Krivično djelo: Ratni zločin protiv civilnog stanovništva iz čl. 142. st. 1. KZ SRJ i Ratni zločin protiv ratnih zarobljenika iz čl. 144. KZ SRJ.

33 Krivična djela: protiv R. K. – predsjednika Opštine Budva zbog krivičnog djela –Zloupotreba službenog položaja iz člana 416 stav 3 u vezi stava 1 i člana 416 stav 1 Krivičnog zakonika, D. M. – potpredsjednika O. B., zbog krivičnog djela - zloupotreba službenog položaja iz člana 416 stav 3 u vezi stava 1 Krivičnog zakonika, Đ. P. poslanika u Skupštini Crne Gore, D. Ž., S. D., S. V., S. T., N. S., M. K. zbog krivičnog djela - zloupotreba službenog položaja putem pomaganja iz člana 416 stav 3 u vezi stava 1 u vezi člana 25 Krivičnog zakonika, D. S., vlasnika i izvršnog direktora preduzeća „M." DOO B., zbog krivičnog djela – zloupotreba ovlašćenja u privredi iz člana 276 stav 2 u vezi stava 1 tačka 5 Krivičnog zakonika i krivičnog djela – zloupotreba službenog položaja putem podstrekavanja iz člana 416 stav 1 u vezi člana 24 Krivičnog zakonika , M. M. zbog krivičnog djela – zloupotreba službenog položaja putem podstrekavanja iz člana 416 stav 1 u vezi člana 24 Krivičnog zakonika i N. P. – izvršne direktorice preduzeća „Z. I." DOO B., zbog krivičnog djela – utaja poreza i doprinosa iz člana 264 stav 3 u vezi stava 1 Krivičnog zakonika

zamolnici za pružanje međunarodne pravne pomoći u predmetnoj krivičnoj stvari, a u vezi sa saslušanjem jednog od svjedoka V. L., konstatuje se da isti nije dostupan ruskim vlastima. Sa ovih razloga, odlučeno je da se u dokaznom postupku neće izvoditi kao dokaz saslušanje S.M. i V.L.

U predmetu **M.G. i dr. Viši sud u Podgorici** - Specijalno odjeljenje za suđenje za krivična djela organizovanog kriminala, korupcije i ratnih zločina, **Ks.br.08/09,**[34] optuženi i oštećeni su koristili svoje pravo da postavljaju pitanja svjedocima i da stavljaju primjedbe na njihove iskaze. Prilikom ispitivanja svjedoka G., optužena N. je dva puta upozorena da postavlja sugestivna pitanja i upozorena da iste mora preformulisati, jer su se odnosila na subjektivan stav svjedoka prema predmetnim činjenicama, a ne na njegova saznanja o tome. Nakon što se optužena N. obratila sudu tražeći da postavi još jedno pitanje svjedoku, predsjednica vijeća joj je odgovorila da nema pravo da postavlja više pitanja, da je to pravo koristila u prethodnom krugu. Na ovu odluku predsjednice vijeća prigovorio je branilac optužene N., uz obrazloženje da se optuženoj ne može uskratiti pravo da postavi pitanje, a da će sud odlučiti da li je isto dozvoljeno ili ne, te da li će dozvoliti odgovor.

Odbrana je, u predmetu **D.V. i dr. Viši sud u Podgorici, K.br.7/10,** [35] više puta isticala i sudu dostavila dokaze da je prilikom oduzimanja dokumentacije od strane policije došlo do ozbiljnih propusta, jer ista nije taksativno nabrojana, pa je nepoznato koja je sve dokumentacija postojala. Činjenica je da nije sačinjen spisak predmetne dokumentacije, što je moglo stvoriti mogućnost za zloupotrebu iste. Okrivljena D.V. izjavila je da su tri osobe imale šifru za ulazak u sistem za odobravanje i podizanje novca, a ne samo ona i tražila je od suda da to i provjeri, međutim, sud u vezi sa tim nije odlučivao.

PRAVO NA EFIKASNU ODBRANU

U predmetu **P. S. i dr. Viši sud Bijelo Polje, Ks.Br.1/08**, takođe je došlo do odbijanja suda da u zapisnik ad litteram unese predlog branioca za izuzeće, a došlo je i do sporenja oko unošenja iskaza okrivljenog (glavni pretres od 20.05.2011). U svim odredbama ZKP-a koje se odnose na sačinjavanje zapisnika kao pravilo je postavljeno da lice koje vodi ispitivanje ili saslušanje unosi iskaze u zapisnik. Zbog toga, uvijek postoji mogućnost neslaganja oko toga šta je stvarno rečeno, posebno kada se radi o dugim iskazima.

Uprkos iskazu svjedoka-oštećenog u predmetu **S. I. i dr. Osnovni sud Podgorica,**[36] da se ne pridružuje krivičnom gonjenju branilac okrivljenog, bez prethodne konsultacije sa svojim klijentom, a nakon što je u trajanju od pola sata odsustvovao sa glavnog pretresa po sopstvenom zahtjevu, obrazloženom time da odbrana u ovoj krivično pravnoj-stvari nije obavezna, započinje sa ispitivanjem svjedoka-oštećenog, tokom kojeg isti izjavljuje da se pridružuje krivičnom gonjenju i postavlja imovinsko-pravni zahtjev isključivo iz tog razloga, što je revoltiran pitanjima postavljenim od strane branioca.
Branilac po službenoj dužnosti u predmetu **F. M. i dr. Osnovni sud u Bijelom Polju, K.br.148/11**, (glavni pretres od 21.06.2011),[37] nije znao identitet okrivljenog kojeg brani. On je naime izjavio da je branilac okrivljenog Ć.G. nakon čega je ga je postupajući sudija opomenuo da je on zapravo branilac okrivljenog R.D. i konstatovao da je "očigledno advokat na suđenje došao nespreman i da se nije upoznao sa predmetom u kojem je postavljen za branioca po službenoj dužnosti".

34 Krivično djelo: Zloupotreba službenog položaja iz čl.416 KZ CG - Krivična djela protiv službene dužnosti, Protiv: M. G., izvršnog direktora AD L. B., I. T. finansijske direktorice, Z. O., predsjednika Sindikata L. B., A. L., glavnog dispečera drumskog saobraćaja, S. J., blagajnice, M. M., referenta blagajničkog poslovanja, Z. V., referenta za obračun zarada i blagajničko poslovanje, R. P., rukovodilac službe za finansijsku operativu i referent naplate u sektoru finansija, Z. N., projektant aplikacija, D. P., rukovodilac radne jedinice finansija, R. D., blagajnice

35 Krivično djelo: Zloupotreba službenog položaja iz čl.416 st.3 KZ CG (Krivična djela protiv službene dužnosti)

36 Krivično djelo: Mučenje iz čl.167.st.3 u vezi st.2 KZ CG

37 Krivično djelo: Nasilničko ponašanje iz čl. 399 KZ CG

Branilac optuženog u predmetu **L.H. Osnovni sud – Rožaje**[38] **K.br.84/11**, u toku glavnog pretresa samo jednom je iskoristio mogućnost da postavlja pitanja svjedocima, nije imao primjedbi na izvedene dokaze, i konačno, u dijelu dopune dokaznog postupka, predložio je samo da se jedno lice sasluša kao svjedok, iako je bio dužan znati da se isto lice ne može saslušati, jer je sve vrijeme prisustvovalo glavnom pretresu, odbrani optuženog i saslušavanju svjedoka.

U predmetu **D.Š., Viši sud u Bijelom Polju - Specijalno odjeljenje za suđenje za krivična djela korupcije, organizovanog kriminala, terorizma i ratnih zločina, Ks. br.16/10**,[39] svjedoku su od strane zastupnika optužbe, više puta bila postavljena ista pitanja i to ona na koja je ovaj svjedok već nedvosmisleno odgovorio. Ovakav način ispitivanja svjedoka koje je usmjeren ka dobijanju povoljnijeg odgovora u korist optužbe, predstavlja primjer loše prakse koju sud treba da spriječi i zaštiti svjedoka od takvog načina ispitivanja, a to u konkretnom nije bio slučaj.

Ukazivanje na pravno nevaljane dokaze

S obzirom na to da je pitanje pravno nevaljanih dokaza istaknuto u velikom broju posmatranih predmeta, smatramo potrebnim da ukaženo na određene stavove odbrane po pitanju istih:

Tokom postupka u predmetu ,,**M", protiv M. M.G., I. M.G., Špira S.L., B. M.G., I. D.M. i Z. M.T. , Viši sud u Podgorici, Ks.br.33/10,**[40] sud je, na predlog odbrane izdvojio iz spisa ovjerene fotokopije zapisnika o saslušanju svjedoka pred sudom Republike Hrvatske. Postupajući po žalbi tužioca, Apelacioni sud je preinačio odluku sudećeg vijeća i odlučio da se ovi iskazi mogu čitati i koristiti kao dokaz u postupku. S obzirom da postupak nije pravosnažno okončan, posmatrački tim nije ulazio u ocjenu ovog pitanja, ali ukazujemo da bi praksa morala biti usaglašena i stavovi nižih i viših sudova po tom pitanju identični. U nastavku postupka, na predlog odbrane izdvojen je dio spisa iz predmeta kao pravno nevaljani dokazi, ali je Apelacioni sud rešenje o izdvajanju dijela spisa, odnosno ovjerenih fotokopija iskaza datih u Hrvatskoj, ukinuo.
Prilikom odlučivanja o načinu izvođenja dokaza u nastavku dokaznog postupka u predmetu **P. S. i dr. Viši sud Bijelo Polje**, **Ks.Br.1/08,** konkretno o predlogu da se dokazni postupak nastavi čitanjem iskaza svjedoka datih neposredno na zapisnik na ranijem glavnom pretresu i čitanjem izvještaja vještaka (koji dokazi su izvedeni na ranije održanom glavnom pretresu, pred vijećem u drugačijem sastavu), sud je odlučivao o ovom predlogu prije saslušanja svih stranaka (u toku prekida glavnog pretresa radi odlučivanja o predlogu za novčano kažnjavanje jednog od branilaca, a prije saslušanja branioca optuženog P.S.). Ovakvo ponašanje suprotno je čl. 329. i čl. 356. ZKP-a, odnosno 317. i 345. tada važečeg ZKP-a.

Problem pravno nevaljanih dokaza istaknut je i u predmetu **Z. A. i dr., Viši sud u Podgorici**. Sud je odlučio da, na predlog odbrane, izdvoji dio spisa koji su sačinjeni u Švajcarskoj, jer prilikom obezbjeđivanja istih nije poštovana zakonom predviđena procedura, čime je u konkretnom predmetu ispoštovani važeći standarda i nacionalni propisi.

U predmetu optuženog **D. R., Viši sud u Podgorici, K.br.10/2010**,[41] na glavnom pretresu pročitan je zapisnik o prepoznavanju osumnjičenog lica, za koji je odbrana tražila da se izuzme iz spisa predmeta

38 Krivično djelo: Teška krađa iz čl. 240. st. 1. tač. 1. u vezi sa čl.49 i čl. 23. st. 2. KZ CG

39 Krivična djela: Stvaranje kriminalne organizacije - Krivična djela protiv javnog reda i mira, Neovlašćena proizvodnja, držanje i stavljanje u promet opojnih droga - Krivična djela protiv zdravlja ljudi i Pranje novca - Krivična djela protiv platnog prometa i privrednog poslovanja KZ CG

40 Krivično djelo: Ratni zločin protiv civilnog stanovništva iz čl. 142. st. 1. KZ SRJ i Ratni zločin protiv ratnih zarobljenika iz čl. 144. KZ SRJ

41 Krivično djelo; Teško ubistvo ubistvo iz čl. 144. st. 1. KZ CG i Pomoć uciniocu posle izvršenja krivičnog djela iz čl. 387 st.3 KZ CG - Krivična djela protiv života i tijela

kao pravno nevaljan dokaz jer je pribavljen suprtno odredbi čl.115 ZKP –a. U konkrednom predmetu, na prepoznavanju lica sa osumnjičenim su bila lica zaposlena u policiji, a to stoji i u samom zapisniku. Dopis koji je upućen od strane policije potvrđuje ove navode da su kod prepoznavanja, odnosno u liniji za prepoznavanje stajala lica zaposlena u policiji, ali da to nisu bila lica koja su ispitivala osumnjičene ili direktno bila vezana za radnje u policiji. Međutim, sama činjenica da su okrivljeni u liniji za prepoznavanje prepoznali službenike policije ukazuje na povredu ZKP-a. Zbog navedenog ovaj dokaz bi morao biti izuzet iz spisa predmeta jer se radi o pravno nevaljanom dokazu.

Prije davanja završnih riječi u predmetu ,,Z", odbrana je dostavila sudu predlog za dopunu dokaznog postupka, tačnije nalaz i mišljenje revizorske kuće iz Beograda doo. ,,P. S.". Zamjenik specijalnog tužioca usprotivio se izvođenju ovog dokaza, iz razloga što je dostavljen u **formi fotokopije** kao i iz razloga što je u toku postupka već angažovan sudski vještak koji se o istom predmetu vještačenja prethodno izjasnio u svom nalazu i mišljenju, sud je odredio pauzu u trajanju od pola sata kako bi izvršio uvid u predloženi dokaz. Sud je prihvation progovor tuzioca nakon što je izvršio uvid u predloženi dokaz, Međutim u predmetu D.V. Viši sud u Podgorici, vještak je dao nalaz i mišljenje na osnovu dokumentacije koju su dijelom činile kopije, a ne originali. Na pitanje branioca okrivljene D.V. vještak je ove navode potvrdio. Na osnovu prethodnog zaključujemo da sud različito postupa u različitim predmetima. Navedeno otvara pitanje rada sudskih vještaka, postupka za njihov izbor i razrešenje, odnosno usklađenosti zakona sa važećim standardima.

U predmetu protiv optuženih **J. M. i dr.**, **Viši sud u Podgorici, K.br.2/11**,[42] na glavnom pretresu u nastavku dokaznog postupka, svjedočio je inspektor u UP PJP Ekspozitura za borbu protiv droge i krijumčarenja, koji je saslušavao jednog od okrivljenih, tačnije R. B. u prisustvu branioca po službenoj dužnosti. Svjedok je istakao da okrivljenog S. M. nije saslušavao, da se u zapisniku sa saslušanja okrivljenog R. B., potkrala tehnička greška, u smislu da je navedeno, da je saslušanje obavio inspektor sa sličnim imenom, odnosno razlikom u jednom slovu, te da osoba pod tim imenom, po njegovom saznanju, nije zaposlena u UP PJP Ekspozitura za borbu protiv droge i krijumčarenja. Okrivljeni S. M. je prigovorio iskazu svjedoka, u smislu da ga isti jeste saslušavao u kancelariji. Okrivljeni R. B. je negirao da je bio u prostorijama za zadržavanje, kako je navedeno u zapisniku, već da je bio 2.00 h u službenoj kancelariji, a naveo je da mu tokom saslušanja inspektor ni u jednom momentu nije saopštavao njegova prava u postupku. Sud je donio rješenje da se iz spisa predmeta izuzme zapisnik o saslušanju R. B. kao pravno nevaljan dokaz i da se u nastavku dokaznog postupka izvrši uvid u svesku, koja je predložena kao dokaz od strane okrivljenog R.B.

Okrivljeni **B. Z., Viši sud u Podgorici, K.br.145/11,**[43] predao je sudu podnesak kojim traži ispravku zapisnika sa glavnog pretesa od 20.12.2011. godine u odnosu na svjedočki iskaz V. R. Punomoćnik oštećene porodice smatra da se zbog protoka vremena od 2 mjeseca, ne može precizno utvrditi šta je svjedok V. R. naveo u svom svjedočkom iskazu na prethodnom glavnom pretresu, a da to nije ušlo u zapisnik. Sud je nakon pauze za vijećanje, odlučio da se uvaži zahtjev okrivljenog i predlog odbrane i odlučio da se u nastavku dokaznog postupka svjedok V.R. pozove i da precizira kontekst i slijed događaja svog iskaza. Branilac okrivljenog iznio je primjedbu da zbog nedostatka tehničkih sredstava – LCD monitora na kojim bi, sve stranke u postupku pratile unošenje u zapisnik sa glavnog pretresa, dolazi do ovakvih propusta. Nakon što je branilac okrivljenog sudu priložio nove dokaze-kopije Dnevnog biltena UP i tri službene zabilješke, punomoćnik oštećene porodice se usprotivio izvođenju ovih dokaza, smatrajući da su isti pribavljeni protivno ZKP. Sud je potom donio rješenje da se u nastavku dokaznog postupka službenim putem pribave predloženi dokazi.

U predmetu **S. B. i dr. Viši sud u Podgorici, Ks.br.1/12**[44] odbrana je prigovorila i valjanosti listinga telfon-

42 Krivično djelo; Neovlašćena proizvodnja, držanje i stavljanje u promet opojnih droga u pokušaju iz čl.300 st.2 KZ CG - Krivična djela protiv zdravlja ljudi

43 Krivično djelo: Ubistvo iz čl.143 KZ CG - Krivična djela protiv života i tijela

44 Krivična djela: Ubistvo iz čl.143 KZ CG i čl.143 u vezi sa čl.24 KZ CG, Izazivanje opšte opasnosti iz čl.327, st.1 KZ CG;

skih razgovora koji su pribavljeni mjerama tajnog nadzora, uz obrazloženje da su isti dostavljeni odbrani u 2 različita formata i da se iz listinga vidi da su "stari" i do 4 godine od izvršenja predmetnog krivičnog djela. Ovo ne bi trebalo da je moguće, imajući u vidu zakonske propise koji su bili na snazi u vrijeme prikupljanja ovih dokaza, a koji su nalagali mobilnim operaterima da ove podatke čuvaju najviše 2 godine.

U predmetu **I. R., Viši sud u Podgorici, K.br.28/12,**[45] odbrana je navela da ima saznanja da je predsjednica vijeća, mimo glavnog pretresa, naložila da se sprovede istražna radnja vještačenja uređaja sa SIM karticom, marke „BMW" koja radnja nije izvedena tokom tužilačke istrage, niti predložena u optužnici, a koje navode monitoring tim nije uspio provjeriti do zaključenja izvještaja.

PRAVO NA NEZAVISAN I NEPRISTRASAN SUD

Posmatrački tim nije uočio direktne dokaze nedozvoljenih uticaja na sud izuzev u predmetu: **R.K. i dr. Viši sud u Podgorici**, **KS.br.8/11**[46]gdje je optuženo više okrivljenih za više krivičnih djela, uglavnom iz grupe krivičnih djela protiv službene dužnosti. Prije početka glavnog pretresa branioci su obavijestili sud da je Ustavni sud Crne Gore prihvatio njihovu inicijativu i poništio rešenja o produženju pritvora protiv pojedinih okrivljenih i insistirali da se oni odmah puste na slobodu. Ne ulazeći u opravdanost odluke Ustavnog suda, postavlja se pitanje kako je moguće da branioci okrivljenih dođu do originala odluke prije nego što je odluka dostavljena Apelacionom sudu, čije je rešenje o pritvoru i ukinuto, odnosno Višem sudu u Podgorici. Sva komunikacija u ovakvim situacijama odvija se preko prvostepenog suda. Glavni pretres je prekinut i nastavljen narednog dana kada je krivično vijeće ponovo odredilo pritvor protiv okrivljenih i to iz istih razloga kao i ranije. U toku glavnog pretresa, pritvor je ukinut i to od strane Apelacionog suda koji je postupao po žalbi na rešenje Višeg suda. U međuvremenu, zbog podnešenog predloga za izuzeće sudećeg sudije i predsjednika Višeg suda u Podgorici, pretres je bio prekinut i nastavljen je nakon što je predlog za izuzeće odbijen. Mora se reći da sva događanja u vezi sa produženjem i ukidanjem pritvora ostavljaju jednu neprijatnu sliku o ponašanju državnih organa i to u jednom izuzetno složenom i društveno interesantnom predmetu. Produženje pritvora od strane Višeg i njegovo ponovno ukidanje od strane Apelacionog može dovesti do sumnje: da je vršen uticaj na sudove posebno na Apelacioni koji na osnovu potpuno istog činjeničnog stanja donosi dvije različite odluke.

U ovom predmetu, došlo je i do rasprave o tome da li se kazivanja učesnika u postupku vjerno unose u zapisnik, do rasprava između tužioca i odbrane da li se neki dokazi mogu predočiti okrivljenom prilikom ispitivanja, do glasnog komentarisanja pitanja i odgovora, oduzimanja riječi, brojnih opomena. Član 321. ZKP-a jasno propisuje ovlašćenja i obaveze predsjednika vijeća, odnosno sudećeg sudije u slučaju kršenja procesne discipline: opomena, novčana kazna, udaljavanje i nije jasno zbog čega sud nije primijenio odredbe ovog člana. Jedan od branilaca je izjavio da nije uplašen opomenom suda nakon čega je, po mišljenju posmatračkog tima, morao biti odmah udaljen iz sudnice sa uskraćivanjem prava da se pojavljuje u postupku, jer ovakva izjava znači da će i nastaviti da se tako ponaša, što se u daljem toku pretresa i potvrdilo, ali takođe bez posledica.

Iznuda iz čl.250, st.1 KZ CG

45 Krivično djelo: Teško ubistvo iz čl.144, st.1, tačka 8 KZ CG Krivična djela protiv života i tijela

46 Krivična djela protiv službene dužnosti : Zloupotreba službenog položaja iz člana 416 stav 3 u vezi stava 1 i člana 416 stav 1 Krivičnog zakonika, zloupotreba službenog položaja iz člana 416 stav 3 u vezi stava 1 Krivičnog zakonika, zloupotreba službenog položaja putem pomaganja iz člana 416 stav 3 u vezi stava 1 u vezi člana 25 Krivičnog zakonika, zloupotreba ovlašćenja u privredi iz člana 276 stav 2 u vezi stava 1 tačka 5 Krivičnog zakonika, zloupotreba službenog položaja putem podstrekavanja iz člana 416 stav 1 u vezi člana 24 Krivičnog zakonika , utaja poreza i doprinosa iz člana 264 stav 3 u vezi stava 1 Krivičnog zakonika.

U predmetu **M. G. i dr., Viši sud u Podgorici - Specijalno odjeljenje za suđenje za krivična djela organizovanog kriminala, korupcije i ratnih zločina, Ks.br.08/09,**[47] prilikom ispitivanja svjedokinje G., sekretarice finansijske direktorke, branilac optužene T., prigovorio je pitanju koje je predsjednica vijeća postavila, a koja pitanja su se odnosila na režim donošenja i otpravljanja odluka koje su obuhvaćene optužnicom. Ovo sa razloga što je branilac smatrao da bi svjedokinja, iako uredno upoznata sa pravima i dužnostima svjedoka, te čl.111 ZKP-a, davanjem odgovora na data pitanja, mogla sebe izložiti eventualnoj krivičnoj odgovornosti, a kod činjenice da je pravno neuka, te da ne može procijeniti da li treba da uskrati odgovor na postavljeno pitanje ili ne. Nakon prigovora branioca, predsjednica vijeća odustala je od postavljenog pitanja i još jednom poučila svjedokinju na pravo da ne svjedoči o određenim okolnostima i pod kojim uslovima to može učiniti. Važno je istaći da u vezi sa navedenim tužilac nije imao primjedbi.

U predmetu **V.L. i dr., Viši sud u Podgorici, K.br.206/11**,[48] odbrana je ukazivala na odluku Vrhovnog suda Crne Gore, koji je postupao po žalbi na drugostepenu presudu kao sud trećeg stepena. Do zaključenja ovog izvještaja, monitoring tim nije uspio izvršiti uvid u presudu Apelacionog suda po zahtjevu za slobodan pristup informacijama.

Predmet **D.V. i dr., Viši sud u Podgorici, K.br.7/10,** [49] ostavlja prostor za sumnju u nezavisan i nepristrasan sud. Treba posebno istaći da vještak sjedi u sudnici cijelo vrijeme tokom više pretresa i to pored tužioca. Odbrana je ukazivala na ovo, međutim objašnjeno je od strane predsjednika vijeća da on mora biti tu da odgovara na postavljena pitanja, kako bi pojasnio dati nalaz i mišljenje. Međutim, vještak je u sudnici i kada se izvode drugi dokazi, a dana 30.11.2011. godine bio je prisutan za vrijeme kada je svjedok D. G. davao iskaz, gdje nije bilo potrebno njegovo prisustvo, a što može dovesti u pitanje nepristrasnost suda u konkretnom predmetu.

PRISTUP SUDU

Prije svega treba istaći da je stanje zgrada i prostora u kojima se odvijaju suđenja generalno nezadovoljavajuće. U Bijelom Polju i Podgorici, viši sudovi dijele zgradu sa drugim sudovima (u Bijelom Polju sa Osnovnim sudom, u Podgorici sa Apelacionim i Vrhovnim sudom). Suđenja se odvijaju mahom u kancelarijama koje su neuslovne i predstavljaju svojevrsan vid ograničenja javnosti. Većina sudova nema vezu sa pritvorskim prostorijam, tako da se pritvorenici dovode i kroz zgradu provode u pratnji zatvorskih službenika i policije. U sudovima se stvara gužva jer su, pored učesnika u postupcima prisutna i druga lica. Ponašanje sudskog osoblja koje obezbjeđuje zgradu i kontroliše prisutne je različito i varira od djelimičnog odsustva kontrole (npr. u Bijelom Polju službenici na vratima često ne postavljaju nikakva pitanja, do vrlo oštre kontrole npr. u Višem sudu u Podgorici), pri čemu se mora navesti da se u komunikaciji sa strankama ponašaju profesionalno. Ni u jednom sudu nema posebne prostorije za svjedoke, a prostorije za privedena lica, tamo i gdje ih ima su male i nedovoljne. Ovim se stvara mogućnost da okrivljeni i svjedoci komuniciraju u hodniku, što može dovesti u pitanje valjanost njihovih kasnijih iskaza. U pojedinim sudskim zgradama uočeni su problemi sa funkcionalnošću toaleta za stranke, što je neprihvatljivo na mjestima na kojima se okuplja veliki broj ljudi. Infrastruktura je posebno loša u Osnovnom sudu u Podgorici ili je barem najuočljivija, jer je to sud sa najviše predmeta, a samim tim i sa najviše stranaka. Niz sudnica pretvoren je u kancelarije, a niz kancelarija u kojima se sudi su neuslovne. Relativno adekvatne sudnice su u Bijelom

47 Krivično djelo: Zloupotreba službenog položaja iz čl.416 KZ CG - Krivična djela protiv službene dužnosti, Protiv: M. G., izvršnog direktora AD L. B., I. T. finansijske direktorice, Z. O., predsjednika Sindikata L. B., A. L., glavnog dispečera drumskog saobraćaja, S. J., blagajnice, M. M., referenta blagajničkog poslovanja, Z. V., referenta za obračun zarada i blagajničko poslovanje, R. P., rukovodilac službe za finansijsku operativu i referent naplate u sektoru finansija, Z. N., projektant aplikacija, D. P., rukovodilac radne jedinice finansija, R. D., blagajnice

48 Krivično djelo: Teško ubistvo iz čl.30 KZ SRJ – Krivična djela protiv života i tijela

49 Krivično djelo: Zloupotreba službenog položaja iz čl.416 st.3 KZ CG (Krivična djela protiv službene dužnosti)

Polju i Podgorici, ali se mora istaći da, izuzev u Višem sudu u Podgorici, održavanje sudnica nije adekvatno. U svim sudovima, kada se suđenje odvija u kancelarijama, uslovi su potpuno neadekvatni: nema dovoljno prostora za stranke, punomoćnici i branioci drže spise na koljenima, atmosfera je zagušljiva. U svim sudovima objavljen je raspored suđenja, negdje nedjeljni, a negdje mjesečni. U sudovima ne postoje garderobe što, posebno u zimskim uslovima u sudovima u Bijelom Polju i Rožaju stvara dodatne probleme. Takođe, vrlo je teško pronaći parking prostor. Posmatrački tim je svjestan da se ovdje radi o nedostatku sredstava i da se odgovornost ne može pripisati sudovima ili barem ne samo njima. Međutim, sve ovo ostavlja jednu sliku neprofesionalizma i svakako ne doprinosi ugledu suda. Pored toga, postavlja se pitanje pristupa sudu koji je svakako otežan.

Glavni pretres u predmetu S. I. i dr. Osnovni sud Podgorica[50] vođen je u kancelariji koja nije mogla da primi sve učesnike u postupku, tako da su jedan službenik ZIKS-a i jedan svjedok, morali stajati tokom trajanja glavnog pretresa. Kako se u velikoj sudnici Osnovnog suda u Podgorici izvode građevinski radovi na njenoj adaptaciji, to se nije mogao obezbijediti adekvatan prostor.

Glavni pretres u predmetu **V.N.Osnovni sud u Podgorici,**[51] zbog brojnosti učesnika u postupku održan u velikoj sudnici Osnovnog suda u Podgorici koja nije klimatizovana, tako da su zbog visoke temperature uslovi rada bili izuzetno teški, faktički na granici mogućeg. Primjedbe na uslove današnjeg višesatnog rada dolazile su kako od advokata tako i od samog sudije koji je tražio da posmatrač konstatuje u kakvim se uslovima radi. U toku trajanja glavnog pretresa, na insistiranje sudije, služena je voda strankama u postupku, kako bi se uslovi za rad učinili koliko toliko podnošljivim, ali nije dozvoljeno da se vrata sudnice drže otvorenim, što je tražila zapisničarka koja je bila u vidno lošem stanju.

Neposredno pred početak zakazanog glavnog pretresa u predmetu **B.I. i dr. Viši sud u Podgorici,**[52] posmatrač je pokušao da dobije informacije o zakazanim suđenjima od pripadnika obezbeđenja suda. Posmatraču je rečeno da mu se ne može staviti na uvid spisak zakazanih ročišta do kraja tekućeg mjeseca (u prethodnim slučajevima taj spisak je bio dostupan posmatračima), uz obrazloženje da se ta informacija može dobiti samo za konkretan datum.

Problem arhitektonskih barijera u prvom dijelu monitoringa postojao je u svim sudovima u Crnoj Gori, ali je tokom drugog dijela napravljen pomak na način da su dva suda, jedan u kojem nije vršen monitoring, Osnovni sud u Nikšiću, tokom jula mjeseca obezbijedio je pristupnu rampu za lica koja se otežano kreću, a Osnovni sud u Podgorici, ovu zakonsku obavezu poštuje od septembra mjeseca ove godine. Treba naglasiti da se ovaj nedostatak mora otkloniti i u svim drugim sudovima do 2013. godine, shodno odredbi čl.165 Zakona o uređenju prostora i izgradnji objekata.

PRAVO NA UPOTREBU JEZIKA KOJI SE RAZUMIJE

Posmatrački tim nije uočio kršenje ovog prava u prvom dijelu posmatračkog izvještaja. Međutim, u drugom dijelu, u predmetu **M.P. Viši sud u Podgorici,**[53] odbrana je prigovorila iskazu svjedoka F., tražeći da se iz spisa predmeta izdvoje zapisnici o saslušanju ovog svjedoka kod istražnog sudije Osnovnog suda u Baru, Ki.br. 125/99, kao i zapisnik sa glavnog pretresa pred Osnovnim sudom u Baru kao pravno nevaljani. Zapisnike posebno treba izdvojiti imajući u vidu iskaz dat na glavnom pretresu koji se u bitnom razlikuje u odnosu na ranije dat iskaz, te činjenicu da kod davanja ranijih iskaza, svjedok nije bio upoznat sa pravom da iskaz može dati na jeziku koji razumije, već ih je dao na zvaničnom jeziku suda.

50 Krivično djelo: Mučenje iz čl.167. st.3 u vezi st.2 KZ CG

51 Krivično djelo: Zloupotreba službenog položaja iz čl.416. st. 5 KZ CG

52 Krivično djelo: Razbojništvo iz čl.242, st. 4 KZ CG

53 Okrivljeni: G. A., B. S., B. I., B. R., N. J., Đ. G., R. H.

PROCESNA DISCIPLINA

U predmetu **S.B. i dr. Ks.br.1/12**, zbog kršenja procesne discipline, uzimanjem riječi bez odobrenja suda, braniocu je izrečena opomena na zapisnik. Zbog ometanja procesne discipline, u istom predmetu, a nakon usmene opomene predsjednice vijeća, iz sudnice su udaljeni članovi porodice pok.oštećenog.

Tokom glavnog pretresa u predmetu **V.N. Osnovni sud u Podgorici,**[54] sudija je pažljivo vodio računa o procesnoj disciplini stranaka i više puta je upozoravao kako svjedoka oštećenog, tako i branioce okrivljenog i okrivljene da ne komuniciraju neposredno, već putem suda, a tužioca, branioca okrivljenog i okrivljene da ne postavljaju sugestivna pitanja.

PONAŠANJE SUDIJA I SUDSKOG OSOBLJA[55]

U toku vršenja monitoringa, zapaženo je da se sudije mimo sudnice ili kancelarije u kojoj se sudi, ponašaju u granicama profesionalnosti i drže do ugleda suda. U principu, sudije ne komuniciraju sa strankama u hodnicima sudova, što smatramo pozitivnim. Međutim, u jednom broju sudova, u kojima se suđenja održavaju u malim kancelarijama, često dolazi do *ex parte* komunikacije između suda i tranaka, kao i između samih stranaka, koja podstiče osjećaj neformalnosti i može negativno uticati na percepciju nezavisnosti i nepristrasnosti sudstva. Izgradnja potrebnog broja sudnica koje mogu primiti zainteresovanu javnost stoga treba da ima prioritet.

OBAVJEŠTENJA O PRAVIMA

Na info punktovima u sudu nalazi se dovoljan broj brošura za žrtve i svjedoke krivičnih djela, putem kojih se isti mogu upoznati sa svojim pravima i obavezama. Vodič za pristup informacijama u posjedu Osnovnog suda u Podgorici, takođe je dostupan, kao i vrste informacija koje se u njegovom posjedu, proceduri pristupa informacijama, načinu ostvarivanja prava na pristup informacijama, rešavanje po zahtjevu i pravna zaštita, kao i informacije o troškovima postupka.

Brošura o nevođenju krivičnog postupka daje informacije zainteresovanim licima kako da brzo i jednostavno dođu do uvjerenja o nevođenju krivičnog postupka.

Dajući informacije o zaštiti prava na suđenje u razumnom roku, brošura pojašnjava šta predstavlja konkretno pravo, kada se i pod kojim uslovima podnosi tužba za pravično zadovoljenje, odlučivanje po istoj, informacije o ustavnoj žalbi i predstavci Evropskom sudu za ljudska prava.

Na info punktovima u Osnovnom sudu u Podgorici, dostupna je brošura o načinu ostvarivanja prava na besplatnu pravnu pomoć, kojom se zainteresovana lica upućuju na to, ko su pružaoci usluga besplatne pravne pomoći, pod kojim se uslovima i u kom postupku usluge besplatne pravne pomoći odobravaju, sve u skladu sa Zakonom o besplatnoj pravnoj pomoći.

Međutim, LCD monitori uz raspored glavnih pretresa i ročišta, sada dodatno emituju i druge sadržaje: obavještenje o lokaciji službe besplatne pravne pomoći; obavještenje o brošurama dostupnim na info--punktovima; poziv za iznošenje ličnog mišljenja putem letka za sugestije; kontakt informacije i radno vrijeme suda i pisarnica**.**
Sud obavještava stranke i druge učesnike u postupku o svim relevantnim pitanjima i čini im dostupnim informacije različite sadržine, kao što su dopisi Advokatske komore Crne Gore ili slično.

