

TRANSITION OF CRIMINAL PROCEDURE SYSTEMS

Editor
Berislav Pavišić

Introduction
Jean Pradel

Volume II

Belarus
Estonia
Georgia
Germany
Kosovo
Latvia
Lithuania
Moldova
Poland
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Rijeka, 2004

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Nakladnik: Pravni fakultet Sveučilišta u Rijeci
Biblioteka Zavoda za kaznene znanosti Mošćenice

Izvršni nakladnik: Žagar d.o.o. Rijeka

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Tiskara: Tiskara i grafika Žagar, Rijeka

Naklada: 500

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ISBN 953-6597-44-6

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Preface

Dedicated to the victims of miscarriage of justice

Transition of Criminal Procedure Systems - Volume II is an outcome of the project conceived within the Institute of Penal Sciences (*Zavod za ka^tiene ^nanosti*) Moscenice of the Faculty of Law, University of Rijeka. It represents cooperation among fifteen universities, four academies, three supreme courts and numerous researchers from various European countries. It is also supported by the Croatian Ministry of Science and Technology. The research was conducted from March through November, 2003.

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The first volume of the present research was published in Turin 2002 in the Italian language as *he altre pmcedun penali*. The Italian *Codice di procedurapenak* of 1988 was one of the most important criminal procedure legislation in 20th Century Europe. As homage to its Italian authors, the first volume was presented in the Italian language.

This second volume is published in English to ensure a wider audience. This is not an easy option for the analysis of criminal procedure systems in civil law countries due to confusing concepts of inquisitorial philosophy and terminology. Translation was difficult in many cases. Translating some typical inquisitorial "continental" concepts to the

English language was often impossible. In many cases identical terms have different meanings in different systems. On the other hand, identical ideas are frequently expressed with different terms, linguistic components of all reports should be subject to further and necessary verification of the common law educated penal jurist.

National reports are the most important part of the entire text. All national reports are similarly structured within the unique common scheme. The reports have fifteen to thirty-five pages and contain a short list of national bibliographical sources as well as contents of the national code of criminal procedure. Contents of the national reports depend on the professional competence of national reporters as well as their linguistic knowledge. Doctrinal positions and statements in a particular national report are of the corresponding author. Opinions presented in national reports, integrality and the accuracy of data in the reports is given by each of the national authors. Changes by coordinators and collaborators of the Institute were in few cases necessary. Editorial interventions were systemic and necessary to determine terminological significance. Opinions in the overview are of the project coordinator.

The creation of the second volume was assisted by numerous persons who merit special recognition. First of all, I am grateful for the participation of my closest collaborators Eduard Kunstek, Davide Bertaccini, and Milana Trbojevic. I also thank the national reporters, language lecturers and to my students, Damira Delost and Marko Biserko.

Credits should be also given to Professor Hans-Heiner Kiihne, Faculty of Law, University of Trier; Doctor Eberhardt Stolz, President of the Higher Regional Court, Stuttgart; Miss Ana Trticna, counselor, Embassy of the Republic of Ukraine in Zagreb; Professor Florian Tremmel, Faculty of Law, University of Pecs; Professor Oto Novotny, Faculty of Law, Charles University, Prague; Professor Miodrag N. Simovic, Faculty of Law, University of Banjaluka, Judge of the Constitutional Court of the Republic Srpska; Professor Hajrija Sijercic - CoEc, Faculty of Law, University of Sarajevo; Assistant Professor Csongor Herke, Faculty of Law, University of Pecs; Professor Miomir Matulovic, Dean of the Faculty of Law, University of Rijeka; Assistant Professor Zeljko Bartulovic, Faculty of Law, University of Rijeka; and Assistant Budislav Vukas, Faculty of Law, University of Rijeka.

We deeply appreciate help and constructive suggestions of Professor Michael Rooke-Ley, co-president of the Society of American Law Teachers (SALT) and his wife Ilisa Rooke-Ley, public defender, Eugene, Oregon.

Special attention should be given to the introduction written by Professor Jean Pradel, Director of the Institute of Criminal Sciences, Faculty of Law and Social Science, University of Poitiers. Professor Pradel is indebted to many students, scholars and researchers in the world for their help with his pioneering work in the field of comparative criminal law. His introduction is an outstanding contribution in support of this Project.

Rijeka, November, 2003

Berislav Pavišić

Introduction

Infatigable découvreur et brillant spécialiste de procédure pénale comparée, le professeur Berislav Pavisic, de l'Université de Rijeka (Croatie), poursuit aujourd'hui son tour d'Europe. Hier, avec Davide Bertaccini, de l'Université de Bologne (Italie), il avait conçu et réalisé une étude sur les procédures pénales des divers pays d'Europe centrale¹. C'est maintenant l'Europe orientale qu'il nous fait découvrir avec le présent volume². Son mérite est considérable car les travaux de procédure pénale comparée, il faut le souligner d'emblée, sort d'une redoutable complexité. Et ils le sont pour deux raisons principales.

En premier lieu, dans tous les pays sans exception, la procédure pénale est mouvante. Partout, cette discipline bouge même de plus en plus. Les facteurs de ce phénomène sont multiples et l'on citera d'abord la montée de la criminalité, notamment dans ses formes économique³ et organisée⁴ ainsi que l'influence grandissante des juges de la Cour européenne des droits de l'homme qui n'hésitent pas à condamner un Etat pour violation d'une disposition de la Convention européenne des droits de l'homme et qui, par contrecoup, obligent cet Etat à aménager son droit. Un autre facteur de renouveau, non négligeable loin de là, provient des vicissitudes politiques, un changement de majorité parlementaire entraînant presque inévitablement des modifications dans la procédure pénale. Le phénomène est net en Espagne et en France depuis quelques années. Il l'est au moins autant dans les pays de l'Europe de l'Est, la disparition du système socialiste en 1989-1990 ayant entraîné rapidement l'apparition d'une nouvelle législation en procédure pénale. Rapidement, la doctrine en fit l'analyse et l'on peut citer la tenue de

¹ B. Pavisic et D. Bertaccini, *Le altre procedure penali. Transironi dei sistemi processuali penali*, Vol I, Albania, Bosnia ed Erzegovina, Bulgaria, Cechia, Croazia, Jugoslavia, Macedonia, Slovacchia, Slovenia, Ungheria.

² Qui traite de la procédure pénale de 12 pays, à savoir 11 anciennement socialistes (Belarus, Estonie, Géorgie, Kosovo, Lettonie, Lituanie, Moldavie, Pologne, Roumanie, Russie et Ukraine) et 1 qui ne l'a été que dans sa partie orientale (Allemagne).

³ La plupart des auteurs non-français parlent de délinquance économique alors que l'on parle en France de délinquance d'affaires, dont la délinquance économique (liée au marché) et un aspect à côté de la délinquance en matière de sociétés, du travail, de l'environnement, etc.

⁴ Dont il n'y a guère de définition dans les législations. V. la bonne approche de Maurice Cusson in *Criminologie actuelle*, PUF 1998, l'auteur indiquant que la notion est « surchargée » et qu'elle évoque dix caractères : « une structure pyramidale, un pouvoir central, la permanence, des règles contraignantes, des criminels professionnels, une organisation méthodique des opérations, la réponse à une demande de biens ou services illicites, la monopolisation, le recours systématique à la violence, la puissance et la menace qu'elle fait peser sur nos démocraties... » p. 105-106.

deux colloques essentiels, l'un à Syracuse (Italie) en novembre 1991⁵ et l'autre à Ljubljana (Slovénie) en octobre 1994⁶. Le présent travail, objet de ce volume, vient donc à son heure d'autant plus que depuis les deux manifestations scientifiques précitées, tous les pays de l'Est sont dotés d'un Code de procédure pénale nouveau.

En second lieu, les études de procédure pénales sont difficiles à conduire à cause du caractère assez national de cette discipline — beaucoup plus national que le droit pénal de fond — alors que, par hypothèse, le comparatiste n'appartient évidemment qu'à un seul système. A consulter en effet les législations de droit pénal de fond des divers Etats d'Europe *lato sensu*, on découvre vite que les principes directeurs sont les mêmes : il existe un droit pénal commun car l'on retrouve partout les principes de légalité et de culpabilité, partout l'admission de certains faits justificatifs comme la légitime défense et l'état de nécessité pour ne prendre que quelques exemples ; partout également les éléments constitutifs des infractions sont plus ou moins les mêmes. C'est si vrai que l'article 31 du Traité d'Amsterdam décide que « l'action en commun dans le domaine de la coopération judiciaire en matière pénale vise entre autre à ___e) adopter progressivement des mesures instaurant des règles minimales relatives aux éléments constitutifs des infractions pénales et aux sanctions applicables dans les domaines de la criminalité organisée, du terrorisme⁷ et du trafic de drogue ». Un groupe d'universitaires, a même établi entre 1998 et 2000 un projet de code pénal européen sur les délits d'affaires (eu ros-délits)⁸. Au contraire, en procédure pénale, les identités nationales sont beaucoup plus affirmées. Tel droit connaît l'action civile, le juge d'instruction et le jury criminel et tel autre les ignore. Ce n'est pas pour rien que les juges européens de Strasbourg ont créé la notion de « marge nationale d'appréciation » dont le domaine d'excellence est justement la procédure pénale et qui tend à sauvegarder comme un jardin secret des particularités culturelles ou idéologiques de tel ou tel Etat. En réalité, alors que le droit pénal est en gros le même partout sous réserve il est vrai d'importantes différences (comme la responsabilité des personnes morales ou l'erreur de droit) la procédure pénale obéit à une sorte de loi des familles, systèmes ou encore modèles. L'Europe occidentale est divisée ainsi en deux blocs : le modèle de common law d'esprit plutôt accusatoire et le modèle romano-germanique d'allure plus inquisitoire encore qu'il y ait au sein des deux modèles des sous-modèles et par exemple la procédure allemande n'est pas exactement celle de la France.

⁵ Séminaire organisé par l'Institut supérieur international de sciences criminelles de Syracuse, 24 novembre — 1^{er} décembre 1991, *justice pénale et droits de l'homme, Europe centrale et orientale et ex-URSS — Criminal justice and human rights. Central and Eastern Europe and former USSR*. Revue internationale de droit pénal, 1992.

⁶ Séminaire pan-européen organisé par le Conseil de l'Europe à la Faculté de Droit de Ljubljana, 17-19 octobre 1994. *IM politiques criminelles dans un Etat de droit (Problèmes de transition) — Crime policier and the rule of law. Problems of transition*. Conseil de l'Europe, 1995.

⁷ En dépit de la lettre de cette disposition, on peut considérer que le terrorisme est une forme de la criminalité organisée, F. Palazzo, *Terrorisme et législation anti-terroriste en Italie*, Rev. Science crim 1987, p 646 st s.

⁸ *Wirtschaftsstrafrecht in der Europäischen Union Jkechtsdogmatik, Richtsvergleich, Rechtspolitik*, Freiburg, Symposium, Herausgegeben von K. Tiedemann. Carl Heymanns Verlag, KG 2002; *Présentation générale du projet sur les euros — délits* par J. Pradel, Rev. pénit et dr. pén 2003, n°2 p 277 et s, *Eurodélitos, el derecho penal económico en la Unión europea*, director K. Tiedemann, coordinator A. Nieto Martín, Colección Monografías, Universidad de Castilla — La Mancha, Cuenca 2003.

L'intérêt de la présente étude sur les systèmes de procédure pénale des pays d'Europe de l'Est est précisément de les comparer avec les deux modèles d'Europe occidentale et aussi de voir ce qui reste du modèle socialiste qui a prévalu en Europe orientale de 1945 à 1991, soit pendant près d'un demi-siècle. Car pendant cette seconde moitié du XXTM^U siècle, trois grandes familles coexistaient en Europe : celle dite romano-germanique, celle du common law et celle qu'on appelait socialiste. La question est donc de savoir comment se situe aujourd'hui la procédure pénale des douze pays d'Europe de l'Est étudiés dans cette étude. A partir de là, deux questions se posent. Quelle a été d'abord la méthode employée dans le présent ouvrage ? C'est celle du questionnaire, classique en droit comparé et à vrai dire assez incontournable : le concepteur de l'ouvrage a établi une série de questions (sources ; système de justice pénale ; participants à la procédure ; principes généraux de la législation de procédure pénale ; déroulement de la procédure ; preuve ; mesures de précaution) qui a été adressée à des spécialistes de chacun des pays considérés. Cette méthode a déjà fait ses preuves⁹ et elle est excellente car elle seule permet de donner une certaine unité dans une matière où, comme cela a déjà été dit, la diversité est indéniable. La seconde question est celle des résultats. Ils sont considérables et il est impossible ici-même de les résumer. On se contentera d'évoquer cinq points : le statut du poursuivant, le caractère de la poursuite, la détermination des agents d'investigation, les droits de la défense, et la position de la victime. Ces aspects qui paraissent particulièrement importants et permettent de situer les droits étudiés vis à vis des droits d'Europe occidentale¹⁰. Prenons quelques exemples illustrant ces divers points.

1. Quel est le statut du poursuivant ? En général, le ministère public, ce poursuivant par excellence, est hiérarchisé fortement et il est le plus souvent placé sous l'autorité du ministre de la justice.

Le plus fréquemment, le chef du ministère public est nommé par le chef de l'Etat ou par le gouvernement.

Le principe général de hiérarchie et de subordination se retrouve dans beaucoup de législations d'Europe occidentale. L'article 151 de la Constitution belge dispose en effet que « le ministère public est indépendant dans l'exercice des recherches et des poursuites individuelles sans préjudice du droit du ministre (de la justice), d'ordonner des poursuites et d'arrêter des directives contraignantes de politique criminelle, y compris en matière de recherche ou de poursuite ». On pourrait donner d'autres exemples dans le même sens. Il est vrai cependant qu'en Italie, le ministère public est indépendant du

⁹ La méthode a déjà été utilisée, et avec le plus souvent les mêmes rubriques, dans une étude sur les procédures pénales des pays de la Communauté européenne, *Criminalprocedure Systems in the Europea» Con/unUy*, Ch. Van Den Wyngaert editor, Butterworth, 1993. L'étude de Ch. Van Den Wyngaert, porte sur 13 pays : Allemagne, Angleterre et Pays de Galle, Belgique, Danemark, Espagne, France, Grèce, Irlande, Italie, Luxembourg, Pays-Bas, Portugal, Ecosse. V.aussi et avec la même méthode, *Procédures pénales d'Europe* sous la direction de M. Delmas-Marty, PUF 1995, cette étude portant sur l'Allemagne, l'Angleterre, la Belgique, la France et l'Italie.

¹⁰ Ces questions sont des « éléments déterminants, « c'est à dire des notions qui caractérisent plus que d'autres un droit ou un système déterminé en ce qu'elle se répercute sur plusieurs secteurs de la procédure, v. sur la notion J.L. Constantinesco, *Traité de droit comparé*, Fxonomica, 1983, I, n°83, II, n°79 ; add. J. Pradel, *Droit pénal comparé*, Dalloz, 2^e éd. 2002, n°32.

ministère de la justice. A côté du ministère public, il existe souvent en Europe de l'Est un poursuivant privé qui est en fait la victime. En outre, en Pologne, ce poursuivant peut exercer l'action publique si le poursuivant officiel a interrompu les investigations et abandonné la poursuite (le Code de procédure pénale parle du « procureur subsidiaire »), ce qui est possible quand la police n'a pas découvert l'auteur des faits dans les cinq jours de la dénonciation par sa victime.

2. Quand on évoque le caractère de la poursuite, on pense aussitôt à la question de savoir si le ministère public est obligé de poursuivre (égalité de la poursuite) ou si il est libre de poursuivre ou de classer l'affaire (opportunité de la poursuite). Le plus souvent, en Europe orientale, la poursuite est obligatoire sauf pour les petites affaires et par exemple, le Code polonais de procédure pénale en donne rémunération (abandon de famille, calomnie, violation du secret des correspondances, vol entre époux..). Dans quelques pays cependant, le ministère public apprécie librement s'il poursuit ou s'il classe. La Pologne qui est légaliste connaît une règle particulière : celle de l'arrêt de l'enquête. La situation n'est pas fondamentalement différente en Europe occidentale : l'Allemagne, l'Italie et l'Espagne ont adopté le système légaliste tandis que la France et l'Angleterre sont opportunistes. Mais dans la pratique, les rapprochements sont certains, les magistrats des pays légalistes se refusant à poursuivre en se fondant secrètement sur des raisons d'opportunité, mais en invoquant officiellement un prétendu défaut de preuves.

3. La question des agents d'investigation au cours de la phase antérieure au procès est résolue presque partout de la même façon : dans tous les droits d'Europe de l'Est, c'est la police qui, sous la direction plus ou moins réelle du ministère public, conduit les recherches. Ce schéma général appelle toutefois quelques précisions. D'abord, dans certains pays comme le Belarus, le ministère public doit donner son accord à certains actes importants tels l'arrestation, les écoutes téléphoniques, les saisies de documents secrets et la liberté sous caution. Ensuite, la détention provisoire est toujours décidée par un juge. En outre, dans plusieurs pays, les atteintes à l'intimité de la vie privée comme les perquisitions domiciliaires et les écoutes téléphoniques sont décidées par un juge (Russie par exemple). Enfin, la Russie connaît encore une sorte de juge d'instruction : succédant à la phase d'enquête conduite par la police, il y a une phase d'investigation avec un juge d'instruction.

Sur cette question de la détermination des agents chargés des investigations, les solutions adoptées en Europe de l'Est sont peu originales par rapport à celles retenues en Europe occidentale où assez souvent les investigations sont conduites par la police sous la direction du ministère public. Toutefois, en Angleterre, la police est autonome et par ailleurs le juge d'instruction est encore souvent maintenu (Belgique, Espagne, France, Pays-Bas, Suisse le plus souvent). L'un des avantages invoqués en faveur du juge d'instruction est son indépendance alors que le ministère public est le plus souvent placé sous la direction du ministre de la justice. On souligne parfois qu'en France, le juge d'instruction est de moins en moins saisi (35 fois sur 100 en 1945, 6 à 8 fois sur 100 aujourd'hui). C'est exact en chiffres absolus. Mais il faut tout de même remarquer que naguère, les parquets saisissaient les juges d'instruction d'affaires simples ne méritant pas l'honneur d'une telle procédure et qu'aujourd'hui les grosses affaires (escroquerie complexe, trafic de drogue, proxénétisme, terrorisme, assassinat...) font encore systématiquement l'objet d'une instruction.

4. Les droits de la défense constituent l'un des meilleurs baromètres pour mesurer le degré de libéralisme d'un pays. On se souvient que les législations d'Europe de l'Est antérieures à 1989 étaient peu soucieuses d'assurer ces droits et les auteurs se plaisaient à les opposer aux droits occidentaux. Ces derniers avaient eux mêmes dans un passé encore relativement récent réduit les droits de la défense au strict minimum comme le montrait l'exemple du Code italien de procédure pénale de 1930 (législation Rocco). Or, depuis 1989, les droits de la défense se sont beaucoup développés dans les législations d'Europe de l'Est et même parfois dans les Constitutions comme celle de la Roumanie - au double point de vue de la présence de l'avocat et de ses pouvoirs¹¹.

Au titre de sa présence, l'avocat est obligatoire dans un certain nombre de cas : si l'accusé le demande, s'il est mineur, s'il est illettré, s'il est suspecté d'avoir commis un crime grave (Belarus) ; si l'accusé le demande, si l'accusé est mineur ou incapable de se défendre lui-même, ou encore s'il encourt une peine de longue durée (Estonie) ; si l'accusé est suspecté d'avoir commis un crime grave (Allemagne) ; s'il est mineur, s'il se trouve sous les drapeaux ou s'il encourt une peine privative de liberté de plus de cinq ans (Roumanie, avec la sanction de la nullité) ; si l'accusé encourt une peine supérieure à quinze ans (Russie), *etc.* Toutefois, certaines législations limitent le nombre d'avocats par accusé ; pas plus de trois en Allemagne et en Pologne. En Russie, un avocat ne peut défendre qu'une seule personne dans une affaire déterminée.

Au titre de ses pouvoirs, l'avocat apparaît désormais comme un personnage essentiel au cours du procès, puisqu'il agit en parallèle avec le ministère public. Dans tous les pays d'Europe de l'Est, l'avocat peut s'entretenir avec l'accusé, son client, de façon confidentielle, il peut consulter le dossier, assister à l'interrogatoire et au cours de son déroulement, poser des questions. Il peut solliciter des mesures d'investigations, voire dans le cadre d'une procédure simplifiée, participer aux négociations. Il peut même exercer des recours contre certaines décisions des organes d'investigation.

On peut affirmer qu'aujourd'hui, le statut de l'avocat en procédure pénale et par conséquent de l'accusé (qui a par ailleurs des droits propres et souvent les mêmes que son conseil) est en Europe orientale le même qu'en Europe occidentale. La procédure est devenue partout contradictoire, le principe du contradictoire consistant selon la Cour de Strasbourg « pour les parties à un procès civil ou pénal, à prendre connaissance de toute pièce ou observation présentée au juge __ en vue d'influencer sa décision et de la discuter »¹².

5. Le rapprochement est également assez net en ce qui concerne le statut de la victime d'une infraction. A l'égard de celle-ci, plusieurs attitudes sont concevables. On peut d'abord l'exclure du procès pénal en ne l'y admettant que comme témoin et permettre la réparation de son préjudice que par l'attribution d'une action purement civile devant le juge civil, sans préjudice de lois d'indemnisation dans des domaines particuliers (terrorisme, préjudice écologique par exemple). Une seconde attitude consiste au

¹¹ Le droit à l'assistance d'un avocat est expressément prévu à l'art.6 §3 de la Convention européenne des droits de l'homme.

¹² CEDH 23 juin 1993, *Rui-çMaéos*, §30 ; 20 février 1996, *Lobo Maehado*, §31 et *Vermeulen*, §33,18 février 1997, *Niderost-Huber*, §30. Comme ces droits de savoir et de proposer sont également accordés au ministère public, on peut parler d'une égalité des armes entre poursuivant et poursuivi.

contraire à intégrer la victime dans le procès pénal en lui permettant soit de joindre son action à celle du poursuivant (action civile d'adhésion) soit même de mettre en mouvement l'action publique (action civile par voie d'action).

Dans les droits d'Europe de l'Est, la victime d'une infraction peut participer à la procédure pénale avec trois réserves. D'abord, elle ne peut agir que par voie d'adhésion, pas par voie d'action, (à de très rares exceptions près), ce qui est le système admis aux Pays-Bas et en Italie par exemple. Ensuite, le juge pénal peut rejeter l'action civile d'adhésion de la victime (Allemagne). En outre, le ministère public peut dans le silence de la victime exercer l'action civile, notamment si la victime est incapable (Moldavie). Enfin, un peu dans le même esprit de faveur pour la victime, le juge peut accorder des dommages et intérêts à la victime *ex officio*, sans demande de sa part (Pologne). Les droits occidentaux ignorent dans l'ensemble ces deux dernières modalités et certains d'entre eux connaissent l'action civile par voie d'action (France et Belgique). Il n'en reste pas moins que dans toute l'Europe — occidentale et orientale — la victime peut demander au juge pénal, déjà saisi par le ministère public, la réparation de son préjudice, ce que n'admettent pas les droits de common law¹³.

En outre, et ceci découle de ce qui vient d'être dit, dans les législations d'Europe orientale, la victime apparaît comme pleinement une partie : non seulement elle peut réclamer réparation, mais encore elle peut consulter le dossier, apporter ses preuves, exercer des voies de recours. Le droit estonien va très loin dans cette voie puisque la victime peut donner son avis sur les charges, participer aux négociations en cas de procédure simplifiée, demander la prise de mesures pour appuyer les garanties de la réparation de son préjudice et même déposer anonymement.

Que conclure de tout cela ? On ne peut que redire que les droits d'Europe orientale se rapprochent ou se sont déjà rapprochés de ceux d'Europe occidentale comme s'ils voulaient, à marche forcée, rattraper leur retard et parvenir eux aussi à cette ligne de but qu'est le procès équitable. Le phénomène est d'ailleurs d'autant plus important qu'il affecte aussi les législations d'Europe centrale, objet du volume II évoqué ci-dessus. Il existe donc aujourd'hui une conscience européenne en procédure pénale, une uniformisation — non pas certes une unification impensable et non souhaitable¹⁴ — qui ne peut que réjouir les juges de la Cour de Strasbourg dont la compétence s'étend, faut-il le rappeler, aux 43 Etats du Conseil de l'Europe, c'est à dire en fait à toute l'Europe, y compris dans sa partie orientale.

Tout serait-il idyllique pour autant ? Ce n'est pas certain car deux problèmes apparaissent aujourd'hui avec une insistance croissante — celui de l'encombrement des juri-

¹³ Le juge peut cependant de lui-même accorder une composition à la victime, ce qui finalement rapproche droits de common law et droits européens continentaux, v. J. Pradel, les procédures pénales dans les droits de common law et romano-germanique : des frontières qui se brouillent, Contribution au colloque organisé en décembre 2002 par les Facultés de droit de Montréal et de Poitiers sur le thème : *Le.r nouveaux territoires du droit et leur impact sur l'enseignement et la recherche*. Publication de la Faculté de droit de Poitiers, 2004, p 191 et s."

¹⁴ En procédure pénale, on ne peut guère dépasser, au moins pour l'heure, le stade des principes directeurs communs, v. J. Pradel. Vers des principes directeurs communs aux diverses procédures pénales européennes. *Mélanges en l'honneur de G. Lepasseur*, Gazette du Palais. Litec, 1992, p 459 et s.

dictions dû à l'accroissement de la criminalité, et celui, pire encore, de la montée du crime organisé, par exemple dans sa variante terroriste. Il faudra bien arriver à concilier tant bien que mal l'idéal du procès équitable et la protection de l'ordre public. Certains droits occidentaux sont maintenant largement engagés dans cette voie. Des traces de ces préoccupations apparaissent déjà dans les droits d'Europe orientale.

Toutes ces réflexions et toutes ces informations, c'est au professeur Berislav Pavišić qu'on les doit. La science comparatiste lui en sera longtemps reconnaissante.

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Overview: Transition of Criminal Procedure Systems-Volume II

Berislav Pavišić

1 Concept

Transition of Criminal Procedure Systems is a unique long-term project which aims to analyze changes of the structure of criminal procedure rules in a certain number of ex socialist countries. In the first place it includes "... the narrow concept that limits the criminal justice system to the investigation, the prosecution, and the judgment."¹ Therefore, the objectives of this research are not similar to recently frequently mentioned analysis of "criminal justice systems" with requirements of extensive elaboration on various constitutional, legislative, political, criminological, sociological and other topics.²

The Entire project is strictly defined and limited with its objectives: recent legislative changes of criminal procedure in lieu of constitutional and legal transition after 1990 which affected almost complete world community of ex socialist countries (Albania, the new countries that emerged after the dissolution of Czechoslovakia, and after the collapse of ex Yugoslavia and Soviet Union, as well as other European countries which were former members of Warsaw Agreement, China, Cambodia, Vietnam, Laos, and, finally, African ex socialist countries).

The Global purpose of this project is to make an initial step towards a comparative analysis of criminal procedure law in transitional countries. On the other hand, the predominant goal is to catalogue the similarities and differences *between* new criminal procedural rules of the above mentioned countries and to describe and compare the sources from which these rules have been derived.

The project offers a broad overview of transitional criminal procedure systems. It is focused on seven fundamental points which are taken into consideration and systematized in the common scheme used as a cornerstone for the analysis of national legislations as follows:³

¹ Pradel, J., General report: International Conference for the 25th anniversary of the International Institute of Higher Studies in Criminal Sciences, Siracusa, 16 - 20 December 1997, published in: *Comparative Criminal Justice Systems: From Diversity to Rapprochement*, Érès: Toulouse, 1998, 529.

² For such type of complex analysis see recent books: Huber, J. B. and Vogler, R. (eds), *Comparative Criminal Procedure*, The British Institute of International and Comparative Law: London, 1996; Reichel, Ph. L., *Comparative Criminal Justice Systems. A topical Approach*, 2nd ed., Upper Saddle River, N. J.: Prentice Hall, 1999; Fields, Ch. B., Moore, R. H. Jr., *Comparative Criminal Justice Systems*, Waveland Press, Inc., 2000; Terril, R. J., *World Criminal Justice Systems: A Survey*, Anderson Publishing Co: Cincinnati, Ohio, 1992; Fairchild, E., Dammer, H. R., *Comparative Criminal Justice Systems*, 2nd Ed., Wadsworth, Thomson Learning: Belmont, 2000, 12. Some other recent comparative analysis are directed specifically on the criminal procedure. See Bradley, C. M., *Criminal Procedure. A Worldwide Study*, Carolina Academic Press: Durham, 1999. This study includes analysis of twelve different national systems of criminal procedure (Argentina, Canada, China, England and Wales, France, Germany, Israel, Italy, Russian Federation, South Africa, Spain, United States) prepared by national reporters and general comments prepared by Johannes Lensing.

³ The methodological approach of this common scheme is a form of "*le principe de l'enquête*". See Pradel, J., *Droit pénal compare* (Comparative Criminal Law), 2nd Ed., Dalloz: Paris, 2002, 30.

I Sources	3.2 Defense Counsel
1 General Observations	4 Victim
2 Historical Overview	4.1 Victim as Subject of Civil Claims
3 Code of Criminal Procedure	4.2 Victim as Subject of Others Rights in Proceedings
4 Other Sources	5 Other Participants
II Criminal Justice System	IV General Principles of Criminal Procedure Legislation
1 Investigating Services	V Course of Criminal Procedure
2 Prosecuting Authorities	1 Pretrial Stage
3 Judging Authorities	2 Trial Stage
3.1 Courts in Pretrial Stage	3 Remedy Stage
3.2 Courts in Trial Stage	4 Special Forms of Procedures
III Participants in Criminal Procedure	VI Evidence
1 Judge	1 General Provisions
2 Prosecutor	2 Means of Evidence
2. 1 Public prosecutor	3 Interference with Right to Privacy
2. 2 Private prosecutor	VII Precautionary Measures
3. Defense	1 General Provisions
3.1 Defendant	2 Particular Measures

As a matter of course, the project's aim is to serve as valuable introduction to criminal justice researchers, scholars and practitioners regarding the state of legislative systems of criminal procedure in new democratic countries at the time of transition for the predominant part of the ex socialist world.⁴ Moreover, this type of research would enable an insight into essentially structural elements, which is absolutely necessary for further analysis.⁵ Comparison of exactly determined components between different countries will be rapidly possible at first hand. Because of that, national reports use identical common scheme numbering system.⁶

The Research work realized up to this point through the first and second stage includes: (1) twenty, European ex socialist national criminal procedure systems in transition,

⁴ Comparison with another legal system can serve for different aims each of which requires its own appropriate method. About legislative comparative law, academic-theoretical comparative jurisprudence and judicative comparative law see: Eser, A., *The Importance of Comparative Legal Research for the Development of Criminal Sciences*, op. cit. 85. Hermann, J., *Criminal Justice Policy and Comparatives, a European Perspective*, published in: *Comparative Criminal Justice Systems: From Diversity to Rapprochement*, op. cit. 134, 135. Numerous recent academic programs and scientific institution's researches in the field of comparative criminal justice systems can be noticed worldwide. See correspondent websites. The majority of those programs are oriented either to the several, well-known systems of common, civil, socialist and Islamic law to the study of one or more foreign systems. Elaboration of this complex matter is quite rarely based on clear inverse approach. See Pradel, ibidem, 9-14. The legislative changes in the field of criminal matters in new emerging European democracies are object of some continued studies (e.g. projects of *Max-Planck-Institut für ausländisches und internationales Strafrecht*, Freiburg i. Br: *Strafrecht in Reaktion auf Systemunrecht. Vergleichende Einblicke in Transitionsprozesse* (Criminal Law in Reaction to State Crime, Comparative Insights into Transitional Processes), project coordinators: Albin Eser/Jörg Arnold/Helmut Kreicker; *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone & Cambodia*: project coordinator Kay Ambos; *South African Law Commission-Research Paper 19-Settlements out of Court: A comparative study of European criminal justice systems coordinated by Hans Jörg Albrecht and other projects of this Institute*. See also project: *Wege zum Rechtsstaat* (Law in Transition), *Deutsche Gesellschaft für Technische Zusammenarbeit* (GTZ).

⁵ Structure of questionnaire enables first conclusive observations about fundamental characteristics of national regulations. About "l'éléments déterminants" and "équivalence des institutions" see Pradel, op. cit. 43 - 46.

⁶ See Pavišić, B., Bertaccini D., *Le altre procedure penali* (Other Criminal Procedures), G. Giappichelli Editore: Torino, I, 2000.

(2) three internal criminal procedure systems existing in Bosnia and Herzegovina, (3) accession of ex East Germany to legislative system of Federal Republic of Germany, and (4) provisional criminal procedure system of Kosovo.⁷

This is the second stage of the project with the comparative approach methodology on the criminal procedure systems of eleven European countries and region of Kosovo. Each chapter is devoted to a single country and to Kosovo aiming to describe and analyze the most important historical, organizational, procedural and critical issues.

The methodological approach in this volume is the same as the one which was applied in the first stage. In this perspective, consequent realization of all of the three basic methodological starting points is achieved: a) structural (contents of the transition of ex socialist orders), b) geographical: movement from west (Europe), to east (Asia), and from north - (Europe and Central and East Asia), to south (South Asia and Africa) and c) national: authentic report prepared by national reporters.

The geographical element is frequently “forgotten” or ignored in legislative and scientific analyses. However, the collapse of the socialist regime restored past historical relations and influences. Because of that, geographic position of a single state combined with historical moments is an quite important factor influencing the structure of the new criminal procedure legislation. The Political position of the countries to relation to referring international association is of the same importance. The Remains of non-democratic regime elements is certainly a characteristic of ex socialist countries which should not be excluded.⁸

The aim of this research was to obtain information which is: (1) general and integral, (2) systematically organized, (3) fundamental, (4) based upon common scheme, (5) about new legislation, and elementary doctrinal sources, (6) obtained from national reporters of states in transition, (7) comparable with other recently organized researches in comparative criminal procedure, and (8) adopted as a starting point for future studies.

The Transition of Criminal Procedure Systems, range over the fundamental “identity” of every single criminal procedure system. Initial, systematically organized and connected, fundamental information usable as a starting point for future comparative criminal procedure law studies of recent legislative systems in emerging European democracies is a projected goal of this research. Moreover, the particular case of accession of ex German Democratic Republic in to the united German federal state was of utmost importance.⁹

The development of procedural systems is closely tied to the political, economic, and cultural life of the society.¹⁰ The diversity of social contexts and the implementation of international standards in national law and practice should, by all means, take into account the particular political, economic, and cultural and legal conditions in various nations. Unfortunately, this was not the case in certain matters. Regarding all ex socialist countries, legal transition in the first place means transformation from the society based on political

⁷ The rest of the Asian and African ex socialist countries will be considered over in the third and subsequent volumes.

⁸ Those elements can be observed in some other contemporary systems (as a general characteristic of single order like a Nazi-regulations and praxis or fascist law and order, many dictatorial systems around the world, military juntas in some South American states, or as a characteristic of a single acts in the rule of law state such as certain contemporary anti-terrorism, anti organized crime and other similar acts). However, circumstances linked with their history, forms of expression, and other social elements are specific. The common external landmark for all of them was only the miscarriage of criminal procedure. The other distinctive features where different.

⁹ This method was widely accepted and realized by national reporters which contributed in the first volume. Unfortunately, situation was completely different regarding the work on the second circle of twelve legislations. Quite a few national authors prepared their papers in determined time limits (Belarus, Germany, Kosovo, Latvia, Poland, Russia).

¹⁰ See Damaška, M., *I volti della giustizia e del potere* (The Faces of Justice and State Authority), il Mulino: Bologna, 2000, 35.

dogma, which was in the final period of legislative development almost uniformly expressed by “socialist legality” to the democratic constitutional states based on the rule of law.¹¹

2 History

In all socialist countries the entire criminal law was an important political device dedicated firstly to protect the political order and the state. This fact determined not only the selection, hierarchy and gradation of the protected values, forms and contents and intensity of sanctions but much more: the predominant part of the ex socialist legislations contain general or partial essential elements of the system of the rule of law negation, “*Systemunrecht*”.¹²

Many normative structural elements of political oppression which depend on the social and political development of the single state were present in ex socialist substantial criminal law. It obviously appeared to be an instrument of protection of the socialist order and power of the working class as well as expression of absolute predominance of collective in relation to individual. Therefore the bulk of legal solutions were in sharp contrast to those in modern rule of law states.¹³

The criminal procedure systems of ex socialist countries have different and heterogeneous structure. Its secondary instrumental character gives more alternatives and more space for various regulations. First of all it is necessary to distinguish two fundamental aspects.

Numerous ex-socialist ordinary criminal procedure legislations retain the main structural elements from pre-socialist period on the normative level. The majority of those,

¹¹ For coherence of comparative researches in the field of criminal law see Pradel, op. cit. 45.

¹² See the Max-Planck Institut für ausländisches und internationales Strafrecht, Freiburg im Breisgau, Project: *Strafrecht in Reaktion auf Systemunrecht. Vergleichende Einblicke in Transitionsprozesse* (Criminal Law in Reaction to State Crime-Comparative Insights into Transitional Processes), project coordinators: Albin Eser/Jörg Arnold/Helmut Kreicker.

¹³ First of all, the socialist criminal substantial and procedural law was never uniform. Neither were the respective socialist societies. Finally, the Soviet law was never the general model for the single national system of criminal law. The first socialist source of criminal law is the General Principles of Criminal Law of RSFSR of 1919 and the first socialist codification was the Criminal Code of RSFSR 1922. In the meantime certain particular decrees were promulgated (about speculations, justice, application of passed imperial law and others). The most important innovation of that period was “creative analogy” and “socialist legal consciousness” as criteria for judicial decisions in the cases where there are no corresponding legal norms. The Fundamentals of Criminal Legislation of SSSR of 1924 (valid until 1958) regulated the general part of criminal law. Incriminations were systematized in criminal codes of single federal republics. The particular solutions existed in the matter of criminal sanctions (with temporary substitution of penalty with the social measures). The fundamental defects of the Soviet criminal law are: (1) the fact that the political stands have direct influence on the legislation, judicial practice and the doctrine; (2) preferential treatment of the interest of the state; and (3) marginalization of the principle of legality. In the late 1960’s of the passed century, all of ex socialist countries had their proper criminal codes. In certain cases (Albania, Bulgaria), the influence of the Soviet law was obvious. Some other countries (Hungary, Poland, Romania), have looked for autonomous solutions. Former Yugoslavia had an autonomous proper way, essentially different in relation to a Soviet and similar models of other socialist countries. The Major features of “specific” components in the matter of criminal law were: (1) certain elements of the general part of criminal code as a principle *nullum crimen sine lege*, a notion of crime (with material element of social peril for socialist order), responsibility for preparatory acts, responsibility for organization of criminal activity (dubious in the same manner as a institute of conspiracy in some common law systems) and others, (2) numerous elements of the special parts of criminal codes (many particular figures of incrimination based on the political elements such as: enemy propaganda, crime against socialist social order and others). The second component can be seen in specific content of criminal sanctions such as confiscation of property for political crimes, for capitalist property in general, forfeiture of the public appearance, forfeiture of the civil rights and others similar sanctions. The third component was inclusion of the various special substantial criminal or even more para-criminal (administrative) rules as special rules of expelling from domicile, punishment by exile (in determinate area), social re-education, forced labor and others. See Zlatarić, B., *Da li je jugoslavensko krivično pravo socijalističko?* (Is Yugoslav Criminal Law Socialist?), *Jugoslavenska revija za kriminologiju i krivično pravo*, 3 (1969).

where not contrary to fundamental, internationally recognized procedural principles.¹⁴ Of course, the open question was the judicial practice which, often dependent on the political and state structures and under pressure of political power, was shaped with deviation and distortion of criminal procedure rules in many cases. These cases of abuse of justice are caused by subjective political and external factor, not by deficiency of procedural rules.

A rather different situation was the case of certain special criminal procedural rules (often “revolutionary” special procedural rules for “politically” cases, for the acts against the state, for the state of emergency, and in some other specific “political determined” circumstances). Almost every ex socialist country has certain period of history with a proper experience of “politically” inspired special forms of procedure.¹⁵ And experience with the abuse of entire criminal justice, too! In those cases contradiction with fundamental procedural guarantees existed *ab initio*.

In majority of those countries the criminal procedure was extremely linked to the “state-citizen” relationship. The State’s monopoly on the use of power in respect of suspects and convicted criminals in some countries became politically directed. Non-democratic social order brought political to instrumentation of the entire criminal legislation.¹⁶ Suspects and person accused of certain crimes became opponents, “enemies” of the state and “international socialist order”.

In this framework a suspect is not an equal adversary of the state’s prosecuting authority. He represents the danger for the country and the whole socialist community. On the other hand, the judge appears to be the subject who is obliged to protect the particular state’s interest. Criminal procedure obtained a clear profile of specific criminal-political means. Hence, what followed was rigged trial carried out practically in every socialist country with extreme severe sanction imposed in most cases upon innocent persons.¹⁷

¹⁴ For example during the existence of ex socialist Yugoslavia the criminal procedure system existed inspired by Soviet model only few years (1948-1953). The period that followed was shaped with a federal criminal procedure rules based on the former Austro-Croatian Code of Criminal Procedure of 1875.

¹⁵ In the first (revolutionary) period of the existence of new socialist states the procedural rules were often contained in organizational acts (the organization of judiciary, prosecuting authority and similar). The common characteristic of the entire development was formal abrogation of precedent bourgeois-law as legal source with contemporary clause of application of these rules as contents of law. In the later period the special procedural rules were closely linked with specific circumstances (social disorder, political confrontation, economic difficulties, foreign and others similar factors).

¹⁶ See Folgesong, T. S. and Solomon, P. H., *Crime, Criminal Justice and Criminology in Post-Soviet Ukraine*, National Institute of Justice: Washington D. C., 2001, 71-75.

¹⁷ The History of "political trials" in ex socialist states is marked with some common characteristics, *i.e.* first of all, with the application of "special" procedural treatment (special procedural rules, or concrete modality of actions, equal procedural position between prosecuting authority and defense and public disqualification of defendant). The second factor was the rapidity of trials with consequently miscarriage of procedural rules, and finally, with the brutality of sanctions. Almost during the entire period of existence of communists administration these was the problem of arbitrary execution and trials inside communist party. In *Strafrecht in Reaktion auf Systemrecht*, op. cit., 27, N. Kartsen, distinguished in the history of ex SSSR four significant periods: a) Introduction of *Soviet* order, b) *Stalinismus*, c) *Post-Stalinismus*, d) Period of final social changes.

During the October Revolution in the territory of ex Soviet Union (Belarus, Estonia, Georgia, Latvia, Lithuania, Moldova, Russia, Ukraine) “the enemy of the people” was prosecuted by special party police-forces named Tcheka (later GPU, NKVD, KGB) and the trials were lead by people' revolutionary courts. The First, who was condemned to death, was admiral Castni in 1918. The New revolutionary authority started to prosecute the “antirevolutionary forces”, like, “the Whites”, the Kozaks, rich citizens, aristocrats and Kulaks, church prelates, but also there own allies (social-revolutionaries-Esers and constitutional-democrats-Kadets). The leaders of the Mensheviks (Martov, Petrasov, Dan, Goldman) were arrested, and 10-15000 of their followers were executed. Spiridonova, the leader of the Esers, was sentenced in 1919 to prison in psychiatry-hospital, 11 followers were condemned to death, but the punishments were relived, although they were murdered in camps. Tcheka founded the special courts (Troike). The members of the “Panrussian committee for helping” were arrested in 1921 (Prokopovic). The patriarch Tikhon was condemned to house arrest in 1922. About 8000 church prelates were killed, and the intellectuals were condemned to exile without the right to return (Prokopovic, Kuskova,

Berdiajev, Bulgakov). Trans-Caucasus region was "cleaned" from "robbers" (bismacis), as were Georgia also after mutiny in 1924, and Chechenia in 1925. The oppositions-leaders Trocky, Zinoviev, Kamenev, Radek and Rakovsky were condemned to exile in 1927. The trials against 53 persons took place in Sakti-region (11 death penalties-5 were executed). Thousands of technicians were condemned because there was lack of qualified workers in building camps. After the murder of Kirov what followed was the secret trial against "the Sixteens" in 1936 (Zinoviev, Kameniev, Smirnov), and against "the Sevens" in 1937 (Piatikov, Muralov, Srebrenakov) characterized by a summary-procedure, without the defender and the right to the remedy, with "confessions" of the accused persons. Marshal Tuhachevsky and the highest-ranking military officials (Jakir, Uborevic, Eideman, Kork, Feldman, Putma, Primakov, and 58 other generals) were condemned on the secret-trials in 1937 and marshals Yegorov, and Blücher in 1938. The "cleaning" of the Red army included 3 marshals, 8 admirals, 217 generals, 41 komessars and 35020 officers. About 2000 members of the Association of writers and musicians were executed or sent to exile (Babel, Pilnak, Olesa, Romanov, Kliuev, Zabolotski, Mari, Tabidz, Mandelstam, Yelaev, Mikoladz). Thousands of prelates were the victims of regime, executed or sent to camps. The Twenty-ones trial take place in 1938 (Rikov, Buharin, Kristenski, Rakovsky, Yagoda). In Ukraine, during the "cleansing" of the Communist Party (CP) only 3 members out of total number of 200 members of Central Committee. The leaders of foreign CP-s were also prosecuted in numerous trials (Germans: Neumann, Remmele, Flieg, Italy: Robotti, Yugoslavia: Gorkic, Copic), as well as The Kominterna leaders (Knorin, Mirov, Abramov, Alihanov). Statistic numbers show, that during 1937-1938 periods, 720000 persons were executed, 7 million persons sent to camps of Solovka and Gulag during 1934-1941. In Latvia were 1480 politicians executed. Political prisoners were not released during the World War II, even when they served their punishment completely. The court oppression became greater than out of court persecutions during thirties of the 20th century. The soviet administration started oppression against opposition in the Baltic states and in Moldavia. The regime settled account with the Anti-Nazis Committee of Soviet Jews in 1947. The president of the Committee Mikhoels lost his life in a "traffic accident". The hundreds of Jews were arrested and some were sentenced to prison in Leningrad in 1949. Grigorievic, Zeikovic, Aleksandrovna, wife of minister Molotov, and Stalin's personal secretary Poskrebisev, were sentenced to death penalty. In 1951, Abakumov, Eitingon, Lev Svarceman and Senin were accused, by NKVD as Jewish conspirators. In the "conspiracy of the doctors", 8 from 15 accused were Jews. In "Leningrad affair" in 1951 some leaders of CP were prosecuted in secret trial (Kusnetsov, Rodionov, Popkov, Voznesenski, Kapustin, Lazutin). They were executed one hour after the deliberation of the sentence. The same sentence was passed against some other members of CP (Solovjev, Badavlev, Verbicki, Basov). Berija ex chief of the police was arrested after the death of Stalin in 1953, under the accusation that he was an English spy. NKVD changes its name into KGB, but continues to control religious groups, national minorities, and intellectuals. New anti-religions police began in 1957, during 1973-1975 periods many Baptists were arrested. In Lithuania 3 prelates were killed in 1981. Writers Siniavka and Danielu were sentenced to prison in 1966. In 1970, 106 political judgments were issued, and some of the condemned persons were arrested and sent to mental hospitals. In quit all of the states of ex Warsaw-pact were subjected to the some appression political methods and sufferened from the acts of abuse of criminal procedure rules.

Ex Czechoslovakia: The trials against leaders of Social-national and Democratic Party of Slovakia began in 1947 and after anticommunist demonstration in Prague in 1948. Ursiny, the leader of democrats was imprisoned and general Pika was condemned to death because of espionage. Podsednik, city mayor of Brno was sentenced to 18 years of prison with the group of 19 social-nationalists in 1949. Even 35 processes were organized to create the illusion of wide conspiracy, 639 persons were condemned, 10 to the death penalty, 48 to life imprisonment. The trials against members of sport organisation Sokol took place during 1948. In the same year forced working camps ("reeducation" camps) were founded and the punishing measures were passed by three-member commission of regional Communist Party Committee. Beran, the arch-bishop of Prague was sent in a psychiatric hospital, as were many of the priests, and some bishops were put in home-arrest. Mastila, the rector of the Institute of Theology was sentenced to life imprisonment in 1950. Three bishops were condemned in Bratislava in 1951 and bishop Trochta to 25 years prison in 1954. Many intellectuals were persecuted: Vackova in Prague in 1952, the big trial in Brno (Fucik) 16 "Titoists" were condemned in Bratislava in 1950, one was executed (Lančanič). Slansky, Geminder, Margolius, Frank, Fischl, Frejka, Reicin, Svab, Simone, London, Klementis, Hajdu, Lobl, Sling and 40 others were arrested in 1951 and condemned on death penalty. Svernova, one of the founders of CP was sentenced to jail for life in 1954. The "Trockists" and other communist prominents were condemned for nationalism (Gustav Husak-life imprisonment). The main characteristics of those trials were the famous confessions of accusation and "condemnation" by the CP secretary before the trial. Zavodsky was the last communist executed in 1953. Barak, the ministry of internal affairs was condemned to 6 years in prison in 1962. Dubcek was replaced after the national movement in 1968, and 1526 persons were condemned by the decree with legislative power by the Presidency of Federal Assembly. The trial against the members of the Revolutionary Youth Movement (Uhl) took place in 1969. The Havel trial was in 1977.

Hungary: Demeny and Skolnik as communists who did not collaborate with Moscow were arrested in 1945. After the victory of the Party of Smallholders in 1946, elections, some trials were constructed because of "plot" (Donath-sentenced to death). Cardinal Mindszenty was sentenced to life imprisonment in 1948, because of conspiracy and espionage, Kalocza's bishop Grosza and Ravasz were condemned in 1951. After conflict between Tito and Inform-bureau a trial against Rakoszy, first secretary of CP took part, and he confessed his guilty and he was executed. The same happened to Rajki, the minister of internal and foreign affairs in 1949, then to Szonji and Szalla. The particularity of the procedures was forced confessions and false testimony as happened to one American (Field). The members of Social-democrat party Justus and Brankov were sentenced to life imprisonment, another 94 persons were condemned or imprisoned in psychiatric hospitals, 15 executed and 11 died in prison. After Stalin's death in 1953, Peter the commander of security service was condemned to life imprisonment. Kovacs, the secretary of this party was kidnapped by the Russian secret services and imprisoned in USSR until 1956. After new elections some other officials were imprisoned: Tildy, former president, Imre Nagy, prime-minister, Varga, assembly president and Kovago, the city-mayor of Budapest. After 1956, when national movement took part, the people's and military courts adopted "the emergency justice". Minister Pal Losonczy died in prison 1957, and Szilagy, head of military staff was sentenced to death. Prime minister Nagy was prosecuted by People's court in 1958. He and his collaborators general Maleter, minister of defense and Gimes were condemned to death and executed the next day at an unknown place. Trials against intellectuals also took place (philosopher Biba). Nyesta a member of the resistance movement was condemned after he refused to join the CP, and he described distinction between nazi investigation "where investigators wanted to find everything", and communist investigators, "where investigators already knew everything without questioning, better than the suspect himself".

Romania: Foris, CP Secretary from the thirties, was accused as a spy in 1944. He was home arrested and killed in 1946. The military court condemned liberal politician Bratianau for terrorism, just before the 1946 elections. Maniu and Mihalache, the leaders of Peasants Party were condemned in 1947, for conspiracy, in the procedure based on police provocations. Maniu died in prison in 1952, and the party was dismissed. Petrescu and Dimitriu, the leaders of Independent Social Democrats were arrested and the party became a part of CP. The leader of National Peasant Party, Puiu was sentenced on 20 years in prison in 1947, released in 1964, and arrested again in 1987. The catholic bishops were arrested and church orders were forbidden in 1949. The military court condemned some bishops as spies in Bucarest in 1951. After the conflict between Tito and Inform-bureau Patrasceanu, the minister of justice, was condemned to death penalty in 1954. The "Moscow group" led by Pauker, Jew, minister of foreign affairs with ministers Luca and Georgescu were prosecuted in 1953. In Temishvar in 1989, demonstrations and revolt arose because of persecution of protestant priest Tokes.

Bulgaria: The "People's courts" were founded in 1944 with their manner of "wild cleansing", pronounced 11000 sentences, among those 2138 death-penalties (i.e. the Bulgarian regent brother of the king Boris III, assembly deputies and some ministers after 1941, priests and intellectuals). Postukhov, a social-democrat was condemned on 5-years prison in 1946, with 15 members of their Central Committee and Lolucev their leader to 15 years. Petkov, the leader of Peasant Party and some of his collaborators were accused of "armed-conspiracy" and sentenced to death. Kostov the CP-member was accused as an agent of former police, "titoist" and spy and was also sentenced to death. During the procedure he withdrew his confession and he was forbidden to talk, even in his final closing speech. Stefanov, Pavlov, Necev and Tutev, the accused in the same trials, were sentenced to jail for life. The closed trials against officers and policemen took also part. Pencev was sentenced to death in 1961, because of restoring Peasant Party, but the penalty was substituted to 20-years of prison. The Bulgarian regime founded camps for education through work (TVO).

Poland: In the end of the Second World War the leaders of National Army were deceived, sent to Moscow and sentenced to 10 years in prison. The commander Okulicki died in 1946 and 3 other principal defendants had not survived. Ministry of Public Security, since 1944, lead investigations against the opposition parties, using torture methods (beating, burnings, solitaires, forbiddance of sleeping, walking, bathing, outside contacts). The trials took place just before the 1947 elections (WiN group). The accused persons waited for trial for more than a year. Pilecki was condemned as a spy to death in 1948. After Tito-Informbureau conflict thousands of people were victims of preventive frightening. Gomulka, United Labor Party secretary, was accused of being the Pilsudsky's and Gestapo agent, but the trial was suspended. He was liberated in 1953. Spychalsky was arrested in 1950, and imprisoned without trial until 1956. Minister Lasowicz was sentenced in 1955. Special commissions were devoted to sabotage in undertakings and factories, and peasants were accused for speculations and set to working camps. Special register lists for "suspicious factors" were founded as well as prisons for "youth political delinquents". Bishop Kacmarek was condemned in 1953 on 12 years of imprisonment, Cardinal Wyszynski and more of 100 bishops were arrested. Jehova-witness were stigmatized as American spies. After Israel-Arabic war in 1967, an anti-cionismus was introduced and used even during students' movement of 1968. After 1969 demonstrations about 1000 persons were prosecuted and imprisoned or sent to the army for "education". A trial against the illegal group of Ruch (48 persons) was in 1970, and in the same year a workers revolt began and with

The transition of socialist criminal procedure systems is underway and this delicate period is marked with serious problems and many open questions of criminal law on global level. Human rights on the one hand and strong pressure of modern crimes on the other posed mutually opposing tasks.

To achieve the balance between the many contradicting goals is not an easy task especially in the ambient of weak emerging democracies confronted with the new types of dangerous crimes, the need for the respect of new constitutional guarantees and the necessity of the efficacy in the suppression of crimes.

Particular countries used different approaches and models in order to achieve the general principles that are embodied in United Nations policies and in numerous acts of European associations. This diversity determines the need to promote the exchange of ideas

40 dead and thousands victims punished without any procedure. Opposition was organized in spite of police and authorities repression methods in 1976. (48 hours jail, lost jobs, confiscations etc.). After the movement of Solidarnosc trade-union developed, a state of emergency was introduced in 1981. The tragic events resulted in 14 dead, hundreds wounded and 4000 arrested in isolation centers (to 12 months). The military courts passed 3 - 10 years in prison sentences. Repressive methods were used by the special police department D, attacks against persons and their property (kidnappings, house and car arsons). After the state of emergency was abrogated in 1983, a number of persons was still imprisoned for collecting help for other prisoners. The victim of this period was a catholic priest Popieluszko, executed by the police department C in 1984.

East Germany: In the period from 1945-1950, in 5000 social-democrats were condemned and 400 of them died in prisons. The "Waldheim Trials" took part in 1950 against the persons accused for war crimes. 3392 persons were sentenced (32 to death, 146 to jail for life). The public trials were organized against 10 persons, and all the others underwent secret trials usually lasting for about 30 minutes, with violation of the elementary procedure rules. After the workers demonstration in Berlin in 1953 which had been suppressed by Soviet the tanks, 1000 persons were arrested and sentenced after summary procedures for the crimes against socialism and helping foreign enemies. Merker, the CP leader was condemned to 8 years of prison.

Albania: Xoxe, the minister of internal affairs and CP General Secretary was condemned to death in 1949. as a "titoist" and Kristo, Koleci, Huta and Mitrojorgij to prison. Xoxe was executed the day after this sentence. Thaci, the bishop of Skadar died during house arrest. Bishop Vola and Ghini regent of apostolic delegation, 3 prelates and about 100 catholic priests and nuns were condemned to death during 1948, as well as the lawyer Pipa, a Moslem, who defended the Franciscans Prendushi, the bishop of Duresh was sentenced to prison with hard work and died in 1949. Gege, a pregnant woman, member of CP Central Committee, generals Ndreu and Buli were sentenced to death also as "titoists" in 1956. After the suspension of relations with URSS in 1961 Belisova, Tasko and Sejko the leaders of CP were eliminated.

Yugoslavia: Analyzing the political history (1945-1990), and the characteristics of the regime and its methods a general systematization of the political trials could be done, in some various categories. The trials after the Second World War inspired by the intention of condemnation of war crimes and other acts considered as quisling activities performed by high-ranking NDH (Independent State of Croatia) officials Budak, Mandić, Rukavina, condemned by death penalty; Supreme Court of People Republic of Croatia condemned Kvaternik, Alajbegović, Perčinić, Košak, Kulenović, cardinal Stepinac (in 1946 in Croatia) and in Slovenia bishop Rožman, too. Hebrang, the member of Politburo of Central Committee of Yugoslav Communist Party, accused for the possible collaboration with Croatian quisling-regime during the war time. He was murdered, or commits suicide during investigation in prison in Belgrade. The Dachau trials (the Dil-Osvald group), against officials and economy leaders of Slovenia took place from 1946 to 1948. The members of this group were accused for collaboration with Gestapo during the World War II. The trial of the greatest interest was led by Military court in April 1948 (The trial of Bohinc). During the summer of 1949, the concentration camps on Adriatic islands Goli and Grgur had been founded. Đilas trial in 1954 was organized because of his criticism against the leadership of Yugoslav Communist Party as well as against the bureaucracy in the state and in the communist party function. He was prosecuted and condemned after being deprived of his political duties. He was imprisoned from 1956-1961 and 1962-1966. The trials followed the end of the Croatian national movement "Croatian spring", 1971. The statistical data for 1972 present 3606 criminal procedures against the participants and leaders of this movement. During the same period some other opposition activities in Slovenia, Serbia, Bosnia and Herzegovina and Macedonia took place and were also reasons for political trials. (Written by: Željko Bartulović, Budislav Vukas).

and experience between different nations. Moreover, the modern practitioners have to deal with offenses and offenders whose origin and connections lie outside their country.¹⁸

In the analyzed systems the recent socialist historical backgrounds are outlined with reference to four criminal procedure models. Firstly, the ex Soviet Code of Criminal Procedure of 1960,¹⁹ then ex -Yugoslav Law of Criminal Procedure of 1976,²⁰ the Polish Code of Criminal Procedure of 1969, and the Romanian Code of Criminal Procedure of 1968. The historical background for the legislation of the territory of ex East Germany is not important in the same manner, taking into consideration the disappearance of the entire german socialist criminal legislative system without any practical influence in the process of accession.

3 Reforms

Reform projects for all transitional reforms are guided by certain internationally accepted governing principles.²¹ The changes of the criminal procedural law, including the implementation of United Nations policies in the criminal justice system, has been a long-term process involving frequent interaction amongst different ideas, groups and communities.²²

Universal Declaration of Human Rights enshrines, in the field of criminal procedure, a series of fundamental principles, including (1) equality before the law, (2) presumption of innocence, (3) the right to a fair and public hearing by an independent and impartial tribunal, and (4) the right to defense of everyone charged with a criminal offence.

These and other principles supported by the majority of United Nations member states are the fundamentals in the reform of criminal procedure in various ex socialist countries.

¹⁸ See *Comparative Criminal Justice Systems: From Diversity to Rapprochement*, op. cit: Ottenhof, R., Introductory Report; 55-59; Tulkens, F., *Rapport de synthèse* (Synthesis Report) 64, 65; Triffeterer, O., Austrian/European Criminal Procedures Between Dogmatism and Pragmatism: The Evolution of Contemporary Experiences in Codification and Legislative Practices, 529.