54 Krivično djelo: Zloupotreba službenog položaja iz čl.416. st. 5 KZ CG

55 U ovom dijelu ne govorimo o ponašanju sudija tokom suđenja, već samo u odnosu na ponašanje u zgradama sudova.

ZAKLJUČNE OCJENE POSMATRAČKOG TIMA

Posmatrački tim je kroz opise posmatranih predmeta već naveo određena zapažanja koja se tiču poštovanja prava na pravično suđenje u tim postupcima. Uzimajući u obzir činjenicu da se monitoring sprovodio samo za period od podignute optužnice do završetka glavnog pretresa, te da u posmatranim predmetima nisu donijete pravosnažne presude, monitoring tim će nastaviti da prikuplja informacije o žalbama i drugostepenim presudama i obavještava javnost o relevantnim činjenicama. U ovom dijelu, ukazaćemo na određene povrede prava na pravično suđenje, ali i na određene tendencije koje bi, po našem mišljenju, trebalo spriječiti ili izbjeći.

NAČELO JAVNOSTI

U odnosu na javnost postupka posmatrački tim nije uočio kršenja. Sudovi načelo javnosti glavnog pretresa poštuju koliko god im to omogućavaju prostorni kapaciteti. Evidentno je da sudovi imaju problem prostornog kapaciteta sudnica, kojih nema u dovoljnom broju i zbog kojih se nekada glavni pretresi održavaju u kancelarijama sudija. Ovaj problem na određen način utiče na ograničavanje prisustva javnosti ali i na kasnije zakazivanje predmeta, u dane kada je sudnica slobodna. Kod ovakve situacije načelo javnosti glavnog pretresa u nekim slučajevima je ograničeno i pored činjenice da se sudije trude da omoguće pristup najvećem mogućem broju zainteresovanih lica.

Kada je u pitanju načelo javnosti rada suda, u posmatračkom periodu zapaženo je više izmjena koje u bitnom unapređuju javnost rada Osnovnog i Višeg suda u Podgorici, a odnose se prije svega na LCD monitore postavljene u paru, u holu prizemlja i na svim spratovima suda, putem kojih se emituje raspored ročišta u parničnom, na jednom LCD monitoru, odnosno glavnih pretresa u krivičnom postupku, na drugom LCD monitoru. Takodje, u holu prizemlja su vidno istaknute: Oglasna tabla parničnog odjeljenja, oglasna tabla sudskih vještaka, tumača i medijatora, oglasna tabla krivičnog odjeljenja i oglasna tabla izvršnog odjeljenja. Osnovni sud u Podgorici je izabran kao pilot projekat koji treba da poveća stepen javnosti rada suda. Kod činjenice da su rezultati vrlo jasni i vidljivi od samog početka realizacije projekta, to bi Osnovni sud u Podgorici trebalo da bude modul javnosti rada svih sudova u Crnoj Gori.

PRAVO NA SUĐENJE U RAZUMNOM ROKU

Sudovi zakazuju glavne pretrese u razumnim rokovima, u skladu sa ZKP-om. Međutim, često se glavni pretresi odlažu zbog nediscipline stranaka i odbrane.

U toku monitoringa, uočeno je da je u jednom predmetu došlo do odlaganja glavnog pretresa usled ,,službene zauzetosti" jednog od branilaca što je, po našem mišljenju, neprihvatljivo, posebno u predmetima sa više optuženih i više branilaca.

Pretres u predmetu C. N. i dr. Osnovni sud u Kotoru[56] odložen je zbog zauzetosti branioca na kongresu političke partije kojoj pripada. Ovakvo odlaganje je po mišljenju monitoring tima neprihvatljivo. Naime, ako sud hoće da bude nepristrasan, onda bi morao prihvatiti svaki takav zahtjev, a to bi značilo da skupovi političkih partija imaju prednost nad zakazivanjem suđenja.

Ukazujemo na teško kršenje prava na suđenje u razumnom roku, jer je presuda za krivično djelo krađe

56 Krivična djela protiv službene dužnosti: krivično djelo: Posluga iz čl.421. KZ i krivično djelo: Prevara iz čl.244.st.3. u vezi st.1 KZ CG

donešena usled apsolutne zastare koji rok iznosi 10 godina. Činjenica da se postupak nije mogao okončati u toliko dugom periodu ukazuje na neodgovoran rad svih državnih organa koji su u postupku učestvovali.

I u drugom dijelu monitoringa, u više predmeta glavni pretres nije održan zbog neispunjavanja procesnih pretpostavki, odnosno zbog toga što Uprava Policije nije postupila po naredbi za prinudno dovođenje okrivljenog lica, niti je sud obaviješten o razlozima za nepostupanje, pa je sud stoga morao slati urgencije kako bi bilo postupljeno po naredbi. Sud često nije ni obaviješten o razlozima nepostupanja po naredbi za dovođenje. Uočeno je u više predmeta da branioci nisu došli na glavni pretres, a uredno su obaviješteni. Na ovu pojavu, prije početka monitoringa, pokušalo se uticati izricanjem visokih novčanih kazni, ali ta pojava i dalje postoji u određenom broju. U velikom broju slučajeva sudu se na poziv ne odazivaju ni svjedoci u krivičnim postupcima iako su uredno pozvani pozivom za svjedočenje na glavnom pretresu ili su obaviješteni na prethodnoj raspravi. Navedeno govori o nepoštovanju i visokom stepenu neodgovornosti koji bi mogao da se prevaziđe strogim sankcionisanjem svih koji ne postupaju po nalogu, odnosno pozivu suda, a da za to nisu imali valjano opravdanje.

Primjetno je da u odnosu na početak monitoringa, u njegovom završnom dijelu, sudovi, kada se ispune uslovi, odmah izdaju naredbu za prinudno doviđenje, bez obzira u kojem svojstvu učestvuje u postupku lice koje na uredne pozive suda ne dolazi na glavni pretres.

U jednom dijelu posmatračkog perioda određeni broj glavnih pretresa nije održan zbog štrajka u sudovima, a koji je bio prouzrokovan vrlo lošom materijalnom situacijom zaposlenih u sudskoj administraciji. Za cijelo vrijeme štrajka rad u sudovima je bio organizovan u hitnim predmetima.

U toku posmatračkog perioda određen broj glavnih pretresa nije održan zbog nedolaska okrivljenih na glavni pretres, iako su uredno obaviješteni o danu i času održavanja istog, pa je usled neispunjavanja procesnih pretpostavki glavni pretres odložen. U nekim predmetima, nakon što okrivljeni budu poučeni od strane suda o svojim pravima, između ostalih i da mogu angažovati branioca, okrivljeni tada zatraže odlaganje glavnog pretresa, smatrajući da im je branilac potreban. Sud uvijek prihvata ovakve zahtjeve okrivljenih i odlože glavni pretres, sa upozorenjem da će sledeći glavni pretres biti održan i da u ostavljenom roku angažuje branioca.

Nekada glavni pretres bude odložen zbog nedolaska sudskih vještaka, koji uredno obavijeste sud da nisu u mogućnosti, zbog poslovnih obaveza da u zakazanom terminu prisustvuju glavnom pretresu.

Branioci okrivljenih u sudskim postupcima su u više predmeta praćenih u posmatranom periodu tražili odlaganje, uglavnom zbog obaveza u drugim sudovima, na drugim glavnim pretresima, a sud je te zahtjeve odbrane najčešće prihvatao. Takođe, evidentirana je situacija da je glavni pretres odložen jer ni optuženi ni oštećeni nisu došli na glavni pretres, a u spisima predmeta nije bilo dokaza o urednoj dostavi. Branioci okrivljenih su u nekoliko slučajeva-koliko novčano kažnjeni zbog nedolaska na glavni pretres i to iznosom od 500,00 eura. U nekim od tih predmeta branioci su uredno obavjestili sud da ne mogu pristupiti u zakazanom terminu za glavni pretres zbog drugih glavnih pretresa i dostavili dokaze za to, međutim, sud im je izrekao novčane kazne.

Svi ovi razlozi, kojima nekada doprinose i sami okrivljeni, ukupno utiču na njihova prava na suđenje u razumnom roku. U velikom broju predmeta dolazi do čestih neopravdanih odlaganja, odnosno do situacija da se pretresi odlažu zbog nedolaska stranaka, branilaca, čak i sudija bez ikakve sankcije. Ne može se prihvatiti da je neko zaboravio na suđenja, da se branioci ne pojavljuju zbog obaveza u drugim predmetima, ili zbog obaveza prema političkim strankama. Dakle, sud mora odložiti pretres ukoliko nijesu ispunjene procesne pretpostavke za njegovo održavanje, ali mora preduzeti odgovarajuće mjere da takvo ponašanje

sankcioniše. Ovdje ponovo ukazujemo na predmet iz Osnovnog suda u Podgorici koji se sudi preko osam godina, kao i predmet iz istog suda u kojem je postupak okončan zbog zastare, kao i predmet iz Višeg suda u kojem odluka u prvom stepenu nije donesena punih 16 godina. Ovakva ponašanja automatski dovode do kršenja prava na suđenje u razumnom roku i ako sudovi ne budu djelovali u skladu sa zakonskim ovlašćenjima, situacija će biti samo gora. Svaki učesnik u postupku, posebno u postupcima gdje je više okrivljenih, oštećenih, branilaca i svjedoka, mora biti svjestan da nedolazak proizvodi u najmanju ruku velike troškove i da će biti strogo sankcionisan ako je neopravdano odsutan.

PRETPOSTAVKA NEVINOSTI

Sudovi pretpostavku nevinosti poštuju.

Vještak je u jednom predmetu ušao u ocjenu dokaza i iznio stav prema okrivljenoj, čime je izašao iz pravila struke i prekršio pretpostavku nevinosti u krivičnom postupku. Međutim, ni u drugom dijelu izvještaja od strane medija pretpostavka nevinosti nije uvijek poštovana. Ovakvo ponašanje je nedopustivo za bilo kojeg učesnika u postupku, a kada je to učinjeno od strane sudskog vještaka, koji svojim nalazom i mišljenjem, zasnovanim isključivo na pravilima struke, treba da ,,pomogne" sudu, kako bi se pravilno utvrdilo činjenično stanje, a koji nesporno krši pretpostavku nevinosti, nedopustivo je. Zbog navedenog, neophodno je ukazati medijima na obavezu poštovanja pretpostavke nevinosti, i posebno naglasiti da novinar mora poznavati standarde u oblasti u kojoj izvještava.

RAVNOPRAVNOST STRANAKA U POSTUPKU-JEDNAKOST ORUŽJA

Ravnopravnost stranaka u krivičnom postupku je pravo koje je u toku posmatranog perioda uglavnom bilo poštovano od strane suda, koji je uredno upozoravao stranke da na glavnom pretresu mogu predlagati dokaze. Međutim, posmatrački tim je uočio i situacije u kojima se načelo ravnopravnosti stranaka moglo različito tumačiti, ali ne u mjeri koja bi mogla uticati na pravičnost suđenja.

Ukoliko je uskraćena mogućnost jednoj strani da pred sudom iznese svoje stanovište i tvrdnje i da se suprostavi stavovima i tvrdnjama druge strane dolazi do povrede načela kontradiktornosti na neposredan način, a dovedi se u pitanje i procesna ravnopravnost stranaka. **Strane u sporu ili optuženi za krivično djelo ne smiju se dovoditi u značajno lošiji položaj u odnosu na suprotnu stranu.** Shodno članu 282. ZKP-a tužilac je bio dužan da na pogodan način obavijesti stranke u postupku o ovom saslušanju kako bi iste mogle prisustvovati i postavljati pitanja.

Branioci okrivljenog su insistirali na tome da se i pitanja unose u zapisnik što ima svoju logiku: kako će se u žalbi istaći da je sud dozvolio odgovor na nedozvoljeno pitanje, ako tog pitanja nema na zapisniku (glavni pretres od 19.07.2011).

U predmetu **S.K., Viši sud u Podgorici, K.br.86/11,**[57] vještak balističke struke izjašnjavajući se o vatrenom oružju koje je dostavljeno na vještačenje (4 vatrena oružja i 8 čaura koje su preuzete sa mjesta izvršenja krivičnog djela), nije mogao da se precizno izjasniti o udaljenosti sa koje su ispaljeni vatreni hici, njihovoj putanji, te vezi između mjesta ispaljivanja hitaca i mjesta na kojem su pronađene čaure. Sud je zbog toga naložio dopunsko balističko vještačenje, na temelju ukupnih spisa predmeta koji će biti dostavljeni vještaku. Takođe, odlučeno je da se na sledeće ročište za glavni pretres pozovu vještaci grafološke i hemijske struke, kako bi odgovarali na pitanja optužbe i odbrane. Kako **vještak** nije u pisanoj formi pripremio dopunu

57 Krivično djelo: Ubistvo iz čl.143 KZ CG - Krivična djela protiv života i tijela

nalaza i mišljenja, već je istu direktno diktirao na zapisnik, na zahtjev tužioca, glavni pretres je odložen. Zapisnik u ovom slučaju predstavlja dodatni nalaz i mišljenje sudskog vještaka, pa je neophodno da se sa njim stranke u postupku bliže upoznaju kopiranjem zapisnika sa glavnog pretresa i izjašnjenjem na isti.

Odbrana je, u predmetu **D.V. i dr. Viši sud u Podgorici, K.br.7/10,** [58] više puta isticala i sudu dostavila dokaze da je prilikom oduzimanja dokumentacije od strane policije došlo do ozbiljnih propusta, jer ista nije taksativno nabrojana, pa je nepoznato koja je sve dokumentacija postojala. Činjenica je da nije sačinjen spisak predmetne dokumentacije, što je moglo stvoriti mogućnost za zloupotrebu iste. Okrivljena D.V. izjavila je da su tri osobe imale šifru za ulazak u sistem za odobravanje i podizanje novca, a ne samo ona i tražila je od suda da to i provjeri, međutim, sud u vezi sa tim nije odlučivao. Na ovaj način, neprovjeravanjem navoda okriljene i neizjašnjavanjem suda o istima, stranke u postupku se mogu dovesti u nejednak položaj.

U vezi sa prethodnom tačkom, posebno treba ukazati da su prisutni stalni problemi odbrane sa fotokopiranjem spisa. U većini sudova moraju se podnijeti posebne molbe za fotokopiranje spisa predmeta, a onda se mora čekati da se spisi fotokopiraju što je posebno teško (a zahtijeva i izvjesne troškove za stranku) u složenim predmetima gdje postoji veliki broj dokumenata. Ovdje se jednako krši pravo na jednakost oružja, kao i pravo na pristup sudu. Ista je situacija i sa kopiranjem zapisnika, kako iz istrage tako i sa glavnog pretresa. Ako je zakonsko rešenje da samo pravosnažno osuđeno lice snosi troškove postupka, i to u određenom dijelu, nije jasno zbog čega mora plaćati fotokopiranje da bi došlo do zapisnika i drugih pismena koja su od značaja za odbranu. Na ovaj način krši se pravo na jednakost oružja i na efikasnu odbranu, ali i dovodi u pitanje pretpostavka nevinosti. Mišljenja smo da država nema pravo da nekoga stavi pod krivični postupak, da ga smatra nevinim dok se suprotno ne dokaže, a da od njega traži da unaprijed snosi troškove dobijanja onoga na što ima pravo.

PRAVO NA EFIKASNU ODBRANU

Pravo na odbranu sudovi poštuju. Sud ostavlja dovoljno vremena odbrani da se upozna sa sadržinom spisa predmeta.

U određenim situacijama, pojavila se dilema da li branilac ili tužilac, odnosno okrivljeni i oštećeni mogu, nakon postavljenog pitanja, a prije davanja odgovora intervenisati u smislu da se zabrani odgovor. Po našem mišljenju, ovo se može dozvoliti: nije striktno zabranjeno, a ovlašćenje predsjednika vijeća da odluči o dozvoljenosti se ne dovodi u pitanje. Monitoring tim svoje mišljenje temelji na načelu raspravnosti, koje daje mogučnst da u svim fazama postupka svaka krivičnoprocesna stranka ima mogučnost da u odgovarajučim procesnim formama iznosi svoje stavove kako u odnosu na krivični predmet, tako i u odnosu na sva druga pitanja u krivičnom postupku, a posebno u pogledu formalno izraženih stavova suprotne stranke. Dakle, sud ima obavezu da omogući raspravljanje krivične stvari, na koji način se ostvaruje suštinska svrha krivičnog postupka, da se kroz raspravljanje o krivičnom predmetu-pretresanje utvrde sve relevantne činjenice, iako konačan zaključak daje sud.

Član 350. ovalšćuje predsjednika sudećeg vijeća da zabrani odgovor na nedozvoljeno pitanje. Kvalitet odbrane je u direktnoj vezi sa poštovanjem prava na pravično suđenje. Na ove okolnosti ukazujemo kako iz razloga prava na pravično suđenje koje podrazumijeva i efektivnu odbranu, tako i iz razloga neprofesionalnog ponašanja učesnika u postupku koje doprinosi i smanjenju ugleda i poštovanja suda. Iz navedenih razloga, odbrana je zatražila od predsjednika vijeća da joj omogući da da prigovor u smislu nedozvoljenog pitanja prije nego što svjedok odgovori na to pitanje, jer se u suprotnom obesmišljava funkcija prigovora pozivajući se na čl.318. st.2 ZKP-a, gdje stranke imaju pravo prigovora u toku izvođenja

58 Krivično djelo: Zloupotreba službenog položaja iz čl.416 st.3 KZ CG (Krivična djela protiv službene dužnosti)

dokaza. Sud je u obavezi da prihvati i izvede kako dokaze koji terete određeno lice, kao eventualnog počinioca određenog krivičnog djela, tako i one koji idu u korist tog lica, jer načelom materijalne istine sud mora da se rukovodi. Branioci optuženih, kao i sami optuženi koriste pravo da postavljaju pitanja sudskim vještacima i prigovaraju njihovim nalazima i mišljenjima. Sud je ostavljao dovoljno vremena za pripremanje odbrane okrivljenih u krivičnom postupku.

Pitanje ocjene dokaza i slobodno sudijsko uvjerenje moraju biti u vezi. Sud je donio rješenje kojim se odbija navedeni predlog odbrane, iz razloga što se radi o dokazu koji je pribavljen suprotno odredbama ZKP, te kao takav ne obavezuje sud. Dakle, sud je izdvojio dio spise, odnosno dokaza predloženih od strane odbrane kao pravno nevaljani dokaze, do kojih se došlo nepoštovanjem predviđene zakonske procedure. Napominjemo da telefonski listinzi ne mogu imati dokaznu snagu bez sadržine i da se na njima ne može bazirati sudska odluka (pogledati *Predmet Khan protiv Ujedinjenog Kraljevstva, 12.maj 2000., dio koji se odnosi na čl.6 EKLJP).*

Sudovi moraju izgraditi stav jednakog tretmana optužbe i odbrane i to ne samo kroz primjenu načela kontradiktornosti (odbrana ima pravo da predlaže dokaze, postavlja pitanja i prigovara iskazima), nego i u svim oblicima i radnjama kroz koje pravo na odbranu treba da se ostvari.

U nekoliko predmeta konstatovano je da branioci po službenoj dužnosti dolaze nespremni na suđenja i da se ne odnose prema branjenicima savjesno i sa potrebnom pažnjom. Ovakva ponašanja treba da sankcioniše Advokatska komora, a sudovi treba da je o tome obavijeste.

PRAVO NA NEZAVISAN I NEPRISTRASAN SUD

U principu se može reći da se pravo na nezavisan i nepristrasan sud poštuje, naravno u okviru postojećeg pravnog okvira.

U nekoliko slučajeva, sud se upustio u raspravu sa braniocima, kako bi okrivljenima objasnio zašto donosi određene odluke što samo ukazuje na nesigurnost u vođenju postupka i poznavanju dokazne materije u predmetu. Pretpostavljamo da je to sud učinio u dobroj namjeri, ali su takva ponašanja nedopustiva, tim prije što sudeći sudija može ukinuti pritvor u svakom momentu. Predmeti poput M.Š. i dr. Viši sud u Bijelom Polju ne doprinose afirmaciji načela nezavisnog i nepristrasnog suda. Izjave predsjednika vijeća su takvog karaktera da dovode u pitanje čitav postupak i to kako sa razloga nepoštovanja pretpostavke nevinosti (čl. 3. ZKP), tako i s aspekta nepristrasnosti odnosno načela istine i pravičnosti (čl. 16. ZKP). Naime, predsjednik vijeća je jasno pokazao da vjeruje da su optuženi krivi i to prije okončanja postupka. Radi se o dvije međusobno povezane izjave, tako da se njegov unaprijed stvoreni stav ne može dovesti u sumnju. Na ovakvu izjavu morali su reagovati i tužilac i branioci i to tako da u najmanju ruku insistiraju da takva izjava uđe u zapisnik. Smatramo da ne treba posebno objašnjavati da su na to bili obavezni Dopuštanja ovakvih ponašanja mogu izazvati ili sumnju u nepristrasnost ili sumnju sigurnost u odnosu na poznavanje normi krivičnog postupka. Primjena pravila o procesnoj disciplini je isključiva nadležnost sudećeg sudije i sudeći sudija je dužan da obezbijedi da se ta disciplina poštuje, makar i po cijenu udaljavanja učesnika u postupku odnosno preduzimanja odgovarajućih mjera.

Sudovi usmeno, a kada je to predviđeno i posebnim rešenjem, sapštavaju i obrazlažu strankama u postupku i njihovim braniocima odluke koje donesu tokom glavnog pretresa, a sve u skladu sa ZKP-om, zapženo je tokom drugog dijela monitoringa. Na odluke sudova nezadovoljna strana koristi pravna sredstva.

Na početku ovog monitoringa postojala je česta praksa ulaska tužilaca i njihovih zamjenika u kancelarije sudija, kada se u njima sudi, a prije poziva suda. Međutim, ovo je uočeno i kada je glavni pretres u sudnici,

tužioci, odnosno njihovi zamjenici prije suđenja ulaze u kancelarije sudija predsjednika vijeća. Ulazak advokata – branilaca u kancelarije sudija, kako predsjednika vijeća, tako i članova vijeća vrlo je rijedak. Sve ovo može uticati na prava okrivljenih, kod kojih se izaziva sumnja u nepristrasnost i nezavisnost suda, jer nakon podizanja optužnice, odnosno nakon njenog stupanja na snagu-potvrde, tužilac je stranka u postupku i mora imati isti tretman kao druga strana. U završnom dijelu monitoringa prethodno opisana praksa bila je rijetka.

I sudije i sudsko osoblje moraju izgraditi potpuno profesionalno ponašanje i obavljati komunikaciju sa strankama samo u skladu sa propisima. Komunikacija suda sa strankama mora se odvijati u skladu sa zakonskom terminologijom i ovlašćenjima suda. Svaka intimizacija i komotno ponašanje mora se izbjegavati. Razlozi za to su očigledni.

PRISTUP SUDU

Kao jedno od načela prava na pravično suđenje, pristup sudu u slovima koji danas postoje u Crnoj Gori, otežan je. Glavni razlog za to jesu finansijski resursi, ali oni iako loši ne smiju uticati na zaštitu ovog konvencijskog prava. Posebno je evidentan nedostatak prostornih kapaciteta u većini sudoca. Tehnička opremljenost je na nešto boljem nivou ali i nju treba unaprijediti.

Loša materijalna situacija zaposlenih u sudskoj administraciji dovela je do štrajka u sudovima krajem prošle i početkom ove godine, ali je rad na predmetima koji su po svojoj prirodi hitni bio obezbijeđen.

Neophodno je otkloniti arhitektonske barijere za lica koja se otežano kreću. U toku ljeta, zgrada Osnovnog suda u Podgorici djelimično je renovirana, obezbijeđena je pristupna rampa za lica koja se otežano kreću, ali to nije dovoljno za konstataciju da je stanje značajno poboljšano.

Konačno, smatramo da infrastrukturni uslovi ne zadovoljavaju potrebe, niti sudova niti stranaka.

PRAVO NA UPOTREBU JEZIKA KOJI SE RAZUMIJE

Sudovi poštuju pravo na upotrebu svog jezika za sve učesnike u krivičnom postupku.

PROCESNA DISCIPLINA

Sud radi održavanja procesne discipline reaguje u sklada sa ZKP-om kada za tim postoji potreba.

Tokom glavnih pretresa sudije su pažljivo vodile računa o procesnoj disciplini stranaka i više puta su upozoravali kako svjedoke i oštećene, tako i branioce okrivljenih i okrivljene da ne komuniciraju neposredno, već putem suda, a tužioca, branioca okrivljenog i okrivljene da ne postavljaju sugestivna pitanja.

Glavni pretres više puta je prekidan kako bi oštećeni i svjedoci isključili mobilne telefone. Od strane predsjednika vijeća, javnost koja je pratila glavni pretres – publika, opominjana je zbog vođenja međusobnih razgovora dok je suđenje u toku. Zbog ponašanja stranaka u postupku, odnosno njihovih branilaca, sud je izrekao više opomena, što znači da je vodio računa o procesnoj discipline, a jedno lice iz publike je udaljeno sa glavnog pretresa, nakon što je bilo upozoreno, jer se ni na prethodnom glavnom pretresu isto lice nije ponašalo shodno kodeksu suda.

Posebne napomene

U nizu predmeta u kojima je ukazano na određene povrede ZKP-a, stiče se utisak da se veliki broj njegovih odredaba tumači kao formalnost. U komentarima o tim predmetima ovo nije pomenuto iz razloga što je postupak u toku i što se radilo samo o tvrdnjama odbrane. Isto tako, u određenim predmeta, okrivljeni su istakli da su bili pod pritiskom i prijetnjama policije prilikom davanja svojih iskaza u prethodnom postupku. Ovo takođe nije pomenuto u komentarima predmeta, jer je odlučeno da se ovi navodi provjere. Međutim, bez obzira na to da li su tvrdnje u ovim predmetima tačne, mišljenja smo da postoji uvriježeno shvatanje da je prvi iskaz okrivljenog, posebno ako ga tereti, istinit i da je svako dalje mijenjanje pokušaj izbjegavanja krivične odgovornosti. Naravno da ima i takvih pokušaja, ali to, po našem mišljenju, ne oslobađa sud od obaveze da sve te okolnosti provjeri na najboljji mogući način i da nakon tih provjera sudi o valjanosti pojedinih iskaza. Mora se poći od činjenice da okrivljeni ima pravo da se brani kako hoće, te da razlozi mijenjanja pojedinih tvrdnji mogu biti različiti. Ovdje naravno ne insistiramo na tome da se prihvataju samo iskazi sa glavnog pretresa, ali smatramo da prilikom odlučivanja o tome koji će se iskaz prihvatiti treba razmotriti sve okolnosti, bez predrasuda i donijeti odluku.

U pogledu zastupanja optužnica od strane specijalnih tužilaca napominjemo da se posebno mora pratiti da li specijalni tužioci sa jednakom pažnjom utvrđivanju činjenica koje idu u prilog okrivljenom, kao što to rade u pogledu činjenica koje okrivljenog terete. Članom 44.st.4. ZKP, je ovakva obaveza državnog tužioca propisana kao dužnost, a i nesaglasno sa dvostrukom ulogom državnog tužioca u krivičnom postupku, gdje se on javlja ne samo kao stranka već i kao državni organ zadužen da zastupa društvene interese. U svjetlu nove uloge državnog tužioca u krivičnom postupku, smatramo nedopustivom uočenu praksu konsultovanja između državnih tužilaca i sudija, prije i nakon održanog glavnog pretresa, a po ugledu na sudsku praksu iz uporednog prava, uočenu na primjeru BiH, smatramo da državni tužioci treba da pristupaju glavnom pretresu po izvršenoj prozivci stranaka, što bi doprinijelo afirmaciji prava na ravnopravnost stranaka u krivičnom postupku.

U određenom broju predmeta zapaženo je da državni organi, posebno Uprava policije, ne postupaju po naređenjima suda. To se odnosi na kako na nepostupanje po naredbama za privođenje, tako i na odsustvo objašnjenja zbog čega se po naredbi nije postupilo. S obzirom da nema podataka da je urađena adekvatna analiza ovakvog odnosa teško je izvoditi zaključke zbog čega je tako. Moguće je da se radi o nedostatku kadra, moguće je da je broj privođenja koja se traže od strane suda veliki, moguće je da dostavne službe ne rade kako treba, mogući su i finansijski razlozi itd. Ono što hoćemo da naglasimo i što smatramo važnim sa aspekta pozicije suda je sledeće: svaki državni organ, pa i policija, je dužan da postupa po naredbama suda i nema pravo da ocjenjuje i selektira koje naredbe će izvršiti, a koje ne. Ako postoje objektivne okolnosti da se po nekoj naredbi ne postupi, onda o tim okolnostima treba blagovremeno obavijestiti sud. Nepostupanje i neobavještavanje zajedno ukazuju na nedovoljno poštovanje sudova i njihovih zahtjeva. Dakle, ako sud treba da zavisi od volje državnih organa da li će po nekoj naredbi postupiti ili ne, onda se ne može raditi o nezavisnom sudu. Pored problema sa privođenjima, ukazujemo da tužilaštvo i policija u određenom broju predmeta koji nije preveliki, ali se radi o složenim i kompleksnim predmetima, ni pored više urgencija suda, nisu blagovremeno dostavili dokaze odbrani (A.M. Viši sud u Podgorici - dokazi pribavljeni putem mjera tajnog nadzora), barem ne u dovoljnom broju primjeraka ili kopija. Sve što ima u sudskom spisu mora biti jednako dostupno strankama.

Kada je u pitanju povjerenje javnosti u rad sudova, valjano funkcionisanje sudova i tužilaštava predstavlja njegov ključni element. Da bi uživao povjerenje javnosti, pravosudni sistem mora biti transparentan. Jedan dio napora na jačanju povjerenja javnosti, pored istraživanja javnog mjenja i kontinuiranih obuka za novinare, može se sastojati i u evaluacija rezultata rada pojedinih kancelarija za odnose sa javnošću koji su trenutno na djelu u nekim sudovima. Osim toga, neophodno je da ove kancelarije obuhvate i tužilaštva,

a radi obezbjeđivanja valjane komunikacije između tužilaštava na jednoj strani i javnosti i medija na drugoj. Na taj način, osiguraće se pravovremena informisanost javnosti i prevenirati eventualne zloupotrebe pri izvještavanju medija o sudskim postupcima. Prema mišljenju monitoring tima, sudije i tužioci treba da budu u mogućnosti da odgovaraju na pitanja medija, u mjeri u kojoj to ne dovodi u pitanje njihovu nepristrasnost. Osim toga, neophodno je nastaviti sa praksom objavljivanja odluka sudova, zbog njihove predvidljivosti, a što je u skladu sa praksom Evropskog suda.

ZAKLJUČCI I PREPORUKE

U predstojećem razdoblju, Crnu Goru očekuje rad na podizanju opštih kriterijuma efikasnosti i kvaliteta pravosudnog sistema, kako bi se obezbijedila puna primjena ustavnog okvira i međunarodnih standarda. Uspostavljanje nezavisnog pravosuđa je naravno složen i višesmjeran proces, jer nije dovoljno da je pravosuđe nezavisno u smislu propisa, pa makar oni bili i idealni. I Evropska komisija za efikasno pravosuđe Savjeta Evrope (CEPEJ) naglašava da nema jednostavnih niti unificiranih rješenja kada je riječ o uspostavljanju vladavine prava na političkom, socijalnom i ekonomskom planu, te da o tome kada jedan sistem treba da se mijenja i na koji način, treba da postoji konsenzus svih ključnih aktera. Stoga je pored jačanja kapaciteta, potrebno raditi i na uspostavljanju širokog dijaloga unutar pravne profesije, ali i dijaloga između pravne profesije i drugih društvenih subjekata.

Neki od izazova koji su navedeni u ovom Izvještaju mogu biti prevaziđeni zajedničkim naporima svih zainteresovanih strana, uključujući zakonodavnu, izvršnu i sudsku vlast, ali i strukovna udruženja sudija i tužilaca, medije i organizacije civilnog društva. Međutim, kako pitanje uspjeha reformi u Crnoj Gori nije samo organizaciono, stručno i kulturološko pitanje, već nadasve pitanje političke volje, Izvještaj ima za cilj da na temelju činjenica utvrđenih u postupku monitoringa, donosiocima odluka ukaže na određene aspekte primjene krivičnog zakonodavstva koji su neophodni za poštovanje evropskih standarda prava na pravično suđenje i rezultate ukupne pravosudne reforme.

Sa tim ciljem, monitoring tim je definisao određene preporuke koje se odnose na nastavak normativne i organizacione reforme, intenziviranje obuke sudija i budućeg sudijskog kadra, poboljšanje materijalnih uslova, kao i iznalaženje mjera za zadržavanje kadra. Dio preporuka odnosi se na unapređenje komunikacije sa sudovima u okruženju i šire, sa ciljem pronalaženja najboljih rešenja i njihove primjene, uz napomenu da su u pitanju već poznati primjeri dobrih praksi koje se manje-više već sprovode.

Osim generalnih preporuka, monitoring tim predlaže i nekoliko mjera čije sprovođenje nije povezano sa velikim teškoćama i troškovima, a koje nam se, nakon sprovedenog monitoringa čine korisnim.

1. Odgovarajućim rešenjima ZKP-a utvrditi obavezu da se sva dokumenta koja se čitaju kao dokazi, uključujući i zapisnike o određenim dokaznim radnjama i zapisnike sa iskazima okrivljenih, svjedoka i drugih učesnika u postupku obavezno dostavljaju strankama na njihov zahtjev. Smatramo takođe, da kompletnu dokumentaciju na kojoj se temelji optužnica, treba dostaviti odbrani odmah nakon stupanja optužnice na pravnu snagu.
2. Takođe, odgovarajućim zakonskim rešenjima treba urediti da se u zapisnike unosi sve što se kaže, uključujući i pitanja, jer će se samo tako izbjeći rasprave o tome šta je ko rekao i da li je nešto rekao, pa je neophodno bezbijediti LCD monitore na kojima bi sve stranke u postupku pratile unošenje sadržine u zapisnik sa glavnog pretresa.
3. Omogućiti strankama da prije nego se odgovori na određeno pitanje iznesu svoj stav o nedozvoljenosti takvog pitanja i da se pitanje i primjedba stranke unesu u zapisnik. Ponovo ukazujemo da

ovo ne znači niti treba da znači raspravu suda i stranke- sud treba da sasluša stranku i po njenom predlogu donese odluku.

4. Unaprijediti dostavu i ojačati poziciju suda prema drugim državnim organima i utvrditi adekvatne sankcije za nepostupanje po naredbama suda. U tom dijelu smatramo da treba ponovo početi aktivnosti na uspostavljanju tzv. sudske policije (ovo je već pominjano u reformi pravosuđa iz 1999) čiji će osnovni zadaci biti: održavanje reda u sudskim zgradama, dostavljanje pismena i dovođenje lica koja se nijesu odazvala sudskom pozivu. Pored praktičnog značaja, postojanje sudske policije bilo bi i dodatni doprinos nezavisnosti sudova- u ovim poslovima sudovi više ne bi zavisili od drugih organa. Ovdje posebno treba insistirati na tome da bilo sudski dostavljač, bilo poštar, obavezno utvrdi identitet lica kojem predaje poziv ili drugo pismeno.
5. Pokušati da se problemi sa neadekvatnom infrastrukturom makar privremeno i u pojedinim slučajevima rešavaju zakupom adekvatnog prostora u slučaju suđenja sa velikim brojem okrivljenih, svjedoka ili branilaca, bez obzira na to što su i takva rešenja skopčana sa određenim teškoćama. Mišljenja smo da bi ovakvo postupanje u takvim predmetima donijelo mnogo više koristi nego štete. Ovdje ponovo ukazujemo na potrebu da se izvršna vlast mnogo više angažuje na rešavanju ovih problema i uopšte na poboljšanju materijalnog položaja sudova. U suštini, izvršna vlast bi trebalo da razmišlja isključivo na način kako da doprinese nezavisnom sudstvu i da odgovarajućim programima i strategijama utvrdi postupak i način uspostavljanja takve infrastrukture i takvih materijalnih uslova koji će u najvećoj mogućoj mjeri garantovati nezavisno sprovođenje sudske funkcije.
6. Izmjeniti, odnosno dopuniti i precizirati KZ –a u dijelu oduzimanja imovinske koristi stečene vršenjem krivičnih djela, odnosno donijeti poseban zakon- lex specialis.
7. Izmijeniti, odnosno dopuniti i precizirati Zakon o sudskim vještacima, odnosno donijeti novi zakon usklađen sa važećim stndardima
8. Dobru praksu javnosti rada Osnovnog suda u Podgorici implementirati u svim sudovima.
9. I dalje raditi na edukaciji sudija i redovnom upaoznavanju sa praksom Evropskog suda.
10. Raditi na edukaciji predstavnika medija radi kvalitetnijeg izvještavanja o radu sudova i sprečavanja kršenja pretpostavke nevinosti, a to podrazumijeva zpecijalizovanje novinara za konkretnu oblast.
11. Problem arhitektonskih barijera treba riješiti u svim sudovima.

<u>Prilozi</u>:

Anex I- Statistika krivičnih djela u postupku monitoringa
Anex II – Broj krivičnih procesa po izabranim sudovima
Anex III – Praksa Evropskog suda za ljudska prava u pogledu člana 6. Evropske konvencije o ljudskim pravima

ANEX I

Pregled krivičnih djela u postupku monitoringa

PREGLED KRIVIČNIH DJELA U POSTUPKU MONITORINGA

NAZIV KD	BROJ
Ratni zločin protiv civilnog stanovništva iz čl. 142, st. 1 KZ SRJ	2
Ratni zločin protiv ratnih zarobljenika iz čl. 144 KZ SRJ	
Mučenje iz čl.167, st.3 u vezi st.2 KZ CG	3
Zloupotreba službenog položaja iz čl.416, st.5 KZ CG	12
Krijumčarenje iz čl. 265, st. 1. u vezi čl. 23, st. 2 KZ CG	2
Posebni slučajevi falsifikovanja isprave iz čl. 413, st. 1. tač. 5. u vezi čl. 412, st. 2. u vezi st. 1, u vezi čl. 49 KZ CG	1
Pronevjera iz čl. 420 KZ CG	
Primanje mita, davanje mita iz čl.424 KZ CG	2
Kriminalno udruživanje iz čl.401, st.2 KZ CG	4
Učestvovanje u grupi koja izvrši krivično djelo iz čl. 404. st.1. KZ CG	1
Stvaranje kriminalne organizacije iz čl. 401a KZ CG	2
Nasilje u porodici ili u porodičnoj zajednici iz čl.220, st. 11 KZ CG	8
Razbojništvo iz čl.242, st. 1 u vezi čl.23 KZ CG	8
Nedozvoljeno držanje oružja i eksplozivnih materija iz čl.403, st.1 KZ CG	5
Nesavjestan rad u službi iz čl.417 st.1. KZ CG	1
Neprijavljivanje krivičnog djela i učinioca iz čl.386. st.2 KZ CG	1
Neprijavljivanje pripremanja krivičnog djela iz čl.385, st.1 KZ CG	2
Pomoć učiniocu poslije izvršenog krivičnog djela iz čl.387, st.2 u vezi st.1 KZ CG	2
Posluga iz čl.421 KZ CG	1
Prevara iz čl.244, st.3, u vezi st.1 KZ CG	2
Dogovor za izvršenje kriv. djela iz čl. 400 KZ CG	1
Ugrožavanje sigurnosti iz čl.168 KZ CG	3
Sprečavanje službenog lica u vršenju službene radnje iz čl.375 KZ CG	1
Nasilničko ponašanje iz čl. 399 KZ CG	3
Napad na službeno lice u vršenju službene dužnosti iz čl.376 KZ CG	1
Zloupotreba položaja u privrednom poslovanju iz čl.272. st.1	1
Zloupotreba ovlašćenja u privredi iz čl. 276 KZ CG	4
Utaja poreza i doprinosa iz člana 264 KZ CG	1
Kleveta iz čl.196 KZ CG	5
Uvreda iz čl. 195 KZ CG	6
Nesavjestan rad u službi iz čl.417, st.1. KZ CG	1
Protivzakonita naplata i isplata iz čl.418, st.1 KZ CG	1
Zlostavljanje iz čl. 166 KZ CG	1
Krađa iz čl.239 KZ CG	7
Teška djela protiv opšte sigurnosti iz čl.388. st.1 KZ CG	1
Teška krađa iz čl. 240 KZ CG	4
Izazivanje opšte opasnosti iz čl.327, st.1 KZ CG;	3
Iznuda iz čl.250, st.1 KZ CG	2
Laka tjelesna povreda iz čl. 152 KZ CG	3
Teška tjelesna povreda iz čl. 151 KZ CG	4
Ubistvo u pokušaju čl.30.st.2.tačka 6. KZRCG u vezi čl.19. KZSRJ	1

Ubistvo iz čl. 143 u vezi čl.20, st.3 KZ CG	7
Teško ubistvo iz čl. 144 KZ CG	12
Teško ubistvo iz čl.30 KZ SRJ	1
Ugrožavanje javnog saobraćaja iz čl.339. st.3. KZ CG	2
Teška djela protiv bezbjednosti javnog saobraćaja iz čl.348, st.2 KZ CG	5
Teška djela protiv zdravlja ljudi iz čl.302. st.2. u vezi čl.290. st.1. KZCG	1
Neovlašćena proizvodnja, držanje i stavljanje u promet opojnih droga iz čl. 300 KZ CG	10
Izdavanje čeka i sredstava bezgotovinskog plaćanja bez pokrića iz čl.263. st.3. KZ CG	1
Falsifikovanje i zloupotreba kreditnih kartica i kartica za bezgotovinsko plaćanje iz čl.260. st.2 KZ CG	1
Falsifikovanje isprave iz čl. 412, čl.bistvo iz čl. 144.l. 152. st.2 u vezi st. 1 KZ CG	2
Nezakonit ribolov iz čl.326. KZ CG	1
Šumska krađa iz ćl. 324. St.2 u vezi st.1. u vezi čl.49 KZ CG	1
Uništenje i oštećenje tuđe stvari iz čl.253. st.2 u vezi st.1 KZ CG	1
Pranje novca iz čl. 268 KZ CG	3

ANEX II

Pregled predmeta po sudovima

PREGLED PREDMETA PO SUDOVIMA

Sud	*Broj predmeta*
Viši sud u Podgorici	*42*
Viši sud u Bijelom Polju	*13*
Osnovni sud u Podgorici	*36*
Osnovni sud u Bijelom Polju	*5*
Osnovni sud u Rožaju	*8*
Osnovni sud u Baru	*9*
Osnovni sud u Kotoru	*11*

ANEX III

Praksa Evropskog suda za ljudska prava zasnovana na članu 6. Evropske konvencije o ljudskim pravima

Praksa Evropskog suda za ljudska prava zasnovana na članu 6. Evropske konvencije o ljudskim pravima

Tokom trajanja postupka, stranke mogu da primijene određeni broj odredbi Evropske konvencije o ljudskim pravima, a naročito član 8 (pravo na poštovanje privatnog i porodičnog života), član 10 (sloboda izražavanja), član 13 (pravo na djelotvoran pravni lijek) i, kao najvažniji, član 6 (pravo na pravično suđenje). Svrha ovog uputstva je da se pozabavi problematičnim pitanjima i incidentima koje su sudski posmatrači CEDEM-a utvrdili kao moguća kršenja Evropske konvencije o ljudskim pravima (EKLJP), tako što predstavlja odgovarajuća načela i sudsku praksu u vezi sa utvrđenim zasebnim oblastima koje se tiču člana 6. Upravo zbog toga ovo uputstvo nije sveobuhvatni pregled člana 6, već ga treba koristiti kao sredstvo koje služi kao polazna osnova. Iako suđenja, kao ona koja su pratili sudski posmatrači CEDEM-a, često pokreću pitanja u vezi sa članom 8 (a posebno u vezi sa prihvatljivošću dokaza) i članom 10 (u vezi sa izvještavanjem medija o suđenjima), ovo uputstvo će se prevashodno baviti „krivičnim" aspektima člana 6.

1. *Svako, prilikom utvrđivanja njegovih građanskih prava i obaveza ili osnovanosti krivične optužbe protiv njega, ima pravo na pravičnu i javnu raspravu u razumnom roku pred nezavisnim i nepristrasnim, zakonom ustanovljenim sudom. Presuda se izriče javno, ali se mediji i javnost mogu isključiti iz cjelokupnog ili jednog dijela suđenja u interesu morala, javnog reda ili državne bezbjednosti u demokratskom društvu, kada to nalažu interesi maloljetnika ili zaštite privatnog života stranka, ili kada to sud smatra nužno potrebnim u posebnim okolnostima kada bi uključivanje javnosti moglo nanijeti štetu interesima pravde.*

2. *Svako ko je optužen za krivično djelo smatra se nevinim dok se na osnovu zakona ne dokaže njegova krivica.*

3. *Svako ko je optužen za krivično djelo ima sljedeća osnovna prava: (a) da odmah, na jeziku koji razumije i podrobno, bude obaviješten o prirodi i razlogu optužbe protiv njega; (b) da mu se obezbjede adekvatno vrijeme i uslovi za pripremanje odbrane; (c) da se brani lično ili uz pomoć branioca koga sam izabere ili, ukoliko ne raspolaže sredstvima da plati branioca, da ga dobije besplatno kada to nalažu interesi pravde; (d) da sam ispituje ili zahtijeva ispitivanje svjedoka optužbe i da se prisustvo i saslušanje svjedoka odbrane odobri pod uslovima koji važe i za svjedoka optužbe; (e) da dobije besplatnu pomoć tumača ukoliko ne razumije ili ne govori jezik koji se koristi u sudu.*

1. UVOD U ČLAN 6

Član 6 jamči pravo na pravično suđenje i zauzima centralnu ulogu u sistemu Konvencije zahvaljujući njegovom suštinskom značaju u demokratskom društvu. Obuhvata načelo vladavine prava na kojem se temelji društvo i odražava dio zajedničkog nasljeđa država ugovornica. O značaju ovog prava svjedoči veliki broj predstavki i sudska praksa u vezi sa njim; naime, član 6 je odredba na koju se podnosioci predstavki pred Evropskim sudom za ljudska prava (ESLJP) najčešće pozivaju. Član 6 ima širok opseg primjene i obuhvata kako žalbene, tako i sudske i neke pretkrivične postupke. Takođe se primjenjuje na određene disciplinske i druge postupke pred specijalnim sudovima. Sud je naglasio da je Konvencija „živi instrument" i da ga treba tumačiti u svjetlu sadašnjih uslova. Kao takva, sudska praksa u okviru člana 6 se tokom godina tako razvila da je obuhvatila širok opseg sudskih postupaka; i zaista, Sud je već izjavio da nema opravdanja za restriktivno tumačenje stava 1 člana 6.

Član 6 se tumači tako da obezbjeđuje procesnu, ali ne i materijalnu, garanciju prava stranaka na građanski postupak i prava okrivljenih u krivičnom postupku. To znači da je uloga Suda da razmotri da li je postupak koji je vođen pred domaćim sudom, uzet u cjelini, bio u skladu sa standardima pravičnosti utvrđenim u članu 6. To je više uslov *procesa*, nego li uslov *rezultata*. Uopšteno govoreći, Sud ne razmatra da li su pravni nalazi domaćih sudova usklađeni sa odredbama materijalnog krivičnog prava države ugovornice, niti da li su osuda ili presuda odgovarajuće. Sud je jasno istakao da ga ne treba posmatrati samo kao višestepeni sud u redovnom žalbenom postupku i stoga se neće baviti činjeničnim greškama niti meritumom određene presude.

Slično drugim odredbama iz Konvencije, mnogi od uslova iz stava 1 člana 6 imaju „autonomno" značenje i nalažu tumačenje koje se može razlikovati od onog koje su dali domaći sud ili državni organi. Posebno su autonomni koncepti „krivične optužbe" i „građanskih prava i obaveza". To znači da definicija koju daje nacionalno zakonodavstvo nije odlučujuća u odnosu na pitanje i na Sudu je da odluči, na osnovu sopstvenih ustanovljenih kriterijuma, da li će se određeni postupak posmatrati kao „krivični" ili će se odnositi na „građanska prava i obaveze". Takođe postoji razlika između procesne zaštite u krivičnim i građanskim predmetima. Dok stavovi 2 i 3 člana 6 sadrže konkretne odredbe u kojima se utvrđuju dodatni procesni standardi primjenjivi samo u krivičnim predmetima, stav 1 člana 6 se primjenjuje kako na „građanske" tako i na „krivične" postupke.

2. OPŠTA NAČELA ČLANA 6

Uočeni problemi

Tokom posmatranja, sudski posmatrači CEDEM-a su utvrdili nekoliko sljedećih pitanja u vezi sa dokazima:

- zvanično proglašenje krivice prije nego je krivica dokazana u skladu sa zakonom
- objavljivanje članaka u novinama u kojima se okrivljeni opisuju kao krivci
- ponašanje vještaka koji postupaju u ime tužioca
- tužilac ima pristup odgovarajućim informacijama koje nisu bile dostupne odbrani
- trajanje postupka

- objavljivanje informacija sa suđenja
- pristup javnosti suđenju.

U ovom dokumentu će sada biti razmotreno da li i kako su ova pitanja regulisana članom 6 Konvencije.

Uvod

Kao što je već pojašnjeno, načela ustanovljena u članu 6 se odnose kako na krivične predmete, tako i na utvrđivanje „građanskih prava i obaveza". Ovim izvještajem su prevashodno obuhvaćena načela koja se primjenjuju na krivične predmete. Član 6 utvrđuje određeni broj prava koja su od suštinskog značaja za pravičnost krivičnog postupka. Ona obuhvataju materijalna prava u skladu sa stavom 1 člana 6 koja se obično nazivaju „opštim načelima pravičnosti" ili „podrazumjevanim elementima pravičnog suđenja". To su pravo na pristup sudu; nezavisan i nepristrasan sud ustanovljen u skladu sa zakonom; pravičnost postupka; i suđenje u razumnom roku. Pored toga, tu su i pretpostavka nevinosti iz stava 2 člana 6 koja u suštini zabranjuje preuranjeno proglašenje krivice. U sljedećem odjeljku su pojedinačno obrađena ova opšta načela.

2.1 Pretpostavka nevinosti

- **Lice protiv kojeg je podignuta „krivična optužba" treba smatrati nevinim sve dok se ne dokaže njegova krivica za krivično djelo.**

Prilikom utvrđivanja da li je došlo do kršenja ovog prava od Suda će se zahtijevati da razmotri na koje načine su u postupku pred domaćim sudom razmatrane činjenične pretpostavke i teret dokazivanja; način na koji su optuženi sankcionisani u pogledu troškova ili na koji se donešene oslobađajuće presude zbog mentalnog stanja; i zabrana proglašenja krivice od strane službenih lica. Termin „krivična optužba" ima isto autonomno značenje kao i u drugim dijelovima člana 6. Ne odnosi se na pojedinca za kojeg se sumnja da je počinio krivično djelo, a protiv kojeg još uvijek nije podignuta „krivična optužba". U predmetu *Allenet de Ribemont protiv Francuske*[59], viši policijski službenik je podnosioca predstavke opisao kao jednog od „podstrekača" ubistva. Iako još uvijek nije bio optužen na osnovu francuskih zakona u trenutku kada je data ova izjava, podnosilac predstavke je uhapšen i zadržan u policijskom pritvoru. Sud je smatrao da je podnosilac predstavke „optužen" u smislu člana 6 i da je došlo do kršenja pretpostavke nevinosti.

Ovo načelo se odnosi na „krivični" postupak u cjelini, nezavisno od faze u kojoj se nalazi ili njegovog ishoda. Takođe se može odnositi na neke vrste građanskih predmeta, kao što su disciplinski postupak u vezi sa radnim pravom ili zahtjevi na naknadu štete koje podnose lica koja su bila osumnjičena ili optužena za krivično djelo, pod uslovom da su ti građanski postupci posljedica već sprovedenog krivičnog postupka ili su u vezi sa njim.

Iako pravila koja utvrđuju pravne i činjenične pretpostavke koje prebacuju teret dokazivanja na optuženog koji treba da ih opovrgne ne dovode automatski do kršenja pretpostavke nevinosti, Evropski sud će razmotriti da li je sud pred kojim je vođen postupak istinski zadržao slobodu ocjenjivanja prilikom utvrđivanja krivice optuženog. U predmetu *Salabiaku protiv Francuske*[60], podnosilac predstavke je bio izložen pretpostavci odgovornosti nakon što je preuzeo isporuku zaključanog kamiona za koji je dokazano

59 Allenet de Ribemont protiv Francuske, 10. februar 1995.

60 Salabiaku protiv Francuske, 07, oktobar 1988.

da sadrži narkotike. Sud ipak nije ustanovio da je došlo do kršenja jer se domaći sud nije automatski oslanjao na tu pretpostavku, već je zadržao slobodu ocjenjivanja i poklonio dovoljno pažnje činjenicama u predmetu.

Izjavama sudija nakon završetka postupka ili nakon donošenja oslobađajuće presude kojima se izražava stav da je podnosilac predstavke kriv će se prekršiti pretpostavka nevinosti. U predmetu *Minelli protiv Švajcarske*[61] je došlo do obustave gonjenja podnosioca zahtjeva po privatnoj tužbi jer je ista zastarjela. Domaći sud je zatim naložio podnosiocu predstavke da plati dio troškova privatnog tužioca i suda na osnovu toga da bi podnosilac predstavke „vrlo vjerovatno" bio osuđen da je suđenje u vezi sa predmetom bilo sprovedeno. Kršenje je utvrđeno jer je u izjavi navedeno da je podnosilac predstavke kriv, iako formalno nije donešena odluka o krivici. Evropski sud je u predmetu *Matijašević protiv Srbije*[62] naveo da će pretpostavka nevinosti iz stava 2 člana 6 Konvencije biti prekršena ako sudska odluka, ili čak i izjava službenog lica u vezi sa optuženim, odražava mišljenje da je on kriv prije nego je njegova krivica dokazana u skladu sa zakonom. Sud je dao opsežno tumačenje termina „službeno lice" obuhvatajući njime ne samo sudije, tužioce i policijske službenike već i dobro poznate javne i političke ličnosti. Međutim, Sud je naglasio da prilikom utvrđivanja da li je došlo do kršenja pretpostavke nevinosti treba uzeti u obzir kontekst i značanje određene izjave, a ne samo njenu formulaciju. U predmetu *Daktaras protiv Litvanije,*[63] advokat odbrane je izjavio da dokaz u spisima predmeta nije „dokazao" krivicu njegovog klijenta i zatražio da krivični postupak protiv podnosioca predstavke bude obustavljen na osnovu nedostatka dokaza. Tužilac je dao pisani odgovor u kojem je izjavio da je „krivica dokazana" na osnovu dokaza prikupljenih u pretkrivičnom postupku. Sud je u nalazu u kojem je izjavljeno da nije došlo do kršenja naveo da izjava nije data u nezavisnom i javnom kontekstu, kao što je konferencija za štampu, već u okviru obrazloženog rješenja u preliminarnoj fazi krivičnog postupka.

2.2 Pravo na pristup sudu

- **Pojedincu se mora obezbjediti razmatranje predmeta pred sudom u cilju donošenja odluke, bez neprimjerenih pravnih ili praktičnih prepreka koje bi stajale na njegovom ili njenom putu.**

Pravo na pristup sudu nije izričito navedeno u članu 6, ali se prema tumačenju Suda može zaključiti da tekst podrazumjeva njegovu zaštitu. Pravo na pristup sudu nije apsolutno i ima različite oblike u krivičnim i građanskim sferama. Iako država može regulisati pristup sudu, ograničenja koja ona primjenuje ne smiju ograničiti pristup u obimu koji bi štetio samoj suštini prava.[64] Nadalje, svako ograničenje mora imati legitiman cilj i biti u skladu sa načelom srazmjernosti.

Postoje moguća kršenja člana 6 tamo gdje su procesne ili praktične prepreke dovele do onemogućavanja djelotvornog pristupa advokata sudu. Sud je zauzeo stav da je odbijanje da se zatvoreniku dozvoli kontakt sa advokatom radi pokretanja postupka u vezi klevete protiv zatvorskog službenika dovelo do kršenja ovog prava.[65] Nije bilo značajno to što se uplitanje odnosilo na njegovo pravo na pristup advokatu, a ne na

61 Minelli protiv Švajcarske, 25. mart 1983.
62 Matijašević protiv Srbije, 19. septembar 2006.
63 Daktaras protiv Litvanije, 10. oktobar 2000.
64 Ashingdane protiv Ujedinjenog Kraljevstva, 28. maj 1985.
65 Golder protiv Ujedinjenog Kraljevstva, 21. februar 1975.

pristup sudu. Pravo podrazumjeva pravo na „djelotvoran pristup" i ono može obuhvatati i pravnu pomoć. „Pravo na pristup sudu" takođe podrazumjeva pravo na pravnu izvjesnost i blagovremeno izvršavanje sudskih odluka. Pravna izvjesnost zahtijeva djelotvorne sudske odluke. To znači da kada presuda u građanskom postupku ili oslobađajuća presuda u krivičnom postupku postanu pravnosnažne ne treba da postoji rizik od njihovog preinačavanja. Ovaj problem može nastati onda kada procesni zakon države sadrži ovlašćenje koje omogućava službenom licu, kao što je tužilac, da interveniše pomoću specijalne ili izvanredne žalbe nakon isteka uobičajenih vremenskih rokova. Sud je u predmetu *Bujnita protiv Moldavije*[66] ustanovio da je došlo do kršenja prava na pravično suđenje gdje je oslobađajuća presuda, protiv koje je podnešena žalba i koja je postala konačna, kasnije ukinuta na zahtjev tužioca bez iznošenja novih dokaza. Sud je smatrao da bi najadekvatniji oblik obeštećenja bio da organi potvrde pravnosnažnu oslobađajuću presudu podnosioca predstavke i da njegova presuda bude izbrisana počev od tog datuma. Sljedeći suštinski aspekt ovog prava je izvršenje pravnosnažne sudske presude. Sud je ustanovio da je došlo do kršenja ovog prava u predmetu *Kyrtatos protiv Grčke*[67] gdje domaći organi tokom perioda dužeg od sedam godina nisu preduzimali neophodne mjere za sprovođenje pravnosnažnih, izvršnih sudskih odluka. Značajno je napomenuti da će Sud ispitati odlaganje izvršenja presuda u okviru „prava na pristup sudu", a ne u okviru pritužbe na trajanje postupka (vidjeti 2.6 u tekstu koji slijedi). Prilikom ocjenjivanja adekvatnosti odlaganja u izvršenju sudske odluke, Sud će razmotriti složenost predmeta i ponašanje stranaka. Nadalje, jamčenje prava na pristup sudu je autonomno u odnosu na uslove iz nacionalnog zakonodavstva jer kršenje vremenskih rokova utvrđenih u nacionalnom zakonodavstvu ne podrazumjeva nužno kršenje člana 6. Odlaganje izvršenja je prihvatljivo pod uslovom da ne škodi samoj suštini prava na pristup sudu.[68] Sud je u predmetu *Jasiuniene i ostali protiv Litvanije*[69] ustanovio da je došlo do kršenja jer izvršni organi nisu izvršili presudu domaćeg suda koja ih je obavezivala da podnosiocu predstavke daju obeštećenje u vidu zemljišta u skladu sa posebnim nacionalnim zakonodavstvom koje uređuje restituciju imovinskih prava, i to tokom perioda od osam godina od datuma donošenja sudske odluke.

U predmetu *Stojanovski protiv Bivše Jugoslovenske Republike Makedonije*[70] podnosilac predstavke je bio makedonski državljanin koji se žalio na činjenicu da nikada nije donešena odluka o njegovom zahtjevu za obeštećenje koja je bila podnijeta tokom krivičnog postupka. Sud je zauzeo stav da je činjenica da domaći krivični sud nije riješio zahtjev podnosioca predstavke značila onemogućavanje pristupa sudu koji je regulisan u stavu 1 člana 6. Sud je u predmetu *Garzičić protiv Crne Gore*[71] ustanovio da je došlo do kršenja prava na pristup sudu jer je Vrhovni sud Crne Gore neosnovano odbio da razmotri zahtjev podnosioca predstavke da preispita odluku nižeg suda. Dva novija predmeta, *Delvina protiv Albanije*[72] i *Eltari protiv Albanije,* su se ticala neizvršavanja pravnosnažnih sudskih odluka donijetih u korist podnosioca predstavke. Sud je zauzeo stav da je pravo oba podnosioca na pristup sudu bilo prekršeno.

66 Bujnita protiv Moldavije, 16. januar 2007.
67 Kyrtatos protiv Grčke, 22. maj 2003.
68 Burdov protiv Rusije
69 Jasiuniene i ostali protiv Litvanije, 06. mart 2003.
70 Boris Stojanovski protiv Bivše Jugoslovenske Republike Makedonije, 06. maj 2010.
71 Garzičić protiv Crne Gore, 21. septembar 2010.
72 Delvina protiv Albanije, 08. mart 2011. i Eltari protiv Albanije, 08. mart 2011.

2.3 Nezavisan i nepristrasan sud

- **Za krivične predmete i predmete koji se tiču „građanskih prava i obaveza" se mora održati rasprava pred nezavisnim i nepristrasnim sudom ustanovljenim na osnovu zakona.**

Iako se radi o različitim konceptima, postoji bliska veza između garancija za postojanje „nezavisnog" i „nepristrasnog" suda. Naime, Sud često razmatra ova dva pojma zajedno. Fraza „sud ustanovljen na osnovu zakona" se odnosi na tijelo čija funkcija je da utvrđuje stvari u svojoj nadležnosti, u postupcima koji se sprovode na način kao što je propisano.[73] Iako članovi tog tijela ne moraju nužno da budu advokati ili kvalifikovane sudije, sud mora da bude nadležan za donošenje pravno obavezujućih odluka koje ne može izmjeniti neko nesudsko tijelo. Neće biti dovoljno da tijelo ima samo kapacitet za davanje preporuka ili savjeta. Činjenica da tijelo obavlja druge funkcije, pored sudske funkcije, ne znači nužno da to nije „sud"[74] Tijela koja spadaju u „sudove ustanovljene na osnovu zakona" obuhvataju stručna disciplinska tijela[75]; vojna i zatvorska disciplinska tijela[76]; i upravna tijela koja se bave pitanjima reformi vezanih za zemljište. [77]
„Nezavisan" sud je onaj koji je nezavisan od izvršne vlasti, stranaka, kao i od zakonodavne vlasti odnosno Skupštine. Prilikom razmatranja da li je sud „nezavisan", Evropski sud uzima u obzir način imenovanja članova, njihove mandate, postojanje garancija da nema spoljnjeg pritiska i pitanje da li tijelo odaje utisak da je nezavisno. Značajno je napomenuti da imenovanja koja vrši izvršna vlast neće dovesti do kršenja člana 6 ako imenovani ne primaju uputstva od ministra prilikom obavljanja svoje uloge u sprovođenju sudskog postupka, ili ako su pravno obavezani da postupaju nezavisno.
„Nepristrasnost" nalaže da sud postupa na način koji nije pristrasan i koji ne uključuje predrasude u odnosu na stranke. Test nepristrasnosti postoji u dva oblika: subjektivnom i objektivnom. To znači da će Evropski sud razmotriti da li je sud subjektivno nepristrasan u smislu da li su njegovi članovi pod uticajem ličnih predrasuda i da li, sa objektivnog stanovišta, postoji utisak nepristrasnosti i da li su garancije nepristrasnosti u datoj situaciji takve da isključuju osnovanu sumnju u vezi sa predmetom.
Uopšteno govoreći, vrlo je teško da pojedinac dokaže ličnu predrasudu kod sudije tako da se mora pretpostaviti da lična nepristrasnost postoji sve dok se ne dokaže suprotno. U predmetu *Kyprianou protiv Kipra*[78], sudije koje su vodile postupak protiv podnosioca predstavke zbog nepoštovanja suda su izričito izjavile da su „duboko uvrjeđene kao ličnosti" ponašanjem podnosioca predstavke pred sudom za koje je presuđeno da je predstavljalo krivično djelo nepoštovanja suda. Formulacija izjava sudija u osuđujućoj presudi podnosioca predstavke, zajedno sa brzinom kojom je vođen postupak, je pokazala nedostatak nepristrasnosti u okviru subjektivnog testa.
U poređenju sa subjektivnim testom, Sud se suočio sa većim brojem situacija u kojima se bavio objektivnim testiranjem nepristrasnosti. Sud je stavio snažan akcenat na značaj utisaka imajući u vidu povjerenje koji sudovi u demokratskom društvu moraju izgraditi kod javnosti i kod okrivljenih u krivičnom postupku. Objektivni test nepristrasnosti nalaže manje ozbiljan teret dokazivanja za podnosioca zahtjeva. Utisak pristrasnosti ili osnovana sumnja u nedostatak pristrasnosti je dovoljan sa stanovišta običnog razumnog

73 Belilos protiv Švajcarske, 29. april 1988.
74 H. protiv Belgije, 30. novembar 1987.
75 Ibid.
76 Engel i ostali protiv Holandije, 08. jun 1976.
77 Ettl i ostali protiv Austrije, 23. april 1987.
78 Kyprianou protiv Kipra (GC), 15. decembar 2005.

posmatrača.[79] Osnovana sumnja može nastati na više načina. Na primjer, u situacijama kada isti sudija interveniše u različitim fazama istog postupka; zbog toga što je sudija ranije bio zaposlen kod jedne od stranaka; ili ako je došlo do intervenisanja sa tužilačkih i sudskih funkcija. Međutim, sama pripadnost člana suda određenoj društvenoj grupi ili udruženju – kao što je pripadnost istoj političkoj partiji ili vjeroispovjesti kao jedna od stranaka u postupku – nije dovoljno da održi osnovanu sumnju u okviru objektivnog testa.

2.4. Značenje pravičnosti i ravnopravnosti stranaka

- **Uslov „pravičnosti " obuhvata postupke u cjelini i odvojen je od pitanja da li je sudska odluka „ispravna" ili „pogrešna". Načelo ravnopravnosti stranaka nalaže da se svakoj stranci mora pružiti odgovarajuća mogućnost da iznese svoj slučaj pod uslovima koji je ne dovode u značajno nepovoljniji položaj u odnosu na suprotnu stranu.**

Pitanje da li je lice imalo „pravično" suđenje se posmatra na osnovu kumulativne analize svih faza, a ne samo konkretnog incidenta. To znači da procesna greška na jednom nivou može biti ispravljena u kasnijoj fazi. Koncept „pravičnosti" je takođe autonoman u odnosu na način na koji se u domaćem postupku tumači kršenje odgovarajućih pravila i kodeksa, s tim da procesna greška koja dovede do povrede postupka pred domaćim sudom – čak i upadljiva greška – ne može sama po sebi prouzrokovati „nepravično" suđenje. Slično tome, kršenje člana 6 se može utvrditi i onda kada je nacionalno zakonodavstvo ispoštovano. Međutim, u predmetu *Barberà, Messegué i Jabardo protiv Španije*[80] je došlo do kršenja člana 6 zbog kumulativnog dejstva različitih procesnih grešaka – uprkos činjenici da svaka greška, uzeta pojedinačno, ne bi ubijedila Sud da je postupak bio „nepravičan".

Iako je na nacionalnom zakonodavstvu da propiše pravila o prihvatljivosti dokaza i na domaćim sudovima da ocijene dokaze, uslovi optužnog načela podrazumjevaju da su priroda prihvaćenih dokaza i način na koji domaći sudovi postupaju prema njima relevantni za član 6. U tom kontekstu, „optužni" podrazumijeva da su objema stranama na raspolaganju relevantni materijali i dokazi. Postoji značajan stepen preklapanja između optužnog načela i ravnopravnosti stranaka. „Ravnopravnost stranaka" takođe nalaže pravičnu ravnotežu između stranaka i u suštini podrazumjeva ravnopravnu procesnu mogućnost da se iznese slučaj. Načelo se odnosi kako na građanske tako i na krivične predmete. Moraju postojati adekvatne procesne garancije koje odgovaraju predmetu uključujući, gdje je to moguće, i adekvatnu mogućnost za iznošenje dokaza, osporavanje dokaza suprotne strane i iznošenje argumenata u vezi sa spornim pitanjem.[81] Za više informacija o ovome vidjeti Odjeljak 3 u tekstu koji slijedi.

79 Piersack protiv Belgije, 01. oktobar 1982.
80 Barberà, Messegué i Jabardo protiv Španije, 06. decembar 1988.
81 H. protiv Belgije, 30. novembar 1987.

2.5 Lično prisustvo i javnost

- **Pravo na „javnu raspravu" proizilazi iz formulacije člana 6, ali se predmeti iz ove kategorije obično posmatraju sa opštijeg stanovišta „pravičnosti". Ovaj element „pravičnosti" se sastoji iz četiri prava koja se podrazumjevaju: (1) pravo na usmenu raspravu i lično prisustvo učesnika u građanskom postupku ili optuženog u krivičnom postupku; (2) pravo na djelotvorno učešće; (3) pravo podnosioca predstavke da traži prisustvo trećih strana i medija na raspravi (javnost); (4) pravo na objavljivanje sudske odluke.**

Uslov prisustva u prvom stepenu je skoro pa apsolutan, iako je hipotetički navedeno da može postojati izuzetak u „posebnim okolnostima".[82] Iako prisustvo pretpostavlja održavanje usmene rasprave, ne mora svaka usmena rasprava da bude javna. Prisustvo pred apelacionim sudom se zahtijeva onda kada se isti bavi činjeničnim i pravnim pitanjima i kada ima potpuno ovlašćenje da ukine ili izmjeni odluku nižeg suda. Sud je u predmetu *Ekbatani protiv Švedske*[83] zauzeo stav da je odsustvo optuženog u krivičnom predmetu pred apelacionim sudom koji se bavio činjeničnim i pravnim pitanjima dovelo do kršenja uslova prisustva. Međutim, Sud je u predmetu *Kremzow protiv Austrije*[84] zauzeo stav da nije došlo do kršenja kada optuženi nije lično prisustvovao postupku za krivični predmet (već ga je zastupao advokat) tokom rasprave u okviru žalbenog postupka u vezi sa njegovim zahtjevom za poništenje. Suđenja *in absentia* će biti dozvoljena samo pod uslovom da su organi uložili najveće napore da pronađu okrivljene i da su ih obavjestili o raspravama koje treba da se održe. U svakom slučaju, okrivljeni zadržava pravo na ponovno suđenje u potpunosti u slučaju ponovnog pojavljivanja.

Sud je u predmetu *Stanford protiv Ujedinjenog Kraljevstva*[85] zauzeo stav da učesnik u građanskom postupku ili optuženi u krivičnom postupku moraju biti sposobni da djelotvorno učestvuju na sudskoj raspravi koja mora biti organizovana tako da uzme u obzir njihovo fizičko i mentalno stanje, godine i druge lične karakteristike. U istom predmetu zauzet je stav da bi pomoć advokata mogla da kompenzuje ličnu sposobnost podnosioca predstavke da djelotvorno učestvuje.