¹⁹ Belarus, Estonia, Georgia, Latvia, Lithuania, Moldova, Russia, Ukraine.

²⁰ Kosovo.

²¹ Some of these principles *inter alia* are (1) fairness; (2) efficiency; (3) clarity; (4) restraint; (5) accountability. See Council of Europe, Committee of Ministers *Recommendation R (1995) 12 on the Management of Criminal Justice, The Training of Judges and Public Prosecutors in Europe*, Strasbourg, 1995, and *Recommendation R (2000) 21 on the Freedom of Exercise of the Profession of Lawyer*.

²² The Office on Drugs and Crime (ODC) formulates and promotes internationally recognized principles in such areas as independence of the judiciary, protection of victims, alternatives to imprisonment, treatment of prisoners, police use of force, mutual legal assistance and extradition. More than 100 countries worldwide have relied on these standards in writing their national laws and policies in crime prevention and criminal justice. This is leading to a common foundation for fighting international crime while respecting human rights and the needs of individuals. See *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice, Minimum Rules for the Treatment of Prisoners; Declaration against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Code of Conduct for Law Enforcement Officials including the Basic Principles on the Use of Force and Firearms; Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty; Annex to resolution on measures Against International Terrorism*. The fundamental United Nations instrument in that field is the *Basic Principles on the Independence of the Judiciary* that was prepared by the Committee on Crime Prevention and Control upon a request of the Sixth Congress, adopted by the Seventh Congress and welcomed by the General Assembly in 1985. The main points of the Basic Principles includes: (1) the independence of the judiciary shall be guaranteed by the State and enshrined in the national law; (2) the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law; (3) the judiciary shall have jurisdiction over all issues of a judicial nature; (4) there shall not be any inappropriate or warranted interference with the judicial process; (5) everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures; (6) judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them fit to discharge their duties.

The essential important novelty is recent and slow but sure development of international criminal judiciary.²³

Corresponding with those tendencies on the universal level, certain regions have made efforts (first of all in the European Union) to harmonize or approximate the numerous procedural institutions.²⁴

Recent projects draw attention to some fundamental procedural rights in European Union member states and the candidate countries.²⁵ Finally, as an initiative of the European Commission, a group of experts worked from 1995 on the *Corpus Juris* project relating to criminal law and criminal procedure.²⁶

Criminal procedure resists harmonization more than other legal disciplines. In the 90's fundamental social changes in the region of South and East Europe occurred. Ex socialist

²³ The inspiration for a permanent criminal court came from ad hoc tribunals that were created in 1993 and 1994 by the Security Council. The purpose of the tribunals was to prosecute violations of international humanitarian law committed in the former Yugoslavia and Rwanda. In May of 1997, the Yugoslavia Tribunal handed down the first conviction by an international criminal tribunal since the Nuremberg trials following World War II. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, Doc. S/RES/827 (1993), and corresponding act for Rwanda; Rome Statute of the International Criminal Court (Doc. A/CONF.183/9).

²⁴ See European Commission Green Papers (1) *Program of Measures to Implement the Principle of Mutual Recognition of decisions in Criminal Matters* (2001/C 12/02), (2) *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union* (COM 2000) 75 Final: "The Green Paper is the outcome of a lengthy consultation process, both with interested parties (such as lawyers and experts in the fields) and with government representatives. The Commission needed information on what rights were currently protected by the legislation of the member states and what rights were considered by experts in the field to be essential for fair trials. Additionally, the Commission wanted to act as fast as possible since this measure was at the heart of the program of mutual recognition, and several of the measures forming the mutual recognition program were underway. Largely for this reason, the Commission decided not to carry out a survey. Experience has shown that a survey, undertaken by an independent research institute, can be a lengthy process and the results are variable. The Commission therefore decided to carry out itself as much research as it could and to consult widely in order to have the benefit of the views of as many parties as possible. Its main research tool was therefore consultation, in particular via its website, but it also received experts from various NGOs and was glad to have their views, and sent representatives to relevant conferences and seminars. The Commission also carried out a modest survey of the current provisions in the Member States by way of a questionnaire. (see p. 12 of Green Paper). The Commission identified the following areas as appropriate for immediate consideration: a) access to legal representation, both before the trial and at trial, b) access to interpretation and translation, c) notifying suspect and defendant of their rights (the "Letter of Rights"), d) ensuring that vulnerable suspect and defendant in particular are properly protected, e) consular assistance to foreign detainees. European citizens and residents can reasonably expect to encounter equivalent standards in respect of safeguards in criminal proceedings throughout the EU". See also *Amnesty International's Response to the Green Paper from the European Commission on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*, COM (2003) 75.

²⁵ They are: conditions of access to justice, implementation of the presumption of innocence, right to defense, information and assistance (in particular, conditions of use of mother tongue and translation of documents, protection of victim and witness (in particular protection of privacy, specific situation of some vulnerable social groups (women, children, migrant, minorities etc, enforcement of court rulings. See *Right to defense and Fair Legal Procedures in the Member States and the Candidate Countries*, European Parliament, Civil Liberties Series, LIBE 115, Luxembourg, 2001.

²⁶ "The aim of the study was to elaborate a number of guiding principles in relation to the protection in criminal law of the financial interests of the European Union within the framework of the European Judicial Space", see Delmas-Marty, M., and Vervaele, J. A. E., (eds.) *The Implementation of the Corpus Juris in the Member States*, Intersentia, Antwerpen-Groningen-Oxford, II (2000); Kühne, H. H., *Strafprozessrecht* (Criminal Procedure Law), 5. Aufl., C. F. Müller: Heidelberg, 13 - 37.

states became gradually members of the Council of Europe as a first fundamental wide framework of European integration.²⁷

In the field of criminal procedure the initial process of European integration obliged new ex socialist states, *grosso modo*, to provide the reforms directed (1) to harmonization of national constitutions and legislations with the Convention for Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR), and with the International Covenant on Civil and Political Rights),²⁸ (2) to prescribing of fundamental principles of criminal procedures in (new) Constitutions,²⁹ and (3) to ratification of the acts of the Council of Europe in the field of international cooperation in criminal matters.³⁰ This was the essential framework of changes in the structures of ex socialist countries criminal procedure.³¹

Actual reforming acts in the framework of legislative transition were practically imposed by the Council of Europe, and utilized for successive *ad hoc* reforms reasoned with the pledge to create a rule of law state and the desire for greater integration with European governmental institutions.

Regarding the number of states and the volume of changes, this is the biggest simultaneous process of changes in criminal procedure legislations in modern history. And also the first essentially imposed by an international organization! Unfortunately, this was significantly out of interest of comparative study of European and international doctrine of criminal procedure.³²

4 Course

a) Legislative systems included in the first volume, except Albania and Bulgaria, are situated on the borders of Western Europe. All of them were in the recent history forcibly subjected to the rule of communist power.

²⁷ The majority of analyzed countries of the first and second circle are members of Council of Europe. Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia, become in 2004 members of European Union.

²⁸ See Pradel, J. General report: International Conference for the 25th anniversary of the International Institute of Higher Studies in Criminal Sciences, Siracusa, 16 - 20 December 1997, in: *Comparative Criminal Justice Systems: From Diversity to Rapprochement*, op. cit. 529 - 541, and particularly Pradel, J., *Rapport de synthèse des colloques de l'ISISC*, (Synthesis Report), in: *Procédure pénale comparée dans les systèmes modernes*, Érès: Toulouse, 1998, 137 - 139.

²⁹ See Blakesley, Ch. L., *Impact of Constitutionalism on Criminal Justice Systems*-Synthesis Report, in: *Comparative Criminal Justice Systems. From Diversity to Rapprochement*, op. cit. 201-205; Amann, D. M., *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, Indiana Law Journal, 75 (2000), 809 - 842.

³⁰ See Pradel, J., Corstens, G., *Droit pénal européen* (European Criminal Law) Dalloz: Paris, 2002, 26 - 35; Council of Europe, Committee of Ministers, *Recommendation R (1996) 8 on Criminal Policy in a Time of Change*. See also *New Social Strategies and the Criminal Justice System*, Council of Europe, Strasbourg, 1994.

³¹ See Schomburg, W., *Aspects from a German/European Perspective*, in: *Comparative Criminal Justice Systems. From Diversity to Rapprochement*, op. cit. 171 - 177; *Judicial System and Human Rights in the OSCE Region in 2001*, International Helsinki Federation for Human Rights, Vienna, 2002.

³² Transition of criminal procedure realized in last decade of XX century, was simultaneous with intensification of comparative studies in the field of criminal (procedural) law. In the 1993 Christine Wan Den Wingaert et al., published the book *Criminal Procedure Systems of European Community*, Butterworths: London, Brussels, Dublin, Edinburgh. The first edition, of the first world renowned academic book: Pradel, J., *Droit pénal compare* (Comparative Criminal Law) Dalloz: Paris, was published in 1995. The project *Procédures pénales d'Europe* (Criminal Procedures of Europe-sous la directions de Mireille Delmas-Marty), was published by Presses Universitaires de France, Paris in 1995. Max - Planck - Institut für ausländisches und internationales Strafrecht-Freiburg i. Br. works on long terms project: *Strafrechtsentwicklung in Europa* (The Development of Criminal Law in Europe), coordinators: Albin Eser/Barbara Huber. See Eser, A. - Kaiser, G., - Weigand, E., (Hrsg), *Von totalitärem zu rechtsstaatlichem Strafrecht*, (From totalitarian, to rules-of-law Criminal Law), Band S 42, too. Reinhard Maurach established the Project *Die Rechtsentwicklung in Osteuropa* (The Development of Law in East-Europe) that was continued from Friedrich Christian Schröder (Universität Regensburg) and others.



Social framework of the transitional process in this circle of European states was essentially different. The level of their economic development and historical pre-communist legislative tradition too!

Ex socialist Federative Yugoslavia was a federation with a specific and most opened political regime of liberal socialism in the final period of communist power. On the other hand Albania had extremely rigid dictatorial order in the final period of communist power. Other countries were under regime of so-called real socialism delineated by the strong influence of Soviet Union.

The basis for reconstruction and disappearance of Czechoslovakian federation was an agreement between two States. Albania, Bulgaria and Hungary entered into new social order in the peaceful manner too. Decomposition of socialist Yugoslav federation was conflicting.

All those circumstances had specific importance for the course of legislative transition and for intensity of participation of international community in legislative reforms too.³³

Structurally, one group of these states realized the necessity for reforms in the old socialist law (Bulgaria, Czech Republic and Slovakia). Such type of changes is the first step of the gradual transition, a quantitative but not a substantial reform.

Other group of the countries opted for different systems of reforms: qualitative changing. Those countries promulgated new models of criminal procedure rules. Such type of change is first of all the new Albanian Code of Criminal Procedure (1995) based on Italian *Codice di procedura penale*.³⁴

The second particular case is a complex of criminal procedure systems in Bosnia and Herzegovina. In Bosnia and Herzegovina there are three valid criminal procedure systems: Criminal Procedure Law of the Federation of Bosnia and Herzegovina of 1998, Criminal Procedure Law of Brčko District of 2000,³⁵ and in the Republic Srpska, the new Criminal

³³ The important institutions with legal expert help activities are numerous (Council of Europe, American Bar Association, Central and East European Legal Aid, *Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit* (German Foundation for International Legal Cooperation), *Hans Seidel Stiftung* (Hans Seidel Foundation) and others.

³⁴ The Italian *Codice di procedura penale*, (Code of Criminal Procedure), which entered into force on 24 October 1989, is the first since the democratic republican regime was established in Italy in 1946, and the fourth since Italy was politically unified in 1861. See contribution of Piermaria Corso in Van Den Wingaert, op. cit. 223-260.

³⁵ On 5 March 1999 the Arbitral Tribunal for the Dispute over the Inter-entity Boundary in Brčko Area issued the Final Award, effectively implementing the final phase of the Dayton Agreement. The Final Award established the Brčko District of Bosnia and Herzegovina an autonomous district held in "condominium" by the Federation

Procedure Law of 2003.³⁶ New important component of criminal procedural rules of the whole Bosnia and Herzegovina is the recent Criminal Law and Law of Criminal Procedure for

and the RS. In so doing, the Arbitration Tribunal removed the District from the “exclusive control of either Entity and placed its governance in the hands of an independent District government, that was both multi-ethnic and democratic, under the exclusive sovereignty of Bosnia and Herzegovina. The Final Award stemmed from the Arbitral Tribunal’s decision in Rome, Italy, on 14 February 1997, to establish the office of a Supervisor for the Brčko District. The Supervisor was vested with the responsibility of implementing the Dayton Agreement in the Brčko area, strengthening the democratic institutions in Brčko, and was given the authority to promulgate binding Regulations and Orders to further these goals. The Brčko District of Bosnia and Herzegovina is a single administrative unit of local self-government existing under the sovereignty of Bosnia and Herzegovina. The District derives its powers of local self-government by virtue of each Entity having delegated all of its powers of governance as previously exercised by the two Entities and the three municipal governments within the pre-war Community (*Općina*) Brčko as defined in Article 5 of the Statute, to the District Government. The Entities shall exercise within the District only those functions and powers assigned to the Entities by the Statute as written at the time it enters into force. District authorities shall not assign or delegate to either Entity any governmental power or function not specifically assigned or delegated in this Statute as written at the time it enters into force. The Constitution of Bosnia and Herzegovina, as well as relevant laws and decisions of the institutions of Bosnia and Herzegovina, are directly applicable throughout the territory of the District. The laws and decisions of all District authorities must be in conformity with the relevant laws and decisions of the institutions of Bosnia and Herzegovina. The article 1 of the Statute shall not be subject to amendment.

³⁶ After adoption of the Constitution of the Republic Srpska was adopted on 28 February 1992, there have been many amendments to the legal regulations regarding criminal procedure took place. changes made in the area of legal regulations in reference to criminal proceedings. The Law on Criminal Proceedings Procedure of the former SFR Yugoslavia itself was amended (1993, 1994, 1997 and 2001). This Law was applied applicable in the Republic Srpska until 1 July 2003, at which time when a new Law on Criminal Procedure, entered into force (published in Official Gazette of the Republic Srpska No. 50/03; hereinafter: Law).

The Law is new not only due to its new name and organizational structure but also because it includes numerous new procedural practices institutes and solutions as well as modifications of the current ones. The Law It was is adapted to the contemporary needs and requirements of a new time and it therefore severed some of the more important links with the law valid to date. It managed this primarily with by letting go of abandoning its ideological heritage and by conforming its provisions on the rights of the individual participants of the criminal proceedings, especially the accused, his its defense attorney counsel and the damaged party, with the international legal standards which have been established in this area by the most important international legal acts, in particularly by with the ECHR. However, the Law kept all of that what was useful in the current criminal proceedings procedure legislation of Bosnia and Herzegovina, the court jurisprudence and legal tradition. The new Law holds a central position in the recently completed legislative reform in this area in the Republic Srpska. It took over and expanded some of the legal solutions from the present Law on Criminal Proceedings of the Brčko District of Bosnia and Herzegovina of 30 November 2000, which introduces, for the first time on the territory of Bosnia and Herzegovina, investigation by the prosecutor, direct and cross-examination, confirmation of the indictment, statement of culpability, agreement on the guilty plea, preliminary objections, procedure for issuing the criminal penal order, holding of the main hearing and the adoption of the decision before the second instance court without the option of referring the case back for renewed proceedings etc. However, the Law also introduces some quite new legal solutions: granting immunity to the witness by the prosecutor, special investigative actions, setting the pretrial detention within the time period for each stage of the proceedings, examination of the first instance judgment only within the scope of the statements from the appeal, only one extraordinary legal remedy (renewal of the proceedings), proceedings against the legal persons etc. The laws on criminal procedure of the entities and the Brčko District, represent an unique version of the Law on Criminal Procedure of Bosnia and Herzegovina, so that the basic principles, basic concepts, stages of criminal proceedings, the basic legal practice in criminal proceedings, the second instance and separate proceedings are almost completely identical. This reflected on the improvement of the efficiency and cost-effectiveness of criminal proceedings while maintaining respect for the rights of the accused, as the main focus of the criminal proceedings procedure. The Basic features of the new legal practices and solutions are the following: conforming to the same features of the Constitution of Bosnia and Herzegovina and the Constitution of the Republic Srpska and international legal acts; better protection of the rights of the suspect or, in other words, the accused; advancement toward the accusatorial type of proceedings; tendency toward the establishment of the equality of the parties and the advancement of the existing and creation of new instruments for more efficient criminal proceedings. In order to accomplish all of the above referenced mentioned, new terminology has been used (*e.g.* the presentation of evidence instead of the investigative actions, issuing the order to the accused that forbids leaving the place of residence instead of his/her its the promise of the same); some of the existing legal

Bosnia and Herzegovina which entered into force on 1 March 2003.³⁷ The next fundamental factor for the future structural cohesion of Bosnia and Herzegovina criminal justice system is

provisions (*e.g.* the possibility for the investigative judge to conduct the investigation); holding the trial in the absence of the accused is prohibited; certain legal solutions that have existed in basic form to date have been modified (for example *e.g.* the competence of the individual judge has been extended); completely new legal practices institutes in criminal procedure which have not existed so far in our legislation have been introduced (for example *e.g.* special investigative actions, judge for preliminary proceedings, examining judge, judge for preliminary interrogation proceedings, proceedings for the issuance of the criminal penal order, punishment of legal persons).

The basic principles, *i.e.*, include *i.e.* the rights of the persons who are denied their freedom as regulated by Article 5, paragraphs 2 and 3 of the ECHR; the prohibition of a renewed trial which could be damaging for the accused, as regulated by Article 14, paragraph 7 of the ECHR, as well as the prohibition and punishment of every extortion of confession or another statement given by not only the person who is denied their freedom but also given by the suspect, the accused or any other party, as provided for by Article 11 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Previous reasons for mandatory pretrial detention are omitted. On the other side, reasons for the so called “optional pretrial detention” are tied to the free conduct of the criminal proceedings and reduced to the danger of possible escape, danger from connivance and the prevention of the counter-threat by the criminal action and the completion of the criminal action (Article 189). The time period duration of the pretrial detention is limited in each stage of the proceedings (Articles 192, 194 and 195). The rights of persons who are denied their freedom are more closely regulated as well too (Article 196).

The present model of the investigative procedure has also undergone some significant changes so that the conduct of the investigation is ordered by the prosecutor under the condition that there is a reasonable suspicion that the criminal act was committed (Article 216, paragraph 1). Certain actions, for the purpose of carrying out the tasks referenced in Article 218, paragraph 1 of Law may be undertaken during the investigation by the authorized officials if there is a reasonable suspicion that the criminal act, for which a prison sentence of up to five years is provided, was committed. The authority of the police force is also more closely regulated. The police no longer have no longer the right to set the pretrial detention or to hold the suspect without providing him/her it a defense or to examine the suspect without the presence of his its defense attorney if he it decides to have the defense attorney (Article 196). Special measures for fight against organized crime and for criminal acts against humanity and international law are also regulated (Articles 226 and 227). A new type of procedure, with the goal of the advancement of the efficiency of the work of the court, is also included; the competence of the single judge has been extended and the pronouncement of criminal sanctions without a main hearing has been made possible (proceedings for issuing of the criminal penal order. (Written by Miodrag N. Simović).

³⁷ High Representative enacted on 24 January 2003, the new Code of Criminal Procedure of Bosnia and Herzegovina with argumentation included in preamble: “Stressing the need for the existence of criminal procedure at the state level of Bosnia and Herzegovina which shall be in conformity with modern internationally recognized standards in the field of criminal procedure and which shall comply with guarantees enshrined under the ECHR witch itself forms part of the Constitution of Bosnia and Herzegovina and enjoys priority over all other law in Bosnia and Herzegovina; Bearing in mind the commitment of the Entities and the Brčko District of Bosnia and Herzegovina to harmonize their respective codes of criminal procedure with the Code of Criminal Procedure of Bosnia and Herzegovina with the aim of securing that justice for all throughout Bosnia and Herzegovina as a whole is based on the same principles and procedural safeguards, and in particular noting the progress achieved so far in that process; Mindful both of the urgency and of the need to adopt the Code of Criminal Procedure of Bosnia and Herzegovina for all the reasons as aforesaid and in order to protect the interests of the citizens of Bosnia and Herzegovina; Having considered and borne in mind all these matters, the High Representative hereby issues the decision Enacting the Code of Criminal Procedure of Bosnia and Herzegovina, which is hereby attached as an integral part of this Decision. The said Code shall enter into force as a law of Bosnia and Herzegovina, with effect from the date provided for in Article 451”. New Code of Criminal Procedure of Bosnia and Herzegovina included 451 articles systematized in three parts (part one-basic provisions: chapters I-XVIII; part two-course of proceedings, chapters: XIX-XXIV; part three-special procedures, chapters XV-XXVIII). The basic principles are: principle of legality, presumption of innocence and in dubio pro reo, ne bis in idem, rights of a person deprived of liberty and suspect or accused, right to defense, right to use own language, legality of evidence, right to compensation and rehabilitation, right to instruction on rights, right to trial without delay, equality of arms, free evaluation of evidence, accusatory principle, principle of legality of prosecution. The new federal code introduced the preliminary proceeding judge and preliminary hearing judge, the direct and cross examination, writings and recording. The investigation refers to the all activities undertaken by the Prosecutor or by authorized officials in accordance with Code, including the collection and preservation of information and evidence. All courts and all authority in the Federation of Bosnia

Law on Legal Assistance and Official Co-operation in Criminal Matters between the Federation of Bosnia and Herzegovina, Republic *Srpska* and the *Brčko* District.³⁸

The third group of states, (Bulgaria, Croatia, Czech Republic, Macedonia, Slovakia, Slovenia, Serbia and Montenegro) have, in their new acts realized, essentially interior reforms in the framework of mixed euro-continental model of criminal procedure. In Bulgaria, Criminal Procedure is regulated by law of 1974 with amendments. Czech Republic has Criminal Procedure Law of 1961 with amendments, too.³⁹ Croatian Criminal Procedure Law of 1997 was largely amended in 2002.⁴⁰ Yugoslavia has a new Code of Criminal Procedure of 2001.⁴¹ The Criminal Procedure Law of 1997 is valid in Macedonia. Slovakia promulgated Criminal Procedure Law 1996. Slovenia also introduced numerous changes in Criminal Procedure Law of 1994.⁴² The Hungarian criminal procedure system has a “double faced character” caused by the special relation between the effective and the “valid” law.⁴³

and Herzegovina, Republic *Srpska* and *Brčko* District shall be bound to maintain official cooperation and to provide legal assistance to the Court. The actions aimed at obtaining evidence in Chapter VIII are: search of dwellings or other premises and persons, seizure of objects and property, questioning of the suspect, examination of witnesses, crime scene investigation and reconstruction of events and expert valuation. The Special Investigative Actions are in Chapter IX, and Measures to guarantee the presence of a suspect or accused and successful conduct of criminal proceedings in Chapter X. The course of ordinary proceedings initiated with investigative procedure, than follows the indictment procedure, main trial, and verdict, regular and extraordinary legal remedies. The special procedures inter alia, are: procedure for issuing the warrant for pronouncement of sentence, juvenile procedure, proceeding against legal persons, application of security measures and some others.

³⁸ See Decision of High Representative enacting this law of 23 May 2002 and 24 January 2003.

³⁹ In Czech Republic on 1 January 2002 an extensive amendment to the Code of Criminal Procedure implemented by Act 265/2001 Coll. came into force. The basic aim of this amendment was (1) to transfer the focus of argumentation from the preliminary proceedings to the trial stage and to strengthen the importance of the main trial, (2) to strengthen the contradictory elements in the court proceedings, in particular the activity of the plaintiff and the defense in the main trial, (3) to enable fast and efficient proceedings regarding minor crimes, (4) to expand certain elements of the accused and the injured parties as the parties in the criminal proceedings. Some other changes were introduced in the matter of criminal prosecution and investigative bodies, civil claims, remedies, custody, and some others institutions (Written by Oto Novotny).

⁴⁰ Law of 17 May 2002. The most important goals of legislative changing were (1) to strengthen the adversarial characteristics in whole course of proceedings, (2) to simplify some of special forms of procedure, (3) to invigorated the course of proceeding in preliminary proceeding and investigation in particular by new acts of investigation, (4) to extend the application of negotiation, (5) to reform remedies and some other institutions.

⁴¹ See Compatibility of Yugoslav Law and Practice with the requirements of the ECHR, Council of Europe, HRCAD, 2002, Strasbourg, 2002, 72-167. In region Kosovo was, until new Provisional Code of Criminal Procedure 2003, into force ex-Yugoslav Law of Criminal Procedure.

⁴² The recent legislative changes of Law of Criminal Procedure were promulgated by Law of 29 December 2001.

⁴³ There were two main reasons in the early 90's to reform the Hungarian criminal procedure regulated by the Act I of 1973 that has been in force for two decades. On one hand the change of the political system resulted in an explosion of increasing criminality-from some hundred thousands to half a million-and the overloading of the authorities. Other causes leading to the reform included the development of the constitutional state, the focusing on human rights and the increasing importance of the so called harmonization of laws in general. Therefore, a Government resolution on the concept of law of criminal procedure had been adopted in 1994, and in 1998 a new law was enacted by the Parliament: Act XIX on the law of criminal procedure consisting of 67 articles, promulgated after enactment. However, the new Code remained not more than a “valid” act, as it has not been put into force so far. Consequently, the old and the new Codes live along in a special way: as the first step, some amending acts (“novels”) to the Code of Criminal Procedure in force were passed, basically transposing from the valid Code of Criminal Procedure some new institutions that seemed to be successful. Nevertheless, many of the latest novels adopted resulted in reintroducing former legal institutions. The above features characterize well the exceptional diversity of the transitional period, and the peculiar “amalgamation” of the two Codes. The most prominent sign of which can be the changing of the opinions in the legislation, on the necessity whether or not to set up tribunal(s) for the introduction of the two-phased ordinary appeal system.

One of the most important objectives of the Criminal Procedure Novel has been the easing of the courts' overload and thus preventing the dragging of the criminal procedures. In case of minor crimes it is necessary to allow the application of institutions other than criminal accusation and accountability. In addition, in the framework of the penal judicature, measures that imply the restriction of rights in a less strict way than

enforceable imprisonment may be applied, and they can promote special prevention together with rendering a remedy for the damage (or a part of that) caused by the criminal act. It is an important aspect, too, that while imprisonment is an expensive way of punishment, these alternative sanctions have no significant costs in general (or the majority of such costs are refunded by the accused). There are some important regulations in the Criminal Procedure Novel aimed at speeding up the criminal procedure.

One of the main practical causes of dragging the criminal procedure is the default to attend when summoned. While it is possible to continue the procedure in the absence of the duly summoned accused (and to prevent-at least partly-the dragging of the procedure caused by the default), the (repeated) defaults of other person subject to the procedure did not allow the application of sanctions more severe than a fine or a compulsory attendance. Therefore, the Criminal Procedure Novel changed article 161 of the Code of Criminal Procedure by allowing in its paragraph (5) to transform paid fines assessed against the persons subject to the procedure (accused, advocate, witness, expert, person in charge of nursing) into a confinement of 1-100 days. The transformation must be adjudged by a court (in case of fines assessed by a prosecutor the transformation into confinement is to be adjudicated by an investigation judge), and it is to be enforced in a detention facility. There is no appeal against the transformation into confinement.

Article 225 of the Code of Criminal Procedure offers a chance for the prosecutor to divert the process from the path of criminal law by delaying the accused. At the same time, the prosecutor may establish mandatory rules of behavior for the suspect. The suspect can be ordered by the prosecutor to compensate the whole or a part of the damage caused to the offended party, pay a sum for predefined purposes or to perform some work for the public. In the interest of the suspect the prosecutor can even order him or her to go through a psychiatry treatment or a treatment curing alcoholism. In case of the suspect violating seriously the rules of behavior or not performing the obligations specified, the prosecutor shall submit the bill of indictment. The wide scale of options to delay the accused offer on one hand a chance for temporary "diversion", but on the other hand, indirectly, it may result in dragging the procedure. A similarly indirect way of diversion is the chance offered by the amendment of 1 March, 2003 of the Criminal Code providing that, in case of certain forms of committing the crime, any suspect may avoid criminal accountability if he or she verifies to complete a continuous treatment of six months to cure drug addiction (or another treatment or prevention course); according to the Criminal Procedure Novel, the accuse may be delayed if the participation of the suspect on the treatment is verified, and if it is not verified the prosecutor shall submit the bill of indictment. However, should a new procedure on the grounds of drug abuse start against the suspect under the period of the delayed accused, the prosecutor may submit the bill of indictment even if the suspect verified the participation in the treatment of six months.

Article 114/A. specifies the rules of reports given by probation officers. Such reports given by probation officers have already been regulated by the Code of Criminal Procedure of 1973: the pre-sentence reports necessary in criminal procedures against adolescents have been prepared by professional probation officers working at public guardianship authorities on county level. Although the reports of probation officers have not become an independent tool of evidence, they are regulated as a special form of experts' opinion. The preparation of a probation officer's report may be ordered by the court or the prosecutor before the application of a punishment or measure, or before the delay of accused. The probation officer shall, on one hand, supply information on the personal situation of the accused (family status, health, skills, workplace, earning and property, etc.), and on the other hand he may propose to order a specific rule of behavior. If requested by the court or the prosecutor, the probation officer shall establish whether the accused is ready and able to comply with the rules of behavior to be ordered, and the readiness of the offended party to accept the compensation. The scope of information available for the probation officer in preparing the report is similar to that available to an expert. The report of the probation officer can be a decisive factor in applying a delayed accused or alternative sanctions. From 1 July 2003 on, probation officers' reports shall only be required in case of delaying the accused together with ordering specific rules of behavior, but it is expected to be made mandatory later in other cases as well.

Finally, there is another regulation serving the purpose of avoiding the dragging of the procedure, it is the option to communicate in writing the decision (the operative clause of that) not only to the accused summoned to the rendition of a peremptory decision at a hearing postponed, but to a duly summoned advocate in default, too. In such cases the defense cannot refer to the lack of information about the reasoning, as the consequence of non appearance at the court when duly summoned is to be born by the defense.

The original text of the Code of Criminal Procedure contained the introduction of bail as a measure of proprietary nature displacing the confinement under remand. For some time, it seemed that the institution of bail shall be the victim of political fights as, due to arguments mentioned many times in the socialist era (bail is preferential to the wealthy ones; the rich can pay for their freedom; bail shall make the criminal procedure money-oriented and utilitarian), according to the Criminal Procedure Novel of 2002 the rules regulating the bail are not to take effect together with the act as a whole. However, the institution of the bail appears again in the text of the act coming into force in the 1 July 2003.

According to article 147, the court may, in case of the risk of escape or hiding (and not in case of the three other causes for confinement under remand), put aside the ordering of confinement under remand or terminate the confinement under remand already ordered if-considering the criminal act and the personal situation of the accused-the application of the bail seems adequate. The bail may be deposited by the accused or by another person.

The deposition of the bail can be proposed by the accused or by the advocate in the court deciding in the question of confinement under remand. The court shall hold a session where the prosecutor, the accused, the advocate and (if the bail is offered by a third party) the depositor of the bail are heard. The session can be held in the absence of the advocate.

The court shall fix the amount of the bail by taking into account the personal situation and the proprietary status of the accused and at the same time a prohibition to leave the residence, a detention at the residence or the withholding of travel documents may be ordered. Only the prosecutor may appeal against the fixing of the bail (neither the accused, nor the advocate may appeal against the sum of the bail). The bail can only be deposited in cash and the accused can (and must) be discharged without delay only after that. In case of refusing the deposition of the bail, a new motion can only be submitted on the basis of a new circumstance.

If the accused fails to appear at a procedural act when summoned, he or she will lose the bail, provided that the default is not excused. The bail is to be paid back to the depositor if the accused, for other reasons, is put into confinement under remand, the investigation is terminated, or the final deadline for that has been expired, the prosecutor delays the accused, or the procedure is finished by the court with a decision of legal force. However, in case of imprisonment the bail can only be paid back upon the commencement of the punishment's execution.

The provisions containing the causes excluding the application of the bail shall not be put into force by Criminal Procedure Novel. According to the original text of the Code of Criminal Procedure, the application of the bail was excluded in case of a felonious crime where the law orders imprisonment over 8 years, a crime committed in a confraternity or as a member of a criminal organization, a habitual offence, armed commitment, where the offended party is an infant, or where the accused is a soldier. According to the reasoning given by the minister, it is not necessary to use such restrictions, as it is in the sole discretion of the court to take into account all circumstances of the case in order to decide whether the deposit of the bail is an adequate measure. However, the discharging of the accused with a bail is always optional, which means that the judge is free to decide upon the matter.

The introduction by the Criminal Procedure Novel of the institution of supplemental private prosecutor means a significant strengthening for the legal position of the offended party. Although we consider that the provisions regulating the institution of the supplemental private prosecutor should be specified by the law in the framework of a special procedure, this is not the case, but the special rules can be found within the regulations on the different stages of the procedure.

There is a specific title in the Act covering the supplemental private prosecution in the phase of the trial. It's provisions are amended by paragraph 3 of article 343 in the Criminal Procedure Novel specifying that in case of the legal representation of the supplemental private prosecutor is terminated in the course of the procedure, and he or she is not able to provide for representation because of the lack of funds available to him or her, the court may allow personal exemption from charges just as in the case of the accused. In such case, the status of the supplemental private prosecutor's legal representative is the same as that of an assigned counsel, although he or she may not get the documents free of charge, but on the basis of the advanced payment of dues and the fee of the assigned representative is not borne, but only advanced by the state. The legal status of the offended party has been furthermore strengthened by the adoption of two important additional laws, namely the Act LXXXV. of 2001 on the program of witness protection, and the Government Decree No. 209/2001 (X. 31.) on the compensation for the offended party secured by the state.

The Criminal Procedure Novel changed the text of the Code of Criminal Procedure (already amended by the Criminal Procedure Novel of 2002). Its provisions address, among others, the following issues: a) the authorities, b) the participants, c) the confinement under remand, d) the investigation, e) the court's procedure, and f) the special procedures. In addition to some amendments of technical nature (the names of certain crimes have been changed in the Criminal Code and the modifications had to be transposed into the Code of Criminal Procedure, too), the Criminal Procedure Novel extended significantly, from 1 January 2005, the scope of crimes falling under the competence of the county courts in the first instance. It is caused by the fact that in the past 10 years there has been a tenfold multiplication in the rate of the cases being in process for more than one year in the local courts. The business-related crimes, causing a significant damage or more than that, had formerly been dealt with by the county courts, but a Criminal Procedure Novel in 1992 transferred them into the competence of local courts. Now they shall return into the competence of county courts in the first instance, with a delay of one and a half year in taking effect after putting the Code of Criminal Procedure in force.

The Novel modifies in part the scope of crimes falling into the exclusive investigative competence of the prosecutor. As the investigating authority of the Tax and Financial Control Administration (called APEH) is

closed down, its responsibilities are transferred to the Office of Financial Investigations working in the framework of the National Police Headquarters (called ORFK). In addition, the Criminal Procedure Novel gives a more detailed list of crimes falling into the competence of the Hungarian Customs and Finance Guard (called VPOP) as compared to the former regulations, in order to secure more guarantees. According to the Code of Criminal Procedure, the accused held in custody must be questioned within 24 hours. However, the former regulations did not oblige the authorities to assign a counsel before the first questioning, therefore-in most cases-the persons held in custody were questioned before they could have provided for an advocate or the assignment by the authorities of a counsel. For this reason, the Criminal Procedure Novel provides for all accused held in custody (including confinement under remand) a generally mandatory legal protection, and paragraph (1) of article 48 is amended with the provision that for an accused held in custody, a counsel must be assigned before the first questioning of the accused, if he or she has no advocate commissioned.

The Criminal Procedure Novel (and the new Code of Criminal Procedure in general) widens the scope of remunerating the assigned counsel. While formerly an assigned counsel was only remunerated for attending at the acts of the investigation and the court trial, the amended text of the Criminal Procedure provides for remuneration even in case of attending on a notification.

The former Criminal Procedure Novel had deleted from the original text of the law the provisions on the assistants. As according to the present opinion in the legislation assistants are indeed necessary in the criminal procedure, the rules on assistants are reintroduced in the text of the Code of Criminal Procedure: assistants are allowed to act in the criminal procedure on behalf of the accused, the witness and other persons specified in the Code.

In addition to the significant amendments concerning the bail, the Criminal Procedure Novel modifies certain details of the confinement under remand: after the expiry of six months upon the submission of the bill of indictment it is the responsibility of the court of the first instance to review the justification of the confinement; later on it will be the court of appeal to review that by six months time.

Again, the Criminal Procedure Novel focuses in the first place on the restrictions applied against the accused based on the special features of the criminal procedure and the interests lying in the order of the institution enforcing the confinement under remand have a secondary importance. Unfortunately, it is still not prescribed by the Code of Criminal Procedure that the rules of confinement under remand should be regulated in a separate law, but it makes a reference to the laws governing the institutions effectuating confinements under remand.

The cases of dismissing a confinement under remand are regulated by the Code of Criminal Procedure in a relatively adequate scope: it is terminated (without a separate act of dismissal) when it expires, the procedure is closed with a decision of legal force, the accused is delayed, when it is prescribed by law to be dismissed, or (as regulated by the Criminal Procedure Novel) the final deadline of two years for the investigation is over.

The basic concept of the new Code of Criminal Procedure at the time of preparing the law was to replace the so called neo-inquisitorial system of the socialist Code of Criminal Procedure-focusing on the phase of investigation-with a new system emphasizing the court trial and decreasing the importance of the phase of investigation. However, contrary to the original aims, investigation had been stressed more and more in the preparation of the new Code of Criminal Procedure, and it was strengthened by the amendments in 2002. Therefore, it has been considered necessary by the legislation to ease the restrictions concerning the rights of the advocate in the phase of investigation as provided by the original text of the law (justified at that time by the increased focus on the procedures in the court). That is why the Criminal Procedure Novel allows the advocate to be present not only at the questioning of the accused and the witness proposed by him, but as well at the confrontation effectuated with the participation of such witness. In addition, the Criminal Procedure Novel widens the rights of the advocate of proposing to put forward questions, allowing him or her to ask questions directly from the person questioned (and from the expert). Due to the amendment, the above rights of the advocate apply *mutatis mutandis* to article clerks, too. By the reason of taking into account international treaties paragraph (8) of article 184 of the Criminal Procedure Novel allows the members of foreign investigation authorities to participate at the acts of investigation. However, such persons are not allowed to perform substantive investigative acts.

The Criminal Procedure Novel changed the majority of the law's provisions on concealed data acquisition. The changes resulted in detailed rules concerning concealed data acquisition with a judicial approval, set in articles 200-206 of the Code of Criminal Procedure, specifying general rules as well as the conditions for obtaining a judicial approval, the implementation of concealed data acquisition, and the communication of the results of such data acquisition. Concealed data acquisition can only be ordered by the court on the motion of the prosecutor. The evidences gained in such way can be used in the procedure in question and in other procedures according to the general rules on evidences.

Using them in other procedures may raise constitutional concerns as well. According to the decision of the Constitutional Court, concealed data acquisitions restrict the right to privacy and the right to protect personal data, therefore such data acquisitions must always be proportional and delimited to the aim of the data

acquisition. Consequently, the results of such concealed actions can only be used in other criminal procedures if the conditions set in article 20143 apply to the other criminal procedure as well, and the objective of using the data thus acquired is the same as the original aim of concealed data acquisition. A new Title III has been added to Chapter VI of the Code of Criminal Procedure: "Supplying information and informing the public in the course of the criminal procedure" (articles 74/A.-74/B.). As today the primary tool for implementing the principle of publicity is the press, the Criminal Procedure Novel has specific rules on how to communicate with the press. Information for the press can only be communicated by the authorized member of the investigation authority and the prosecutor in the phase of investigation; after that and before the accuse only the prosecutor is allowed to give information; in the court's procedure only the person authorized to do so in the act on the legal status and the remuneration of judges is allowed to communicate with the press. In open trials sound and image recordings may be taken (without prejudice to the personal rights of the persons affected, with their approval), except when the court considers that taking the recording would hinder the course of the trial. Only the persons entitled to do so by the Code of Criminal Procedure are allowed to observe the documents of the procedure under way or a closed one. In addition, the Criminal Procedure Novel provides for the possibility to have the documents observed by scientific researches or, in certain cases, by students of law.

The phase of preparing the trial (together with the accused) is an intermediary stage impacted between the investigation and the trial. Only a part of the related rules is affected by the Criminal Procedure Novel. It specifies that if there is more than one court with competence to decide in joint cases, the rule of precedence is to be applied in defining the competent court. According to the Act on the Constitutional Court, the judge shall suspend the court procedure and initiate a procedure in the Constitutional Court, if in the course of the procedure he or she is confronted with a law considered by him or her to be constitutional. In line with the provision referred to above, there is a suspension clause specified in the Criminal Procedure Novel. Similarly, the novel gives more detailed rules for the potential and mandatory cases of suspending the procedure if the accused is on abroad, and in cases related to drug abuse.

The original text of the Code of Criminal Procedure was based on the concept of the trial oriented on the concerned parties. Therefore, it would have been the right and the obligation of the "parties" in action to question the accused and the witnesses and to hear the expert (limited cross-questioning). However, as there are no traditions in Hungary of such a system, and in many cases neither the prosecution nor the defense would be in a position to manage-without obstacles-the production of evidence in this way (let us consider the prosecutors who receive the files of the case an hour before the trial, or assigned counsels who, sometimes, do not know about the case even at the beginning of the trial), the Criminal Procedure Novel of 2002 returned to the concept of the former Code of Criminal Procedure. Accordingly, the production of evidence is lead by the president of the judicial council, although the novel preserved the alternative option to cross examination the witness and the expert. At the same time, by deterring from the concept of the trail oriented on the concerned parties, the novel cancelled the rights of the accused and the advocate to present the substantial points of the defense at the beginning of the trial, after the presentation of the accused. This provision is, however, reintroduced by the Criminal Procedure Novel, although not on the grounds of the concept of the trial being oriented on the concerned parties, but by allowing for the defense to outline the framework of the factual and legal questions of the case. This may support the planning of the production of evidence and speed up the procedure. If it is motioned by the prosecution or the defense to have the witness questioned by the prosecutor, the accused, or the advocate, and it is refused by the court, such a resolution (similarly to decisions refusing motions to produce evidence) can only be appealed against in the appeal submitted against the peremptory resolution of the case.

Based on the principle of general binding force, the court of first instance is not allowed to change it is decision after promulgating the peremptory resolution. This general rule is modified by the Criminal Procedure Novel by taking into account the case if the accused dies or is given procedural mercy in the period between the promulgation of the resolution and gaining it's legal force. In such cases the court of first instance itself is allowed to change the resolution and terminate the procedure.

As extraordinary legal remedies are concerned, there are primarily technical amendments and clarifications in the Criminal Procedure Novel. For example, the legal representative of an adolescent is now given the right to propose a retrial, in addition to the right to propose a review (although it comes from the rules on the rights of the defense, too). It is explicitly stated by the law that there is no way of review in case of breaches of the law that may be cured in special procedures. Due to the amendments, it has become possible to have the time spent in detention at the residence be counted into the period of imprisonment (in addition to the time spent in confinement der remand), therefore the rules of the related special procedure had to be amended, too. The provisions on establishing the force of foreign judgments have been modified as well: it is necessary to have an acknowledgement issued by a Hungarian court concerning the registry of foreign convictions about which a notice has been sent to Hungarian authorities on the basis of a bilateral or multilateral international agreement. It has been made available as well to apply by the way of general legal remedies against the court's decision acknowledging a foreign sentence.

b) The second volume of Transition of Criminal Procedure Systems comprise fundamental analysis of remaining twelve north-eastern European systems of criminal procedure.⁴⁴ Ten of them are new «transitional» law.



In two systems, the new law has essentially different characteristics. Namely, in one case (Germany) transition consists in accession of new “transitional” territory of ex-German Democratic Republic under the actual legislative system of Federal Republic of Germany. The second particular case is the actual legislation on Kosovo. Kosovo is final problem of Yugoslav drama. Actually, Kosovo is a part of the State of Serbia and Montenegro (ex third Yugoslavia), but has been a UN protectorate since 1999 after NATO bombed Yugoslavia in a bid to prevent a crackdown by Serb forces on the majority ethnic Albanians.⁴⁵

By returning to the double-faced character of the Hungarian law of criminal procedure, the peculiar symbiosis of the effective and valid Code of Criminal Procedure and the novels adopted in the above framework, it is important to note as a closing remark, that unfortunately it is now available to read the consolidated version of the new Code of Criminal Procedure on a CD-ROM, and that Hungary succeeded to avoid the special way of unifying the criminal procedure law of abrogating the new Code of Criminal Procedure by the old one. Nevertheless, both Codes have maintained some of their elements: in fact, the two Codes have been amalgamated, and as a consequence, the most important achievements of the (original) new Code of Criminal Procedure-prosecution-oriented investigation, cross-examination, appeal system, could not enter in force, but at the same time the remaining provisions and institutions of the old Code of Criminal Procedure have been modernized to a great extent, with special regard to the fields of the harmonization of laws, the speeding up of the criminal procedure, and easing the overload of criminal jurisdiction. However, practically the whole process of codification has not been closed “with legal force” yet. This is also justified by the fact that a new government decision was adopted on reviewing the system of legal remedies in the Code of Criminal Procedure. (Written by Flórián Tremmel and Csongor Herke).

⁴⁴ Belarus, Estonia, Germany, Georgia, Kosovo, Latvia, Lithuania, Moldova, Poland, Romania, Russia, Ukraine.

⁴⁵ Kosovo has its own parliament, president and prime minister. But decision-making power remains with the United Nations Mission in Kosovo (UNMIK) created by Security Council Resolution 1244 that governs all actions of UNMIK and the NATO-led peacekeepers (KFOR). In Kosovo, more than two years after the war, one of the major hurdles to establishing the rule of law and providing of security and stability for all its inhabitants irrespective of their ethnic or other origins, remains the delay in (re)establishing a functioning judicial and legal system along with efficient and robust law enforcement agencies. The deficiencies in the post-war developments have most gravely affected the Serb and Rom minorities, but Albanians as well. The re-establishment of a functioning system has been hindered by the lack of an efficient international police force especially in the immediate post-war period but also today. Gradual, visible improvements take place but suffer from insufficient dynamics. The absence of a functioning law enforcement agency has left even judges and legal officials

Eight of the analyzed countries were ex Soviet Socialist Republics.⁴⁶ Formally, in all of them the process of transition is coming to the first crucial result: the promulgation of new procedural rules. This group of sources from ex Soviet States sources encompasses: (1) Russian Federal Code of Criminal Procedure,⁴⁷ (2) three codes of Baltic States,⁴⁸ and (3) codes of criminal procedure of Ukraine,⁴⁹ (4) Moldova,⁵⁰ (5) Georgia, and (6) Belarus.

In fact new procedural structures are corresponding acts of Belarus (1999), Estonia (2003), Georgia (1999), Lithuania (2002), Moldova (2003) and Russia (2001). In the rest of the two ex Soviet countries (Latvia and Ukraine), a revised structure of ex Soviet Federal Code of Criminal Procedure of 1960 is in force and is based on the famous Grounds of Soviet Criminal Procedure of 1958.

The Code of Criminal Procedure of Republic of Belarus was adopted in 1999 and came into force on the 1 January 2001. After adoption by the Parliament the Code was largely amended in 2003. This new Code is signed with significant influence of old Soviet rules.

Estonian criminal procedure legislative system was based on the 2001 revised and amended Code of Criminal Procedure of 1961 in which new democratic rules coexisted with old rules of the Soviet period. The new Code of Criminal Procedure is promulgated on 1 February 2003 and will enter into force on 1 July 2004.

Under the Council of Europe guidance, Georgia adopted 1998 the new Code of Criminal Procedure directed to the introduction of the concept of due process of law.

vulnerable to intimidation in a climate of general insecurity. Other difficulties include the partial destruction of court premises and absence of basic equipment. However, since spring 2000, there has been positive development towards a functioning judicial and more efficient law enforcement system in Kosovo. By mid-August 2000, UNMIK had appointed 405 local judges as well as over 700 judicial personnel and other support staff. Setting up a multi-ethnic judicial system has however proved difficult, with few Serbs among those accepting these appointments and being employed. A major difficulty in getting the judicial system functioning in Kosovo has also been the slow appointment and dispatching of international judges, as approved earlier by international authorities, in order to guarantee biased handing of ethnically related cases.

⁴⁶ Belarus, Estonia, Georgia, Latvia, Lithuania, Moldova, Russia, Ukraine.

⁴⁷ Promulgated on 18 December 2000, (Federal Law 174-FZ). Russia is a federation, but the precise distribution of powers between the central government and the regional and local authorities is still evolving. The Russian Federation consists of 89 components, including two federal cities, Moscow and St. Petersburg. Kaliningrad region is located close to the center of Europe on the southern eastern coast of the Baltic Sea. It is the most western enclave territory of the Russian Federation. It borders with the Lithuanian Republic in the north east, with Poland in the south and it is washed by the Baltic Sea in the west and north-west. The Constitution explicitly defines the federal government's exclusive powers, but it also describes most key regional issues as the joint responsibility of the federal government and the Federation components. In contrast to post-war Germany there was neither punishment nor repentance in Russia. No former KGB butcher guilty of mass killings and persecutions of millions of Soviet people was convicted and punished. All those involved in the August putsch of 1991 and the communist mutiny in October 1993 were given free pardon. The attempt to ban the Communist party in the Constitutional Court in 1992 ended in a compromise that confirmed dissolution of the executive bodies of this party, prohibited their restoration, but legalized local grass-roots party organizations set up on the territorial principle, i.e. not on the premises of enterprises and offices. But even this compromise was not complied with and soon the communist party was completely restored to form the core of anti-reform opposition and to pose a major threat to freedom and democracy in Russia. See Schroeder, F. Ch., *Die neue russische Strafprozessordnung*, (New Russian Code of Criminal Procedure), Arbeitspapier 10, Dezember 2002, Forschungsverbundes Ost, Universität, München.

⁴⁸ See for these countries *Rights to Defense and Fair Legal Procedures in the Member States and the Candidates Countries*, European Parliament. Directorate General for Research, Civil Liberties Series, LIBE 115 EN, 2001, 25; 53; 71; 77.

⁴⁹ The actual Criminal Procedure Code of the Ukraine is still the same reformed and amended ex-socialist procedural act. Current criminal procedure reform in Ukraine is in course. Council of Europe-Expert opinion about Draft Code of Criminal Procedure of Ukraine was discussed in Kiev in October 2003, on the Expert meeting on the Draft Code of Criminal Procedure, on the basis of the existing experts' recommendations.

⁵⁰ See for some problems in the functioning of the Moldavian judicial system *Judicial Systems and Human Rights in the OSCE Region in 2001*, International Helsinki Federation for Human Rights, Vienna, 2002.

However, in 1999, Georgia adopted some regressive amendments. Presently new reform motion is in course because of external pressure.

With the *Einigungsvertrag* (Treaty of the Establishment of German Unity), of 31 August 1990, and with accession of the *Beitrittsgebiet* (territory of ex *Deutsche Demokratische Republik*, German Democratic Republic)⁵¹ constitutional separation of two Germany States was finished. After 3 November 1990, Code of Criminal Procedure of Federal Republic of Germany is in force in all German territory. In that particular case “transition” is in fact one legislative accession with consequent disappearance of ex procedural rules of previous East Germany. Rules of criminal procedure of ex East Germany disappeared with this state. This is the principal result of German unification in the field of criminal procedure law. They have no new rules of criminal procedure as a product of transition. The real transitional rules *stricto sensu* are only some new rules in the *Anlage I* of *Einigungsvertrag*.

The United Nations top official in Kosovo signed on 6 July 2003 Kosovo's Provisional Criminal Code and Provisional Code of Criminal Procedure, both regulations replacing an amalgam of the legislations based on the former Yugoslavia's criminal law.⁵² The new code incorporates the latest legislation on terrorism, organized crime, trafficking of persons and covert measures of surveillance. Actual legal system of criminal procedure in Kosovo region is a hybrid of essentially different sorts of sources.⁵³

The Code of Criminal Procedure of the Latvian SSR, adopted on 6 January 1961, which entered into force on 1 April 1961, remains in force in Republic of Latvia in accordance with the Law of 22 August 1991. Numerous amendments to that Code have been made. Therefore it is vastly different from the Code, of the early 90's. Changes are related to the introduction of new principles of criminal procedure (presumption of innocence, adversary proceeding, etc.), review of the structure of criminal procedure (transfer of criminal investigation to prosecutors), implementation of new forms and institutions of procedure (summary procedure, settlement or conciliation agreement in certain matters). Significant changes are also related to the fact that the new Criminal Code was adopted in 1998 and entered into force on 1 April 1999. Presently the Criminal Procedure Draft Law is being prepared.

The Lithuanian Code of Criminal Procedure of 1961 with soviet legal elements was partially amended in 1994. Such laws were valid until 2003, when the new Code which contains many general provisions of contemporary and self-awareness content, came into force. The new Lithuanian Code of Criminal Procedure was adopted on 14 March 2002 and was entered into force on 1 May 2003.

The new Code of Criminal Procedure of Moldova was adopted on 14 March 2003, and was entered in force 12 June 2003.

The Code of Criminal Procedure of Republic of Poland of 6 June 1997 came into force in 1998. The act is compatible with the new Constitution of 1997 and with the ECHR. Afterwards, changes in 2000 and 2003 leading to the restriction of procedural guarantees of

⁵¹ New Federal States (*Bundesland*) established by Constitutional Act 22 July 1990 are: Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt, Thüringen and Land Berlin.

⁵² The Code will come into effect in nine months time in order for the training of legal professionals and the reorganization of the judicial system.

⁵³ According to Chapter 8 of the Constitutional Framework, the Kosovo justice system remained under direct authority of UNMIK, and International Administrator was the supreme authority (as High Representative in Bosnia and Herzegovina). The Constitutional Framework set up the Judicial and prosecuting Council, which was authorized to counsel the International Administrator on a relevant issues. The international community dispatched ten international judges to the Supreme Court and six prosecutors to the Office of Public Prosecutor and to all district courts, to deal with war crimes, inter-ethnic and other complex case.

the participants of the proceedings seemed to be necessary, firstly regarding the accused. The goal of the amendments was to conduct criminal procedure much more effectively.

The reformed Code of Criminal Procedure of Republic of Romania of 1968 is still valid.⁵⁴

The new Code of Criminal Procedure of Russian Federation was adopted on 18 December 2001 and was entered into force on 1 July 2002. It was amended in 2002 and 2003. The Code introduced new democratic procedures combined with some old rules of the Soviet era. It extended the applicability of the adversarial principle and reinforced judicial control during the pretrial stage too. Moreover, the Code provided for the gradual extension of the institution of jury trials throughout the territory of the Russian Federation. The Code includes provisions relating to the inadmissibility of evidence obtained through illegal searches too.

The principal source of Ukrainian system of criminal procedure is the Code of Criminal Procedure adopted in 1960. This Code, during forty years of its operation, underwent numerous changes and supplements. The new Code of Criminal Procedure will probably be adopted in 2004.

5 Problems

The new transitional states are faced with largely identical problems as states which are members of European Union. Firstly, there is a general increase and globalization of organized and economic crime,⁵⁵ insufficiency of financial means,⁵⁶ lack of coordination between these enforcement levels,⁵⁷ demands in respect of the quality of criminal proceedings,⁵⁸ slowness of the proceedings,⁵⁹ miscarriage of justice,⁶⁰ inadequate protection for the victim of crime,⁶¹ and gradual loss of confidence in the criminal justice systems.⁶²

⁵⁴ Bulletinul Oficial 145-146 12/11/1968 (revised and amended 1973, 1996 and 1997).

⁵⁵ The threat posed by transnational organized crime to the political, economic and social fabric of societies was recognized by the international community beginning in the mid-1990s. The subsequent negotiation of an International Convention against Transnational Organized Crime (TOC or Palermo Convention), was a historic step forward in countering this threat. The Convention provides the normative framework and orientation for the global program. The Convention was adopted by resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth session of the General Assembly of the United Nations.

⁵⁶ See Council of Europe, *Recommendation R (1995) 12 on the Managing of Criminal Justice*.

⁵⁷ See the participants in the trial: with particular reference to criminal proceedings, Council of Europe, Strasbourg, 1997, 111.

⁵⁸ Waltos, S., *The Pragmatic Approach to the Codification of Criminal Procedure: The Polish Experience*, published in: *Comparative Criminal Justice Systems*, op. cit. 496.

⁵⁹ "...celerity aims at speeding up the penal process as much as be can be possible without jeopardizing the fundamental principles of justice". See Pradel, J., *The Celerity of Criminal Procedure in Comparative Law*, *International Review of Penal Law*, 3-4 (1995), 343.

⁶⁰ An individualistic rights-based approach to miscarriages of justice see by Walker, C., and Starmer, K., *A Miscarriage of Justice*, Blackstone Press Ltd.: London, 1999, 39: "A miscarriage occurs as follows: whenever suspects or defendants or convicts are treated by the State in breach of their rights, whether because of, first, deficient processes or, second, the laws which are applied to them or, third, because there is no factual justification for the applied treatment or punishment; fourth, whenever suspects or defendants or convicts are treated adversely by the State to a disproportionate extent in comparison with the need to protect the rights of others; or, fifth, whenever the rights of others are not effectively or proportionately protected or vindicated by State action against wrongdoers or, sixth, by State law itself".

⁶¹ See Council of Europe Committee of Ministers *Recommendation R (1985) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure*; General Assembly - United Nations *Declaration of Basic Principles of Justice for victims of Crime and Abuse of Power A/Res/40/34* of 29 November 1985.

⁶² See Goldstein, A. S., *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, published in: *Israel Law review* 31(1997) 1-3: "It is becoming increasingly apparent to criminal justice scholars that single theory models of criminal procedure-whether termed inquisitorial or adversarial-are being stretched beyond their capacity by the phenomena they are designed to control. Virtually everywhere, formal systems of charge and adjudication cannot possibly be enforced in accordance with the premises underlying them". See Proceedings, Agenda item 3 *Promoting Rule of law and strengthening the criminal justice system*: Tenth Congress on the

European states, whether they want that or not will be obliged to cooperate with each other in the field of criminal procedure (especially in extradition, mutual assistance, transfer of proceedings and execution of sentences). Crime suppression is to be considered as a matter of common concern for each modern state. Lawyers are confronted with criminal proceedings with international elements, a labyrinth of foreign criminal justice systems, and with differences in procedural rights.⁶³

The reforms of criminal procedure of East-European states, indicates some common characteristics. The starting point for legislative reform in all of the countries of the second group was the same: inquisitorial (“continental”) structure of criminal procedure with different more or less present adversarial elements.⁶⁴ Dynamics of changes in the analyzed states compared with the states of the first group was similar. The first essential event in all of ex Soviet Bloc countries was the disappearance of East Germany law of criminal procedure in 1990. The real beginning of entire transitional process in the matter of criminal procedure in the whole northern and eastern region of Europe!

Not all the changes made by the second group of countries can be considered as transitional. The nature, course and contents of legislative changes in some states are different in many aspects. The most important factors influencing the legislative changes are the political circumstances of social changes and the contents of ex socialist legislation.

Disappearance of the Code of Criminal Procedure of ex German Democratic Republic and entry into force of the rules of Code of Criminal Procedure of Federal Republic of Germany was, in this circle of countries, a unique particular case: not transition in a restricted sense, but extension of existing rules of criminal procedure on new territories. Legislative reform follows the international multilateral and bilateral agreements⁶⁵ and constitutional changes.⁶⁶

Prevention of crime and the Treatment of Offenders, Vienna, 2002. Several speakers noted that an increase in lawlessness was a common feature of emerging democracies. It was argued that among the factors contributing to that increase was the fact that respect for authority and for the rule of law had deteriorated under the previous regime. New democracies faced challenges in creating new laws and infrastructure and coping with increased crime, which often occurred during transition. The public’s loss of confidence in the new system might even produce a backlash that would weaken the protection of accused persons. Council of Europe Committee of Ministers, *Recommendation R (1995) 12 on the Management of Criminal Justice*. See Vandermeersch, D., *Droit continental v. Droit anglo-américain* (Continental law vs. Anglo-American law), published in: *Revue de droit pénal et de criminologie*, 6 (2001), 467-531; Van Koppen, P. J., and Penrod, S. J., (eds.), *Adversarial versus inquisitorial justice: Psychological perspectives on criminal justice systems*, Plenum: New York, 2003. For the public opinion polls on attitudes of Americans toward criminal justice-related issues and numerous topics including perceptions of problems in schools; ratings of the police and courts; fear of crime; and attitudes toward the death penalty, firearms laws, marijuana legalization, access to criminal records, and much more. Results of polls conducted by The Gallup Organization; Harris Interactive; the National Opinion Research Center; the Monitoring the Future Project at the Institute for Social Research, University of Michigan; the National Center on Addiction and Substance Abuse at Columbia University; and others are included in Sourcebook of Criminal Justice Statistics Online Section 2 (*Public attitudes toward Crime and Criminal Justice-related Topics*) and Section 5 (*Judicial Processing*).

⁶³ There are too many offences, too many offenders and too few resources to deal with them all. One result has been a steady movement towards a convergence of legal systems-towards borrowing from others those institutions and practices that offer some hope of relief. See cil of Europe, *European Sourcebook of Crime and Criminal Justice Statistics. Draft*, Strasbourg, 1995.

⁶⁴ Practically the starting points of the second circle of countries were: a) Code of Criminal Procedure of ex Soviet Union of 1960 (Belarus, Estonia, Georgia, Latvia, Lithuania, Moldova, Russia, Ukraine), b) Polish Code of Criminal Procedure, c) Romanian Code of Criminal Procedure and d) Yugoslav Code of Criminal Procedure (Kosovo).

⁶⁵ See Treaty of the Federal Republic of Germany and the Democratic Republic of Germany concerning the establishment of the Unification of German (Unification Treaty) of 31 August 1990

⁶⁶ The German Constitution entered into force in the eastern German territory on 3 October 1990 (Article 3 of the Unification Treaty).

The second particular case is the Code of Criminal Procedure of Kosovo. The new act of Kosovo is imposed by international authority. That is also not a transition in the narrow sense of the word.

A particularity of this system is the fact that Kosovo, as a part of Serbia and Montenegro, has proper adversarial criminal procedure order, essentially different from the new version of continental civil law structure in the Code of Criminal Procedure of Serbia and Montenegro of 2002. The consequence of that fact is the existence of not only the plurality of sources, but the existence of different criminal procedure models in one state, as in Bosnia and Herzegovina.

In the case of Kosovo there are no corresponding rules in the field of competency of judges, public prosecutors and other organic rules. With such characteristics the criminal procedure system of Kosovo is practically autonomous. With entry into force of the new Code of Criminal Procedure of Kosovo in Serbia and Montenegro *de lege lata* exist two different systems of criminal procedure. In all other countries, the process of legislative changes, have being going through more or less evolutionary transition.

Why are reforming actions appropriate in the area of criminal procedure systems of ex socialist countries? The motives for transitional reforms are substantial and formal. First of all the newly created democratic constitutions were passed in compliance with the ECHR as a cornerstone for any thoughts in this area. New constitutional regulation initiate need, in the first period of transition, for work to be launched on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of principles of some procedural basic rights respecting the fundamental legal principles of a particular state.⁶⁷

Contemporary international political position of ex socialist states looks for practical and effective procedural system to encounter equivalent standards in respect of safeguards in criminal proceedings throughout Europe and certain minimal degree of standardization directed to make mutual cooperation possible.

Some of the ex socialist criminal procedure legislative acts contain a certain number of particular “experimental” norms which were abrogated during the reform changes.⁶⁸ Finally, the scientific progress influenced new democratic legislators to search new legislative solutions. Depending on the political relations and economic situation in a particular country there is an influence of various foreign doctrinarian positions frequently “materialized” in a support programs and “personalized” in expert activity on the legislative drafts. Foreign experts assumed crucial role in that activity in certain countries.

The second group of countries attempted to integrate domestic and foreign professionals. In the third group of countries the influence of foreign experts is marginalized to the benefit of national scholars and practitioners. The most important place of common

⁶⁷ Council of Europe-Committee of Ministers, *Recommendation R (1996) 8 on Crime Policy in Europe in a Time of Change*.

⁶⁸ Single ex socialist cotries attempted first of all to introduce the various new institutions directed to substitute traditional institutions of the criminal justice systems. The most radical was the elimination of professional criminal justice to the benefit of “revolutionary popular justice” in certain period in single countries (Albania). Some countries tried to introduce various forms of social intervention like mandatory social mediation committee (Germany Democratic Republic, Yugoslavia and Romania). The specific procedural rules regulated mandatory communications between procedural authority and some social institutions like special bodies for “social auto-protection”, and for “control of origin of property” and some others with the similar nature of ideologies and similar political and social control bodies. In a technical sense many of these new institutions are similar with some modern, internationally accepted criminal justice procedural forms necessary for the efficient suppression of organized crimes (the seizure and confiscation of the means and product of crime, the mutual cooperation in the field of exchange of the information about suspected financial transaction, investments, proceedings in course, and others).

discussion and evaluation of national projects were the Council of Europe's corresponding organs of legal aid.

6 Methods

For the purpose of transition, the legislators of the second-circle countries used three different methods. The first and rapid reform opted for new legislative acts.⁶⁹ In some cases this method resulted in the introduction of significant elements of a different, new model. The first group of countries (and territories) is characterized with the fact that the new criminal procedure rules are the result of intensive scientific, comparative and legislative researches. In some cases the new legislative act is marked with the import of elements of foreign law.

In others cases national legislators were guided with pragmatic interest to rapidly achieve result comparable with modern western democratic states. This second, pragmatic reformation approach opted for graduate legislative reforms in the framework of existing ex socialist rules, and older pre-socialist historical sources too. In some cases not without essential news!⁷⁰ In this second group of countries are those in which the real transitional process is still in the initial stage.

In the third group of countries the transitional changes have not yet been realized. They are in the intermediate or final stages of changes.⁷¹

The new Code of Criminal Procedure of Kosovo is an exceptional case. It is a recent legislative result of the "new approaches in international criminal justice" marked with strong heterogeneous elements and with the discretion in some solutions typical for a "politically" imposed legislative experiment from international political subjects.

7 Sources

Almost all of the new criminal procedure systems are based on the traditional concept of the European continental or civil law model, of the *lex scripta* as an exclusive and principal source of criminal procedure law. Majority of the reformed and analyzed criminal procedure sources are conceptualized as a code, and rarely as a law. The code of criminal procedure is the principle source.

Moreover, in certain countries the code is one and only source. A particular system is valid in Serbia and Montenegro. In this country there are various equal statutory sources of criminal procedure: Federal Law of Criminal Procedure of Serbia and Montenegro, and new Provisional Code of Criminal Procedure of Kosovo. In the Russian Federation as well as in Serbia and Montenegro the criminal procedure rules are within federal legislative competence.

The structure of new codes is in certain fundamental elements rather similar on the large scale, which is primarily true in the area of the partition and order of contents.

The volume of particular principle sources varies considerably. Majority of new and reformed codes have between 400-500 articles. The biggest one is the new Polish Code of Criminal Procedure with 682 articles. It includes not only the rules of criminal procedure in narrow sense, but others rules (international criminal cooperation, juvenile criminal procedure, some special procedures) too. As far, as the number of articles, is considered the new Provisional Code of Criminal Procedure of Kosovo with 357 articles, the smallest in size.

The volume of a particular Code depend on the constitutional order, elaborated contents, legal traditions, concept of the code, existence of special procedures as military justice, juvenile delinquency and others.

8 Types

⁶⁹ Georgia, Estonia, Kosovo, Lithuania, Moldova, Poland, Romania, Russia

⁷⁰ Belarus, Latvia, Romania.

⁷¹ Latvia, Ukraine.

Regarding the type of procedure analyzed systems are still in majority of cases a classical, European, continental, neo-inquisitorial or “mixed” systems. All of them contain newly introduced significant adversarial elements. The majority are gradually reformed models of ex socialist law with typical characteristics of provisional legislative solution.⁷² Almost all of the legislators have regulated the main stage of the proceedings as adversarial. The pretrial stage of the procedural structure remained significantly similar to the previous system, especially concerning the procedural position of public prosecutor and the structure of procedural acts taken from the previous legislative system, with the addition of new rights of the defendant (participation of defendant and defense counsel in procedural acts etc.)

Certain legislative acts are newly composed criminal justice systems which are predominantly based on the pragmatic balancing of structural elements of the civil law and common law models of criminal procedure. These newly introduced adversarial elements in certain traditional civil law criminal procedure systems are still an important change in the entire set of European continental criminal procedure rules.⁷³ Consequently, many of the new national criminal procedure systems, are based on both, the inquisitorial (followed in preliminary investigation), and adversarial models (dominates when the case goes to trial).

Finally, there is one internationally imposed and specific Code of Criminal Procedure that of Kosovo which is based on the elements of the modern adversarial system of common law and combined with significant elements of the previous inquisitorial mixed model. Not without serious discrepancies!

9 Structure

a) In all of the analyzed countries the investigating body having the general power to investigate all crimes is the police. In some countries it has discretionary powers concerning further actions. In others does not have similar powers at all! In certain countries there are several regular or specialized police agencies (for example: federal, state and municipal police, judicial police, border service, custom service, military police) with different investigative competence.

In some countries there are specialized investigative authorities. Those special investigators have general and special *ratione materiae* competence, e.g. for organized crimes, corruption, money laundering, trans-border financial crimes etc. as well as *ratione personae* competence for certain matters or persons (military, juvenile delinquents, higher state officials, ships crew).

The police have standardized duties. It is generally the first authority to deal with if a criminal offence takes place. First of all it must immediately report offences to the public prosecutor. Police officers are under duty to make written records of their inspections, information, findings and follow all further instructions from public prosecutor.

They are obliged to collect information about offenses even on their own initiative and must take necessary steps to protect the evidence and gather any other element that may be useful for the procedural aims.

b) In the European criminal procedure systems the majority of crimes are prosecuted as a rule, *ex officio*. The prosecution of crimes is prescribed generally on the basis of the principle of legality. However, for certain forms of crimes, the principle of legality is substituted with the principle of opportunity.

For the majority of serious crimes the prosecuting authority is generally the public prosecutor (state attorney). For other crimes, the prosecuting subject is the victim or other subjects foreseen by law.

⁷² Belarus, Georgia, Estonia, Latvia, Lithuania, Moldova, Ukraine.

⁷³ Poland, Russia.

The public prosecutor has general competence to investigate the serious crime *ex officio* and is *dominus litis* of the investigation. Therefore, it decides which action is to be taken after receiving the initial information of the crime.

The public prosecutor has the same investigative powers as the police and can perform all investigation by himself. However, in practice investigations are carried out by the police on the instruction of the public prosecutor.

The public prosecutor is without judicial power. He/she is formally a public party but his/hers task is to act objectively in the sole interest of preserving the law and justice; he must collect the evidence irrespective of whether it is evidence for the prosecution or for the accused.

The public prosecutor in some systems does not have a monopoly over criminal prosecution. The victim of the crime has a right to prosecute certain crimes as private prosecutor, and according to some national laws becomes a subsidiary prosecutor. The victim of the crime is also a subject of civil claims and some other rights in proceedings.

c) The new codes have adopted the principle that investigative and judicial functions should be strictly separated. The role of the investigating judge is disappearing. The successor to the investigating judge is the judge for the preliminary investigation.⁷⁴ In the preparatory stage, investigation becomes prosecutorial, not judicial proceeding.

The judge for the preliminary investigation has no investigative powers any longer. It exercises essentially different control function over the activities of the investigating authorities and in doing so, guarantees respect for the rights of the accused whenever measures which restrict personal freedom or affect the right to privacy must be taken. Another important task of the judge for preliminary investigations in some systems is the preliminary adversarial hearing. This action is directed to primary judicial analysis of accusation.

The legal status of the victim is described in all of the codes. The victim is an individual who suffers either direct material or moral loss or damage from a crime. He/she is eligible to participate in the investigation or trial. The victim's report of the crime can serve as the basis for initiating criminal proceedings by the investigator, the prosecutor or the judge. Moreover, the victim goes directly to trial and participates in the offender's prosecution.

The victim has rights which provide him/hers with an opportunity to actively participate in the investigation. The legal rights of the victim include the right to testify; to present evidence; to issue a complaint; to make motions; to be apprised of the evidence immediately after the preliminary investigation has been conducted; to participate in the trial; to ask that an investigator, the judge, or the public prosecutor be excluded from the case; and to bring complaints against the investigator, the judge, and the public prosecutor. It has also a right to appeal and participate in the appellate process.

The victim is allowed to participate in the debate during the trial when the public prosecutor does not participate. In cases with so called "private prosecution" the victim may provide prosecution, personally or through its legal representative.

d) There is a clear distinction between the suspect and the accused in all the analyzed codes. A suspect is not a party of criminal procedure. The pretrial or preparatory procedure, generally, has not the formal character of criminal procedure.

The substantive and procedural rights of the suspect and accused, based on article 6 of the ECHR and the national Constitution's provisions are stipulated in the analyzed codes.

While the trial is pending the accused has a right: a) to make a motion on decline; b) to have legal counsel or act as his own defense lawyer; c) to make motions and express an opinion on motions of other participants of the trial; d) to ask the court to include the case documents, summon witnesses, employ forensic research and obtain other evidence; e) to

⁷⁴ Well-known figure of judge for preliminary investigations is "*il giudice per le indagini preliminari*" of actually Italian *Codice di Procedura Penale*.

provide explanations at any moment of judicial investigation; f) to ask questions to other suspects, witnesses, forensic experts, and the victim(s); g) to participate in the inspection of the crime scene and documents; h) to participate in court's debates if it is not legally represented. The accused has also the right to appeal the court's verdict, and to participate in the appellate process.

The defense counsel may be contracted or assigned to represent a defendant at trial. He/she is usually chosen by the accused or his/his relatives. If the defendant does not have resources to pay a counsel, the investigator, prosecutor, judge, or chair of a law firm may partially or completely release the defendant from the obligation to pay for legal assistance. In situations where the case legally requires a counsel to participate in a trial, but the defendant or his relatives have not contracted one, the investigator or the court could assign one through a law firm. The cost of this defense counsel is borne by the state although the accused might be required to reimburse the state afterwards.

The presence of the legal counsel is also required in cases involving minors and persons who, because of their physical or mental disabilities cannot exercise their right to defense; persons accused of capital crimes; or when the prosecutor participates at trial.

The pretrial stage is an investigative proceeding realized by the investigative and prosecutorial authority. The rights of the suspect in this stage depend on the goal of investigative acts. If the single act is dedicated to obtain evidence (search, seizure, interrogation of suspects and witness, expertise), the form of act and its modality are identical to the corresponding act realized in the criminal procedure. If one investigative act has only operative aims, the mentioned similar formal conditions do not exist. In the second case, the results of such act cannot be used as evidence in criminal proceeding.

e) The course of criminal proceedings is different in the field of regular and special (summary) procedural forms. The regular procedure includes the pretrial stage (investigation and accusation), trial and remedies stage. In certain number of analyzed codes various possibilities for direct accusation exist too.

The majority of criminal cases must proceed through the stage of preliminary investigation. Exceptions may be made for cases involving private prosecution and cases which require special pre-judicial preparation.

In the majority of analyzed systems the preliminary investigation before the trial is composed of: 1) initiation of the criminal case and collection of sufficient evidence to accuse a person of the crime; 2) presenting the accusation, examination of the accused, arrest or other precautionary measures; 3) collection and test of other evidence which may prove or deny the charge, including aggravating or mitigating circumstances; and 4) action related to completing the investigation, writing the indictment and forwarding the case to trial.

Criminal proceedings may be initiated by the prosecutor, the investigator, and some other investigative body. The investigation is conducted by investigators who are at service to the prosecutor, bodies of internal affairs, and national security. These investigators are outside the judiciary.

After sufficient evidence is collected to accuse a suspect of committing a crime, the investigator makes a statement formally charging the suspect of the crime. The statement describes the circumstances of the crime and the definition and category of the offense with a reference to a Criminal Code. The investigator presents this statement to the suspect and explains his/his rights regarding the preliminary investigation.

The investigator's arrest statement must be supported by the prosecutor. As a rule, the pretrial detention during the preliminary investigation cannot last longer than two months. This term can be extended in certain cases indicated above.

The defendant and the defense counsel can appeal the prosecutor's post-arrest decisions (e.g. pretrial detention) to the court. The judge has the power to cancel and change these decisions.

One way to complete a preliminary investigation without directing the case to trial is to drop the case. If the investigator finds the defendant not guilty of committing the crime, the prosecutor has a right to drop the case. The consent of the convicted person must be obtained in order to drop the case on the grounds stated above. The investigator or the prosecutor must also consider the victim's opinion, although they are not obligated to act accordingly. Persons who may be affected by the statement of the investigator or prosecutor to drop the case can make an appeal to the court.

f) The entire number of analyzed sources is marked with the existence of various forms of special procedures. Some of these procedural forms included in the structure of the certain codes are not in fact the proper criminal procedure. Namely, in some cases the framework of criminal procedure is included, as a special form of criminal procedure in the execution, various forms of mutual assistance and international cooperation in criminal matters, extradition, and procedure regarding compensation of damages and rehabilitation.

The criminal procedure in the proper sense consists only of procedural rules which are dedicated to determinate the crime, guilt, and the condition for the application of a criminal sanction. All other procedural forms are eventually the criminal procedure in improper sense.

The real special forms of the criminal procedure are the procedures for juvenile delinquency, before military tribunals, various forms of abbreviated procedure (expedite and summary procedures), procedure regarding private charges, and especially various forms of bargaining proceedings.

The procedure for juvenile delinquency is regulated with two different methods. In some countries the special rules for the procedure dedicated for minors is included in the Code as special part. In others legislations, the Code contains general rules for all forms of procedures valid for the juvenile procedure too, and the specific legislative act with special procedural rules as well as other substantial and organizational ones.

The procedure before military tribunals is present only in certain countries. The particularity of this procedure is the structure of courts body, course of the preparatory stage, subjects of proceedings, organization of trial, specific rules of remedies and some others particular rules.⁷⁵

The abbreviated procedures consists in various form of the summary procedure, accelerated procedure, procedure for issuing the warrant for pronouncement of sentence, the procedure against legal persons which is included only in some countries.⁷⁶

The procedure for the application of security measures is dedicated first of all to coercive measures⁷⁷ of medical and psychiatric character.

In some sources first various forms of diversion are present too.⁷⁸

g) Almost all of the analyzed sources have two groups of rules of evidence. The common rules of evidence are in the general introductory part of codes. The specific norms for particular evidence are prescribed in numerous special rules.

The rules of evidence in analyzed sources have generally common hybrid characteristic. The rules of the particular means of evidence, rulings on evidence, their evaluation, admissibility of evidence, exclusionary, and others contents of different rules, comes in part, from inquisitorial, and in part, from the adversarial ambient.

⁷⁵ Belarus, Romania, Russia.

⁷⁶ Belarus, Estonia, Poland, Romania, Russia

⁷⁷ Belarus.

⁷⁸ Estonia, Moldova and others.

The means of evidence which influenced the rights of privacy (search and seizure, medical and psychiatric examination) are regulated with special accuracy. Some technical means as: an interception of communication or video-surveillance is subject to special limitations regarding their use as evidence.

The most important novelty in the whole matter of evidentiary rules is the principle of contradictory procedure (1) as a manner in realizing of all evidentiary actions, and (2) as an argumentative principle within the framework of evaluation of the proof. This complies with the actually European tendency expressed in *Corpus juris* project.

i) The precautionary measures are numerous and classified in categories. All of them are based on the principles of necessity, gradation and accountability. Special substantial conditions and temporal restrictions are valid for the measures of the privation of liberty (arrest, hold, detention, house arrest).

10 Conclusion

a) Transitional reforms of criminal procedures in European ex-socialist countries took place in the period of fundamental social, political and economical changes. The majority of national legislators have conducted the reforms in two gradually organized steps.

The first step in transition changes was pragmatic: a) the need to find an “easy to handle” and effective way to prosecute crime, b) the “cleaning” of “technical” procedural elements from remains of socialist regime, c) to guarantee individual rights.

As this stage there was an important impact of international community (first of all of the Council of Europe) on the criminal procedure reforms in all transitional countries. This was transition in the strict sense. The new criminal procedures in the first period were a temporary legislative solution in almost all of the newly established democracies.

The second (dogmatic) step is the elaboration of the new structure of the legislative criminal procedure structure. Predominant part of transitional countries, have not yet realized this second stage. Here however, the concept of transition can only be taken in a wider sense. In fact, this second stage represents the “regular” reform of the criminal procedure system. The necessity of reform has become for all the European countries!

The entire European post-socialist transitional process in the criminal procedure involves (1) dynamism of changes, (2) wide range of included systems and (3) influence of international community. Such big number of new legislative systems in short period of quite one decade, inspired with same or similar (internationally accepted) ideas, is absolutely new significant fact characterising the actual and future criminal procedure law.

b) The new transitional criminal procedures are different. Nevertheless, these procedures are a) based on the international acts of human rights, and national constitutions, and equality of arms, b) with the clear tendencies directed to simplification of the course of proceedings, c) with contradictory of evidence, d) exhibit the need for separating the procedural functions and e) tend to distinguish between preparatory stage with the public prosecutor as *dominus litis*, and as a fact-finding body, and with the trial stage as judicial proceedings.

c) Transition of single criminal procedure system is not a uniform process. Each procedure is different in a numbers of details. New democratic legislators in transitional countries demonstrate in some questions boldness in taking radical measures (abandon of the concept of preparatory stage as judicial proceeding, introduction of undercover operations in criminal investigation, new forms of summary procedures, new course of main trial, new forms of diversion *etc.*). However, this is not the case in some other questions (*i.e.* in the structure of criminal justice system, forms and contents of procedural actions, the list and forms of remedies *etc.*).

Nevertheless, the transitional reforms steps in European ex-socialist countries deserve much interest and attention by the international scientific community, irrespective of the size of their countries and population, economic power *etc.*

Chapter 1

Criminal Procedure System of the Republic of Belarus*

Luidmila Zaitseva** - Vadim Samarin***



I Sources

1 General Observations

The supreme law governing Belarusian criminal procedure is the Constitution of 1994 (as amended in 1996).⁷⁹ Any law in conflict with the Constitution will be superseded by the latter and the provisions of the latter will be applied. The Constitution also establishes fundamental principles of modern Belarusian criminal procedure.

Code of Criminal Procedure of the Republic of Belarus (*Kryminalna-Prazessualny Kodeks*-hereinafter: Code),⁸⁰ determines the procedure of work of bodies conducting criminal proceedings⁸¹ and the rights and duties of participants in those proceedings.⁸² It is based on the Belarusian Constitution and it is the exclusive legislative act that regulates criminal procedure in the territory of Belarus. It is compulsory for all the participants in criminal proceedings.

The creation, functioning and structure of prosecutorial bodies, courts and certain adjoining institutions is regulated with special legislation *e.g.* Law of the Prosecutor's Office (1993),⁸³ Law of Advocacy (1993),⁸⁴ Law of the Judicial System and Status of Judges (1995),⁸⁵ and Law of Procedure and Conditions of Arrest and Detention (2003).⁸⁶ Some matters are considered in ordinances of the President of the Republic which may have the force of law such as Ordinances on assessors (*narodny zasedatel*),⁸⁷ and on taking of the oath by the judge.⁸⁸

Although that is not constitutionally recognized, decisions of the Supreme Court (*Vjarhouny Sud*) and the General Prosecutor (*Generalny Prakuror*) are applied in the domain of criminal procedure. The Supreme Court generalizes judicial practice and, on the basis of such generalization, issues decisions that are guiding rules for courts of all levels. Those decisions, however, do not create new rules of law although the General Prosecutor issues

* National report dated 14 September and 1 October 2003. Editor's note: Original Belarusian text of certain footnotes is not changed.

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*** Author of parts I, II, III 1, 2, 3 and 5, IV and VI.

⁷⁹ *Нацыянальны рэестр прававых актаў Рэспублікі Беларусь*, 1 (1999), пер. № 1/0.

⁸⁰ *Нацыянальны рэестр прававых актаў Рэспублікі Беларусь*, 77-78 (2000), пер. № 2/71.

⁸¹ "Bodies conducting criminal proceeding" are determined with the Code as bodies of inquiry, investigators, prosecutors and court.

⁸² Article 1 of the Code. Editor's note: The numbers of articles and paragraphs without additional mark refer to the Code.

⁸³ *Ведамасці Вярхоўнага Савета Рэспублікі Беларусь*, 10 (1993), арт. 95.

⁸⁴ *Ведамасці Вярхоўнага Савета Рэспублікі Беларусь*, 20 (1993), арт. 242.

⁸⁵ *Ведамасці Вярхоўнага Савета Рэспублікі Беларусь*, 11 (1995), арт. 120.

⁸⁶ *Нацыянальны рэестр прававых актаў Рэспублікі Беларусь*, 76 (2003), пер. № 2/964.

⁸⁷ *Нацыянальны рэестр прававых актаў Рэспублікі Беларусь*, 58 (2001), пер. № 1/2747.

⁸⁸ *Нацыянальны рэестр прававых актаў Рэспублікі Беларусь*, 24 (2002), пер. № 1/3526.

orders that are obligatory for all prosecutors. Majority of those orders are applicable to the investigation of criminal cases and to the prosecutor's role in criminal procedure.

It is questionable whether acts of the Constitutional Court (*Kanстыtucyjny Sud*) are sources of criminal procedure law. National doctrine recognizes certain decisions of that Court as sources of law which abolish as unconstitutional certain provisions of the Code of Criminal Procedure. International treaties are also applicable but only if related to human rights and freedoms.⁸⁹

2 Historical Overview

Belarusian legal tradition has ancient roots in the middle ages. It was influenced by its neighboring countries and their progressive ideas. Legal documents written in ancient Belarusian include Statutes of the Grand Duchy Litouskae of 1529, 1566 and 1588. Statute of 1588⁹⁰ was in force on the territory of the contemporary Belarus until the mid 1800's. Those acts, *inter alia*, prescribed rules of criminal procedure and established judicial system of the country. With adoption of the Statute of 1588, reform of the medieval judicial system was completed with inclusion of many progressive elements such as the principles of orality proceedings, publicity of court trial, presumption of innocence and concept of an adversarial judicial procedure.

With the annexation of Belarusian territory to the Russian Empire at the end of the 18th century, imperial laws were gradually implemented in Belarus. These included laws of criminal procedure such as the Judicial Statutes of 1864.

After the October Revolution of 1917, Belarus found itself at war with Germany until the end of 1918 and, afterwards, with the Poles until 1921 when most of Belarus was occupied. In 1919 Belarusian people declared their independence and Belarus became the Soviet Socialistic Republic of Belarus. At the beginning, the legislation of the Russian Soviet Federal Socialistic Republic including the Code of Criminal Procedure of 1922 was applicable in Belarus.⁹¹

From 1923 until 1991 Belarus was part of the Union of Soviet Socialistic Republics. General principles of criminal procedure were determined by the Union and the socialist legal system heavily influenced Belarusian criminal procedure. The first Code of Criminal Procedure of the Belarusian Soviet Socialistic Republic came into force 1923. It was largely amended 1927. During 1920's and 1930's Belarusian criminal procedure acquired inquisitional features. Proceedings were conducted in haste. Certain stages were excluded and participation of the prosecution and defense was sometimes optional. Sentences including the death penalty were immediately carried out. This situation inevitably created repression and abuse of the rights of numerous innocent people.

During the 1950's liberalization of the law of criminal procedure took place. Belarusian Code of Criminal Procedure⁹² was adopted 1960. It proclaimed certain democratic principles of criminal procedure such as presumption of innocence, rule of law, establishment of the truth, enforcement of justice in criminal matters only by a competent court, equality of

⁸⁹ Editor's note: Belarus Constitution is more clear on that and provides as follows: "The Republic of Belarus shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles." See Article 8(1). It seems that the Code could raise the question on its constitutionality regarding this matter.

⁹⁰ *Статут Вялікага княства Літоўскага 1588: Тэкст, Давед, Камент* (Statute of the Grand Duchy Litouskae of 1588: Texts, Information, Comments), БелСЭ: Минск, 1989, 573.

⁹¹ Довнар, Т., *Краткий очерк истории государства и права Республики Беларусь (послеоктябрьский период)* (Eritome of the History of the State and Law of the Republic of Belarus: after-October period), Институт современных знаний: Минск, 1997, 24.

⁹² *Уголовно-процессуальный кодекс Республики Беларусь* (Code of Criminal Procedure of the Republic of Belarus), Репринт: Минск, 1994, 304.

parties, independence of the judiciary etc. This Code was amended on numerous occasions. Investigative body within the Ministry of Interior was established 1963, protocolar form of pretrial stage 1985, participation of the defense in investigations 1990, trial by a single judge 1993, and finally application of judicial examination legality and validity of arrest (*habeas corpus*) 1994.

After Belarusian independence democratic legislative reform took place. Firstly, 1992 doctrine and judicature developed Conception of Judicial Law Reform. Main goals of that conception were establishment of a legal system capable of ensuring normal functioning of a democratic state with rule of law, strengthening judicial independence and application of democratic principles in the criminal justice system.⁹³

This conception included adoption of the Code as one of the reform's objectives. At the same time Supreme Soviet of the Republic of Belarus decided to include military tribunals in the system of courts⁹⁴ and to establish Military Prosecutor's Office.⁹⁵

New Constitution which established democratic principles in criminal procedure, was adopted 1994. Moreover, Law of the Prosecutor's Office, Law of the Constitutional Court and Law of the Judicial System and Status of Judges were passed during the period 1993 through 1995.

The Code was adopted 1999 and came into force on the 1 January 2001. After passing the Parliament, Code contained provisions on trial by jury and bail (*sudovy prystaw*) but the President of the Republic while signing the Code excluded them. The Code signed by the President was thought to be complete but subsequent research revealed many defects. Consequently it was largely amended by the Law of the 4 of January 2003.⁹⁶

3 Code of Criminal Procedure

Code is divided into three parts: "General Provisions", "Pretrial Proceedings" and "Trial Proceedings". It contains 15 sections, 48 chapters and 476 articles.

This legislative act established new type of criminal procedure based on adversarial principles of due process and respect for human rights. There are clear distinctions in the functions of all participants in criminal procedure: prosecution, defense and judiciary. No person can have more than one of these functions at any given time.

Main objectives of the Code are embedded in its text: 1) establishment of fair legal procedure for criminal cases, 2) ensurance of human rights and legal interests of individuals or judicial persons who were incurred by a crime with physical, property or moral damages, 3) defense of suspects and accused persons.⁹⁷ It is applicable in the entire territory of the state.

4 Other Sources

Main law establishing the judicial system of an independent Belarus is Law on the Judicial System and Status of Judges of the 13 January 1995. This law became the part of the

⁹³ *О Концепции судебно-правовой реформы от 23/04/1992* (On Conception of Judicial Reform), Ведомасці Вярхоўнага Савета Рэспублікі Беларусь, 16 (1992), арт. 270.

⁹⁴ *О включении военных трибуналов в систему судов Республики Беларусь от 16/01/1992* (Decision of the Supreme Soviet of the Republic of Belarus on Inclusion of Military Tribunal in Judicial System of the Republic of Belarus), Ведомасці Вярхоўнага Савета Рэспублікі Беларусь, 7 (1992), арт. 130.

⁹⁵ *О военной прокуратуре от 16/01/1992* (On Military Prosecutor's Office), Ведомасці Вярхоўнага Савета Рэспублікі Беларусь, 7 (1992), арт. 131.

⁹⁶ Editor's note: Accordingly to National report it seems that president has power of veto on the legislative acts. See Constitution of the Republic of Belarus Article, 84. National Report does not contain precise title of the Law which amended the Code.

⁹⁷ Article 2.

Code by the amendments of the 16 October 2000⁹⁸ and it determines the applicability of *ratione temporis* of the Code. Law of the Prosecutor's Office of the 29 January 1993, deals with matters which are under the prosecutor's supervision. This law establishes the system of the Prosecutor's Office and requirements that prosecutors should meet. Law on Advocacy of the 15 June 1993 introduces the tasks (the main one is legal assistance) of this independent legal institution and regulates status of lawyers and their associates. Law of Procedure and Conditions of Taking a Person into Custody of the 16 June 2003 is applicable to detained, arrested and, in some cases, sentenced persons.

II Criminal Justice System

1 Investigating Services

Bodies and officials with the power to prosecute and investigate offenses prescribed by the Code are: 1) militia; 2) bodies of state security; 3) commanders of military units; 4) chiefs of correctional institutions; 5) border services; 6) customs bodies; 7) investigation services for financial crimes, 8) fire prevention services, 9) naval captains, commanders of airplanes (when outside of Belarus) and 10) heads of diplomatic representations.

There are four investigating services in Belarus: 1) Investigating Service of the Prosecutor's Office; 2) Investigating Committee of the Ministry of Interior; 3) Investigating Service of the Committee of State Security; and 4) Department of Financial Crimes of Committee of State Control.

Assistance with investigations is rendered by the National Central Bureau of Interpol. It was organized in 1993 within the Ministry of Interior. However, its activities are regulated only with acts of that body.⁹⁹

2 Prosecuting Authorities

According to the Code prosecutors (*prakuror*) carry out public criminal prosecutions. They exercise a special form of public work, supervision under the accurate and uniform implementation and execution of laws. System of Prosecutor's Office is centralized and strongly hierarchical. The General Prosecutor heads the system and is appointed by the President of the Republic with the consent of the Counsel of the Republic (the upper House of the Parliament). Deputies of the General Prosecutor are appointed by the General Prosecutor with the consent of the President. Heads of all other prosecutor's offices are appointed by the General Prosecutor. The term of office for all prosecutors is 5 years with the possibility of re-appointment.

This system has three levels of competence and specialized prosecutor's offices. Structure of the prosecutor's offices includes state, regional and *Minsk-City*, district (city) and inter-district level. Specialized prosecutor's offices are: military, inter-garrison and border prosecutor's offices, transport prosecutor's offices of *Minsk, Mogilev, Brest, Grodno, Vitebsk, Gomel, Baranovichi*, Orsha and correctional prosecutor's offices of *Orsha* and *Mogilev*.¹⁰⁰

3 Judging Authorities

⁹⁸ *Национальный реестр правовых актов Республики Беларусь*, 100 (2000), пер. No 2/205.

⁹⁹ Левитанов, В., Самарин, В., *Взаимодействие правоохранительных органов Беларуси и Национального центрального бюро Интерпола в Республике Беларусь* (Co-operation of Law Enforcement Bodies of Belarus with the National Central Bureau of Interpol in the Republic of Belarus), Юстиция Беларуси, 2 (2002), 32-34.

¹⁰⁰ Данилевич, А., Зайцева, Л., Мартинович, И., Острога, Е., Солтанович, А., *Судоустройство* (Judicial System), Амалфея: Минск, 2002, 275-276.

Judges of the Republic ought to be citizens of Belarus, at least 25 years of age with higher legal education, no criminal record and a record of service in the legal field for a period of no less than two years (or trained on probation during two years). Judges must also have passed qualifying exams. All judges are appointed by the President of the Republic (for Supreme Court judges' consent of the Counsel of Republic is necessary). There is no term of office for judges (the principle of tenure applies except for the first-time appointed judges who hold the office for a five-year term).

Judicial system includes courts of general jurisdiction, economic courts and the Constitutional Court. Criminal cases are tried by courts of general jurisdiction. System of the latter is based on three levels. Most cases are heard by judges of courts of the first instance, district (city) and inter-garrison courts. The second instance includes regional, *Minsk-City* and military courts. The Supreme Court is the highest court. Criminal cases are conducted by a panel of judges, military panel of judges and panel of the Supreme Court.

Belarusian judges enjoy judicial autonomy. They gather for judicial congresses to discuss draft legislation concerning their activities and to discuss other matters of relevance to the judiciary. Important role also play qualification boards of judges.

3.1 Courts in Pretrial Stage.

Courts in pretrial stage have no significant power. Judges hear a limited number of complaints. A judge in the pretrial stage also decides on referrals of individuals to medical centers for expert forensic psychiatric examinations.

3.2 Courts in Trial Stage.

District (city) courts try all cases that are not subject for trial in other courts. Inter-garrison courts try cases of military personnel. Regional, *Minsk-City* and military courts try crimes against peace and security of mankind, crimes against the state and capital crimes. The Supreme Court tries cases involving high state officials, judges and cases referred to it with the consent of the accused for ensuring impartiality. Higher courts can also take any case from the jurisdiction of subordinate courts.

III Participants in Criminal Procedure

The Code classifies participants of criminal procedure as follows: 1) court; 2) public bodies and officers of criminal prosecution; 3) participants defending their rights and interests, including representatives; and 4) other participants.

1 Judge

The Code includes the term "court" because criminal cases can be tried by a single judge or by a panel of judges. Main task of the judge is to ensure that justice is served and that there is a lawful resolution of criminal cases. Furthermore, judges hear complaints on the actions and decisions of criminal prosecutorial bodies.

A court is empowered to: 1) prepare and appoint court hearings; 2) try criminal cases; 3) review criminal cases in cassation procedure; 4) consider criminal appeals; 5) convert a sentence to execution; 6) decide matters concerning execution of sentences and clearing criminal records; 7) examine criminal cases with application of measures for individual security and medical treatment. It has certain powers in the pretrial stage too.¹⁰¹

2 Prosecutor

2.1 Public Prosecutor

¹⁰¹ Editor's note: National Report does not specify those powers.

As we have previously mentioned, public prosecutor conducts public criminal prosecutions and holds public office in the court. His/here participation in trial is obligatory except in cases of private prosecution. He/she can also sue on behalf of the victim who for any reason cannot exercise its rights.

During the pretrial stage public prosecutor is empowered to supervise the application of the law. In doing so it is independent and guided only by law with the following vested rights: 1) to begin a prosecution and refer it to the appropriate investigative body; 2) to investigate a criminal case; 3) to refuse to prosecute and 4) to exercise supervision and instruction for bodies (officials) of inquiry, investigators or subordinate prosecutors. Prosecution also hears complaints against the motions and decisions of prosecutorial bodies. It can apply, change and cancel coercive measures, prolong certain terms (of arrest, house arrest, etc.) and return criminal cases for additional investigation.

Prosecutors have certain judicial powers at the pretrial stage.¹⁰² Prosecutorial consent is necessary for arrest (*zakljuchenne pad vartu*), exhumation, search and seizure of mail, monitoring and recording of conversations, seizure of documents containing state secrets, search, house arrest, referral of an individual to a medical center for expert forensic medical examination, bail, examination of a private property and arrest of such property and the provisional dismissal of an accused from his post.

During the trial stage prosecutor has right to raise objections and petitions, express opinions, present evidence, apply coercive measures in order to ensure presentation of evidence in the court, participate in the court investigation of evidence, amend or add to the indictment or indict anew, dismiss the charge, object, and demand that his objections or other substantial information be added to the record. The public prosecutor also enjoys other powers prescribed in the Code.

2.2 Private Prosecutor

A private prosecutor is: 1) victim of a crime its representative or the representative of an individual in the justice system who sue to a court and support the charge in the court; and 2) victim, representative of a juridical person in cases of public or public-private charging who on its own support the charge in the court (when a public prosecutor dismissed public charge). Private prosecutor enjoys all rights of a public prosecutor.

3 Defense

3.1 Defendant

A defendant in the criminal procedure is called “accused” before delivery of the sentence, a “convict” when the sentence is condemnatory for the indicted offense or a lesser offense, or “acquitted” when the sentence is “not guilty”.

The Code also mentions suspects. All individuals in the above mentioned roles have right to legal assistance. Previously, a suspect could get legal assistance free of charge only in presence of an official. This provision was abolished 2003.¹⁰³

An accused is a person against whom a decision is issued at the beginning of criminal proceedings and in cases of private prosecution, a person against whom a judge accepted a criminal suit. The Code lists 28 rights of the accused. The most important of them are rights to: 1) be aware about charge; 2) receive a written list of its rights; 3) notify its relatives (via the body conducting criminal proceedings) about the place where is in custody; 4) have a defense counsel and the right to freely communicate with him; 5) present evidence, raise

¹⁰² Editor's note: It seems that separation is not consequently realized in the actual Code.

¹⁰³ See: *Закон Республики Беларусь о внесении изменений и дополнений в некоторые законодательные акты от 04/01/2003* (Law on amending of certain legal acts of the Republic of Belarus), Национальный реестр правовых актов Республики Беларусь, 8 (2003), пер. No 2/922.

objections and petitions; 6) communicate with native language or with the services of an interpreter; 7) plead guilty or not guilty; 8) object to motions of other participants in the criminal proceedings; 9) file complaints against its detention, arrest, house arrest or placement in a medical center for expert forensic psychiatric examination; 10) make a final statement, receive compensation for damages caused by illegal acts of the participants in the criminal justice system and be rehabilitated when falsely accused etc.

On the other side, accused has certain duties: 1) to appear after subpoena; 2) to obey legal orders of the body conducting criminal proceedings; and 3) to participate in investigative and other legal actions when it is necessary.¹⁰⁴

3.2 Defense Counsel

The Code uses term “defender” (*abaronets*). The defender is a person who defends the rights and legal interests of suspect or accused and provides legal assistance. Advocates (citizen of Belarus or foreign citizen if allowed so by the international treaty) can act as defenders. Close relatives or legal representatives of a suspect or accused can be allowed to act as defenders too. According to the Code defenders can participate in a case from the moment of actual detention, opening of a case, application of a coercive measure, recognition of a person as a suspect or issuance of a decision on beginning of criminal proceedings against a concrete person.

The participation of a defender is obligatory in the following situations: 1) at the request of the suspect or accused; 2) when the suspect or accused is a minor; 3) when the suspect or accused lacks knowledge of the language of criminal proceedings or is illiterate; 4) when the suspect or accused by virtue of his/her physical or psychological defect cannot exercise the right to defend itself; 5) when a person is suspected or accused of committing a especially grave crime; 6) when the interests of co-suspects or co-accused persons are in conflict and one of them has a defender. In the aforesaid situations, a defender (as a rule, an advocate) ought to be assigned. In certain situations free legal counseling is possible.

A defender is empowered to be informed of what crime its client is accused, freely communicate with suspect or accused, be present while the charge is announced to defendant, participate in the examination and in other investigative actions in which defendant participates, become acquainted with all protocols and decisions and copy out necessary information from them, examine suspects, accused persons, victims, witnesses, experts and specialists after the body conducting criminal proceedings gives consent, present evidence, object and raise complaints in order to protect interests of its client, gather information about the circumstances of the crime, participate in trial and in the review of a case in cassation procedure and in appeal or cassation procedure, file complaints against actions and decisions of the body conducting criminal proceedings, and to express opinions during court hearings. The defender can also exercise other powers determined in the Code and must do its utmost to find and present exculpatory evidence.

A defender is prohibited to: act against the interests of its client or prohibit enjoy its rights, plead its client guilty against its wishes, (*e.g.* without client’s permission reconcile with a victim), plead no defense or withdraw the client’s complaint, withdraw from the case or delegate its powers without the client’s consent.

Duties of a defender are to appear after subpoena or, within 24 hours, notify the body conducting criminal proceedings that he/she cannot appear, obey legal orders of the body conducting criminal proceedings, and maintain confidentiality of information received while providing legal assistance. The absence of a defender (except assigned defender) will not stop investigative actions if the suspect or accused do not object.

¹⁰⁴ Editor's note: In the National report those duties are not precisely described. It seems that the last mentioned duty includes duty to submit to the DNA and blood analysis as well as other body examination.

Defendant can at any moment dismiss a defender. This action has to be result of its free will and if in custody in the presence of the defender. Indigence on behalf of the accused is not a valid reason for dismissal of a defender. Participation of a defender is discontinued when defendant revoke an appropriate contract or dismiss the defender. Body conducting criminal proceedings dismisses a defender after discovery of facts that exclude his participation in a case. This body also accepts suspect's or accused dismissal of a defender. Defendant cannot dismiss a defender without the consent of the body conducting criminal proceedings.

4 Victim

4.1 Victim as Subject of Civil Claims

Civil claims of physical and legal persons as well as of the prosecutor for reimbursement of pecuniary damages arising as a result of moral, physical or property damage caused directly by a crime or a socially dangerous action of an insane person ought to be considered in the criminal proceedings.¹⁰⁵ The plaintiff is exempted from state duty.¹⁰⁶

Anyone who has sustained damage as a result of a socially dangerous action/crime of an insane person or its representative has the right to bring a civil suit against the accused or persons bearing material liability for its actions or actions of an insane person from the moment of initiation of the criminal proceedings until the end of courts proceedings.¹⁰⁷ Court is obliged to consider civil suit together with the criminal case.¹⁰⁸

Physical or legal person who brought the suit is recognized as the civil plaintiff. It has to be notified on the ruling on recognition as civil plaintiff and explained on its pertinent rights.¹⁰⁹

In adjudicating a sentence while delivering of a ruling on application of a forced precautionary measure and medical treatment, court depending on the proven grounds and amount of the civil suit, can satisfy the suit in full or in part or deny its satisfaction.¹¹⁰ If the criminal case has been discontinued at the stage of pretrial proceedings physical person or legal entity have right to bring a suit through civil proceedings.

4.2 Victim as Subject of Other Rights in Proceedings

Victim is a physical person who has been inflicted physical, property or moral damage by an action prohibited by criminal law.¹¹¹ It has right to: 1) be informed of the course of the proceedings; 2) present evidence and other materials that ought to be included in the criminal case and examined at court; 3) file challenges and petitions; 4) familiarize itself with minutes of the investigation and other procedural actions in which it participated and make remarks regarding recordings in minutes; 5) familiarize itself with the minutes of the court's sitting and make remarks to them; 6) copy excerpts from the file; 7) take part in court session; 8) submit complaints against actions and decisions of the bodies of criminal prosecution and of the court etc.¹¹²

Victim has duty to: 1) appear when summoned by the body conducting the criminal proceedings; 2) present evidence on demand of the body conducting the criminal proceedings and present objects, documents as well as samples that are in his/here possession for a contradictory examination; 4) be subject to examination about the crime allegedly committed

¹⁰⁵ Article 148.

¹⁰⁶ *Loc. cit.*

¹⁰⁷ Article 149.

¹⁰⁸ *Loc. cit.*

¹⁰⁹ Article 150(2).

¹¹⁰ Article 155(1).

¹¹¹ Article 49(1).

¹¹² Article 50.

in relation to it; 5) be subject to ambulatory expertise for checking its ability to correctly perceive and reproduce circumstances to be established in the criminal case if there are sufficient grounds to doubt that ability; 6) obey legal orders of the body conducting the criminal proceedings; and 7) not to divulge data on circumstances that have become known to it from the case.¹¹³

5 Other Participants

The Code enumerates as other participants certain persons that are not parties. Beside representatives they are: a) witness, b) expert, c) specialist, d) interpreter, e) person, which was present during the investigative action in order to certify its fact, process and results (*panjaty*).

The Code contains a list of persons who cannot be examined as witness: suspect; persons without capacity by virtue of age, physical or psychological defect; advocates, their probationers, legal consultants (on the information received while providing legal assistance); persons who became acquainted with the information during their participation in criminal proceedings in the role of defender, representative, civil plaintiffs or civil defendants; prosecutors, investigators, officials of inquiry (*daznavach*), court reporters (about information acquainted during their participation in criminal proceedings) and judges (about discussion in the consultation room); priest (regarding information containing in confession); doctors (about confidential medical data); persons who provided confidential assistance during the detection of a crime.

A witness has no right to have a representative, although this right is based on the provisions of the Constitution.¹¹⁴

IV General Principles of Criminal Procedure Legislation

The Code enacts following general principles of criminal procedure:

a) Legality. Judges and bodies of criminal prosecution must accurately apply provisions of the Code. Evidence received in breach of procedure determined by the Code is inadmissible and has no legal power.

b) Protection of human rights and freedom. The protection of these is duty of judges and bodies of criminal prosecution. Furthermore, they are obliged to promptly comply with the valid requests of participants of criminal proceedings. Nobody can be forced to carry out duties not determined in the Code.

c) Inviolability of personal freedom. This is a constitutional principle which means that nobody can be detained, arrested or referred to a medical center without observance of the procedure determined in the Code. None of the participants in the criminal procedure can be humiliated and severely treated or subjected to any experiments without its consent. Taking a person into custody must not threaten its life or health.

d) Inviolability of person's honor and dignity. Investigative or other actions that humiliate, disgrace or represent a danger to a person's life or health are prohibited.

e) Protection of privacy. Illegal interference in private life is inadmissible.

f) Inviolability of the home.

g) Publicity ("*galosnast*") of trial. Trials are public. Closed (secret) trials are possible 1) for the sake of ensuring the protection of state secrets or other secrets protected by law; 2) in cases of minors; 3) in cases of sexual crimes; and 4) in the interests of ensuring the security of the victim, witness or other participants in criminal proceedings and their relatives. After closed trials, only the verdict is publicly announced.

h) Presumption of innocence.

¹¹³ *Loc. cit.*

¹¹⁴ Article 62 of the Constitution.

i) Right to defense for suspects and accused. Suspects and accused can exercise this right personally or with a help of a defender.

j) Detailed, full and impartial investigation of a case. Body conducting criminal prosecution must gather all evidence and either establish guilt or acquit. A judge must maintain impartiality and objectivity. It is forbidden to force someone to testify.

k) Free evaluation of evidence. A judge and official of criminal prosecution while evaluate evidence are guided only by the law and their free conscience. There is no evidence with has prescribed weight.

l) Equality of persons before the law and equal protection of their human rights and legal interests.

m) Use of language in criminal proceedings. Criminal proceedings are conducted in Belarusian or Russian. Participants that lack knowledge of these languages can use services of an interpreter free of charge.

n) Independence of the judiciary and rule of law. Interference in judicial work is forbidden and entails liability.

o) Adversarial character of the judicial proceedings and equality of parties.

p) The principle of the supervision of higher courts over the actions of lower courts was excluded from the new Code but the principle of prosecutor's supervision in criminal proceedings still remains. Some of the aforementioned principles have constitutional grounds while others are special for criminal procedure.

V Course of Criminal Procedure

1 Pretrial Stage

Authorities of criminal prosecution are obliged to pass a ruling on initiation of a criminal case when legal conditions are met.¹¹⁵ Grounds for initiation of a criminal case are: 1) reports of citizens; 2) confession; 3) reports of officials of enterprises, institutions and organizations; 4) reports in mass media; and 5) direct detection of data indicating to the elements of crime by a body of criminal prosecution.¹¹⁶

Ruling on the initiation ought to contain: time and the place, indication of the competent authority, charge, article of criminal code *etc.* Copies of the ruling ought to be forwarded to a prosecutor within 24 hours. The applicant will be notified of the decision.¹¹⁷

If there are no grounds for initiation of criminal proceedings prosecutor or investigative authority ought to make a reasoned ruling on denial of initiation.¹¹⁸

After deliverance of a ruling, prosecutor is obliged to forward the case to the investigator, or the body of inquiry for a preliminary investigation or inquiry, or to begin itself with the performance of a preliminary investigation.¹¹⁹

Investigator ought to take all measures for full and objective investigation of the circumstances of the case and execute criminal prosecution in relation to which sufficient evidence indicating the commission of crime of the accused and making charges as well as data regarding the measures of suppression to be applied. Moreover, it has to transfer the case to the prosecutor for referring it to court. Investigator is also obliged to take precautionary measures for assuring presence of the participants in the proceedings.¹²⁰

¹¹⁵ Article 175.

¹¹⁶ Article 166.

¹¹⁷ Article 175(2).

¹¹⁸ Article 178(1).

¹¹⁹ Article 177.

¹²⁰ Article 36(2).

All decisions on the performance of investigative actions are to be taken by the investigator itself except in cases when law stipulates the obtaining of sanctions of the prosecutor and bear full liability for legal and timely execution thereof.¹²¹

Investigator has the right to initiate, discontinue or suspend criminal cases and deny their initiation, perform preliminary investigation and fulfill all investigative actions: inspection, examination, reconstruction of events; search, seizure, imposition of arrest and restriction on postal and telegraph sending, control and recording of communications; interrogation, confrontation, identification and checking of testimony; ordering of expertise involving the capacity of the accused and bringing of charges.

Having acknowledged that all investigative actions for the case have been fulfilled and the collected evidence is sufficient for forwarding the case to court, investigator has to notify the victim, civil plaintiff, civil defendant, their representatives and accused as well as its defense counsel and explain to them the right of familiarization with the materials of the case and for addressing petitions for conduction of additional preliminary investigation or taking other decisions on the case.¹²² After familiarization of those persons with the materials of the case, investigator ought to make a ruling on transfer of the case to the prosecutor for forwarding it to the court.¹²³

Prosecutor is obliged to forward the case to the court. In doing so it has the right to exclude certain charges or change qualification on a less grave crime as well as to discontinue the case in relation to accused.¹²⁴

2 Trial Stage

Having established that the procedural obstacles do not exist, judge decides on the appointment of a court's session.¹²⁵

Presiding judge conducts the court's session and in the interests of justice takes all measures for assuring the equality of the rights of the parties, preserving at the same time objectiveness and impartiality and creating the conditions required for a determination of the relevant facts. Presiding judge has also duty to assure the observance of the schedule of the court's sessions and explain to all participants their rights and duties and procedure for their application.¹²⁶

During the trial stage all evidence submitted by the parties is subject to direct examination by the court. Reading out the evidence given during preliminary investigation may be possible only in cases stipulated by the Code.¹²⁷

The court's trial begin with the announcement by the public prosecutor regarding the charges against the person and, in cases of private prosecution with the presentation of the statement by the person who has submitted it or by its representative.¹²⁸

The first to present evidence is prosecution. Public prosecutor and, in cases of private prosecution, person who has submitted the application present to the court the factual data which, in their opinion, confirms that the accused is guilty of the criminal action committed. List of evidence given in confirmation of the charges has to be submitted to the court by the public prosecutor in writing.¹²⁹

¹²¹ Article 36(3).

¹²² Article 255(1)(2).

¹²³ Articles 256, 257 and 260.

¹²⁴ Article 264.

¹²⁵ Article 281(1).

¹²⁶ Article 290.

¹²⁷ Article 286(2).

¹²⁸ Article 324(1).

¹²⁹ Article 325(1).

Court determines the manner of examination of the evidence with the parties' consent. It also delivers rulings on the issues of establishment or alteration of the procedure for examination of evidence.¹³⁰

If the accused pleads guilty and its confession is not disputed by any of the parties and causes no doubts for the court, after interrogation of the accused and clarification whether its confession has been forced, court has the right, with the consent of the parties, to limit itself to the investigation of the evidence indicated by the parties or declare the court's proceedings completed and transfer to judicial debates. In doing so court must explain to the parties that waiver of examination of evidence will entail inadmissibility of appeal or protest against the sentence on this ground.¹³¹ This type of proceedings is not applicable in cases of crimes committed by juveniles or crimes for which the law prescribes deprivation of liberty for a term of over 10 years, life imprisonment or the death penalty as well as to cases when at least one of the accused does not plead guilty and the case cannot be severed as a separate proceeding.¹³²

On completion of the court's proceedings, court passes to judicial debates which include statements of the prosecutor, victim, civil plaintiff, civil defendant and their representatives, defense counsel and the accused in its own defense. Upon their proposals court establishes the sequence of statements of the participants, but in all cases the first to speak is the prosecutor.¹³³ After completion of the court's debates, presiding judge gives the accused the last word. No question can be asked to the accused during his final statement.¹³⁴ Having heard the final statement of the accused, the court retires to the deliberation room for adjudicating the sentence.¹³⁵

When the case is before a panel of judges adjudication of the sentence ought to be preceded by deliberation of judges.¹³⁶ In resolving each issue none of the judges is entitled to abstain from voting. All issues are to be decided by the majority of votes. The presiding judge votes last.¹³⁷ An accused may be sentenced to capital punishment only by a unanimous decision of all judges.¹³⁸

The sentence of the court may be to convict or to acquit.¹³⁹ Convicting sentence has to be adjudicated on the condition that in the course of the court's proceedings the accused was found guilty of commission of the crime, which was confirmed by evidence examined by the court. Sentence may not be based on suppositions.¹⁴⁰

In adjudicating the convicting sentence with the prescription of punishment to the accused court must precisely determine its type, size and the beginning of calculation of the term for serving the punishment.¹⁴¹

The accused will be acquitted if: 1) the event of crime is absent; 2) the action of the accused does not constitute *corpus delicti*; or 3) participation of the accused in the commission of the crime has not been proven. Acquittal on any of the enumerated grounds means that the accused is found not guilty which entails its complete rehabilitation.¹⁴²

¹³⁰ Article 325(2).

¹³¹ Article 326(1).

¹³² Article 326(2).

¹³³ Article 345(1).

¹³⁴ Article 346.

¹³⁵ Article 348.

¹³⁶ Article 354(1).

¹³⁷ Article 354(2).

¹³⁸ Article 354(4).

¹³⁹ Article 355(1).

¹⁴⁰ Article 356(1).

¹⁴¹ *Loc. cit.*

¹⁴² Article 357.

Upon signing of the sentence court returns to the courtroom and presiding judge pronounces the sentence,¹⁴³ with information to the parties on the procedure and terms of familiarization with the record of the court's sitting as well as on the procedure and terms for appeal against the sentence.¹⁴⁴

If the accused is convicted to the death penalty presiding judge ought to inform it on the right to petition for a pardon.¹⁴⁵

3 Remedy Stage

a) The appellate court is the second-instance court in which a party may lodge a complaint or protest against the sentence, decision or ruling of the court of first instance that has not come into legal force.¹⁴⁶

Appeals and protests against the sentence of the court of first instance may be made within ten days from the day of the pronouncement of the sentence, whereas in relation to the convict kept in custody, within the same term from the day a copy of the sentence was delivered to it.¹⁴⁷

Within the term established for appellation against the sentence, the case may not be taken from the court on demand. Prosecutor as well as defendant, defense counsel and legal representatives, victim, civil plaintiff, civil defendant and their representatives have right to familiarize themselves in court with the proceedings for the appeal or protest.¹⁴⁸

Cases on appeal ought to be considered by the appellate panel of not less than three professional judges one of which is the presiding judge.¹⁴⁹

Appeal court may be attended by the prosecutor, defense counsel, civil plaintiff, civil defendant, victim or their representatives.¹⁵⁰ Court decides on the issue of participation of the convict in the court. Defendant who appeared in court is always allowed to give explanations.¹⁵¹ The participation of the person sentenced to the death penalty and his defense counsel in the appellate court proceedings is mandatory.¹⁵²

Failure to appear of the persons who have been timely notified to appear, does not prevent its consideration except in cases mentioned in the Code.¹⁵³

Witnesses and experts examined in the court of first instance may be summoned to the court of appeal for giving explanations on the essence of their testimony or conclusions if the court recognizes their summons necessary on petition of the parties or on its own initiative.¹⁵⁴

When considering the case, the court has the right, on petition of the parties, to: 1) appoint a forensic psychiatrist; 2) appoint a repeated or additional forensic expertise if it is possible to make it on the materials available in the case; and 3) demand documents connected with the state of health, family status and data on previous convictions of the convict.¹⁵⁵

¹⁴³ Article 365(1).

¹⁴⁴ Article 365(3).

¹⁴⁵ Article 365(5).

¹⁴⁶ Article 6(44).

¹⁴⁷ Article 374(1).

¹⁴⁸ Article 374(2).

¹⁴⁹ Article 379.

¹⁵⁰ Article 382(1).

¹⁵¹ Article 382(2).

¹⁵² Article 382(3).

¹⁵³ Article 382(4).

¹⁵⁴ Article 384(5).

¹⁵⁵ Article 384(6).

Court delivers one of the following decisions: 1) to leave the sentence unaltered; 2) to revoke the sentence and remand the case to the court of first instance; 3) to cancel the sentence and discontinue the case; or 4) to alter the sentence.¹⁵⁶

Court may mitigate punishment prescribed by the court of first instance or apply the law of a less serious crime, alter the treatment of serving the punishment both towards its mitigation and aggravation, recognize the person as a special dangerous recidivist, establish the actual beginning of the count of the term of serving of punishment and decide other issues connected with alteration of the sentence, but it is not entitled to enhance punishment or apply the law on a graver crime.¹⁵⁷

Sentence may be revoked in connection with the need to apply the law on a more serious crime or because of the leniency of punishment only in cases when the prosecutor has made a protest on these grounds or an appeal has been lodged by the victim or by its representative.¹⁵⁸

b) Court of review is a court which through review procedure, considers an appeal against a legally final and enforceable sentence, definition or ruling of the court of first instance or appellate court.¹⁵⁹

Protests for review may be lodged by: 1) the Chairman of the Supreme Court, the General Prosecutor and their deputies; 2) chairmen of the *Oblast* and *Minsk City* courts and their relevant prosecutors.¹⁶⁰

Review of the sentence and ruling of the court in connection with the required application of the law on a more serious crime, leniency of punishment or on other grounds, acquittal or ruling of the court on discontinuance of the case during one year after their legal finality and enforceability.¹⁶¹

Prosecutor takes part in consideration of the case through the review procedure. Defendant, legal representatives of juveniles, victim and its representative, civil plaintiff, civil defendant and their representatives may be invited to give explanations to the review court. Persons invited to court are assured the opportunity to familiarize themselves with the protest or conclusion.¹⁶²

As a result of the consideration of the case through the review procedure, the court may: 1) leave the protest unsatisfied; 2) cancel the sentence and all subsequent judicial definitions and rulings and discontinue the case or remand it for a new consideration by the court; 3) cancel the appellate ruling as well as the subsequent judicial rulings if they have been made and transfer them for a new consideration through appeal procedure; 4) cancel rulings made through the review procedure and leave the sentence of the court and appellate ruling in force with or without modification; and 5) make amendments in the sentence or ruling of the court.¹⁶³

While considering the case on review court may mitigate the punishment prescribed for the convict or apply the law of a less serious crime, alter the treatment of serving the punishment, both towards its mitigation and towards its enhancement, recognize the convict as a special dangerous recidivist, establish the actual beginning for counting the term of serving of punishment and decide other issues connected with alteration of the sentence, but has no right to enhance the punishment or apply the law on a graver crime.¹⁶⁴

¹⁵⁶ Article 385(1).