Argument u prilog javnosti postupka je zaštita učesnika u građanskom postupku ili optuženih u krivičnom postupku od sprovođenja pravde u tajnosti i obezbjeđivanje veće vidljivosti pravde, uz održavanje povjerenja javnosti u pravosudni sistem.[86] Iako se radi o uslovnom pravu, pretpostavka uvijek mora biti u korist javne rasprave, dok isključivanje javnosti mora biti strogo uslovljeno okolnostima u predmetu. Sud je u predmetu *Riepan protiv Austrije*[87] ustanovio da je došlo do kršenja zahtijeva za prisustvom javnosti prilikom održavanja rasprave zatvorene za javnost u vezi sa novom optužbom protiv osuđenog zatvorenika, dok organi nisu preduzeli korake da informišu javnost o datumu i mjestu suđenja u zatvoru. Sud nije u obavezi da čita svoju cjelokupnu presudu u sudu otvorenom za javnost; dovoljno je objaviti je u pisanom obliku iako odluka mora biti raspoloživa za uvid u pisarnici suda.[88]

82 Allan Jacobsson (br. 2) protiv Švedske, 19. februar 1998.
83 Ekbatani protiv Švedske, 36. maj 1988.
84 Kremzow protiv Austrije, 21. septembar 1993.
85 Stanford protiv Ujedinjenog Kraljevstva, 23. februar 1994.
86 Axen protiv Njemačke, 08. decembar 1983.
87 Riepan protiv Austrije, 14. novembar 2000.
88 Pretto i ostali protiv Italije, 08. decembar 1983.

2.6 Trajanje postupka

- **Stranke u građanskom postupku i optuženi u krivičnom postupku treba da budu zaštićeni od pretjeranih odlaganja sudskog postupka.**

Opravdanost trajanja postupka se ocjenjuje u svjetlu određenih okolnosti u predmetima pri čemu se uzimaju u obzir složenost predmeta, ponašanje podnosioca predstavke,ponašanje organa i onoga što predstavlja rizik po podnosioca predstavke. Predmet se može smatrati složenim zbog pravnih složenosti postupka koje mogu da proisteknu iz, na primjer, obaveze domaćih sudova da primjenjuju neki novi propis. Ako Sud prihvati da je ustanovljeno da je postupak složen onda će, uopšteno govoreći, organima dati duži vremenski period za njegovo zaključivanje. Ako su odlaganja prouzrokovali učesnici u građanskom postupku ili optuženi u krivičnom postupku onda se ona ne uzimaju u obzir u odmjeravanju opravdanosti trajanja postupka sa stanovišta člana 6. Međutim, ne može se okriviti optuženi zato što je u odbrani sopstvenih interesa u potpunosti iskoristio zakonske mogućnosti koje mu je pružilo nacionalno zakonodavstvo.[89] Odlaganja koja se pripisuju organima koji krše uslov „razumnog vremenskog perioda" su se odnosila na sljedeće: ponovljeno vraćanje predmeta istražiteljima na istim osnovama u cilju sprovođenja novih istraga[90]; ponovljeni pokušaji da se isti svjedoci pozovu na suđenje[91]; česte izmjene u sastavu suda u kojem se održava suđenje[92]; i odlaganja u upućivanju predmeta iz prvostepenog suda u apelacioni sud.[93] Međutim, Sud je u predmetu *Zimmerman i Steiner*[94] ustanovio da uobičajena odlaganja povremeno izazvana obimom rada u sudovima mogu biti prihvatljiva pod uslovom da ne traju tokom dužeg vremenskog perioda i da organi preduzimaju odgovarajuće korake u postavljanju prioriteta u rješavanju predmeta na osnovu njihove hitnosti i značaja.[95]

U okviru uslova za razumnim trajanjem ne postoje absolutni vremenski rokovi. Uopšteno govoreći, očekuje se da se krivični postupak sprovodi ekspeditivnije nego građanski. Sud će uzeti u obzir kakav je „rizik" podnosioca predstavke. U krivičnim predmetima garancija razumnog roka počinje da teče od trenutka kada je protiv okrivljenog formalno podignuta optužba. Građanski postupci počinju pokretanjem sudskog postupka i završavaju se kada je slučaj pravnosnažno zaključen.

Sud je u predmetu *Majaric protiv Slovenije*[96] jednoglasno zaključio da je došlo do kršenja stava 1 člana 6 jer je krivični postupak pred domaćim sudom trajao duže od četiri godine i pet mjeseci. Sud je u predmetu *Janković protiv Hrvatske*[97] zauzeo stav da je za građanski i izvršni postupak u ukupnom trajanju od osam godina, pet mjeseci i šest dana bilo potrebno isuviše dugo vremena čime je došlo do kršenja uslova „razumnog vremenskog perioda".

89 Kolomiyets protiv Rusije, 22. februar 2007.
90 Šleževičius protiv Litvanije, 13. novembar 2011.
91 Kuvikas protiv Litvanije, 27. jun 2006.
92 Simonavičius protiv Litvanije, 27. jun 2006.
93 Martins Moreira protiv Portugala, 26. oktobar 1988.
94 Zimmermann and Steiner protiv Švajcarske, 13. jul 1983.
95 Međutim, ovaj predmet je sada prilično zastario i na njega se moguće oslanjati samo u izuzetnim okolnostima.
96 Majaric protiv Slovenije, 08. februar 2000.
97 Janković protiv Hrvatske, 05. mart 2009.

3. DOKAZI
Uočeni problemi

Tokom posmatranja,sudski posmatrači CEDEM-a su utvrdili nekoliko sljedećih pitanja u vezi sa dokazima:

- sprovođenje postupka tokom prepoznavanja osumnjičenih lica
- dobijanje priznanja
- postupanje prema svjedočenju
- značaj nalaza vještačenja

Uvod

Uopšteno govoreći, na domaćim sudovima je da utvrde prihvatljivost dokaza i da ocjene dokaze. Međutim, ESLJP će utvrditi postojanje kršenja Konvencije ako je, uzimajući u obzir okolnosti predmeta u cjelini, podnosilac predstavke bio lišen mogućnosti da djelotvorno učestvuje u postupku ili ako je položaj odbrane značajno oslabljen.[98] Stoga korišćenje dokaza pribavljenih kršenjem pravila iz nacionalnog zakonodavstva ne znači nužno da je došlo do kršenja člana 6. Slično tome, oslanjanje na dokaze pribavljene kršenjem nekog drugog člana Konvencije (na primjer člana 8, pravo na privatni i porodični život) ne dovodi nužno do kršenja uslova za pravično suđenje iz člana 6. Međutim, dokaz pribavljen kršenjem člana 3 (zabrana mučenja, neljudskog i ponižavajućeg postupanja) će u većini slučajeva dovesti do sprovođenja postupka kojim se krši član 6. Da li će sud ustanoviti da je došlo do kršenja zavisi od niza faktora kao što su:

i. odredba iz Konvencije za koju se tvrdi da je prekršena (članovi 3, 6, 8 itd.)

ii. uloga koju su dokazi odigrali u postupku

iii. postojanje adekvatnih garancija kojima se obezbjeđuje sudski nadzor nad navodnim kršenjima Konvencije

U sljedećem odjeljku su obrađeni različiti aspekti prihvatljivosti dokaza.

3.6 Iznošenje dokaza

- **Domaći sudovi su u obavezi da obezbjede odgovarajuće i pravično iznošenje dokaza.**

To u praksi znači da se od Suda može zahtijevati da izvrši ispravku neadekvatnog iznošenja dokaza bilo koje od stranaka. Predmet *Barbera, Messegue i Jabardo protiv Španije*[99] se odnosio na slučaj pljačke i ubistva za koji su donešene presude u trajanju do 36 godina, a koji je razmotren na suđenju koje je trajalo jedan dan. Uprkos činjenici da su i tužilac i odbrana odustali od usmenog iznošenja pisanih dokaza na suđenju, ESLJP je ustanovio da to nije Suda oslobodilo od obaveze da obezbjedi suđenje koje je u skladu sa članom 6.

Nekoliko faktora je relevantno prilikom utvrđivanja da li su dokazi iznešeni na odgovarajući i pravičan način. Činjenica da nijedna od stranka nije dala prigovor na iznošenje određenih dokaza je značajna,

98 Vidjeti Dombo Beheer BV protiv Holandije, 27. oktobar 1993.
99 Barbera, Messegue i Jabardo protiv Španije, 06. decembar 1988.

ali ne i odlučujuća.[100] Biće uzet u obzir bilo koji dio postupka koji bi mogao ublažiti ili ispraviti navodnu nepravičnost. Pored toga, značajno je i da li je predmet bio pažljivo razmotren u žalbenom postupku.

3.7 Prepoznavanja osumnjičenih lica

- **Prepoznavanja osumnjičenih lica moraju biti organizovana na način kojim se ne oduzima njihova dokazna vrijednost.**

Domaći organi su u obavezi da obezbjede da prepoznavanja osumnjičenih lica budu sprovedena bez nepravilnosti koje bi mogle prouzrokovati nepravično suđenje. Na primjer, ESLJP je u predmetu *Laska i Lika protiv Alabanije*[101] u kojem je osuđujuća presuda donešena na osnovu rezultata prepoznavanja osumnjičenih ustanovio da to što su podnosioci predstavke natjerani da nose crno-bijele fantomke slične onima koje su nosili navodni počinioci, dok su ostali nosili crne maske, nije bilo u skladu sa članom 6. Razlog je činjenica da je ovo dovelo do „upiranja prstom krivice" na podnosioce predstavke i stoga nije moglo imati dokaznu vrijednost.

3.8 Priznanje i prinuda

- **Dokazi pribavljeni pod prinudom i/ili prisilom ne smiju imati odlučujuću i ključnu težinu u donošenju osuđujuće presude.**

Nikada se ne treba oslanjati na optužujuće dokaze pribavljene kršenjem člana 3, zabrana mučenja, kao na dokaze kojim se ustanovljava krivica žrtve.[102] Međutim, Sud je ostavio otvoreno pitanje da li okolnosti koje nisu prouzrokovale mučenje, ali jesu uključile neljudsko i ponižavajuće postupanje, automatski dovode do nepravičnog suđenja.[103] Ti predmeti će zavisiti od činjenica u pojednačnom predmetu i Sud će prilikom njihovog utvrđivanja obratiti posebnu pažnju na ulogu koju su dokazi odigrali na suđenju. Da bi se zauzeo stav da je dokaz pravno nevaljan, potrebno je da isti imao uticaja na donošenje osuđujuće presude.

U predmetu *Jalloh protiv Njemačke*[104] zauzet je stav da je pribavljanje dokaza nedobrovoljnim uzimanjem emetika (lijekova koji izazivaju povraćanje) u cilju primoravanja podnosioca predstavke da podrigne kesicu kokaina bilo protivno članu 6 i članu 3. Sud je napomenuo da je, iako namjera organa nije bila da nanesu bol i patnju podnosiocu predstavke, dokaz pribavljen sprovođenjem mjere kojom je prekršeno jedno od osnovnih prava zajamčenih Konvencijom. Nadalje, narkotici pribavljeni spornom mjerom su se pokazali odlučujućim elementom u sigurnom donošenju osuđujuće presude za podnosioca predstavke. I na kraju, javni interes u sigurnom donošenju osuđujuće presude za podnosioca predstavke nije mogao opravdati

100 Karen Reid, Evropska konvencija o ljudskim pravima – upustvo za praktičare, str. 150. Vidjeti, na primjer, X protiv Ujedinjenog Kraljevstva, 06. oktobar 1976.
101 Laska i Lika protiv Albanije, 20. april 2010.
102 Jalloh protiv Njemačke, 11. jul 2006.
103 Karen Reid, *Ibid*.
104 Jalloh protiv Njemačke, 11. jul 2006.

korišćenje dokaza pribavljenog na taj način na suđenju. Shodno tome, korišćenje narkotika pribavljenih prisilnim davanjem emetika podnosiocu predstavke su doveli do potpuno nepravičnog suđenja.

Predmet *Gäfgen protiv Njemačke* se odnosio na otmicu jedanaestogodišnjeg dječaka i dokaz u vezi sa njegovim kretanjem koji je pribavljen od podnosioca predstavke nakon prijetnji policije tokom pretresa, što je naknadno okarakterisano kao neljudsko i ponižavajuće postupanje. ESLJP je napomenuo da je u tom predmetu, koji je primjer „vremenske bombe koja otkucava" član 6 nije apsolutan i da „[je] pravičnost krivičnog postupka dovedena u pitanje samo onda kada se pokaže da je kršenje člana 3 imalo odlučujući uticaj na ishod postupka." Osuđujuća presuda u predmetu *Gäfgen* je bila zasnovana isključivo na novom, potpunom priznanju podnosioca predstavke na suđenju. Stoga je Sud ustanovio da je prekinuta uzročna veza između prijetnje mučenjem i osuđujuće presude jer „kršenje člana 3 u istražnom postupku nije imalo odlučujući uticaj na priznanje podnosioca predstavke na suđenju." [105]

U uslovima kada se dođe do saznanja da nije bilo ni mučenja ni neljudskog ponašanja, ali postoje navodi o zlostavljanju, značajno je da postoje adekvatne procesne garancije koje će omogućiti ispitivanje tih navoda prilikom utvrđivanja da li su dokazi pravno nevaljani. Na primjer, u situaciji kada je podnosilac zahtjeva, kojem je uskraćen pristup advokatu, dao priznanje u okolnostima za koje tvrdi da su uzrokovale prisilu; činjenica da domaći sud nije adekvatno istražio ove navode će vjerovatno dovesti do sprovođenja postupka koji je suprotan članu 6.[106]

3.9 Nalazi vještačenja

- **Ne postoji apsolutno pravo na postavljanje vještaka po sopstvenom izboru da svjedoči na suđenju, niti pravo na postavljanje dodatnog alternativnog vještaka.**

Iako ne postoji apsolutno pravo na postavljanje vještaka po sopstvenom izboru, ESLJP može ustanoviti da je u postupku došlo do kršenja člana 6 ako domaći sud nije adekvatno razmotrio odgovarajuće dokaze prilikom donošenja odluke o nekom ključnom medicinskom pitanju čime je podnosioca predstavke lišio pravičnog saslušanja. Na primjer, Sud je u predmetu *Sommerfeld protiv Njemačke*[107] koji se odnosio na pristup djetetu roditelja koji nije imao starateljstvo izjavio da bi „bilo pretjerano reći da se od domaćih sudova uvijek zahtijeva da angažuju vještaka psihološke struke u neko pitanje […], ali to zavisi od konkretnih okolnosti u samom predmetu pri čemu se uzimaju u obzir godište i zrelost djeteta." Međutim, ESLJP je u drugom predmetu koji se odnosio na pristup djetetu roditelja koji nije imao starateljstvo ustanovio da je to što domaći sud nije naložio angažovanje vještaka psihološke struje dovelo do kršenja prava roditelja. [108]

Evropski sud je zauzeo stav da ne postoji pravo na neutralnost vještaka kojeg postavlja sud sve dok vještak ne uživa procesne privilegije koje su značajno nepovoljne po podnosioca predstavke.[109] Međutim, kada mišljenje vještaka igra odlučujuću ulogu u postupku sud je insistirao na neutralnosti zvaničnih vješaka. [110]

105 Gäfgen protiv Njemačke, 30. jun 2006.
106 Vidjeti, na primjer, Yaremenko protiv Ukrajine, 12. jun 2008.
107 Sommerfeld protiv Njemačke, 08. jul 2003.
108 Elsholz protiv Njemačke, 13. jul 2000.
109 Brandstetter protiv Austrije, 28. avgust 1991.
110 Sara Lind Eggertsdóttir protiv Islanda, 05. jul 2007.

4. PRAVA NA ODBRANU
Uočeni problemi

Tokom posmatranja sudski posmatrači CEDEM-a su utvrdili nekoliko sljedećih pitanja u vezi sa dokazima:

- tvrdnja podnosioca predstavke da je zadržan u službenim prostorijama i da mu nisu saopštena prava u postupku
- zakazani datumi ročišta objavljeni na zvaničnom vebsajtu ne odgovaraju datumima održavanja ročišta
- lično zastupanje
- unakrsno ispitivanje
- prevođenje

Uvod

Licima „optuženim za krivično djelo" zajamčena su određena osnovna prava koja su neophodna za pripremu i iznošenje odbrane i u cilju obezbjeđivanja da okrivljeni može sebe da zastupa pod jednakim uslovima koji postoje za tužioca. Sud je odavno prepoznao osnovna prava na odbranu u krivičnom postupku, propisana u stavu 3 člana 6, kao specifične aspekte koji čine dio šireg koncepta prava na pravično suđenje. Tako je Sud obično ispitivao navodna kršenja jednog od prava iz stava 3 člana 6 zajedno sa stavom 1 člana 6. Stoga, da bi dokazao da je došlo do kršenja jednog od njegovih prava na odbranu optuženi takođe mora da pokaže dejstvo ograničavanja njegove odbrane na pravičnost krivičnog postupka u cjelini.

4.1. Obavještenje o optužbi

- **Okrivljeni mora biti obavješten o optužbi kako bi mu se omogućilo da pripremi i iznese odgovarajuću odbranu.**

Pravo na informisanje ima za cilj da okrivljenom pruži konkretne i podrobne informacije o optužbi koje su mu neophodne za pripremu i iznošenje odgovarajuće odbrane na suđenju. „Razlog" za pružanje informacija koje su obavezne u skladu sa tačkom a) stavom 3 člana 6 se odnosi na navodno počinjena djela, dok se „priroda" odnosi na definiciju djela u nacionalnom zakonodavstvu. Sud je u predmetu *Pellisier i Sassi protiv Francuske*[111] zauzeo stav da je pružanje potpunih informacija o prirodi i razlogu optužbe glavni preduslov za obezbjeđivanje pravičnog postupka. Obavještenje u pisanom obliku nije obavezno ako je usmenim putem dato dovoljno informacija.[112] Međutim, Sud je zauzeo stav da se informacije moraju pružiti na jeziku koji optuženi razumije.[113] Postoji relativno mali obim sudske prakse o pravu na „neodložno" informisanje. Iako se sve relevantne informacije, bilo činjenične bilo pravne prirode, moraju pružiti okrivljenom na način da mu se dâ dovoljno vremena da pripremi odbranu, pristup Suda nalaže da ovaj uslov ne podrazumjeva da se informacije moraju pružiti odmah. Sud je u predmetu *Mattoccia protiv Italije*[114] ipak zauzeo stav da se osnovne informacije o optužbi moraju dostaviti najkasnije prije

111 Pellisier i Sassi protiv Francuske, 25. mart 1999.
112 Kamasinski protiv Austrije (1989.)
113 Brozicek protiv Italije (1989.)
114 Mattoccia protiv Italije, 25. jul 2000.

prvog razgovora sa policijom. Značajno je napomenuti da je teret na podnosiocu predstavke koji treba da pokuša da pribavi informacije prisustvovanjem na raspravama i iznošenjem odgovarajućih zahtjeva.[115]

4.2. Adekvatno vrijeme i uslovi za pripremu odbrane

- **Licu protiv kojeg je podignuta krivična optužba treba obezbjediti dovoljno vremena i uslova da se brani tokom krivičnog postupka.**

Postoji značajno preklapanje između ovog prava i prava na pravno zastupanje, prava na obavještavanje o optužbi, kao i opštih načela pravičnosti u smislu stava 1 člana 6. Kako bi se utvrdila usaglašenost sa ovim uslovom, neophodno je uzeti u obzir opštu situaciju odbrane, uključujući i branioca, a ne samo situaciju okrivljenog nezavisnu od ostalog. [116]

Garancija za obezbjeđivanje „adekvatnog vremenskog perioda" za pripremu odbrane počinje da teče od trenutka kada se protiv lica podigne krivična optužba. Test adekvatnosti vremenskog perioda je subjektivan jer se moraju uzeti u obzir različiti faktori u vezi sa prirodom i složenošću predmeta, fazom postupka i onim što je predstavlja rizik za podnosioca predstavke. Sud je u predmetu *Campbell i Fell protiv Ujedinjenog Kraljevstva* smatrao da je period od pet dana za obavještavanje o disciplinskom saslušanju u zatvoru adekvatan period jer se radilo o jednostavnom predmetu.

Test „adekvatnih uslova" je takođe subjektivan jer zavisi od određenih okolnosti i mogućnosti podnosioca predstavke. Određeni uslovi, kao što je pravo okrivljenog da komunicira sa advokatom, se mogu smatrati suštinski značajnim; međutim, na pravo na sastanak sa braniocem se mogu primjenjivati određena ograničenja. Na primjer, ESLJP je zauzeo stav da domaći sud može odbaciti ono što je lice optuženo za krivično djelo izabralo ako postoje odgovarajući i dovoljni uslovi za zauzimanje stava da je to neophodno u interesu pravde[117]. Takođe je dozvoljeno da nacionalno zakonodavstvo propiše čak i strožija pravila za one koji žele da brane lica pred vrhovnim sudovima.[118] Pored toga, pravo odbrane na pristup svim informacijama u posjedu tužioca nije apsolutno; može se desiti da postoje suprotstavljeni interesi. Oni mogu obuhvatiti pitanja državne bezbjednosti ili potrebu za zaštitom svjedoka. U takvim primjerima sud mora biti uvjeren da su ograničavanja prava na odbranu strogo neophodna u okolnostima pojedinačnog predmeta. Takođe su obuhvaćeni „uslovi" koje zahtijeva odbrana u fazi suđenja. Kao takvoj, odbrani se mora obezbjediti dovoljno vremena da iznese argumente odbrane, da pozove vještake, ili da joj se omogući odlaganje. Slično tome, podnosiocu treba obezbjediti dovoljno uslova za pripremu žalbe što podrazumjeva njegovo pravo da zna razloge sudske presude.[119] Presuda Suda u predmetu *Korellis protiv Kipra*[120] ukazuje da test ne podrazumjeva „stvarnu predrasudu" prema odbrani koja nastaje kao rezultat neuspjeha države da omogući pristup „uslovima"; umjesto toga, podrazumjeva „relevantnost" pripreme odbrane.

115 Campbell i Fell protiv Ujedinjenog Kraljevstva, 28. jun 1984.
116 Krempovskij protiv Litvanije (dec.), 20. april 1999.
117 Croissant protiv Njemačke, 25. septembar 1992.
118 Meftah i ostali protiv Francuske, 26. jul 2002.
119 Hadjianastassiou protiv Grčke, 16. decembar 1992.
120 Korellis protiv Kipra, 07. januar 2003.

4.3. Pravno zastupanje ili lično zastupanje prilikom odbrane

- **Lice protiv kojeg je podignuta optužba ima pravo da se brani lično ili da angažuje advokata. U određenim okolnostima postoji pravo na besplatnu pravnu pomoć.**

Pravo na zastupanje se odnosi na fazu pretkrivičnog i sudskog postupka. Iako to ne podrazumjeva neograničen pristup pravnom zastupanju, Sud je u predmetu *Salduz protiv Turske*[121] ustanovio opšte načelo prema kojem se okrivljenom, osim u izuzetnim okolnostima, mora obezbjediti pravna pomoć počev od prvog saslušanja. Ne postoji pravo, kao takvo, na pristup advokatu u svim fazama postupka, a mogu se uvesti i ograničenja na broj i trajanje sastanaka pod uslovom da se odmah nakon hapšenja ispoštuje osnovna potreba za pristupom pravnoj pomoći .[122]

Okrivljeni može odlučiti da se lično zastupa pod uslovom da se radi o slobodnom izboru i da to nije suprotno interesima pravde. Međutim, ovo pravo nije apsolutno i državni organi ga mogu uskratiti ako nacionalno zakonodavstvo nalaže da lice ima pravnog zastupnika, posebno kada je navodno djelo ozbiljne prirode. Država ne može zahtijevati od okrivljenog da se brani lično; iako je značajno napomenuti da pravo na pravnu pomoć, besplatnu ili neku drugu, ne podrazumjeva apsolutno pravo na izbor branioca. Domaći sud može postaviti advokata odbrane, a da okrivljeni to smatra nepotrebnim[123], dok nije dovoljno da nadležni organi samo postave ili dozvole advokatu da postupa. Sud je u predmetu *Artico protiv Italije*[124] naveo da pravna pomoć mora biti „praktična i djelotvorna“, a ne samo „teorijska i iluzorna“. [125]

Domaći organi moraju, u odnosu na pitanje besplatne pravne pomoći, uzeti u obzir finansijsko stanje okrivljenog i interes pravde. To obuhvata razmatranje prirode i složenosti navodnog djela, ozbiljnost sankcije koja bi se mogla izreći i sposobnost okrivljenog da sebe adekvatno zastupa.[126] Ako okrivljeni ima dovoljno finansijskih sredstava da plati advokata ne uzimaju se u obzir interesi pravde u svrhu pružanja pravne pomoći.[127] Sud je zauzeo stav da interesi pravde moraju biti razmotreni u svakoj fazi postupka.[128] Država nije odgovorna za svaku manu advokata odbrane, bilo da se radi o pravnoj pomoći ili ne, jer je ponašanje odbrane u suštini stvar odnosa između okrivljenog i njegovog branioca.[129] Međutim, ako je neuspjeh ili nemogućnost, branioca dodjeljenog u okviru pravne pomoći očigledna ili je u dovoljnoj mjeri na nju skrenuta pažnja nadležnih državnih organa onda su oni u obavezi da intervenišu.[130]

121 Salduz protiv Turske (GC), 27. novembar 2008.
122 John Murray protiv Ujedinjenog Kraljevstva, 02. februar 1996.
123 Croissant protiv Njemačke, 25. septembar 1992.
124 Artico protiv Italije, 13. maj 1980.
125 Ibid 31-38
126 Timergaliyev protiv Rusije, 14. oktobar 2008.
127 Campbell i Fell protiv Ujedinjenog Kraljevstva, fusnota 54 u prethodnom dijelu teksta
128 Granger protiv Ujedinjenog Kraljevstva, 28. mart 1990.
129 Artico protiv Italije, 13. maj 1980.
130 Kamasinski protiv Austrije, 19. decembar 1989.

4.4. Pravo na ispitivanje svjedoka131

- **Mora postojati potpuna ravnopravnost stranaka u pogledu ispitivanja svjedoka.**

Ovo pravo se odnosi na suđenje i svaki žalbeni postupak, i uopšteno govoreći ne odnosi se na pretkrivični postupak. To nije apsolutno pravo; međutim, sva ograničenja moraju biti u skladu sa načelom „ravnopravosti stranaka". Termin „svjedok" ima autonomno značenje. Nije ograničen na lica koja iznose živi dokaz na suđenju. Takođe obuhvata vještake koje pozivaju tužilac ili odbrana (ali ne i vještaka kojeg postavlja sud[132]); saokrivljenog[133]; i one koji su dali izjave zabilježene u pretkrivičnom postupku i iščitane na suđenju.[134]
Lica koja tvrde da im je prekršeno ovo pravo moraju da dokažu ne samo da im nije bilo dozvoljeno da pozovu određenog svjedoka, već i da je saslušanje svjedoka bilo apsolutno neophodno za utvrđivanje istine i da je činjenica da nije bilo saslušanja ograničila prava odbrane i pravičnost postupka u cjelini.[135]
Samo se ključni svjedok tužioca – odnosno onog čiji dokaz se koristi u cjelini, ili u odlučujućoj ili ključnoj mjeri u cilju obezbjeđivanja donošenja osuđujuće presude - može pozvati bez dozvole suda. [136] Prilikom odlučivanja da li je određeni svjedok ključan ili ne, nadležni organ može ponekad ispitati kvalitet i pouzdanost drugih dokaza koji su korišćeni protiv okrivljenog.
Odbijanje ključnog svjedoka da svjedoči u izuzetnim okolnostima, kao što su predmeti koji se odnose na seksualne prestupe kao što je silovanje, ili seksualno zlostavljanje djeteta, može poslužiti kao legitimna osnova za korišćenje svjedočenja zabilježenog u pretkrivičnom postupku bez ponovnog pozivanja svjedoka. Sud je u predmetu *S.N.* protiv Švedske[137] ustanovio da nije došlo do kršenja tačke d) stava 3 člana 6 u vezi sa osuđivanjem nastavnika za seksualno nasilje nad desetogodišnjim učenikom. U skladu sa nacionalnim zakonodavstvom, u takvim predmetima se djeca u ulozi tužioca rijetko pozivaju da iznesu dokaze pred sudom zbog traumatičnog dejstva koje bi to moglo imati na njih, dok je glavni dokaz bio snimljeni video razgovor dječaka sa posebno obučenim policijskim službenikom. Sud je ustanovio da je za svrhe člana 6 bilo dovoljno to što branilac podnosioca predstavke nije mogao da prisustvuje razgovoru sa djetetom, niti je mogao dati policijskom službeniku pitanja koja je odbrana željela da postavi dječaku.

4.5. Besplatna pomoć prevodioca

- **Okrivljeni ima pravo na besplatnu pomoć prevodioca ako ne može adekvatno da razumije i da govori jezik suda.**

Ovom garancijom se štite pojedinci koji su već „optuženi za krivično djelo" i ona se odnosi na fazu pretkrivičnog postupka, kao i na kasnije faze. Pravo se takođe proširuje na sve žalbene postupke. Ovom odredbom se jamči pravo na besplatnu pomoć prevodioca licu koje ne razumije jezik suda, ali ne nužno

131 Postoji određeni stepen preklapanja između ovog prava i prihvatljivosti dokaza koja je obrađena u odjeljku 3 prethodnog dijela teksta.
132 Brandstetter protiv Austrije, 28. avgust 1991.
133 Luca protiv Italije, 27. februar 2001.
134 Kostovski protiv Holandije, 20. novembar 1989.
135 Butkevičius protiv Litvanije, dec. 28. novembar 2000; presuda od 26. marta 2002; Krempovskij protiv Litvanije, 20. april 1999.
136 Vidal protiv Belgije, 22. april 1992; Doorson protiv Holandije, 23. jun 1996.
137 S.N. protiv Švedske, 02. jul 2002.

i pravo na pomoć na maternjem jeziku okrivljenog.

Pravo okrivljenog na besplatnu pomoć prevodioca je apsolutno. Ne zavisi od finansijskog stanja okrivljenog. To znači da ova usluga ne samo da treba da bude besplatna za okrivljenog tokom suđenja, već i da domaći organi ne smiju tražiti naplatu tih troškova na kraju krivičnog postupka.[138] Ovo pravo takođe obuhvata pismeno ili usmeno prevođenje svih onih dokumenata ili izjava u postupku pokrenutom protiv okrivljenog koje su mu potrebne da bi stekao razumjevanje ili koje je potrebno prevesti na jezik suda kako bi mu se obezbjedilo pravično suđenje. Međutim, to ne znači da se moraju pismeno prevoditi sve stavke pisanih dokaza ili zvanična dokumenta u postupku.[139] Teret je na sudiji u postupku koji treba da pokloni značajnu pažnju obezbjeđivanju da odsustvo prevodioca neograničava potpuno učešće podnosioca predstavke u pitanjima koja su od ključnog značaja za njega. [140]

138 Luedicke, Belkacem i Koc protiv Njemačke, 28. novembar 1978.

139 Kamasinski protiv Austrije, 19. decembar 1989.

140 Cuscani protiv Ujedinjenog Kraljevstva, 24. septembar 2002.

CENTER FOR DEMOCRACY AND HUMAN RIGHTS

THE AIRE CENTRE
Advice on Individual Rights in Europe

JUSTICE SYSTEM

MONITORING

MONTENEGRO

September 2012

EUROPEAN UNION
DELEGATION TO MONTENEGRO

This is an EU funded project, managed by the Delegation of the European Union to Montenegro.

FINAL REPORT ON TRIAL MONITORING
FOR THE PERIOD 01 APRIL 2011 – 31 JULY 2012

PUBLISHER:
Centre for Democracy and Human Rights - CEDEM

For the Publisher:
M. Sc Nenad Koprivica

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PROJECT PARTNERS:
AIRE Centre,London

PREPRESS AND GRAPHIC DESIGN:
Aleksandar Pajević

PRINTED BY:
Studio Mouse

NUMBER OF COPIES:
150

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This report was prepared with the support of the European Union. The content of this report is sole responsibility of the Centre for Democracy and Human Rights (CEDEM) and in no way does it reflect the views of the European Union.

CONTENTS

FOREWORD

The justice system reform is undoubtedly one of the most important political, legal and social tasks of Montenegro. Without an efficient judicial system, it is not possible to establish rule of law in its entirety, nor is it possible to implement necessary economic reforms. Besides, the success of this reform makes a *conditio sine qua non* for accession of Montenegro to the European Union. Monitoring of legislative practice and case law is one of the ways to contribute to more successful reforms and faster fulfilment of the EU membership criteria.

The report that you have in front of yourselves is a key result of the project "Justice System Monitoring" which aims to encourage establishment of an accountable, efficient and transparent justice system in Montenegro. The project is funded by the European Union and managed by the Delegation of the European Union to Montenegro. On the basis of the fact that function of a trial, which involves application of the law to the specific case, is inherently the central part the justice system reform, monitoring included more than a hundred criminal proceedings conducted before the Montenegrin courts in the past sixteen months. In fact, we opted for criminal legislation since its implementation illustrates almost all the challenges and limitations of the reform process and enables resolving of some of the critical issues that should lead to the fulfilment of visible results in the justice system.

Given the complexity and the number of the monitored cases, dynamics of the work in courts and circumstances in which the law was applied, it was not easy to use a single methodology for the trial monitoring task and, particularly, to ensure that it did not impair independence of the courts. In doing so, we were guided by the fact that the role of civil society in trial monitoring may be observed only in the framework of procedural rules and that comments may be given in respect of the monitored cases only after an enforceable decision has been rendered for them. However, monitoring of individual cases makes it possible to create a certain picture of indicators of a fair trial and functioning of the justice system since application of the law must be founded on the rule of law principle and it must also correspond to the legitimate expectations of parties on which the law is applied. In that regard, even a benign breach of procedural rules may arouse a feeling of legal uncertainty on the side of parties and contribute to a negative perception of the work of courts.

This report was prepared with the aim to identify main problems and challenges regarding implementation of innovated criminal legislation. In addition to a potential identification of bias and corruption which are nowadays most frequently referred to in commenting judicial proceedings in public discourse, our aim was also to draw attention of the public to the other, equally important matters such as resources and technical equipment in courts and accountability of other stakeholders for the quality of trials. The report also contains recommendations regarding certain amendments to the legislative framework and its implementation in practice, which we deem necessary in order for the envisaged reform of the justice system to be a source of stable and prosperous social community.

M. Sc Nenad Koprivica, Executive Director, CEDEM
Biljana Braithwaite, Program manager for the Western Balkans, AIRE Centre

INTRODUCTION

In the past fifteen years, Montenegro has invested significant efforts in the field of justice system reform. The latest comprehensive reform implemented in 1999-2000 aimed to transform administration and local government to a citizen oriented service; it also aimed to create an independent justice system as a guarantee of the rule of law and intended for these two segments, together with the legislative power, to become an effective and efficient legislative and organisational framework for economic, social and other processes in Montenegro. The reform which began in 2000 was intensified after the restoration of independence in 2006. The 2007 Constitution reinforced independent position of the justice system and the state prosecutor` s office. The Strategy for the Reform of the Judiciary 2007-2012 was adopted, along with the Action Plan for its implementation and numerous legal amendments concerning institutional set-up of the justice system, mutual relations and powers of office holders in the justice system. The main organisational regulation in the field of justice system, which was adopted in 2000 and which is in still force after being subject to certain amendments, is the Law on Courts. In addition, the Law on Judicial Council and the Criminal Procedure Code were also adopted, along with some novelties in the Criminal Code.