¹⁵⁷ Article 386(1).

¹⁵⁸ Article 386(2).

¹⁵⁹ Article 6(45).

¹⁶⁰ Article 404(2).

¹⁶¹ Article 406.

¹⁶² Article 411.

¹⁶³ Article 412(1).

¹⁶⁴ Article 414(2).

Having recognized the acquittal of the accused or discontinuance of the case in the court of first or appeal instance as incorrect as well as the punishment prescribed for the convict as non-correspondent to the committed act because of its leniency, the court of review has right to cancel the sentence or ruling and forward the case for a new consideration to the court of first instance or court of appeal, respectively.¹⁶⁵

c) The sentence or ruling of the court that have come into legal force may be cancelled and the proceedings of the case renewed on new discovered evidence.¹⁶⁶

The grounds for renewal of proceedings of the criminal case based on new discovered evidence are: 1) evidence on the false testimony of the victim or witness and conclusion of the expert contained in the sentence of the court that has come into legal force as well as forgery of material evidence, records of investigative and judicial actions and other documents or obviously incorrect translations entailing the adjudication of an unlawful sentence or ruling; 2) criminal actions of the body of inquiry, inquirer, investigator or prosecutor established by the sentence of the court that has come into legal force entailing the adjudication of unlawful sentence or ruling; 3) criminal actions of the judges committed by them during consideration of the given case as established by the sentence of the court that has come into legal force; and 4) other circumstances established by the verification or investigation that were unknown to the court when it adjudicated the sentence or ruling which taken alone or in conjunction with the previously established circumstances *in favorem* of the convict or to the commission by it of a different crime as to the degree of its gravity as compared to the crime for which it has been convicted or on guilt of the acquitted person or a person in relation to whom the case was discontinued.¹⁶⁷

Review of the sentence on newly disclosed circumstances for the benefit of the convict is not be limited to any terms.¹⁶⁸

Death of the convict is not an obstacle for the renewal of proceedings on new discovered evidence for the purpose of rehabilitation.¹⁶⁹

Review of the acquittal or ruling on discontinuance of the case as well as review of the sentence on the bases of leniency of punishment or necessity of application of the law for a more serious crime is allowed only within the statute of limitations for bringing criminal liability and not later than one year since the day when new evidence is discovered.¹⁷⁰

Right to initiate proceedings based on new discovered facts belongs to the prosecutor.¹⁷¹ Conclusion of the prosecutor on the necessity to renew proceedings is to be considered by courts which are *ratione materiae* competent for the renewal.¹⁷²

Having considered the conclusion of the prosecutor on the renewal of proceedings court passes one of the following rulings: 1) on cancellation of the sentence ruling of the court and transfer of the case for a new investigation or new court's proceedings; 2) on cancellation of the sentence or ruling of the court and discontinuance of the case when a new investigation or court's proceedings are not required for the delivery of the final decision of the case; or 3) on rejection of the conclusion of the prosecutor.¹⁷³

4 Special Forms of Procedures

The Code of Criminal Procedure provides certain specials forms of procedure.

¹⁶⁵ Article 414(3).

¹⁶⁶ Article 418(1).

¹⁶⁷ Article 418(2).

¹⁶⁸ Article 419(1).

¹⁶⁹ Article 419(2).

¹⁷⁰ Article 419(3).

¹⁷¹ Article 420(1).

¹⁷² Article 422(1).

¹⁷³ Article 423.

4.1 Procedure for Minors

All provisions concerning underage persons (less than eighteen years of age) who committed crimes are compiled. Interests of the minor are represented by two subjects (defender and legal representative). The latter can participate in criminal proceedings as of the first examination (questioning). The questioning is limited to 2 hours without a break, 4 hours per day. Such coercive measures as detention, arrest and house arrest can be applied to a minor only if he/she has committed a misdemeanor or felony. The Code contains provisions about special courts for minors or specialized judges for such cases, but unfortunately this article is not implemented.

4.2 Procedure for Application of Measures of Security and Medical Treatment

The former Code provisions concerning such measures were spread all over the text. Such measures are applied to persons who committed an act dangerous to the public and are included in Criminal Code: insanely or disturbed mentally after the commission, and when these persons are dangerous to public.

4.3 Accelerated Procedure

Certain authors recognize this procedure as a third type of inquiry, but lawmakers described it as a special form of procedure. This form is applied only to a restricted number of cases prescribed in the Code when the accused pleads guilty and the facts regarding criminal offense are obvious.

4.4 Procedure on Compensation of Damages Caused by Illegal Acts of Bodies Conducting Criminal Proceedings

The appearance of such proceedings shows the liberalization of Belarusian criminal procedure. Damage from illegal detention, arrest, house arrest, provisional dismissal from office, placement of a person into medical center for expert forensic medical examination, conviction, application of measures of security and medical treatment is to be compensated without regard to the guilt of body conducting criminal proceedings.

Unfortunately, lawmakers excluded from the draft of the Code provisions concerning co-operation with foreign institutions of justice. Extradition, mutual assistance, transfer of convicts to the state of their citizenship is not regulated at all or is regulated with ministerial acts, acts of the USSR and with a small number of international treaties.¹⁷⁴

VI Evidence

1 General Provisions

Collection of evidence is of the utmost importance during decision-making proceedings on reporting of the crime, summary proceedings, inquiry, preliminary investigation and court hearings. Bodies of criminal prosecution and courts are empowered on their own initiative or *ad seciam* to gather evidence prescribed in the Code by means of conducting investigative and court actions, demanding such evidence from officials and individuals as well as inspections and revisions etc.

¹⁷⁴ Samarin, V., *Сотрудничество органов Республики Беларусь, ведущих уголовный процесс, с учреждениями юстиции иностранных государств по уголовным делам: Студентų tarptautinių mokslinių konferencijų medžiaga* (Co-operation of Belarusian Bodies Conducting Criminal Proceedings with foreign institutions of justice in criminal matters: International Science Conference of Law Students), Vilnius, 9-10 April 2003, Vilnius, 2003, 139-145.

A defender can present evidence and gather information, request letters of information and other documents or their copies. Evidence can also be presented by the public or private prosecutor, suspect, accused, defender, victim, civil plaintiff and defendant, representatives and by any other person.

Some investigative actions and gathering of evidence are allowed before the opening of a case (answers, demand of additional documents, examination of the crime scene, expertise, detention and personal search). During the collection of certain evidence two persons must participate as witnesses in the investigative action in order to certify facts, process and results.

Gathered evidence ought to be comprehensive, fully and impartially reviewed by the body conducting criminal proceedings and then evaluated in the context of its relevancy, admissibility and reliability. Evidence must be sufficient in order to establish the truth.

2 Means of Evidence

The Code provides the following means of evidence: 1) statements of suspects, accused, victim or witness, 2) expert opinion, 3) material evidence, 4) protocols of investigative actions, court hearings and operational search actions, other documents and any other information carrier received in accordance with the Code. The list of sources of evidence is not conclusive. On the other side, there is no regulation of the weight of evidence obtained by foreign institutions of justice on the request of Belarusian bodies conducting criminal proceedings. Only court can decide what evidence is admissible, evaluate evidence and deliver the sentence.

3 Interference with the Right to Privacy

The right to privacy is laid down in the Constitution and is one of the principles of Belarusian criminal procedure. Prosecution and gathering evidence can breach this right only according to the Code. During investigative actions this right is not protected judicially, but prosecutorial consent is necessary for seizure and search of mail, search, and conversation monitoring and recording. Since this can undermine the privacy of individuals, investigator and the official of inquiry must do their best to uphold the protection of privacy.

3.1 Search and Seizure

Search and seizure of documents containing state secrets can only be carried out with the prosecutor's consent. Other types of seizure are carried out on the basis of the decision of the investigator. In extraordinary situations, search can be done without such consent but with notification of the prosecutor within 24 hours. However, search can be executed only with the witnesses present during investigative action. Personal searches can be held without prosecutorial consent and without the participation of the aforementioned persons during detention or arrest and also when there is probable cause during the search of room. During personal searches, only persons of the same sex are to be present.

3.2 Body Search and Interrogation

Body searches can be carried out on a suspect, accused or victim (but only when it is the victim of a felony). This investigative action is held by the investigator (official of inquiry). Participation of a medical doctor was previously obligatory, but lawmaker amended the Code 2003. Its participation, as well as other specialists, is optional now. When an examinee is of another sex, examination is held only by a medical doctor with presence of persons of same sex.

Interrogation is obligatory only when person receives a subpoena. The new Code limits the time of interrogation to 8 hours for a day with a break for an hour after 4 hours of

examination. The suspect, accused, witness and victim can be examined (but regarding the suspect and accused it is a right and not a duty). The suspect and accused can not be charged for false statements or refusing interrogation. The examinee has the right to write its statement by hand. Nevertheless, they are to be familiarized with the content of the protocol and to sign it.

VII Precautionary Measures

1 General Provisions

No one can be detained on suspicion of commission of a crime or taken into custody as a measure of suppression, or placed into a medical institution for judicial psychiatric or other expertise in the absence of legal grounds for this and in violation of the procedure stipulated by the Code.¹⁷⁵

Prosecutor and court are obliged to release immediately every person who is illegally detained or deprived of freedom, or illegally placed into a medical institution or kept in custody in excess of the term stipulated by law or their sentence.¹⁷⁶

Measures of procedural coercion (*меры процессуального принуждения*) are: detention (*задержание*), measures of suppression (*меры пресечения*), and other measures of procedural enforcement.

2 Particular Measures

Detention may be applied only to a person suspected of commission of a crime for which a punishment of deprivation of freedom, keeping in a disciplinary military unit or arrest may be prescribed.¹⁷⁷

Detention may not last more than 72 hours from the time of detention on which expiration the detained person must be released from custody or a measure of suppression must be elected with regard to it as stipulated by the Code.¹⁷⁸

Measures of suppression is are forcible measures applied to the suspect or accused for preventing them from commission of actions prohibited by criminal law or hindering the criminal proceedings as well as for assuring execution of the sentence.¹⁷⁹ Those are: 1) written undertaking not to leave the place and to behave oneself duly; 2) personal guarantee; 3) transfer of a serviceman under the supervision of the commandment of the military unit; 4) placement of a juvenile under the care; 5) bail; 6) home arrest; and 7) taking into custody.¹⁸⁰

Measures may be applied by investigative bodies, prosecutor or court only in case when materials collected for the case give sufficient grounds to assume that the suspect or accused may: escape to the bodies conducting the criminal proceedings, hinder the investigation of the case or consideration of it by the court including by influence on persons participating in the criminal proceedings, conceal or falsificate materials having importance for the case, fail to appear without justified reasons when summoned by bodies conducting the proceedings, commit an action prohibited by criminal law, and prevent execution of the court's sentence.¹⁸¹

When issue of the necessity of application of those measures to a concrete suspect or accused is solved, bodies conducting criminal proceedings must take into account the gravity

¹⁷⁵ Article 11(1).

¹⁷⁶ Article 11(2).

¹⁷⁷ Article 107(2).

¹⁷⁸ Article 3(3).

¹⁷⁹ Article 116(1).

¹⁸⁰ Article 116(2).

¹⁸¹ Article 117(1).

and the character of suspicion or charges, personality of the defendant, its age and state of health, occupation, family and property status, availability of permanent residence and other circumstances.¹⁸²

Custody as a measure is applied only in relation to a person suspected of or charged with commission of the crime for which the law stipulates punishment represented by deprivation of freedom for a term of over two years.

In relation to persons suspected of or charged with commission of a grave crime, measure of custody may be applied on the basis of the danger of the crime alone. In exclusive cases this measure may be applied in relation to a person suspected or accused of crimes for which the law stipulates punishment of deprivation of liberty for a term of up to two years if they do not have permanent residence in the territory of the State, or if their personality has not been established, or they have escaped bodies of criminal prosecution or the court.¹⁸³ Keeping in custody while the pretrial proceedings, may not exceed two months.¹⁸⁴

When required, this term may be extended by the regional (district) or town prosecutor or a prosecutor of equal status, or by their deputies in cases when it is not possible to complete investigation, and when there are no grounds to alter or cancel this measure of suppression for up to three months.

A further extension of the term may be executed only by reason of special difficulty of the case by the prosecutor of the *Oblast* or the City of *Minsk* or prosecutor of equal status up to six months.¹⁸⁵

Extension of the term of custody in excess of six months can be allowed only in cases of persons charged with the commission of grave crimes as well as in criminal cases of special complexity. Such extension can be executed by the deputies of the General Prosecutor up to 12 months and the by the General Prosecutor up to 18 months.¹⁸⁶

After forwarding criminal case to the court the extension of the term in custody will be executed by the court which conducts the trial. Anyway, the accused may not be kept in custody on the criminal case processed by the court of justice over 6 months whereas in cases of grave crimes as well as in cases of special complexity over 12 months.¹⁸⁷

For the purpose of assuring the procedure of investigation and trial as well as for proper execution of the sentence, body of criminal prosecution or court has right to impose other measures on the suspect or accused: obligation to appear, compelled appearance, temporary dismissal from its position and imposition seizure.¹⁸⁸

Authorities of criminal prosecution or court have also right to apply to the victim, witness or other participant's coercive procedural measures: such as compelled appearance and fine.¹⁸⁹

¹⁸² Article 117(2).

¹⁸³ Article 126(1).

¹⁸⁴ Article 127(1).

¹⁸⁵ Article 127(3).

¹⁸⁶ Article 127(4).

¹⁸⁷ Article 127(10).

¹⁸⁸ Article 128(1).

¹⁸⁹ Article 128(2).

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Chapter 2

Criminal Procedure System of the Republic of Estonia*

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I Sources

1 General Observations

The Estonian Criminal Justice System has been designed, for the most part, according to the European continental models. The Soviet-style Code of Criminal Procedure was revised after Estonia regained its independence and, in 1994, Parliament (*Riigikogu*) passed extensive amendments. The new Code of Criminal Procedure was adopted in 2003 and will enter into force on 1 July 2004. Main sources of criminal procedure law are: 1) the Constitution of the Republic of Estonia;¹⁹⁰ 2) generally recognized principles and provisions of international law as well as international agreements to which Estonia is a party; 3) the Code of Criminal Procedure and other legislative acts which provide for criminal procedure; 4) decisions of the Supreme Court for issues which are not regulated in other sources of criminal procedure law but which arise in the application of the law. The criminal justice system is shaped with legislative acts concerning the structure, organization and functions of courts and public prosecution as well.

2 Historical Overview¹⁹¹

3 Code of Criminal Procedure

The Code of Criminal Procedure (adopted on 6 January 1961, entered into force 1 April 1961 revised and amended in 1994, hereinafter: ECCP) and the new Code of Criminal Procedure¹⁹² (adopted by the Parliament (*Riigikogu*) on 12 February 2003, will enter into force on 1 July 2004, (hereinafter: NCCP).¹⁹³

4 Other Sources

See supra 1 as well as Courts Act,¹⁹⁴ Prosecutor's Office Act,¹⁹⁵ Code of Criminal Court Appeal and Cassation Procedure,¹⁹⁶ etc.

* National report dated 3 October 2003.

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¹⁹⁰ Official Gazette, RT, 06/07/1992, 26, 349.

¹⁹¹ Editor's note: National reporter omitted historical overview of Estonian criminal procedural system. Therefore deeper roots of criminal procedure are not included in this paper. However, it is obvious that recent history of criminal procedure of this country was predominantly shaped with Soviet doctrine. See national reports of Lithuania, Latvia and other ex Soviet countries.

¹⁹² *Ibid.* RT I, 13/03/2003, 27, 166.

¹⁹³ Official Gazette, RT I 2002, 85, 503.

¹⁹⁴ *Ibid.* RT I 2002, 64, 390.

¹⁹⁵ *Ibid.* RT I 1998, 41/42, 625.

¹⁹⁶ Passed of 21 June 1993 with numerous further amendments. Consolidated text RT I 2002, 83, 488.

II Criminal Justice System

1 Investigating Services

Pretrial investigation is conducted by the following bodies within the limits of their competence: 1) Police Board, Central Criminal Police and police prefectures;¹⁹⁷ 2) Security Police Board; 3) prisons and the expulsion centre;¹⁹⁸ 4) border guard authorities; 5) customs offices; 6) Headquarters of the Defense Forces; 7) Tax Board;¹⁹⁹ 8) Competition Board.²⁰⁰

Moreover, officials with the authority of preliminary investigators with the competence to apply expedited procedure and conduct investigative activities which allow no postponement such as inspection of the scene of the criminal offense, search, seizure, physical examination, interrogation of a suspect, questioning of a victim or witness, taking of comparative samples, and at the request of a preliminary investigator or prosecutor, conduct other investigative activities (19 April 2000 entered into force 1 July 2000-RT I 2000, 35, 222),²⁰¹ are: 1) officials of environmental supervision agencies in cases of violations of the requirements of protection and use of the environment and natural resources; 2) officials exercising supervision over fire safety in cases of violations of fire safety requirements; 3) supervisory officials of the Technical Inspectorate in cases of violation of the rules concerning industrial, construction and mining operations, and of the driving rules as well as operational and safety rules of machines; 4) county and city labor inspectors in cases of violations of occupational, health and safety rules;²⁰² 5) physicians of county health protection offices in cases of violations of the rules of epidemics and epizootic prevention;²⁰³ 6) consumer protection supervision officials in cases of violations of trade rules;²⁰⁴ 7) captains of maritime vessels or aircrafts during voyages in cases of criminal offenses committed on board ships under their navigation or on board aircraft under their operation.

Investigative jurisdiction may be altered by a prosecutor on the bases provided for in §120 (2) (10) of the ECCP. Investigative jurisdiction determined by a prosecutor may be altered only by a higher-ranking prosecutor. A prosecutor of the Public Prosecutor's Office may alter investigative jurisdiction by its reasoned order, if he or she deems it necessary. A head of the investigation cannot alter investigative jurisdiction determined by a prosecutor of the Public Prosecutor's Office (19 April 2000, entered into force 1 July 2000-RT I 2000, 35, 222).

2 Prosecuting Authorities

Organization and operations of prosecution is regulated with the Prosecutor's Office Act and with the ECCP. This body is a governmental agency within the Ministry of Justice, the duty of which is to: 1) supervise the legality of the registration of reports of criminal offenses and legality of pretrial criminal proceedings;²⁰⁵ 2) supervise legality of surveillance

¹⁹⁷ Accordingly to the new Code of Criminal Procedure (NCCP) police prefectures will lose the function from 01/07/2004.

¹⁹⁸ 15 December 1999, entered into force 1 January 2000-RT I 1999, 95, 845. Accordingly to the NCCP prisons and the expulsion centre will lose the function from 01/07/2004.

¹⁹⁹ 20 December 2000 entered into force 1 April 2001-RT I 2001, 3, 9.

²⁰⁰ 18 September 2002 entered into force 24 October 2002-RT I 2002, 82, 480.

²⁰¹ Accordingly to the NCCP these institutions will conduct only investigative activities which allow no postponement.

²⁰² Accordingly to the NCCP this function will be of Labor Inspectorate.

²⁰³ Accordingly to the NCCP physicians of county health protection offices will lose the function from 01/07/2004.

²⁰⁴ Accordingly to the NCCP consumer protection supervision officials will lose the function from 01/07/2004.

²⁰⁵ Act of 19 April 2000 entered into force 1 July 2000-RT I 2000, 35, 222.

conducted by surveillance agencies pursuant to the Surveillance Act,²⁰⁶ 3) represent public prosecution; 4) perform duties arising from international cooperation; 5) perform other duties imposed on the Prosecutor's Office by law.²⁰⁷

The prosecutor represents public prosecution in court proceedings. The division of the prosecutorial function is based on territorial competence between prosecutors of the Public Prosecutor's Office and prosecutors of the county and city prosecutor's offices. Prosecutors are independent while performing their duties and act only pursuant to the law and according to their conscience. The Chief Public Prosecutor directs the Prosecutor's Office and performs other duties imposed on it by law. Prosecutors of the Public Prosecutor's Office represent public prosecution before the Supreme Court and circuit courts. Prosecutors of the county and city prosecutorial offices supervise the legality of pretrial procedure in criminal matters, represent public prosecution before the county and city courts and perform other duties imposed on them by law. Prosecutors of county and city prosecutorial offices are senior county or city prosecutors, county or city prosecutors and assistant prosecutors.

The Chief Public Prosecutor is appointed for a term of five years by the Estonian Government on the proposal of the Minister of Justice taking into account the opinion of the Legal Commission of the Parliament.

Senior county or city Prosecutors are appointed for a term of five years by the Minister of Justice on the proposal of the Chief Public Prosecutor.

Prosecutors of the Public Prosecutor's Office are appointed by the Minister of Justice on the proposal of the prosecutors' competition and evaluation committee for an unlimited period. County and city Prosecutors and the assistant prosecutors are appointed by the Chief Public Prosecutor on the proposal of the prosecutors' competition and evaluation committee for an unlimited period.

As of September 2003, there are 164 county and city prosecutors, while there are 24 state prosecutors, and the Chief Public Prosecutor.

3 Judging Authorities

The Estonian court system is governed with the Chapter 13 of the Constitution, as well as with the Courts Act (2002). Justice is exclusively administered by courts of law. The courts are independent in their work and administer justice in accordance with the Constitution and the laws.

The Estonian court system consists of the following three levels: 1) County and City Courts, and Administrative Courts as a trial courts; 2) District Courts as a courts of appeal; 3) Supreme Court as a court of last resort and court for judicial constitutional review.

Courts of the first instance and courts of appeal are administered in cooperation with the Council for the Administration of Courts and the Ministry of Justice. The Supreme Court is legally as well as financially independent.

Through its Courts Department, the Ministry of Justice maintains primary responsibility for policy, planning, and administration of the judicial branch. However, although the powers of the new Council for Court Administration are mostly of an advisory character, the Minister is required to seek the Council's consent for a number of important policy and administrative decisions.²⁰⁸

Provided that it is effectively implemented, this arrangement may achieve a needed improvement in the governance and administration of the judicial branch. For example, the

²⁰⁶ RT I 1994, 16, 290; 1995, 15, 173; 1996, 49, 955; 1997, 81, 1361; 93, 1557; 1998, 47, 698; 50, 753; 51, 756; 61, 1981; 1998/99, 1575; 101, 1663; 1999, 16, 271; 31, 425; 1995, 845; 2000, 35, 222; 40, 251; 102, 671; 2001, 3, 9; 7, 17; 58, 353; 68, 407; 2002, 56, 350; 61, 375.

²⁰⁷ § 1 of the Prosecution Act.

²⁰⁸ Courts Act, § 40.

Ministry has, until now, failed to develop standard norms for caseloads, which produce inefficiencies in planning for other areas such as court technology and equipment. The new system has the potential to cure such problems if implemented comprehensively and with full political and bureaucratic support.

The new Council for Court Administration consists of: 1) the Chief Justice of the Supreme Court, as the Council's President *ex officio*; 2) five judges elected by the General Assembly of judges; 3) two Members of Parliament; 4) a licensed advocate appointed by the Bar Association; 5) the Prosecutor General (or an appointee); and 5) the Legal Chancellor (or an appointee). The Minister of Justice participates in the meetings of the Council but without the right to vote. The Minister or the Chief Justice of the Supreme Court convenes meetings of the Council; the official convening the meeting decides on its agenda. The Minister of Justice must seek the consent of the Council in order to: 1) determine territorial jurisdiction and seat of courts; 2) determine the number of judges in district and regional courts; 3) appoint and remove court presidents; adopt court rules; determine the number of judicial apprentices and appoint apprentices; 4) decide on additional payments to judges who consent to reappointments to a different court in the interests of justice.

In addition, the Council's consent is required for the determination of a number of lay assessors, and to court presidents and court administrative directors while determining the structure of their courts.²⁰⁹ The Council for Court Administration is entitled to render non-binding opinions concerning candidates for vacant Supreme Court Judge positions; any decrease of the number of courts or judges; release of judges on health grounds; release of judges after non-judicial service for the Ministry of Justice or the Supreme Court when there are no vacant judicial positions; and release of judges due to incompatibility of continued judicial service with other engagements.²¹⁰

Therefore, creation of the Council for Court Administration therefore, represents an important step towards limiting the unnecessarily broad influence of the Ministry of Justice over the judiciary's administration. However, the new requirements for joint decision-making with the Ministry combined with a lack of administrative capacity (the Council will not have an independent budget or support staff, but rather will be serviced by the staff of the Ministry) may hinder the independent and efficient work of the Council.

Lack of independent budgetary authority particularly threatens to undercut otherwise positive developments initiated by the new Courts Act. The Ministry of Justice retains primary responsibility for district and regional court budgets, and there are neither objective criteria nor guarantees for funding levels to guide the Ministry in this process. Furthermore, there is no dedicated chapter for courts in the State budget; the chapter allocated to the Ministry of Justice includes a separate budget line for district and regional courts.

Court managing directors plan and prepare budgets that, after approval by the court president, are submitted to the Ministry of Justice and then to the Ministry of Finance for approval or revision.²¹¹ After submission, court officials do not have the opportunity to make further comments. More substantial participation of court presidents or managing directors in the budget process would help to ensure that courts' legitimate infrastructure needs are met.

One significant development is a new provision in the Courts Act that entitles the Council for Court Administration to adopt principles for drawing up and changing court budgets.²¹² The Ministry of Justice is obliged to take the adopted principles into account in

²⁰⁹ *Loc. cit.*

²¹⁰ *Ibid.* § 41(3).

²¹¹ State Budget Act, §§ 11-15, RTI 1999, 55, 584 as amended by RT I 2000, 55, 360.

²¹² Courts Act § 41(2).

determining the court budgets²¹³ although it is not clear how they will limit the Ministry's scope of discretion.

The new Courts Act also provides that the Chief Justice submits an annual report to the Parliament on the state of affairs in the judicial system.²¹⁴ As the reports will be publicly available, they may encourage a certain measure of public scrutiny of operations of the judicial system and provide an opportunity for public feedback about courts' performance and their legitimate organizational needs.

3.1 Courts in Pretrial Stage

Courts have very limited functions in this stage: decision to arrest and confinement, permission to perform exceptional surveillance activities referred to in § 121 of the Surveillance Act and refusal to grant such permission ought to be formalized with a reasoned ruling of a county or city court judge.

Search of a notary's office for regarding notaries act, or other document which contains secrets of a notaries act, or seizure of such document can only be performed on the basis of permission or ruling of a county or city court.

Other searches are conducted on the basis of an order of a preliminary investigator with the consent of a prosecutor only. In cases that allow no postponement, a preliminary investigator may conduct a search even without the consent of a prosecutor. However, the prosecutor ought to be notified of the conduct of the search within one twenty-four hour period.

3.2 Courts in Trial Stage²¹⁵

III Participants in Criminal Procedure

1 Judge

The Estonian Constitution provides that justice is administered exclusively by the courts that are independent in their work. Consequently, they are bound only by the Constitution and laws.²¹⁶ This principle is strengthened in the ECCP²¹⁷ although that can be deemed unnecessary because of the Constitutional general rule. Moreover, judges are obliged to defend constitutionality, which is certainly applicable to criminal procedure.²¹⁸

Constitution generally determines the status of judges,²¹⁹ the court system²²⁰ and immunities.²²¹ Those provisions are quite comparable with other modern democratic legal

²¹³ *Ibid.* § 43(1).

²¹⁴ *Ibid.* § 27(3).

²¹⁵ Editor's note: See *infra* V 2.

²¹⁶ See Article 146 of the Constitution.

²¹⁷ See § 12. Administration of justice solely by the court

(1) Justice in criminal matters is administered solely by the courts.

(2) A person may be convicted for the commission of a criminal offense and punished pursuant to criminal procedure solely by a court judgment and in accordance with the law.

Editor's note: The numbers of articles and paragraphs without mark refer to the ECCP.

²¹⁸ See Article 15(2) of the Constitution. The courts shall observe the Constitution and shall declare as unconstitutional any law, other legal act or procedure which violates the rights and liberties laid down in the Constitution or which is otherwise in conflict with the Constitution.

²¹⁹ Article 147 [Term, Incompatibility].

(1) Judges shall be appointed for life. The bases and procedures for recalling judges shall be determined by law.

(2) Judges may be recalled only by a Court decision.

(3) Judges may not hold any other elected or appointed office, except in cases prescribed by law.

(4) Guarantees for the independence and the legal status of judges shall be determined by law.

²²⁰ Article 148 [Court System] of the Constitution.

systems. On the other hand, special attention should be given to the tenure of judges, jurisdiction *ratione materiae* regarding constitutionality of the Supreme Court²²² and the fact that the laws which deal with the organization of the courts and court procedures have to be adopted with a qualified parliamentary majority.²²³

County and city courts have first instance jurisdiction. A single judge is competent to conduct trial in cases of third-degree offenses and in cases of second degree offenses for which the prescribed punishment does not exceed three years of imprisonment. That also applies to simplified criminal proceedings. In other cases, the court is conducting the trial in a panel of one judge and two lay judges.²²⁴ Because of the principle that criminal matters have to be heard and adjudicated by the same panel, the ECCP provides for reserve lay judges in cases where the trial continues for an extensive time period.²²⁵ Exclusive jurisdiction *ratione materiae* and venue on the criminal offenses in case of §196 of the Criminal Code²²⁶ is on the

(1) The court system shall be comprised of:

- 1) county and city courts, as well as administrative courts;
- 2) district courts;
- 3) The Supreme Court.

(2) The creation of special courts to handle some categories of court cases shall be determined by law.

(3) The establishment of emergency courts shall be prohibited.

Article 149 [Court Levels]

(1) County and city courts, as well as administrative courts shall be first level courts.

(2) District courts shall be second level courts, and they shall examine the decisions of the first level courts as appeal procedures.

(3) The Supreme Court is the highest court in the land, which examines court decisions as appeal procedures. The Supreme Court is also the court for constitutional supervision.

(4) The court system and court proceedings shall be regulated by law.

Article 150 [Supreme Court].

(1) The Chairman of the Supreme Court shall be appointed by the Parliament, on proposal by the President of the Republic.

(2) Members of the Supreme Court shall be appointed by the Parliament, on proposal by the Chairman of the Supreme Court.

(3) Other judges shall be appointed by the President of Republic, on proposal by the Supreme Court.

²²¹ Article 153 [Immunity of Judges]

(1) A judge may be charged with a criminal offense during his or her term of office only on proposal by the Supreme Court and with the consent of the President of the Republic.

(2) The Chairman of the Supreme Court and its members may be charged with a criminal offense only on proposal by the Legal Chancellor and with the consent of the complement of the Parliament.

²²² Article 152 [Constitutional Review by Supreme Court]

(1) If any law or another legal act is in conflict with the Constitution, it shall not be applied by the Court in trying a case.

(2) If any law or other legal act is in conflict with the provisions and spirit of the Constitution, it shall be declared null and void by the Supreme Court.

²²³ See Article 104 of the Constitution.

²²⁴ See § 23. Moreover, lay judges have equal rights as professional judges have. Local government council submits a list of candidates for lay judges to a county or city court. Lay judges are appointed to office among candidates for lay judges by the committee for appointment of candidates for lay judge. The committee for appointment of candidates for lay judge comprises of the chairman of the county or city court, one judge elected by the full court and one member of the local government council elected by the council from each local government of the territorial jurisdiction of the court.

²²⁵ § 24.

²²⁶ § 196 (Repealed by the Decree of the Presidium of the Supreme Soviet of the Estonian SSR of 24/12/1966.). § 196¹. Membership in or forming of criminal organization or recruiting of members thereto or leading such organization or part thereof

(1) Membership in a criminal organization, i.e. a permanent organization consisting of three or more persons who share a distribution of tasks and whose aim is or whose activities are directed at the commission of criminal offenses in the first or second degree, is punishable by three to eight years imprisonment.

(2) Forming an organization specified in subsection (1) of this section, recruiting of members thereto or leading such organization or a part thereof is punishable by five to ten years imprisonment.

Tallinn City Court.²²⁷ Also, if a person is accused of membership or formation of a criminal organization, a panel of three judges tries the case.

Jurisdictional disputes between courts are prohibited and a court that receives a criminal matter from another court ought to accept such matters for hearing.²²⁸ However, there is no provision on procedure in cases where jurisdictional disputes arise.

Procedure and legal grounds for exclusion of the *iudex inhabilis* and especially *iudex suspectus* from the proceedings are rather confusing.²²⁹ The general rule is that a single judge must be excluded if he/she is directly or indirectly personally interested in the criminal matter. A certain definition of the “direct” or “indirect” interest and not a conclusive list of grounds for exclusion would be plausible. This rule is not applicable to the member of a court panel in which case there is a more clear difference between *iudex inhabilis* and *iudex suspectus*. Members of the court panel cannot be persons who are related to one another although there is no indication on the substance of relation between those persons. Exclusion is also applicable to actual or former participants in given criminal matters and listed relatives to participants with the exception of a judge who has previously adjudicated preventative measures with regard to the accused. Finally, exclusion is obligatory for persons in relation to whom presented facts give reason to doubt their impartiality. Non conclusive list of those facts is not provided too. Judges are required to exclude themselves in previously mentioned cases. However, challenge on the exclusion can be raised by other participants. The NCCP is clearer on those matters.²³⁰

Judges are appointed for a lifetime and serve until they reach the age of 68. The Chief Justice of the Supreme Court is appointed by the *Riigikogu* (Parliament) on the proposal of the President of the Republic. Justices of the Supreme Court are appointed by the *Riigikogu* (Parliament) on the proposal of the Chief Justice of the Supreme Court. All other judges are appointed by the President of the Republic on the proposal of the Chief Justice of the Supreme Court.

Special attention regarding the NCCP should be given to the role of a preliminary investigation judge.²³¹

2 Prosecutor

The Constitution does not contain references on the position of the prosecutor in criminal proceedings and leaves that to the law.²³² Therefore, a general determination of its rights and duties is laid down in the ECCP. Prosecutor represents public prosecution in court proceedings with a mandatory presence.²³³ Prosecutors are independent and bound only by the law. Supervision over the legality of the commencement of criminal proceedings and preliminary investigations is exercised by Chief Public Prosecutor and prosecutors who are

(3) A member of a criminal organization who did not participate in the preparation, attempt or commission of any of the criminal offenses committed by such organization shall be released from punishment if he or she voluntarily gives notice of his or her membership in such organization.

(17/04/1996 entered into force 24/05/1996-RT I 1996, 31, 631)

²²⁷ See § 29(3).

²²⁸ §33.

²²⁹ See § 20, § 26, and § 232.

²³⁰ NCCP § 49.

²³¹ NCCP §§ 21, 231, 232.

²³² See Article 151 of the Constitution.

²³³ See § 22(2) and amendment (2¹).

subordinate to it pursuant to the Prosecutor's Office Act.²³⁴ NCCP went further with the previously mentioned role of the preliminary investigation judge.²³⁵

2.1 Public Prosecutor

The Chief public prosecutor is appointed by the Government of the Republic on the proposal of the Minister of Justice and, after considering the opinion of the Legal Affairs Committee of the *Riigikogu* (Parliament). The Minister of Justice appoints senior county and city prosecutors on the proposal of the Chief Public Prosecutor. It appoints public prosecutors on the proposal of the prosecutors' competition and evaluation committee. On the other side, the Chief Public Prosecutor appoints county and city prosecutors and assistant prosecutors on the proposal of the prosecutors' competition and evaluation committee.

Public prosecutor is a participant in all stages of criminal proceedings. However, its competence is different from stage to stage. While pretrial investigation is pending, it has the right to be informed regarding the commencement of the procedure.²³⁶ If a preliminary investigator disagrees with the instructions of a prosecutor concerning the charging of a criminal offense, the legal assessment of a criminal offense and the extent of the charges, the referral of a criminal matter for the prosecution of the accused or for the termination of a criminal matter, preliminary investigator has right to submit a file to a higher ranking prosecutor together with its written objections.²³⁷ In those cases, prosecutor can annul the instructions of a lower ranking prosecutor, or assign the task of investigation to another preliminary investigator. Prosecutor has right to propose to a preliminary investigator to annul a chosen preventative measure, to substitute the measure with another, or to choose a preventative measure, if a measure has not been chosen.²³⁸ Wording of this provision leads to the conclusion that its proposal is binding on the preliminary investigator. Therefore, it is unclear whether the proposal is, in fact, an order. Moreover, detention as a preventative measure, or a preventative measure chosen by a prosecutor or preliminary investigator, may be annulled or altered by the preliminary investigator only with the consent of the prosecutor. Consent of the prosecutor is necessary in cases of search and seizure as well as in cases of seizure of property.

After reviewing a criminal file, a prosecutor may: 1) approve the summary of charges; 2) return the criminal matter together with its written instructions for further investigation to a preliminary investigator, or 3) terminate the criminal proceedings by making a corresponding order pursuant to the procedure prescribed in § 168 of the ECCP.

After a prosecutor has approved or amended the summary of charges prepared by a preliminary investigator, or prepared a new summary of charges, the criminal matter must be sent to a criminal court according to the rules of jurisdiction and venue. From that point, all requests and complaints regarding the matter are to be submitted directly to the court.²³⁹

²³⁴ § 22(1).

²³⁵ Regarding the prosecutor see also NCCP § 30 (Prosecutor's office in criminal procedure), § 53 (Removal of prosecutor), § 193 (Commencement of criminal proceedings), § 213 (Prosecutor's office in pretrial proceedings) *etc.*

²³⁶ § 109 Acceptance of criminal matter

(1) (Repealed-19/04/2000 entered into force 1/07/2000-RT I 2000, 35, 222);

(2) Upon commencement of pretrial investigation, a preliminary investigator is required to promptly make an order on acceptance of the criminal matter, and send a transcript of such order to a prosecutor within twenty-four hours.

²³⁷ § 106(2).

²³⁸ § 78(2).

²³⁹ § 181.

Prosecutor is also an appellate authority on the acts of the preliminary investigator although it is not clear whether this procedural act is an appeal or a complaint. Furthermore, it is not clear whether this action has the effect of suspending the proceedings.

Moreover, the removal of a preliminary investigator, expert, specialist, interpreter or translator, criminal defense counsel,²⁴⁰ or the representative of a victim, plaintiff or defendant ought to be decided by the prosecutor who exercises supervision over pretrial investigations within three twenty-four hour periods after the motion is submitted. If the motion is submitted against a prosecutor, it is to be decided by a higher-ranking prosecutor within the same term.

Upon review of a file received from a preliminary investigator, a prosecutor verifies: 1) whether the act for which charges have been brought against the accused occurred; 2) whether the necessary elements of a criminal offense are present in the act; 3) whether facts to cause the termination of criminal proceedings on the basis of § 5 of the ECCP exist; 4) whether the pretrial investigation has been conducted considering all perspectives, thoroughly, objectively and in accordance with the law; 5) whether the charges brought are reasoned; 6) whether charges have been brought against the accused in all criminal offenses established in the pretrial investigation; 7) whether all persons against whom sufficient evidence on the commission of a criminal offense has been collected in pretrial investigation have been charged with a criminal offense; 8) whether the reasons for the criminal offense, the conditions promoting the commission thereof, and the circumstances describing the personality of the accused have been ascertained; 9) whether the legal assessment of the acts of the accused is correct; 10) whether the summary of charges has been prepared in compliance with the requirements of the ECCP; 11) whether preventative measures have been chosen correctly; 12) whether measures for securing a civil action have been applied.²⁴¹

While the trial is pending, a prosecutor represents the public prosecution and participates in the examination of evidence, submits opinions on issues arising during a court hearing, and considerations with regard to the application of criminal law and the punishment of the accused at trial. It represents the public prosecution pursuant to the requirements of law and its conscience, based on the examination of all facts.

If the prosecutor is convinced that the data relating to examination by the court fails to prove the charges brought against the accused at trial, it is required to withdraw the charges and submit the reasons to the court. However, withdrawal of charges by a prosecutor does not release a court from the obligation to continue the hearing of a criminal matter and adjudicate the issue of liability of the accused at trial.²⁴² That means that trial has to be finished with *res iudicata* which is in favor of the accused regarding the avoidance of double jeopardy.

2.2 Private Prosecutor

In case of certain criminal offenses only the victim or, if the victim is a minor or a disabled person, a legal representative of the victim has the right to request the commencement of criminal proceedings. In the trial of a matter regarding private charges, the victim acts as the accuser. The procedure on the private charges is specified in the Part IX, Chapter 34 of ECCP.²⁴³

An application for the commencement of criminal proceedings regarding the private charges contains: 1) name, surname and residence of the victim; 2) name, surname and residence of the person against whom the private charges are brought; 3) contents of the

²⁴⁰ According to the NCCP the removal of the defense counsel will be decided by the judge of preliminary investigation.

²⁴¹ See § 179.

²⁴² See § 210.

²⁴³ § 391 through § 396.

private charges; 4) names, surnames and residences of persons whose summoning to a court session is requested; 5) evidence which is requested to be submitted.

Upon submission of an application, a victim or its legal representative is obliged to pay, a security in the amount of thirty days wages to the trust account of the court. At the request of a victim, a court has the right to reduce the amount of security or release the victim from the payment of security if the court considers it necessary.

Private charges can be brought in cases of crimes such as disclosure of confidential data, which becomes known due to professional activity,²⁴⁴ defamation,²⁴⁵ or insult.²⁴⁶ However, even in case of private charges, a court or a prosecutor may commence criminal proceedings without the application of a victim if it is in the public interest or if the victim is unable to protect its rights or lawful interests due to its helpless situation or a dependent relationship with the accused. In such cases, the pretrial procedure is conducted as a preliminary investigation and, after the completion of the preliminary investigation, the matter is heard by the court pursuant to the general procedure. In ordinary cases, victims cannot act as accusers, but they have extensive rights (up to appeal and cassation) as victims. It seems that the institution of the subsidiary prosecutor does not exist. Furthermore, it seems that the NCCP reduces the procedural possibilities of the victim.²⁴⁷

3 Defense

Although the right to defense is not explicit in the Constitution, it is obvious that the legislative body has strict obligation to regulate this matter.²⁴⁸ Therefore, the ECCP contains a provision which is quite clear. A suspect has right to be informed for what he/she is suspected, to have a criminal defense counsel and to confer with the counsel without the presence of other persons, for unlimited number of times with unlimited duration, except in certain cases²⁴⁹ A suspect also has the right to be informed that its testimony may be used to bring charges, to give testimony concerning the content of the suspicion, or to refuse to give such testimony. A list of suspects' rights includes the right to submit petitions for exclusion, applications, to file appeals and participate in the court sessions in which the taking of the suspect into custody or the extension of the term during which the suspect may be held in custody is discussed. If a person being held in custody is undergoing treatment in an in-patient medical institution, the court may, without the presence of the person, extend the term during which the person may be held in custody. A suspect may participate in procedural acts with the permission of the preliminary investigator. Rights of the suspect and accused are extensively described, although the list is not conclusive.²⁵⁰

3.1 Defendant

Procedural positions of the suspect and accused are previously mentioned.²⁵¹ However, parents, guardians, curators or other persons, as well as enterprises, agencies, and organizations that, on the basis of law, bear proprietary liability for the damage caused by a criminal offense, may be involved in the criminal matter as defendants. A defendant or the representative of a defendant has the right: 1) to contest a filed action; 2) to give explanations

²⁴⁴ *Ibid.* § 128¹.

²⁴⁵ *Ibid.* § 129.

²⁴⁶ *Ibid.* § 130.

²⁴⁷ NCCP § 38.

²⁴⁸ Article 151 [Organization by Law]. The organization of representation, defense, state prosecution and supervision of legality in court procedures shall be determined by law.

²⁴⁹ See § 37(2).

²⁵⁰ § 35¹. Other rights of the suspect, accused and accused at trial are also provided for in this Code.

²⁵¹ See *supra* note and referring text.

concerning the action; 3) to submit evidence and applications; 4) upon completion of pretrial investigation, to examine the materials of the file; 5) to participate in the court hearing; 6) to submit petitions for removal; 7) to file complaints against the acts of a preliminary investigator, prosecutor, court, or file appeals against a court judgment or court ruling in such part of the judgment or ruling which concerns the civil action.

Prior to the commencement of negotiations for simplified proceedings, a defendant has the right to examine the charges brought against the defendant and the civil action, to present an opinion concerning the extent of damage set out in the charges, and the civil action, to receive explanations concerning the consequences of the application of simplified proceedings, to give consent to the application of simplified proceedings, or to refuse to give such consent. If the defendant has given consent for simplified proceedings, it has no right to withdraw from such consent; the plaintiff also has no right to participate in the negotiations for simplified proceedings, the entry into settlement for simplified proceedings, in the court hearing of the matter, or to file appeals against a court judgment or court ruling.²⁵² The defendant has the right to compensation in cases of wrongful charges, conviction, or preventative custody.

3.2 Defense Counsel

Defense counsel is a participant except in cases of simplified criminal proceedings.²⁵³ This role is the exclusive right of sworn Estonian advocates, senior clerks and clerks of sworn advocates and other persons with the permission of the preliminary investigator or the court. This list is limited before the Supreme Court to sworn advocates only. The suspect and the accused may have several criminal defense counsels. On the other hand, criminal defense counsel may defend several persons, if the interests of such persons do not conflict.²⁵⁴

Preliminary investigator, court, or prosecutor²⁵⁵ is obliged to appoint criminal defense counsel for a suspect, accused or accused at trial if the participation of criminal defense counsel in the proceedings is mandatory, or if the suspect or accused has requested the participation of criminal defense counsel but does not have criminal defense counsel. In such cases, the Estonian Bar Association ensures the participation of criminal defense counsel at the expense of the state. If the criminal defense counsel chosen by the suspect cannot commence the performance of its duties as a criminal defense counsel within the time prescribed in ECCP, or if the criminal defense counsel cannot participate in the criminal proceedings within two days, the preliminary investigator or the court may propose that another criminal defense counsel be chosen or may appoint another criminal defense counsel. Defense counsel is required to notify the court of its agreement or refusal to commence with the duties within two days after receipt of the notice. A person to whom criminal defense counsel has been appointed has no right to refuse such counsel except in a limited number of cases. A person being defended may be fully or partly released from payment of legal assistance.²⁵⁶

Criminal defense counsel has the right and, at the same time, the obligation to use all means and methods of defense in conformity with the law for the timely and full ascertainment of all facts which vindicate the person being defended or mitigate its liability,

²⁵² See § 43.

²⁵³ § 34 Participants in proceeding

(1) Participants in criminal proceedings are the suspect, accused, accused at trial and his or her criminal defense counsel, the prosecutor in court proceedings, and the victim, plaintiff, defendant and his or her representatives.

(2) The victim, plaintiff, defendant and their representatives are not participants in the proceedings in simplified proceedings.

²⁵⁴ See § 36.

²⁵⁵ Only, while negotiations, for simplified proceedings, are pending.

²⁵⁶ See § 361.

and to provide other lawful legal assistance necessary in the criminal matter. It has the right to participate in a criminal proceeding after the detention of a person as a suspect or, if the person has not been detained as a suspect, after the communication of the ruling on the declaration of the person as suspect to the person, and if the person has not been interrogated as a suspect, after the bringing of charges against the person. After the entry into the criminal proceeding as criminal defense counsel, the counsel has the right to confer with the person being defended without the presence of other persons, for an unlimited number of times with unlimited duration except in previously mentioned circumstances. It has the right to examine the petitions and statements of the person being defended, records of the interrogation of such person, and also to examine records of the detention of the person being defended, and the ruling on the choice of a preventative measure, and to make excerpts there from.

Moreover, it has the right to participate in the bail hearing, and in the court hearing regarding the extension of the term for holding the person being defended in custody. Its capacity extends also to: 1) right to submit petitions for exclusion and applications; 2) file appeals; 3) participation in the ordering of expert assessments and in all procedural acts performed with the participation of the person being defended with the right to submit questions and make statements through the preliminary investigator; 4) examination of the records of investigative activities conducted with the participation of the defense counsel and to submit comments to that effect; 5) examination of the documents of state and local government agencies which are necessary for the provision of legal assistance and to make excerpts and copies there from; 6) receiving information, notices and certificates necessary for defense, and in matters requiring special expertise, to receiving oral and written consultation from experts. While conducting those activities, criminal defense counsel has the right to use equipment. However, the preliminary investigator may refuse to permit such use with good reason that must be documented in the records of the procedural act.²⁵⁷ After the conclusion of the pretrial investigation, criminal defense counsel has the right to examine the materials concerning the criminal matter pursuant to the procedure prescribed in ECCP²⁵⁸ and to make excerpts and copies there from. Of course it has right to participate in trial with all rights prescribed in this Code.²⁵⁹

After the order of a prosecutor on application of simplified proceedings and at the commencement of negotiations, defense counsel has rights: 1) to examine all materials of the criminal matter, make excerpts and copies there from; 2) to participate in the negotiations for simplified proceedings; 3) to participate in the entry into settlement for simplified proceedings; and 4) to participate in the hearing of the matter in court with all the rights prescribed for simplified proceedings.²⁶⁰

Criminal defense counsel has no right to withdraw from its duties unilaterally. Of course, information entrusted to criminal defense counsel by a person being defended is confidential it has no right to disclose such information without the consent of the person being defended. Criminal defense counsel has no right to make public other information that becomes known to it in connection with the defense if such disclosure conflicts with the interests of the person being defended or the administration of justice.²⁶¹

Participation of criminal defense counsel in criminal proceedings is mandatory: 1) in criminal matters of minors until the minors attain the age of majority; 2) in criminal matters of persons who, due to physical or mental disabilities, are not capable of exercising their right of

²⁵⁷ It is not specified what «equipment» means (e.g. video or audio recording, pencil *etc.*). It seems that this provision opens wide door for malpractice of the preliminary investigator.

²⁵⁸ See § 169.

²⁵⁹ See § 37(1 and 2).

²⁶⁰ § 37(2¹).

²⁶¹ § 37(3 and 4).

defend by themselves; 3) in criminal matters of persons who are accused of the commission of a criminal offense for which life imprisonment may be imposed as a punishment; 4) in the hearing of criminal matters in the Supreme Court. Mandatory participation is also provided in simplified proceedings from the moment of the commencement of negotiations.²⁶² The suspect and accused can waive the right to defense counsel.²⁶³ On the defense counsel see Chapter 1, Division 6 of the NCCP.²⁶⁴

4 Victim

Preliminary investigator delivers an order on declaration of the person as a victim. It has to notify the victim that he/she has been declared to be a victim and explain its procedural rights. According to the ECCP only a physical person can be a victim.²⁶⁵ On the other hand, a legal person can have the position of plaintiff.²⁶⁶ According to the NCCP, legal persons can have the status of a victim as well (status of a victim and of a plaintiff will be merged).²⁶⁷

A victim is defined as a person who suffers moral, physical or proprietary damage caused by a criminal offense.²⁶⁸ It has the right to give testimony concerning the criminal matter. Moreover, the victim and its representative have the right to: 1) submit evidence and requests, and, after the completion of the pretrial investigation, to examine the materials of the file; 2) to participate in trial, and, in closing arguments to present opinions concerning the charges and the punishment; 3) to submit petitions for exclusion, to file complaints against the acts of a preliminary investigator, prosecutor, court, or against a court judgment, court ruling or ruling of a judge.²⁶⁹ Prior to the commencement of negotiations for simplified proceedings, the victim has the right to examine the charges brought against the accused, to present an opinion concerning the charges and the punishment, to receive explanations concerning the consequences of the application of simplified proceedings, to give consent to the application of simplified proceedings, or to refuse to give such consent. However, if it has given consent to the application of simplified proceedings, the victim has no right to withdraw such consent. Also, it has no right to participate in the negotiations for simplified proceedings, in the entry into a settlement for simplified proceedings, in the trial of the matter, or to file appeals against a court judgment or court ruling.²⁷⁰ Regarding the private prosecutor's role of a victim see supra 2.2.

4.1 Victim as Subject of Civil Claims

Both the ECCP and the NCCP contain provisions for a civil action in criminal procedure. In the case of the ECCP there are two different statuses: 1) victim (only physical person); and 2) plaintiff (physical or legal person). As previously mentioned, the NCCP merges victim and plaintiff under the term "victim" and both physical and legal persons have the same position.

Plaintiff is entitled to demand a preliminary investigator or a judge to take precautionary measures to guarantee compensation for damages. The court is obliged to adjudicate whether to satisfy a civil action, by whom, in whose favor and in which amount,

²⁶² See § 38.

²⁶³ See § 39. Of course this right does not exist if defense counsel is mandatory.

²⁶⁴ NCCP §§ 42 through 48.

²⁶⁵ § 40

²⁶⁶ See § 41.

²⁶⁷ § 37(1).

²⁶⁸ See § 40(1).

²⁶⁹ § 40(2).

²⁷⁰ § 40 (2¹ and 2²).

and which measures are to be applied for securing a civil action or compensation for proprietary damage.²⁷¹

Plaintiff has somewhat limited rights if compared to the rights of an accused and victim (e.g. plaintiff's right to appeal is limited to the issues of its civil claim; although the plaintiff will be informed about the date and time of the trial, it is possible to try the case if it does not appear in court etc.). But the plaintiff will be entitled to: 1) "receiving the dossier" (actually both the ECCP and the NCCP guarantee only that plaintiff is entitled "to examine, at the request of the plaintiff or the representative of the plaintiff, the materials of the file"; 2) receive "notification of procedural steps" (actually plaintiffs are notified only about the most significant "procedural steps" like the completion of the pretrial investigation, the trial *etc.*); 3) "assistance by a lawyer"; 4) "presence at the hearing" (actually if there is a preliminary hearing, plaintiffs are not summoned to the preliminary hearing); 5) "participation in the administering of the evidence"; and 6) "exercise of the right to appeal as far as its civil interests are concerned".²⁷²

Generally, any person suffering proprietary damage as a result of a criminal offense has the right, while criminal proceedings are pending, to file a civil action against the accused or against the persons who bear proprietary liability for the acts of the accused. Such action has to be heard in court together with the criminal matter and there is no right of the court to declare *forum non conveniens*.²⁷³

A civil action may be filed against the accused or against the persons, enterprises, agencies or organizations which bear proprietary liability for the acts of the accused as of the commencement of criminal proceedings during the entire proceeding. However, it has to be filed prior to the completion of the examination of the matter by the court, and in case of simplified proceedings-until the commencement of negotiations.²⁷⁴

There is no fee provided for civil actions filed in criminal matters, civil actions arising from court judgments in criminal matters which have not entered into force, and for a notation of prohibition made in the land register to secure the action.²⁷⁵

Prosecutor has the obligation to support a civil action if the protection of a national interest or rights of the persons requires.²⁷⁶

Court has the right to decide on compensation for proprietary damage caused by the criminal offense on its own. This provision can be regarded as quite interesting. On the other side, if there was no civil party, some other questions can be raised, especially regarding the right of that party to file a claim according to the rules of civil procedure, which is forbidden, in cases of a sentence delivered on the claim filed in criminal proceedings.²⁷⁷

4.2 Victim as Subject of Other Rights in Proceedings

A person who is declared a victim of a criminal offense has the right to give testimony concerning the criminal matter. If a preliminary investigator ascertains that an enterprise, agency, organization or person has been caused proprietary damage by a criminal offense, the preliminary investigator shall explain the right to file a civil action to such enterprise, agency, organization or person, or their representatives.²⁷⁸

²⁷¹ § 263(1, 12, 13).

²⁷² ECCP § 4(2). NCCP §§ 18, 19, 38.

²⁷³ § 41(1).

²⁷⁴ § 42(1).

²⁷⁵ § 42(2).

²⁷⁶ § 42(3).

²⁷⁷ See § 42(4 and 5).

²⁷⁸ § 114(2).

In order to ensure the security of a victim²⁷⁹ or persons close to the victim, the anonymity of such persons may be applied. Anonymity ought to be formalized by a reasoned order of a preliminary investigator at the request of a person in question or on the initiative of the preliminary investigator. Because of that, the full name and address of the person whose anonymity is ensured as well as other information directly facilitating the identification of such persons cannot be indicated in any of the records included in the investigation file, or any other document or audio file.²⁸⁰ Upon mentioning the relevant person in the records or other documents, only a fictitious name can be used. True name and address as well as other data, together with a signature certifying the correctness of the data, are to be entered on a separate sheet of paper enclosed in an envelope. That envelope, bearing the number of the file and the signature of the preliminary investigator, has to be sealed and deposited with the preliminary investigator. It has the obligation to produce this envelope for the court or the prosecutor on the first demand. Moreover, the sealed envelope has to be kept separately from a criminal file. Access is provided only to the preliminary investigator, prosecutor and the court.²⁸¹

Victim has the right to be compensated for the full time of its absence from work or from everyday activities on the basis average daily remuneration, for the costs in connection with appearance in court, travel expenses, and costs of renting residential space. Moreover it has the right to daily allowance.²⁸²

There is an existing obligation²⁸³ to notify the victim on the completion of the pretrial investigation, and if it requests, the file has to be presented to the victim for examination. This is also applicable to film and audio recordings.²⁸⁴ It is unclear whether there is a sanction for omission to fulfill this obligation and which are further effects of that act. The same statement is applicable to the victim's right to be notified of the termination of the criminal proceedings.²⁸⁵

5 Other Participants

Each person concerning whom there is information that such a person knows facts relevant to a criminal matter and is capable of providing truthful testimony concerning such facts may be heard as a witness.

However, there are some exceptions and certain persons may not be heard as witnesses or may refuse to give testimony: 1) criminal defense counsel may not be heard as a witness with regard to the facts that become known to it in connection with the performance of its duties as criminal defense counsel; 2) witness has the right to refuse to give testimony against itself, and against persons close to it (spouse, parents, step-parents, foster parents, children, step-children, foster children, adopted children, adoptive parents, brothers, half-brothers, sisters, half-sisters, grandparents or grandchildren), and a witness shall be notified of such rights prior to the commencement of its substantive hearing; 3) persons listed in § 1281 of the Criminal Code (doctors, medical assistants, nurses, midwives, psychologists, advocates, notaries or other persons who due to their professional activity know confidential data relating to the descent, artificial insemination, family or health of a person) have the right to refuse to give testimony concerning confidential information on the *origin, artificial* insemination, family or health of a person which has become known to such persons in their professional activities.

²⁷⁹ This provision is also applicable to witnesses. See § 79¹.

²⁸⁰ Editor's note: We can presume that this provision is applicable on the video files too.

²⁸¹ See § 79¹.

²⁸² This provision is applicable to other listed persons. See § 88.

²⁸³ Editor's note: It is not specified to whom this obligation is attached.

²⁸⁴ § 171.

²⁸⁵ See § 191. See also supra note 95.

A person who is summoned as a witness is required to appear and disclose everything he/she knows concerning the matter and to give truthful answers to the questions posed to it by the preliminary investigator, prosecutor or court.

Preliminary investigators and courts have the right to impose compelled attendance with regard to witnesses who fail to appear without a reasonable impediment; a fine may also be imposed on a witness who fails to appear before a preliminary investigator or in a court session without a reasonable impediment.

Pursuant to the Criminal Code, witnesses bear criminal liability for their refusal to appear, refusal to give testimony or for giving knowingly false testimony.

Accordingly to the ECCP, testimony given by a witness in pretrial investigation may be disclosed and an audio recording of its testimony annexed to the record of the hearing may be presented for hearing in the following cases: 1) if testimony given by the witness in the pretrial investigation contradicts the testimony given by it in examination by the court; 2) if the witness fails to appear in court sessions or refuses to give testimony in court sessions; 3) if the whereabouts of the witness are unknown; 4) if anonymity has been applied with regard to the witness; 5) if the testimony contains numerical data, names or other data which are difficult to memorize, whereas such testimony may be disclosed only after the oral hearing of the witness.²⁸⁶

The NCCP contains the same principle. The only grounds for disclosing testimony given by a witness in pretrial investigations are slightly changed. According to the NCCP, it is possible if the witness fails to appear at trial with a good reason or it has not been possible to establish the whereabouts of the witness, or if the witness refuses to testify in court.²⁸⁷

After establishing the need for conducting an expert assessment, a preliminary investigator ought to prepare an order for an expert assessment which has to indicate grounds for ordering the assessment, name of the expert or forensic institution, materials submitted to the expert, and questions concerning which the expert has to give its opinion.

An expert should provide an opinion, which is based on the results of the examination conducted according to the special expertise of the expert. The expert has to prepare an expert's report concerning the conduct of an assessment which ought to indicate: 1) time and place of the assessment; 2) given name and surname, profession, specialty, education, academic degree, academic position, rank or honorary title of the expert; 3) grounds for the conduct of the assessment; questions posed to the expert; 4) persons present at the assessment; materials used and examination conducted in the assessment; persons present at the assessment; 6) materials used and examination conducted in the assessment.

In the conclusive part of an expert's report, an expert has to provide a reasoned opinion to the posed questions. If expert considers received materials to be insufficient for providing an opinion or the question posed to the expert to be outside of its competence, it has to prepare a reasoned report on the impossibility of conducting an expert assessment.

After examining an expert's report or report on the impossibility of conducting an expert assessment, a preliminary investigator has right to question the expert for the clarification and supplementation of the opinion of the expert or the expert's report. Prior to the commencement of the questioning, preliminary investigator will issue caution to the expert on the liability for the refusal to give an opinion, and for giving a knowingly false opinion. If there is a need for an expert opinion as evidence it is mandatory to hear the expert's opinion at a trial.²⁸⁸

²⁸⁶ § 246.

²⁸⁷ § 292.

²⁸⁸ § 206.

According to the NCCP, it is possible to use expert opinion as evidence even without the expert present at the trial.²⁸⁹ The expert's opinion will be disclosed at trial and the expert will be called to testify only at the request of the prosecutor, defendant, defense counsel, victim or plaintiff.

In subsidy or tax fraud cases, officers from the relevant subsidy or tax administration are allowed to testify as witnesses if they have personal knowledge of the facts relevant to a criminal matter and are capable of providing truthful testimony concerning such facts. Appearance of those persons at trial may be replaced by testimony given in preliminary investigation only if their whereabouts has not been possible to establish or they have exculpatory reasons for not appearing in court or refuse to testify.

According to the ECCP, a document issued by an enterprise, agency, organization, official or person is evidence if the document contains factual data, which is important in the criminal matter.²⁹⁰ A written report may be admitted as a document, but written report cannot replace testimony.

In subsidy or tax fraud cases, officers from the relevant subsidy or tax administration are allowed to serve as experts if they have specific expertise which is necessary in given criminal matters and are appointed by a preliminary investigator, prosecutor or court as an expert. According to the ECCP, if they serve as experts they have to appear in court. On the other hand, the NCCP provides an opportunity to serve as an expert without appearing at court. Those persons will be obliged to appear at court only at the request of the prosecutor, defendant, defense counsel, victim or plaintiff.

List of other participants should include interpreters, translators and impartial observers of investigative activities too.

IV General Principles of Criminal Procedure Legislation

Principles, which are binding for legislative authority while passing the ECCP as well as other laws are indicated in the Constitution. Those are: general equality and prohibition of discrimination, right to protection, access to courts, right to life, prohibition of torture, personal freedom, conditions for custody or arrest, presumption of innocence and the right against self-incrimination, the right to fair and public trial which includes the right to appeal, independence of the courts *etc.* Those principles as well as principles of contemporary criminal procedural doctrine developed in the civilized world are contained in relevant provisions of the ECCP (legality, obligation to establish the truth, reasoned sentence, right to defense, proportionality in use of precautionary measures and procedural actions, protection of private life and correspondence, orality, free evaluation of evidence *etc.*).

V Course of Criminal Procedure

1 Pretrial Stage

Pretrial investigation authorities within the limits of their competence are: 1) Police Board, the Central Criminal Police and police prefectures; 2) Security Police Board; 3) prisons and the expulsion centre; 4) border guard authorities; 5) customs offices; 6) Headquarters of the Defense Forces. Investigative jurisdiction is regulated in detail by the relevant provision of ECCP.²⁹¹

²⁸⁹ NCCP § 293.

²⁹⁰ § 65.

²⁹¹ § 105.

Upon preliminary investigation, a preliminary investigator decides on the direction of the investigation and performance of investigative activities independently, except in cases where obtaining of consent from a prosecutor or permission from a court is prescribed in the ECCP. Moreover, a preliminary investigator bears full responsibility for legality and timeliness. If a preliminary investigator disagrees with the instructions of a prosecutor concerning the charging with a criminal offense, the legal assessment of a criminal offense and the extent of the charges, the referral of a criminal matter, for the prosecution of the accused or for the termination of a criminal matter, the preliminary investigator has the right to submit a file to a higher ranking prosecutor together with its written objections. In such cases, the prosecutor can annul the instructions of a lower ranking prosecutor or assign the task of investigation to another preliminary investigator. A preliminary investigator has the right to submit, in a criminal matter under investigation, written applications for the performance of individual investigative activities and for the provision of assistance in investigative activities to other pretrial investigation authorities. Such tasks and applications of preliminary investigators are binding on pretrial investigation authorities and ought to be complied with promptly, although it is unclear, which are the consequences, in case of failure to act as required.²⁹²

A preliminary investigator is obliged to be guided by the requirements of the law in an accurate manner, and to direct the investigation with the aim of detecting the truth.²⁹³

Upon commencement of a pretrial investigation, a preliminary investigator is required to promptly make an order on acceptance of the criminal matter, and send a transcript of such order to a prosecutor within twenty-four hours.²⁹⁴

The pretrial investigation has to be concluded no later than within two months. That time limit includes the date of the first procedural act until the date on which the file with the summary of charges or with an order on referring the criminal matter to court for deciding the administration of coercive treatment is sent to the prosecutor, or until the termination or suspension of the proceeding in a criminal matter. A prosecutor may extend the term for pretrial investigation by up to four months. The term for pretrial investigation may be extended further only by a senior county or city prosecutor or by a prosecutor of the Public Prosecutor's Office. There are additional possibilities for extension, some of which can be deemed as unwelcome.²⁹⁵

Participation of impartial observers of investigative activities is mandatory upon searches and investigative activities where the application of force is necessary, or if it is necessary to enter a person's residence, premises in its possession, or place of employment of a person in order to perform an investigative activity in its absence or absence of its representative or an adult family member. In other cases, the participation of impartial

²⁹² See § 106.

²⁹³ More on the obligations of investigative authorities and venue rules see § 107 and § 108.

²⁹⁴ § 109.

²⁹⁵ See § 111.

(3) If a court or a prosecutor refers a criminal matter for further pretrial investigation, or in the case of the resumption of the proceeding in a terminated or suspended criminal matter, the prosecutor exercising supervision over the pretrial investigation shall set a term for further pretrial investigation of not more than one month as of the date of the acceptance of the criminal matter. Further extension of the term in such criminal matters shall take place pursuant to the general procedure.

(4) If the extension of a term for pretrial investigation is necessary, the preliminary investigator shall prepare a reasoned order to that effect, and shall submit the order to the prosecutor prior to the expiry of the term for pretrial investigation.

(5) After compliance with the requirements of § 169 of this Code, further pretrial investigation shall take place pursuant to the general procedure within the limits of the maximum term, if necessary.

observers is to be decided by a preliminary investigator on its own initiative or on the motion of interested persons.²⁹⁶

During the pretrial procedure, the prosecutor has: 1) right to commence criminal proceedings; 2) right to conduct individual procedural acts in a criminal matter in which a preliminary investigator is conducting the proceedings, or in a criminal matter which is referred to it for the approval of the summary of charges (in that case the prosecutor has all the rights and obligations of a preliminary investigator; 3) obligation to exercise supervision over the legality of pretrial investigation

The prosecutor can also: 1) require explanations from a preliminary investigator concerning the receipt, registration and settlement of petitions and notices submitted concerning a criminal offense, and concerning the process of pretrial investigation and the termination of criminal proceedings; 2) require criminal files, documents, materials and other information concerning committed criminal offenses or criminal offenses being planned, the process of pretrial investigation and the persons who committed a criminal offense; 3) monitor the compliance with the requirements of the law in police institutions concerning the receipt, registration and settlement of submitted petitions and notices concerning criminal offenses; 4) annul or alter unlawful or unjustified orders of preliminary investigators; 5) give written instructions to preliminary investigators concerning the investigation of criminal offenses, the performance of procedural acts, the choice, alteration or annulment of preventative measures, the legal assessment of criminal offenses, the search of persons who have committed a criminal offense, the commencement or termination of surveillance, and concerning the ascertainment of the possibility to apply for simplified proceedings; 6) notify the persons who have the right to impose disciplinary punishments of the elements of a disciplinary offense which have become evident in the activities of a preliminary investigator or competent police officer; 7) sanction searches and other activities of a preliminary investigator in the cases prescribed by law; 8) extend the term for settlement and investigation of a petition or a notice concerning a criminal offense in the cases prescribed by law; 9) return a criminal matter to a preliminary investigator with instructions for the conduct of further investigation or for the elimination of deficiencies; 10) remove a preliminary investigator from any criminal matter by its reasoned order for the conduct of a more thorough and objective investigation, and to refer such criminal matters to another preliminary investigator, taking into account the competence and jurisdiction of preliminary investigators; 11) exclude preliminary investigators who have violated the law upon the investigation of a criminal matter from further proceedings in the criminal matter by its reasoned order; 12) commence criminal proceedings or terminate criminal proceedings, approve the summaries of charges, and, in the cases prescribed by law, approve an order of a preliminary investigator, refer criminal matters to court; 13) perform the tasks provided for in Chapter 33 of ECCP upon the application of simplified proceedings. Written instructions of a prosecutor given to a preliminary investigator pursuant to the procedure provided for in this Code are binding on the preliminary investigator.

Preliminary investigator has to prepare a summary of charges after the accused; victim, plaintiff, defendant or their representatives have examined all the materials of the file.²⁹⁷ After reviewing a criminal file, a prosecutor can: 1) approve the summary of charges; 2) return the criminal matter together with its written instructions for further investigation to a preliminary investigator; or 3) terminate the criminal proceedings by making a corresponding order.²⁹⁸ After a prosecutor has approved or amended a summary of charges prepared by a preliminary investigator, or prepared a new summary of charges, it has to send the criminal

²⁹⁶ § 113.

²⁹⁷ See § 174.

²⁹⁸ § 180.

matter to a court according to the jurisdictional rules. Once the criminal matter has been sent to a court, all requests and complaints regarding it have to be submitted directly to the court.²⁹⁹

2 Trial Stage

The central stage of criminal proceedings is trial before the first instance court. Rules regarding this stage are contained in Part III of the ECCP.³⁰⁰ Those provisions deal with the prosecution of the accused and preparation for court, general conditions for court hearings, opening of court sessions, court examinations, summations and final rebuttal of the accused at trial and delivery of the judgment.

Court judgments are to be made on behalf of the Republic of Estonia.³⁰¹ Deliberation and voting is held *in camera* and only the judges who are included in the panel of the court in a given criminal matter and the clerk of the court session whose presence is deemed necessary by the court for the preparation of a written judgment may be present.³⁰²

A court judgment has to be in accordance with the law, reasoned and based only on such evidence that has been heard in a court session.³⁰³ Adjudication is obligatory to deal with the following issues: 1) whether the act for which charges have been brought against the accused at trial occurred; 2) whether the accused at trial committed the act; 3) whether the necessary elements of a criminal offense are present in the act, and which section, subsection or clause of criminal law prescribes the criminal offense; 4) whether the accused at trial is guilty of the commission of the criminal offense; 5) whether the accused at trial will be punished for the criminal offense committed; 6) whether circumstances which mitigate or aggravate the liability of the accused at trial exist; 7) the type of punishment to be imposed on the accused at trial and whether it has to serve the punishment; 8) whether the accused at trial who has been sentenced to imprisonment will serve the sentence in a maximum-security, medium-security, open or juvenile prison; 9) whether to approve an application for the release of the accused at trial from punishment, and to impose of surety on it; 10) whether to apply a preventative measure with regard to the accused at trial and which; 11) which measures are to be applied with regard to the minor children of the convicted offender who are left unsupervised, and its property; 12) whether to satisfy a civil action, by whom, in favor of whom and in which amount, or whether proprietary damage is subject to compensation if a civil action has not been filed; 13) which measures are to be applied for securing a civil action or compensation for proprietary damage; 14) how to proceed with regard to physical evidence and confiscated objects; 15) who will bear legal costs; 16) whether the security is to be returned or transferred into the public revenue; 17) whether to satisfy a civil action and compensate for legal costs out of the security to be transferred into the public revenues.³⁰⁴

3 Remedy Stage

Unique characteristic of Estonian criminal procedure is that the appellate procedure is regulated by the Code of Criminal Court Appeal and Cassation Procedure of 21 June 1993³⁰⁵

²⁹⁹ § 181.

³⁰⁰ § 184 through § 289⁴. On the pretrial stage see also Chapter 8 of the NCCP.

³⁰¹ § 260.

³⁰² § 261.

³⁰³ § 262.

³⁰⁴ § 263.

³⁰⁵ Entered into force 15/09/1993 (consolidated text: RTI I 2002, 83, 488).

instead of the ECCP. However, the NCCP contains provisions regarding this stage.³⁰⁶ Available remedies are: 1) appeal; 2) cassation; 3) review; 4) correction of court errors.³⁰⁷

Contemporary doctrine and judicature considers the right of appeal as a basic human right.³⁰⁸ Although the right of appeal is generally restricted in many ways, it is indisputable that this right must be available to the persons who are governed by the law. Therefore, the Estonian Constitution provides for the right of appeal.

Because procedure is intended to protect rights optimally rather than perfectly, most, if not all systems impose a variety of limits on the right of appeal. This is also the case in Estonia. For example, proceedings are not instituted if the interested parties do not initiate them themselves.³⁰⁹ Further, in some cases, the institution of appellate proceedings is conditioned upon the payment of application fees or security,³¹⁰ which can lead to a situation in which some people are unable to defend their rights because they lack the financial resources.³¹¹ The question is how far we can go in terms of these limits?

The phrase “optimal protection” will obviously have different meanings for different people. Nevertheless, it means that the rule of law is not strictly enforced in every instance. Deviation can be big or small. As far as appellate review is concerned, there are several possible areas that can affect the size of the deviation.

First, in some cases, appeal is simply not allowed, and judicial error cannot be cured. The Estonian NCCP prohibits appeal in certain cases which can raise the question of constitutionality *e.g.* against a judgment made by way of summary proceedings.³¹²

Second, the possibility of appeal is generally restricted by requirements that govern the time limits in which the interested party must institute the appellate proceedings.³¹³ This restriction obviously affects the correct application of the law because the error becomes effectively incurable if the time period for taking action has lapsed. On the other hand, if time restrictions were not imposed, legal security and certainty would be seriously damaged because proceedings could be instituted *ad infinitum*. However, time limits can be overly strict, which could, in some cases, lead to absurd situations. This is why many procedural systems including Estonia have adopted the principle of *restitutio in integrum*.³¹⁴ If appeal is not available because of this restriction *ratione temporis*, many procedural systems introduce certain remedies that can still cure erroneous judgments. Nevertheless, the use of these remedies is usually more restricted than the use of ordinary appeals. Estonian law prohibits cassation in case of a party, which has not contested a judgment by way of appeal,³¹⁵ but renewal of the proceedings is possible.³¹⁶

³⁰⁶ See NCCP, Chapter 11 §§ 318 through 343 (Appeal); Chapter 12 §§ 344 through 364 (Cassation); Chapter 13 §§ 365 through 373 (Review)

³⁰⁷ NCCP excluded availability of this remedy.

³⁰⁸ See Article 13 ECHR; American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force 18/07/1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992)-Article 8.2.h.

³⁰⁹ Code of Criminal Court Appeal and Cassation Procedure See § 5.

³¹⁰ *Ibid.* See § 43(1). The appellant in cassation shall pay security on cassation in the amount of one half of the minimum wage valid at the time of the filing of the appeal. NCCP does not contain similar provision.

³¹¹ Cure is possible with provisions concerning release of payment. See § 43(1) regarding persons with the right to receive legal aid, convicted offenders held in custody, appointed criminal defense counsels *etc.*

³¹² See NCCP § 318.

³¹³ Code of Criminal Court Appeal and Cassation Procedure, § 6; NCCP § 319.

³¹⁴ Code of Criminal Court Appeal and Cassation Procedure, § 6 (3) A court which made a judgment may restore a term for filing an appeal at the request of a participant in a proceeding, his or her criminal defense counsel or legal representative if the court finds that the term was allowed to expire with good reason.; NCCP § 319(5).

³¹⁵ Code of Criminal Court Appeal and Cassation Procedure, § 37(2).

³¹⁶ *Ibid.* Chapter VIII Review on Basis of Petitions for Review of Court Decisions in Force.

Third, appeal and other remedies are usually restricted *ratione personae*. Generally, only those persons who were parties in the first instance proceeding are allowed to bring an appeal. In addition, only parties who have a legal interest (or “standing”) can institute appellate proceedings. Legal standing is generally limited to those parties for whom the judgment on appeal (if upheld) can produce certain positive effects. This is obvious in the Estonian system as well, *e.g.* appeal is not possible for the accused in case of judgment of acquittal made by way of alternative proceedings *etc.*³¹⁷ On the other hand, even more severe restrictions are imposed on the parties in adhesive proceedings regarding civil actions because they can file appeals only in the part of the judgment or ruling which concerns the civil action.³¹⁸

Fourth, appeals can be restricted *ratione materiae*. Generally, there are three main possibilities for judicial error: 1) facts relevant to the situation that cause deviation from the law could be incorrectly determined; or 2) facts could be determined correctly, but the law is applied incorrectly; or 3) failure to follow the required procedure. Such procedural errors may be fundamental, which will in most procedural systems, lead to the automatic annulment of the decision, or they may be less significant, which will lead to annulment only if the error affected (or could affect) correctness of the first instance judgment.

Procedural systems in different countries differ in terms of the restrictions *ratione materiae*. In some cases, there are no restrictions. However, in most cases appeal is restricted to some extent. The Estonian criminal procedure system is one that contains those restrictions contained in numerous provisions.³¹⁹

The next question to be addressed is which court has appellate jurisdiction - the same court that rendered the decision or some other court? Where the appeal is heard before the same court, it is termed a *remonstrative* appeal. However, there are many reasons to avoid remonstrative appeals. The main reason is that it is unlikely that the same court would reverse itself because it is quite natural that a judge would be reluctant to accept that he did anything wrong. The rule of law principle would be better protected, and control of the first instance judicial work would be imposed. In lieu of providing for purely remonstrative appeals, procedural systems generally adopt the *devolutivity* - principle.³²⁰ Estonia is one of them.

Whether the appellate proceeding should have any effect on enforcement of the trial court’s judgment? If the judgment is ineffective until the appeal process has run its course, substantive law would be unexecuted and rights unprotected for a certain time period, which can create a substantial delay given the usual length of appellate proceedings. On the other hand, it is not yet certain that the judgment is correct, and its pre-appeal enforcement could produce a situation in which the rights of the appellant are violated. If, however, the appeal has suspensive effect, this remedy creates the possibility of abuse by the appellee, which would be in a position to delay the proceedings, and thus the satisfaction of the judgment against it, even further. The Estonian system generally recognizes principle of suspension during the appellate and cassation procedure except in case of appeal against ruling.

4 Special Forms of Procedures

Criminal procedure can be conducted differently in certain cases provided for in the ECCP. If it is possible to ascertain facts relating to the commission of a criminal offense

³¹⁷ NCCP § 318(3).

³¹⁸ Code of Criminal Court Appeal and Cassation Procedure, § 5(2); NCCP § 318(2).

³¹⁹ Code of Criminal Court Appeal and Cassation Procedure, *e.g.* §§ 39, 77¹; NCCP § 346 *etc.*

³²⁰ However, first instance courts are often given the first opportunity to correct their judgments by themselves (*i.e.*, the “appeal” is first remonstrative, then devolutive). This procedure can be helpful in preventing congestion of the higher courts. Nevertheless, if the first instance court rejects the appeal by itself, another court should have the opportunity for appellate review. There are strong reasons for some remedies to be remonstrative. In cases of minor corrections of orders that do not alter the substance of the case, this would be advisable.

within ten days after the receipt of a notice or petition of a criminal offense, and such facts are explicit, expedited procedure may be applied with regard to any criminal offense in the third degree or a in case of specific criminal offenses independently of their degree (expedited procedure).³²¹ In criminal proceedings commenced with regard to a criminal offense in the second or third degree simplified proceedings can be applied if the facts relating to the subject of proof are explicit and the accused has confessed to all the charges.³²² Proceedings regarding the private charges are regulated with Chapter 34 of ECCP.³²³ Legal assistance procedure is applied regarding to the Chapter 35 of ECCP which includes the principles of the conventions of the Council of Europe except otherwise is provided by an international agreement to which Estonia is a party.³²⁴

On the other hand, the NCCP contains special provisions for the preparation of statements of charges and performance of certain procedural acts which is applicable *ratione personae* to the President of the Republic, members of the Government and Parliament, Auditor General, Legal Chancellor, Chief Justice and judges of the Supreme Court.³²⁵ Furthermore NCCP provides special procedure for alternative proceedings,³²⁶ settlement proceedings,³²⁷ summary proceedings,³²⁸ administration of coercive psychiatric treatment,³²⁹ and grant of permission for imposition of sanctions provided for in Juvenile Sanctions Act.³³⁰

VI Evidence

1 General Provisions

Facts which are subject to proof in the Estonian criminal procedure are: 1) criminal act (time, place and manner of commission of the criminal offense, and other circumstances of the criminal offense); 2) commission of the criminal offense by the suspect, accused or accused at trial, and its guilt; 3) circumstances which influence the degree and nature of the liability of the accused or accused at trial; 4) nature and extent of damage caused by the criminal offense.³³¹

According to the ECCP, evidence in a criminal matter is any factual data on the basis of which the preliminary investigator and court ascertain, pursuant to the procedure provided by law, the existence or absence of an act punishable pursuant to criminal procedure, the guilt of the person who committed such an act, and other facts relevant to the just adjudication of the criminal matter.³³² Those facts can be established by the testimony of witnesses, victims, suspects, the accused or accused at trial, by the opinion of experts, physical evidence, records of investigative activities and acts of court, and other documents, by photograph or film, audio, video or other data recording, and documents or things obtained by way of surveillance.³³³ Free evaluation of evidence is the leading principle. Therefore, the court, prosecutor and preliminary investigator, guided by their conscience, evaluate the aggregate of

³²¹ § 357. See § 78¹, 109, 139(1 and 2), 140(1 and 2), 149¹, 177², 177³, 180, 181, 185, 187, 195, 197(1 and 2), 203, 204 (1), (3) or 252 (1) of the Criminal Code.

³²² § 364.

³²³ See supra 2.2.

³²⁴ § 397.

³²⁵ NCCP, Chapter 14 §§ 375 through 382.

³²⁶ *Ibid.* §§ 233 through 238.

³²⁷ *Ibid.* §§ 239 through 250.

³²⁸ *Ibid.* §§ 251 through 256.

³²⁹ *Ibid.* Chapter 16 §§ 393 through 403.

³³⁰ *Ibid.* Chapter 17 §§ 404 through 407

³³¹ See § 46.

³³² § 48(1).

³³³ § 48(2).

evidence from all perspectives, thoroughly and objectively pursuant to law. No evidence has predetermined weight.³³⁴

The NCCP contains provisions regarding evidence with numerous alterations compared to the ECCP *e.g.* inclusion of long-distance hearing of the witness, collection of evidence by surveillance activities, police agent with false identity *etc.*³³⁵

2 Means of Evidence

The ECCP specifies a non-conclusive list of evidence: 1) testimony of the suspect and accused; 2) testimony of witness and victim; 3) expert assessment and opinion 4) physical evidence 5) records of investigative and court actions; and 6) documents.³³⁶ Methodology applied in NCCP remains the same.³³⁷

3 Interference with Right to Privacy

The Estonian Constitution provides that everyone is entitled to privacy of messages transmitted by it or to it by post, telegram, telephone or other generally used means. Exceptions may be made on authorization by a court, in cases and in accordance with procedures determined by law in order to prevent a criminal act or for the purpose of establishing facts in a criminal investigation.³³⁸ Persons are guaranteed the inviolability of their homes. No one has the right to enter a residential space against the will of the persons residing therein without legal basis.³³⁹

The ECCP strengthens the principles of the Constitution and therefore: 1) confidentiality of the private life, correspondence, telephone calls and telegraph messages of persons is protected by the law; 2) search, seizure, inspection of premises of persons, detention of correspondence and seizure thereof from post and telegraph offices may be effected only on the bases and pursuant to the procedure prescribed in ECCP.³⁴⁰ Detention and seizure of correspondence from post and telegraph offices can be conducted only on the basis of permission or ruling of a county or city court judge. A representative of the post and telegraph office has to be present upon the seizure of correspondence. If necessary, a preliminary investigator has right to summon a specialist to participate in the seizure of correspondence by post or by telegraph.³⁴¹

Even performance of exceptional surveillance activities specified in § 121 of the Surveillance Act, that is covert examination of the postal items of the person held in custody, and wiretapping and recording of the messages and other information of the person held in custody, delivered by telegraph, telephone and other commonly used technical communication channels, is permitted allowed with the permission of the court.³⁴²

The NCCP obviously went further regarding the guarantees for protection of privacy.³⁴³

³³⁴ § 50.

³³⁵ NCCP §§ 60 through 126.

³³⁶ See more § 51 through 65.

³³⁷ NCCP § 63.

³³⁸ Article 43 of the Constitution.

³³⁹ See Article 33 of the Constitution and § 11¹.

³⁴⁰ § 11¹.

³⁴¹ § 145

³⁴² § 75.

³⁴³ See NCCP § 114 (Grant of permission for surveillance activities), § 116 (Covert examination of postal and telegraphic items) *etc.*

VII Precautionary Measures

1 General Provisions

Preventative measures may be applied if there is sufficient reason to believe that an accused or accused at trial who is at large absconds investigation or court proceedings, impedes the establishment of the truth in a criminal matter or continues to commit criminal offenses, or in order to ensure the enforcement of a court judgment.

While deciding on the preventative measure, following factors must be considered: 1) seriousness of the committed criminal offense, 2) personality of the suspect, accused, or accused at trial; 3) possibility that the suspect, accused, or accused at trial may abscond investigation or the court proceedings or may impede the establishment of the truth and the state of health; 4) age and the marital status and other facts concerning the suspect, accused or accused at trial which may be relevant in the application of a preventive measure. A preliminary investigator or prosecutor has to prepare a reasoned order, or in case of the decision of the court, it has to prepare a reasoned ruling concerning the application of a preventative measure which sets out the nature of the charges and provides the grounds for the application of the preventative measure. The order or ruling concerning the application of a preventive measure ought to be communicated to the person with regard to whom such order or ruling is made.³⁴⁴

2 Particular Measures

The ECCP provides for the following classes of preventative measures: 1) signed undertaking not to leave place of residence; 2) personal surety; 3) taking into custody; and 4) bail. In addition to the application of such preventive measures, a minor may be placed under the supervision of its parents, guardians, curators, or the administration of an educational, child care or medical institution. With regard to a member of the armed forces, the applicable measure is supervision by the command staff of a military unit.³⁴⁵

A signed undertaking not to leave a place of residence is a written commitment obtained from a suspect, accused or accused at trial not to leave its permanent or temporary residence without the permission of a preliminary investigator, prosecutor or court. If a suspect, accused or accused at trial violates such a commitment, a more severe preventative measure may be applied with regard to it, against which the suspect, accused or accused at trial has to be cautioned upon the obtaining of its signature.³⁴⁶

Personal surety is a written commitment by a trustworthy person to ensure the appearance of a suspect, accused or accused at trial when summoned by a preliminary investigator or court. The number of sureties is to be determined by a preliminary investigator, prosecutor or court.³⁴⁷ If a suspect, accused or accused at trial fails to appear before a preliminary investigator or to a court session at the time set out in the summons without a reasonable impediment, a fine may be imposed on the surety in an amount equivalent to one hundred daily rates.³⁴⁸

On the application of a suspect, accused or accused at trial, a county or city court judge may substitute taking into custody as a preventative measure with bail. The minimum rate for a security is an amount equivalent to five hundred daily wages. A county or city court judge has to notify a preliminary investigator, criminal defense counsel and prosecutor of the

³⁴⁴ § 68.

³⁴⁵ § 66.

³⁴⁶ § 69.

³⁴⁷ However, minimum number is two. See § 70.

³⁴⁸ § 71.

motion for this preventative measure and they have right to participate in a hearing regarding that motion.³⁴⁹

If a suspect, accused or accused at trial absconds pretrial investigation or the court proceedings without good reason, or intentionally commits a new criminal offense, the bail will be transferred into public revenues by a court judgment or a ruling on termination of criminal proceedings after an amount necessary for the satisfaction of a civil claim and the compensation for legal costs has been deducted there from. On the other hand, bail will be returned if a suspect, accused or accused at trial does not violate the obligation to appear in court or at a preliminary investigation authority when summoned, or if a county or city court judge has changed or annulled this preventative measure on the proposal of a preliminary investigator or prosecutor, or upon termination of the criminal proceeding, or upon the acquittal of the accused at trial.³⁵⁰

Taking into custody may be applied as a preventative measure with regard to a suspect, accused or accused at trial in order to prevent their absconding from the criminal proceeding, the commission of a new criminal offense or in order to ensure the enforcement of a court judgment. Permission to take a suspect or accused into custody, or permission for the performance of exceptional surveillance activities referred to in § 121 of the Surveillance Act is given exclusively by a county or city court judge on the basis of a reasoned ruling submitted it, which has to set out the period of time for holding the suspect or accused in custody. After the completion of pretrial investigation, the extension of the term for holding a person in custody, or the performance of exceptional surveillance activities may be requested by a prosecutor. A person which is taken into custody must be interrogated as a suspect or accused and ensured the right of defense. The suspect or accused also has the right to request its interrogation by a county or city court judge with the participation of criminal defense counsel.³⁵¹

A person may not be held in custody for longer than six months during the investigation of a criminal matter. In case of a particularly complex or extensive criminal matter, the Chief Public Prosecutor or senior county or city prosecutor may exceptionally request the extension of the term of custody for up to one year.³⁵²

Upon the placement of a minor under the supervision of its or her parents, guardians, curators, or the administration of educational, child care or medical institutions, a written commitment ought to be obtained from them to ensure the appearance of the minor before a preliminary investigator and court, and to ensure its good conduct. They are to be notified of the criminal offense of which the minor is suspected or accused and cautioned of the liability applied to them if the suspect, accused or accused at trial fails to appear before a preliminary investigator or court.³⁵³

Supervision applied with regard to a member of the armed forces who is a suspect, accused or accused at trial by the command staff of a military unit represents the application of measures prescribed by the regulations of the armed forces in order to ensure the required conduct and its appearance when summoned by a preliminary investigator, prosecutor or court. Upon the application of supervision, the commanding officer of a military unit ought to be notified of the criminal offense of which the member of the armed forces is suspected or accused. Commanding officer of the military unit has to give to a preliminary investigation authority, prosecutor or court a written notice of the application of supervision.³⁵⁴

³⁴⁹ § 71¹.

³⁵⁰ *Loc. cit.*

³⁵¹ § 73.

³⁵² § 74.

³⁵³ § 76.

³⁵⁴ § 77.

The NCCP lists preventative measures as: 1) prohibition on departure from residence;³⁵⁵ 2) supervision of members of Defense Forces;³⁵⁶ 3) arrest;³⁵⁷ 4) bail;³⁵⁸ 5) compelled attendance;³⁵⁹ 6) search;³⁶⁰ 7) exclusion of suspect or accused from office;³⁶¹ and 8) seizure of property.³⁶²

³⁵⁵ NCCP § 128.

³⁵⁶ *Ibid.* § 129.

³⁵⁷ *Ibid.* §§ 130 through 134.

³⁵⁸ *Ibid.* § 135.

³⁵⁹ *Ibid.* § 139.

³⁶⁰ *Ibid.* § 140.

³⁶¹ *Ibid.* § 141.

³⁶² *Ibid.* §§ 142 and 143.

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Chapter 3

The Criminal Procedure System of the Republic of Georgia

Merab Turava



Chapter 4

Criminal Procedure System of the Federal Republic of Germany*

Robert Esser



I Sources

1 General Observations

The Federal Republic of Germany (hereinafter: FRG) is a democratic and social federation consisting of sixteen independent states (*Bundesländer*) based upon the principle of separation of powers and the rule of law (*Rechtsstaatsprinzip*). Legislative power is divided between the Federation (*Bund*) and the states (*Länder*). According to Articles 74 § 1 No. 1, 72 of the German Constitution, (*Grundgesetz*, hereinafter: the Basic Law),³⁶³ the states have no legislative competence in the fields of criminal law and criminal procedure. Therefore all penal laws in Germany are federal laws.³⁶⁴

2 Historical Overview

The Law of Criminal Procedure describes the procedure by which the existence of a criminal offense is investigated and penalties or other measures are imposed and executed.³⁶⁵ Today most of the law in Germany is codified, but what we describe as the German penal law system is the product of many centuries of development, starting with the Germanic tribal laws of the native population (*Stammesrechte*).³⁶⁶

In the Germanic period, a distinction between civil and criminal procedure was unknown. Instead, there existed a system of retaliation based upon the principle of private accusation by the victim or his clan. The public hearing on the case took place at the people's assembly (*Thing*). In the Middle Ages, an inquisitorial system of prosecution dominated in which the judge combined the functions of investigator, prosecutor, fact finder, and judge.

The most important source of criminal procedure law during that age was the *Constitutio Criminalis Carolina* of Emperor Karl V (1532). Against a background of old Germanic customs that had been influenced by Roman and Feudal law over the course of many centuries, the middle of the 18th century saw promulgation of the first codes of law and written police regulations (*Polizeiverordnungen*), which derived from the individual territorial entities that had gained political power at this time. The codes that evolved in the 19th century combined elements of German, received Roman law, and canon law and were to a large extent influenced by the ideals of the 18th century's Enlightenment, which had led to the French Revolution. The impetus for the promulgation of codes governing the entire German territory was absent until 1871, when political unification was reached under Prussian rule. The movement toward legal unification was strongly encouraged by legal scholars, who worked toward the construction of a system of law applicable to the entire German people.

* National report dated 22 April 2003.

³⁶³ An English version of the *Grundgesetz* has been published by Tschentscher, A., *Grundgesetz* (The Basic Law), Jurisprudential Verlag: Würzburg, 2002.

³⁶⁴ An introduction to the entire German legal system is given in Robbers, G., *Einführung in das deutsche Recht*, (An Introduction to German Law), 2. Aufl., Baden-Baden, 1998.

³⁶⁵ Krey, V., *German Criminal Law-General Part, Textbook in English and German*, I (2002), 37; Krey, V., *Strafverfahrensrecht*, (Criminal Procedure Law), Volume I, Kohlhammer: Stuttgart u. a., 1988, Rn. 1.

³⁶⁶ Rüping, H. / Jeruschek, G., *Grundriß der Strafrechtsgeschichte* (Outline of the History of Criminal Law), 4. Aufl., C. H. Beck: München, 2002., 4.

After the creation of the German Reich (*Reichsgründung*) in 1871, several codifications were turned into Laws of the Reich (*Reichsgesetze*). The most important ones in the field of criminal law were the Penal Code of 1871 (*Strafgesetzbuch*, hereinafter: Criminal Code), the Code of Criminal Procedure of 1877 (*Strafprozessordnung*, hereinafter: Code) and the Judiciary Act of 1877 (*Gerichtsverfassungsgesetz*). Although many amendments have changed the Code since that time, its general structure and the most important principles governing criminal procedure remain valid today.

During the Nazi dictatorship between 1933 and 1945, criminal procedure law deteriorated into a weapon of the state used to subdue political opponents. Immediately after the end of World War II, the restoration of a legal system based on the rule of law and the principles of legal justice commenced. Major guidelines were set by the Basic Law, which entered into force in May 1949.

The Basic Law expresses strong individual rights (*Grundrechte*) that are binding not only on the legislature, but also on the judiciary, thereby establishing a limit on the ability of state organs to interfere with personal rights.

2.a The German Unification-A Transition of Criminal Procedure Law?

With the fall of the Berlin Wall on 9 November 1989, the political system of the German Democratic Republic (hereinafter: GDR) began to collapse, and the process toward German Unification began. After a new Parliament was elected in the in March 1990, the GDR became part of the FRG on 3 October 1990 by way of accession (*Beitritt*) to the territory covered by the Basic Law. That procedure was founded on the former Article 23 of the Basic Law.

The legal instrument setting forth major details of the constitutional and legal reunification of Germany including the “harmonization of law” (*Rechtsangleichung*) is the Unification Treaty of 31 August 1990 (*Einigungsvertrag*).³⁶⁷ The Unification Treaty is a bilateral international treaty between the FRG and the GDR addressing all of the various fields of law that had to be harmonized, e.g. civil law, administrative law, labour law, social law and, last but not least, criminal law.

Even before the unification of Germany was completed in 1990, the GDR had modified and deleted provisions empowering authorities to detain people for exercising freedom of expression, assembly and movement. The Basic Law entered into force in the eastern German territory on 3 October 1990³⁶⁸ and is now “valid for the entire German people following the achievement of the unity and freedom of Germany”.³⁶⁹ The GDR ceased to exist.

According to Article 8 of the Unification Treaty, the federal law of the FRG-including the criminal statutes described above³⁷⁰-entered into force in the eastern German territory (*Beitrittsgebiet*) on the same day, with exceptions and minor modifications enumerated in Appendix No. 1 (*Anlage I*), Chapter III and Appendix No. 2 (*Anlage II*) of the Unification Treaty. Important provisions of the Criminal Code that did not enter into force in the territory of the former GDR were § 218 et seq. The Criminal Code, concerning the criminal offense of abortion, and several regulations concerning placement of persons in preventive detention (*Sicherungsverwahrung*).³⁷¹ However, in 1992 and 1995 the German legislature, forced by the Federal Constitutional Court, enacted a new law of abortion that governs the entire German

³⁶⁷ Treaty of the Federal Republic of Germany and the Democratic Republic of Germany concerning the establishment of the unification of Germany. Unification Treaty of 31/08/1990; BGBl. II (1990), 889.

³⁶⁸ Article 3 of the Unification Treaty.

³⁶⁹ Article 146 The Basic Law.

³⁷⁰ See I 3 and 4.

³⁷¹ § 66 of the Criminal Code.

territory. Legal unification concerning the institution of preventive detention was achieved in August 1995.

Since the reunification of the Criminal Code is applied throughout the entire territory of Germany.³⁷² This includes the new states for criminal acts committed after the date of the reunification 3 October 1990. But German prosecuting authorities and criminal courts were forced to deal with many crimes committed under the former regime of the GDR and thus faced the typical problems of a state undergoing transition to a democratic regime. The central question that arose was which substantive criminal law applied to offenses committed on the territory of the GDR before 3 October 1990.

The applicability of the FRG's criminal law for offenses committed in the GDR did not follow from the principles of international criminal law included in the Criminal Code.³⁷³ Although the Basic Law, had always been applied to the entire German people, the territory of the GDR was not regarded as German territory in the sense of Article 3 of the Criminal Code since the territory of the GDR had been acknowledged by the FRG in the Basic Treaty of 21 December 1972 (*Grundlagenvertrag*).³⁷⁴ Under certain circumstances, the Criminal Code is also applicable to criminal acts committed abroad, *i.e.* not on the German territory in the sense of § 3 of the Criminal Code, if the perpetrator or the victim is a German national. However, considering the territory of the GDR not to be German territory in the sense of § 3 means consequently characterizing the citizens of the GDR as "Non-Germans" in the sense of § 7 of the Criminal Code despite the fact that the FRG had declared them as German nationals in the Basic Treaty. Following that approach further, § 7(2) No. 1 of the Criminal Code at least from its wording, could have led to a direct application of the Criminal Code.

However, the Federal Court of Justice (*Bundesgerichtshof*, hereinafter: BGH) took the view that such a direct and absolute application of FRG's penal law to offenses committed before 3 October 1990 in the territory of the GDR would have provoked serious conflicts with the principle of non-retroactivity (see *infra*).³⁷⁵ Therefore, the prosecution of criminal acts and the applicability of German criminal law to these acts had to be regulated in the Unification Treaty.

Appendix No. 1 to Chapter III of the Unification Treaty of 31 August 1990, taken together with the Unification Treaty Act (*Einigungsvertragsgesetz*) of 23 September 1990³⁷⁶ and the transitional provisions of the Criminal Code, §§ 315 to 315(c) of the Introductory Act to the Criminal Code (*Einführungsgesetz zum Strafgesetzbuch*), provides that the applicable law is in principle the law of the place where the offense was committed (*lex loci, Tatortprinzip*).³⁷⁷ This means that the applicable substantive law for criminal proceedings brought with respect to offenses committed by citizens of the GDR inside the territory of the GDR before 3 October 1990 is in principle that of the GDR, except for those cases in which the result of the offense (*Erfolgsort*), *e.g.* the death of a person wounded while crossing the border, took place on the territory of the FRG ("place of commission/effect rule").³⁷⁸ Except

³⁷² § 3 of the Criminal Code.

³⁷³ § 3-9 of the Criminal Code. These are provisions of national criminal law addressing the question of the circumstances under which German criminal law applies to crimes committed outside the German territory.

³⁷⁴ § 3 of the Criminal Code (Applicability to Domestic Acts/Acts within the territory): "German penal law is applicable to acts committed within the country".

³⁷⁵ Federal Court of Justice, *Entscheidungen des Bundesgerichtshofs in Strafsachen* (Decisions of Federal Court of Justice), Official Publication Series (BGHSt), Vol. 32, 293.

³⁷⁶ BGBl. II (1990), 885.

³⁷⁷ § 315(4) EG Criminal Code, § 3, 9 Criminal Code. § 2(1) (Temporal applicability): "The punishment and its collateral effects are determined by the statutory law applicable at the time of the act".

³⁷⁸ § 315(4) EG Criminal Code, § 3, 9 Criminal Code. § 3 Criminal Code (Applicability to domestic acts/Acts within the territory) see footnote No. 11; § 9(1) (Place of the act) Criminal Code: "An act is committed at any place where the actor has acted or, in case of an omission should have acted, or where the result belonging to the act definition occurred or was to occur according to the actor's belief".

for those cases with a local connection to the territory of the FRG, citizens of the former GDR are tried according to the GDR's criminal law that was applicable to them at the material time. The law of the FRG in force at the time of conviction is applicable only if it is more lenient, *i.e.* more favorable to the defendant, than the law of the GDR (*lex mitius/mitior*).³⁷⁹

If a corresponding criminal offense (*Straftat*) covering the core of the perpetrator's wrongdoing does not exist in the law of the FRG, punishment is not possible.³⁸⁰

Very soon after these provisions had entered into force, the question arose as to whether this legal approach was compatible with the Basic Law and the standards of international criminal and human rights law. Basic Law lays down an absolute prohibition against retroactivity ("*nullum crimen, nulla poena sine lege*") and provides that an act shall not be punishable unless it was defined by law as a criminal offense before it was committed.³⁸¹ In other words, the Constitution allows a conviction only for acts that, at the time when they were committed, were defined by statute with sufficient precision as criminal offenses. It also prohibits the imposition of a higher penalty than the one prescribed in the statute at the time that the offense was committed.³⁸² Criminal Code affirms this constitutional principle "no punishment without statutory authorization" by saying that "personal conduct may be punished only if it has been made punishable by statute prior to the commission of the act."³⁸³ However, Basic Law does not preclude the application of law more lenient than that applicable at the material time.³⁸⁴

The Federal Court of Justice has taken the view that the more lenient law is the law which, on the basis of an overall comparison and assessment in the specific individual case (*Gesamtvergleich*), yields a judgment more favorable to the offender, the decisive factor being the legal consequences of the offense.³⁸⁵ The law of the GDR would have been more lenient if the perpetrator could rely on a ground of justification excusing his criminal responsibility.

Soldiers and members of the GDR border guard who were charged with having caused the death of people trying to cross the border or the Berlin Wall often invoked grounds of justification stipulated in the GDR's State Borders Act (*Grenzgesetz*), arguing that Article 103 § 2 of the Basic Law prohibited their conviction because their acts were not regarded as criminal under the law of the GDR at the time of the incidents.

The German Federal Constitutional Court (*Bundesverfassungsgericht*, hereinafter: BverfG) rejected this argument, reasoning that the absolute prohibition of retroactive effect of criminal law set forth in Article 103(2) of Basic Law derives from the special trust reposed in criminal statutes enacted by a democratic legislature required to respect fundamental rights.

³⁷⁹ § 315(1) EG Criminal Code, § 2(3) Criminal Code. BGH, Judgment of 26 November 1992, Official Publication Series (BGHSt) 39, 54, 65 et seq.; § 2(3) (Temporal application) Criminal Code: "If the statute as it appeared at the completion of the crime is amended prior to the judgment in the case, the most lenient statute shall be applied".

³⁸⁰ § 2(2) (Temporal application) Criminal Code: "If the penal threat is amended during the act's commission, then that statutory law is to be applied which is applicable at the act's completion".

³⁸¹ Article 103(2) of the Basic Law. The principle of non-retroactivity was also enshrined in the Constitution of the GDR (Article 99(2)).

³⁸² Concerning the historic development of the principle "no punishment without law": Krey, V., *German Criminal Law-General Part*, Textbook in German and English, I (2002), 40 et seq.

³⁸³ § 1 of the Criminal Code.

³⁸⁴ Article 103(2) of the Basic Law.

³⁸⁵ German Federal Court of Justice, Judgment of 12 February 1991, *Entscheidungen des Bundesgerichtshofs in Strafsachen* (Decisions of Federal Court of Justice), Official Publication Series Vol. 37, 320, 322. Concerning the GDR's government criminality (Regierungskriminalität) under the SED-Regime see also: BGHSt 39, 1; 39, 168; 40, 218; 42, 65; 44, 204; Marxen-Werle *Die strafrechtliche Aufarbeitung von DDR-Unrecht* (The Finishing Touches of GDR "Non-Law"), 1999; *Strafjustiz und DDR-Unrecht* (Criminal Justice and GDR Non-Law), Vol. 1-3, 2000/2002.

This special basis of trust no longer persists where a State defines certain acts as serious criminal offenses by statute while excluding the possibility of punishment by allowing grounds of justification covering some of these acts and even by encouraging them, thus gravely breaching the human rights generally and internationally recognized. A citizen of the former GDR subject to the criminal jurisdiction of the FRG for acts committed in the former GDR cannot rely on grounds of justification obviously infringing elementary concepts of justice and the international law of human rights.³⁸⁶ The Constitutional Court referred to the International Covenant on Civil and Political Rights of 19 December 1966 as well as to the United Nations' Universal Declaration of Human of 1948 and based its legal opinion on the so-called "Radbruch's formula" (*Radbruch'sche Formel*),³⁸⁷ which states that positive law must be considered contrary to justice where the contradiction between statutory law and justice is so intolerable that the former must give way to the latter.

In two judgments of 22 March 2001 in the cases of *Streletz, Kessler and Krenz v. Germany* and *K. H. W. v. Germany*,³⁸⁸ the European Court of Human Rights in Strasbourg found no violation of Article 7 § 1 (no punishment without law)³⁸⁹ and Article 14 (prohibition of discrimination) of the ECHR. The applicants had submitted that their actions, at the time when they were committed, did not constitute offenses under the law of the GDR or international law and that their conviction by the German courts had therefore breached the Convention.³⁹⁰ The ECHR took the view that at the time when they were committed, the applicants' acts constituted offenses defined with sufficient clarity and foreseeability by the law of the GDR and international law.

After the GDR was officially proclaimed on 7 October 1949, a completely different system of law from that of the FRG developed, strongly influenced by the ideas of socialism and communism.³⁹¹ The amended German Criminal Code of 1871 remained applicable until 1968, when the GDR's Constitution and Criminal Code entered into force, both strengthening the principles of "fundamentals of socialistic legality" (*Grundsätze der sozialistischen Rechtspflege*). The judicial authorities of the GDR were always under the control and leadership of GDR's Parliament (*Volkskammer*) and never obtained the position of autonomous institutions. Accordingly to the Article 93 § 3 of the Constitution, even the Supreme Court of the GDR (*Oberste Gericht*), the highest court in the judicial system of the

³⁸⁶ German Federal Constitutional Court, Order of 26 October 1996, Official Publication Series, Vol. 95, 96.

³⁸⁷ Gustav Radbruch (1878-1949): German professor of Law (University of Heidelberg, Königsberg and Kiel).

³⁸⁸ Three applicants were senior officials of the GDR, *i.e.* Deputy Minister of Defense (Streletz), Minister of Defense (Kessler), President of the Council of State (Krenz). K.-H. W., a member of the *Nationale Volksarmee*, (National People's Army) had been stationed as a border guard at the border between the GDR and the FRG.

³⁸⁹ Article 7(1) ECHR: "No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed."

³⁹⁰ The Court reasoned "that a State practice such as the GDR's border-policing policy, which flagrantly infringes human rights and above all the right to life, the supreme value in the international hierarchy of human rights, cannot be covered by the protection of Article 7(1) of the Convention. That practice which emptied of its substance the legislation on which it was supposed to be based and which was imposed on all organs of the GDR, including its judicial bodies, cannot be described as "law" within the meaning of Article 7 of the ECHR". European Court of Human Rights, Cases of *Streletz, Kessler and Krenz v. Germany* and *K.-H. W. v. Germany*, Applications Nos. 34044/96, 35532/97 and 44801/98, Judgments of 22/03/2001.

³⁹¹ Lekschas, *Strafrecht der DDR* (GDR's Criminal Law), 1. Aufl., 1988; Duft, *Strafrecht der Deutschen Demokratischen Republik* (Criminal Law of German Democratic Republic) 5. Aufl., 1987; Roggemann, *Strafgesetzbuch und Strafprozeßordnung der DDR mit Nebengesetzen* (Criminal Code and Code of Criminal Procedure of GDR and By-laws), 2. Aufl., 1978; SageI-Grande, *Grundzüge des Strafrechts in der DDR* (Outlines of Criminal Law of GDR) 1977; Bechthold, *Die Prozeßprinzipien im Strafverfahren der DDR* (Principles of Criminal Procedure of GDR) 1967; Heilborn, *Strafprozessrecht der DDR* (GDR's Criminal Procedure Law), 3. Aufl., 1989; Luther, *Strafverfahrensrecht* (Criminal Procedure Law), 3. Aufl., 1987.

GDR, was responsible to the Parliament and the Council of State (*Staatsrat*). The same applied to the GDR's General Prosecutor, who was able to participate in the meetings of the Council of Ministers and could apply for the issuance of directives and decisions by the Supreme Court. The President and the judges of the Supreme Court were elected by and responsible to Parliament. All other judges in the court system were elected either by municipal councils or directly by the people. It is a striking fact that the independence of the judiciary was not recognized in the GDR. While the Article 96 § 1 of the GDR's Constitution stipulated that all judges were independent as far as their jurisdiction was concerned, the removal of a judge from office was possible if he acted against the laws and social principles.³⁹² In addition to the state courts, more than 25 000 "social courts" (*gesellschaftliche Gerichte/Konfliktkommissionen, Schiedskommissionen*) existed which, among other things, dealt with petty crimes.

According to the Article 97 of the GDR's Constitution, the Public Prosecutor's Office (*Staatsanwaltschaft*) was vested with the surveillance of all institutions in compliance with the principle of "socialistic legality" (*sozialistische Gesetzlichkeit*). Initially prosecutors were subordinated to the Council of Ministers; from 1963 onward, they fell under the authority of the GDR's Parliament. With regard to criminal procedure, the right of appeal (*Revision*) was abolished in 1952. In its place, a new remedy against final judgments, called "cassation," was introduced. Only the General Prosecutor and the President of the Supreme Court, not the convicted person, could apply for such relief. The reunification of Germany resulted in the extension of the FRG's laws of criminal procedure to the territory of the unified Germany.

The Code of Criminal Procedure (hereinafter: Code), ECHR, the Judiciary Act and all other federal statutes of the FRG described above became applicable in the territory of the former GDR on 3 October 1990 by Article 8 of the Unification Treaty of 31 August 1990, with modifications set forth in Appendix No. 1 of the Treaty.

The law of the GDR that remained in force according to Article 9 of the Unification Treaty was set forth in Appendix No. 2.³⁹³ Even before 3 October 1990, the GDR's Parliament (which was democratically elected in March, 1990) had abolished provisions of the former socialist criminal law system, such as the remedy of cassation, and enacted several laws enshrining fundamental legal principles, the most important of which were the independence of the judiciary, the right of the accused against self-incrimination, and access by defense counsel to the case file.

After unification, the court system of the FRG could not directly be transferred to the territory of the former GDR because the necessary personal and organizational structures were absent. A certain period of adaptation was needed. According to Appendix No. 1, Chapter III of the Unification Treaty, the Local Courts (*Kreisgerichte*) and *Bezirksgericht* of the GDR were not abolished. In principle, the Local Courts had the competence of District Courts, the *Bezirksgerichte* that of Regional and Higher Regional Courts, and the *Kammergericht* in Berlin had the first instance competence of a Higher Regional Court. The *Kreis*-and *Bezirksgerichte* existed until the Justice Assimilation Law of 26 June 1992 (*Rechtspflegeanpassungsgesetz*) entered into force and District Courts, Regional Court and Higher Regional Courts took their place.³⁹⁴

In the GDR, a large number of criminal boards of arbitration (*Schiedsstellen*) were established. These boards dealt with petty crimes and were able to terminate criminal

³⁹² § 95(3).

³⁹³ See the comprehensive annotation of the Appendixes to the Unification Treaty by Rieß and Hilger, published in: Löwe/Rosenberg, *Die Strafprozessordnung und das Gerichtsverfassungsgesetz mit Nebengesetz* (The Code of Criminal Procedure and the Judiciary Act), Großkommentar zur Strafprozessordnung, 25. Aufl., De Gruyter: Berlin: Berlin, 2002, Vol. 6, Part II.

³⁹⁴ BGBl. I (1992), 1147.

proceedings by offering a settlement between the victim and perpetrator. The Law of 13 September 1990 concerning Boards of Arbitration in the Communities (*Gesetz über die Schiedsstellen in den Gemeinden*) abolished the social courts and formally established a criminal arbitration system in addition to the dispense possibilities under § 153 et seq. Code.³⁹⁵ Appendix No. 2 of the Unification Treaty continued this arbitration system. Some of these provisions, although they have been amended several times, still exist today.

With regard to criminal procedure law, the principle of non-retroactivity was no obstacle to the prosecution of crimes that had taken place before October 1990. It is a general rule that new provisions of procedure law apply to pending proceedings from the time that the provisions enter into force.

According to its development and to the wording of Article 103 § 2 of the Basic Law, the prohibition of retroactive effect of criminal law does not apply in the law of criminal procedure, but only in substantive criminal law. For that reason, the prohibition does not apply to provisions concerning statute-barred prosecution. By their nature and from a systematic point of view, provisions concerning statute-barred prosecution (*Verjährung*) are procedural law, although they are found in the German Criminal Code.³⁹⁶

The enforcement of judgments rendered by the GDR's judiciary is regulated by Article 18 of the Unification Treaty. In accordance with Articles 17 and 18 of the Unification Treaty, a statutory basis for the rehabilitation of people wrongly convicted by GDR courts was created—namely, the Law of 29 October 1992 concerning the Rehabilitation and Compensation of Persons Having Fallen Victim to Unlawful Criminal Procedural Measures in the Acceding Territory (*Gesetz über die Rehabilitierung und Entschädigung von Opfern rechtsstaatswidriger Strafverfolgungsmaßnahmen im Beitrittsgebiet*).³⁹⁷

In total, the provisions of the Unification Treaty concerning criminal procedure law may be portrayed more as a model for the harsh substitution (“take-over”) of a criminal law system by that of another state than as a smooth transition of law in the narrow sense. That conclusion brings us to the general structure and major principles of the German criminal law system existing today.³⁹⁸

3 Code of Criminal Procedure

The central source of German criminal procedure law is the federal Code of Criminal Procedure first promulgated in 1877. The Code contains the major provisions requiring criminal proceedings and is applicable at both the state and federal levels.³⁹⁹

4 Other Sources

The highest law within the German hierarchy of laws is the Basic Law. The Basic Law sets forth fundamental individual rights⁴⁰⁰ forming a protection against arbitrary interferences by the state and enshrines the rule of law.⁴⁰¹

The ECHR of 4 November 1950, which became part of German federal law on 3 September 1953,⁴⁰² sets out individual rights and procedural guarantees, such as the right of

³⁹⁵ GDR's Law Gazette (*Gesetzblatt der DDR*), Vol. I, 1527; see also: Meyer-Goßner, L., *Strafprozessordnung* (Code of Criminal Procedure), 46. Aufl., C. H. Beck: München, 2003, § 153 Rn. 42.

³⁹⁶ Krey, *German Criminal Law-General Part*, I (2002), 61–63 with further references. See also: European Court of Human Rights, *Dassault v. Belgium*, Judgment of 18/09/2001; *Coeme v. Belgium*, Judgment of 22/06/2000.

³⁹⁷ BGBl. I (1992), 1814.

³⁹⁸ Kühne, H.H., *Strafprozessrecht* (Criminal Procedure Law), 6. Aufl., C. F. Müller: Heidelberg, 2003; Beulke, W., *Strafprozeßrecht* (Criminal Procedure Law), 6. Aufl., C. F. Müller: Heidelberg, 2002; Volk, K., *Strafprozeßrecht* (Criminal Procedure Law), 3. Aufl., C. H. Beck: München, 2002.

³⁹⁹ Editor's note: The numbers of paragraphs without additional mark refer to the Code.

⁴⁰⁰ Articles 1 through 19, 101 § 1, 103, 104 of the Basic Law.

⁴⁰¹ Article 20 § 3 of Basic Law.

an arrested or detained person to be brought promptly before a judge⁴⁰³ and to participate in a proceeding by which the lawfulness of his detention is decided speedily by a court,⁴⁰⁴ as well as the right of any person charged with a criminal offense to a fair and public hearing within a reasonable time by an independent and impartial tribunal.⁴⁰⁵

Another central source of criminal procedure law is the Judiciary Act, which establishes and describes the German court system, *i.e.* the jurisdiction and staffing of the various courts as well as the appointment of lay judges (*Schöffen*). It also contains procedural regulations concerning the principle of public trial,⁴⁰⁶ the maintenance of order during trial,⁴⁰⁷ the deliberation and voting of the court,⁴⁰⁸ and the use of an interpreter.⁴⁰⁹ Introductory Act to the Judiciary Act (*Einführungsgesetz zum Gerichtsverfassungsgesetz*) provide for judicial control over administrative measures of authorities involved in criminal proceedings.⁴¹⁰ However, this kind of judicial procedure is subsidiary to the remedies set forth in the Code.

Provisions of the Code of Civil Procedure (*Zivilprozessordnung*) are applicable in criminal proceedings where the Code expressly references them.⁴¹¹ The Criminal Code contains regulations relevant to criminal procedure, such as regulations governing crimes that cannot be prosecuted without formal complaint by the victim (*Strafantrag*)⁴¹² and rules of statute-barred prosecution (*Verjährung*).⁴¹³

The Juvenile Court Act (*Jugendgerichtsgesetz*) lays down special procedural rules and sanctions for juvenile offenders between the age of fourteen and twenty-one.

Important principles defining the position of federal and state court judges are set forth in the Basic Law,⁴¹⁴ in the ECHR,⁴¹⁵ and in the German Judges' Law (*Deutsches Richtergesetz*).

The Federal Advocates' Law (*Bundesrechtsanwaltsordnung*) sets forth the professional responsibilities, ethics and duties of lawyers as binding rules of law. The Courts Costs Law (*Gerichtskostengesetz*) and the Federal Advocate's Costs Law (*Bundesrechtsanwaltsgebührenordnung*) provide guidelines for the calculation of court costs and lawyer's fees. Provisions for the compensation of witnesses and experts are found in the Witness and Expert Compensation Law (*Zeugen und Sachverständigenentschädigungsgesetz*), while persons who have been subjected to criminal procedural measures through no fault of their own are compensated pursuant to the Act for the Compensation of Criminal Prosecution (*Strafrechtsentschädigungsgesetz*). The Federal Register Law (*Bundeszentralregistergesetz*) regulates the registration of criminal sentences and defines which persons and institutions have access to such data.