Despite the efforts that have been invested, the planned outcomes of the reform have not been completely achieved which was also noted in the European Commission` s Progress Reports for 2009 and 2010, European Commission` s Opinion on Montenegro`s Application for Membership of the European Union and reports of the Council of Europe Monitoring Missions. In fact, the court funding system is still under the strong influence of executive and legislative authorities; objectively speaking, conditions in which the courts and judges work do not guarantee independent position which leads to the brain drain of judicial staff to the other professions, while the system for permanent training of the new staff has not developed yet, particularly in regard to new regulations. Besides, the justice system in Montenegro is facing particularly serious challenges such as organised crime, corruption, terrorism and war crimes, as well as the unresolved social problems and the growing economic crisis.

On the other hand, condition in the justice system has never been given so much space in public media, while interest of international and domestic public in the issues in law application has never been as intensive as it is now. Additional ground for such findings is also reflected in the fact that the justice system has been increasingly subject to open attacks and criticism and other, more subtle, forms of interference in its independence. Despite formal endeavours in the field of the justice system reform, interests of political parties are frequently conflicted with the position of independent justice system. The parties often act in a way which challenges the constitutional principle of the division of powers, while autonomy of judicial power is called into question. Particularly worrying is the fact that it is impossible to reach political consensus regarding necessary constitutional amendments which are to contribute to strengthening of independent position of the justice system in relation to the other branches of power. Despite increasing influence of the civil sector, which is reflected in the number of criminal charges brought by NGO and reactions of courts and prosecution offices to the initiatives for criminal prosecution, the influence of civil sector has still not increased to the extent in which it might produce more significant effect on resolving the problems mentioned above. In fact, the social scene lacks capable non-party bodies or non-governmental organisations that would continuously work on promotion of the independent justice system and would have the capacity to monitor state of play in the justice system; and which would also propose reform projects and participate in preparation of relevant regulations.

The flaws in functioning of the justice system mentioned above certainly go back further to the past and may also be identified as a result of the former bureaucratic and hierarchical model of the justice system set-up, but also as a result of political and economic turmoil that marked the development of democracy in the region. In such constellation of relations, the justice system did not have the influence it was entitled to, since a majority of social problems were resolved outside the institutions of the system, through party mechanisms and other channels outside the institutions. A large number of inherited backlog cases; state of war and semi state of war in the surrounding countries which caused institutional crisis and affected quality and efficiency of the judicial system, as well as an endeavour to establish an autonomous judicial legitimacy in the conditions involving interaction between several centres of power are only some of the factors which had a critical impact on the achieved results.

On the basis of the above mentioned, it may be noted that the justice system reform in Montenegro has never been as dynamic as it is now, while the task of any individual judge who has been entrusted with the power to adjudicate (*iurisdictio est etiam iudicis dandi licentia*) and provide guarantees for the lawful and fair trial has become even more complex. Recent decision of the European Union to open and conclude negotiations with chapters 23 and 24 highlights importance of the justice system reform for accession of Montenegro to the European Union. That is why the trial monitoring presents a special challenge, not only for policy makers in the justice system and judicial officials, but also for the other stakeholders in society, primarily media and civil society organisations engaged in democratisation and human rights.

The report prepared under the project "Justice System Monitoring Project - Montenegro" includes findings about the criminal cases observed in the light of Article 6 of the European Convention on Human Rights which was incorporated in domestic legislation and which inherently represents a recognised professional standard. However, this report does not deal with all the matters that are relevant for functioning of the criminal legislation in accordance with the standards set out in the European Convention (such as the enforcement of court decisions), nor does it seek to provide an assessment of independence, impartiality, efficiency and transparency of the overall justice system. Purpose of the report is to contribute to establishing such system by identifying certain normative and factual barriers that affect full respect of the right to a fair trial and definition of recommendations for their elimination. In fact, the report is based on the methodology that involves direct presence at the trials, which inherently has some limitations since it is partly founded on the established facts and partly on subjective assessments/perceptions and information presented by very parties to proceedings during project activities. Taking into account the fact that findings and assessments of the monitors may also become subject to political and other types of assessments, monitoring was primarily directed towards objective indicators and results instead of the personalities of judges and other stakeholders in proceedings.

The report also includes an overview of relevant case law of the European Court for Human Rights which serve in a way, to draw a parallel between the Montenegrin legislative framework and case law and European standards concerning the right to a fair trial. Given that there are no universal solutions which will be applied automatically on all the cases in practice, the judgments of the European Court for Human Rights are important as they provide additional interpretations of provisions of the European Convention. Finally, the case law of the European Court for Human Rights, in addition to the legal weight, also has political weight because of the ECHR jurisdiction and right to individual applications filed by the Council of Europe member states which accepted jurisdiction of this court and which enable comparison of the quality and scope of the respect of human rights in their national justice systems.

BASIC REMARKS CONCERNING THE PROJECT

The project "Justice System Monitoring – Montenegro" was funded by the European Union through the European Union Delegation to Montenegro and was implemented by the Centre for Democracy and Human Rights (CEDEM) in partnership with AIRE Centre from London in the period from 01 February 2011 until 31 July 2012.

The following were the main project goals:

1. Build capacity of civil society organisations for monitoring criminal proceedings and initiating changes;
2. Influence judicial policy and case law by collecting, analysing and distributing updated, highly reliable information about the criminal case law with the aim of identifying the field of reform, including recommendations for changes;
3. Support painless transition to the new system established under the 2009 Criminal Procedure Code by analysing and monitoring the activities undertaken so far;
4. Serve as a platform for cooperation between the Government and civil society with the aim of facilitating and supporting the justice system reform.

Since there is still a certain lack of public confidence in justice and prosecuting systems in the Montenegrin society, the project also aimed to contribute to a higher level of information among the public regarding the work in courts, on the basis of the premise that the possibilities for the potential influence on judicial officials decrease as the social awareness of its importance raises.

Monitoring was entrusted with the monitoring team selected by CEDEM, which included the following members:
Vladan Đuranović, head of the team (for the period from 01 April -31 September 2011)
Daliborka Knežević, head of the team (for the period from 01 October 2011-31 July 2012)
Marija Vuksanović, member
Andrej Popović, member

Trial monitoring began on 01 April 2011. Memoranda of understanding had been signed earlier with the following:

- Supreme Court of Montenegro;
- Supreme State Prosecutor` s Office;
- Ministry of Justice of the Government of Montenegro;

Monitoring included all the participants in proceedings:

- first instance courts in which proceedings are conducted, for a specific case: high courts in Podgorica and Bijelo Polje, including special divisions, and Basic Courts in Podgorica, Bijelo Polje, Rožaje, Bar and Kotor;
- prosecutors representing bills of indictment, including the special prosecutor;
- Police Directorate, regarding the complaints of their work brought in the course of proceedings and regarding offences that involve overstepping the powers and failure to respect human rights, for which the bill of indictment has been brought.
- defence attorneys of the accused;
- proxies representing the aggrieved parties;
- expert witnesses;
- media reporting on trials.

We also note that monitoring included the control of application of certain mechanisms from the Criminal Procedure Code in practice and assessment of certain legal norms. Opinions on these matters are included in recommendations.

Monitoring is conducted in relation to the actions of the court, in the phase from bringing the bill of indictment until adopting the first instance decision.

SUBJECT OF MONITORING

Under Article 6 of the European Convention on Human Rights and Fundamental Freedoms, monitoring was conducted in relation to the respect of the following rights:

1. Right to an independent court
2. Right to an impartial judge
3. Right to a public hearing
4. Access to court
5. Right to use the language one understands
6. Presumption of innocence
7. Right to an efficient defence
8. Right to a trial within a reasonable time
9. Equality of arms

In addition to the above mentioned rights, monitoring also included the following:

1. Illegally obtained evidence
2. Respect of the rights of the aggrieved – victims, and their families

LEGISLATION

The following are relevant pieces of regulations in the criminal justice field:

1. Constitution of Montenegro
2. Criminal Code
3. Criminal Procedure Code
4. Law on Liability of Legal Persons for Criminal Offences
5. Law on Witness Protection
6. Law on Courts
7. Law on Expert Witnesses
8. Law on the State Prosecutor` s Office
9. Law on Attorney Practice
10. Law on Protection of the Right to a Trial within a Reasonable Time
11. Law on Judicial Council
12. Law on Managing Seized and Confiscated Assets

Judicial function is performed by the Supreme Court, Appellate Court, two high courts, 15 basic courts, Administrative Court and Commercial Court. Criminal proceedings are conducted before the basic courts which act as first instance courts in all the cases, while the high courts decide on appeals against the judgments passed by these courts. High courts are first and second instance courts. The Appellate Court decides on the appeals against the judgments passed by these courts, where they act as the first instance courts. The Supreme Court decides on extraordinary legal remedies in the criminal proceedings and always acts as the court of last resort. Since the subject of monitoring includes criminal proceedings, we will now elaborate the Criminal Procedure Code to the extent needed for understanding the monitoring activities.

The criminal procedure is governed by the Criminal Procedure Code (Official Gazette of Montenegro 57/09 of 18 August 2009, 49/10 of 13 August 2010) which entered into force in its entirety on 01 August 2011. Since assessment of this code is not the subject of monitoring, we will now focus on several major characteristics.

The main difference from previous regulations which governed the criminal procedure is reflected in the fact that investigation (Article 275) has now been entrusted with the state prosecutor, instead of the court as it was prescribed before entry of this Code into force. On the basis of the fact that the investigation has significant influence on further course of the proceedings, we should now highlight several circumstances:

a) transferring investigation to the competence of the prosecutor essentially means that the state authority which is not independent (under Article 134 of the Constitution, the prosecution office is a unique and autonomous authority, while the Law on State Prosecutor` s Office stipulates in which situations the prosecutor is not independent) may significantly limit rights and freedoms of citizens since being under investigation, even without being imposed detention, is a significant limitation on rights and freedoms. Under the previous Code, the decision on conducting investigation used to be made by the judge, independently and on the basis of the fulfilment of requirements for conducting the investigation. Now, the investigation is ordered by the prosecutor, therefore an authority arranged in hierarchy in which (under Article 110 of the Law on State Prosecutor` s Office) the high prosecutors give mandatory work instructions to the lower ranking prosecutors. This means that the Supreme State Prosecutor may ultimately always decide whether the investigation will be conducted – therefore, instead of independence there is a hierarchical arrangement. Under CPC, the investigation is initiated by the prosecutor` s order which may not be appealed. It is

unclear why the appeal is not allowed. Earlier regulations allowed appeal against the decision on initiating investigation rendered by the investigative judge, while now such appeal is not allowed. The intention was probably to improve efficiency of investigation and to accelerate its course which is essentially positive. There is also a valid argument according to which if the investigation is entrusted with the state prosecutor which is a strictly arranged hierarchical authority, it makes no sense to lodge an appeal against the order on initiating investigation, except where such appeal would not be lodged with the court which would then call into question powers of the prosecutor who conducts investigation – the investigation would not be conducted even though the prosecutor believes it should be. Finally, since the investigation is conducted in order for the prosecutor to determine whether to bring an indictment or not (Article 274), there are reasons to completely entrust the prosecutor with that phase of the proceedings. The practice will certainly demonstrate advantages and disadvantages of this mechanism; however we believe that the court should have been included in the initiation of investigation, at least for a certain period of time. Another important matter is detention, since the detention requirements that had not been laid down in the previous Code (from 2003) were put in place again. This resulted in an illogical situation where the existing Code which emphasises exceptional character of the detention allows more possibilities for imposing it, if compared to the previous one. Furthermore, there is a question from the perspective of human rights protection as to whether such a significant limitation on human rights should be allowed without the court decision.

b) In addition, it is not clear why the right of the accused to file complaint against the bill of indictment was abolished. According to the existing provisions, the suspects may not intervene in relation to whether the investigation will be ordered, nor may they intervene in relation to the bill of indictment that has been brought, at least not in the scope they could have done it earlier. Let us note the following: according to the earlier legal provisions, the accused was entitled to file complaint against the bill of indictment for a number reasons defined in Article 282 of the previous Code: in terms of whether the prosecuted act constituted a criminal offence; whether there were circumstances that excluded guilt; whether there had been a statute of limitations, abolition, pardon; whether there was evidence justifying suspicion which was sufficient for bringing an indictment. According to the existing provisions (Articles 293, 294, 296 and 297), where the three-judge panel (Article 24 paragraph 7) has found that the court has jurisdiction to conduct the trial on the basis of a specific bill of indictment (Article 293 paragraph 4) and where it has found that there are no conditions to dismiss the bill of indictment (Article 294 paragraph 1) it renders decisions to confirm the bill of indictment. The accused may appeal against such decision only for the reason involving lack of jurisdiction of the court (Article 293 paragraph 4), while the state prosecutor and the aggrieved party acting as the prosecutor may appeal in accordance with all the sub-paragraphs of Article 294 paragraph 1. Therefore, the accused that have no legal remedy at their disposal during investigation may appeal against the bill of indictment only for the reason involving lack of jurisdiction – which means that the trial should not be conducted by that court, but by the other one. The reason for this is also the fact that their rights are limited after the bill of indictment becomes legally effective to a higher extent compared to the investigation phase – let us just mention the impossibility to apply for a number of jobs. On the other hand, the state prosecutor and the aggrieved party acting as the prosecutor may challenge the decision on dismissal for the reasons related to content and bring about confirmation of the bill of indictment even though the bill of indictment has been dismissed by the first instance panel. Therefore, the accused are placed at a disadvantage since they have no effective legal remedy against the bill of indictment at their disposal.

Decision on punishment without conducting the main hearing is possible for the offences punishable by three years of imprisonment or less, a fine and other more lenient criminal sanctions and as such it represents a novelty in the criminal procedure.

Finally, an important novelty is plea bargaining (Articles 300 through 303 of CPC). In the case of criminal offences for which imprisonment of up to 10 years is prescribed, the accused or the state prosecutor may propose that a plea bargain be entered into in a way that, should the plea agreement be reached, the court passes judgment in accordance with that plea. This is a completely new mechanism in our case law. The court virtually only states that the plea exists and is obligated to pass the judgment in accordance with that plea. Therefore, the judgment is basically passed by the accused and the prosecutor.

GENERAL PRINCIPLES OF THE CRIMINAL PROCEDURE CODE

General provisions of the Code, Title I and Basic Rules define the goal of the Code and the principles underlying criminal procedure. We emphasise the principles that are directly connected with the contents of this report:

a) Subject and goal of the Code:
The main goal of the Code is to ensure that no innocent person is convicted and that an adequate criminal sanction is imposed on an offender (Article 1).

b) Principle of legality:
A criminal sanction may be imposed only by the court of appropriate jurisdiction in the proceedings conducted in compliance with this Code (Article 2).

c) Presumption of innocence and *in dubio pro reo*:
All persons are considered innocent until their guilt has been established by an enforceable court decision[1]. Everyone, and public figures and media in particular, is obligated to observe the presumption of innocence (Article 3).

d) Rights of suspects and the accused:
Information about the criminal offence and the grounds for suspicion is provided at the first hearing. They are also informed that they are not obligated to make any statements, and are afforded the opportunity to make a statement regarding the evidence incriminating them and to present the evidence in their favour (Article 4).

e) Rights of persons deprived of liberty:
Information in a language they understand about grounds for deprivation of liberty, right to a defence attorney, right to inform their family, diplomatic or consular mission if they are foreign nationals or to inform relevant organisations, obligation to bring them before the state prosecutor (Article 5);

f) Prohibition of retrial (*ne bis in idem*):
No person may be tried again for the same criminal offence, but reopening the proceedings in compliance with this Code is allowed (Article 6).

g) Official language in criminal proceedings:
Montenegrin language is official language, while in the areas where a minority nation constitutes majority the language of the minority is also used. Parties to proceedings use their language or the language they understand and if that is not possible they will be provided with an interpreter.

1 Judgment is enforceable once it has become impossible to lodge a regular legal remedy against it.

Written communication is in Montenegrin language, while detainees may use their language or the language they understand, while calls and decisions are also provided to them in that language (Articles 7, 8 and 9).

h) Prohibition of use of violence and extortion of a confession:
Prohibition of violence and extortion, and prohibition for the court judgment to be based on the statement obtained by the use of violence and extortion (Article 11).

i) Right to defence:
It includes the right of the accused persons to defend themselves in person or with the assistance of a defence attorney of their own choice, the right to agree with the defence attorney on the manner of defence, the warning that any statements they make may be used against them as the evidence, the ex officio defence attorney is appointed in accordance with the Code (Article 12).

j) Right to rehabilitation and award of damages:
Person who has been unjustifiably convicted has the right to the award of damages and other rights in accordance with the law (Article 13).

k) Instruction on the Rights of the Accused or other Participants in Proceedings:
All the state authorities participating in proceedings are obligated to inform the accused about their rights in order for them not to fail to exercise their right or not to omit to perform an action, while they are also obligated to inform them about consequences of the failure to act (Article 14).

l) Right to a prompt trial:
The right of the accused to be brought before the court in the shortest possible time, to be tried without delays, and the prohibition to abuse the right for the purpose of delay. Detention must be reduced to the shortest possible time (Article 15).

m) Principles of truth and fairness, including equality of arms:
The court and other state authorities participating in proceedings are obligated to assess conscientiously all t*he evidence and to assess, with equal attention, the pieces of evidence that incriminate the accused persons and the ones in their favour. The court is obligated to provide equal conditions for the defence attorney of the accused in terms of proposing, accessing and presenting the evidence (Article 16)*.

n) Free assessment of evidence and illegally obtained evidence:
The existence or non-existence of facts is determined on the basis of free assessment by the judge (there are no formal evidentiary rules) and the judgment may not be grounded on the evidence that has been obtained by violations of human rights, constitutional norms and provisions of the criminal procedure.

MONITORING

GENERAL REMARKS

Monitoring is conducted in a way that involves direct presence of monitors at the trials. Pursuant to the agreement with presidents of the courts, the monitors announce their presence and it may be said that, besides temporary lack of technical understanding, the monitors did not face any serious problems during their presence at the trials. In performing their role, the monitors record their findings, communicate with all the participants in proceedings, while they also refrain from giving any comments. In parallel with trial monitoring, they monitor media reporting on trials as well. Furthermore, reports on trials are submitted to CEDEM and AIRE Centre once a week, while analytical reports are submitted once a month.

Data on the trials are obtained from different sources: weekly schedules of trials in the courts included in the project; media; direct findings about the trials.

Cases are selected in accordance with instructions given by the project management team; priority is given to the cases involving organised crime and corruption; criminal offences against humanity and international law; and other cases involving elements of overstepping the power, particularly those with the elements of torture, domestic violence cases, criminal offences against honour and reputation, cases against foreign nationals, while cases involving so-called classic crime, such as the criminal offences against property and criminal offences against life and limb, were also monitored.

A majority of the monitored criminal offences were criminal offences against official duty, which includes criminal offences with the elements of corruption and organised crime. In addition to the criminal offences from this group, the criminal offences with elements of organised crime were monitored in additional 17 cases (criminal association, smuggling, agreement to commit a criminal offence, drug trade).

Two proceedings concerning criminal offences against humanity and international law were also monitored – these were the only proceedings for criminal offences from this group which were conducted in the reporting period.

Criminal offences against payment transactions and business operations were monitored in 10 cases as follows: abuse of authority in economy, abuse of office in business operations, money laundering and evasion of taxes and contributions.

Criminal offences involving torture and ill-treatment were monitored in four cases, while one case involved attack on a person in official capacity during discharge of an official duty.

Criminal offences involving insult and defamation were monitored in 11 cases in the early stage of monitoring, to be more precise up until the criminal offences became decriminalised, while in these cases it was not the journalists who were charged.

Criminal offence involving domestic violence and violence in a domestic unit were monitored in eight cases.

The other monitored cases included so-called classic criminal offences such as murder, grievous bodily injury, violent behaviour, theft.

In the reporting period, the monitoring team attended a total of 240 hearings, while 124 cases were monitored.

OBSERVATIONS OF THE MONITORING TEAM

This part of the report includes key findings of the monitoring team regarding certain aspects of respect of the right to a fair trial in accordance with the European Convention on Human Rights and Fundamental Freedoms which provides guarantees to everyone charged with a criminal offence that their rights and freedoms in the course of criminal proceedings will be protected. Court proceedings may not achieve required quality without existence of these fundamental guarantees. Findings mentioned above refer to the principle of publicity, that is publicity of trials, and publicity of the work in courts; principle of trial within a reasonable time; respect of the presumption of innocence; equality of parties in proceedings (so-called equality of arms); right to an efficient defence; right to use the language which parties understand; right to an independent and impartial court; access to court and other matters relevant for trials, such as informing about the rights and transparency of the work in courts. Due to the fact that the judgments were not drafted in the proceedings monitored by the monitoring team, except in five cases, and that the decisions are not enforceable in these cases, free assessment of evidence will be analysed in the forthcoming period. Any further comments on the proceedings for which enforceable decisions were not rendered would constitute interference in an independent work of the courts. For the same reasons that are valid for free assessment of evidence, illegally obtained evidence will be subject of a separate analysis in the forthcoming period given that the issue involving illegally obtained evidence was often raised during the main hearings, particularly in relation to application of the covert surveillance measures.

PRINCIPLE OF PUBLICITY
Principle of the publicity of trials

In the case **M. R. and others, Podgorica Higher Court, K.br.162/11**,[2] the main hearing was held in the presiding judge's office, which was not large enough to accommodate the interested public, so that the sister of the accused could not be present during the trial.

The same problem was noticed in the case **D.R. and others, Podgorica basic Court, K.br. 904/11**,[3] where the persons interested in monitoring the trial had no place to sit, and a journalist of a daily newspaper was allowed to stand in order to be able to follow the course of the main hearing.

The main hearing in the case of the accused **Z.D., Podgorica Higher Court, K.br.140/95**,[4] according to the trial schedule of Podgorica Higher Court, was not published on the website "Sudovi Crne Gore" (Courts of Montenegro), which is still under construction. This practice can be noticed in the example of other courts, which also publish partially this kind of information for certain number of trials.

In the case **B.V. and others, Podgorica Higher Court, Ks.br.29/11**,[5] the main hearing was held in the presiding judge's office, which was not large enough to accommodate the interested public, so that the mother of one of the accused could not be present, the reason being the fact that the large courtroom was occupied because of another criminal proceeding which had lasted longer than originally foreseen. The presiding judge asked the parties to the proceeding whether they agreed for the main hearing to be

2 Criminal act; Attempted unauthorized production, possession and circulation of stupefying drugs from the Article 300 paragraph 2 in relation to the paragraph 1 of the Article 20 of the PC of MNE – Criminal acts against human health

3 Criminal act: Torture and ill-treatment from the Article 167 paragraph 3 in relation to the paragraph 2 related to the Article 25 of the PC

4 Criminal act; Attempted murder from the Article 30 paragraph 2 item 6 of the PC of the Republic of Montenegro related to the Article 19 of the PC of the FRY – Criminal acts against life and body

5 Criminal act: Criminal association from the Article 401 paragraph 2 of the PC of MNE – Criminal acts against public order and peace

held in the office, and since there were no objections the main hearing was held there.

The main hearing in the case **K.br. 416/11**,[6] before Kotor Basic Court, was held one day earlier in relation to the trial schedule announced on the official website www.sudovi.me. Such discrepancy, that the information from the trial schedule announced on the official Internet site www.sudovi.me do not correspond to the trial schedule held by the presiding judges, was noticed in the examples of other courts, not only with Kotor Basic Court.

As regards the requests for the exclusion of public, there were two such requests during the observed period. In the case **I.R., Podgorica Higher Court, K.br.28/12,**[7] the agents of damaged families suggested for public to be excluded from the main hearing, justifying the proposal by the need to protect the rights and the interests of juvenile children of the victims, the late R. and D. The agents stated in their justification that the procedure was being conducted under public scrutiny and that it was very unlikely that they would be "spared" the allegations on the manner and the motifs for the perpetration of the subject criminal act. They particularly invoked the Article 6 of the European Convention according to which the press and public may be excluded from all or part of the trial, inter alia, in the interests of juveniles or the protection of the private life of the parties. After the recess, the Panel decided to exclude the public from the rest of the proceeding, after which all the present, apart from the parties to the proceeding, left the courtroom**.** Several days later, the court passed a formal decision to reject the proposal of the defence for the exclusion of the public. With the fact that the trial panel excludes the public when it assesses that there exists some of the alternatively prescribed reasons in the CPC and that that decision must contain concrete explanations on specific reasons or specific reason, the question is raised on which fact the court based the decision to exclude the public and with what explanation, or rather which of these facts changed or have occurred causing the proposal to be rejected only a couple of days later.

In the case **K.Ž., Podgorica Higher Court, br. K.br.86/11**[8]**,** the agent of the family of the victim addressed the court with the proposal for the public to be excluded from the trial, with the explanation that he was dissatisfied with media reporting. Due to the fact that the agent of the victim, in procedural sense, may not lodge such proposal, the court asked the same to explain his proposal in more details at the subsequently scheduled hearing. The court will then consider the same and make a decision ex officio. Since the agent of the damaged family failed to appear at the scheduled hearing, and did not repeat the proposal for the exclusion of the public from the rest of the proceeding, the court was not considering this issue.

PRINCIPLE OF THE PUBLICITY OF THE WORK OF COURTS

During the observation period, several amendments were being noted which essentially enhance the publicity of the work of Podgorica Basic and Higher Court. They are primarily related to the LCDs placed in pairs, in the entrance hall of the ground floor and on all the floors of the courts, in order to broadcast the hearing schedule in civil, on one LCD, and the main hearings in criminal proceedings, on the other. Also, in the entrance hall on the ground floor visibly placed there are: civil department notice board, court experts, interpreters and mediators notice board, criminal department notice board and the enforcement department notice board. Podgorica Basic Court was selected to be the pilot court for the project aimed at increasing the degree of publicity of the work of the court and given the results to be achieved it should become the model for the publicity of work of all Montenegrin courts.

6 Kotor Basic Court, the case was registered under the register number K.br.416/11

7 Criminal act: First degree murder from the Article 144,paragraph 1, item 8 of the PC of MNE – Criminal acts against life and body

8 Criminal act: Murder from the Article 143, paragraph 1, item of the PC of MNE – Criminal acts against life and body

RIGHT TO TRIAL WITHIN REASONABLE TIME

In the case **P. S. and others, Bijelo Polje Higher Court**[9] first of all we would like to state that the trial was not conducted within the legal deadline, that the accused who had been detained were released since the 3 year deadline had elapsed without the termination of the proceeding. Not entering into the justification of detention, we point out to the violation of the right to trial within reasonable time irrespective of all the complexity of the case and the number of evidence produced. This is particularly so with regards to the facts that the provisions of the CPC, especially of the Article 15 dealing with the urgency of the procedure when the accused are detained, are clear.

In the case **L. R. and others, Podgorica Basic Court,**[10] it was noticed that four consecutively scheduled hearings had been held since procedural assumptions had not been met. Namely, the first hearing was not held because of the absence of the accused Đ.D, whose subpoena for the main hearing had been improperly serviced, as well as of his defence counsel, who had been dully subpoenaed. The second hearing was not held because the judge attended a seminar, and the accused and one defence counsel appeared at the new hearing while the second defence counsel informed the judge of his having a trial before another court. Since the accused Đ. D. refused to present his defence without the presence of his defence counsel, new hearing was scheduled where the accused L. R, his defence counsel and the defence counsel of the second accused appeared, but not the accused Đ.D. The last of these four hearings was not held because the agent of the prosecution had altered the factual description of the indictment and the legal qualification of the act. The main hearing was thus adjourned since the accused used their legal right to prepare themselves for the final speeches, due to the fact that the indictment had been altered.

During the interview, after the adjourned hearing, with the defence counsel of the accused in the case **R. D. Podgorica Basic Court,**[11] it was pointed out that in the given criminal matter Podgorica Basic Court had been acting as the first instance court since 31st December 2004, when due to the amendment of the law, the case was handed over to the competence of Podgorica Basic Court following the investigation procedure conducted by Podgorica Higher Court. In this multiannual procedure being conducted before Podgorica Basic Court since then, several presiding judges have been changed, but the procedure has not yet been terminated. Furthermore, the actions on the perpetration of the criminal act which the accused is charged with in the indictment, according to his defence counsel, date back to the period from 1998 to 2003.

In the case **D. V. and others, Podgorica Higher Court**[12]**,** the hearing has been adjourned on two occasions because of the failure of the Police Directorate to act upon the order for the bringing of the witnesses before the court, at which the Police Directorate fails to inform the court about the reasons for the inaction. Also, this is not the case of unjustified adjournment since there are simply no reasons for the failure to act upon the order.

In the case **A.M. and others, Podgorica Higher Court**[13]**,** the main hearing was adjourned because certain evidence had been delivered to the defence counsels one day before the hearing notwithstanding the fact that on several occasions the court urged the Police Directorate for the evidence to be delivered. As it has been pointed out, the cause for the previous adjournment had been the inaction of another public authority and unjustified as such, no matter that the court had had to adjourn the hearing.

In the case **D.A and others, Podgorica Higher Court,**[14] we point out to the adjournment due to the absence of defence counsel who had been engaged in another case, at which the court reacted properly by

9 War crime against civilians from the Article 142 paragraph 2 of the PC of FRY

10 Criminal act: Abuse of office from the Article 416 paragraph 5 of the PC of MNE

11 Criminal act: Abuse of office from the Article 416 paragraph 5 in relation to the paragraphs 4 and 1 of the PC of MNE

12 Criminal acts of the abuse of office and embezzlement from the group of criminal acts against office Article 416, paragraphs 1-3 and the Article 420 of the PC of MNE

13 Criminal acts of receiving bribe, offering bribe and abuse of office from the group of criminal acts against office Article 416, Article 423, paragraphs 1-3 and Article 424, paragraphs 1 and 2 of the PC of MNE

14 Criminal act – Attempted or instigated abuse of office in commerce from the Article 276 paragraph 2 in relation to the paragraph 1 item 5 related to the Articles 20 and 24 of the PC of MNE

informing the accused of the inappropriateness of such reason. The stated case is considered interesting also because of the fact that similar issues are discussed in civil procedure which, according to the claims of the defence counsels goes in favour of the accused. The observation team will continue monitoring this case, especially with the purpose of seeing the reaction of the participants in the procedure to possible decisions of litigation courts which might challenge the rationale of the indictment, and to the possible situations where two public authorities act differently upon the same issue.

The hearing in the case **C. N. and others, Kotor Basic Court**[15]**,** was adjourned because the defence counsel had been engaged at the congress of the political party which he is a member of. According to the opinion of the monitoring team, such adjournment is unacceptable.

In the case **B. M. and others, Bar Basic Court**[16]**,** we point out to the fact that the accused failed to appear before the court because they had forgotten of the trial. The judge ordered for them to be brought before the court. We would like to emphasize here the extreme case of the contempt of the court and that such behaviour should be sanctioned in a stricter way.

In the case **V.N. Podgorica Basic Court,**[17] the court passed the decision by means of which the criminal procedure against V.N. for the criminal act of violent behaviour from the Article 399 of the PC is separated from the others, because it is procedurally not sustainable for the same person in the same case be examined both in the capacity of the victim and the accused. In "V.N." theft fell within the statute of limitations.

The annulment of the judgement in the case **D. V. and others, Podgorica Higher Court, K.br.7/10,**[18] and failure to pass the decision, or the delay of the court to decide upon the requests of the accused and of the defence, can affect the trial within reasonable time, especially with the fact that it concerns a 2006 case, that the evidence are mostly in the possession of the public authorities or institutions, all the accused appear regularly at the main hearing, the witnesses are accessible to the court, thus the measures that the court undertakes pursuant to the CPC are justified, in order for the criminal proceeding to be more efficient.

In the case of the accused **M. M., Podgorica Basic Court, K.br.11/516** [19] the witness – victim E.K. fail to appear at the previous main hearing because of which the same was adjourned. The same witness – victim failed to appear at the newly scheduled hearing, thus the court introduced the measure envisaged by the CPC and issued the order on forceful bringing of the witness – victim in the criminal proceeding before the court.

In the case of the accused **Z.D. and others, Podgorica Higher Court, K.br.140/95,**[20] the main hearing was adjourned because of the absence of the witnesses, but also of the medical court expert. We have the information that Podgorica Higher Court has been acting in the said case as the first instance court since 21st September 1995. In this sixteen-year long proceeding, several presiding judges have been changed, but the proceeding has not yet been terminated. The criminal acts the accused are charged with in the indictment were perpetrated on 22nd July 1995. We would also like to mention that the trial against the accused Z.D. has been conducted in absentia.

The main hearing in the case of the accused **S.M., Podgorica Basic Court, K.br.05/1225,**[21] was adjourned since neither the accused nor the agent of the prosecution appeared before the court at the scheduled

15 Criminal acts against office: Criminal act: Unauthorized use from the Article 421 of the PC and the criminal act: Embezzlement from the Article 244 paragraph 3 in relation to the paragraph 1 of the PC of MNE

16 Criminal acts against marriage and family - Criminal act domestic violence from the Article 220 in relation to the paragraph 1 of the PC coupled with the criminal act of threatening security from the Article 168 paragraph 2 in relation to the paragraph 1 of the PC, as well as the criminal act of preventing an official in performing official duty from the Article 375 paragraph 3 in relation to the paragraphs 2 and paragraph 1 of the PC of MNE

17 Criminal act: Abuse Of office from the Article 416 paragraph 5 of the PC of MNE

18 Criminal act: Abuse of office from the Article 416 paragraph 3 of the PC of MNE (Criminal acts against office)

19 Podgorica Basic Court, the case with the register number K.br.11/516

20 Criminal act; Attempted murder from the Article 30 paragraph 2 item 6 PC of the Republic of Montenegro in relation to the Article 19 of the PC of the FRY - Criminal acts against life and body

21 Criminal act: Aggravated theft from the Article 240 paragraph 1 of the PC of MNE - Criminal acts against property

time. In relation to the accused, at the previous main hearing the court issued the order for his forceful bringing before the court, and the authorized officers of the Police Directorate – Bijelo Polje Regional Unit, informed the court that they had not found the above accused at the address given. It was concluded that the agent of the prosecution had failed to appear at the main hearing, namely the Deputy Basic Prosecutor – Podgorica. The latter one appeared with some delay justifying his delay by his representing the prosecution in another criminal matter which was being conducted at the same time.

In the case **P.M., Podgorica Higher Court, K.br.97/11,**[22] the witness N.V. failed to appear at the main hearing at the specified time, for the reason that the Police Directorate had failed to act upon the court order for the witness to be brought before the court, without informing the court thereof, although within the case file there is the evidence of the Police Directorate being duly and timely informed of the subject order.

The main hearing in the case **D.R. and others, Podgorica Basic Court, K.br. 904/11,**[23] was adjourned due to failure to meet procedural assumptions, since the accused R. R. failed to appear despite being duly informed by means of the proclamation of the decision from the preceding main hearing.

The accused **S.H., Podgorica Basic Court, K.br.716/11,**[24] failed to appear at the preceding main hearing at the specified time, and since on the day prior to the second main hearing, he was brought before the court in another criminal matter, he was brought before the presiding judge in order to give his statement in this case.

PRESUMPTION OF INNOCENCE

In the case **A.M. and others, Bijelo Polje Higher Court** (see section "Right to impartial judge"), the marked statements of the judge: "one starts from small things" (from which it results that the accused provides his livelihood through criminal activities) and that the accused not only has the problem with drugs, but also with enabling others to enjoy drugs, constitute violations of the presumption of innocence.

During the trial in the case **M. G. and others, Podgorica Higher Court,**[25] certain media published the following allegations in their own interpretation: That the trial would be terminated "with the satisfaction for victims"; that the case would be conducted in the manner to increase the trust by Croatian society and their judiciary". The above statements can be characterized as a pressure on the court as well as a suggestion of the public for the accused to be sentenced, and the publishing of the same does not favour the observance of the presumption of innocence.

In the case **D.A. and others, Podgorica Higher Court**, the article on the trial published by a newspaper, the heading of which suggests that the accused attempted to earn more than three million euros, constitutes the violation of the presumption of innocence, due to the fact that one can conclude from the article that they had attempted to gain profit in an illegal way.

Generally speaking, media reporting in the case **Š.D. and others, Bijelo Polje Higher Court,**[26] is such that only few media observed the presumption of innocence, especially by bringing in relation the accused and his brother who had not even been charged in this case. Also, on several occasions the defence pointed out to the fact that media reporting was such that it created the image of the guilt of the accused, and

22 Criminal act: First degree murder from the Article 144, paragraph 1, item 1-4 of the PC of MNE - Criminal acts against life and body

23 Criminal act: Torture and ill-treatment from the Article 167 paragraph 3 in relation to the paragraph 2 related to the Article 25 of the PC

24 Criminal act: Theft from the Article 239 of the PC of MNE - Criminal acts against property

25 Criminal act: War crime against civilians from the Article 142 paragraph 1 of the PC of FRY and war crime against the prisoners of war from the Article 144 of the PC of FRY

26 Criminal acts: Creating criminal organization from the group of criminal acts against public order and peace; unauthorized production, possession and circulation of narcotics from the group of criminal acts against human health and money laundering and the group of criminal acts against payment circulation and commercial operations from the Article 268, paragraph 4 in relation to the Article 49 paragraph 1 of the PC of MNE Article 416, paragraphs 1-5 of the PC of MNE, Article 300 of the PC of MNE and the Article 268, paragraph 4 in relation to the Article 49 paragraph 1of the PC of MNE.

that the court could not adjudicate independently under such pressure.

In the case **"M" with the accused B.B., B.J., A.M. and M. F., Podgorica Higher Court** – Special Department for Criminal Acts of Organized Crime, Corruption and War Crimes, this presumption was not observed since the outcome of the proceeding was prejudiced in relation to the accused A.M. In the rationale of the decision on the extension of detention it reads: "it is certain that in the subsequent part of the proceeding he would be convicted for serious criminal acts he had been charged with", which constitutes flagrant violation of the presumption of innocence. In this way, the court "finds" the defendant guilty prior to having his guilt proven in accordance with the law. The stated decision was annulled with the decision of the Constitutional Court of Montenegro Už-III br.464/11 which adopted the constitutional complaint and annulled the decision of Podgorica Higher Court, Kv.br. 573/11, dated 22nd June 2011 and the decision of the Court of Appeals of Montenegro, Kž.br. 497/11, dated 5th July 2011 in relation to the appellant.

The presumption of innocence was also violated in the case D.V. and others, Podgorica Higher Court, K.br.7/10,[27] by the court expert, who on several occasions entered into discussion with the accused after being asked questions by the same, responding that he had written everything in his report and that "everything was clear". Sometime later to the question of the defence if he had given the finding and the opinion on the basis of the original financial documentation, the expert gave a negative answer, saying that in the material he had received in order to compile the finding and give his opinion, there had not been all originals, in fact some examined documents had been copies. Responding to the accused that "everything was clear", with the fact that a part of the examined documentation had not been original, which is beyond the rules of the profession, the expert clearly expressed his view, rather his opinion related to the responsibility of the accused. In one of numerous arguments between the expert and the defence and the accused, he stated that "there was no documentation in the Supreme Court for the entire year, and the same individuals continued working", he said that it was the "same as when one ties a goat to guard cabbage", alluding to the accused D. V. We would like to underline that the stated expert statements were not put into the record, neither a warning was issued to the expert.

In the case **"M"**, **Podgorica Higher Court, Ks.br.33/10**,[28] the media – daily newspapers violated the presumption of innocence by publishing the article on the trial, with the violation of the presumption visible in the heading itself which read "*Civilians and Prisoners of War Ill-treated*".

In the case **M. R. and others, Podgorica Higher Court, K.br.162/11**,[29] the accused R.M. stated at the main hearing that the article in the daily newspapers from 28th February 2012, under the heading: "Smuggled Drugs alongside the Teak Wood", violated the presumption of his innocence.

EQUALITY OF THE PARTIES TO THE PROCEEDING - EQUALITY OF ARMS

In the case **Š.D. and others, Bijelo Polje Higher Court[30],** the defence emphasized several times at the beginning of the trial and during the main hearing the issue of the right to efficient defence and to the equality of arms. At the very beginning, the defence pointed out that they had been serviced a series of evidence in the possession of the prosecution even from the time of the investigation. They also pointed out that the defence counsels were unable to have undisturbed contact with the defendants during the period of detention – that the premises lacked proper conditions, that they were separated from the

27 Criminal act: Abuse of office from the Article 416 paragraph 3 of the PC of MNE (Criminal acts against office)

28 Criminal act: War crime against civilians from the Article 142 paragraph 1 of the PC of FRY and War crime against the prisoners of war from the Article 144 of the PC of FRY.

29 Criminal act: Attempted unauthorized production, possession and circulation of stupefying drugs from the Article 300 paragraph 2 in relation to the paragraph 1 of the Article 20 of the PC of MNE - Criminal acts against human health

30 Criminal acts: Creation of criminal organization from the group of criminal acts against public order and peace; unauthorized production, possession and circulation of stupefying drugs from the group of criminal acts against human health and money laundering from the group of criminal acts against payment circulation and commercial operations from the Article 268, paragraph 4 in relation to the Article 49 paragraph 1 of the PC of MNE, Article 416, paragraphs 1-5 of the PC of MNE, Article 300 of the PC of MNE and the Article 268, paragraph 4 in relation to the Article 49 paragraph 1 of the PC of MNE

defendants by means of a glass barrier and that they were unable to have undisturbed contact with the defendants during the trial.

The Panel Chair refused this proposal and started with the proceeding. This decision was mainly based on the statement of the accused D.Š. himself, who responded positively to the question about his readiness to present his defence. When one has in mind total discord between the defence counsels and this accused (the defence counsels claim that the accused is unable to present his defence, and the accused responds positively to such answer) the question of the efficiency of the defence is raised. However, the observation team considers that the justification of the court to initiate the main proceeding is disputable, to say the least. Namely, the accused, who has been already detained for 9 months, can hardly wait for the main hearing to start, and on the other hand, he cannot be familiar with the provisions of the criminal procedure, and it is unlikely that he can be aware of what he states once he starts giving his statement, if his defence counsels are not at least familiar with all the evidence. We think that the court should have instructed the accused to consult his defence counsels, which was its duty pursuant to the Article 14 of the CPC, especially with the view of the fact that in the continuation of the main hearing the Panel Chair informed the defence that it would be possible for them to have undisturbed contact with the accused whilst he is in detention facility, as well as that they would have the evidence serviced which they claimed not to have received, and one part of the evidence was handed over to them at the main hearing, but only following the examination of the accused. In this way, the question is raised of the right to efficient defence and especially the right on the equality of the parties to the proceeding, i.e. the equality of arms.

Furthermore, the Panel Chair addressed the accused on several occasions by using his first name, or often by using his brother's name. When this information was made public, Bijelo Polje Higher Court reacted by issuing the communiqué which sounded strange to say the least. Namely, in the first part of the communiqué (the section concerning the behaviour of the judge) it reads that the judge did nothing to exceed his authorities in the proceeding, nothing that would undermine his professionalism and good behaviour, and that he addressed the accused in the above manner due to the pressure created in the. However, immediately afterwards it reads: "The President of the Supreme Court, immediately upon finding out of the publishing of the recording from the trial in the media, requested from the President of Bijelo Polje Higher Court to talk to the presiding judge and to warn him to use legal terminology in the continuation of the trial, which was done in the concrete case and which suggestion and critique was acknowledged by the judge". Therefore, had there not been the reaction of the President of the Supreme Court, there would have been no criticism either, since it is obvious that Bijelo Polje Higher Court considers that the Panel Chair made no mistake whatsoever. Legal terminology, thus also the terms: "accused" and "charged'' were established exactly because of the principle of equality and every individual in such position should be addressed using the above terms. Different conclusions can be made out of such behaviour of the judge, as well as in every case the law is not complied with.

Finally, even in this case here was a discussion on the recording the statements into the minutes, and the defence counsels insisted on the questions being put into the minutes, which does have its own logic: how can the appeal refer to the fact that the court allowed the answer to an illegal question, if there is no such question in the minutes (main hearing from 19th July 2011).

The problem was noticed in the case "M", against M. M.G., I. M.G., Špiro S.L., B. M.G., I. D.M. and Z. M.T., Podgorica Higher Court, Ks.br.33/10,[31] where the defence emphasized the abuse of the right by the deputy special prosecutor for organized crime and war crime, which behaviour is contrary to the decision of the Court of Appeals, which annuls the judgement of the Higher Court and returns the case to the first instance court for retrial in the part related to the criminal act of war crime against the prisoners of war. The defence in the stated case considers that the deputy special prosecutor abuses his rights and authorities so as to convict the accused for the criminal act of the war crime against the prisoners of war.

31 Criminal act: War crime against civilians from the Article 142 paragraph 1 of the PC of FRY and War crime against the prisoners of war from the Article 144 of the PC of FRY.

In the case "Z", Podgorica Higher Court, Ks.br. 8/11,[32] the defence emphasized on several occasions that the behaviour of the court put them in an unfavourable position in relation to the indictment, for the reason that almost all the proposed evidence of the defence had been rejected, with the explanation, amongst other things, that the first finding of the financial expert had been compiled upon the proposal of the defence, for the needs of the Higher State Prosecutor and the initiation of the investigation, that the supplementary finding had been compiled upon the proposal of the agent of the victim, and that the proposal of the defence for the finding and the opinion to be prepared by an independent audit institution had been rejected. We considered as purposeful to point out to the allegations of the defence that the subject finding is contradictory. Namely, the balance sheet and the profit and loss account of the D.O.O."Z. I." were not serviced to the expert, although the latter refers exactly to these sources. The stated practice is inadmissible and should be severely sanctioned.

In the same case, the court acquainted the parties with the letter of the investigating judge of Belgrade Higher Court dated 20th March 2012, upon the letter rogatory of Podgorica Higher Court, Ks.br.8/11 dated 31st January 2012, with regards to the examination of the witness S.M., in which letter the investigating judge states that S.M. is not accessible to Serbian authorities. In the same case, the defence pointed out to the violation of the right to the equality of the parties – equality of arms, since the prosecution in Moscow had examined three witnesses from the stated case without the presence of the defence counsels. The defence counsels requested for the examination to be done via video link, in order for the defence to have the opportunity to pose questions to the witnesses, which proposal was rejected by the court due to inaccessibility. However, according to the letter of the General Prosecution of the Russian Federation, serviced upon the letter rogatory for the extension of the international legal aid in the subject criminal matter, with regards to the examination of one of the witnesses, V. L., the conclusion is that he is not accessible to Russian authorities. For these reasons, it was decided that in the examination of the witnesses S.M. and V.L. would not be presented as evidence.

In the case **M.G. and others, Podgorica Higher Court** - Special Department for the Criminal Acts of Organized Crime, Corruption and War Crimes, **Ks.br.08/09,**[33] the accused and the victims used their right to pose questions to the witnesses and to object to their statements. On the occasion of the examination of the witness G., the accused N. was warned on two occasions for asking suggestive questions and needed to reformulate the same, since they were related to the subjective attitude of the witness towards the subject facts, and not to his knowledge about the same. After the accused N. had addressed the court wishing to pose another question to the witness, the Panel Chair responded to her that she had no right to ask further questions, that this right had been used in the previous round. The defence counsel of the accused N. objected to this decision of the Panel Chair, with the explanation that the accused might not be denied the right to pose questions, and that the court would decide whether the same would be permitted or not, and whether the answer would be allowed.

32 Criminal acts: against R. K. – the Mayor of Budva Municipality for the criminal act –Abuse of office from the Article 416 paragraph 3 in relation to the paragraph 1 and the Article 416 paragraph 1 of the Penal Code, D. M. – the Vice-Mayor of Budva Municipality, for the criminal act - Abuse of office from the Article 416 paragraph 3 in relation to the paragraph 1 of the PC, Đ. P. – a member of Montenegrin Parliament, D. Ž., S. D., S. V., S. T., N. S., M. K. for the criminal act - Abuse of office through offering assistance from the Article 416 paragraph 3 in relation to the paragraph 1 related to the Article 25 of the PC, D. S., the owner and the executive director of the enterprise "M." DOO Budva, for the criminal act – Abuse of authorities in commerce from the Article 276 paragraph 2 in relation to the paragraph 1 item 5 of the PC, and the criminal act – Abuse of office through instigation from the Article 416 paragraph 1 in relation to the Article 24 of the PC, M. M. for the criminal act – Abuse of office through instigation from the Article 416 paragraph 1 in relation to the Article 24 of the PC and N. P. – the executive director of the enterprise "Z. I." DOO Budva, for the criminal act – Evasion of taxes and contributions from the Article 264 paragraph 3 in relation to the paragraph 1 of the PC

33 Criminal act: Abuse of office from the Article 416 of the PC of MNE - Criminal acts against office, against: M. G., the executive director AD L. B., I. T. financial director, Z. O., Trade Union president L. B., A. L., chief road transport dispatching officer, S. J., cashier, M. M., cashier operations officer, Z. V., payment calculation and cashier operations officer, R. P., head of the department for financial operations and payment collection officer in financial sector, Z. N., applications designer, D. P., head of the financial working unit, R. D., cashier

In the case **D.V. and others, Podgorica Higher Court, K.br.7/10,**[34] the defence pointed out on several occasions, and submitted evidence that on the occasion of the seizure of the documentation by the police there had been serious omissions, since the documentation had not been clearly specified, thus it was not known which documents had existed there. The fact that there was no list of the subject documentation could open the possibility for the abuse of the same. The accused D.V. stated that three persons had been in the possession of the access code for the system for the approval and withdrawal of money, and not only her, and she asked the court to see into that. The court, however, did not deliberate upon that.

RIGHT TO EFFICIENT DEFENCE

In the case **P. S. and others, Bijelo Polje Higher Court**, the court also refused to put into the minutes *ad litteram* the proposal of the defence counsel for exclusion, and there was also a dispute on inserting the statement of the accused (the main hearing held on 20th May 2011). In all the provisions of the CPC related to compiling minutes, as a rule the persons conducting the interrogation or examination enters the statements into the minutes. Because of that, there is always a possibility to have discord about what was actually said, especially when long statements are concerned.

Despite the statement of the witness – victim in the case **S. I. and others, Podgorica Basic Court,**[35] not to join the criminal prosecution, the defence counsel of the accused, without prior consultation with his client, after having been absent from the main hearing for half an hour upon his own request, with the justification that the defence in that criminal matter was not mandatory, starts examining the witness-victim, who states that he wishes to join the criminal prosecution and sets the property claim solely because he was annoyed by the questions posed by the defence counsel.

The ex officio defence counsel in the case **F. M. and others, Bijelo Polje Basic Court** (the main hearing held on 21st June 2011),[36] did not know the identity of the accused he was supposed to defend. Namely, he stated that he was the defence counsel of the accused Ć.G. after which the presiding judge warned him that he was in fact the defence counsel of the accused R.D. and concluded that "the lawyer had obviously come unprepared to the trial and that he did not become familiar with the case for which he had been appointed ex officio defence counsel".

The defence counsel in the case **L.H., Rožaje Basic Court,**[37] during the main hearing used the opportunity to pose questions to the witnesses only once, did not have any objections to the presented evidence, and finally, in the part related to the supplement of the evidence presenting procedure, suggested only one person to be examined as a witness, although he should have known that the same person could not be examined because he/she participated all the time at the main hearing, at the defence of the accused and at the examination of witnesses.

In the case **D.Š., Bijelo Polje Higher Court – Special department for criminal acts of corruption, organized crime, terrorism and war crimes, Ks. br.16/10**,[38] the agent of the prosecution posed one and the same question to the witness on several occasions, the ones which this witness had previously unambiguously responded to. This way of witness examination directed towards obtaining a more favourable response in favour of the prosecution, constitutes an example of bad practice which should be prevented by the court in order to protect the witness which did not happen in the case concerned.

34 Criminal act: Abuse of office from the Article 416 paragraph 3 of the PC of MNE (Criminal acts against office)

35 Criminal act: Torture from the Article 167 paragraph 3 in relation to the paragraph 2 of the PC of MNE

36 Criminal act: Violent behaviour from the Article 399 of the PC of MNE

37 Criminal act: Aggravated theft from the Article 240 paragraph 1 item 1 in relation to the Articles 49 and 23 paragraph 2 of the PC of MNE

38 Criminal acts: Creation of criminal organization - Criminal acts against public order and peace, Unauthorized production, possession and circulation of stupefying drugs - Criminal acts against human health and Money laundering - Criminal acts against payment circulation and commercial operations - PC of MNE

Pointing out to legally invalid evidence

Due to the fact that the issue of legally invalid evidence was raised in a large number of the observed cases, we consider it necessary to pint out to certain views of the defence according to the same:

During the proceeding in the case **M. G. and others, Podgorica Higher Court,**[39] upon the proposal of the defence the court put aside the certified Xerox copies of the minutes on the examination of witnesses before a court in the Republic of Croatia. Acting upon the appeal of the prosecutor, the Court of Appeals reversed the judgement of the presiding panel and decided that these statements could be read and used as evidence in the proceeding. Since the proceeding has not been terminated with an enforceable judgement, the observation team did not enter into the merit of this issue, but it pointed out that the practice would have to be harmonized and the views of lower and higher courts on this issue identical. In the further proceeding, upon the proposal of the defence some documents were taken out of the case file as legally invalid evidence, but the Court of Appeals annulled the decision on setting aside some documents from the case file, i.e. the certified Xerox copies of the statements given in Croatia.

When deciding on the manner of the presentation of evidence in the continuation of the evidence presenting procedure in the case **P. S. and others, Bijelo Polje Higher Court**, when deciding on the proposal for the evidence presenting procedure to be continued with the reading of the witness statements given directly to the minutes at the preceding main hearing and the reading of the expert's report (which evidence had been presented at the previously held main hearing, before a different panel) the court was deliberating on this proposal prior to the examination of all the parties (during the recess in the main hearing so that decision can be made on the proposal for the fining of one of the defence counsels, prior to the examination of the defence counsel of the accused P.S.). Such behaviour is contrary to the Articles 329 and 356 of the CPC, i.e. 317 and 345 of the then effective CPC.

The problem of legally invalid evidence was also emphasized in the case **Z. A. and others, Podgorica Higher Court**. Upon the proposal of the defence, the court decided to set aside one part of the case file compiled in Switzerland, since on the occasion of securing the same legally prescribed procedure had not been observed, by which the effective standards and national regulations in the case concerned were observed.

In the case of the accused **D. R., Podgorica Higher Court, K.br.10/2010**,[40] the minutes were read at the main hearing on the identification of the suspect, which the defence insisted on being set aside from the case file as legally invalid evidence since it had been obtained contrary to the provision of the Article 115 of the CPC. In this specific case, the minutes read that together with the suspect there were employees of the police at the identification. The letter sent by the police confirms these allegations, but that these employees had not been involved in the examination of the suspects or directly connected with the activities in the police. However, the very fact that the accused recognized police officers in the identification line up points out to the violation of the CPC. Because of that, this piece of evidence would have to be set aside from the case file as legally invalid evidence.

Prior to delivering the final speeches in the case "Z", the defence submitted to the court the proposal for the evidence presenting procedure to be supplemented, i.e. the finding and the opinion of the audit house from Belgrade - doo. "P. S.". The Deputy Special Prosecutor objected to the presentation of this kind of evidence, for the reason that it had been submitted in the form of a Xerox copy, as well as for the reason that during the procedure a court expert had already been engaged who already presented his finding and the opinion. The court announced half an hour recess in order to inspect the proposed evidence. The court accepted the prosecutor's objection after having inspected the proposed evidence. However, in the case "D.V.", Podgorica Higher Court, the expert gave his finding and opinion on the basis of

39 Criminal act: War crime against civilians from the Article 142 paragraph 1 of the PC of the FRY and War crime against the prisoners of war from the Article 144 of the PC of the FRY

40 Criminal act; First degree murder from the Article 144 paragraph 1 of the PC of MNE and Assistance offered to perpetrator after committing a crime from the Article 387 paragraph 3 of the PC of MNE - Criminal acts against life and body

the documentation which had partly been composed of the copies and not the originals. To the question of the defence counsel of the accused D.V. the expert confirmed these allegations. Pursuant to the abovementioned, we can conclude that the court acts differently in different cases. This raises the issue of the work of court experts, the procedure for their appointment and dismissal, and the harmonization of the laws with the valid standards.

In the case against the accused **J. M. and others**, **Podgorica Higher Court, K.br.2/11**,[41] the Inspector of the Police Directorate Regional Unit – Department for the fight against drugs and smuggling testified at the main hearing, during the continuation of evidence presenting procedure. Namely, he had been the one to interrogate one of the accused, i.e. R. B., in the presence of his ex officio defence counsel. The witness underlined that he had not interrogated the accused S. M., that in the R.B. interrogation minutes had a technical error in the sense that the interrogation had been conducted by the inspector with the similar name, rather with only one letter difference, and that the person with such name, according to the information he had, was not employed by the Police Directorate Regional Unit – Department for the fight against drugs and smuggling. The accused S. M. objected to the witness statement, in the sense that he had interrogated him in the office. The accused R. B. denied his presence in then detention premises, as the minutes read. Instead he said that he had spent two hours in the office and that during the interrogation the inspector never communicated him his rights. The court passed the decision to exclude from the case file the minutes on the interrogation of R. B. as legally invalid evidence and to inspect the notebook which was proposed as a piece of evidence by R. B.

The accused **B. Z., Podgorica Higher Court, K.br.145/11,**[42] submitted a request to the court for the correction of the minutes from the main hearing held on 20th December 2011 in relation to the statement of the witness V. R. The agent of the damaged family considers that due to the fact that 2 months have elapsed, it cannot be precisely determined what the witness V. R. had stated in his statement at the previous main hearing, without it being entered into the minutes. After a recess, the court decided to sustain the request of the accused and of the defence and decided to subpoena the witness V.R. for the extended evidence presenting procedure in order for the same to specify the context and the course of events with regards to his statement. The defence counsel objected to the lack of technical means – LCDs where all the parties to the proceeding would follow the notes from the main hearing being put into the minutes. The defence counsel having submitted new evidence to the court – copies of the Daily Bulletin of the Police Directorate and three official notes, the agent of the damaged family opposed the presentation of these pieces of evidence, considering that the same had been collected contrary to the CPC. Then, the court decided for the proposed evidence to be obtain through official channels for the continuation of the evidence presenting procedure.

In the case **S. B. and others, Ks.br.1/12**[43]**,** the defence also objected to the validity of the listing of telephone calls obtained with the use of secret surveillance measures, with the explanation that the same had been delivered to the defence in 2 different formats and that it could be seen from them that they were up to 4 years "old", as of the perpetration of the subject criminal act. This should not be the case when one has in mind legal provisions that had been in force at the time of the collection of these pieces of evidence, which imposed the obligation upon the mobile operators to keep such data for the period of 2 years at the most.

In the case **I. R., Podgorica Higher Court, K.br.28/12,**[44] the defence stated that it had knowledge of the

41 Criminal act; Attempted unauthorized production, possession and circulation of stupefying drugs from the Article 300 paragraph 2 of the PC of MNE - Criminal acts against human health

42 Criminal act: Murder from the Article 143 of the PC of MNE - Criminal acts against life and body

43 Criminal acts: Murder from the Article 143 of the PC of MNE and the Article 143 in relation to the Article 24 of the PC of MNE, Causing general danger from the Article 327, paragraph 1 of the PC of MNE; Extortion from the Article 250, paragraph 1 of the PC of MNE

44 Criminal act: First degree murder from the Article from the Article 144, paragraph 1, item 8 of the PC of MNE Criminal acts against life and body

Panel Chair, outside the main hearing, ordering the investigating action of expert examination of the device with a SIM card, of "BMW" make, which action had not been performed during the prosecution led investigation stage nor proposed in the indictment, which the monitoring team was not able to check until the conclusion of the report.

RIGHT TO INDEPENDENT AND IMPARTIAL COURT

The observation team did not notice direct evidence of illegal influences on the court except in the case R.K. and others, Podgorica Higher Court[45], where several accused were charged with several criminal acts, mainly from the group of criminal acts against office. Prior to the beginning of the main hearing, the defence counsels informed the court that the Constitutional Court of Montenegro had accepted their initiative and annulled the decisions on the extension of detention against certain accused and they insisted on their immediate release. Not elaborating on the justification of the decision of the Constitutional Court, the question is raised how is it possible for the defence counsels of the accused to get hold of the original of the decision prior to it being delivered to the Court of Appeals, whose decision on detention was abolished, or to Podgorica Higher Court. Every communication in such situations goes through first instance court. The main hearing was interrupted and continued on the next day when the criminal panel pronounced detention against the accused for the same reason as before. During the main hearing, the detention was suspended by the Court of Appeals which acted upon the appeal to the decision of the Higher Court. In the meantime, due to the proposal for the exclusion of the presiding judge and the president of Podgorica Higher Court, the hearing was interrupted and continued after the exclusion proposal was rejected. It must be said that all the happenings related to the extension and the suspension of the detention leave an unpleasant picture on the behaviour of public authorities in an exceptionally complex and socially interesting case. The extension of the detention by the Higher Court and its new suspension by the Court of Appeals can lead to the suspicion that the courts had been under influence, especially the Court of Appeals which passes two different decisions on the basis of the completely identical factual situation.

In the case **R.K. and others, Podgorica Higher Court,** there was a discussion as to whether the statements of the participants in the procedure are faithfully recorded into the minutes, there was also a discussion between the prosecutor and the defence as to whether certain evidence can be presented to the accused on the occasion of the interrogation, and there was loud commenting on the questions and answers, interruptions, numerous warnings. The Article 321 of the CPC clearly prescribes the authorities and the duties of the Panel Chair, or presiding judge in the case of the violation of procedural discipline: warning, fine, removal, and it is not clear why the court failed to apply the provisions of this article. One of the defence counsel stated that he was not afraid of the warning pronounced by the court after which, according to the opinion of the observation team, he should have been removed from the courtroom immediately with the denial of the right to reappear in the proceeding, since such a statement means that he will continue to behave in this way, which proved to be so during the proceeding but also without consequences.

In the case **M. G. and others, Podgorica Higher Court - Special Department for Criminal Acts of Organized Crime, Corruption and War Crimes, Ks.br.08/09,**[46] on the occasion of the examination of the witness G.,

45 Criminal acts against office: Abuse of office from the Article 416 paragraph 3 in relation to the paragraph 1 and the Article 416 paragraph 1 of the Penal Code, Abuse of office Abuse of office from the Article 416 paragraph 3 in relation to the paragraph 1of the PC, Abuse of office through offering assistance from the Article 416 paragraph 3 in relation to the paragraph 1 related to the Article 25 of the PC, Abuse of authorities in commerce from the Article 276 paragraph 2 in relation to the paragraph 1 item 5 of the Penal Code, Abuse of office through instigation from the Article 416 paragraph 1 in relation to the Article 24 of the PC , Evasion of taxes and contributions from the Article 264 paragraph 3 in relation to the paragraph 1 of the PC.

46 Criminal act: Abuse of office from the Article 416 of the PC of MNE - Criminal acts against office, against: M. G., Executive director of AD L. B., I. T. Financial director, Z. O., Trade Union President L. B., A. L., Chief Road Transport Dispatching Officer, S.

the Secretary to the Financial Director, the defence counsel of the accused T., objected to the questions posed by the Panel Chair, which questions concerned the regime of passing and dispatching decisions covered by the indictment. This is because the defence counsel considered that the witness, although duly acquainted with the rules and duties of the witnesses, and the Article 111 of the CPC, by responding to the questions asked, could have exposed herself to possible criminal responsibility, with the fact that she is legally incompetent, and that she could not assess if she should refrain from responding to the question or not. Following the objection of the defence counsel, the Panel Chair withdrew the question and instructed the witness once again not to testify on certain circumstances and on the conditions under which she can do it. It is important to emphasize that in relation to the above the prosecutor placed no objection.

In the case **V.L. and others, Podgorica Higher Court, K.br.206/11**,[47] the defence pointed out to the decision of the Supreme Court of Montenegro, which acted as the third instance court upon the appeal to the second instance judgement. By the time this report was concluded, the monitoring team was not able to inspect the judgement of the Court of Appeals upon the request for the free access to information.

The case **D.V. and others, Podgorica Higher Court, K.br.7/10,**[48] leaves the space for suspicion in the independent and impartial court. It should be particularly stressed that the experts sits in the courtroom, next to the prosecutor, all the time during several hearings. The defence was pointing out to this, however, the explanation of the Court President was that he had to be there in order to be able to respond to the questions and clarify the finding and the opinion given. However, the expert was present in the courtroom even when other pieces of evidence were being presented, and on 30th November 2011 he was present when the witness D. G. gave his testimony, where his presence had not been necessary. All this can raise the issue of the impartiality of the court in the specific case.

ACCESS TO COURT

First of all, it should be underlined that the condition of the buildings and the premises in which trials are held is generally dissatisfying. In Bijelo Polje and Podgorica, the higher courts share the buildings with other courts (in Bijelo Polje with the Basic Court, in Podgorica with the Court of Appeals and the Supreme Court). The trials are mostly held in the offices which are inappropriate and constitute a special form of the restriction of publicity. The majority of courts have no connection with the detention facilities, so that the detainees are brought and conducted through the building accompanied by prison guards and the police. The courts become crowded because, besides the participants to the proceedings there are also other persons present. The behaviour of the court personnel that provide security to the building and control the present persons is inconsistent and varies from the partial absence of the control (for instance, in Bijelo Polje the doormen very often do not ask any question) to very strict control (for instance, in Podgorica Higher Court), at which it should be mentioned that in the communication with the parties they behave professionally. Not in a single court are there special premises for the witnesses and the premises for the persons brought before the court, even if they exist are small and inappropriate. This creates the opportunity for the accused and the witnesses to communicate in the hall, which might raise the issue of the validity of their subsequent testimonies. In certain court buildings the problems of the functionality of the restrooms for the parties, which is unacceptable in the places where great number of people assemble. The infrastructure is particularly bad in Podgorica Basic Courts, or at least particularly visible, since this is the court with the largest number of cases, and by that with the largest number of parties. A number of courtrooms were turned into offices, and a number of offices in which

J., cashier, M. M., Cashier operations officer, Z. V., Officer for the calculations of wages and cashier operations, R. P., Head of financial operations service and payment collection officer in financial sector, Z. N., applications designer, D. P., Head of the financial working group, R. D., cashier

47 Criminal act: First degree murder from the Article 30 of the PC of the FRY – Criminal acts against life and body

48 Criminal act: Abuse of office from the Article 416 paragraph 3 of the PC of MNE (Criminal acts against office)

trials are held are inappropriate. Relatively adequate are the courtrooms in Bijelo Polje and Podgorica, but it must be emphasized that, with the exception of Podgorica Higher Court, the maintenance of the courtroom is inadequate. In all the courts, where trials are held in the offices, the conditions are totally inadequate: the participants are squeezed, the agents and the defence counsels hold case files in their laps, the atmosphere is stuffy. The trial schedule is announced in all the courts, either weekly or the monthly one. There are no checkrooms in the courts which creates additional problems, especially in winter conditions in the courts in Bijelo Polje and Rožaje. Also, it is very difficult to find parking space. The observation team is aware that the funds are scarce and that the courts are not to be blamed for that, at least not only them. However, all this leaves a picture of unprofessionalism and certainly does not contribute to the reputation of the courts. Besides, this raises the issue of the access to court has certainly been hindered.

The main hearing in the case S. I. and others, Podgorica Basic Court,[49] was conducted in the office which could not accommodate all the participants in the proceeding, so that one prison officer and one witness had to stand during the main hearing. It was not possible to ensure adequate space since construction works were under way in the big courtroom.

The main hearing in the case **V.N. Podgorica Basic Court,**[50] due to the large number of the participants, was held in the large courtroom which does not have air conditioning, so that the conditions for work were exceptionally difficult, practically at the limit of the possible, due to high temperature in the room. The objections to the conditions of the long lasting work were coming both from the lawyers and the judge himself, who asked the observer to note down the conditions of work. During the main hearing, upon the insisting of the judge, water was served to the parties to the proceeding in order for the conditions to be made bearable to a certain extent. However, it was not allowed for the courtroom door to be kept open, as was requested by the minute keeper who was obviously feeling bad.

Immediately before the beginning of the scheduled main hearing in the case **B.I. and others, Podgorica Higher Court,**[51] the observer tried to get the information from the security officer on the scheduled trials. He was told that he could not have a look into the list of the hearings scheduled till the end of that month (in previous cases this list had been accessible to the observers), with the explanation that such information get be obtained solely for a specific date.

In the first stage of the monitoring process, there was the issue of the architectural barriers in all Montenegrin courts, but during the second stage there was the improvement in the way that two courts, one of which was not subject to monitoring – Nikšić Basic Court, during the month of July secured the access ramp for the persons with moving disabilities, and Podgorica Basic Court has been complying with this legal provision since September this year. It should be emphasized that this shortcoming should be eliminated in all other courts by 2013, pursuant to the provision of the Article 165 of the Law on Spatial Planning and Building of Structures.

RIGHT TO THE USE OF LANGUAGE ONE UNDERSTANDS

The observation team did not notice the violation of this right in the first part of the monitoring report. However, in the second part, in the case **M.P. Podgorica Higher Court,**[52] the defence objected to the testimony of the witness F., asking for the minutes on the examination of that witness to be removed from the case file held with the investigating judge of Bar Basic Court, Ki.br. 125/99, as well as the minutes from the main hearing before Bar Basic Court as legally invalid. The minutes should be removed especially

49 Criminal act: Torture from the Article 167 paragraph 3 in relation to the paragraph 2 of the PC of MNE
50 Criminal act: Abuse of office from the Article 416 paragraph 5 of the PC of MNE
51 Criminal act: Robbery from the Article 242, paragraph 4 of the PC of MNE
52 The accused: G. A., B. S., B. I., B. R., N. J., Đ. G., R. H.

when one has in mind the fact that the statement given at the main hearing was essentially different from the previously given statement, and the fact that while giving previous statements, the witness had not been acquainted with the right to giving his statement in the language he understands. Instead, he gave them in the official language of the court.

PROCEDURAL DISCIPLINE

In the case **S.B. and others, Ks.br.1/12**, due to the violation of the procedural discipline, by interrupting without the approval of the court, the defence counsel had a warning pronounced to the record. Due to the violation of the procedural discipline, in the same case, and following the verbal warning of the Panel Chair, the members of the late victim were removed from the courtroom.

During the main hearing in the case **V.N. Podgorica Basic Court,**[53] the judge was carefully paying attention to the procedural discipline of the parties and warned on several occasions both the witness of the victim, and the defence counsels of the accused and the accused not to communicate directly, but through the court, and he also warned the prosecutor, the defence counsels and the accused not to ask suggestive questions.

BEHAVIOUR OF THE COURT AND OF COURT PERSONNEL[54]

During the monitoring process, it was noticed that outside the courtroom or the office in which trials are held behave within the limits of professionalism and observe the reputation of the court. In principle, the judges do not communicate with the parties in the court corridors, which we consider positive. However, in one number of courts, where trials are held in small offices, there is often *ex parte* communication between the court and the parties, as well as between the parties themselves, which creates the feeling of informality and may have negative impact on the perception of the independence and the impartiality of judiciary. Therefore, priority should be put on the construction of the necessary number of courtrooms capable of accommodating the interested public.