⁴⁰² The Convention was ratified by the Law of 7 August 1952, BGBl. Vol. II, 1952, 685, 953.

⁴⁰³ Article 5(3) ECHR.

⁴⁰⁴ Article 5(4) ECHR. Concerning the European Court of Human Right's jurisdiction on pretrial detention (Article 5 of the ECHR) see: Kühne H.-H./Esser, R., *Strafverteidiger*, (Defense Counsel), *Juristenzeitung*, 2002, 383; Esser, R., *Auf dem Weg zu einem europäischen Strafverfahrensrecht* (Towards a European Criminal Procedural Law), De Gruyter: Berlin, 2002, 199 et seq.

⁴⁰⁵ Article 6(1) ECHR.

⁴⁰⁶ § 169 of the *GVG*.

⁴⁰⁷ *Ibid.* § 177.

⁴⁰⁸ *Ibid.* 192.

⁴⁰⁹ *Ibid.* 185.

⁴¹⁰ § 23 et seq. of the *GVG*.

⁴¹¹ *E.g.* notification of decisions, § 37; Securing seizure measures, §§ 111c(3), 111d(2); Taxation of costs, § 464b.

⁴¹² §§ 77 and 77b of the Criminal Code.

⁴¹³ §§ 78 and 79b of the Criminal Code.

⁴¹⁴ Articles 92, 97 of the Basic Law.

⁴¹⁵ § 6(1).

II Criminal Justice System

1 Investigating Services

The law provides that the public prosecutor is the master of the investigation.⁴¹⁶ The police, who are organized at the level of the federal states, are merely an auxiliary of the public prosecutor.⁴¹⁷

In practice, however, it is the police who lead and carry out the investigation. The Federal Police Agency (*Bundeskriminalamt*) at the federal level fulfills mainly a supporting function. By its own motion, it can only investigate a limited number of crimes of federal concern (e.g. terrorism, internationally organized crime), which are enumerated in Article 4 of the Law concerning the Federal Police Agency (*Bundeskriminalamtgesetz*).

2 Prosecuting Authorities

The public prosecutor is a civil servant of the state. He has the duty to investigate crimes. Portrayed as the “guardian of the law,” he must look for both incriminating and exonerating circumstances.⁴¹⁸ The office of the public prosecutor forms part of the State Ministry of Justice (*Justizministerium*).

The "Prosecutor General" (*Generalstaatsanwalt*) has competence in the area of a Higher Regional Court (*Oberlandesgericht*), while the district prosecutors (*Staatsanwälte*) are attached to a Regional Court. They are subordinated to the Prosecutor General. At the federal level, under the authority of the Federal Ministry of Justice (*Bundesjustizministerium*), the federal prosecutor's office (*Bundesanwaltschaft*) is competent in cases of activities against the state (*Staatsschutzdelikte*)⁴¹⁹ and enumerated serious crimes if the case bears “special importance”.⁴²⁰ With respect to petty crimes, the prosecutor may drop the case on the basis of his limited discretionary power (*Opportunitätsprinzip*).⁴²¹

3 Judging Authorities

3.1 Courts in Pretrial Stage

With the reform of criminal procedure law in 1975, the position of the investigating judge in cases of serious crimes was abolished in favor of an unlimited competence of the public prosecutor to investigate during the pretrial stage. Unlike in France, Belgium, and the Netherlands, the pretrial involvement of the judge is very limited in the German criminal procedure system. A judge may intervene only on application of the public prosecutor to order a coercive measure⁴²² where the law expressly demands a prejudicial control.⁴²³

3.2 Courts in Trial Stage

According to the principle of legal judge (*Grundsatz des gesetzlichen Richters*),⁴²⁴ the jurisdiction and competence of a court for any particular case must be statutorily determined in advance on an abstract basis. The jurisdiction of the courts is governed by the Judiciary

⁴¹⁶ § 152(2), 160.

⁴¹⁷ § 152 of the GVG.

⁴¹⁸ § 160(2) of the GVG.

⁴¹⁹ § 120, 142a of the GVG.

⁴²⁰ § 120(2) of the GVG.

⁴²¹ §§ 153 et seq.

⁴²² See Chapter VIII.

⁴²³ § 162.

⁴²⁴ Article 101 of the Basic Law.

Act. Criminal cases are initially heard at a District Court (*Amtsgericht*), Regional Court (*Landgericht*) or at the Higher Regional Court (*Oberlandesgericht*).

The overwhelming majority of all criminal cases start either at the District Court or at the Regional Court. The District Court has first instance jurisdiction in cases in which the expected penalty does not exceed four years.⁴²⁵ Within the District Court, the seriousness of the charge determines whether the case is heard by a single judge (*Amtsrichter*) or a panel consisting of one professional and two lay judges (*Schöffengericht*).⁴²⁶ Prosecutions leading to a maximum sentence of approximately two years are heard by a single judge. For cases involving possible sentences from two up to four years, the *Schöffengericht* has jurisdiction. Special juvenile courts (*Jugendgerichte*) exist with regard to offenses by juvenile offenders. Their jurisdiction is regulated by the Juvenile Court Act.⁴²⁷

Criminal cases in which the sentence exceeds four years are referred to a Regional Court (*Landgericht*). They are heard by a penal chamber consisting of three⁴²⁸ professional judges and two lay judges (*Große Strafkammer*). First instance jurisdiction of the Regional Court also exists with respect to crimes that do not fall under the jurisdiction of either the District Court or the Higher Regional Court. Certain serious crimes enumerated in Articles 74-74(c) Judiciary Act come within the jurisdiction of a special chamber of the District Court, the so-called *Schwurgericht*.

First instance jurisdiction of the Higher Regional Court (*Oberlandesgericht*) exists in cases of terrorism and extraordinary political crimes against the security of the state.⁴²⁹

The highest court in the criminal justice system, the Federal Court of Justice, in Karlsruhe never hears a case of first instance.

In 2001, the German court system consisted of 826 courts: 685 District Courts (*Amtsgerichte*), 116 Regional Courts (*Landgerichte*) and 25 Higher Regional Courts (*Oberlandesgerichte*).⁴³⁰

III Participants in Criminal Procedure

1 Judge

The judge is the leading figure in the trial. His independence as a central guarantee of the rule of law and other principles defining his position are set forth in the Constitution⁴³¹ and in the German Judges' Law (*Deutsches Richtergesetz*). A judge who cannot be independent or impartial can be disqualified by motion of the accused.⁴³² In the District court (*Amtsgericht*) and Regional court (*Landgericht*), lay judges can be members of the bench.

Germany does not employ the features of the Anglo-American jury system. In 1924, the classical jury courts (*Schwurgerichte*) were abolished and “*Schöffengerichte*” with lay judges were established in their place. Lay judges are citizens who are elected to act as judges on an honorary basis for a certain period of time. They are in the same legal position as professional judges and decide all matters with the same vote as their professional counterparts. In contrast to jurors in the classical jury systems, they are not only responsible to reach decisions concerning the facts of the case but also to decide upon the guilt of the

⁴²⁵ § 24(1) of the GVG.

⁴²⁶ § 29 of the GVG.

⁴²⁷ § 33 et seq. of the GVG.

⁴²⁸ After the commencement of trial proceedings (see VI 2) the chamber may decide to hear the case with two professional judges and two lay judges if the case bears no special difficulties (§ 76(2) GVG).

⁴²⁹ E.g. high treason and assaults against the highest representatives of the state (§ 120 GVG).

⁴³⁰ See: Data-Report 2002 of the *Statistisches Bundesamt* (Federal Statistical Office) available at www.statistisches-bundesamt.de.

⁴³¹ Articles 92, 97 of the Basic Law.

⁴³² § 24.

accused and to find an adequate and just sentence.⁴³³ However, they have no right to inspect the case file because their impression of the case and decision on the guilt of the accused must not be influenced by written statements, but only by the public court proceedings. *Schöffen* take part only in the public trial and are not involved in the preparation of the trial.⁴³⁴ The written judgment is signed only by the professional judges.⁴³⁵

2 Prosecutor

The prosecutor must be present at the court proceedings. He acts as the representative of the state and has the responsibility for discharging the burden of proof.

2.1 Public Prosecutor

See III. 2.

2.2 Private Prosecutor

See III. 4.2.

3 Defense

3.1 Defendant

The defendant is the main figure of the criminal proceedings. His role must be seen as that of a “subject” not of an “object” of the trial. His procedural rights have not been enumerated by the Code in a special chapter.

Some procedural guarantees are not even expressly mentioned in the Code, but have been established by the criminal courts or the BverfG on the basis of the rule of law, such as the right to remain silent and the right against self-incrimination (“*nemo tenetur se ipsum accusare*”). The framework of all procedural guarantees is provided by Article 6 (3) of the ECHR.

3.2 Defense Counsel

The Code contains provisions concerning the defense of a person charged with having committed a criminal offense, in particular the choice or appointment of defense counsel.⁴³⁶ At any stage of the proceedings, a suspect has the right to consult defense counsel of his choice.⁴³⁷ However, not more than three defense counsels may be chosen,⁴³⁸ and a defense counsel may not appear at the same time for more than one person accused of the same offense. He also may not appear in a single proceeding for more than one person accused of different offenses.⁴³⁹

Attorneys-at law admitted to practice before a German court as well as law professors may be engaged as defense counsel; other persons may be engaged only with court approval. Any lawyer (*Rechtsanwalt*) admitted to this function by the Bar can act as defense counsel (*Verteidiger*).

In many cases, the accused can defend himself in person. The assistance of defense counsel is mandatory, to name the three most important cases, if the main hearing (*Hauptverhandlung*) is held at first instance at the Higher Regional Court (*Oberlandesgericht*) or at the Regional Court (*Landgericht*), if the accused is charged with a felony

⁴³³ § 30(1) and 77 GVG.

⁴³⁴ § 30(2) and 76(1), 2 GVG.

⁴³⁵ § 275(2).

⁴³⁶ §§ 137 et seq.

⁴³⁷ Article 137, Article 6(3)(c) of the ECHR.

⁴³⁸ § 137(2).

⁴³⁹ § 146.

(*Verbrechen*)⁴⁴⁰ or if the accused has been in an institution for at least three months based on judicial order.⁴⁴¹

If the accused does not choose a defense counsel on his own motion, the court will appoint a lawyer. Such an official appointment will also be made in cases in which the assistance of defense counsel appears necessary. According to Article 6 (3)(c) ECHR, everyone charged with a criminal offense has the right to be given free legal assistance if the interest of justice so requires and if he lacks sufficient means to pay for it.

The function of defense counsel is not the representation but rather the assistance of the accused during the criminal proceedings. This means, as a rule, that the accused must be present during the entire trial, even if he has chosen or has been appointed defense counsel. Defense counsel enjoys also a public function, which is described by the term “organ of the judicial system” (*Organ der Rechtspflege*). However, in his procedural activities, defense counsel is under no authority of the court and can be dismissed by the court only in extraordinary circumstances.⁴⁴²

In order to fulfill his function, defense counsel has far-reaching rights. For example, he has unlimited access to the suspect in custody.⁴⁴³ In principle, correspondence between defense counsel and suspect is not subject to any control. The accused is entitled to communicate with his defense counsel in writing as well as orally. Written communication between the accused and his defense counsel is not subject to seizure.

Defense counsel also has the right to refuse to testify on professional grounds. He may refuse to testify in court concerning the information that was entrusted to him or became known to him in his capacity as defense counsel.⁴⁴⁴ After the completion of the investigation, defense counsel has the right to unlimited access to the case file.⁴⁴⁵

Defense counsel has the right of participation in any investigative measure that requires the presence of the suspect. He must be informed about investigative activities that are carried out by a judge.

According to §§ 163a(3), 168c(1) of the Code the public prosecutor and defense counsel must be permitted to be present during the examination of the accused by a judge or prosecutor. While defense counsel has no right to attend the interrogation of the accused by the police, a statement of the accused made in the absence of his defense counsel may not be used by the court if the prosecuting authorities have prevented contact between the accused and his counsel.

The prosecutor, the accused and defense counsel must be permitted to be present during the judicial examination of a witness or expert.⁴⁴⁶ During the trial, defense counsel's presence cannot be restricted. In cases of serious charges and mandatory defense, trial cannot be carried out without defense counsel.⁴⁴⁷

Defense counsel has a right to investigate the case on his own. However, he is not allowed to influence the evidence, e.g. to urge a witness to make a statement in favor of the accused.

The right to an adversarial trial, which is ensured by Article 6 ECHR, means that in a criminal case both the prosecution and defense must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other

⁴⁴⁰ § 12 of the Criminal Code.

⁴⁴¹ § 140(1).

⁴⁴² § 138a.

⁴⁴³ § 148.

⁴⁴⁴ § 53(1) No. 2.

⁴⁴⁵ § 147(2).

⁴⁴⁶ § 168c(2).

⁴⁴⁷ § 140.

party with a view to influencing the court's decision.⁴⁴⁸ Whatever method is chosen, it should ensure that the other party is made aware of the fact that observations have been filed and will receive a meaningful opportunity to respond.

After each co-defendant has been examined and after evidence has been taken in each individual case, the defendant should be asked whether he has anything to add.⁴⁴⁹ Upon request, the public prosecutor and defense counsel are also given the opportunity to make statements after the examination of the defendant and after evidence have been taken in each individual case.⁴⁵⁰ The presiding judge must permit the public prosecutor, the defendant, and defense counsel to address questions to the defendant, witnesses, and experts.⁴⁵¹

Only defense counsel may be given the right to cross-examination of witnesses. The presiding judge must leave the examination of witnesses and experts named by the prosecutor and the defendant to the public prosecutor and defense counsel upon concurring application by both.⁴⁵²

Code provides defense counsel with the right to a closing argument (*Schlussvortrag, Plädoyer*).⁴⁵³ After the taking of evidence has been concluded, the public prosecutor and subsequently the defendant shall be given the opportunity to present their arguments and to file briefs. The public prosecutor shall have the right to reply, the defendant shall have the last word.

The defense bears no burden of proof whatsoever. Nevertheless, defense counsel has the right to make an application to take evidence on his own motion, independently of the accused. The right of the defense to submission of evidence (*Beweisantrag*) is extended to all forms of proceedings.

Defense counsel may file an appellate remedy on behalf of the accused, but not against the latter's express will.⁴⁵⁴

4 Victim

4.1 Victim as Subject of Civil Claims

A person who was the victim of an intentional crime has the right to public compensation paid by the state according to the Victims Compensation Act (*Opferentschädigungsgesetz*). The victim may also sue the perpetrator for compensation in the civil courts.

Criminal procedure law enables the victim to bring a civil claim for compensation of damages resulting from the crime within the trial by way of a joint procedure (*Adhäsionsverfahren*).⁴⁵⁵ However, the judge may reject such an application if it is not suitable.⁴⁵⁶

The Law to Ensure the Victim's Civil Claims of 8 May 1998 (*Opferanspruchssicherungsgesetz*) aims at the protection of the victim's civil claims by taking into account the financial interests of the victim.⁴⁵⁷ Victims of a criminal offense are provided with a lien on fees that the perpetrator has gained by marketing the deed to the media.

⁴⁴⁸ European Court of Human Rights, *Vermeulen v. Belgium*, Reports 1996-I, Article 33.

⁴⁴⁹ § 257(1).

⁴⁵⁰ § 257(2).

⁴⁵¹ § 240(2).

⁴⁵² § 239.

⁴⁵³ § 258.

⁴⁵⁴ § 297.

⁴⁵⁵ § 403.

⁴⁵⁶ § 405(2).

⁴⁵⁷ *Gesetz zur Sicherung der zivilrechtlichen Ansprüche der Opfer von Straftaten*, BGBl. 1998, Vol. I, 905; entered into force on 20 July 1998.

4.2 Victim as Subject of Other Rights in Proceedings

Traditionally, the victim had scarcely any procedural rights in German criminal procedure. Until 1986, the role of the victim was mostly reduced to that of a witness. Then the Victim Protection Act of 1986 (*Opferschutzgesetz*) improved the position of the victim in penal proceedings by taking into account the special needs of the victim in a criminal proceeding. The victim has the right to consult the case file. However, this right can only be exercised through a lawyer.⁴⁵⁸

The consultation with and representation of the “victim witness” (*Opferzeuge*) by a lawyer during the hearing is free of charge if the victim is indigent.⁴⁵⁹ During the hearing when the victim is a witness, the public can be excluded in order to protect the victim’s privacy.⁴⁶⁰

The victim of crimes enumerated in § 395 of the Code may act as an accessory prosecutor (*Nebenkläger*) supporting the prosecutor’s case by pursuing his own interest. The victim of such offenses may support the public prosecutor as joint plaintiff. He has the right of presence and application in the trial, and he may plead and file an appeal.

The victim of a crime may act as a private prosecutor (*Privatkläger*)⁴⁶¹ if the prosecutor does not exercise his right to public prosecution or is unable to obtain sufficient evidence to proffer an indictment. As a private prosecutor, the victim has in principle the same legal position as the prosecutor. However, the right to act as private prosecutor is restricted to less serious crimes enumerated in § 374 of the Code such as trespass, defamation, violation of the privacy of correspondence, bodily injury, threat and criminal damage to property. Private prosecution of these crimes may be brought only after conciliation (*Sühneversuch*)⁴⁶² was unsuccessfully attempted by a conciliation board (*Vergleichsstelle*).

5 Other Participants

In trials against juveniles and adolescents, a member of the local Juvenile Justice Service (*Jugendgerichtshilfe*) participates in the hearing in order to bring the personal background and the specific interests of the youth to the attention of the court and the other participants. Witnesses and experts are not regarded as subjects of the trial; instead, they are means of evidence (*Beweismittel*).

IV General Principles of Criminal Procedure Legislation

The presumption of innocence (*Unschuldsvermutung*) forms an important basic element of criminal proceedings and the rule of law. It is explicitly mentioned in Article 6 (2) ECHR. Any suspect is regarded as innocent until he is found guilty by a final judgment. The burden of proof rests exclusively with the prosecution. Any doubt as to his guilt benefits the accused.

The principle of instruction (*Instruktionsmaxime*) imposes upon all authorities involved in criminal proceedings the duty to search for the truth. It is the task of the prosecutor, and during intermediate proceedings and the main trial that of the court, to produce the necessary means of evidence.⁴⁶³

Before a disadvantageous decision is made, the accused must be given the opportunity to explain his point of view (*Anspruch auf rechtliches Gehör*).⁴⁶⁴

⁴⁵⁸ § 406e.

⁴⁵⁹ §§ 406f, 406g.

⁴⁶⁰ § 171b, 173(2) GVG.

⁴⁶¹ § 374.

⁴⁶² § 380.

⁴⁶³ § 244(2).

⁴⁶⁴ Article 103 of the Basic Law.

The principle of acceleration (*Beschleunigungsgebot*) imposes a duty on all legal authorities to avoid any unnecessary delay in criminal proceedings. The accused has the right to a speedy trial.⁴⁶⁵ A heavy judicial workload and declining budgets are not adequate reasons for an undue prolongation of trial, which must be compensated, at least, by a reduction in sanctions. Article 6(1) ECHR imposes a duty on the national state and its judiciary to organize the legal system in such a way that the courts satisfy each of the requirements laid down in the Convention.⁴⁶⁶

The state has the monopoly on criminal prosecution and a duty to proceed with the criminal investigation *ex officio* if there are the reasons to believe that a crime has been committed (*Offizialprinzip*). Except for offenses that are prosecuted only with a formal complaint (*Strafantrag*) of the victim, criminal investigations must be conducted irrespective of whether the victim desires so or not.

The prosecutor is required by law to bring a charge whenever there are sufficient grounds to suspect a person of having committed an offense (*Legalitätsprinzip*).⁴⁶⁷ The opposite principle (*Opportunitätsprinzip*) gives the prosecutor discretionary power either to drop the charge (with or without informal sanctions) or to bring the case before the trial judge. It applies only to petty offenses in Germany⁴⁶⁸ and is also of practical importance in criminal proceedings against juvenile offenders (*Diversion*).⁴⁶⁹

According to the principle of accusation (*Anklagegrundsatz*), any trial must be initiated by an indictment.⁴⁷⁰ Without the formal accusation of the prosecutor, no court can hear a case.

Another fundamental principle of German and international criminal law⁴⁷¹ is that no one can be punished twice for the same offense (“*ne bis in idem*”).

Until the 18th century, secrecy was a common feature of criminal proceedings. In order to achieve public control over trials, the openness of trials (*Öffentlichkeitsgrundsatz*) was a very strong demand of the Enlightenment. Secret trials without defense counsel, conducted by judges simultaneously occupying the position of a prosecutor, were abolished by the Laws of the *Reich* of 1877. Today, trials are open to the public. However, in order to ensure the presumption of innocence and to protect the privacy of the accused and witnesses, access of the public to trials can be restricted.⁴⁷²

Registration of the public trial by means of photography, film or tape is forbidden.⁴⁷³ However, the presiding judge may allow a recording during a break in the hearing. If the accused is a person of major interest (*Person der Zeitgeschichte*), media enjoy a right to such recording.⁴⁷⁴

According to the principle of oral proceedings (*Mündlichkeitsprinzip*),⁴⁷⁵ all material that is submitted as evidence must be heard or read aloud during the public hearing.

⁴⁶⁵ Article 6(1) ECHR.

⁴⁶⁶ European Court of Human Rights, *Buchholz v. Germany*, Series A No. 42; *De Cubber v. Belgium*, Series A No. 86; *Lechner a. Hess v. Austria*, Series A No. 118, § 58; *Milasi v. Italy*, Series A No. 119. The jurisdiction of the ECHR concerning the length of proceedings is annotated in Kühne, op. cit. 529.

⁴⁶⁷ §§ 152(2), 170(1).

⁴⁶⁸ §§ 153 et seq.

⁴⁶⁹ § 45 through 47 JGG.

⁴⁷⁰ § 151.

⁴⁷¹ See Article 54 of the *Convention Applying the Schengen Agreement*. With regard to the implementation of the “European” principle of *ne bis in idem* of Article 54 SDÜ in the EU Member States: European Court of Justice, Judgment of 11 February 2003-C-187/2001 and C-385/2001 (*Gözütok u. Brügger*) and annotation in Kühne, op. cit. 303.

⁴⁷² §§ 171a et seq. GVG.

⁴⁷³ § 169, 2 GVG.

⁴⁷⁴ Federal Constitutional Court, op. cit. Vol. 91, 125-Case of *Erich Honecker, Erich Mielke* a.o.

⁴⁷⁵ § 261.

As discussed previously, the European Court of Human Rights in Strasbourg has inferred several procedural guarantees from the principle of a fair trial (*Recht auf ein faires Verfahren*), such as the principle of direct evidence and the right to be silent (*Schweigerecht*). The fairness of proceedings is the central guarantee of Article 6(1) ECHR.

As a rule, a trial can only be held if the accused is present. The attendance of the accused is not necessary in very limited circumstances.⁴⁷⁶

V Course of Criminal Procedure

1 Pretrial Stage

Criminal proceedings begin with the simple suspicion that a criminal offense has been committed (*Anfangsverdacht*). If there is evidence that a crime has been committed, the police transmit the file to the prosecutor's office. A preliminary investigation is conducted by the Public Prosecutor's Office.⁴⁷⁷ The prosecutor in charge may return the file to the police for further inquiries. After the investigation has been completed, the public prosecutor decides whether to proffer an indictment or to discontinue the proceedings.⁴⁷⁸ He may drop the case for lack of evidence or lack of violation of the law.

If there is sufficient evidence that a criminal offense has been committed (*hinreichender Tatverdacht*), the prosecutor is obliged to bring the charge before the court by way of a written indictment (*Anklageschrift*).⁴⁷⁹ Without this formal act, the court is unable to commence and proceed with the case. According to the rules described above, the prosecutor determines the competent court by the nature of the charge brought.

2 Trial Stage

If the prosecutor decides to prosecute the case, he brings it before the court that he believes is competent for the trial proceedings. The court before which the charge is brought may correct the prosecutor's application by remitting the case to another court. The aim of the intermediate proceedings is the protection of an innocent accused from a public trial. It is the court before which the public hearing takes place that decides whether or not the "main trial" (*Hauptverfahren*) should be held. Before that decision is rendered, the indictment must be communicated to the accused.⁴⁸⁰ The court may take more evidence, it may refuse to proceed with the trial, or it may order the accused to stand trial according to the prosecutor's indictment or with alterations.

The competent trial court decides upon the prosecutor's indictment, which defines the subject matter of the proceedings. After preparation of the hearing by the court,⁴⁸¹ the main hearing (*Hauptverhandlung*) is conducted. The major procedural steps are set forth in § 243 of the Code and include: calling of the case; checking of the attendance of the defendant, defense counsel, witnesses and experts; sequestering of witnesses from the courtroom; interrogating the accused as to his identity by the court; reading out of the indictment by the prosecutor; instructing of the accused that he is free to remain silent; interrogating of the accused as to the facts of the case (if he is willing to give evidence); taking of other evidence, *i.e.* examination of witnesses and experts, reading out of documents,⁴⁸² inspection of other

⁴⁷⁶ §§ 231a, 233(1) and 232.

⁴⁷⁷ §§ 160 and 161.

⁴⁷⁸ § 170.

⁴⁷⁹ § 170(1).

⁴⁸⁰ § 201.

⁴⁸¹ §§ 213 through 225a.

⁴⁸² § 249.

material brought before the court; closing of the evidence (*Beweisaufnahme*);⁴⁸³ final pleas of the prosecutor and defense counsel; last word of the accused (*Schlussvorträge*);⁴⁸⁴ deliberation of the court (in camera); and public announcement of the verdict and its reasons.⁴⁸⁵ The verdict itself must always be pronounced publicly; only the reasons of the judgment can be read under restricted publicity.⁴⁸⁶

3 Remedy Stage

A judgment rendered by a District Court of first instance can be appealed (*Berufung*) by the accused and/or the prosecutor. An Appeal Chamber of the District Court presided over by one professional judge and two lay judges decided the appeal (*kleine Berufungskammer*). The entire case is heard a second time on all issues of fact and law. The decision of the Appeal Chamber can only be challenged, by the accused and/or the prosecutor, by way of an appeal on questions of law (*Revision*).

Whereas the Appeal Chamber reviews the entire proceeding, the appeal on points of law is restricted to questions of law. A senate of the Higher Regional Court renders decisions concerning the complaint.

The German court system does not allow an appeal from a first instance judgment rendered by the Regional Court. Although the cases tried before the Regional Court as a first instance court are more serious than those tried by the District Court, the judgment of the Regional Court can be challenged only by an appeal on questions of law to the Federal Court of Justice in Karlsruhe, *i.e.* without a review of fact findings.

Germany's highest court, the Federal Constitutional Court, which is also situated in Karlsruhe, decides upon constitutional appeals (*Verfassungsbeschwerde*) of citizens alleging a violation of their constitutional rights by state authority. Before a person alleging a breach of his rights during criminal proceedings may file a constitutional appeal, the national legal proceedings must have been exhausted. In contrast to the U.S. Supreme Court and the House of Lords in England, the Federal Constitutional Court does not hear final appeals of cases. That function belongs to the Federal Court of Justice.

If the *BverfG* denies redress, the accused may file an application to the European Court of Human Rights in Strasbourg.⁴⁸⁷ Since 1960, the European Court of Human Rights has corrected the criminal law decisions of the *BGH* and the *BverfG* in thirteen cases.⁴⁸⁸

A judgment that has become final is executed by the Public Prosecutor's Office.⁴⁸⁹ It can be corrected only by a successful petition for retrial.⁴⁹⁰ Such a petition may be filed both

⁴⁸³ § 244.

⁴⁸⁴ § 258.

⁴⁸⁵ § 260.

⁴⁸⁶ §§ 173, 171b and 172 GVG.

⁴⁸⁷ See the evaluation of the judgments of the European Court of Human Rights from 1960-2000 in the field of criminal law by Esser, R., *Auf dem Weg zu einem europäischen Strafverfahrensrecht* (Towards a European Criminal Procedural Law), De Gruyter: Berlin, 2002.

⁴⁸⁸ The cases *Luedicke, Belkacem, Koç*, Judgment of 28 October 1978, Series A No. 29 (costs for interpreter); *Eckle*, Judgment of 15 July 1982, Series A No. 51 (duration of criminal proceedings); *Pakelli*, Judgment of 25 April 1983, Series A No. 64 (defense counsel for the hearing in appeal on points of law proceedings); *Öztürk*, Judgment of 21 February 1984, Series A No. 73 (costs for interpreter); *Megyeri*, Judgment of 12 May 1992, Series A No. 237-A (mandatory defense counsel in proceedings concerning the placement of a person in psychiatric hospital according to § 63 of the Criminal Code); *Niemietz*, Judgment of 16 December 1992, Series A No. 251-B (Search of a lawyer's office); *K.-F.*, Judgment of 27 October 1997, Reports 1997-VIII (duration of police detention); *Garcia Alva, Lietzow, Schöps*, Judgments of 13 February 2001 (access to the case file); *Erdem*, Judgment of 5 July 2001 (duration of pretrial detention: five years eleven months); *Metzger*, Judgment of 31 May 2001 (duration of criminal proceedings); *P.S.*, Judgment of 20 December 2001 (rights of defense of the accused in case the victim of a sexual offense is the only witness against him).

⁴⁸⁹ § 451.

⁴⁹⁰ § 359.

in favor of a convicted and against an acquitted person. For instance, a retrial in favor of a convicted person is possible if relevant new facts or evidence have been found that were not previously known to the court.

In 1998, the German legislature amended the law by adding the possibility of reopening the proceedings concluded by a final judgment for the convicted person's benefit where the European Court of Human Rights has found a violation of ECHR or of its Protocols and the relevant judgment of the national court was based upon that violation.⁴⁹¹

Amnesty can be granted by law. A prominent case was the Amnesty Law of 28 September 1990 enacted in conjunction with German unification.

The power of pardoning in individual cases is vested in the Federal President (*Bundespräsident*)⁴⁹² in cases decided at first instance within the federal jurisdiction.⁴⁹³ In all other cases, it is vested in the states.⁴⁹⁴

4 Special Forms of Procedures

Code recognizes some summary proceedings. Accelerated proceedings (*Beschleunigtes Verfahren*)⁴⁹⁵ are available with respect to charges of minor offenses dealt with at the District Court. The prosecutor can initiate a main trial without a bill of indictment and without passing through the intermediate procedure (*Zwischenverfahren*) by applying for accelerated trial.

Code provides for the imposition of a penal order in cases concerning minor offenses (*Strafbefehlsverfahren*).⁴⁹⁶ The public prosecutor may submit to the District Court an application for a penal order that contains a reference to the fact that the penal order should be final, binding and enforceable if the accused fails to lodge a written objection. In a proceeding by penal order, a District Court judge decides on the written prosecutor's application without arranging any further hearing.

If the accused files an objection (*Einspruch*), public trial proceedings are instituted. The aim of the *Strafbefehlsverfahren* is to enable judicial authorities to concentrate their resources on more serious cases.

VI Evidence

1 General Provisions

The accused can be convicted only if the court has found sufficient evidence of his guilt. It follows from the presumption of innocence laid down in Article 6(2) ECHR that the burden of proof in criminal proceedings is on the prosecution. Therefore, any doubt as to the accused's guilt benefits the accused. The evidence adduced by the public prosecutor must be sufficient to convict the accused.⁴⁹⁷ If any reasonable doubt remains at the end of the hearing, the accused must be acquitted (*in dubio pro reo*). The principle of a fair trial forces the public prosecutor to disclose to the defense all material evidence for or against the accused.⁴⁹⁸ The court is in no way bound by the evidence brought by the defense and the prosecution. Plea bargaining is possible only under very limited circumstances.

⁴⁹¹ § 359(6).

⁴⁹² Article 60(2) of the Basic Law.

⁴⁹³ §§ 120, 142a GVG.

⁴⁹⁴ § 452.

⁴⁹⁵ § 417 through 420.

⁴⁹⁶ § 407 through 412.

⁴⁹⁷ European Court of Human Rights, *Barberà, Messegue, Jabardo v. Spain*, Series A No. 146, § 77 („inform the accused of the case that will be made against him, so that he may prepare and present his defense”).

⁴⁹⁸ European Court of Human Rights, *Edwards v. United Kingdom*, Series A No. 247-B.

2 Means of Evidence

According to the principle of immediacy (*Unmittelbarkeitsgrundsatz*), the court must take all evidence in open trial in presence of the accused and the prosecutor.⁴⁹⁹ As a rule, no evidence obtained outside of the trial may be a ground for conviction. The Code recognizes four different means of evidence (*Beweismittel*): witness (*Zeuge*), expert (*Sachverständiger*), documents (*Urkunden*), and the inspection of objects (*Augenschein*).

Statements of the defendant or his co-defendant (*Mitbeschuldigter*) are not a means of evidence in the narrow sense. In practice, however, such statements are also regarded as evidence that may lead to a conviction of the defendant.

With a few exceptions,⁵⁰⁰ German law does not contain rules of evidence binding on the court. Therefore, the principle of free evaluation of evidence is laid down in the Code.⁵⁰¹ The decisive element is the discretion of the court. For that reason, the judge is in no way bound by a guilty plea. Of course, this does not mean that all evidence is admissible.

According to the principle of oral proceedings (*Mündlichkeitsprinzip*), a conviction cannot be based on the written statement of a witness. Witnesses' statements must be made in open court. Audio-visual taping of the witness' statement in the pretrial stage and the showing of that recording during the main hearing is allowed only where it is necessary to avoid an imminent and serious danger to the witness.⁵⁰² In principle, all documents must be read aloud. However, there are a few exceptions to that rule, the most important of which is that a document can be regarded as being made at the trial with the consent of the court, the prosecutor, defense counsel and the accused (*Selbstleseverfahren*).⁵⁰³

3 Interference with the Right to Privacy

The ECHR sets strict procedural limits on all measures interfering with the right to privacy.⁵⁰⁴ Telephone surveillance must be ordered by judicial warrant and may be ordered only in cases of very serious offenses enumerated exclusively in the Code.⁵⁰⁵ If the prosecutor has issued the warrant in case of urgency, it will expire automatically after three days unless it is confirmed by a judge.⁵⁰⁶ Code allows a "small bug attack" (*kleiner Lauschangriff*), i.e. the videotaping and acoustic monitoring of the private communication of a suspect outside his private accommodation by technical devices.⁵⁰⁷ Since 1998, § 100c(1) No. 3 of the Code permits such acoustic monitoring on the private premises of the suspect (*großer Lauschangriff*).

Undercover investigators (*Verdeckte Ermittler*) may be used by order of the prosecutor's office.⁵⁰⁸ They are not obliged to disclose their real identity when they appear as a witness during the investigation or in court. The use of informants (*Vertrauensperson*) is not explicitly governed by statute.

Fingerprints and photographs of the suspect may be taken where necessary for the investigation or for police data systems.⁵⁰⁹ Irrespective of his consent, the suspect can be required to submit to an examination of his body to verify relevant facts. Blood tests and

⁴⁹⁹ § 250.

⁵⁰⁰ § 274.

⁵⁰¹ § 261.

⁵⁰² §§ 58a, 168e and 255a.

⁵⁰³ § 249(2).

⁵⁰⁴ § 8.

⁵⁰⁵ § 100.

⁵⁰⁶ § 100b.

⁵⁰⁷ § 100c(1) No. 2.

⁵⁰⁸ § 110a through 110e.

⁵⁰⁹ § 81b.

medical examinations (*körperliche Eingriffe*) are allowed if the health of the accused is not endangered.⁵¹⁰ Code deals with the mental examination of the accused for the maximum period of six weeks.⁵¹¹ Flowing from his right against self-incrimination (*Selbstbelastungsprivileg*), the accused is not obliged to cooperate with a medical or mental examination. Blood samples may be genetically examined on the basis of judicial order where the sole purpose is the identification of a person.⁵¹²

VII Precautionary Measures

1 General Provisions

According to the rule of law, all coercive criminal procedural measures (*strafprozessuale Zwangsmaßnahmen*) must be based on a statute and comply with the principle of proportionality (*Verhältnismäßigkeitsprinzip*). They can be imposed only if a material suspicion exists.

Code uses different levels of suspicion-simple suspicion (*Anfangsverdacht*), reasonable suspicion (*hinreichender Tatverdacht*) and strong suspicion (*dringender Tatverdacht*)-referring to an assessment of probability. These differing levels are meant to restrain state authority in criminal proceedings. Nevertheless, they are not very efficient because there are no criteria for distinguishing between the various levels of suspicion.

In principle, coercive measures imposed on an innocent person are legal if a material suspicion exists. Because of the vagueness of the term “suspicion,” a person can hardly argue that the measure was not justified for lack of suspicion. If the accused is ultimately found innocent, he will be compensated according to the Act for the Compensation of Criminal Prosecution (*Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen*).

Depending upon the seriousness of their interference into the private sphere of a suspected person, some coercive measures must be ordered by a judge, *i.e.* the order of an arrest warrant and detention on remand (*Haftbefehl/Untersuchungshaft*),⁵¹³ the provisional committal of the accused for observation to a mental hospital (*Untersuchung, vorläufige Einweisung*),⁵¹⁴ an order for a molecular and genetic examination (*DNA-Untersuchung*),⁵¹⁵ acoustic monitoring on the private premises of the suspect (*großer Lauschangriff*),⁵¹⁶ the provisional withdrawal of permission to drive (*vorläufige Entziehung der Fahrerlaubnis*),⁵¹⁷ or the provisional prohibition of pursuit of an occupation (*vorläufiges Berufsverbot*).⁵¹⁸

2 Particular Measures

For other coercive measures a judicial order or warrant is needed, but in case of urgency, *i.e.* where there is no time to seek an order from the judge without endangering the effect of the measure, the prosecutor or even the police may order the measure or issue the warrant themselves. This category of measures includes: physical examination of a person

⁵¹⁰ § 81a.

⁵¹¹ § 81.

⁵¹² § 81e.

⁵¹³ Articles 104(2)1 of the Basic Law and § 114.

⁵¹⁴ § 81(2) and 126a(1).

⁵¹⁵ § 81e, 81f(1) and 81g(3). The DNA samples obtained during criminal investigations in the federal states are centrally collected at the Federal Police Agency (Bundeskriminalamt) in Wiesbaden.

⁵¹⁶ § 100c(1) No. 3. Acoustic monitoring on the private premises of the accused must be ordered by a *Staatsschutzkammer* (Chamber concerning National Security of the Regional Court - *Landgericht*) consisting of three judges (§§ 100d § 2 and 74a GVG).

⁵¹⁷ § 111a.

⁵¹⁸ § 132a(1). Kühne, H.-H., *Strafprozessrecht* (Criminal Procedure Law), 6. Aufl., C. F. Müller: Heidelberg, 2003, Ch. 32.

(*körperliche Untersuchung*),⁵¹⁹ seizure (*Beschlagnahme*),⁵²⁰ computer-assisted search (*Rasterfahndung*),⁵²¹ seizure of mail (*Postbeschlagnahme*),⁵²² interception of telecommunications (*Telefonüberwachung*),⁵²³ the videotaping and acoustic monitoring of the private communication of a suspect outside his private accommodation by technical devices (*kleiner Lauschangriff*),⁵²⁴ search (*Durchsuchung*),⁵²⁵ road traffic controls (*Kontrollstellen*),⁵²⁶ and the use of undercover investigators (*Einsatz Verdeckter Ermittler*).⁵²⁷

Without pre-judicial control, the prosecutor and the police may take photographs and fingerprints of a suspect (*erkennungsdienstliche Behandlung*),⁵²⁸ establish the identity of a person (*Identitätsfeststellung*),⁵²⁹ order the apprehension of persons disrupting official activities (*Störerfestnahme*),⁵³⁰ and order a provisional arrest (*vorläufige Festnahme*).⁵³¹

⁵¹⁹ §§ 81a, 81c.

⁵²⁰ § 98(1).

⁵²¹ § 98b(1).

⁵²² § 100.

⁵²³ § 100a.

⁵²⁴ § 100c No. 2.

⁵²⁵ § 105(1).

⁵²⁶ § 111.

⁵²⁷ §§ 110a, 110b.

⁵²⁸ § 81b.

⁵²⁹ § 163b, 163c.

⁵³⁰ § 164.

⁵³¹ § 127(2).

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Chapter 5

The Criminal Procedure System of Kosovo*

Ejup Sahiti** - Rexhep Murati*** - Eduard Kunštek****



I Sources

1 General Observations⁵³⁴

When the United Nations Mission in Kosovo (hereinafter: UNMIK) was established, there was a legal vacuum. Initially, in UNMIK Regulation No. 1999/1, and later in UNMIK Regulation No. 1999/24, the Special Representative of the General Secretary of the Security Council (hereinafter: SRSB) determined the applicable law in Kosovo to be the following: 1) regulations promulgated by the SRSB and subsidiary instruments issued there under, and 2) the law in force in Kosovo on 22 March 1999. In case of conflict, the regulations and subsidiary instruments issued there under take precedence.

* National report dated 24 August 2003.

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⁵³⁴ “Kosovo legal experts on the Joint Advisory Council on Legislative Matters took the lead in preparing the Provisional Criminal Code and Provisional Code of Criminal Procedure in August 1999, on an initiative of former SRSB Bernard Kouchner. The Codes represent the culmination of over three years of work. The new Codes will bring criminal law in Kosovo into greater conformity with international and European standards. In drafting the Codes, the applicable criminal law was taken as the startingpoint. Many of the provisions in the applicable law have been maintained without change. At the same time, important modifications have been introduced in the Codes taking into account criminal law reforms, in particular, in Slovenia, Croatia and the Federation of Bosnia and Herzegovina and elsewhere in the region. The Codes will clarify the full range of criminal law applicable in Kosovo in two comprehensive legislative texts. Various UNMIK Regulations and Administrative Directions have been incorporated in the texts where appropriate. This should facilitate the work of judges, prosecutors and other legal practitioners. The reforms introduced by the Code have three major aims: 1) to strengthen powers of prosecutors; 2) to enhance the protection of defendants and injured parties; 3) to enhance effectiveness of the administration of justice in Kosovo. Following changes have been made in the Code to strengthen prosecutorial capacity. The public prosecutor will have the authority to open, conduct and supervise investigations. Under the current system, investigations are conducted by the investigating judge. The investigating judge will be replaced by a pretrial judge whose primary function will be to determine whether persons should be detained, searched or subject to other restrictions of their rights. The Code incorporates three significant UNMIK Regulations relating to injured parties and witnesses cooperative witnesses and covert and technical measures of surveillance and investigation. Other important changes and innovations have been made to protect defendants and injured parties. For example the defense counsel will be appointed at public expense in a wider range of circumstances than envisaged under the current applicable law. The UNMIK Regulation on the Rights of Persons Arrested by Law Enforcement Authorities, including the right to defense counsel, has been incorporated and will apply throughout detention. Judicial supervision of detention has been strengthened. A procedure has been introduced which allows a detainee or his or her defense counsel to petition a judge at any time to determine the lawfulness of his or her detention. Recognizing that pretrial detention should be ordered only when it is strictly necessary, the Code now provides for house arrest and other measures as alternatives to pretrial detention. A new chapter (Chapter VII) has been added to address the protection of injured parties during criminal proceedings. The public prosecutor may refer a case involving less than three years of imprisonment to mediation. The Regulations promulgating the Codes were signed on 6 July 2003, but the date for the effective implementation of the Codes will be on 6 April 2004”. (UNMIK Press Briefing Notes, 8 July 2003).

Regulation No. 1999/24 further implies that if a competent court or body or person required to implement the provisions of law determines that a particular subject matter is not covered by UNMIK regulations or the applicable law in force in 22 March 1999, but is covered by another law in force in Kosovo after that date, that law is applied provided that it is not discriminatory and meets international standards of human rights.

2 Historical Overview

According to the Constitution of 1974 of the Socialist Federal Republic of Yugoslavia, the Socialist Autonomic Province of Kosovo was a constitutional element of that Federation with legislative enforcement, and judicial powers, having a Supreme and Constitutional Court like the other federal elements.⁵³⁵ However, as in the other republics of the former federation, the Law of Criminal Procedure of Yugoslavia has been applied in Kosovo.

Under the dictatorial regime, during 1989 Serbia abolished by force Kosovo's autonomy and replaced it for a decade with apartheid-like system. Killings, mistreatment, and especially deportation by force of most of the Albanian population as part of an ethnic cleaning in Kosovo led to a humanitarian intervention by the international community. Under the *Kumanovo* Agreement, military, police, and paramilitary forces of the Federal Republic of Yugoslavia withdrew from Kosovo so that NATO and the United Nation Mission could be deployed there.

Pursuant to the regulation providing for the continued application of the laws in effect on 22 March 1989, Federal and Serbian laws continued to be applied. For that period, legal needs were satisfied because the legal vacuum was filled. However, from a psychological point of view, application of Yugoslavian and Serbian Laws (which had been the vehicle for discrimination against Kosovo for decades) even after the end of Serbian regime in Kosovo caused problems with regard to both the general population and judicial authorities, especially in applying criminal law.⁵³⁶ There was the additional problem that previous laws applicable in Kosovo in many respects reflect the passed socialist system and do not contain international standards on human rights and essential freedoms.

For these reasons, in August 1999, SRSG, established the Joint Advisory Council for Legislative Matters (JAC/LM) composed of local and international experts. At that time, priority was given to drafting laws in the criminal field.

Working group in this field prepared the first draft versions of a Criminal Code and Code, which were translated into English by American Bar Association Central and East European Law Initiative (hereinafter: ABA/CEELI).

This was followed by three and one-half years of intensive work by local and international experts (UNMIK, OSCE, ABA/CEELI and especially the Council of Europe) to correct and revise these drafts. Because UNMIK considers drafting of the laws a reserved competence of SRSG,⁵³⁷ he, sent these two draft codes to both the Government and Parliament of Kosovo for review. In the attached letter of SRSG, it was stated that it is very

⁵³⁵ Kosovo, even when under Yugoslavia (SFRY), like other republics of that Federation, had its own Special Part of Criminal Code.

⁵³⁶ See Murati, R., *Regulation of Criminal Procedure in Kosovo after the establishment of the International Administration*, 2 etc.

⁵³⁷ According to UNMIK Regulation 2001/9, On the Constitutional Framework for Interim Self-Government in Kosovo (hereinafter Constitutional Framework) in Chapter 8, which governs the competence and responsibilities of the SRSG, sub § (g) to (j) include: final authority regarding the appointment of judges and prosecutors; assignment of international judges and prosecutors; exercising powers and responsibilities of an international nature in the legal field; and exercising authority over law enforcement institutions and the correctional service, both of which include and are supported by local staff. Chapter 5 (Article 3, §§ (a) (m) of the Constitutional Framework foresees that many issues regarding the functioning of judiciary and correctional system are the responsibilities of institutions of the Interim Self-Government.

important that the Kosovo institutions be completely involved in this great legal initiative that would be a crucial contribution for administration of justice in Kosovo.

Government and Parliament submitted their remarks and suggestions. On 6 July 2003, SRSG, signed UNMIK Regulation No. 2003/25, on the Provisional Criminal Code and UNMIK Regulation No. 2003/26, on the Provisional Code of Criminal Procedure (hereinafter: Code).⁵³⁸

It should be emphasized that during drafting of the Code, a considerable number of laws from a variety of sources (including the laws of other countries in the region, western and U. S. laws, and international conventions) were taken into consideration, and also many UNMIK regulations in the criminal field are covered by this code. The promulgation of the Code provides the Kosovo judicial system with a body of consolidated and comprehensive criminal procedure legislation instead of the prior legislation consisting of many different parts.

3 Code of Criminal Procedure

Code, as compared with the Law of Criminal Procedure of Yugoslavia of 1976, the previously applicable law in Kosovo, includes new provisions aimed at catching up with democratic principles set forth in contemporary laws and international conventions. We are of the opinion that the Code, in this way, undoubtedly constitutes a more fundamental change of the criminal system than the criminal procedure laws of other countries in the region.⁵³⁹ A number of these provisions are a part of the criminal procedure laws of other countries of the dissolved federation; however, the Code of Kosovo contains new provisions that do not exist in the laws of these countries. Therefore, under the Code there is a transformation from the existing mixed system (inquisitorial in investigating stage and accusative in the main trial) to a system of accusative elements in the pretrial procedures and in the main trial.

Provisions of the Code aim to offer a proper balance for some essential issues. First, there have been efforts to include international standards on human rights and freedoms, emphasizing the right to a fair trial. Fundamental principles are readjusted, and new procedural principles are included. Cross-examination is accepted as the form of examination.⁵⁴⁰ Rights of the defendant and other procedural participants during their examination are emphasized, and police restrictions on a person's liberty (provisional arrest and police detention) as well as detention on remand and its alternatives⁵⁴¹ are regulated. Judicial control on classic investigative actions, such as searches of premises and persons, is strengthened. Code establishes strict controls over covert and technical measures of surveillance and investigation⁵⁴² and on data from medical examinations and DNA.⁵⁴³

Second, the Code aims to increase the efficiency of administering criminal justice during all stages of the criminal proceeding. The most important provisions in this regard include a new investigative model, which is applied by public prosecutor assisted by the police. There are also provisions allowing for alternative solutions to solving conflicts, such

⁵³⁸ The Criminal Code and Code will enter into force on 6 April 2004. The period of time of 9 months called *vacatio legis* was put in place to allow for enough time for training and introduction to these Codes and the important changes that they work, especially in reconstruction of the judicial system in pretrial procedures. The numbers of articles and paragraphs without additional mark refer to the Code.

⁵³⁹ The Code of Albania (endorsed by the law No. 7905, dated 15 November 1995 with later supplements and amendments), which is like the Italian Code, puts the implementation of preliminary proceedings under the authority of the public prosecutor and judiciary police.

⁵⁴⁰ Article 165 and 372. Editor's note: The numbers of articles and paragraphs without additional mark refer to the Code.

⁵⁴¹ Articles 210 through 219 and 279 through 287.

⁵⁴² Articles 258 through 264.

⁵⁴³ Articles 191 through 195.

as the ability of public prosecutor to suspend, terminate, or refrain from prosecution for criminal offenses tried in summary proceedings, apart from cases involving family violence and sexual offenses. Mediation procedure is also regulated.⁵⁴⁴ Additionally, in order to speed up criminal proceedings, individual judges of the Municipal Court may, under certain conditions,⁵⁴⁵ impose punishment without holding a trial.

Third, the Code contains a number of provisions designed to fight serious crime, organized crime, and corruption. Among the important measures in this regard are covert and technical measures of surveillance and investigation.

Code contains the rules regulating the issue of protecting the injured party and witness. Code also regulates cooperative witnesses, too.⁵⁴⁶

4 Other Sources

Since the Code and the Criminal Code will not enter into force until 6 April 2004, the Kosovo judiciary presently applies the existing law. However, in writing this article we decided to focus on the provisions of the new laws despite the fact that they have not yet entered into force. Further, because the draft code on juvenile law and the law on execution of criminal sanctions of Kosovo are not yet finalized and because the organizing system of the judiciary is based upon previous laws, we rely and refer to other sources of applicable law as needed.

Criminal Code has a contemporary structure and is composed of the General Part, containing provisions on general notions concerning criminal offenses, the perpetrator, and criminal sanctions; and the Second Part where concrete criminal offenses are set forth.⁵⁴⁷ Criminal Code has a new system of categorizing punishments. In contrast to the traditional Categorization of criminal punishments as main punishments, security measures, and legal consequences of punishments, the new Criminal Code divides the subject matter into principal, alternative, and accessory punishments.⁵⁴⁸ Accessory punishments cover most of the security measures and legal consequences of punishments.

II Criminal Justice System

1 Investigating Services

All public entities⁵⁴⁹ have a duty to report criminal offences prosecuted *ex officio* of which they have been informed or learned about in some other manner. In such cases, they

⁵⁴⁴ Article 228.

⁵⁴⁵ Articles 476 through 480.

⁵⁴⁶ Articles 298 through 303.

⁵⁴⁷ Incriminations in the Criminal Code are considered a criminal offense. Minor offenses are treated by the Law on Minor Offense.

⁵⁴⁸ Article 35 of Criminal Code. Principal punishments are: punishment of long term imprisonment (for a time period from twenty-one years up to forty years-Article 37 of Criminal Code), punishment of imprisonment (from fifteen days up to twenty years-Article 38 of Criminal Code), and punishment by a fine (up to 25.000 € or for criminal offenses conducted for personal benefit it cannot be more than 500.000 €-Article 39 of Criminal Code). Alternative punishments are: conditional sentence and semi-liberty. When imposing a conditional sentence, the Court may also impose: an order for mandatory rehabilitation treatment; an order for supervision by probation service; and, an order for community service work (Article 42 of Criminal Code). Accessory punishments are: fine; deprivation of the right to be elected; prohibition on exercising public administration or public service functions; prohibition on exercising a profession, activity or duty; prohibition on driving a motor vehicle; seizure of a driving license; seizure of an object; order to publish a judgment and expulsion of a foreigner from the territory of Kosovo (Article 54 of Criminal Code).

⁵⁴⁹ According to Article 151(1) No. 23 UNMIK Regulation “public entity” means an entity of the United Nation Interim Administration Mission in Kosovo or the Provisional Institutions of Self-Government. Such a definition is a result of actual situation in Kosovo and its undetermined status.

must present evidence known to them and undertake steps to preserve traces of the criminal offense and other evidence.

Any person is entitled to report a criminal offense that is prosecuted *ex officio* and has a duty to do so when the failure to report the criminal offense itself constitutes a criminal offense. Criminal reports are submitted to the public prosecutor.

Investigation, as a preliminary procedure, is conducted by the public prosecutor itself or with assistance of the police, under his supervision. In those cases provided for by law, the police or public prosecutor must obtain an order from a pretrial judge when undertaking certain investigative actions.

2 Prosecuting Authorities

A public prosecutor is an independent public authority separate from the court and from other public bodies dealing with individual criminal issues or investigations.⁵⁵⁰ It is also a party in the criminal proceeding. Organization and activity of public prosecutor's office is based on hierarchical, substitutive and individual deciding principles. In Kosovo, the following prosecutorial offices exist: Municipal Prosecutor's Office, District Prosecutor's office (in *Prishtina, Mitrovica, Peja, Prizren* and *Gjilan*) and Kosovo Prosecutor's Office.

3 Judging Authorities

3.1 Courts in Pretrial Stage

See Chapter V 1.

3.2 Courts in Trial Stage

According to the constitutional framework, Kosovo has the following court structure: Supreme Court, district courts,⁵⁵¹ municipal courts, and courts for minor offenses.⁵⁵² The constitutional framework⁵⁵³ provides for the establishment of a special chamber in the Supreme Court regarding issues of the constitutional framework, which, for unknown reasons, has not yet been established.

The jurisdiction of the criminal courts is essentially as follows. The Municipal Court has jurisdiction to adjudicate criminal offenses punishable by imprisonment of up to five years. The district court has first instance jurisdiction over criminal offenses punishable by imprisonment of at least five years, as well as appellate jurisdiction over the judgments of the municipal courts. The Supreme Court adjudicates as a second instance court (reviewing appeals from judgments of the district courts) or third instance court where provided for by the law and extraordinary legal remedies.

III Participants in Criminal Procedure

⁵⁵⁰ Article 46(2).

⁵⁵¹ According to the law on ordinary courts of ex-SAP of Kosovo, there are district courts in *Prishtina, Mitrovica, Peja, Prizren* and *Gjilan*.

⁵⁵² Criminal justice system in Kosovo includes adjudication of civil persons who commit criminal offenses. Because of undetermined status of Kosovo, in the Criminal Code there is no provision which determine criminal offenses and proceedings against military persons. Because of the same reasons, the law on court martial of Yugoslavia (Gazeta Zyrtare e RFSJ-sw, Nr. 4/1977) can not be applied as an applicable law. KFOR has mandated to secure the environment based on the Directory 42 of United Nations in connection with Resolution 1244. Because of the mandate KFOR has in Kosovo, eventual liability of a person member of KFOR is proceeded according to the legislation and in the country he/she comes from.

⁵⁵³ Chapter 9(4 and 11) of Constitutional Framework.

1 Judge

The judge, who constitutes the essential participant in criminal proceedings, exercises the adjudicative function. The jurisdiction and actions of judges are circumscribed by fundamental procedural principles and other principles of law. Judges must be independent and render decisions in conformity with the law.⁵⁵⁴

Judges may decide criminal cases individually or in a panel. Judges preside individually with regard to the request of a public prosecutor or the police for permission to conduct any pretrial investigative action that limits human rights and basic freedoms. Judges also preside individually with regard to confirmation of an indictment, the imposition of punishment, and the adjudication of summary proceedings.

Judges preside in panels with regard to conducting and rendering a judgment in criminal trials. A trial panel is composed of five judges (two professional judges, one of whom is the presiding judge, and three lay judges) in cases involving criminal offenses punishable by imprisonment of at least fifteen years; lesser criminal offenses are presided over by a panel of three judges (one professional judge as presiding judge and two lay judges). Trial panel renders a judgment upon the factual and legal issues of the criminal matter. Each panel member has an equal vote. At the appellate level, cases are heard by a panel of three or five professional judges. Panel of five judges decides in the case of second instance trial.⁵⁵⁵

Supreme Court renders decisions as a panel of five professional judges when reviewing appeals in the third instance, when deciding upon extraordinary legal remedies with regard to criminal offenses punishable by imprisonment at least of fifteen years, or when deciding upon extraordinary legal remedies arising out of a decision rendered by one of its own panels.⁵⁵⁶

2 Prosecutor

Prosecutorial function in criminal proceedings is conducted by an authorized prosecutor, who is an essential participant in the proceeding. Authorized prosecutors are the public prosecutor, subsidiary prosecutor, and private prosecutor.

2.1 Public Prosecutor

Public prosecutor prosecutes the criminal offenses prosecuted *ex officio* based on legality principle with some exceptions which lead to opportunity principle.⁵⁵⁷ When the public prosecutor assesses the circumstances for a concrete prosecution and determines that there is no basis for prosecution or withdraws from the prosecution, in certain conditions a subsidiary prosecutor (victim) can appear as a authorized prosecutor in the proceeding.⁵⁵⁸

Some of the criminal offenses delineated in the Criminal Code⁵⁵⁹ that are also prosecuted *ex officio* may be prosecuted only if the injured party submits a motion for prosecution to the public prosecutor.

2.2 Private Prosecutor

Prosecution of some criminal offenses can be conducted only upon a private charge submitted by private prosecutor.⁵⁶⁰

⁵⁵⁴ Article 8(1).

⁵⁵⁵ Articles 24, 411 and 414.

⁵⁵⁶ Article 26.

⁵⁵⁷ Articles 47, 226 and 227.

⁵⁵⁸ Article 151(1) No. 9, Subsidiary prosecutor means an injured party who, in the circumstances provided for by the present Code, undertakes prosecution of those criminal offenses that are prosecuted *ex officio*.

⁵⁵⁹ Articles 160(4), 161(5) *etc.*

⁵⁶⁰ Editor's note: Articles 190(1), 265(3) and others.

3 Defense

3.1 Defendant

The defendant is the party against whom a procedural request is filed. As an essential participant and a procedural party, the defendant has enumerated rights and obligations and may be the subject of various coercive measures. Depending on the stage of the criminal proceeding, the Code⁵⁶¹ uses different terms for the person against whom criminal proceedings are initiated and conducted. Suspect is a person who the police or the prosecutorial authorities reasonably suspect to have committed a criminal offense, but against whom criminal proceedings have not been initiated. Defendant is a person against whom criminal proceedings are underway. Term defendant is also used in the present code as a general term for a defendant, accused, or convicted person. An accused is a person against whom an indictment has become final. A convicted person is a person who has been found guilty of the commission of a criminal offense by a final judgment of a court.

Before he is examined the defendant, whether detained or free, must be informed of: the criminal offense he or she has been charged; the right to remain silent; the right to be given the free assistance of an interpreter; the right to receive the assistance of defense counsel; the fact that his statement may be used as evidence before the court; and the fact that he may request evidence to be gathered in his/her defense.⁵⁶²

3.2 Defense Counsel

Defendant has the right during all the stages of proceedings to defend itself or to be defended by the defense counsel of its choice (who is a member of the Bar Association). It has the right to defense counsel during all the stages of the criminal proceeding and must be informed of this right before any examination. Defense counsel may be appointed free of charge when required by the interest of justice.

Defense counsel is mandatory in certain situations, including:⁵⁶³ from the first interrogation when the defendant is mute, deaf, or displays signs of mental illness; at hearings on arrest and throughout the time when he is in detention on remand; from the filing of an indictment, if the indictment has been brought against him for a criminal offense punishable by imprisonment of at least eight years; and in proceedings involving extraordinary legal remedies where: the defendant is mute, deaf, or displays signs of mental illness; or a punishment of long-term imprisonment has been imposed. Defendant has the right to appeal a judgment rendered against it and to use extraordinary legal remedies.

4. Victim

4.1 Victim as Subject of Civil Claims

Injured persons and other authorized persons⁵⁶⁴ can bring civil claims for damages, return of the object, and annulment of the juridical act. These claims are presented in the form of an unspecified motion rather than a lawsuit.⁵⁶⁵ The motion can be presented at any stage of the proceeding but not later than the termination of the first-instance proceeding.⁵⁶⁶ The court has an obligation to instruct the victim on his right to submit a motion, although there is no

⁵⁶¹ Article 151(1 through 4).

⁵⁶² Articles 231 and 371.

⁵⁶³ Article 73.

⁵⁶⁴ Editor's note: It can be assumed that those are persons who could present their claims in civil proceedings. See Article 108(1).

⁵⁶⁵ See Article 10 (1).

⁵⁶⁶ See Article 102(1 and 2).

sanction if the court fails to fulfill this obligation. The injured person can withdraw his motion at any stage of the proceeding and bring his action according to the rules of civil procedure. However, while the victim's motion is pending in the criminal proceeding, he cannot commence a parallel civil action.

The criminal court has the right to decline to exercise its jurisdiction over a civil claim if it finds that adjudicating the claim would considerably delay the criminal proceeding.⁵⁶⁷ There is no appeal of a decision declining jurisdiction, probably because the injured person is allowed to bring its claim in civil proceedings. The court can decide only that proposal on the civil claim is fully or partially founded. If the proposal is partially founded and if court finds out that there is no basis to decide on the civil claim there is no possibility to reject the claim. In those cases injured person can only be instructed to submit its claim to the civil court.⁵⁶⁸ If the claim is directed towards the invalidation of juridical act court could bring the declaratory judgment but not violating rights of the third persons.⁵⁶⁹ On the proposal of the authorized persons the court as well as investigating judge can decide on the provisional measures which can be directed to the third persons as well as to the accused.⁵⁷⁰

4.2 Victim as Subject of Other Rights in Proceedings

Injured party can also act as a subsidiary or private prosecutor.⁵⁷¹ For crimes that are prosecuted upon private charges, a motion to prosecute must be filed with the public prosecutor's office. The private charge itself must be presented to the competent court.⁵⁷² Victim's right to prosecute can be transferred to certain persons in case of death of a victim.⁵⁷³ Where the public prosecutor does not exercise its authority, the injured person has the right to continue the prosecution or subsequent stages of criminal proceeding. In such a case, the injured person is a subsidiary prosecutor with the same rights as the public prosecutor, except those that are attached to the public prosecutor as a public official.⁵⁷⁴

5 Other Participants

Apart from the fundamental participants, defense counsel, and procedural representatives (legal representative and authorized representative), there are other participants in criminal proceedings such as the police, witnesses, experts *etc.* Code sets forth rules governing each participant in criminal proceedings.

IV General Principles of Criminal Procedure Legislation

Criminal procedure in Kosovo is based on the following procedural principles: 1) principle of finding the material truth;⁵⁷⁵ 2) presumption of innocence;⁵⁷⁶ 3) principle of *in dubio pro reo*;⁵⁷⁷ 4) principle of *ne bis in idem*;⁵⁷⁸ 5) accusatory principle expressed through the maxim *nemo iudex sine actore*, which is valid throughout the proceedings; 6) principle of legality⁵⁷⁹ (with the *ex officio* principle); 7) principle of opportunity;⁵⁸⁰ 8) principle of a fair

⁵⁶⁷ See Article 107(1).

⁵⁶⁸ See Article 112.

⁵⁶⁹ Article 114.

⁵⁷⁰ Articles 116 through 118.

⁵⁷¹ Articles 53 through 68.

⁵⁷² Article 55.

⁵⁷³ Article 57.

⁵⁷⁴ Article 65.

⁵⁷⁵ Article 7.

⁵⁷⁶ Article 3(1).

⁵⁷⁷ Article 3(2).

⁵⁷⁸ Article 4.

⁵⁷⁹ Article 47.

trial;⁵⁸¹ 9) principle of independence of court;⁵⁸² 10) principle of freely assessment of evidence;⁵⁸³ 11) principle of the use of native language;⁵⁸⁴ 12) principle of equality of arms;⁵⁸⁵ 13) principle of publicity;⁵⁸⁶ 14) principle of compensation and rehabilitation⁵⁸⁷ *etc.*

V Course of Criminal Procedure

Provisions of the Code determine the course of the criminal proceeding in any concrete criminal case. The Code provides for two types of criminal proceedings: regular proceedings and summary proceedings. The Code does not encompass proceedings against juveniles, which will be covered in the Juvenile Code of Kosovo.

Regular criminal proceedings are, in principle, composed of these stages: preliminary proceeding (which includes investigations, charging, and confirmation of the indictment), trial, and rendition and pronouncement of the judgment and sentencing. All of these stages are designed to work together so that the actions taken by the various procedural bodies are not isolated, but on the contrary are organically related to each other to achieve the ultimate goals of criminal procedure.

1 Pretrial Stage

Under the Code, the regulation of pretrial investigation presents a new model of regulation as compared to the manner in which this area is regulated by other regional countries. This model is expected to produce more efficient and accelerated proceedings. Pursuant to the Code, the public prosecutor is authorized to conduct, and responsible for conducting investigation. In investigating criminal cases, the public prosecutor uses the assistance of judiciary police,⁵⁸⁸ which acts under its supervision. Actions of the police in criminal proceedings are regulated according to international standards.

In pretrial stage, depending on the procedural situation, the pretrial judge occupies a role similar to that of an investigating judge. Competence of the pretrial judge has been reduced, but its role remains very important-indeed, although the Code transferred the competence over investigations of criminal cases from the investigating judge to the public prosecutor and police, it did not also transfer the judge's competence to decide matters involving investigating actions by which the rights and liberty of persons are deprived. In such cases, upon the request of the public prosecutor, the pretrial judge decides upon these issues. In certain enumerated circumstances even pretrial judge may interrogate the witness or hear the opinion of the expert. Pretrial judge also presides over the hearing in which the indictment is confirmed.

Based upon the adversarial principle, criminal proceedings are initiated only upon the request of an authorized prosecutor. Under the Code, with regard to some criminal offenses provided for by the Criminal Code, public prosecutor initiates criminal proceedings only upon a motion by the injured party.⁵⁸⁹ The Code further provides that after the investigation is

⁵⁸⁰ Articles 226 through 227 and 468.

⁵⁸¹ Article 5.

⁵⁸² Article 8.

⁵⁸³ Articles 152(2) and 357 (2).

⁵⁸⁴ Article 15.

⁵⁸⁵ Article 10(2).

⁵⁸⁶ Article 328.

⁵⁸⁷ Article 16.

⁵⁸⁸ According to Article 151(1) subsection 18, the term 'judiciary police' means police officers authorized to carry out investigative and related functions under the supervision of the public prosecutor in addition to other police functions.

⁵⁸⁹ Article 6.

completed, or when the public prosecutor considers that the information gathered regarding the criminal offense and the offender provide sufficient grounds for filing an indictment, proceedings before the court may be continued only on the basis of an indictment filed by public prosecutor.⁵⁹⁰

Same circumstances sufficient for the public prosecutor to file an indictment are also valid for prosecutions initiated by a private or subsidiary prosecutor.

Procedure relating to the confirmation of an indictment did not fundamentally change and, indeed, has even been established on new bases. Indeed, as a form of confirming the indictment, the Code provides for the institution of confirmation of indictment.⁵⁹¹ This new institution is aimed at a real confirmation of the indictment before the case is sent for trial. Judicial practice has proven that confirmation of the indictment under the actual procedure is not an efficient mean of preventing the submission of ungrounded indictments.

Under the Code, when pretrial judge determines that the indictment has been prepared contrary to the law, it immediately calls a hearing for confirmation of the indictment. Judge summons the parties, defense counsel, and the injured party to verify whether the indictment meets the conditions required for the defendant to be sent to trial. At the hearing for confirmation of the indictment, evidence is not administered but the parties are obligated to present the evidence that they will present at trial. If legal conditions exist to withdraw the indictment and terminate the criminal proceeding, the judge renders a decision withdrawing the indictment and terminating the criminal proceeding. However, when the defendant pleads guilty at the hearing, or if at the hearing it is proven that conditions warranting withdrawal of the indictment do not exist, the judge issues a ruling confirming the indictment and sends the case forward for trial.⁵⁹²

2 Trial Stage

Trial is the main stage of the criminal proceeding in which the trial panel, after considering all of the evidence presented, decides upon the reasonableness of the indictment. This stage is composed of preparation for trial,⁵⁹³ trial,⁵⁹⁴ delivering of judgment,⁵⁹⁵ and pronouncement of judgment.⁵⁹⁶ Presiding judge, under the course of the preparation of the main trial, immediately after the indictment is finalized, determines the main trial. With regard to the trial, the Code has retained all of the prior provisions and principles relating to the adversarial nature of the system, and has supplementing them with provisions and principles that strengthen the adversarial nature of criminal proceedings. Some of these new provisions and principles will be discussed below.

Parties and the injured party in the summons are informed also for pleading guilty and indictment confirmed by the judge in the hearing for confirmation of the indictment. When the accused pleads guilty in the hearing on confirmation of the indictment, presiding judge does not summon witnesses and experts at trial.⁵⁹⁷

The Code contains new provision regarding the issue of guilty pleas.⁵⁹⁸ Specifically, when the presiding judge is convinced that the accused has understood the indictment, the accused is given the opportunity to plead guilty or not. If the accused does not wish to enter any plea, he is considered not to have pled guilty. On the other hand, when the accused in the

⁵⁹⁰ Article 304.

⁵⁹¹ Articles 309 through 318.

⁵⁹² Article 316.

⁵⁹³ Articles 319 through 327.

⁵⁹⁴ Articles 328 through 384.

⁵⁹⁵ Articles 385 through 391.

⁵⁹⁶ Articles 392 through 397.

⁵⁹⁷ Article 327(2).

⁵⁹⁸ Article 358.

hearing on confirmation of the indictment pleads guilty to every count of the indictment and does not plead guilty at trial, then the presiding judge may adjourn the trial to summon witnesses and experts. When the trial panel determines that the defendant has pled guilty under the circumstances set forth in the Code, trial continues with closing statements. If the accused pleads not guilty at the beginning of the trial, his examination is conducted at the end of the presentation of evidence. In certain cases the public is excluded from the trial, including when necessary to protect the accused, injured party, other participants in the proceedings (such as witnesses), and/or their families.⁵⁹⁹

The Code provides that the court can deliver three types of judgment: judgment rejecting the indictment; judgment acquitting the accused of the charge; and judgment pronouncing the accused guilty.⁶⁰⁰ Under certain enumerated conditions,⁶⁰¹ the trial panel must dismiss the indictment even after the trial is scheduled.

3 Remedy Stage

Under the Code, the procedures relating to post-judgment relief⁶⁰² are optional rather than indispensable because it is the choice of the parties whether to seek such relief. With regard to post-judgment relief, the Code regulates appeals from judgments⁶⁰³ as well as the use of extraordinary legal remedies.⁶⁰⁴

The Code has broadened the right of an injured party to appeal. Injured party may challenge a judgment relating to a criminal offense committed against life or body, against sexual integrity, or against the security of public traffic. It may also appeal with respect to the costs of the criminal proceeding.⁶⁰⁵ Moreover, appeal is allowed with respect to substantial violations, which includes situations in which the accused was asked to enter his plea, pled not guilty to all or certain counts of charge, and was examined before the presentation of evidence was completed.⁶⁰⁶

According to the Code, an important innovation in extraordinary legal remedies makes available three of four extraordinary legal remedies existing in the contemporary criminal procedure law in Kosovo:⁶⁰⁷ 1) renewal of criminal proceedings; 2) extraordinary mitigation of punishment; and 3) request for protection of legality. The Code allows the request for protection of legality to be submitted, apart from the public prosecutor, by the defendant and its defense counsel, and in the case of death of the defendant, the relatives of the defendant. Extraordinary legal remedies may be applied for only by the defendant. Exceptionally, the request for renewal of the criminal proceeding may be submitted against the defendant.⁶⁰⁸

4 Special Forms of Procedures

In addition to regular criminal proceedings, the Code regulates special forms of proceedings. Special proceedings are an exception to the ordinary form of proceedings and are based upon the gravity of the criminal offense at issue and the personality of the perpetrator. They are designed to facilitate an easier and more efficient criminal proceeding for lesser criminal offenses. Special forms of proceedings are: 1) summary proceedings; 2) proceedings for issuance of a penal order; and 3) judicial admonition.

⁵⁹⁹ Article 329 (4)(6).

⁶⁰⁰ Articles 388(1) and 389 through 391.

⁶⁰¹ Article 384.

⁶⁰² Articles 398 through 437.

⁶⁰³ Articles 398 through 429.

⁶⁰⁴ Article 430.

⁶⁰⁵ Article 399(3).

⁶⁰⁶ Article 403(1), subsection 9.

⁶⁰⁷ Articles 438 through 447, 448 through 450, and 451 through 460.

⁶⁰⁸ Articles 4(2) and 442(2).

Summary proceedings⁶⁰⁹ are conducted by an individual judge of the municipal court for criminal offenses punishable by fine or imprisonment of up to three years.

Another innovation of the Code relates to issuance of penal orders. With regard to criminal offenses punishable by fine or imprisonment of up to three years, public prosecutor may ask an individual judge to issue a punitive order and to impose upon the accused the appropriate sentence (not including imprisonment) without holding a trial. Judicial admonitions, as a special form of sanctions, must be pronounced by a sentence.

The Code does not regulate proceedings against juveniles. The Draft Law on Juveniles is presently being drafted to cover this area of criminal procedure law. Contemporary law, which provides for trial panels for juveniles, will continue to be applied with respect to juvenile perpetrators of criminal offenses until endorsement of the Juvenile Law of Kosovo.

The Code includes several provisions regulating special proceedings. They are: 1) proceedings regarding persons who have committed criminal offenses under the influence of alcohol and drug addiction;⁶¹⁰ 2) proceedings for seizure;⁶¹¹ 3) proceedings for revocation of alternative sanctions;⁶¹² 4) proceedings for rendering a decision on the erasure of a conviction;⁶¹³ 5) procedure for international legal assistance and the execution of international agreements in matters of criminal law;⁶¹⁴ 6) extradition;⁶¹⁵ 7) proceedings for compensation, rehabilitation and the exercise of other rights of persons who have been convicted or arrested without justification;⁶¹⁶ and 8) proceedings for issuance of a wanted notice and public announcements.⁶¹⁷

VI Evidence

1 General Provisions

Delivering a proper and just decision in a criminal case means undertaking a number of procedural actions in criminal proceedings to ascertain the truth and establish the circumstances of the events that occurred in the past. Achieving such a goal requires the verification of material facts. Court determines contested facts through the proof process, be it from evidence in the form of a direct observation or a statement by a physical person or legal person who presents it in written form *etc.* However, for a piece of data to be acceptable in court as evidence, it is a precondition that the data be offered and admitted or it be admitted by the court itself and later verified and assessed.

Most of the presentation of evidence is done in the main trial. Because the investigation is conducted by the public prosecutor as a public entity and a party, data collected by it or by the police during investigation of criminal case is introduced at trial, and the court renders its decision on the basis of the evidence examined and verified at trial.⁶¹⁸ However, the public prosecutor or the defendant may, on an exceptional basis, apply to the pretrial judge to take testimony from a witness or request an expert analysis for the purpose of preserving evidence where there is a unique opportunity to collect important evidence or there

⁶⁰⁹ Articles 461 through 475.

⁶¹⁰ Articles 486 through 488.

⁶¹¹ Articles 489 and 499.

⁶¹² Article 500.

⁶¹³ Articles 501 through 505.

⁶¹⁴ Articles 506 through 515.

⁶¹⁵ Articles 516 through 533.

⁶¹⁶ Articles 534 through 542.

⁶¹⁷ Articles 543 through 547.

⁶¹⁸ Articles 8 and 387(1).

is a significant danger that such evidence may not be subsequently available at trial.⁶¹⁹ In certain circumstances, upon the request of the defendant or the injured party, the public prosecutor is required to collect evidence if there is a danger that the evidence will be lost or if such evidence may justify the release of the defendant from pretrial detention, or there are other reasons to justify collecting such evidence. If public prosecutor rejects the application to collect evidence, then the defendant and the injured party may file an appeal to the pretrial judge.⁶²⁰

In certain circumstances,⁶²¹ a statement of the defendant or injured party given to the police or public prosecutor may be admissible evidence to impeach a statement of the defendant in court.

The Code determines the various forms of evidence (examination of the defendant, witnesses, expert *etc.*). Court, according to its own assessment, may admit any evidence considered by the court to be important with respect to the criminal offence at issue.⁶²² Indeed, application of technical instruments, as a result of today's improvements in technology, is reflected in the field of criminal procedure. However, application of technical instruments in criminal proceedings requires a consideration of the problems caused by conflicts of interest. Usage of technical instruments and other scientific methods to investigate criminal offenses is a human and ethical procedure, which requires professionalism and significant experience. The use of technology cannot compromise human dignity or individual integrity. The solution to these problems must be oriented towards the progress of social development aiming a final goal of human liberty, not human slavery.⁶²³

The Code⁶²⁴ requires the authorities to establish truthfully and completely the facts that are important to deliverance of a lawful decision. The authorities are obligated to establish carefully the facts against and in favor of the defendant with maximum professionalism and devotion.

Court is authorized to freely assess all evidence presented to determine its importance and admissibility.⁶²⁵ However, evidence obtained in violation of the provisions of criminal procedure is inadmissible,⁶²⁶ and the court cannot base its judgment on it.

2 Means of Evidence

Defendant is required to appear before the authorities when duly summoned. If he fails to appear without any reason, he may be brought in by force.

Since the defendant is not required to give a statement or to answer questions asked to him, and because of the importance of his statement in criminal proceedings, the defendant is examined in criminal proceedings (in the investigation he is examined, and when at the commencement of trial he pled not guilty, he is examined after the presentation of evidence at trial).⁶²⁷

Before any examination, defendant must be informed of his legal rights.⁶²⁸ Examination of the defendant is conducted with respect to its dignity; thus, questions must be asked in a clear, distinct, and precise manner.⁶²⁹ If the examination of the defendant is

⁶¹⁹ Article 238.

⁶²⁰ Article 239.

⁶²¹ Article 309.

⁶²² Article 152(1) subsection 2.

⁶²³ Sahiti, E, *Argumentimi ne Proceduren Penale*, Prishtine, 1999, 123-124.

⁶²⁴ Article 7.

⁶²⁵ Article 152(2).

⁶²⁶ Articles 153(1), 155(1) and 233(2)(3).

⁶²⁷ Article 372.

⁶²⁸ Articles 231 and 371.

⁶²⁹ Article 234.

conducted by means or methods prohibited by law, or if the defendant is not notified of his rights, or if during examination it is assumed that the defendant has admitted something that he has not admitted, then the statement of the defendant is an inadmissible evidence, and the court judgment can not be based on it.⁶³⁰ If the judgment is based on inadmissible evidence, there is a substantial violation of the provisions of criminal procedure.⁶³¹

Any person summoned as a witness in the criminal proceedings is obligated to reply to the summons, and if not otherwise excused under the provision of the Code, he must testify. If this obligation is not fulfilled, the Code provides for punishment of that person.⁶³²

Person, who by giving testimony, would violate the obligation to keep an official or military secret, may decline to reveal the secret until the competent body releases him from that obligation; the same rule obtains with regard to defense counsel with respect to matters confided to him by the defendant, unless the defendant himself requests revelation of the confidence. In some circumstances (relating to the relationship between the witness and the defendant or other circumstances), some persons are exempted from the obligation to testify, and their eventual statement depends on their willingness to testify.⁶³³ If a person who, by law, cannot testify or is exempted from testifying is examined as a witness, or if illegal means are used against him, then his testimony is inadmissible.⁶³⁴

Witness is not obligated to answer questions by which he would be likely to expose himself or a close relative to serious disgrace, considerable material damage, or criminal prosecution.⁶³⁵

Injured party can be examined as a witness. In certain circumstances, injured party or witness in danger because of its testimony in a criminal proceeding enjoys special protection.⁶³⁶ At any stage of the criminal proceeding, the parties,⁶³⁷ defense counsel, the injured party, or the witness may present to the judge (pretrial judge or presiding judge) a petition to impose protective measures or to order anonymity when there exists a serious danger for the injured party, witness, or a member of its family. It is a fact that the principle of equality of arms provides the accused with the right to examine or to 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.⁶³⁸

Pretrial judge may order a search of a house and other premises and property of a specific person, as an investigative act, if there are grounds to suspect that the person has committed a criminal offense prosecuted *ex officio* and it is likely that the search will result in the arrest of such a person or in the discovery and seizure of evidence important for criminal proceedings. Warrant to search a house and other premises and property of a person not suspected of a criminal offense is issued if there is a probability that the search will result in the arrest of a defendant or if it is necessary to preserve or seizure specific objects found in the premises and which cannot be obtained without conducting the search.⁶³⁹

Search warrants are executed by the judicial police in accordance with the procedures provided for by law. In special cases, the Code provides for the possibility of entering the

⁶³⁰ Articles 235, 155, 231, and 234(2).

⁶³¹ Article 403(1) subsection 9.

⁶³² Article 167(1)(2).

⁶³³ Articles 159 and 160.

⁶³⁴ Article 161.

⁶³⁵ Article 162.

⁶³⁶ Articles 168 through 174.

⁶³⁷ According to Article 151(1) subsection 16 'party' is the prosecutor and defendant. When a property claim (Article 108) or an appeal of the injured party [Article 399(3)] is filed, the injured party is considered a party as well.

⁶³⁸ Article 6(3) of the ECHR.

⁶³⁹ Article 240.

house and other premises and searching without a warrant where necessary. However, evidence obtained in violation of the Code is inadmissible.⁶⁴⁰

Objects that can be seized include objects that may prove to be evidence in criminal proceedings or objects that are to be seized under the Criminal Code.

Public prosecutor or the court can order a site inspection or a reconstruction to examine the evidence collected or to clarify facts that are important for criminal proceedings. Inspection or reconstruction conducted without the presence of the defendant or defense counsel is inadmissible evidence. Assistance from specialists in different fields can be used in the case of site inspection or reconstruction to provide or describe the evidence.⁶⁴¹

Expert witnesses are engaged when determination or assessment of an important fact calls for the finding and opinion of a specialist possessing the necessary professional knowledge. Experts are appointed by the court. There are some cases when the opinion of an expert is mandatory.

The Code does not regulate the issue of persons suffering from mental disturbance. This issue is treated in special regulations.⁶⁴²

3 Interference with Right to Privacy

For certain enumerated crimes, the Code provides special investigative measures, including supervision and recording of telephone conversations and other means of communication and interception. These measures and time limits are imposed by the judge.

VII Precautionary Measures

1 General Provisions

The Code provides for several types of measures designed to ensure the defendant's presence at criminal proceedings: 1) summons; 2) order for arrest; 3) promise of the defendant not to leave his place of current residence; 4) prohibition of approaching a specific place or person; 5) attendance at police station; 6) bail; 7) house detention; and 8) detention. In deciding which of those measures to impose in a concrete case, the court is guided by the principles of legality, gradualism, proportionality and *ex officio* control of their implementation.

2 Particular Measures

If a person is caught in the act of committing a criminal offence *ex officio* prosecuted or is being pursued, the police or any other person is authorized to arrest him provisionally even without a court order. In certain circumstances the police, upon the authorization of the public prosecutor, can arrest or detain a person. If in exigent circumstances such an order

⁶⁴⁰ Articles 245 and 246.

⁶⁴¹ Article 254.

⁶⁴² Editor's note: Actually legislation in Kosovo provides for psychiatric examination of the defendant as a special form of expertise. Such an examination is ordered when it is suspected that, due to a lasting or temporary mental illness, temporary mental disturbance or mental retardation, the defendant is excluded from liability or his liability is diminished. Applicable law also regulates special proceedings for issuing the security measure of required psychiatric treatment in a proper medical institution, or required psychiatric treatment on an outpatient basis. Some believe that these provisions fall short of the contemporary standards concerning this issue as expressed in the 3 January 2000 White Paper of the Council of Europe on the protection of the rights and dignity of people suffering from mental disorder, especially those placed as involuntary patients in psychiatric establishments.

cannot be provided before the arrest, then the police must inform the public prosecutor immediately after the arrest. Arrested person ought to be informed of its legal rights.⁶⁴³

As soon as possible after the arrest (and in any event no later than six hours from the time of the arrest), the public prosecutor or an authorized senior police officer must issue to the arrested person a written decision on detention. This decision may be appealed to the pretrial judge, who renders a decision within 24 hours from the moment of the arrest.⁶⁴⁴

Detention can be ordered where there is: a well-grounded suspicion that a person has committed a criminal offense, and there is a risk of flight; a risk of destruction of evidence or influencing of witnesses or accomplices; and/or a risk that a person will repeat the criminal offense, complete an attempted criminal offense, or commit a criminal offense that he has threatened to commit.⁶⁴⁵

Detention is ordered by the pretrial judge in a hearing session based on the request of public prosecutor for a one-month period of time. This detention may be continued by a three-judge panel for a period not exceeding two months. Any further continuation of the detention is conducted according to the same system as it was commenced⁶⁴⁶ within the limits provided for in Article 284 of the Code.

Before filing of the indictment, detention cannot continue more than three months (exceptionally nine months) with regard to criminal offenses punishable by up to five years of imprisonment and six months (exceptionally twelve months) with regard to criminal offenses punishable by more than five years of imprisonment.⁶⁴⁷

⁶⁴³ Article 214.

⁶⁴⁴ Article 212.

⁶⁴⁵ Article 281.

⁶⁴⁶ Article 285(3 and 4).

⁶⁴⁷ Article 284.

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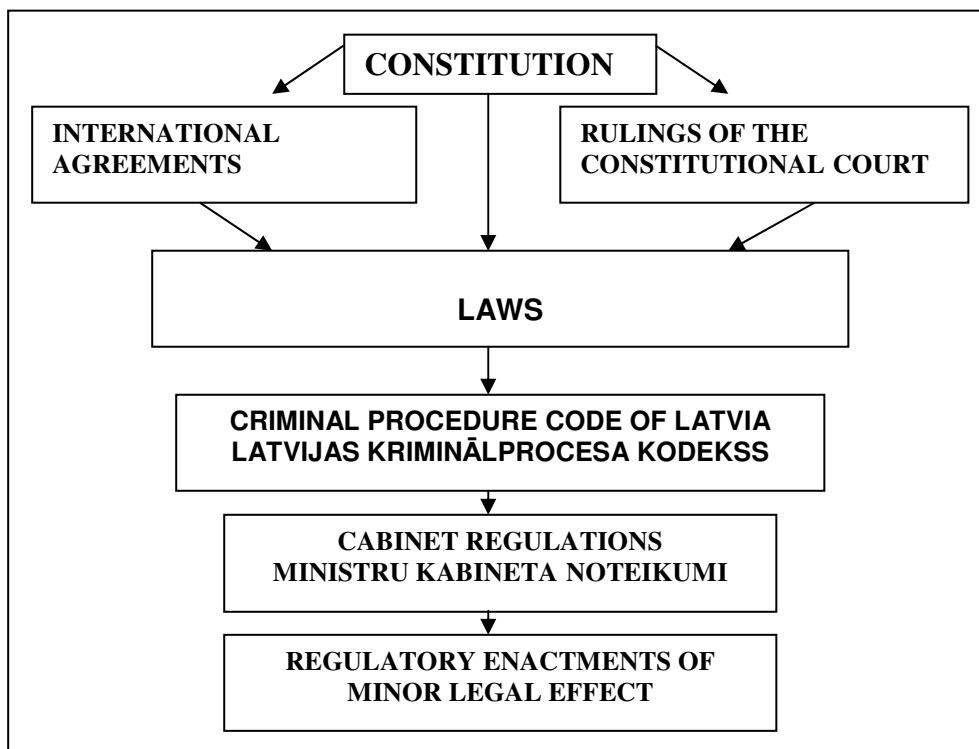
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I Sources

1 General Observations

After the restoration of independence in 1990, Latvian Criminal Procedure abandoned predominant influence of Soviet doctrine and legal practice. Consequently, basic international legal principles, judicature, and legal teaching became considered as secondary sources of criminal procedure law. However, it should be noted that regulatory enactments maintain, and probably will continue to maintain, the leading status as the basic source of criminal procedure law. The hierarchy of such enactments can be characterized by the following general diagram:



2 Historical Overview

The Code of Criminal Procedure of the Latvian SSR adopted on 6 January 1961, which entered into force on 1 April 1961, remains in force in Latvia. In accordance with the Law of 22 August 1991, this code regarded as the Code of Criminal Procedure of Latvia (hereinafter: Code) pending the adoption of a new law.⁶⁴⁸ Since the Code's enactment, a number of amendments (more than 25) have been made to the Code that have rendered it

* National report dated 21 April 2003.

⁶⁴⁸ Editor's note: The numbers of articles and paragraphs without additional mark refer to the Code.

vastly different from the Code of the former Code. Basically, the changes are related to the introduction of new principles of criminal procedure (presumption of innocence, adversary proceeding *etc.*), review of the structure of criminal procedure (transfer of criminal investigation to prosecutors), implementation of new forms and institutions of procedure (summary procedure, settlement or conciliation agreement in matters of public charge), inclusion of regulatory instruments for international cooperation in the Code *etc.*

Significant changes in the Code are also related to the fact that the new Criminal Law (*Krimināllikums*) was adopted in 1998 and entered into force on 1 April 1999.

Taking into account the need to adjust legal norms of criminal procedure to international standards, even prior to the events described in the preceding paragraph, the Presidium of the Supreme Council of the Latvian SSR adopted, on 18 October 1990, a measure that created a working group tasked with developing a new Code of Criminal Procedure. However, no new law has been adapted to date. One of the draft Codes that had been in the works for almost ten years was rejected, and in February 2001, a new working group was assembled to develop a draft law of criminal procedure. At present, this working group, under the guidance of the Deputy State Secretary of the Ministry of Justice G. Kūtris, has developed a Criminal Procedure draft law (hereinafter: Draft). This Draft has been forwarded to the Cabinet for discussion in early January 2003; however, it is likely that many issues will arise during the discussion and adoption of the draft that will require discussion and review. Consequently, the adoption and, moreover, the entry into force of the code is unlikely to occur in the near future. Nevertheless, the guidelines included in the Draft regarding the relevant issues are briefly indicated below to show the most significant changes that have been proposed.

3 Code of Criminal Procedure

As discussed above, the Code is the main source of law in the area of criminal procedure. However, the Code must comply with the Constitution and international agreements. This fact is taking on increased importance in Latvia, and challenges to provisions of the Code are being raised in both the Constitutional Court and in European Court of Human Rights.

4 Other Sources

Apart from the Code provisions, other regulatory enactments also govern criminal procedure. First, of course, is the Constitution. At the end of 1998, the Constitution was supplemented with a chapter entitled "Fundamental Human Rights," which includes several principles on the subject of criminal procedure, such as equal rights of persons, the presumption of innocence, and security of persons. These principles are elaborated and specified in the Code. The Code cannot contravene the Constitution. The provisions included in it must also be harmonized with the international obligations of Latvia. In addition to instruments governing human rights, Latvia has undertaken international commitments by acceding to a number of conventions of the Council of Europe on international judicial cooperation in criminal matters *etc.*

Other laws, such as the laws on judicial power, office of the prosecutor law, police, advocacy *etc.*, also regulate criminal proceedings. Each of these laws has its own basic subject matter of legal regulation. Issues of criminal procedure included in these laws are not of fundamental significance; these issues are fragmentary and are mainly included in the respective laws to regulate organizational and special issues rather than the core relations in criminal proceedings. The law on recovery of damage caused as a result of unlawful or undue activity of an investigative institution, the office of the prosecutor or court, which provides for

a preferential redress mechanism in favor of unlawfully or unduly prosecuted persons, is one such law.

Regulatory enactments relating to criminal procedure that have a minor legal effect are rare. Enactments governing the application of various procedural coercive measures are an example of one such measure.

II Criminal Justice System

1 Investigating Services

The authority to investigate during the pretrial stage is given by the Code first to investigative institutions and their officers. Prosecutors are entrusted with supervision of these institutions. Prosecutors themselves are also entitled to carry out investigations.

With regard to the investigative institutions, the Code includes references to the following investigative institutions: 1) the State Police; 2) commanding officers of ships operating in high sea; and 3) other institutions authorised by law.⁶⁴⁹ Many other laws also provide for investigating institutions; consequently, at present there is a relatively wide range of investigative institutions in Latvia. In addition to the State Police, the most well-known of these are the Safety Police, the Military Police, the Finance Police, the Border Guard, Customs officials, and Penitentiary administrators. Each of the investigative institutions has its own field of competence. The State Police has the widest sphere in this regard.

Officers of an investigative institution have decision-making power in the pretrial stage only, not throughout the entire proceeding. They have power until the moment when, in their opinion, the guilty person in a matter has been ascertained and the evidence to initiate the criminal prosecution has been collected. At that point, the matter is forwarded to the prosecutor, and the investigative institution's power ends. However, it may re-join the proceedings later upon the prosecutor's or court's assignment.⁶⁵⁰

Activities of an investigative institution are subjected to the prosecutor's supervision who is entitled to give binding and mandatory orders to investigative institutions. It also examines complaints regarding activities and decisions of investigative officers and revokes unlawful and unfounded decisions made by investigative officers.⁶⁵¹

2 Prosecuting Authorities

The current Code provides for three types of criminal matters - criminal matters of public charge, criminal matters of private-public charge, and criminal matters of private charge.

Criminal matters of public charge are all of those criminal matters that do not fall within the category of criminal matters of private charge or criminal matters of private-public charge. They are initiated regardless of the will of the victim, and the investigation is conducted according to the general rules of procedure. The charge in these matters is brought and maintained by the prosecutor. Until April 1999 a settlement between the accused and the victim in matters of this category was not available; however, since April 1999 a settlement is available in cases of criminal violations (a criminal offense for which the sentence does not exceed imprisonment in excess of two years) unless the victim is under the age of 18.⁶⁵²

Criminal cases of private-public charge are those criminal matters that can be initiated only upon receipt of a complaint by the victim. Absent such a submission, the matter cannot

⁶⁴⁹ Article 116.

⁶⁵⁰ Articles 45(3) and 107 through 125.

⁶⁵¹ Articles 21, 41, 115, 125(1) and 220 through 221.

⁶⁵² See *infra* V 3.

be initiated. However, once a complaint has been received and the matter has been initiated, the proceedings take place just as in matters of public charge (therefore henceforth they will be described together with the public proceedings).

The charge is brought and maintained by the prosecutor, and a settlement between the victim and the accused cannot substantially affect the progress of the procedure. At present only one type of criminal offense falls within this category-rape without mitigating circumstances. The draft proposes to extend this category of matters substantially by including within it a number of other criminal offenses, such as, for example, theft, and fraud, small-scale misappropriation *etc.*

Matters of private charge are likewise initiated only upon receipt of a complaint by the victim.⁶⁵³ These matters are initiated by a judge of a district (city) court. No pretrial investigation is conducted in these matters, and the charge is brought and maintained by the victim. A settlement of the matter between the victim and accused terminates the proceeding. At present, the category of matters of private charge includes intentional infliction of slight bodily injury, defamation, and infringement of honor. The Draft does not provide for the extension of this category of matters.

If any of the matters of private-public charge or private charge is of great public significance or the victim is a person unable to defend himself or herself fully, the matter may be initiated by the prosecutor even without the victim's complaint and thereafter proceeds in accordance with the procedures applicable in cases of public charge.

3 Judging Authorities

In accordance with the Law on Judicial Power, there exists a three-level court system. The system consists of a district-city court, regional court, and the Supreme Court (which consists of panels and the Senate). The levels of the system are district-city court-regional court-Supreme Court, which break down as follows in terms of jurisdiction: first instance (adjudicates a matter according to substance)-appellate instance (repeated examination of the matter according to substance)-cassation instance (examines the matter not according to facts, but in connection with errors of law that have occurred in the lower courts).

Under the Code, courts have powers during all stages of the criminal proceeding. Depending upon the provisions of law, the issues within the scope of the court's jurisdiction are decided upon either by a single judge or by the court as a panel. The composition of the panel may be the following:⁶⁵⁴ one professional judge and two lay judges⁶⁵⁵ (when adjudicating factual matters in the first instance proceeding); three or five professional judges (when adjudicating matters within higher instances).

3.1 Courts in Pretrial Stage

During pretrial proceedings courts have powers in both the stage of initiating a criminal matter and the stage of the pretrial investigation. During the stage of initiating a criminal matter, a court can make a decision to initiate or refuse to initiate a criminal matter.⁶⁵⁶

For a long period of time, courts had no power during the pretrial investigation. Since the alterations to the Code and other regulatory enactments in the mid 90's, courts have been required to decide upon a number of compulsory measures during the pretrial investigation.

⁶⁵³ Article 111.

⁶⁵⁴ Hereinafter, the term "court" will be used regardless of whether the issue is decided upon by a single judge or a panel of judges.

⁶⁵⁵ Lay judges (*tiasas piesēdētāji*) are persons elected by the local authority who are not professional judges and who need not be lawyers.

⁶⁵⁶ Articles 109 through 113.

Such issues include: propriety of detention and house arrest and extension of the term, performance of investigative activities relating to search, removal and examination of documents containing State secrets, wiretapping of conversations, and acquisition of information through technical means. Issues relating to these measures are decided upon by the judge of a district-city court and may be appealed to the Regional court.⁶⁵⁷

The Draft provides that issues relating to various procedural compulsory measures and the performance of certain investigative activities, as well as conducting of supervision over observance of human rights during the pretrial proceedings, will be performed by special investigating judges.

Courts also have power during another pretrial stage-namely, during the stage of commitment of the accused to stand trial.⁶⁵⁸ Just courts are those which decide during this stage of criminal procedure whether the case is to be transferred for adjudication or not.

3.2 Courts in Trial Stage

At present, the Code provides that a person may be tried and punished only by a court.⁶⁵⁹ Thus, courts are the bodies that examine and render decisions on the merits regarding accusations brought against persons.

Jurisdiction over matters in a particular district-city or regional court is determined by the Code. It depends mainly upon the seriousness and nature of the offense and place of commission of the offense (territorial jurisdiction).⁶⁶⁰

If the case is heard in the first instance by a district-city court, the case is appealed to the regional court, but, if the regional court is the court of first instance, appeal proceedings are carried out by the Panel of the Supreme Court. The court of the cassation instance is the Senate of the Supreme Court only.

Court orders of the first and appellate instance courts are subject to appeal, but the decision of the court of the cassation instance is final and is not subject to appeal. Decisions of the court of the cassation instance may be reviewed only in connection with newly discovered circumstances or substantial violations discovered afterwards.⁶⁶¹

III Participants in Criminal Procedure

1 Judge

A judge is vested with certain powers during all stages of the criminal process.⁶⁶² Judges' decisions are subject to appeal in a court of higher instance. In order to examine a case, a judge must be impartial and disinterested. The Code provides that a judge cannot take part in the examination of a matter if he is a relative of any of the judges who comprise the court panel in the matter under examination, if he is the victim, civil plaintiff, civil respondent in the matter or a relative or the spouse of these persons, if he is a relative or the spouse of the accused, if he has taken part in the matter as the victim, witness, expert, specialist, interpreter, investigative officer, investigator, prosecutor, counsel, lawful representative of the accused, representative of the victim, civil plaintiff, civil respondent, or if he himself or his relatives or spouse are interested in the matter, whether directly or indirectly.

⁶⁵⁷ Articles 168, 176, 176(1), and 222(1).

⁶⁵⁸ See *infra* V.

⁶⁵⁹ See *infra* IV.

⁶⁶⁰ Articles 32 through 39.

⁶⁶¹ Articles 388, 393(1), 433, 435, 448 and 452.

⁶⁶² See *infra* II.

Decisions rendered by a judge in the matter under examination regarding the application of procedural compulsory measures provided for by the Code and acceptance of investigative operations activities to be carried out in the specific manner provided for by the investigative operations work law cannot serve as the grounds for recusal of the judge. When establishing the circumstances prejudicing the examination of the matter, a judge must recuse himself; otherwise a motion to recuse may be made against him.

Every participant in the proceeding interested in the matter has a right to move for recusal.⁶⁶³ The principle of impartiality of a judge has been retained in the Draft as well. However, there it is regulated more generally by a provision that a judge cannot participate in the proceedings if he is personally interested in the outcome of the matter or circumstances exist which give reasonable grounds to the participants of the criminal proceeding to presume such interest.

2 Prosecutor

2.1 Public Prosecutor

Since 1994, the Code has adopted the position that prosecutors are the only persons entitled to carry out criminal prosecutions in Latvia; prior to then, such rights were conferred upon investigative institutions as well.⁶⁶⁴ Such changes were made alongside the changes regarding the system of investigative institutions and prosecutorial institutions when the new Office of the Prosecutor Law was adopted.

Prosecutors are members of the court system. The system of the Office of the Prosecutor is harmonized with the court system. At present, there exists a three-level centralized system of the Office of the Prosecutor managed by the Prosecutor General. The system includes district-city prosecutor's offices, prosecutor's offices of a judicial region, and the Office of the Prosecutor General. There are also several specialized offices of the prosecutor having a status of either district-city office of the prosecutor or of the office of the prosecutor of a judicial region.

Functions of the prosecutors during criminal proceedings include overall supervision of legality, supervision and coordination of the activities of investigative institutions, guidance and conducting of the pretrial investigation, as well as prosecuting charges on behalf of the State. To assist in the exercise of their powers, prosecutors are given a wide range of authority, and their lawful prescriptions are mandatory.⁶⁶⁵

The main function of prosecutors is bringing and prosecuting the charge. This is performed by prosecutors in all cases of public prosecution.⁶⁶⁶ When conducting criminal prosecutions, all of the necessary activities regarding the criminal matter are carried out either by the prosecutor himself or by investigative institutions that he designates. The activities to be carried out exclusively by the prosecutor himself are all of those activities involving the person prosecuted.

At present, the Code provides that the charge brought by the prosecutor is ruled upon by the court; however, the Draft provides that in certain cases the prosecutor himself will be able to determine the punishment imposed on the person concerned.⁶⁶⁷

The public prosecutor acts in matters of public charge.⁶⁶⁸ An important power of the public prosecutor is the commencement of the criminal prosecution by making a decision on

⁶⁶³ Articles 27 and 29.

⁶⁶⁴ Articles 128(1) and 145.

⁶⁶⁵ Article 41.

⁶⁶⁶ See *infra* III 2.

⁶⁶⁷ See *infra* IV.

⁶⁶⁸ Articles 41 and 125(1).

holding a person criminally liable, bringing a charge, interrogating the person prosecuted, and conducting all of the necessary investigative activities. The prosecutor is authorized to assign investigative activities to an investigative institution.

Not long ago, the prosecutor was entitled to suspend proceedings of public charge only if circumstances precluding proceedings were established or sufficient evidence to forward the matter to court had not been collected. At present, the powers of a prosecutor to decline to proceed with the matter during the pretrial stage are more extensive.

The Law of 1997 provides for the right of the Prosecutor General, under certain specified conditions, to terminate a matter against a person who has essentially helped in the detection of an offense committed by another person.⁶⁶⁹

In April 1999 prosecutors obtained the right to decline to forward the matter to a court and to release a person from criminal liability in cases in which a settlement with the victim (unless he is a minor) has been achieved or the offense committed is not so harmful to warrant a criminal penalty. It is also possible to release minors from criminal liability if there are reasonable grounds to believe that they can be rehabilitated through the use of compulsory measures of a correctional nature.⁶⁷⁰

Since November 2002 the Code includes the possibility for prosecutors to terminate matters on condition.⁶⁷¹ This means that the criminal matter is terminated, and the guilty person is required to carry out certain actions and not to participate in criminal activities during the determined probation period. If he violates these conditions, the matter is resumed and forwarded to the court; if he complies with the conditions, the matter is terminated definitely.

If the prosecutor opts to forward a matter to the court, his powers as the public prosecutor include compiling of the indictment and bringing an action in court.⁶⁷² The prosecutor maintains the State's charges⁶⁷³ in a court of first instance by participating in the verification of the evidence and providing his findings regarding circumstances established at the time of the proceedings and by giving his opinion as to the application of the criminal law and kinds of punishment, as well as regarding the civil legal consequences of the criminal offense. If, at the time of the proceedings, the prosecutor finds that the charge has not been substantiated during the judicial investigation, his duty is to waive the charge and provide a statement of reasons. The prosecutor maintains the charge in a court of appellate instance, and he is entitled to submit a protest on unlawful and unfounded court orders. The prosecutor also participates in adjudication of a matter in a court of cassation instance, and he is entitled to initiate legal proceedings in a criminal matter due to newly-discovered evidence.

The Draft provides for the extension of the powers of the prosecutor as the public prosecutor, including conferring certain punishment functions upon him by applying the so-called prosecutor's regulation on punishment (*prokurora soda priekšraksts*), taking an active stand during the consensus process *etc.*

The prosecutor must be impartial and disinterested in the matter. He is subject to the same conditions of recusal and self-recusal⁶⁷⁴ as a judge. A motion to recuse the prosecutor is decided upon by a higher prosecutor in the pretrial stages and by the court during the adjudication stage. The prosecutor's decisions are subject to appeal to a higher prosecutor; however, certain decisions of the Prosecutor General are appealed to the Senate of the Supreme Court.

⁶⁶⁹ Article 208(1).

⁶⁷⁰ Article 5(3).

⁶⁷¹ Article 5(4).

⁶⁷² Article 209.

⁶⁷³ Article 249.

⁶⁷⁴ Article 42.

2.2 Private Prosecutor

The victim acts as private prosecutor in matters of private charge.⁶⁷⁵ It is within his sole competence to decide whether or not to initiate the proceeding. Acting as a private prosecutor, the onus of proving the guilt of the accused is on the victim. He has all the rights of an active participant in court (to submit requests, recusals, to provide evidence *etc.*). The private prosecutor is in any case entitled to make a settlement with the accused, in which case the matter is terminated.

3 Defense

Under the Code, the defense in a criminal matter may be performed either by the accused himself (the suspect or the defendant) or he may procure professional counsel to conduct the defense.⁶⁷⁶ The engagement of counsel does not preclude the accused himself from actively defending his interests. These principles have remained essentially unchanged in Latvian criminal procedure during recent years, and no major changes are included in the Draft.

3.1 Defendant

Currently, the defense includes the following participants—the suspect, the accused and the defendant (*aizdomās turētais, apsūdzētais un tiesājamais*). Under the Code, the state guarantees the rights of these persons to defend themselves either on their own or by procuring professional counsel.⁶⁷⁷

The suspect within the meaning of the Code is a person who has been either arrested according to the provisions of criminal procedure or subjected to a precautionary measure prior to bringing of the charge.⁶⁷⁸ The draft proposes to include under the term “suspect” a person regarding whom a decision has been made finding him to be the suspect.

The accused within the meaning of the Code and the draft is a person regarding whom a decision has been made to hold him criminally liable.⁶⁷⁹ The defendant, according to the Code, is a person who a judge has committed to stand trial.⁶⁸⁰ The draft does not provide for the specific status of a defendant.

In addition to the right to defense, these persons have numerous other rights, the most significant of which include the right: 1) to be informed of the charge; 2) to give explanations and make a statement; 3) to provide evidence; 4) to submit requests and recusal motions; 5) to use of a language understood by the suspect, accused, or defendant and to make use of the interpreter’s services; 6) to familiarize himself with the case file; 7) to participate in the adjudication of the matter; 8) to submit complaints; 9) to special procedural protections *etc.*⁶⁸¹

The obligation of the defendant is to appear as required by the summons of the court or investigator, to obey his lawful requirements, and to participate in the investigative activities. If the defendant fails to fulfill his obligations, the law provides for various procedural compulsory measures—precautionary measures, forcible conveyance, search of the person, inspection of the person, placement in a medical treatment institution, wiretapping of conversations *etc.* However, these measures must not violate the criminal procedure provisions, demean the defendant’s dignity, or endanger his health and life.⁶⁸²

⁶⁷⁵ Articles 100 and 111.

⁶⁷⁶ Article 95(1).

⁶⁷⁷ Article 18.

⁶⁷⁸ Article 121.

⁶⁷⁹ Article 145.

⁶⁸⁰ Article 223.

⁶⁸¹ Article 95.

⁶⁸² Articles 68, 148 and 149.

The defendant has no duty of self-accusation. In other words, he is not warned about a refusal to give evidence or the giving of knowingly false evidence, and the defendant cannot be held criminally liable for refusing to give evidence or for knowingly giving false evidence. This point of view has been sharply criticized by the public recently. The draft includes the right of the defendant not to give evidence, but the defendant is no longer given the right to knowingly mislead the authorities.

A person who has been accused unlawfully or without basis and who has been caused harm in connection with the accusation has a remedy provided for by law and according to the procedures prescribed by the law.

3.2 Defense Counsel

Under the current Code, only an attorney at law of the Republic of Latvia may act as defense counsel in a criminal matter. A foreign attorney at law may act as a defense counsel only in cases and according to the procedures provided for by international agreements.⁶⁸³ The Code describes the cases in which a particular attorney is prohibited from serving as defense counsel in a particular matter.⁶⁸⁴

These prohibitions include the following cases: when the attorney is providing or has previously provided legal aid to a person whose interests are contrary to the interests of a person conducting the matter; when he has previously participated in the matter as a judge, prosecutor, investigator, investigative officer, expert, specialist, interpreter, witness or invited person; and when the attorney has a relationship with an official participating in the investigation or adjudication of the matter. The same reasons may serve as the basis for disqualification of a particular attorney at law with regard to representation of a civil plaintiff, civil respondent or the victim. The attorney at law also may not undertake the defense of several persons in the context of the same matter where their defense interests are in conflict.⁶⁸⁵

Any person has the right to hire or decline defense counsel. However, in certain cases the legislature has provided for compulsory defense. At present, there exist five such cases. With regard to two of these cases - cases of criminal offenses committed by minors and cases regarding mute, deaf, blind, and other persons unable to exercise their right to defense due to their physical or mental deficiencies-the decision to decline defense counsel is not binding upon the court and/or investigating authority; regardless of the wishes of the defendant, defense counsel will nevertheless participate and perform all of the functions of defense counsel.⁶⁸⁶

The draft considers the cases of compulsory participation of defense counsel in a different manner. Compulsory defense is required with regard to persons who for some reason (age, illness, level of education) are unable to fully defend themselves as well as to special cases in legal proceedings (process of agreement *etc.*).

The Code sets forth the comprehensive rights and obligations of defense counsel.⁶⁸⁷ The main obligation of defense counsel is to carry out all the necessary activities to disclose and prove the existence of circumstances mitigating and exonerating the liability of the person being defended. Defense counsel has unlimited rights to meet and talk with the defendant, as well as to participate in all activities with the defendant. For the purpose of fulfilling the function of defense counsel, he has virtually the same rights as the defendant (to furnish proof, submit requests, recusal motions *etc.*) with the exception of the right to give evidence.

⁶⁸³ Article 96.

⁶⁸⁴ Article 97(1)

⁶⁸⁵ Article 96.

⁶⁸⁶ Articles 98 and 99.

⁶⁸⁷ Article 97.

Defense counsel is subject to the lawful requirements of the court and investigative authorities. He is bound to keep his client's confidences; thus, he cannot disclose information he has become aware of in connection with fulfilling the functions of defense counsel without the consent of the defendant. In certain cases, he may also be required not to disclose the findings of the pretrial investigation. In such a case, if the information is disclosed, criminal liability may be imposed.⁶⁸⁸

Defense counsel may not withdraw from a defense that he has undertaken. The defendant may in any case terminate a particular defense counsel or decline defense counsel at all and continue to defend himself on his own.

4 Victim

Under the Code, the victim (*cietušais*) is a physical or legal person who has been caused non-material or physical injury or economic loss through a criminal offense. A person acquires the status of victim from the moment that the investigative officer, prosecutor, or court makes a determination that the person constitutes the victim.⁶⁸⁹

4.1 Victim as Subject of Civil Claims

The Code provides that any person who has been caused economic loss through a criminal offense has the right to bring a civil action (*civilprasība*). If the judge or investigative authority determines initially that the civil action is duly justified, then a decision is made acknowledging the person as a civil plaintiff (*civilprasītājs*).

The civil plaintiff and his representative are granted various rights, the most essential of which are the rights to: furnish proof, submit requests, participate in the adjudication of the matter, request to bring a civil action, maintain the civil action, and lodge a complaint on the judgment and judicial decisions concerning the civil action.⁶⁹⁰

Civil actions may be brought against the defendant as well as against other persons responsible for the material effects of the offense committed by the defendant (*e.g.*, parents, insurance company). If the civil action is brought against a person other than the defendant, a separate participant in the procedure—a civil respondent (*civilatbildētājs*) appears in the proceedings. The civil respondent and his representative have the same rights as the civil plaintiff.⁶⁹¹

Both the civil plaintiff and the civil respondent are subject to the Code provisions and the lawful orders of the relevant authorities. In case of a violation of these provisions or order, they may be subjected to procedural sanctions or be held liable as prescribed by law.

A civil action is finally adjudicated by the court, which can decide to uphold, reject or dismiss it. If the civil action is dismissed, the civil plaintiff is entitled to submit it according to the civil procedure.⁶⁹²

The Draft does not provide for the institution of a civil action. However, to regulate property issues it recommends introduction of the victim's compensation, which would be paid by the guilty person either on a voluntary basis or on the basis of a court order. The main difference between victim's compensation and the present civil action is that compensation would not be considered as payment of damages within the meaning of civil law and would not abrogate the rights of the victim to refer the matter to the court for compensation of losses according to the civil law. In addition, the Draft recommends that where the owner of

⁶⁸⁸ Article 130.

⁶⁸⁹ Article 100.

⁶⁹⁰ Article 102.

⁶⁹¹ Article 103.

⁶⁹² Article 308.

property acquired by criminal means is known, the prosecutor or court on final adjudication of the criminal matter may return the property to its owner.

4.2 Victim as Subject of Other Rights in Proceedings

The Code confers rather extensive rights upon the victim.⁶⁹³ The most significant of these rights include the rights to: 1) furnish proof; make petitions; 2) submit recusal motions; 3) obtain access to all materials in the case; 4) participate in the adjudication; 5) lodge complaints; 6) require security guarantees according to the procedures prescribed by law; and 7) maintain the charge on the victim's own or with the assistance of a representative at a court hearing.

Recently, a trend has developed restricting the victim's rights. For example, since November 2002 the victim's consent concerning whether or not judicial investigation takes place is not sought in summary proceedings.⁶⁹⁴

5 Others Participants

Apart from the aforementioned, some other participants are involved in criminal proceedings.

Duty of a witness⁶⁹⁵ duty is to provide information on significant facts in the case. A witness may refuse to give testimony against itself and members of its family. An expert⁶⁹⁶ is invited to give an opinion in situations requiring special knowledge. An interpreter⁶⁹⁷ is utilized if interpreting is necessary. A specialist⁶⁹⁸ is invited as a consultant to the court or relevant authority if a particular activity requires special knowledge. In certain cases, the Code requires mandatory participation of a specialist (for example, a doctor at the external examination of the body or a psychologist when interrogating a minor). The court reporter⁶⁹⁹ records the minutes of a court hearing. Advocates⁷⁰⁰ have been a part of criminal proceedings since November 2002. They are separate from defense counsel, and are persons who may be invited by any of the participants in the proceeding (except those enjoying the right to defense) to provide legal aid. Representatives or legal representatives (*pārstāvji vai likumiskie pārstāvji*)⁷⁰¹ of the victim, the civil plaintiff, the civil respondent, the suspect, the accused or the defendant and some other persons are participants of criminal proceedings too.

Liability may be imposed upon a witness, expert, or interpreter for an unfounded refusal to perform his duty and for giving knowingly false information (perjury, false opinion, or false interpretation or translation). The expert, specialist, interpreter, court reporter are subject to recusal if they are not competent or are interested in the outcome of the matter.

IV General Principles of Criminal Procedure Legislation

The general principles concerning criminal procedure in Latvia are basically fixed in the Constitution, Law on Judicial Power, Office of the Prosecutor Law, the Code and in other legislative enactments. Many of these principles have been in existence since 1961 when the current Code entered into force, while many were introduced after the renewal of independence in the early 90's. Revisions of the criminal procedure provisions are ongoing.

⁶⁹³ Article 100.

⁶⁹⁴ Article 416.

⁶⁹⁵ Articles 53 and 54.

⁶⁹⁶ Articles 59 through 62.

⁶⁹⁷ Articles 135 through 137.

⁶⁹⁸ Articles 134(1 and 2)

⁶⁹⁹ Articles 244 and 245.

⁷⁰⁰ Article 95(1).

⁷⁰¹ Articles 104 and 105.

The most significant principles relating to criminal procedure include the principles of: 1) legality; 2) public charge; 3) ensuring inviolability of persons' rights and fundamental freedoms; 4) court jurisdiction; 5) equal rights for persons before the law and the courts; 6) collegiality; 7) judges' independence and duty to act according to law; 8) procedural language; 9) publicity; 10) defense; 11) ascertainment of the truth; 12) presumption of innocence; 13) direct review and oral hearing in adjudication; 14) continuity of adjudication; 15) adversary proceeding and equality of arms; 16) participation of representatives of the people; 17) ensuring life, health, honour and dignity of a person; 18) appeal regarding legal action and court decisions; and 19) procedural economy.⁷⁰²

Many of these principles are of a limited nature and apply only in the trial stage (*e.g.*, principles of publicity, direct review and oral hearing, collegiality, adversary proceeding *etc.*).

The transition to a democratic political system required the introduction of several significant principles in the criminal procedure arena. Thus, in the early 90's, one of the currently most significant principles of criminal procedure - the presumption of innocence⁷⁰³ - was included in the legislation of Latvia. At present it includes three basic provisions: 1) no one may be found guilty other than by judgment of a court having come into legal effect; 2) guilt must be proved by the prosecutor; the accused need not prove his innocence; 3) all doubts are resolved in favor of the accused. At present, active discussions are being conducted in Latvia as to whether the presumption of innocence should be revised by excluding several substantial references from it. The Draft, however, maintains the presumption of innocence, but its content is considerably narrowed in the following formulation: "No person may be considered guilty of committing a criminal offense until proven guilty in accordance with the procedures prescribed in this Law."

In addition to this proposal, the principle of court jurisdiction⁷⁰⁴ has also been proposed for revision. At present, this principle operates in all cases; however, the Draft envisions that, if the accused consents, not only the court but also the prosecutor will be able to determine the accused's guilt for committing a criminal offense. Consequently, the draft replaces the principle of court jurisdiction (in any case a person shall be found guilty and punishment shall be adjudged by the court only) by the principle of the right to court proceedings (any person has a right to demand adjudication of his matter).

Another principle introduced in the Code in the early 90's is the principle of adversary proceeding, which holds that the parties exercise their rights and fulfill their obligations in court through adversarial competition. This principle has also been criticized by theoreticians and practitioners. Presently, the opinion supported by the compilers of the draft is that a classical principle of adversary proceeding is impossible because the participants are not in equal starting positions and equal requirements have not been imposed on them; thus, such a principle has not been included in the draft. The principle of equality of the participants in the proceedings continues to exist, however, and is envisioned to be retained in the future.⁷⁰⁵

Several principles that have existed in Latvia for decades are being revised in recent years. For example, the principle of representatives of the people⁷⁰⁶ encompassed, for many years, two basic forms of expression - participation of the chosen representative in certain investigative activities (search, removal, investigative experiment *etc.*) and participation of lay judges in the adjudication of the matter. With regard to the chosen representatives, it should be noted that such participants in the criminal procedure were not provided for until November 2002. The Draft also does not include them.

⁷⁰² Articles 3, 11 through 19(1), 138, 220 through 222(1), 242, 243 and 466.

⁷⁰³ Article 19(1).

⁷⁰⁴ Article 12.

⁷⁰⁵ Article 243.

⁷⁰⁶ Article 138.

With regard to lay judges, their participation in the adjudication of criminal matters has been reduced gradually. Since 1993, in addition to the already existing rule that matters of private complaints are adjudicated by a single judge, it was the rule that a lay judge does not participate in the adjudication of those criminal matters determined through a summary procedure.

Participation of lay judges was reduced still more in November 2002, by providing that in the district (city) courts, matters are generally to be examined by a single judge, with the exception of cases specially provided for by law. With regard to matters to be adjudicated by regional courts, participation of lay judges at present has been retained. The Draft envisions that except for the cases specially provided for by law, in the court of first instance the matter is adjudicated by the judge alone. The aforementioned also implies changes concerning the principle of collegiality in adjudication.