INFORMATION ON RIGHTS

At the information points in the courts there is sufficient number of brochures for victims and the witnesses of criminal acts, by means of which the same can familiarize themselves with their rights and obligations.

The Access to Information Guide in the possession of Podgorica basic Court is also available, as well as other information in its possession, on the access to information procedure, on the manner of exercising the right to access to information, on resolving upon requests and on legal protection, as well as the information on the costs of procedures.

The brochure on avoiding criminal procedure offers the information to the interested parties as to how to come to the conviction on avoiding criminal procedure in a quick and straightforward manner.

Giving the information on the protection of rights to trial within reasonable time, the brochure clarifies this right, when and under which conditions the complaint is lodged for just satisfaction, deliberating upon the same, the information on constitutional complaint and on the application to the European

53 Criminal act: Abuse of office from the Article 416 paragraph 5 of the PC of MNE

54 In this part we do not talk about the behaviour of judges during trials, but only in relation to the behaviour in the court buildings.

Court of Human rights.

At the information points in Podgorica Basic Court, the brochure is available on the manner of exercising the right to free legal aid, by which the interested persons are informed about who free legal aid service providers are, under which conditions and in which procedure free legal aid services are approved, in line with the Law on Free Legal Aid.

However, LCDs besides the schedule of trials and hearings, broadcast also the following content: information on the location of the free legal service; information on the brochures available at the info-points; invitation for the presentation of personal view through the suggestion flyer; contact information and working hours of the court and of the court registry**.**

The court informs the parties and other participants in the procedure on all relevant issues and it makes available to the same the information of various content, like the letters of the Bar Association of Montenegro and similar.

FINAL REMARKS OF THE OBSERVATION TEAM

Through the description of the described observed cases, the observation team has already stated certain remarks concerning the observance of the right to fair trial in these proceedings. Taking into consideration the fact that the monitoring process was being carried out solely for the period from the issuance of the indictment to the termination of the main hearing, and that in the observed cases no enforceable judgements have been passed, the monitoring team will continue to collect information on the appeals and second instance decisions and to inform the public on the relevant facts. In this part, we will point out to certain violations of the right to fair trial, but also to certain tendencies which should be prevented or avoided according to our view.

PRINCIPLE OF PUBLICITY

In relation to the publicity of the proceedings, the observation team noticed no violations. The courts observe the principle of publicity of the main hearing to the extent spatial capacities enable it. It is obvious that the courts have got the problem of spatial capacities in their courtrooms. The number of courtrooms is insufficient and therefore the main hearings are sometimes held in the judges' offices. This problem impacts in certain ways the restriction of the presence of public but also delay in case scheduling, i.e. paying attention to the days when courtrooms are free. In such a situation, the principle of publicity of the main hearing is restricted in some cases despite the fact that the judges try hard to enable the access to the largest possible number of interested persons.

RIGHT TO TRAIL WITHIN REASONABLE TIME

The courts schedule the main hearings within reasonable deadlines, pursuant to the CPC. However, the main hearings are often adjourned due to the lack of discipline of the parties and of the defence.

During the monitoring process it was noticed that the main hearing was adjourned in one case due to the "official busyness" of one of the defence counsels which, according to our opinion is unacceptable, especially in the cases with several accused and several defence counsels.

The hearing in the case C. N. and others, Kotor Basic Court[55], was adjourned because of the busyness of

55 Criminal acts against office: Criminal act: Unauthorized use from the Article 421 of the PC and Criminal act: Embezzlement

the defence counsel, i.e. because of his attending his political party congress. Such adjournment, according to the opinion of the monitoring team, is unacceptable. Namely, if the court wants to be impartial, it should then accept every such request, which would mean that political party meetings have priority over the scheduling of trials.

We point out to serious violation of the right to trial within reasonable time, since the judgement for the criminal act of theft was passed because of the absolute statute of limitation which is 10 years. The fact that the procedure could not be terminated within such a long time points out to the irresponsible work of all public authorities that had taken part in the proceeding.

In the second part of the monitoring process, the main hearing was not held because procedural assumptions had not been met, i.e. because the Police Directorate had failed to act upon the order for the forceful bringing of the accused before the court, and because the court had not been informed on the reasons for inaction, thus the court had had to send urgencies in order for the order to be followed. The court is often not informed on the reasons for the failure to follow the order for the bringing before the court – (statistics-Andrej). It was noticed in several cases that the defence counsels had failed to come to the main hearing despite having been duly notified. There were attempts to influence this phenomenon before the beginning of the monitoring, by pronouncing big fines, but this phenomenon still exists to a certain extent. In a large number of cases the witnesses in criminal proceedings fail to appear before the court too despite being duly subpoenaed to testify at the main hearing or notified at the previous hearing. This speaks about the contempt and high degree of irresponsibility which could be overcome by strict sanctioning of all those who do not follow the order, or court subpoena, without having a valid explanation for that.

It is noticeable that in relation to the beginning of the monitoring, in its final stage, the courts issue the order for the forceful bringing before the court immediately when conditions are met, no matter of the capacity they participate in the proceedings.

In one part of the observation period, certain number of the main hearings was not held because of the strike in the courts. The reason for the strike was very bad material situation of the court administration. Throughout the strike, the work in the courts was organized for urgent cases.

During the observation period, certain number of main hearings was not held due to the absence of the accused, despite having been duly notified on the day and the hour of the holding of the same, thus due to the lack of procedural assumptions the main hearing was adjourned. In some cases, after the accused are instructed by the court on their rights, amongst other things also that they may appoint engage defence counsels, the accused then request the adjournment of the main hearing, considering that they need defence counsels. The court always grants such requests of the accused and adjourns the hearing, with the warning that the subsequent main hearing will be held and that they are to appoint defence counsels within the specified deadline.

Sometimes the main hearing gets adjourned for the absence of court experts, who duly inform the court of their inability to attend the main hearing at the scheduled time due to some professional duties.

The defence counsels of the accused in the judicial proceedings requested the adjournment in several monitored cases, mostly due to the obligations in other courts, at other main hearings, which requests of the defence the court mostly accepted. Also, there was a situation where the main hearing was adjourned since neither the accused nor the victims appeared at the main hearing, and in the case file there was no evidence on regular delivery. In several cases (how many) the defence counsels were fined for the failure to appear at the main hearings with the amount of up to € 500,00. In some of these cases the defence counsels duly notified the court of their inability to appear at the scheduled time due to other main hearings and they submitted the proofs of that, however the court pronounced fines to them.

from the Article 244 paragraph 3 in relation to the paragraph 1 of the PC of MNE

All these reasons, which are sometimes contributed by the accused themselves, impact the total of their rights to trial within reasonable time. In a large number of cases there are frequent unjustified adjournments, i.e. the situations that the hearings are adjourned due to the absence of the parties, the defence counsels, even the judges without any sanction whatsoever. It cannot be accepted that someone should forget his/her trials, that the defence counsels should not appear due to their obligations in other cases, or due to their obligations towards political parties. Therefore, the court must adjourn the hearing in case procedural assumptions are not met for the holding of the same, but appropriate measures must be undertaken for such behaviour to be sanctioned. Here we point out again to the case from Podgorica Basic Court which has been going on for more than eight years so far, as well as the from the same court in which the proceeding has been terminated due to the statute of limitation, as well as the case from the Higher Court in which the decision in the first instance has not been passed for the full 16 years. Such behaviour automatically leads to the violation of the right to trial within reasonable time and if the courts do not act in accordance with the legal authorities, the situation is bound to worsen. Every participant in the proceeding, especially in the proceedings with several accused, victims, defence counsels and witnesses, must be aware that the failure to appear generates huge expenses to say the least and that they will be strictly sanctioned if unjustifiably absent.

PRESUMPTION OF INNOCENCE

The courts observe the presumption of innocence.

In one case the court expert started assessing the evidence and stated his view towards the accused, by which he outstepped the rules of the profession and violated the presumption of innocence in criminal procedure. However, even in the second part of the report by the media the presumption of innocence was not always observed. Such behaviour is unacceptable for any participant in the proceeding, and when this is done by the court expert, who by means of his finding and opinion, based solely on the rules of profession, should "assist" the court, in order for the factual situation to be properly established, who indisputably violates the presumption of innocence, it is unacceptable. Due to the abovementioned, it is necessary to point out to the media to the obligation to observe the presumption of innocence, and especially to emphasize that a journalist must be familiar with the standards in the area he/she reports about.

EQUALITY OF PARTIES TO THE PROCEEDING - EQUALITY OF ARMS

The equality of parties to the criminal proceeding is the right which was mainly observed in the second part of the observed period by the court which warned the parties to propose evidence at the main hearing. However, there were other situations, too.

In case one party had the possibility denied to present the viewpoint and claims before the court and to challenge the views and the claims of the other side, it comes to the violation of the principle of equality in a direct way, raising the issue of the procedural equality of the parties. **The parties to the dispute or the accused for a criminal act must be put in a considerably worse position in relation to the opposite party.** Pursuant to the Article 282 of the CPC, the prosecutor was obliged to inform the parties to the proceeding in a favourable way about this examination in order for the same to be able to participate and pose questions.

The defence counsels insisted on entering the questions into the minutes, which has its logic behind: how will the appeal state that the court allowed the answer to a forbidden question, if there is no such question in the minutes (main hearing from 19th July 2011).

In the case **S.K., Podgorica Higher Court, K.br.86/11,**[56] the ballistic expert giving his statement on the firearms he had examined (4 firearms and 8 cartridges taken from the crime scene), could not give precise information of the distance from which shots had been fired, their trajectories, and the link between the place where shots had been fired from and the place where cartridges had been found. Because of that, the court ordered additional ballistic expertize, on the basis of the overall case file which will be delivered to the expert. Also, it was decided that graphology and chemistry experts be invited to the main hearing, in order to be able to respond to the questions of the prosecution and the defence. The main hearing was adjourned because the **expert** had not prepared a written form of the finding and the opinion, but dictated the same into the minutes instead upon the request of the prosecutor. The minutes in this case contains additional finding and the opinion of the court expert, thus it is necessary for the parties to the proceeding to become familiar with by producing Xerox copies of the minutes from the main hearing and to give their opinion on the same.

In the case **D.V. and others, Podgorica Higher Court, K.br.7/10,**[57] the defence underlined on several occasions and submitted to the court the evidence that on the occasion of the seizure of the documentation by the police there had been serious omissions, since there was no list of the subject documentation, thus it is not known if all of the documents had actually existed, which could in turn create the possibility for the abuse of the same. The accused D.V. stated that three persons had been in the possession of the system access code for the approval and the withdrawal of money, and not only her, and she asked from the court to see into it. However, the court made no decision about it. In this way, by not checking the allegations of the accused and by the failure of the court to give its opinion on the same, the parties to the proceeding can be brought to an unequal position.

In relation to the previous item, particular attention should be paid to the fact that there are constant problems of the defence to make copies of the case file. In most courts special requests need to be lodged for making Xerox copies of the case file, and then it takes time to make the copies, which is particularly difficult (and there are certain costs for the party involved) in complex cases where there are numerous documents. Here, the equality of arms is equally violated as the right to access the court. The same applies for making copies of the minutes, both the one from the investigation and the one from then main hearing. If the law provides for the costs of the procedure to be covered solely by a convicted person, within certain part, it is not clear why he/she has to pay for the making of the copies of the minutes and of other writs that are important for the defence. In this way the right to the equality of arms is violated, as well as the one of the efficient defence, but it also raises the issue of the presumption of innocence. We think that the state does not have the right to subject someone to criminal proceeding, to consider him/her innocent until proven differently, and yet to ask from him/her to bear the expenses for what he/she is entitled to.

RIGHT TO EFFICIENT DEFENCE

The right to defence is observed by the courts. The court leaves enough time for the defence to become familiar with the content of the case file. Therefore, there is a question whether a defence counsel, or a prosecutor, the accused and the victim can intervene, after a question is posed and before answering the same, in the sense that the answer is prohibited. According to our opinion, this can be allowed: it is not strictly forbidden, and the authority of the Panel Chair to decide on that is not challenged. The monitoring team bases its opinion on the principle of equality, which offers the possibility for a party to a criminal proceeding to have the possibility in all stages of the proceeding and in appropriate procedural forms to express his/her views, both in relation to the criminal case, and in relation to all other issues in the criminal proceeding, especially with regards to formally expressed views of the opposing party. Therefore, the court has got the duty to enable for the criminal matter to be deliberated upon, in which

56 Criminal act: Murder from the Article 143 of the PC of MNE - Criminal acts against life and body

57 Criminal act: Abuse of office from the Article 416 paragraph 3 of the PC of MNE (Criminal acts against office)

way basic purpose is achieved of the criminal procedure, i.e. establishing all relevant facts, although the court is to give the final conclusion.

The Article 350 authorizes the Panel Chair to forbid the answer to a forbidden question. The quality of the defence is directly linked to the observance of the right to fair trial. We point out to these circumstances, both for the reason of the right to fair trial which comprises the effective defence, and for the reason of the unprofessional behaviour of the participants to the proceeding which contributes to the diminishing of the dignity and reputation of the court. For the above reasons, the defence requested from the Panel Chair to be given the right to object in the sense of a forbidden question before the witness answers such question, since otherwise the function of objection is rendered senseless invoking the Article 318 paragraph 2 of the CPC, where the parties have the right to objection during the presentation of evidence. The court has got the duty to accept and present both the evidence against certain person, as a possible perpetrator of a criminal act, and the one in favour of the same person, since the court must be governed by the principle of substantive truth. The defence counsels of the accused, as well as the accused themselves use the right to pose questions to court experts and to object to their findings and opinions. The court left enough time for the accused in criminal proceedings to prepare their defence.

The issue of the assessment of the evidence and judicial discretion must be mutually connected. The court passed the decision which rejects the stated proposal of the defence for the reason that it concerns the evidence obtained contrary to the provisions of the CPC, and as such is not binding to the court. Thus, the court, set aside one part of the case file, i.e. the evidence proposed by the defence as legally invalid evidence, which had been obtained by breaching the envisaged legislative procedure. We would like to remind that the telephone listings may not have the power of evidence without the content and that judicial decision may not be based on them (see the *Case Khan v. United Kingdom, 12th May 2000, the part related to the Article 6 of the ECHR).*

The courts must build the attitude of equal treatment of the prosecution and the defence, not only through the application of the principle of equality (the defence is entitled to propose evidence, pose questions and object to statements), but also in all forms and actions through which the right to defence is to be exercised.

In several cases it was concluded that the ex officio defence counsels come to trials unprepared and that they do not treat the defenders conscientiously and with a due attention. Such behaviour should be sanctioned by the Bar Association once notified by the courts.

RIGHT TO INDEPENDENT AND IMPARTIAL COURT

In principle, it can be said that the right to independent and impartial court is observed, of course within the existing legal framework. The court allowed itself entering into discussion with the defence counsels and explaining to the accused why certain decision are passed, which indicates the insecurity in conducting the proceedings and in knowing the evidence in the case. It is to be assumed that the court did that in good faith, but such behaviour is unacceptable, the more so because the presiding judge can abolish the detention at any time. The cases like M.Š. and others, Bijelo Polje Higher Court, do not contribute to the affirmation of the independent and impartial court. The statements of the Panel Chair are of such character that they put a question mark on the entire proceeding both for the reason of the failure to observe the presumption of innocence (Article 3 of the CPC), and from the aspect of the impartiality, or the principle of veracity and fairness (Article 16 of the CPC). Namely, the Panel Chair clearly indicated that he believed in the guilt of the accused even before the end of the proceeding. It concerns two mutually connected statements, so that his attitude created beforehand cannot be questioned. Such a statement must have been objected by the prosecutor and the defence counsels by at least insisting on inserting such a statement into the minutes. We think that it should not be particularly important to explain that

it was their duty. Allowing such behaviour might cause either the suspicion into the impartiality or the suspicion into the security in relation to the knowledge of the norms of criminal procedure. The application of the rules of procedural discipline is the sole responsibility of the presiding judge and he/she is obliged to ensure for this discipline to be observed, even at the expense of the removal of the participants in the procedure, or by undertaking the appropriate measures.

It was noticed during the monitoring process that the courts communicate and explain to the parties and to the defence counsels verbally, and when this is envisaged also by means of a special decision, the decisions passed during the main hearing, in line with the CPC. The party dissatisfied with the decision uses the available legal remedies.

At the beginning of the monitoring process there was a frequent practice of the prosecutors and heir deputies entering the judges' offices, during the trial and prior to being called by the court. However, it was also noticed during the main hearing in the courtroom that the prosecutors and their deputies would enter the offices of the presiding judges prior to the hearing. The lawyers-defence counsels very rarely enter the judges' offices. All this can affect the rights of the accused, who might develop suspicion into the impartiality and the independence of the court, since after the issuance of the indictment, and after it has become effective-confirmed, the prosecutor is a party to the proceeding and needs to have the same treatment as the other party. In the final stage of the monitoring process previously described practice was quite rare.

Both judges and judicial staff must develop completely professional behaviour and communicate with the parties solely in accordance with the regulations. The communication between the court and the parties must be carried out in line with the legal terminology and the authorities of the court. Any kind of intimate and comfortable behaviour must be avoided. The reasons for that are obvious.

ACCESS TO COURT

As one of the principles of the right to fair trial, the access to court in current situation in Montenegro is hindered. Financial resources are the main reason for that, but despite the fact that they are scarce, must not affect the protection of this Convention right. Particularly evident is the lack of spatial capacities in most courts. Technical equipment is at a somewhat better level, but it still needs improvement.

Bad material situation of the employees of judicial administration lead to the strike in the courts at the end of the last and the beginning of this year, but the work on urgent cases had been ensured.

It is necessary to eliminate architectural barriers for the persons with disabilities. During summer, the building of Podgorica Basic Court has been partly reconstructed, the access ramp has been built, but this is still not enough in order for one to conclude that the situation has been significantly improved.

Finally, we consider that the infrastructural conditions do not meet the needs, neither of the courts nor of the parties.

RIGHT TO USE THE LANGUAGE ONE UNDERSTANDS

The courts observe the right to use one's language for all the participants in a criminal procedure.

PROCEDURAL DISCIPLINE

For the purpose of maintaining the procedural discipline, the court reacts in accordance with the CPC when there is a need for that.

During the main hearings, the judges were paying close attention to the procedural disciplines of the parties and on several occasions they warned both the witnesses and the victims, as well as the defence counsels and the accused not to communicate directly, but through the court, and also the prosecutor, the defence counsel and the accused not to ask suggestive questions.

The main hearing was interrupted on several occasions in order for the victims and the witnesses to switch off their cell phones. The Panel Chair warned the public, which followed the main hearing – audience, for talking among themselves during the trial. Due to the behaviour of the parties to the proceeding, and their defence counsels, the court pronounced several warnings, which means that it paid attention to the procedural discipline, and one person from the audience was told to leave the main hearing, after having been warned since the same person had not behaved in accordance with the Code at the preceding hearing.

Special remarks

In a series of cases in which certain violations of the CPC were pointed out, there is the impression that a large number of its provisions are interpreted as a formality. In the commentaries to these cases this was not mentioned for the reason that the proceeding was on-going and because these concerned solely the allegations of the defence. Likewise, in certain cases, the accused stressed that they had been under pressure and exposed to police threats while giving their statements in the preceding procedure. This was also not mentioned in the commentaries to the cases, since it was decided for these allegations to be checked. However, irrespective of the fact whether the claims in these cases are true, we think that there is the ingrained understanding that the first statement of the accused, especially if it charges him/her, is true and that every further alteration is the attempt to avoid criminal responsibility. It is natural that there are such attempts too, but we think that it does not relieve the court from the responsibility to check all these circumstances in the best possible way and after such checks to deliberate on the validity of certain statements. One must start from the fact that the accused is entitled to defend himself/herself in the way he/she deems most appropriate, and that the reasons for the alteration of certain claims can be different. Of course we do not insist here on accepting solely the statements from the main hearing, but when deciding about what statement to accept, we consider that all the circumstances are to be taken into account, without prejudices and decision to be made.

With regards to the representation of indictments by special prosecutors, we remind that special attention should be paid as to whether special prosecutors are equally attentive when it comes to establishing the facts that go in favour of the accused, as they do in relation to the facts that the accused is charged with. The Article 44 paragraph of the CPC, prescribes this duty of the state prosecutor, in disagreement with the double role of the state prosecutor in criminal procedure, where he/she appears not only as a party but also as a public authority with the task to represent public interests. In the light of the new role of the state prosecutor in criminal procedure, we consider as unacceptable the noticed practice of consultations between the state prosecutors and the judges, before and after the main hearing. Following the model of the case law from the comparative law, noticed at the example of Bosnia and Herzegovina, we think that the state prosecutors should attend the main hearing upon the call up of the parties, which would contribute to the affirmation of the right to the equality of the parties in criminal proceedings.

It was noticed in certain number of cases that the public authorities, especially the Police Directorate, do not follow the court orders. This is related both to the failure to act upon the orders for the bringing before the court, as well as to the lack of explanation as to why an order has not been followed. Since there is no information that an adequate analysis of such relationship has been done, it is hard to come to a conclusion as to why this is so. It is possible that the reason is the lack of personnel, or that the number of people to be forcefully brought before the court is large, or indeed that the delivery services do not operate properly, and there are also possible financial reasons, etc. We would like to emphasize what we

consider important from the aspect of the position of the courts. Namely, every public authority, even the Police, is obliged to follow court orders and has no right to evaluate or select the orders to be followed, or not. If there are objective circumstances for some order not to be followed, then the court should be timely notified of such circumstances. The failure to act and the failure to notify indicate insufficient level of respect towards the courts and their requests. Therefore, if the court is to be dependent of the willingness of public authorities to follow certain order or not, then we cannot talk about independent judiciary. Besides the problem related to the forceful bringing before the court, we point out to the fact that the prosecution and the police, in certain number of cases, which is not too big but it concerns complex and complicated cases, despite several urgencies issued by the court, failed to deliver the evidence to the defence in a timely manner (A.M. Podgorica Higher Court – evidence obtained using secret surveillance measures), at least not in a sufficient number of copies. Everything within the case file must be equally accessible to the parties.

When public trust in the work of the courts is considered, proper functioning of the courts and prosecution constitutes it key element. In order to enjoy the public trust, justice system must be transparent. One part of the efforts on the strengthening of the public trust, besides public opinion polls and continuous training for journalists, can include the on-going evaluations of the results of the work of certain public relation offices. Besides that, it is necessary for these offices to cover prosecution offices too, for the purpose of ensuring proper communication between the prosecution on one side and the public and the media on the other. In that way, public will be timely informed and possible abuses will be prevented related to media reports on judicial proceedings. According to the opinion of the monitoring team, judges and prosecutors should be able to respond to media questions, to the extent this does not raise the issue of their impartiality. What is more, it is necessary to continue with the practice of publishing court decisions due to their foreseeability, which is in accordance with the European Court case law.

CONCLUSIONS AND RECOMMENDATIONS

In the forthcoming period, Montenegro is expected to work on raising general efficiency criteria and the quality of the justice system, in order to ensure full application of the constitutional framework and international standards. The establishing of independent judiciary is certainly a complex and multidirectional process, since it is not sufficient for judiciary to be independent in the sense of regulations, even if these are ideal. Even the European Commission for the Efficiency of Justice (CEPEJ) underlies that there are no straightforward nor unified solutions when talking about the establishing of the rule of law at the political, social and economic plane, and that there should be a consensus of all key actors when one system is to be changed. Therefore, besides the strengthening of capacities, it is necessary to work on the establishing of a broad dialogue within the legal profession, but also the dialogue between the legal profession and other social entities.

Some of the challenges stated in this report can be overcome through joint efforts of all stakeholders, including the legislative, executive and judicial authority, but also of the professional associations of judges and prosecutors, media and civil society organizations. However, since the issue of the success of the reforms in Montenegro is not only the organizational, professional and cultural issue, but above all the issue of political will, the Report is aimed at pointing out to the decision makers the key aspects of the application of the criminal legislation decisive for the observance of the European standards of the right to fair trial and for the overall judicial reform, on the basis of the facts established in the monitoring process.

With this in mind, the monitoring team has defined certain recommendations related to the continuation of the legislative and organizational reform, intensified training of judges and the future judicial personnel, improvement of material conditions, as well as to devising measures for retaining the personnel. One part of the recommendations is related to the improvement of communication with the courts in the

region and wider, with the purpose of finding the best solutions and their application, with the remark that these are already known examples of good practice that are being implemented more or less.

Besides general recommendations, the monitoring team suggests several measures the implementation of which is not linked to great difficulties and expenses, which seem useful to us, following the implementation of the monitoring process.

1. By means of the appropriate solutions of the CPC, establish the obligation for all the documents read as evidence, including the minutes on certain evidence presenting actions and the minutes with the statements of the accused, of the witnesses and other participants to the proceedings to be mandatorily delivered to the parties, upon their request. We also consider that the entire documentation which the indictment is based on should be delivered to the defence immediately upon the indictment coming into effect.
2. Also, by means of the appropriate legislative solutions, it should be arranged for everything said to be entered into the minutes, including the questions, since this is the only way to avoid the discussions on who said what and whether something was said, thus it is necessary to provide LCDs where all the parties to the proceedings could follow the minutes being made during the main hearing.
3. Make it possible for the parties, before the answer to certain question is given, to express their view on the permissibility of such question and for the question and the objection of the party to be entered into the minutes. We reiterate that this does not mean nor should it mean the discussion between the court and the party – the court should listen to the party and make a decision upon the proposal of the same.
4. Improve the delivery and strengthen the position of the court towards other public authorities and determine adequate sanctions for the failure to follow the court orders. In that part we consider that the activities should be initiated again on establishing the so called judicial police (this was already mentioned in the reform of the judiciary from the year 1999) the main tasks of which will be: keeping order in in court buildings, servicing writs and bringing people who failed to comply with the subpoena. Besides practical importance, the existence of the judicial police would be an additional contribution to the independence of courts – in these activities courts would not be dependent of other authorities. It should be particularly stressed here that either court courier, or a postman must establish the identity of the person whom the subpoena or other writ is to be serviced.
5. Attempt to resolve the problems related to inadequate infrastructure, at least temporarily and in certain cases, by leasing adequate space in case of trials with a large number of the accused, witnesses or defence counsels, notwithstanding the fact that even such solutions are linked with certain difficulties. We think that such behaviour in such cases would be far more beneficial than harmful. We point out again to the need for the executive power to become engaged a lot more on resolving these problems and in general on the improvement of the material position of the courts. Essentially, the executive branch should be thinking exclusively as to how to contribute to the independent judiciary and through appropriate programmes and strategies to establish the procedure and the manner for the creation of such infrastructure and such material conditions which will guarantee to the greatest possible extent independent performance of judicial office.
6. Amend the Penal Code, i.e. supplement and render it more precise in the part related to the seizure of proceeds of crime, or enact a special law - lex specialis.
7. Amend the Law on Court Experts, i.e. supplement and render it more precise, or enact a new law harmonized with the valid standards.
8. Good practice of Podgorica Basic Court related to the publicity of work to be implemented in all courts.

9. Work permanently on the training of judges and regular familiarization with the European Court case law.
10. Work on the training of media representatives for the purpose of higher quality reporting on the work of courts and preventing the violation of the presumption of innocence, which comprises specialization of journalists for a specific area.
11. The problem of architectural barriers should be resolved in all courts.

Supplements:

Addendum I – Statistics of criminal acts in the monitoring process

Addendum II – Number of criminal trials per selected courts

Addendum III – European Court of Human Rights Case Law based upon the Article 6 of the European Convention on Human Rights

ADDENDUM I

Overview of criminal acts

in the monitoring process

MONTENEGRIN JUDICIAL SYSTEM MONITORING

ADDENDUM I

OVERVIEW OF CRIMINAL ACTS IN MONITORING PROCESS

CRIMINAL ACT	NUMBER
War crime against civilians from the Article 142, paragraph 1 of the PC of the FRY	2
War crime against the prisoners of war from the Article 144 of the PC of the FRY	
Torture from the Article 167, paragraph 3 in relation to the paragraph 2 of the PC of MNE	3
Abuse of office from the Article 416, paragraph 5 of the PC of MNE	12
Smuggling from the Article 265, paragraph 1 in relation to the Article 23, paragraph 2 of the PC of MNE	2
Special cases of forging a document from the Article 413, paragraph 1 item 5 in relation to the Article 412, paragraph 2 in relation to the paragraph 1, related to the Article 49 of the PC of MNE	1
Embezzlement from the Article 420 of the PC of MNE	
Receiving bribe, offering bribe from the Article 424 of the PC of MNE	2
Criminal association from the Article401, paragraph 2 of the PC of MNE	4
Taking part in the group which perpetrates a criminal act from the Article 404 paragraph 1 of the PC of MNE	1
Creation of a criminal organization from the Article 401a of the PC of MNE	2
Violence in family or in family community from the Article 220, paragraph 11 of the PC of MNE	8
Robbery from the Article 242, paragraph 1 in relation to the Article 23 of the PC of MNE	8
Unauthorized possession of arms and explosive devices from the Article 403, paragraph 1 of the PC of MNE	5
Negligent performance of duty from the Article 417 paragraph 1 of the PC of MNE	1
Failure to report a criminal act and the perpetrator from the Article 386 paragraph 2 of the PC of MNE	1
Failure to report the preparation of a criminal act from the Article 385, paragraph 1 of the PC of MNE	2
Assistance to perpetrator after the perpetration of the criminal offence from the Article 387, paragraph 2 in relation to the paragraph 1 of the PC of MNE	2
Unauthorized use from the Article 421 of the PC of MNE	1
Fraud from the Article 244, paragraph 3, in relation to the paragraph 1 of the PC of MNE	2
Agreement to perpetrate criminal offence from the Article 400 of the PC of MNE	1
Endangering security from the Article 168 of the PC of MNE	3
Preventing the official in the performance of the official action from the Article 375 of the PC of MNE	1
Violent behaviour from the Article 399 of the PC of MNE	3
Attack on the official who performs his duty from the Article 376 of the PC of MNE	1
Abuse of duty in commercial operations from the Article 272 paragraph 1	1

Abuse of authorities in commerce from the Article 276 of the PC of MNE	4
Evasion of taxes and contributions from the Article 264 of the PC of MNE	1
Defamation from the Article 196 of the PC of MNE	5
Insult from the Article 195 of the PC of MNE	6
Negligent performance of duty from the Article 417, paragraph 1 of the PC of MNE	1
Illegal collection and payment from the Article 418, paragraph 1 of the PC of MNE	1
Ill-treatment from the Article 166 of the PC of MNE	1
Theft from the Article 239 of the PC of MNE	7
Serious offences against general security from the Article 388 paragraph 1 of the PC of MNE	1
Aggravated theft from the Article 240 of the PC of MNE	4
Causing general danger from the Article 327, paragraph 1 of the PC of MNE	3
Extortion from the Article 250, paragraph 1 of the PC of MNE	2
Light bodily injury from the Article 152 of the PC of MNE	3
Serious bodily injury from the Article 151 of the PC of MNE	4
Attempted murder from the Article 30 paragraph 2 item 6 of the PC of the RMNE in relation to the Article 19 of the PC of the FRY	1
Murder from the Article 143 in relation to the Article 20, paragraph 3 of the PC of MNE	7
First degree murder from the Article 144 of the PC of MNE	12
First degree murder from the Article 30 of the PC of the FRY	1
Endangering public transportation from the Article 339 paragraph 3 of the PC of MNE	2
Serious offences against public transportation safety from the Article 348, paragraph 2 of the PC of MNE	5
Serious offences against human health from the Article 302 paragraph 2 in relation to the Article 290 paragraph 1 of the PC of MNE	1
Unauthorized production, possession and circulation of stupefying drugs from the Article 300 of the PC of MNE	10
Issuing cheque and non-cash payment means without cover from the Article 263 paragraph 3 of the PC of MNE	1
Forging and abuse of credit cards and non-cash payment cards from the Article 260 paragraph 2 of the PC of MNE	1
Forging of documents from the Article 412, paragraph čl.bistvo iz čl. 144.l. 152. 2 in relation to the paragraph 1 of the PC of MNE	2
Illegal fishing from the Article 326 of the PC of MNE	1
Timber theft from the Article 324 paragraph 2 in relation to the paragraph 1 related to the Article 49 of the PC of MNE	1
Destruction and damage of other person's object from the Article 253 paragraph 2 in relation to the paragraph 1 of the PC of MNE	1
Money laundering from the Article 268 of the PC of MNE	3

ADDENDUM II

Overview of cases per court

MONTENEGRIN JUDICIARY SYSTEM MONITORING

ADDENDUM II

OVERVIEW OF CASES PER COURT

Court	***Number of cases***
Podgorica Higher Court	*42*
Bijelo Polje Higher Court	*13*
Podgorica Basic Court	*36*
Bijelo Polje Basic Court	*5*
Rožaje Basic Court	*8*
Bar Basic Court	*9*
Kotor Basic Court	*11*

ADDENDUM III

European Court of Human Rights Case Law

based on the Article 6 of the European Convention

on Human Rights

MONTENEGRIN JUDICIARY SYSTEM MONITORING

ADDENDUM III

European Court of Human Rights Case Law based on the Article 6 of the European Convention on Human Rights

During the course of a trial, the proceedings and/or the conduct of the parties may engage a number of provisions of the European Course of Human Rights, in particular Article 8 (the right to respect for private and family life), Article 10 (freedom of expression), Article 13 (right to an effective remedy) and most importantly, Article 6 (the right to a fair trial). The purpose of this guide is to address problematic issues and incidents identified by the CEDEM Court Monitors as potentially raising violations of the ECHR, by setting out the relevant principles and jurisprudence in relation to the identified discrete areas as they concern Article 6. Consequently, this guide is not a comprehensive overview of Article 6, but rather should be used as a tool on which to build. Although trials such as those observed by CEDEM Court Monitors often raise issues in relation to Article 8 (in particular in relation to the admissibility of evidence) and Article 10 (when it comes to media reporting on trials), this guide will deal primarily with the "criminal" aspects of Article 6.

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests 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 so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;(b) to have adequate time and facilities for the preparation of his defence;(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS:

1. INTRODUCTION TO ARTICLE 6

Article 6 guarantees the right to a fair trial and occupies a central role in the Convention system owing to its fundamental importance in a democratic society. It enshrines the principle of the rule of law, upon which such a society is built and reflects part of the

common heritage of the Contracting States. The importance of this right is evidenced by

the large volume of applications and jurisprudence that it has attracted; in fact Article 6 is the provision most frequently invoked by applicants before the European Court of Human Rights (ECtHR). Article 6 has a wide field of application and covers appellate as well as trial and some pre-trial proceedings. It also applies to certain disciplinary and other proceedings before special tribunals. The Court has stressed that the Convention is a 'living instrument' and should be interpreted in the light of present-day conditions. As such, Article 6 jurisprudence has evolved over the years to include a wide variety of legal proceedings; indeed, the Court has previously stated that there is no justification for interpreting Article 6(1) restrictively.

Article 6 has been interpreted as providing a procedural, not a substantive, guarantee of the rights of parties to civil proceedings and the rights of the accused in criminal proceedings. This means that the Court's role is to consider whether the domestic proceedings, taken as a whole, complied with the standards of fairness set out by Article 6. It is a requirement of *process*, rather than a requirement of *result*. Generally, the Court is not concerned whether the legal findings of the domestic courts were compatible with the provisions of the substantive criminal law of the Contracting State, or whether the conviction or sentence was appropriate. The Court has made it clear that it should not be seen simply as a higher instance in the ordinary appeal procedure, and therefore it will not address errors of fact or the merits of a particular judgment.

Similar to other provisions of the Convention, many of the terms used in Article 6(1) bear "autonomous" meaning and require interpretation which may differ from that given by the domestic law or the national authorities. In particular, the concepts "criminal charge" and "civil rights and obligations" are both autonomous. This means that the definition attached by domestic law is not determinative of the issue and it will be for the Court to decide, according its own established criteria, whether particular proceedings are to be considered "criminal" or concern "civil rights and obligations". There is also a difference in procedural protection in criminal and civil cases. While Article 6(2) and (3) contain specific provisions setting out additional procedural standards applicable only in criminal cases, Article 6(1) applies both to "civil" and "criminal" proceedings.

2. GENERAL PRINCIPLES OF ARTICLE 6

Perceived problems
In their observations, CEDEM court monitors identified several evidentiary issues related to:
Official declarations of guilt before guilt is proven according to law
Articles appearing in newspapers which described the accused as guilty.
The conduct of expert witnesses appearing on behalf of the prosecution.
The prosecution having access to relevant information which was not available to the defence.
The length of proceedings
The publication of trial information
Public access to the trial

This paper will now move on to examine if and how these issues are regulated by Article 6 of the Convention.

Introduction

As explained above, the principles enshrined in Article 6 relate to both criminal cases and the determination of 'civil rights and obligations'. This report will primarily cover the principles which apply to criminal cases. Article 6 contains a number of rights which are fundamental to the fairness of criminal proceedings. These include the substantive rights under Article 6(1), commonly referred to as 'general principles of fairness' or 'implied elements of a fair trial'. These are the right to access to court; independent and impartial tribunal established by law; fairness of proceedings; and trial within a reasonable time. In addition there is the presumption of innocence, enshrined in Article 6(2), which essentially disallows premature declarations of guilt. The following section shall address these general principles in turn.

2.1 Presumption of Innocence

- **A person subject to a "criminal charge" should be considered innocent until proved guilty of a criminal offence.**

In determining whether this right has been violated, the Court will be required to consider the ways in which the domestic proceedings dealt with factual presumptions and the evidentiary burden of proof; the manner in which defendants are penalised in costs or issue qualified acquittals; and the prohibition of declaration of guilt by public officials. The term "criminal charge" has the same autonomous meaning as elsewhere in Article 6. It does not apply to an individual who is under suspicion of having committed an offence, but is not yet subject to a 'criminal charge'. In *Allenet de Ribemont v France*[58], the applicant was described by a senior police officer as one of the 'instigators' of a murder. Although not yet charged under French law when the remark was made, the applicant had been arrested and was in police custody. The Court held that the applicant was "charged" for the purposes of Article 6 and that the presumption of innocence had been violated.

The principle applies to "criminal" proceedings in their entirety, irrespective of their stage or even their outcome. It may also apply to some kinds of civil cases, such as professional disciplinary proceedings or compensation claims by former criminal suspects or defendants provided that those civil actions are a consequence of or concomitant with the prior criminal proceedings.

Although rules which impose presumptions of law and fact that shift the burden on the defendant to rebut them do not automatically violate the presumption of innocence, the Court will consider whether the trial court retained a genuine freedom of assessment in determining the defendant's guilt. In *Salabiaku v France*[59], the applicant was subject to a presumption of responsibility after he took delivery of a locked truck which proved to contain drugs. The Court nevertheless found no violation since the domestic court did not automatically rely on the presumption and instead maintained a freedom of assessment and gave sufficient attention to the facts of the case.

Statements made by judges on the termination of proceedings or following acquittal which express the view that the applicant is guilty will violate the presumption of innocence. In *Minelli v Switzerland*[60], a private prosecution against the applicant was discontinued because it had become statute-barred. The national court then ordered the applicant to pay part of the private prosecutor's and court costs on the basis that the applicant would 'very probably' have been convicted had the case gone to trial. A violation was found as the statement indicated the applicant's guilt even though there was no formal decision as to guilt. The European Court in the case *Matijasevic v. Serbia*[61], stated that the presumption of innocence under Article 6(2) of the Convention will be violated if a judicial decision, or even a public official's statement

58 Allenet de Ribemont v France, February 10, 1995
59 Salabiaku v France, October 7, 1988
60 Minelli v Switzerland, March 25, 1983
61 Matijasevic v. Serbia, September 19, 2006

in relation to the defendant, reflects an opinion that he is guilty before he is proven guilty according to law. The Court has interpreted "public official" quite broadly to include not only judges, prosecutors and the police, but also well known public and political figures. However, the Court has emphasised that the context as well as the meaning of a particular statement, and not only its wording, should be taken into account in establishing whether it violates the presumption of innocence. In *Daktaras v Lithuania*[62], the defence lawyer had asserted that the evidence in the case-file failed to "prove" his client's guilt and requested that the criminal proceedings against the applicant be discontinued on the ground of lack of evidence. The prosecutor replied in writing that the applicant's "guilt was proved" by the evidence collected in the course of the pre-trial investigation. In finding that there had not been a violation the Court noted that the statement was not made in an independent and public context such as a press conference, but as part of a reasoned decision at the preliminary stage of the criminal proceedings.

2.2 Right to access to court

- **An individual must be able to have a matter brought before a court for determination without any improper legal or practical obstacles being placed in his or her way.**

The right of access to a court is not expressly stated in Article 6, but according to the Court's interpretation its protection can be inferred from the text. The right to a court is not absolute and takes different forms in the criminal and civil spheres. Although a State may regulate access to a court, the limitations it applies must not restrict access to the extent that the very essence of the right is impaired.[63] Furthermore, any limitations must pursue a legitimate aim and comply with the principle of proportionality.

There may be a possible violation of Article 6 where procedural or practical impediments operate to bar effective access to a court. The Court has held that the refusal of permission to a prisoner to contact his solicitor to initiate libel proceedings against a prison officer violated this right.[64] It did not matter that the interference was with his right to access a solicitor, not the court. The right is a right of 'effective access' and may include legal assistance.

The 'right to a court' also entails the right to legal certainty and the timely enforcement of court decisions. Legal certainty requires effective court decisions. This means that once a civil judgment or a criminal acquittal has become final and binding, there should be no risk of its being overturned. This problem may arise where a State's procedural code contains a power enabling a public official, such as a prosecutor, to intervene by way of special or extraordinary appeal, after the normal time limits for appeal have passed. In *Bujnita v Moldova*[65], the Court found a violation of the right to a fair trial where an acquittal that has been appealed and became final, was later quashed upon a request by the prosecutor, without any new evidence being presented. The Court considered that the most appropriate form of redress would be for the applicant's final acquittal to be confirmed by the authorities and for his conviction to be erased with effect from that date.

Another fundamental aspect of this right is that a final court judgment should be executed. The Court found a violation of this right in *Kyrtatos v Greece*[66] where the national authorities had refrained for more than seven years from taking the necessary measures to comply with the final, enforceable judicial decisions. It is important to note that the Court will examine any delay in the enforcement of judgments under the heading of 'right to a court' and not as a complaint about length of proceedings (see 2.6 below). When assessing the appropriateness of a delay in execution of a court decision the Court will consider the complexity of the case and the behaviour of the parties. Furthermore, the guarantee of a

62 Daktaras v Lithuania, October 10, 2000
63 Ashingdane v United Kingdom , May 28, 1985
64 Golder v United Kingdom, February 21 , 1975
65 Bujnita v Moldova, January 16, 2007
66 Kyrtatos v Greece, May 22, 2003

right to a court is autonomous from the requirements of domestic law since a breach of domestic time limits for enforcement does not necessarily mean a breach of Article 6. Delay in enforcement may be acceptable provided it does not impair the very essence of the right to a court.[67] In *Jasiuniene and Others v Lithuania*[68], the Court found a violation where the executive authorities had failed to execute a domestic court judgment obliging them to make compensation in land to the applicant under the special domestic legislation for restitution of property rights after more than eight years from the date of the court decision.

In *Stojanovski v Former Yugoslav Republic of Madeconia*[69], the applicant was a Macedonian national who complained about the fact that no decision had ever been taken concerning his compensation claim brought in the course of criminal proceedings. The Court held that the failure of the national criminal court to deal with the applicant's claim constituted a denial of access to court as regulated by Article 6(1). In *Garzičić v. Montenegro*[70], the Court found a violation of the right to access to court because the Supreme Court in Montenegro had unreasonably refused to consider the applicant's request for review of the lower court's decision. Two recent cases, *Delvina v. Albania*[71] and *Eltari v. Albania,* concerned the non-enforcement of final court decisions in the applicants' favour. The Court held that both applicants' right to access to a court had been infringed.

2.3 Independent and Impartial Tribunal

- **Criminal cases and cases which concern 'civil rights and obligations' must be heard by an independent and impartial tribunal established by law.**

Although they are distinct concepts, there is a close relationship between the guarantees of an 'independent' and an 'impartial' tribunal. In fact the Court frequently considers both notions together. The phrase 'tribunal established by law' refers to a body whose function is to determine matters within its competence, following proceedings conducted in a prescribed manner.[72] Although members of the body do not necessarily have to be lawyers or qualified judges, the tribunal must have the competence to take legally binding decisions which cannot be altered by a non-judicial authority. It will not be sufficient if the body only has the capacity to make recommendations or give advice. The fact that a body has other functions, besides a judicial function, does not necessarily mean that it is not a "tribunal".[73] Bodies found to be a "tribunal established by law" include professional disciplinary bodies[74]; military and prison disciplinary bodies[75]; and administrative bodies dealing with land reform questions.[76]

An "independent" tribunal is one that is independent of the executive, the parties and also of the legislature or Parliament. In considering whether the tribunal is "independent", the Court will have regard to the manner of appointment of the members, their terms of office, the existence of guarantees against outside pressure and the question whether the body presents an appearance of independence. It is important to note that appointments made by the Executive will not violate Article 6 if the appointees are not subject to any instructions from the Minister in their adjudicatory role, or if they are under a legal obligation to act independently.

"Impartiality" requires a tribunal to act in a manner which is not biased or prejudicial towards the parties. The impartiality test exists in two forms: subjective and objective. This means the Court will consider whether the tribunal is subjectively impartial in the sense that its members are free from personal bias, and

67 Burdov v Russia
68 Jasiuniene and others v Lithuania, March 6, 2003
69 Boris Stojanovski v. The former Yugoslav Republic of Macedonia, May 6, 2010
70 Garzičić v. Montenegro, September 21, 2010
71 Delvina v. Albania, March 8, 2011 and Eltari v. Albania, March 8, 2011
72 Belilos v Switzerland, April 29, 1988
73 H. v Belgium, November 30, 1987
74 Ibid.
75 Engel and others v Netherlands, June 8 , 1976
76 Ettl and others v Austria, April 23, 1987

whether, from an objective point of view, there is a sufficient appearance of impartiality and whether the guarantees of impartiality in a given situation are such as to exclude any legitimate doubt on the matter. It is generally very difficult for an individual to prove personal bias of a judge and personal impartiality must be assumed unless there is proof to the contrary. In *Kyprianou v Cyprus*[77], judges who tried an applicant for contempt of court expressly stated that they were "deeply insulted as persons" by the applicant's behaviour in court, which was ruled to amount to the offence of contempt. The wording of the judges' statements in the applicant's conviction, coupled with the speed with which the proceedings were carried out, showed lack of impartiality under the subjective test.
Compared to the subjective test, the Court has had many more occasions to deal with the objective test of impartiality. The Court has placed great emphasis on the importance of appearances, having regard to the confidence which the courts in a democratic society must inspire in the public and, as far as criminal proceedings are concerned, in the accused. The objective test of impartiality necessitates a less serious burden of proof for the applicant. An appearance of bias or a legitimate doubt as to the lack of bias is sufficient from the point of view of an ordinary reasonable observer.[78] Legitimate doubt may arise in a number of ways. For example, in situations where the same judge intervenes at different stages of the same proceedings; as a result of previous employment of a judge with one of the parties; or where there has been the intertwining of prosecutorial and judicial functions. However, the mere affiliation by the member of the tribunal to a certain social group or association – such as belonging to the same political party or religious confession as one of the parties in the case – is not sufficient to sustain legitimate doubt under the objective test.

2.4 Meaning of fairness and equality of arms

- **The requirement of "fairness" covers proceedings as a whole and is separate from the question whether the tribunal's decision is "correct" or "wrong". The principle of equality of arms requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.**

The question whether a person has had a "fair" trial is looked at by way of cumulative analysis of all the stages, not merely of a particular incident. This means that a procedural defect at one level may be put right at a later stage. The notion of "fairness" is also autonomous from the way the domestic procedure construes a breach of the relevant rules and codes, with the result that a procedural defect amounting to a violation of the domestic procedure – even a flagrant one – may not in itself result in an "unfair" trial. Similarly a violation under Article 6 can be found even where the domestic law was complied with. However, in *Barberà, Messegué and Jabardo v. Spain*[79], the domestic proceedings were in violation of Article 6 because of the cumulative effect of various procedural defects – despite the fact that each defect, taken alone, would not have convinced the Court that the proceedings were "unfair".

While it is for the national law to lay down the rules on admissibility of evidence and it is for the national courts to assess evidence, the requirements of the adversarial principle means that the nature of the evidence admitted and the way in which it is handled by the domestic courts are relevant under Article 6. In this context, "adversarial" means that the relevant material or evidence is made available to both parties. There is a significant degree of overlap between the adversarial principle and equality of arms. "Equality of arms" also requires a fair balance between the parties and essentially denotes equal procedural ability to state the case. The principle applies to both civil and criminal cases. There must be adequate procedural safeguards appropriate to the nature of the case including, where appropriate, adequate opportunity to adduce evidence, to challenge hostile evidence, and to present argument on the matters at issue.[80] For more on this, see Section 3 below.

77 Kyprianou v. Cyprus (GC), December 15, 2005
78 Piersack v Belgium, October 1, 1982
79 Barberà, Messegué and Jabardo v Spain, December 6 , 1988
80 H. v Belgium, November 30, 1987

2.5 Personal Presence and publicity

- **The right to a "public hearing" derives from the wording of Article 6, but cases in this category are usually looked at under the more general heading of "fairness". This element of "fairness" consists of four implied rights: (1) right to an oral hearing and personal presence by a civil litigant or criminal defendant before the court; (2) right to effective participation; (3) the right for the applicant to claim that third parties and media be allowed to attend the hearing (publicity); (4) right to publication of the court decision.**

The presence requirement at first instance is close to absolute, though it has been stated hypothetically that it may be justifiably dispensed with in "exceptional circumstances".[81] Although presence presupposes an oral hearing, not every oral hearing must be public. Presence before an appeal court will be required where it deals both with questions of fact and law and where it is fully empowered to quash or amend the lower decision. In *Ekbatani v. Sweden*[82], the Court held that the absence of the defendant in a criminal case before an appeal court dealing with both questions of fact and law violated the presence requirement. However in *Kremzow v. Austria*[83], the Court found there was no violation where the defendant in a criminal case was not present in person (but represented by a lawyer) during appeal hearing of his plea of nullity. Trials in absentia will only be allowed as long as the authorities made best efforts to track down the accused and inform them of forthcoming hearings. In any event, the accused retains the right to full re-trial in the event of their re-appearance.

In *Stanford v. the United Kingdom*[84], the Court held that a civil litigant or criminal defendant must be able to participate effectively in a court hearing, which must be organised to take account of his physical and mental state, age and other personal characteristics. In the same case it was held that that assistance by a lawyer may counter-balance the applicant's personal inability to participate effectively.

The rationale of public proceedings is to protect civil litigants and criminal defendants from secret administration of justice and to ensure greater visibility of justice, maintaining the confidence of society in the justice system.[85]Although it is a qualified right, the presumption must always be in favour of a public hearing, and the exclusion must be strictly required by the circumstances of the case. In *Riepan v. Austria*[86], the Court found a violation of the publicity requirement where there had been a closed trial on fresh charges against a convicted prisoner, and no steps were taken by the authorities to inform the public of the date and place of the trial in prison. There is no obligation for a court to read out its full judgment in open court; publishing in writing is sufficient, though the decision must be available for consultation in the court's registry.[87]

81 Allan Jacobsson (No. 2) v Sweden, February 19, 1998
82 Ekbatani v Sweden, May 26, 1988
83 Kremzow v Austria, September 21, 1993
84 Stanford v United Kingdom, February 23, 1994
85 Axen v Germany, December 8, 1983
86 Riepan v Austria, November 14, 2000
87 Pretto and others v Italy, December 8, 1983

2.6 Length of proceedings

- **Civil litigants and criminal defendants should be protected against excessive delays in legal proceedings.**

The reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of the cases having regard to the complexity of the case, the conduct of the applicant, the conduct of the authorities and what is at stake for the applicant. A case can be considered complex as a result of legal complexity of the proceedings which may arise, for example, from the task of the domestic courts to apply a fresh piece of legislation. If the Court accepts that the proceedings have been established as complex, it will generally allow a longer period of time for the authorities to finalise the case. Where delays are caused by a litigant or defendant, they are not taken into account for the purposes of calculating reasonableness of the length of proceedings from the point of view of Article 6. However, a defendant cannot be blamed for taking full advantage of the legal avenues afforded by national law in the defence of his interests.[88] Delays attributable to the authorities in breach of "the reasonable time" requirement have included the following: repeated return of case to investigators on the same grounds for fresh investigations to be carried out[89]; repeated attempts to summon same witnesses at trial[90]; frequent changes in composition of trial court[91]; and delays in sending case from first instance to appeal court[92]. However, in *Zimmerman and Steiner[93],* the Court found that general delays caused occasionally by the courts' case-load may be acceptable as long as they are not prolonged in time, and where reasonable steps are being taken by the authorities to prioritise cases based on their urgency and importance[94].

There is no absolute time limit under the reasonableness requirement. Generally speaking, criminal proceedings will be expected to be pursued more expeditiously than civil matters. The Court will take into account what is 'at stake' for the applicant. In criminal cases the reasonable time guarantee runs from the time that an accused is subject to a formal charge. Criminal proceedings end when the charges are determined or the final sentence is imposed. Civil proceedings commence when court proceedings are initiated, and terminate when the case is finally determined.

In *Majaric v Slovenia[95]* the Court unanimously concluded that there had been a breach of Article 6(1) where the domestic criminal proceedings had lasted for over four years and five months. In *Janković v Croatia[96]*, the Court held that civil and enforcement proceedings which lasted in total eight years, five months and six days, constituted an excessively long period, in violation of the 'reasonable period' requirement.

88 Kolomiyets v. Russia, February 22, 2007
89 Šleževičius v. Lithuania, November 13, 2011
90 Kuvikas v. Lithuania, June 27, 2006
91 Simonavičius v. Lithuania, 27 June 2006
92 Martins Moreira v Portugal, October 26, 1988
93 Zimmermann and Steiner v Switzerland, July 13, 1983
94 However, this case is now rather out of date and could only be relied on in extraordinary circumstances.
95 Majaric v Slovenia, Feburay 8, 2000
96 Janković v Croatia, March 5, 2009

3. EVIDENCE

Perceived problems

In their observations CEDEM court monitors identified several evidentiary issues related to:

- The procedure followed during an identity parade
- The acquisition of confessions
- The treatment of testimony
- The weight of expert evidence

Introduction

Generally it is for domestic courts to determine the admissibility and assessment of evidence. However, the ECtHR will find a violation of the Convention where, considering the circumstances of the case as a whole, an applicant was deprived of an ability to participate effectively in the proceedings or where the position of the defence was significantly impaired.[97] Therefore the use of evidence obtained in breach of domestic rules will not necessarily be contrary to Article 6. Similarly, reliance on evidence obtained in breach of another article of the Convention (for example Article 8, the right to private and family life) does not necessarily infringe fair trial requirements in Article 6. However, evidence obtained in violation of Article 3 (the prohibition against torture, inhuman and degrading treatment) will render proceedings contrary to Article 6 in most cases. Whether the Court will find a violation depends on a number of factors including:

– The provision of the Convention that was alleged to be violated (Article 3, 6, 8 etc.)
– The role that the evidence played in the proceedings
– Whether adequate safeguards existed to ensure judicial oversight of alleged breaches of the Convention
– The following section shall address discrete aspects of the admissibility of evidence.

3.1 Presentation of evidence

- **National courts have a duty to ensure evidence is properly and fairly presented.**

In practice this means that the Court may be required to rectify inadequate presentation of evidence by either party. *Barbera, Messegue & Jabardo v Spain*[98] involved a case of robbery and murder resulting in sentences of up to 36 years which was examined in a trial lasting one day. Despite the fact that both the prosecution and the defence had waived the oral presentation of documentary evidence at trial, the ECtHR found that that this did not remove the requirement that the Court ensured the trial complied with Article 6.

Several factors are relevant in determining whether the evidence was properly and fairly presented. The failure of either party to object to the presentation of certain evidence is important, but not decisive.[99] Any part of the proceedings that might mitigate or remedy the alleged unfairness will be taken into account. In addition, whether the matter was subject to careful scrutiny on appeal is significant.

3.2 Identity Parades

97 See Dombo Beheer BV v Netherlands, October 27 1993

98 Barbera, Messegue & Jabardo v Spain, December 6 , 1988

99 Karen Reid, A Practitioner's Guide to the European Convention on Human Rights, p150. See for example , X v United Kingdom, 6 October 1976.

- **Identity parades must be organised in a way that does not extinguish their evidential value.**

National authorities have a duty to ensure that identity parades are carried out without irregularities that may render a trial unfair. For example in *Laska & Lika v Albania*,[100] which involved a conviction based on the results of an identity parade, the ECtHR found the fact that the applicants were made to wear blue and white balaclavas similar to the alleged perpetrators while the other participants wore black masks, did not comply with Article 6. This is because it amounted to pointing "the finger of guilt" at the applicants, and consequently could have no evidential value.

3.3 Confession and Coercion

- **Evidence obtained under compulsion and/or coercion must not carry a decisive or crucial weight in a conviction.**

Incriminating evidence obtained in violation of the Article 3 prohibition against torture should never be relied on as proof of the victim's guilt.[101] However, the Court has left open the question whether evidence obtained under circumstances falling short of torture, but constituting inhuman and degrading treatment, automatically renders a trial unfair.[102] Such cases will depend on the facts of each case, and in their determination the Court will pay particular attention to the role played by the evidence at trial. For evidence to be held unfairly obtained in such circumstances, it must have had a bearing on conviction.

In *Jalloh v Germany,*[103] evidence obtained through the involuntary administration of emetics (drugs to induce vomiting) in order to force the applicant to regurgitate a bag of cocaine, was held to be contrary to Article 6 as well as Article 3. The Court noted that, even if it had not been the authorities' intention to inflict pain and suffering on the applicant, the evidence was nevertheless obtained by a measure which breached one of the core rights guaranteed by the Convention. Furthermore, the drugs obtained by the impugned measure proved the decisive element in securing the applicant's conviction. Lastly, the public interest in securing the applicant's conviction could not justify allowing evidence obtained in that way to be used at the trial. Accordingly, the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant had rendered his trial as a whole unfair.

Gäfgen v. Germany involved the kidnap of an 11 year old boy and evidence relating to his whereabouts obtained from the applicant following threats, made by the police during the search, and subsequently categorised as inhuman and degrading treatment. In that case, an example of the 'ticking time-bomb' scenario, the ECtHR noted that Article 6 was not absolute and that a "criminal trial's fairness [is] only at stake if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings." In *Gäfgen*, the conviction was based exclusively on the new, full confession made by the applicant at the trial. Therefore, the Court found that the causal link between the threat of torture and the conviction had been broken as "the breach of Article 3 in the investigation proceedings had no bearing on the applicant's confession at the trial". [104]

In circumstances where neither a finding of torture nor inhuman treatment is made, but ill-treatment is alleged, the existence of adequate procedural safeguards enabling the examination of any such claims is relevant in determining whether the evidence was unlawfully obtained. For example in a situation where an applicant, denied access to a lawyer, confessed in circumstances he claimed constituted coercion; the fact that the national court failed to adequately investigate these claims is likely to render the proceedings contrary to Article 6.[105]

100 Laska & Lika v Albania, April 20 , 2010
101 Jalloh v Germany, July 11, 2006
102 Karen Reid, Ibid.
103 Jalloh v Germany, July 11, 2006
104 Gäfgen v. Germany, June 30, 2006
105 See for example Yaremenko v Ukraine, June 12, 2008

3.4 Expert Evidence

- **There is no absolute right to appoint an expert of one's choosing to testify at trial or the right to appoint a further alternative expert.**

Although there is no absolute right to appoint an expert of one's choosing, the ECtHR may find proceedings in violation of Article 6 where the national court fails to properly consider the appropriate evidence in reaching its decision on a crucial medical issue and by doing so, deprives the applicant of a fair hearing. For example in *Sommerfeld v Germany,*[106] which involved access to a child by the non-custodial parent, the court stated "[i]t would be going too far to say that domestic courts are always required to involve a psychological expert on the issue […], but this depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned." However, in another case involving access to a child by the non-custodial parent, the ECtHR found that the failure of a domestic court to order an expert psychological report violated the rights of the parent.[107]

The Court has held that there is no right to neutrality of a court-appointed expert as long as that expert does not enjoy any procedural privileges which are significantly disadvantageous to the applicant.[108] However, where the opinion of an expert plays a determining role in the proceedings, the court has insisted on neutrality of official experts.[109]

4. DEFENCE RIGHTS

Perceived Problems

In their observations CEDEM court monitors identified several evidentiary issues related to:
An applicant's claim that he was held in an official's office and did not have his procedural rights communicated to him
Scheduled trial dates published on the official website not corresponding to the day trials actually take place.
Self-representation
Cross-examination
Interpretation

Introduction

Persons 'charged with a criminal offence' are guaranteed certain minimum rights that are necessary for the preparation and conduct of the defence and to ensure that accused is able to defend himself on equal terms with the prosecution'. The minimum defence rights in criminal proceedings, set out in Article 6(3), have long been recognised by the Court as specific aspects that form part of the wider concept of the right to a fair trial. Thus the Court has typically examined an alleged violation of one of the Article 6(3) rights together with Article 6(1). Therefore in order to prove a violation of one of his defence rights, an applicant has to also show the effect of the restriction of his defence on the fairness of the criminal proceedings taken as a whole.

106 Sommerfeld v Germany, July 8,2003
107 Elsholz v. Germany, July 13, 2000
108 Brandstetter v. Austria, August 28, 1991
109 Sara Lind Eggertsdóttir v. Iceland, July 5, 2007

4.1. Notification of the charge

- **The accused must be notified of the charge in order to allow him to prepare and mount a proper defence.**

The right to be informed is intended to provide the accused with specific and detailed information of the accusation, which is necessary to prepare and conduct a proper defence at trial. The "cause" in the information required under Article 6(3)(a) relates to the acts allegedly committed, and the "nature" refers to the definition of the offence in domestic law. In *Pellisier and Sassi v France*[110], the Court held that provision of full information of nature and cause of the accusation is an essential prerequisite for ensuring that the proceedings are fair. Written notification is not required, so long as sufficient information is given orally.[111] The Court has however held that the information must be in a language the defendant understands.[112] There is relatively little case law on the right to be informed 'promptly'. Although any relevant information, whether of fact or law, must obviously be given to the accused in sufficient time to enable him to prepare his defence, the Court's approach suggests that this requirement does not mean information must be provided immediately. Nevertheless in *Mattoccia v Italy*[113], the Court held that basic information about the accusation must be submitted at least prior to the first interview with the police. It is important to note that the onus is on the applicant to attempt to obtain information by attending hearings or making relevant requests.[114]

4.2. Adequate time and facilities to prepare a defence

- **A person subject to a criminal charge should be given sufficient time and facitilites to defend himself during the criminal proceedings.**

There is considerable overlap between this right and the right to legal representation, the right to notification of the application, as well as the general principles of fairness within the meaning of Article 6(1). In order to determine compliance with this requirement, it is necessary to have regard to the general situation of the defence, including legal counsel, and not merely the situation of the accused in isolation.[115]
The guarantee of 'adequate time' to prepare a defence begins to run from the moment that a person is subject to a criminal charge. The test of what time is adequate is a subjective one, as various factors regarding the nature and complexity of the case, the stage of the proceedings, and what is at stake for the applicant, have to be taken into account. In *Campbell and Fell v United Kingdom*, the Court considered five days' notice of a prison disciplinary hearing to be adequate because it was a straightforward case.
The "adequate facilities" test is also a subjective one, depending on the particular circumstances and abilities of the applicant. Certain facilities such as the right of the accused to communicate with his lawyer can be regarded as essential; the right to confer with counsel may however be subject to restrictions. For example the ECtHR has held that the national court may override the choice of the person charged with a criminal offence when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.[116] It is also permissible for national law to lay down even stricter rules for those who wish to defend persons in supreme courts.[117] In addition, the right of the defence to have access to all the information held by the prosecution is not absolute; there may be competing interests. These may include issues of national security or the need to protect witnesses. In such instances, the court must

110 Pellisier and Sassi v France, March 25,1999
111 Kamasinski v Austria (1989)
112 Brozicek v Italy (1989)
113 Mattoccia v Italy, July 25,2000
114 Campbell and Fell v United Kingdom, June 28, 1984
115 Krempovskij v Lithuania (dec.), April 20, 1999
116 Croissant v Germany, 25 September 1992
117 Meftah and Others v France, 26 July 2002

ensure that restrictions of the rights of the defence are strictly necessary in the circumstances of the individual case. "Facilities" which are required by the defence at the trial stage are also covered. As such, the defence counsel must be allowed sufficient time to present the defence, to call expert witnesses, or be allowed an adjournment. Similarly, the applicant must be allowed sufficient facilities to prepare his appeal, which includes the right to know the reasons for the court judgment.[118] The Court's judgment in *Korellis v Cyprus*[119] suggests that the test is not one of 'actual prejudice' to the defence resulting from the state's failure to allow access to "facilities"; instead it is one of 'relevance' to the preparation of the defence.

4.3. Legal representation or defence in person

- **A person subject to a criminal charge has the right to defend himself or may appoint a lawyer. In certain circumstances there is a right to free legal assistance.**

The right to representation applies at the pre-trial and the trial stage. While this does not confer unlimited access to legal representation, the Court, in *Salduz v Turkey*[120], established the general principle that, save in exceptional circumstances, an accused must be provided with legal assistance from the first interrogation. There is no right, as such, to have access to a lawyer at all times of the proceedings, and restrictions may be placed on the number or duration of meetings, provided the crucial need of access to legal advice is respected immediately after the arrest.[121]

The accused can choose to represent himself so long as the choice is freely made and is not contrary to the interests of justice. However, this right is not absolute, and the State authorities can deny this where domestic law requires that a person be legally represented, particularly where the alleged offence is serious in nature. The State cannot require an accused to defend himself in person; though it is important to note that the right to legal assistance, free or otherwise, does not confer an absolute right to choose counsel. The national court may appoint a defence lawyer which an accused considers unnecessary[122] , but it may not be enough for the competent authorities merely to nominate or allow a lawyer to act. In *Artico v Italy*[123], the Court stated that legal assistance must be "practical and effective" and not merely "theoretical and illusory".[124]

On the question of free legal assistance, the national authorities must take account of the means of the accused as well as the interests of justice. This includes a consideration of the nature and complexity of the alleged offence, the severity of the penalty that might be imposed, and the capacity of the accused to represent himself adequately.[125] If the accused has sufficient means to pay for a lawyer, no consideration of the interests of justice need be undertaken for the purpose of granting him legal aid.[126] The Court has held that the review of the interests of justice must take place at each stage of the proceedings.[127] The State is not responsible for every shortcoming of a defence lawyer, whether under legal aid or not, as the conduct of the defence is essentially a matter between the accused and his counsel. [128] However if a failure by, or inability of, legal aid counsel to provide effective representation is either manifest, or sufficiently brought to the attention of the competent national authorities, there is an obligation on them to intervene.[129]

118 Hadjianastassiou v. Greece, December 16, 1992
119 Korellis v Cyprus, January 7, 2003
120 Salduz v. Turkey (GC), November 27, 2008
121 John Murray v United Kingdom, February 2, 1996
122 Croissant v Germany, September 25, 1992
123 Artico v. Italy, May 13, 1980
124 Ibid at 31-38
125 Timergaliyev v Russia, October 14, 2008.
126 Campbell and Fell v United Kingdom, fn54 above
127 Granger v. the United Kingdom, March 28, 1990
128 Artico v Italy, May 13, 1980
129 Kamasinski v Austria, December 19, 1989

4.4. Right to examine witnesses[130]

- **There must be full equality of arms with regard to the examination of witnesses.**

This right applies to the trial and any appeal proceedings and does not generally apply at the pre-trial stage. It is not an absolute right; however any restrictions must be consistent with the principle of "equality of arms". The term "witness" has an autonomous meaning. It is not limited to persons giving live evidence at the trial. It also includes expert witnesses called by the prosecution or the defence (though not a court-appointed expert[131]); a co-accused[132]; and the authors of statements recorded pre-trial and read out at trial[133].

Persons alleging a breach of this right must prove not only that they were not permitted to call a certain witness, but also that hearing the witness was absolutely necessary in order to ascertain the truth, and that the failure to hear the witness prejudiced the rights of the defence and fairness of the proceedings as a whole.[134] Only a key prosecution witness – namely one whose evidence is used in its entirety, or to a decisive or crucial degree to secure a conviction – can be required to be called as of right.[135] In deciding whether or not a particular witness is key, the competent authority may sometimes examine the quality and reliability of other evidence used against the accused.

In exceptional circumstances, such as in cases involving sexual offences like rape, or sexual abuse of a child, the refusal of a key witness to testify can serve as a legitimate ground for using testimony recorded pre-trial without summoning that witness. In *S.N. v Sweden*[136], the Court found no violation of Article 6(3)(d) in respect of conviction of a schoolteacher for sexually assaulting her 10 year-old pupil. Under the domestic law, in such cases child complainants were rarely called to give evidence in court because of the traumatising effect this might have on them and the main piece of evidence was a video-taped interview of the boy with a specially trained police officer. The Court found that it was sufficient for the purposes of Article 6 that the applicant's counsel could have attended the interview of the child or given the police officer any questions which the defence wanted to be put to the boy.

4.5. Free assistance of an interpreter

- **The accused has the right to free assistance of an interpreter if he cannot adequately understand and speak the language of the court.**

This guarantee protects individuals once they are "charged with a criminal offence" and applies to the pre-trial stage of proceedings thereafter. The right also extends to any appeal proceedings. This provision guarantees the right to free interpretation for someone who does not understand the language of court, and not necessarily assistance in the accused's mother tongue.

The right of an accused to free assistance of an interpreter is an absolute one. It does not depend on the accused's means. This means not only that the service should be free to the accused during the trial, but also that the domestic authorities may not reclaim the costs at the end of criminal proceedings.[137] This right also covers the translation or interpretation of all those documents or statements in the proceedings instituted against an accused which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial. However, this does not mean that there must

130 There is a certain degree of overlap between this right and the admissibility of evidence discussed in section 3 above
131 Brandstetter v. Austria, August 28, 1991
132 Luca v. Italy, February 27, 2001
133 Kostovski v. the Netherlands, November 20, 1989
134 Butkevičius v. Lithuania, dec. November 28, 2000; judgment March 26, 2002; Krempovskij v. Lithuania, April 20, 1999
135 Vidal v. Belgium, April 22, 1992; Doorson v. the Netherlands, June 23, 1996
136 S.N. v. Sweden, July 2, 2002
137 Luedicke, Belkacem and Koc v Germany, November 28, 1978

be a written translation of all items of written evidence or official documents in the procedure.[138] The onus is on the trial judge to show considerable diligence in ascertaining that the absence of an interpreter would not prejudice the applicant's full involvement in matters of crucial importance for him.[139]

138 Kamasinski v. Austria, December 19, 1989

139 Cuscani v. the United Kingdom, September 24, 2002