Certain changes have been made to the principles of direct review, oral hearing, and continuity of adjudication.⁷⁰⁷ With regard to the principles of oral hearing and direct review of adjudication, it should be noted that the legal norm governing those principles has not been changed currently and is included in the Code in the same form. However, alongside the alterations to other norms governing the procedure of adjudication, the scope of this principle has been narrowed. Specifically, since April 1999 the Code has included a provision that it is possible not to conduct a judicial investigation (the part of adjudication where the evidence is examined-oral testimony, victim statement, documentary check *etc.*) in matters adjudicated by summary procedure.

In November 2002 the possibility of proceeding with a judicial investigation was also extended to matters regarding all criminal offenses except for especially serious ones to be adjudicated by the common procedure. However, a number of other provisions are relevant in this case, including the consent of the defendant to forego examination of the evidence. The guideline that a judge may not adjudicate another matter before the previous has been completed, which is included in the principle of continuity of adjudication, was replaced in November 2002 by the guideline that adjudication of other matters is possible provided that the adjudication of the prior matter has been adjourned for more than one day.

The principle of mandatory institution of proceedings and investigation⁷⁰⁸ has been retained, but the procedure for extrajudicial settlement of criminal law disputes has been considerably extended.

The principle of procedural economy, which ensures the right of persons to have their matters resolved within a reasonable time, has been considered to be of particular significance lately. This issue became significant after the decision by the Court of Human Rights in the case *Aleksandrs Lavents versus the State of Latvia*. For the purpose of this principle, strict time limits for performing various activities and applying procedural compulsory measures are more frequently included or proposed to be included in the laws.

In conclusion, it should be noted that the draft proposes to define more strictly the principles that already exist but have not been as clearly expressed as desired (for example, the principle of prohibition of double punishment, the separation of procedural powers *etc.*) as well as to include other principles, such as the right to cooperation.

V Course of Criminal Procedure

1 Pretrial Stage

⁷⁰⁷ Article 242.

⁷⁰⁸ Article 127.

Currently the Code provides for three obligatory stages prior to adjudication of a matter.

Bringing of a criminal action (*krimināllietas ierosināšanas stadija*) is the first stage of the criminal process.⁷⁰⁹ During this stage, a decision is made, based upon the information received, whether or not a criminal action is to be brought. The Code precisely formulates the reasons, grounds, and procedure for bringing of a criminal action. The Code also strictly regulates those cases in which a criminal action must not be brought and in which the relevant authority has the right to decide whether or not to bring a criminal action.

Investigative activities, except for the crime scene examination, must not be carried out during the stage of bringing a criminal action. An expert examination may be performed provided that no other activities are required for this purpose.

The relevant authority during this stage is an investigative institution, the prosecutor, or a judge. The stage is concluded with a decision to bring or not to bring a criminal action. The Draft does not provide for this stage as a separate stage.

The task of the pretrial investigation is to detect quickly and completely the criminal offense, established during the stage of bringing a criminal action, to ascertain the guilty party, and to decide upon the issue of holding this person criminally liable. This stage is necessary to fix procedurally the trace of a criminal offense prior to the trial, to collect, procedurally fix and examine all of the evidence necessary to ascertain the truth in the matter, as well as to define and bring the charge, thus preparing and ensuring the possibilities for resolution and adjudication of the matter at a court hearing.

Pretrial investigation consists of two stages. The first stage is from the moment of bringing of a criminal action until the moment at which the person to be held criminally liable has been ascertained. The relevant authorities during this stage are the investigative institution and the prosecutor. The second stage of the pretrial investigation is the criminal prosecution, which begins at the moment that the prosecutor makes a decision to hold the person criminally liable. From this moment forward, the procedures are aimed at a concrete person. The relevant authority at this stage is the prosecutor.

Pretrial investigation is completed either by referring the matter to a court (usually by an indictment) or by termination of the criminal matter if the necessary evidence has not been collected or other circumstances exist prohibiting continuation of the prosecution.

The tasks during the stage of committing of the accused to stand trial (*apsūdzētā nodošana tiesai*)⁷¹⁰ are to: 1) ascertain whether it is possible to adjudicate the matter and whether there are grounds for committing the accused to stand trial; and 2) decide whether to forward the matter to the appropriate court, refer it for supplementary investigation, or stay or terminate proceedings. The relevant authority during this stage is the court. The accused is brought before the court, which renders a decision as to that individual. During this stage, the court has the right to reduce the scope of the charge in favor of the accused.

2 Trial Stage

An obligatory stage is the trial in first instance (*iztiesāšana 1. instancē*).⁷¹¹ The trial and appellate proceedings conduct substantive adjudication of the matter. The trial consists of the preparatory part of the court hearing, judicial investigation, oral proceedings, and the defendant's last word and rendering and proclaiming of the court order. In accordance with the November 2002 amendments to the Code, the judicial investigation may be omitted in certain cases prescribed by law.

⁷⁰⁹ Articles 107 through 115.

⁷¹⁰ Articles 223 through 241.

⁷¹¹ Articles 223 through 321.

3 Remedy Stage

Optional stages are the trial in appellate instance and trial in cassation instance (*iztiesāšana apelācijas un kasācijas instancē*).⁷¹² The trial and appellate proceedings conduct substantive adjudication of the matter.

In the cassation proceeding, the matter is re-examined because of substantive violations of the Criminal law or the Code (*e.g.*, erroneous application of substantive law, the matter has been adjudicated by the wrong court panel; the secrecy of deliberations has been violated *etc.*).

Both the appellate and cassation proceedings are permissible only regarding court decisions that have not become final. Court decisions that have become final may be re-examined in two ways, each of which constitutes an independent optional stage of criminal procedure.

The Code provides for the possibility of reopening a matter when any substantial new circumstances or evidence has been discovered (*e.g.*, knowingly false evidence or expert's opinion upon which the court decision was based, improper conduct on the part of the relevant authorities, resumption of matters in connection with new discovered circumstances (*lietu atjaunošana sakarā ar jaunatklātiem apstākļiem*)).⁷¹³

The initial ascertainment of these circumstances is undertaken by the prosecutor. If he finds that such circumstances exist, the court then decides whether or not the matter is to be reopened. If the court decides to reopen the matter, it is re-examined.

The possibility for a new adjudication of matters in connection with essential infringements of substantive and procedural provisions (*lietu jauna izskatīšana sakarā ar būtiskiem materiālo un procesuālo normu pārkāpumiem*)⁷¹⁴ has been provided for by the Code since November 2002. The Code provides for such adjudication when justifications for cassation have been established but the matter has not been appealed according to cassation procedure, as well as when the prior court proceeding has been determined by an international judicial authority not to conform to international agreements.

The execution (*tiesas nolēmumu izpildes stadija*)⁷¹⁵ involves the enforcement of final and enforceable court orders. The court order is delivered for enforcement by the court that issued the order. Obviously, it is essential that the judgment of conviction not be enforced until after it has become final. Judgment of acquittal and judgment releasing the defendant from punishment are enforced immediately after its proclamation by the release of the defendant from detention, house arrest and police custody.

This stage must not be equated with the concept of practical execution of criminal sentence, which is a non-procedural act. A criminal sentence is executed practically by penitentiary institutions or sworn bailiffs.⁷¹⁶

4 Special Forms of Procedures

Currently, the Code provides for three special forms of criminal procedure. The specific features of criminal procedure in matters of private complaints⁷¹⁷ relate to the fact that the prosecution is performed by the victim. The most characteristic feature of this process is that the charge is brought and maintained by the victim himself. There is no pretrial investigation in this process. The action is brought and adjudicated in the first instance by a district (city) court.

⁷¹² Articles 433 through 465.

⁷¹³ Articles 388 through 392(1).

⁷¹⁴ Articles 393(1 and 10).

⁷¹⁵ Articles 357 through 375(1).

⁷¹⁶ Editor's note: Particularities of this procedure are not elaborated in detail.

⁷¹⁷ Article 265.

Another special form of criminal procedure similar to the common procedure but with a slight difference, is a judicial proceeding relating to the use of compulsory measures of a medical nature.⁷¹⁸ This procedure differs in the guarantees provided to the defendant. In certain cases, the process may take place without the presence of the defendant. The final objective of the procedure is to impose measures of a medical nature rather than punishment.

The third special procedural form is the summary procedure (*saīsinātais process*).⁷¹⁹ This procedure may be applied in certain cases prescribed by law. The procedure utilizes greatly reduced time limits; generally, the matter is resolved in a little more than a month. This quick resolution is achieved by the simplified criminal procedures provided for by the law - the number of procedural documents to be drawn up during the procedure has been reduced, their content has been simplified, and other measures facilitating the procedure have been taken.

The Code includes other special forms of criminal procedure such as, for example, settlement procedures and a procedure in which the prosecutor rather than the court imposes punishment.

VI Evidence

1 General Provisions

With regard to general provisions of evidence, the following key issues must be addressed: 1) the person with whom the burden of proof rests; 2) the manner of proof (the standard of proof); and 3) the means of proof (evidence, its characteristics and types).

In Latvia, the only principle that currently determines the burden of proof is the aforementioned presumption of innocence.⁷²⁰ The presumption of innocence unequivocally provides that the burden of proof rests with the accuser, and the accused need not to prove his innocence. Currently, there are no deviations from this principle. However, discussions in respect of the necessity to revise this guideline have been ongoing among the public for quite a long period of time already and have influenced the wording of the Draft.

The Draft provides for the shifting of the burden of proof to the accused in certain cases provided for by law. First, it has been proposed to shift the burden of adducing evidence (the evidentiary burden), *i.e.*, the obligation to come forward in certain circumstances in which the offense was committed under circumstances excusing criminal liability. The so-called persuasive burden has also been proposed to be shifted if a person contests the presumptions provided for by law (*e.g.*, that the fact established already by a final judgment of a court regarding another matter is true, or that a generally known fact is true *etc.*). The Draft also includes an obligation for a person to prove the lawful origin of his financial resources in particular cases.

The role of court (a judge) in the proof process relates to its function - resolution of a dispute. The court is regarded as the decisionmaker of the dispute who listens to the participants' evidence and argument and renders an impartial, independent, lawful and reasoned judgment.

With regard to the standard of proof, the current Code provides that the entire investigation in a matter is to be conducted completely, comprehensively, and impartially.⁷²¹

⁷¹⁸ Articles 394 through 405.

⁷¹⁹ Articles 406 through 416.

⁷²⁰ Article 19(1).

⁷²¹ In light of the uncertainties inherent in complying with this requirement, the draft code includes an instruction that generally, proof must satisfy the standard of guilt beyond a reasonable doubt or exclusion of any reasonable doubt; however, in case in which the burden of proof has been shifted to the defence, the standard is the lower standard of creating of reasonable doubt or preponderance of the evidence.

Evidence consists of information about facts that may be used in the proof process.⁷²² To be admissible, evidence must be submitted in a certain procedural form and meet certain requirements. In this respect (including also the issues below regarding taking of evidence and types of evidence), no essential changes have taken place since the 60's, and the guidelines have remained the same.

Currently, the Code does not name and specify particular characteristics of evidence; however, practice and theory recognize unequivocally the existence of two features of evidence-admissibility (*pieņādījumu pieļaujamība*) and relevance (*pieņādījumu attiecināmība*). These characteristics are considered to be permanent features of evidence.

The relevance of evidence relates to the usefulness of the information included in the evidence in proving the matters in dispute, while the admissibility of evidence relates to the form of the evidence-*i.e.*, considers whether the information has been obtained in compliance with the requirements set out in the law of criminal procedure.

Presently, the Code does not include specific criteria according to which evidence must be recognized as unacceptable and inadmissible. In practice, however, this issue is considered in relation to the seriousness of the procedural violation that has occurred. If information obtained in another country is being used in Latvia, its procedural quality is assessed according to the laws of the country in which the information was obtained.⁷²³

2 Means of Evidence

Under the Code, investigative activities serve as the basic means to obtain information that can later be used as evidence in a criminal proceeding. Currently, the Code provides for the following investigative activities - examination, inspection (examination of live persons), confrontation (a simultaneous interrogation of two persons with a view to eliminate inconsistencies in their previous testimony), presentation for recognition, search, removal, wiretapping of conversations and acquisition of information through technical means, investigative experiments, ascertainment of evidence on the spot, and expert examination.⁷²⁴ In certain cases, the necessary evidence may also be acquired by conducting other activities that presently have not been granted the status of investigative activities under the Code. For example, the authorities may obtain the defendant's identity or other information of interest simply by making an inquiry and receiving a response.

The Draft proposes to discontinue considering certain activities as independent investigative activities (*e.g.*, ascertaining the given evidence on the spot); however, it proposes to supplement the existing activities with new ones, such as inquiry and investigative activities to be performed in a special manner.

The characteristic features of these activities (*e.g.*, surveillance and shadowing of a person, wiretapping of conversations *etc.*) are secrecy and the fact that the subjects of the activities are unaware of them.

⁷²² Article 49.

⁷²³ The draft code includes guidelines currently recognized in the academic literature and names and characterizes three features of evidence-relevance, admissibility, and reliability. With regard to admissibility, the draft code provides an expanded explanation of the effects of the procedural violations that occurred when the information was obtained. In this respect, two separate categories are proposed - absolute inadmissibility and restricted admissibility. Absolutely inadmissible information would include information that was obtained by means of violence, threats or extortion, a procedural activity performed by a person who, according to the law, was not entitled to perform the activity, or by other means specifically provided for by law. Information with restricted admissibility would include information obtained in violation of a procedural requirement, which may be admitted despite the violation in circumstances where the procedural violation does not affect the truthfulness of the information or the information's reliability has been corroborated by other information obtained lawfully during the investigation.

⁷²⁴ Articles 179, 182, 157, 162, 151, 163, 165, 168, 176.1, 184, 185, and 186.

Currently, the majority of these activities (except those discussed above as provided for by the Code) are regulated by the Investigative Operations Law. Information obtained via these procedures may be admitted as evidence only if it can be ascertained in accordance with the procedures prescribed by the Code. It should be noted that the inclusion of these “covert” activities in the draft is one of the most widely debated issues and has engendered substantial opposition, including opposition from recognized scientists and practitioners.

The Code’s list of the types of evidence⁷²⁵ is exhaustive; thus, no other types of information may be admitted as evidence. At present, the list of evidence includes the following: testimony, expert opinion, material evidence, investigative and court records, information acquired and fixed through technical means in accordance with the procedures prescribed by the law, and other documents.

The Draft retains essentially the same position, with the exception that the lists of evidence have been supplemented to include auditors’ conclusions and conclusion of a competent authority.

3 Interference with Right to Privacy

It is obvious that the acquisition of evidence is frequently connected with interference with a person’s rights and freedoms, including the right to privacy. In light of this fact, all of the activities related to acquisition of evidence must be performed strictly in accordance with the law, taking account of persons’ rights, without defamation, injuring dignity, or affecting persons. To protect these rights and freedoms, a number of procedural rules and guarantees have been created.

Further, rules exist requiring a judicial decision prior to use of certain investigative activities. The requirement of judicial intervention was introduced in the early 90’s and provides a good example of the striking changes that have taken place in Latvian criminal procedure.

At present, a judge’s decision is required with respect to searches (with the exception of cases specially provided by law), examination and removal of documents containing official secrets, wiretapping of conversations of the suspect and the accused and acquisition of information through technical means, and interception of postal and telecommunications correspondence.⁷²⁶

The right to appeal also applies to all of the other activities of public bodies that are considered to infringe upon and unreasonably interfere with persons’ private lives. Arbitrary and wrongful interference with the inviolability of private life is regarded as a gross violation, and the official who allowed it to occur is held liable in accordance with the law (including criminal liability).

The prohibition against unreasonable interference with private life is of great public significance and is respected in practice. In the Draft, the regulation of this issue is included in the section concerning the basic principles of criminal procedure. In particular, the Draft states that the criminal proceedings must be conducted taking into account internationally acknowledged human rights and must preclude the imposition of unjustified obligations of criminal procedure and interference in persons’ lives and activities.

The Draft also includes a reference that human rights may be restricted only if required by public safety and only in accordance with the procedures prescribed by law in proportion to the seriousness and dangerousness of the criminal offense. It further imposes

⁷²⁵ Article 49.

⁷²⁶ The draft code proposes to extend the requirement of judicial intervention to all investigative activities and to employ special procedures (*i.e.*, the decision would be made by a special investigation judge). Decisions on performing the respective activities may be appealed to a court of a higher instance by the persons concerned. However, an appeal does not stay enforcement of the decision.

upon officials the task of ensuring the protection of privacy. Information about a person's private life may be acquired and used only if it is necessary for ascertaining the circumstances to be proved at trial.

Unlike the current Code, the Draft provides directly that a physical person has the rights to demand not to include information regarding his private life and financial status in the criminal case file unless it is necessary for the fair regulation of legal relations.

VII Precautionary Measures

1 General Provisions

Precautionary measures (*drošības līdzekļi*) are one of the preventive compulsory elements of criminal procedure.

The permissible types of precautionary measures are set forth in the law. The list of precautionary measures included in the Code is exclusive, meaning that use of any other precautionary measure is not allowed and is regarded as grossly illegal. The criminal procedural regulation of precautionary measures has changed significantly since the restoration of independence. In particular, several new precautionary measures have been introduced, and several have been deleted. Further, the content and details regarding the use of many precautionary measures have been considerably changed.⁷²⁷

At present, the Code regulate the following types of precautionary measures: obligation not to leave domicile, personal guarantees, security deposits (bail), placement under police's control (in police custody), house arrest, detention (arrest), placement of a minor under supervision, and placement of a soldier under the supervision of the commander of the unit.⁷²⁸

Precautionary measures such as the security deposit, placement in police custody, house arrest, and placement of a soldier under the supervision of the commander of the unit have been included in the Code only since the end of 1994. At that time, one precautionary measure - guarantee by a public organization - was deleted from the Code.

The precautionary measures provided for by law are imposed strictly in accordance with the laws on criminal procedure.⁷²⁹ Precautionary measures may be imposed only upon particular subjects of criminal procedure - generally, the accused or the defendant, but in exceptional cases also the suspect. In such a case, the charge must be brought no later than ten or thirty days from the date on which the precautionary measure was imposed. The applicable time limit depends upon the category of the suspected criminal offense. The time limit is exact and may not be extended under any circumstances.

The precautionary measures provided for by the Code are optional, not mandatory; thus, their imposition is a right rather than an obligation imposed upon the relevant authorities. They may be imposed only with a view to achieving the objectives laid down in the law.

The Code includes an exclusive list of the objectives of precautionary measures: 1) to prevent the possibility of evading investigation and trial; 2) to prevent the possibility of interfering with ascertainment of the truth in a criminal matter, including influencing of persons giving testimony in a criminal matter; 3) to prevent the possibility of performing criminal activities; and 4) to ensure the execution of a judgment.

It follows from the law that precautionary measures are not to be imposed with a view toward achieving other objectives. The following reference included in the Code is also of

⁷²⁷ Article 68.

⁷²⁸ Article 69.

⁷²⁹ Article 70.

great significance: precautionary measures are to be imposed with a view of achieving the above listed objectives if there are adequate grounds for imposing precautionary measures- *i.e.*, a probability that the suspect, accused, or defendant will evade the investigation and trial, interfere with ascertainment of the truth in a criminal matter, or perform criminal activities.

Once the requisite grounds for imposition of a precautionary measure have been established, various circumstances are considered to determine the choice of the specific precautionary measure to be imposed. These circumstances include: 1) the seriousness of the criminal offense committed; 2) the personality of the defendant; 3) the probability that the defendant will evade the investigation and trial or will interfere with ascertainment of the truth; 4) the occupation, age, state of health, family status of the defendant; and 5) other circumstances.

The issue of who is entitled to impose a precautionary measure⁷³⁰ is of no less importance. The legislature has granted the right to impose a precautionary measure to investigators, prosecutors, and courts when acting as the relevant authorities. A judge also imposes certain precautionary measures during the stage of the pretrial investigation.

The current Code does not regulate specially the issue of imposing precautionary measures upon persons enjoying particular immunity - judges, prosecutors, lay judges, and deputies. However, a special procedure has been provided for by other legislative enactments. Thus, for example, a judge may not be detained (arrested) without the consent of the *Saeima*. Further, a lay judge (sworn) may not be detained while fulfilling duties connected with court adjudication without the consent of the local government that elected him.

The decision on detention of a lay judge (sworn) is made by a special authorized judge of the Supreme Court. The detention of a prosecutor takes place in accordance with procedures prescribed by law, including the requirement of immediate notification of the Prosecutor General. A member of the *Saeima* may not be detained without the consent of the *Saeima*.

The documentation relating to imposition of a precautionary measure⁷³¹ takes the form of a substantiated order prepared by the respective authority entitled by the law to impose the precautionary measure. Apart from the usual requisites, the order on a precautionary measure must include a reference to the relevant criminal offense, as well as information on the person's age, family status, occupation, state of health and other circumstances that may affect the determination of the type of precautionary measure. A decision regarding imposition of a precautionary measure is subject to appeal.

If the decision has been made by the performer of procedures, it may be appealed to the prosecutor; if it has been made by the prosecutor-to a senior prosecutor; if it has been made by a judge-to a court of higher instance. Appeal of the decision does not suspend its enforcement.

If the necessity for a precautionary measure has disappeared, a decision on repealing the precautionary measure is made, but if it is necessary to replace the precautionary measure with a simpler or more severe measure, a decision to modify the precautionary measure is made.

The current Code does not provide for maximum time limits for application of most precautionary measures and, thus, does not restrict the period of their application. Fixed time limits of the application exist for only two types of precautionary measures-detention (arrest) and house arrest.

While similar to the precautionary measures discussed above, the arrest according to criminal procedure (*kriminālprocesuālā aizturēšana*)⁷³² is not included in the current Code as

⁷³⁰ Article 68.

⁷³¹ Article 71.

⁷³² Article 120.

a precautionary measure. Instead, the arrest according to criminal procedure is regarded as a separate procedural compulsory measure. Arrest according to criminal procedure may be performed by the investigator or prosecutor with respect to a criminal offense punishable by deprivation of liberty.

The right to arrest arises when the following conditions exist: 1) the person has been caught at the moment of committing the criminal offense or immediately thereafter; or 2) eyewitnesses, including the victims, point directly to this person as the perpetrator of the criminal offense; or 3) an obvious trace of the criminal offense has been found on the body or clothing of the suspect, in the suspect's possession, or in the suspect's home.

If there are other facts that substantiate suspecting a person for having committed a criminal offense, this person may be arrested only if that person: 1) tried to escape; or 2) has no permanent residence; or 3) has not been ascertained.

Arrest according to criminal procedure is a right of the relevant authorities, but not an obligation. Arrest according to criminal procedure must not exceed 72 hours from the actual moment of arrest. A judge's decision is not required for this type of arrest.

2 Particular Measures

The current Code provides for the following six general types of precautionary measures and two types of special precautionary measures to be applied to a certain group of persons only. General precautionary measures are discussed in the order of lightest to most severe.

The obligation not to leave domicile (*paraksts par dzīves vietas nemainīšanu*) is one of the most basic and frequently used of the precautionary measures.⁷³³ This precautionary measure has been utilized in Latvia for many years, and its content has not been modified in recent years. This measure imposes an obligation upon a person not to leave his place of residence or temporary place of residence without the authorisation of the investigator, prosecutor or court.

The consensus that has arisen from both practice and theory is that an absence without special authorization may not exceed one day. If the person violates his signed promise not to leave his domicile, he may be subjected to a more severe precautionary measure. This precautionary measure may be applied by all of the relevant authorities.

A personal guarantee (*personisks galvojums*) in accordance with the Code is a written obligation by which a third person guarantees that the suspect, accused or defendant will arrive on the summons of the investigative institution, prosecutor and/or court, will not interfere with ascertainment of the truth in the matter, and will not continue to commit criminal offences.⁷³⁴ In practice, this precautionary measure is rarely utilized.

The essence of the personal guarantee lies not in the direct compulsion of the suspect, accused, defendant himself to behave according to the interests of the legal proceedings during the pretrial investigation and adjudication of a criminal matter, but in the moral influencing of that person by third persons-guarantors-relying upon the sense of responsibility of the defendant *vis-à-vis* the guarantors.

The guarantor may be any physical person. The issue with respect to use of a personal guarantee arises when the relevant authority is approached by a person who requests to place in his charge the accused, suspect or defendant, respectively. Thus, the initiative comes from the possible guarantor. The relevant authority has the right to decide whether or not to accept a personal guarantee.

⁷³³ Article 73.

⁷³⁴ Article 74.

In case of non-compliance with the conditions of the guarantee, the person concerned is subjected to a more severe precautionary measure. With regard to the guarantor, there has been discussion of imposing administrative liability.

The security deposit (*drošības nauda*) is one of the precautionary measures provided for in the Criminal Code of Latvia.⁷³⁵ This measure was introduced in the current Code at the end of 1994. Under the Code, the security deposit is money or something of value deposited with the investigative institution, the prosecutor or court in order to ensure that the suspect, accused, or defendant arrives as required by the summons of the investigative institution, the prosecutor or court, does not interfere with ascertainment of the truth in the matter, and does not continue to commit criminal offenses.

Security deposits may be utilized by all types of authorities. The law prescribes that the security deposit may be given by the suspect, accused, or defendant as well as by any other physical or legal person.

The amount of the security deposit is determined by the investigative institution, prosecutor, or court. The law does not fix the maximum limit of the security deposit; it fixes the minimum limit only, which must not be less than fifty minimum monthly salaries (at present-LVL 3500, which is approximately € 2200).

If this precautionary measure is not complied with, the investigative institution, the prosecutor or court may order that the security deposit be forfeited to the State budget.

Despite the fact that the security deposit is an innovation in our current criminal procedure legislation, this precautionary measure has already found its practical application.

Placement in police custody (*nodošana policijas uzraudzībā*) is another of the precautionary measures provided for by the Code; it, too, appeared in the Code at the end of 1994.⁷³⁶ Under the Code, this precautionary measure consists of four conditions: 1) the person must not leave the district of his permanent or temporary residence without authorization from the investigator, the prosecutor or court; 2) the person must not visit the places or establishments indicated in the decision; 3) the person must present himself to the respective police institution at least two times per week; and 4) a police officer may enter the residential unit of the person in order to check his behavior.

The order placing a person in police custody is sent by the prosecutor, court, or investigative institution to the police department in the territory in which the suspect, accused, or defendant lives. The police department registers the order and hands it over to the respective police inspector for enforcement.

The order placing a person in police custody is violated if any of the included conditions has not been complied with. The violation of or non-compliance with any of the conditions may serve as grounds for the imposition of a more severe precautionary measure.

House arrest (*mājas arests*) is yet another of the precautionary measures included in the Code at the end of 1994.⁷³⁷ House arrest restricts the personal freedom of a person by requiring that the person remain permanently in his house or flat at a fixed address. Unlike the precautionary measures of obligation not to leave domicile and placement in police custody, which prohibit a long-term absence from the place of residence or a move away from the district of the permanent or temporary place of residence without the authorisation of the investigative institution, the prosecutor or court, house arrest required the person to stay permanently in his residential unit.

“Permanently” in this context means that the person is not allowed to leave his residential unit in connection with the duties of employment or other domestic activities. The person’s rights of movement are limited to a space within the territory of the house or flat.

⁷³⁵ Article 75.

⁷³⁶ Article 75(1).

⁷³⁷ Article 75(2).

As house arrest severely restricts the person's freedom of movement, it is obvious that this precautionary measure may not be imposed upon persons living alone because it would prevent them from leaving the house to purchase food, nor can it be imposed upon ill persons who require regular medical assistance.

House arrest also includes a prohibition against communication with persons specified in the order through any means of communication, including correspondence or use of an intermediary. This prohibition is based upon the trust and confidence to the person who has been applied the precautionary measure

The Code prescribes that, if necessary, the house or flat of the person held under house arrest may be guarded, in which case the police are charged with carrying out surveillance of the person's behaviour. Thus, there are actually two types of house arrest in Latvia-with and without police guards.

Like detention, house arrest may be imposed in cases involving criminal offenses that are punishable by a deprivation of liberty.

Detention (*apcietinājums*) is the most severe of the precautionary measures because it affects most deeply and most essentially the interests of the person upon whom it has been imposed.⁷³⁸ Detention is one of the precautionary measures most often imposed in practice.

Detention has been provided for since the Code of the Latvian SSR of 1961; however, in 1994 and the following years, substantial modifications were made to the procedures regarding imposition of this precautionary measure. Thus, at present the procedures for imposing this precautionary measure are substantially different from those provided for in the early 90's.

Under the current Code, detention for the suspect, accused or defendant is selected only in cases in which no other precautionary measure is sufficient to ensure a successful detection and investigation of the criminal offense, timely stopping of criminal activities, and complete isolation of a dangerous person from society. Further, detention may be imposed only in cases involving crimes punishable by a deprivation of liberty. Detention may be imposed on minors only in exceptional cases where necessary in connection with the seriousness of the offense, the minor's personality, or repeated offenses.

Detention may be imposed only by the decision of a judge rendered after a hearing on the basis of materials presented by the prosecutor or the investigator in the presence of the person to be detained, his counsel and, where provided by law, the lawful representative. The presence of the person to be detained is not obligatory if he is outside the territory of Latvia or his location is unknown. It should be noted that the requirement that detention be imposed only by a judge was not included in the Code until 1994, and the provision that the person to be detained must be present when the order is decided upon and issued was not included until 1997.

The judge's decision regarding the imposition of detention may be appealed to a court of higher instance by either the person detained or the authorities who sought detention. Such an appeal may be lodged within seven days from the moment the person became aware of the order imposing or refusing to impose detention. The decision on the appeal is rendered within seven days from the day of reception of the appeal with the appellant and the prosecutor participating. That decision is final and not subject to appeal.

The decision regarding detention may be revoked by a higher instance court only through the appeal mechanism. However, a decision to amend the detention order may be made either by the prosecutor during the pretrial investigation stage or by the court in the subsequent stages of the criminal proceeding.

With a view toward ensuring the lawful interests of the person detained, the law strictly regulates the maximum time limits for detention. The time limit for detention is

⁷³⁸ Articles 76 through 80.

calculated from the day of the suspect's arrest; where the person has not been arrested, it runs from the date of commencement of detention. Detention during the pretrial investigation cannot exceed two months. If it is impossible to complete the pretrial investigation during that timeframe and the prosecutor has no grounds to modify the detention order, the judge may extend this time limit up to one year and six months (up to six months with regard to minors) but not exceeding two months upon the prosecutor's request and a review of the materials presented, with participation, if necessary, of the detained person, his counsel and the lawful representative in cases provided for by law. Further extensions of the time limit are not permitted. Upon expiration of the time period, the detained person must be released immediately.

The detained person must also be released immediately when the time limit of the detention exceeds the maximum term of the custodial sentence provided for by the Criminal law with regard to the offense at issue.

If during the investigation the accused has committed a new criminal offense punishable by a deprivation of liberty, detention may be imposed for that offense as well. In such a case, the time limit of the detention is calculated in accordance with general provisions regardless of the period the accused has been detained in connection with the previously committed criminal offense.

After completion of the investigation before the expiration of the maximum time limit of the detention provided for by law, the results of the investigation of the criminal matter must be presented immediately to the accused and his counsel for their review. In this case, the time spent reviewing the case materials is not included in the time limit for the detention.

If the matter is forwarded for additional investigation and there are no grounds for modification of the detention order, the term of the detention is determined by the court; however, it must not exceed one month. In this case, the time limit of the detention is calculated from the moment at which the matter is received by the prosecutor's office.

Initially, the maximum time limits regarding detention were regulated only during the pretrial investigation; in the subsequent stages, they were not regulated. However, in light of public discussions and the necessity of harmonizing the laws with EU requirements, alterations were made later. The first modifications, which were made in the summer of 2001, related to minors; these modifications provided that detention could not exceed six months from the date upon which the matter was received by the court (through completion of the adjudication of the matter in the court of first instance). Upon expiration of the term, the detention is revoked and the minor is released immediately. In exceptional cases regarding especially serious crimes connected with violence or the threat of violence, the time limit for the detention may be extended beyond six months by the Senate of the Supreme Court.

Later, a similar approach was adopted with regard to all detained persons; thus, since November 2002, the law provides for a one and one-half year maximum time limit for detention during adjudication in the court of first instance for adults as well. In exceptional cases involving especially serious crimes connected with violence or the threat of violence, the time limit may be extended beyond one year and six months by the Senate of the Supreme Court.

Detained persons are held in the investigation prison or in a section of the investigation prison formed in a prison of another type. Amendments to the Code of November 2002 provide that the procedures relating to the placement of detained persons, daily arrangements, rights and obligations, medical service and material supply, precautionary measures and procedures for release of the detained from the investigation prison or their transfer to another place of deprivation of liberty are determined by the Cabinet.

Placement of a minor under supervision (*nepilngadīgā nodošanu pārraudzībā*) may be imposed by the investigator, prosecutor, or court on the basis of general provisions regarding

the application of precautionary measures.⁷³⁹ This precautionary measure may only be imposed upon minors. Imposition of this precautionary measure may be initiated by either the relevant authorities or the minor's parents or guardians. This precautionary measure provides that a minor may be placed under the supervision of his parents, guardians or trustees, when these persons undertake by a written commitment to ensure delivery of the accused minor to the prosecutor or court and to supervise the minor's behavior. If the minor fails to act as required, the minor may be subjected to a more severe precautionary measure, and the parents, guardians, or trustees may be held administratively liable.

Placement of a soldier under supervision of the commander of the unit was introduced in the Code in 1994 (under a slightly different title) and was also provided for in Latvia by the Code.⁷⁴⁰ The Code stated that soldiers of active service may be placed under the supervision by the command of the respective armed forces unit as a precautionary measure. The relevant section was excluded from the Code in 1992. Thus, in the period from 5 February 1992 through 1 October 1994, the laws on criminal procedure in Latvia did not provide for a special type of precautionary measures applicable to soldiers.

At present, placement of a soldier under supervision of the commander of the unit (*karavīra nodošana vienības komandiera /priekšnieka/pārraudzībā*) means that the commander of the unit, in accordance with the decision of the investigative institution, the prosecutor or court, is subjected to an obligation to ensure that the suspect, accused or defendant soldier arrives upon the summons of the aforementioned persons, does not interfere with ascertainment of the truth in the matter, and does not continue to commit criminal offenses.⁷⁴¹

⁷³⁹ Article 81.

⁷⁴⁰ Article 81(1).

⁷⁴¹ With regard to precautionary measures as a whole, the draft code considers these measures, including the types of these measures, in a different way. For example, the draft does not include the precautionary measure "obligation not to leave domicile." The precautionary measure "house arrest" has been revised; the draft considers it not as an independent precautionary measure, but as a precautionary measure to be imposed in cases in which the person cannot be detained, for example, because of illness or other reasons. Other new precautionary measures include: prohibition against leaving the country, prohibition against approaching a certain person or place, and placement of a minor in an educational establishment. While presently the imposition of only one precautionary measure is permitted, the draft allows for the possibility of combining several precautionary measures.

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Chapter 7

Criminal Procedure System of the Republic of Lithuania*

Saulius Juzukonis-Raimundas Jurka



I Sources

1 General Observations

Lithuania is an independent and democratic republic. No one may limit or restrict its sovereignty. In case of such threat, each citizen has right to oppose anyone who forcibly encroaches on the independence, territorial integrity, or constitutional order of Lithuania. The Constitution of Lithuania protects individual's inherent rights and freedoms, guarantees the right to freely choose any religion and manifest that religion in private or in public, to form political, national or public organizations, and defend the rights and freedoms provided by the law. Citizens of Lithuania exercise supreme sovereign power directly through referendums, or indirectly through elected representatives. Powers of the state are exercised by the *Seimas* of the Republic of Lithuania (Parliament of the Republic of Lithuania-*Lietuvos Respublikos Seimas*), President of the Republic, Government, and the Judiciary.⁷⁴²

Lithuanian territory is divided into 10 counties (*apygardų*). Counties consist of 9 towns and 51 region municipalities. Furthermore, municipalities are divided into sub districts (*rajonus*). The Government appoints head of each county. The basic task of its administration is to ensure fulfillment of the Constitution and laws in the territory of the county. Any law or other statute, which contradicts the Constitution, is deemed invalid.

Only laws that are promulgated are valid and ignorance of the law does not exempt anyone from responsibility. Official language is Lithuanian.⁷⁴³

Criminal procedure is carried out by the pretrial (preliminary) investigators at the beginning of the preliminary investigation and by public prosecutors as well as courts (judges) during the trial, delivery of judgement and its execution.

This definition represents predominant standing points and opinions of Lithuanian doctrine. Generally, criminal procedure provides for the procedure in criminal matters during pretrial investigation and in the court of first instance. This procedure is uniform and mandatory for all courts, prosecutor's office and pretrial investigative authorities operating in Lithuania. In fact, criminal procedure law, which is in force at the time of a corresponding procedural act, applies to the proceedings in criminal matters (*tempus regit actum*).

Main functions of criminal procedure are to fully detect criminal offenses expeditiously, ascertain offenders and ensure the correct application of the law in order that everyone who committed a criminal offense is justly punished and that no innocent person is charged or convicted of a criminal offense. If elements of a criminal offense are evident a preliminary investigation office or prosecutor is obliged to, within the limits of its competence, commence criminal proceedings and conduct legally prescribed actions to establish that a criminal act has taken place and to identify the person who committed the criminal offense. This rule is called the principle of official proceedings (*ex officio*).

2 Historical Overview

* National report dated 25 September 2003.

⁷⁴² The Constitution of the Republic of Lithuania, Žin., 1992, Nr. 33-1014.

⁷⁴³ Article 14 of the Constitution.

History of Lithuanian criminal procedure is not long (a little over 10 years). As new Lithuanian Code of Criminal Procedure entered into force on the 1 May 2003 it is rather difficult to discuss relation between theory and practice of criminal procedure. It is important to mention that the present Code is absolutely unlike the former Soviet one.

In 20th century Lithuanian legal system was predominantly influenced by the law of Russian empire and Soviet Union. In spite of the Soviet constitutional declarations about the protection of human rights and freedoms, practical situation was quite different.

After the Declaration of Lithuanian Independence 1991 serious measures for creating a national and prospective legal system were taken. Lithuanian Constitution was adopted in 1992. This legal act contains general provisions for the protection of human rights and freedoms according to the practice of the European Court of Human Rights and European Union, *aqui communautaire*.

The Code of Criminal Procedure influenced with Soviet legal doctrine was partially amended in 1994. Such laws existed until 2003 when the new Code which contains many general provisions of contemporary and self-aware content came into force.

3 Code of Criminal Procedure

The main source of Lithuanian criminal procedure law is the previously mentioned Code (*Lietuvos Respublikos baudžiamojo proceso kodeksas* - hereinafter: Code).⁷⁴⁴ It was adopted on the 14 March 2002 and entered into force on 1 May 2003. This Code contains major provisions regarding criminal proceedings and is applicable to all state authorities and persons.

4 Other Sources

The highest legal act within the Lithuanian hierarchy of law is the Constitution of the Republic of Lithuania (*Lietuvos Respublikos Konstitucija*). This source contains many fundamental individual rights and freedoms which are inherent.⁷⁴⁵ Law protects the right to life.⁷⁴⁶ Personal freedom is inviolable and no person may be arbitrarily arrested or detained. Deprivation of liberty is possible only on the bases and accordingly to the procedure which has been established by law. A person detained *in flagrante delicto* ought to be brought to court within 48 hours for the purpose of determining validity of the detention. In case the court does not pass a decision to arrest the person in question, he/she must be released immediately.⁷⁴⁷ The person is inviolable and law protects human dignity. Therefore it is prohibited to torture, injure, degrade, or maltreat a person as well as to establish such punishments. No person may be subjected to scientific or medical testing without its knowledge thereof and consent thereto.⁷⁴⁸

Private life of an individual is also inviolable. Personal correspondence, telephone conversations, telegraph messages, and other communications are protected. Information concerning the private life of an individual can be collected only by a justified court order and in accordance with the law. Legal system and courts protect individuals from arbitrary or unlawful interference in their private or family life and from encroachment upon their honor and dignity.⁷⁴⁹ Other rights and freedoms that could be infringed during criminal procedure

⁷⁴⁴ *Baudžiamojo proceso kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo įstatymas. (KODEKSAS) (Lietuvos Respublikos Seimas/Aktuali redakcija/IX-785 10/04/2003Aktuali nuo 01/05/200 iki 18/062003)*, Žin., 2002, Nr. 37-1341, Nr. 46. Editor's note: The numbers of articles and paragraphs without additional mark refer to the Code.

⁷⁴⁵ Article 18 of the Constitution

⁷⁴⁶ *Ibid.* Article 19.

⁷⁴⁷ *Ibid.* Article 20.

⁷⁴⁸ *Ibid.* Article 21.

⁷⁴⁹ *Ibid.* Article 22.

are also protected. Therefore: 1) all people are equal before the law, court, and other State institutions and officers, and a person cannot have its rights restricted in any way, or be granted any privileges, on the basis of its sex, race, nationality, language, origin, social status, religion, convictions, or opinions;⁷⁵⁰ 2) any person whose constitutional rights or freedoms are violated has the right to appeal in court, and the law ought to establish the procedure for compensation of material and moral damages inflicted on a person;⁷⁵¹ 3) each person is to be presumed innocent until proven guilty accordingly to the procedure established by law and until declared guilty by an effective court sentence every indicted person has right to a fair and public hearing by an independent and impartial court, individuals can not be compelled to give evidence against themselves or against their family members or close relatives, punishments may only be administered or applied on the basis of law, no person may be punished for the same offense twice, and from the moment of arrest or first interrogation, persons suspected or accused of a crime are guaranteed the right to defense and legal counsel.⁷⁵²

Additional central sources of criminal procedure law are generally recognized principles and provisions of international law (especially European Community Law), and international agreements binding Lithuania *e.g.* ECHR which became the part of Lithuanian legal system on the 20 June 1995.

There is a number of other legal sources of criminal procedure. For instance: Law on Police Activity (*Lietuvos Respublikos policijos veiklos įstatymas*); Law on Prosecutor (*Lietuvos Respublikos prokuratūros įstatymas*); Law on Advocacy (*Lietuvos Respublikos advokatūros įstatymas*); Law on Operational Activity (*Lietuvos Respublikos operatyvinės veiklos įstatymas*); Law on the Prevention of Organized Crime (*Lietuvos Respublikos organizuoto nusikalstamumo užkardymo įstatymas*); Law on Courts (*Lietuvos Respublikos teismų įstatymas*); and decisions of the Supreme Court on issues which have not been settled by other sources of criminal procedural law, or which arise in the application of law.

II Criminal Justice System

1 Investigating Services

The Code lists⁷⁵³ following investigating services: Police, State Border Guard Service, Special Investigations Service, Military Police, State Security Department (SSD), Financial Crime Investigating Service, Department of Customs, Department of Prisons, captains of the long voyage ships and Department on the Anti-fire Security and Rescuing. Police has general competence to investigate all criminal offenses mentioned in the Criminal Code.

The State Border Guard Service is under the Ministry of the Interior and protects the borders on land, at sea, at the Coronial Sea, and frontier inland waters. It exercises control over persons and means of transport crossing the border, enforces relevant legal regulations, and as far as that lies within the scope of its competence, regulates border-crossing points. This body also participates in the implementation of control over migration processes and ensuring public order, performs the enforcement functions established by law in the frontier zone, and in war time, defends the State as an integral part of the armed forces. It also performs certain other functions assigned to it with specific special laws.

⁷⁵⁰ *Ibid.* Article 29.

⁷⁵¹ *Ibid.* Article 30.

⁷⁵² *Ibid.* Article 31.

⁷⁵³ Article 165 of the Code.

Special Investigations Service carries out operational activities of detecting and preventing corruption related crimes; conducts inquiry and preliminary investigation; cooperates with other law enforcement institutions; collect, store, analyze and sum up information about corruption and related social and economic phenomena; on the basis of the available information prepare and implement corruption prevention and other measures; jointly with other law enforcement institutions implement crime control and prevention programs; at least twice a year report to the President of the Republic and the Chairman of the Seimas about the results of the Service's activities; and submit its proposals on how to make the activities more effective.

State Security Department (SSD) is a state institution responsible to the Seimas and the President, charged with the protection of the sovereignty of the Republic of Lithuania and its constitutional system. The role of the Department is to identify activities which constitute a threat to the security of the state, its territorial inviolability and integrity, interests and its economic, and defense potential. SSD fights against such activities and investigates their causes and conditions as provided by law.

While performing its activities Customs follows the Constitution, the Customs Code, the Statute of Service for Customs, government resolutions, provisions of the Customs Department and other legal acts concerning customs activities as well as provisions of international agreements and conventions related to this field. The Customs Code in line with the provisions of the European Union Customs Code has been applicable since 1998. It defines the basics of customs activities, procedure for import, export and transit of goods, application of import and export taxes, prohibitions, restrictions and control. The Statute of Service with the Customs of the Republic of Lithuania regulates the status of customs officials, the procedure of their employment and their dismissal from service, their rights and obligations and other activities.

Other special investigative bodies have exclusive competence in corresponding matters.

2 Prosecuting Authorities

All prosecutors and officers of the prosecutor's offices represent a uniform, centralized system of the prosecutor's office which consists of: 1) the Office of the Prosecutor General at the Supreme Court of Lithuania; 2) regional prosecutor's offices at the regional courts; and 3) district prosecutor's offices at the district courts.

The Prosecutor General of the Republic of Lithuania directs and controls activities of all prosecutors' offices. It also determines internal structure of prosecutor's offices and the list of staff.

Directives and instructions of the Prosecutor General are mandatory for all officers of the prosecutor's office. It has power to revoke acts of all officers of the prosecutor's office, which are subordinate to him, and to annul those decisions of the said officers, which are not in compliance with the law. Service of officers of the prosecutor's office is organized on the basis of statutory discipline. The Statute of Service in the Prosecutor's establishes the terms and procedure of service of the Office of the Republic of Lithuania. Prosecutor commences criminal prosecutions in the manner prescribed by law on criminal procedure. In the course of criminal investigations, it conducts acts of prosecution and refers the case to court.

Prosecutor controls and directs the investigation demanding the bodies of investigation to undertake, strictly in compliance with the requirements established with law, all possible search and procedural actions in order to determine the identity of the person who committed a crime with regard to whom the prosecutor may instigate criminal prosecution. Prosecutor may personally conduct an investigation of any crime. For the violations of law as well as for non-compliance with the prosecutor's instructions, prosecutor who directs the investigation

may suspend investigator from the investigation of a certain crime, or request its removal from office and apply other disciplinary penalties.

Prosecutor's request to take disciplinary action against the investigator must be considered and it ought to be notified in writing on the adopted decision within 15 days of the receipt of the request.

Preliminary investigation is conducted by investigators in the manner prescribed by the Code. Prosecutor pursues charges on behalf of the state in the court of first instance, court of appellate jurisdiction or court of cassation. It is obliged to appeal against unlawful court sentences, rulings and decisions. On the other hand, senior prosecutor must appeal against unlawful court sentences, rulings or decisions which have not been appealed from by the prosecutor subordinate to it as well as to nullify an unlawful appeal lodged by a prosecutor in a subordinate position.

Prosecutor ensures that the execution of sentences is carried out in a timely manner and participates in court hearings on the issues concerning the changes of the terms and conditions of punishment imposed on the convicted person/s.

3 Judging Authorities

Courts of the Republic of Lithuania are district and county courts, the Court of Appeal and the Supreme Court. Specialized courts may be established for the hearing of administrative, labor, family and other categories of cases. Courts are established with law. Those with special powers may not be established except in a state of war. Courts have legal personality⁷⁵⁴ and a seal engraved with the State Emblem of Lithuania.

A district court consists of a chairperson, vice-chairpersons and other judges. Vice-chairpersons are appointed to courts with at least six employed judges. A district court has jurisdiction over the territory determined by law.

A county court consists of the chairperson, divisional chairpersons and other judges. A county court has Civil and Criminal divisions.

The Court of Appeal consists of the chairperson, divisional chairpersons, and other judges. This court sits in Vilnius.

The Supreme Court has almost the same structure with exception of the Supreme Court Senate. It also sits in Vilnius.

A district court is the first instance judicial authority for: 1) civil cases; 2) criminal cases; 3) administrative cases; 4) cases relative to the enforcement of decisions and judgments; 5) passing of decisions (rulings) relative to the application of coercive measures established by law; and 6) investigation of complaints against the actions of an investigator or a prosecutor in cases established by law. Judges of district court perform the functions of a judge in pretrial investigation. District court judges cannot hear a case in which acted as a pretrial judge.

County Court is competent: 1) in the first instance for civil cases legally assigned to it; 2) in the first instance for criminal cases legally assigned to it; 3) in the appellate instance for the decisions, judgments and rulings of district courts; and 4) in the cassation instance for the decisions, judgments or rulings of district courts which have not been examined in the appeal procedure. A county court is to provide consultations to judges on issues of the application of laws during their visits to district courts that are located within the territory of their jurisdiction as well as in any other manner.

The Court of Appeal is an appellate instance for cases which have been tried by county courts as the courts of first instance as well as cassation instance for decisions, judgments and rulings of county courts passed in accordance with the appeal procedure.

⁷⁵⁴ Editor's note: It would be quite interesting to have more information regarding the legal personality of the courts, especially those relating to the substance of their rights and duties.

The Supreme Court is cassation instance for: 1) decisions, judgments and rulings of the Court of Appeal; and 2) decisions, judgments and rulings of county courts, passed in the first instance court.

The Supreme Court Senate, on the proposal of the Chairperson of the Supreme Court, hears cases relative to the effective rulings of the of the Supreme Court panels or cassation decisions of the Court of Appeal in case that decision of the Senate would be important for the uniform judicial practice. The Supreme Court unifies judicial practice. Consequently it: 1) publishes the decisions of the Supreme Court Senate passed in cases heard on the proposal of the Chairperson of the Supreme Court, and the decisions of the panels of the Supreme Court and other courts approved by the Senate. Interpretations of the application of laws provided for in court decisions and approved by the Senate must be taken into account by courts, state and other institutions as well as other subjects when applying laws; 2) analyzes judicial practice on issues of the application of laws; and 3) provides consultations to judges on issues of the application of law during their visits to county courts and the Court of Appeal that are within the territory of their jurisdiction as well as in any other manner.

The Supreme Court also provides consultations to district court judges and issues a bulletin in which the following material is published on a regular basis: 1) decisions of the Supreme Court Senate passed in the cases heard on the proposal of the chairperson of the Supreme Court and the court decisions approved by the Senate; 2) methodological material concerning the application of laws approved by the Supreme Court.

The bulletin is self-financed. However, courts and judges of the Republic of Lithuania receive it free of charge. The activities of the Supreme Court are regulated with the Statute of the Supreme Court approved by law and with other laws.

3.1 Courts in Pretrial Stage

See infra III 1 and V 1.

3.2 Courts in Trial Stage

See infra III 1 and 2.

III Participants in Criminal Procedure

1 Judge

The Constitution⁷⁵⁵ provides that courts have exclusive right to administer justice. While administering justice, judges and courts are independent and bound only by the law. Court decisions are delivered on behalf of the Republic of Lithuania.

Judges may not apply laws that contradict the Constitution. In cases when there are grounds to believe that the law or another legal act applicable in a certain case contradicts the Constitution, judge is obliged to suspend proceedings and appeal to the Constitutional Court to decide whether the law or other legal act in question complies with the Constitution.

Another legal act that concerns legal status of the judges is the Law on Courts. It establishes the court system, jurisdiction, organization, activities, administration and the system of self-governance, principles, status of judges, procedure of selection of candidates to judicial office, appointment of judges, system of their promotion and liability, social guarantees to judges and other issues relating to courts.

Legal regulation on the organization and activities of courts, status of judges and related issues is based on the universally recognized principles of law laid down in the Constitution, other laws and international agreements to which Lithuania is a party. We should mention respect for human rights and freedoms, especially universal rights to a judicial

⁷⁵⁵ Chapter 9, Articles 109, 110 and 111.

remedy, fair and public trial by an independent and impartial tribunal, principle of separation of powers under which justice is administered only by courts, rule of law, independence of courts and judges, autonomy of courts to organize their functioning, their financial independence from other state institutions and decisions of the officials, self-regulation and self-governance of courts, other principles of the structure of courts, status of judges and the judicial proceedings.⁷⁵⁶

In general, a judge sitting alone adjudicates criminal cases. A court in a panel of one judge and two lay judges adjudicate criminal matters or other criminal offenses.⁷⁵⁷ A reserve lay judge (*atsarginis teisėjas*) is also provided.⁷⁵⁸ This provision applies when trial requires an extensive period of time and a reserve lay judge may be summoned to the court session on the basis of a court ruling. Reserve lay judges ought to be present in the courtroom during the hearing of the matter, and if necessary replace lay judge who cannot continue in the court panel. Reserve lay judge has the right to require repetition of the court activities in which he or she did not participate. Trial has to be conducted by same court panel.⁷⁵⁹ If judge or lay judge can no longer participate in the session for some reason it ought to be replaced, and the court session to commence *de novo*. Jurisdictional disputes between courts are prohibited and a court that receives criminal matter from another court ought to accept such matter for hearing.

2 Prosecutor

The Constitution determines legal position of the prosecutor in criminal proceedings.⁷⁶⁰ Prosecutors organize and direct pretrial investigation and prosecute criminal cases on behalf of the State. Prosecutors defend rights and lawful interests of any individual, society and the State. When discharging their functions, prosecutors are independent and bound only by the law. The Prosecutor's Office of the Republic of Lithuania is comprised of the Office of the Prosecutor General and territorial prosecutor's offices. The Prosecutor General is appointed and dismissed from office by the President of the Republic with consent of the Seimas. Procedure for the appointment and dismissal from office of prosecutors as well as their status is prescribed with law.

2.1 Public Prosecutor

Activities of public prosecutor are regulated with law. The Law on the amendment of the Law on the prosecutor's office of Lithuanian Republic specifies those activities.⁷⁶¹ The prosecutor's office is a state institution performing the functions established by the Constitution and laws. Prosecutor's office ensures lawfulness and assists courts in the administration of justice.

The prosecutor's office, on the grounds and according to the procedure prescribed by law: 1) organizes and directs pretrial investigations;⁷⁶² 2) conducts pretrial investigations or individual actions of pretrial investigation;⁷⁶³ 3) controls activities of pretrial investigation officers in criminal proceedings; 4) prosecutes on behalf of the State; 5) supervises the submission of judgments for enforcement and the enforcement thereof; 6) co-ordinates

⁷⁵⁶ Law on Courts of the Republic of Lithuania. Editor's note: Data on the official publication omitted in the report.

⁷⁵⁷ Article 221.

⁷⁵⁸ Article 222.

⁷⁵⁹ Article 223.

⁷⁶⁰ Article 118 of the Constitution.

⁷⁶¹ Law on the Amendment of the Law on the Prosecutor's Office of Lithuanian Republic. See Article 2. Editor's note: Data on the official publication omitted in the report.

⁷⁶² *Ibid.* Article 164.

⁷⁶³ *Ibid.* Articles 169 through 172.

actions of the pretrial investigative bodies pertaining to the investigation of criminal acts; 7) protects the public interest; 8) examines, within its competence, petitions, applications and complaints submitted by individuals; 9) takes part in the drawing up and implementation of national and international crime prevention programs; 10) takes part in the legislative process; and 11) fulfills other functions prescribed by law.

Prosecutor decides independently and individually. However it is bound by the laws and principles of reasonableness, respect for human rights and freedoms, presumption of innocence as well as with the principle of equality of persons before the law irrespective of their social and family status, duties, occupation, convictions, views, origin, race, gender, ethnic origin, language, religious beliefs and education. Lawful demands and decisions of the prosecutor are binding on all state and municipal institutions and agencies, their officials, public servants and employees, natural and legal persons and must be complied with in the entire territory of Lithuania. Failure to comply with demands and decisions of the prosecutor will result in legal liability.

Acts and decisions of the prosecutor may be appealed to a superior prosecutor and competent court following the procedure established by law. Damage caused to individuals by unlawful acts or omissions of the prosecutor are to be compensated in accordance with the procedure established by the Law on Compensation for the Damage Caused by Unlawful Actions of Government Institutions, Civil Code and the Code of Civil Procedure. Prosecutor's office is headed by the Prosecutor General of the Republic of Lithuania who is accountable to the President of the Republic and the *Seimas*. Those bodies set the priorities for activities of the prosecutor's office and exercise parliamentary control over the activities. Superior prosecutor and court control procedural actions of prosecutors. Moreover, superior prosecutor determines violations of procedural laws and reverse unlawful decisions. Economic and financial activities of the Office of the Prosecutor General and territorial offices of prosecutors are controlled by the Prosecutor General and prosecutors authorized by the Prosecutor General, the State Control and other authorized state institutions. Prosecutor General submits information about the prosecutor's office to the Government and to the public.

2.2 Private Prosecutor

Role of private prosecutor (*privatus kaltintojas*) is regulated with the Code⁷⁶⁴ which specifies rules of the private matters proceedings.⁷⁶⁵ In those cases victim files private complaint before the court.⁷⁶⁶ This person acquires status of private prosecutor. Private prosecution is provided for certain criminal offenses such as constraint of freedom of person's activity;⁷⁶⁷ slander;⁷⁶⁸ assault⁷⁶⁹ and some other.

3 Defense

From the moment of arrest or first interrogation suspect or accused is guaranteed right to defense (*gynyba*) and legal counsel. This rule is prescribed by the Constitution.⁷⁷⁰ As mentioned *supra*, in accordance with Article 10 of the Code, suspect, accused and convicted are ensured the right to defense. Courts, prosecutors and preliminary investigators are obliged to ensure that the suspect, accused or convict has the opportunity to defend itself against the

⁷⁶⁴ Chapter XXX.

⁷⁶⁵ Articles 407 through 417.

⁷⁶⁶ Article 408.

⁷⁶⁷ Article 148 of the Criminal Code.

⁷⁶⁸ *Ibid.* Article 154.

⁷⁶⁹ *Ibid.* Article 155.

⁷⁷⁰ Article 31 of the Constitution.

suspicion or charges by means and in the manner prescribed by law, and to ensure protection of its personal and proprietary rights.

The Code provides for the definition of defense counsel - *gynėjas*.⁷⁷¹ A person is recognized as a defender when it, under the law's determined procedure, applies legal aid (ensures the right of defense) to a suspect, accused at the trial or convicted.⁷⁷² In certain cases, a person may be recognized as assistant of the defender. The third Chapter of the Code considers the assurance of participants' rights.⁷⁷³

3.1 Defendant

The defendant is a participant in the court proceedings.⁷⁷⁴ A defendant has the right to: 1) contest filed actions; 2) give explanations concerning the action; 3) submit evidence and applications; 4) upon completion of pretrial investigation, to examine the materials of the file; 5) participate in the court hearing; 6) submit petitions for exclusion; 7) file complaints against acts of a preliminary investigator, prosecutor, court, or 8) file appeals against a court judgment or court ruling in such part of the judgment or ruling which concerns civil action etc.

3.2 Defense Counsel

Suspect, accused or accused at trial may have several defense counsels.⁷⁷⁵ Defense counsel may defend several persons if the interests of such persons do not conflict with each other.

Rights and duties of criminal defense counsel are regulated with the Code.⁷⁷⁶ It ought to use all means and methods of defense in conformity with law for the timely and full ascertainment of all facts which vindicate the person being defended or mitigate his liability, and to provide other lawful legal assistance necessary in the criminal matter. Defense counsel has right to participate in proceedings after the detention of a suspect, or if the person has not been detained as a suspect, has been communicated with the relevant ruling. If person has not been interrogated as a suspect, defense counsel can participate after charges against it have been brought.

After arrival of criminal defense counsel to the proceedings, it has the right to confer with the person being defended without the presence of other persons for an unlimited number of times and with unlimited duration. Criminal defense counsel has right to examine the petitions and statements of the person being defended, the minutes of the interrogation, to examine the minutes of the detention, ruling on a preventive measure and to take excerpts from them. It has also right to participate in court hearings for taking the accused into preventive custody, and in court hearings for the extension of custody. Moreover, defense counsel has rights to submit petitions for exclusion, applications, file appeals, participate in proceedings for ordering expert assessments, and in all procedural acts performed with the participation of the person being defended. It has right to submit questions and make statements through the preliminary investigation, to examine minutes of investigative activities conducted with participation of the defense counsel, and to submit comments to that effect.⁷⁷⁷

⁷⁷¹ Article 17.

⁷⁷² Zabiela, V., *Rinktinės advokatų kalbos teisme/sudarytojas* (Selected speeches of defenders in the court) Vilnius: Justitia, 1998, 17-20.

⁷⁷³ Second paragraph of this Chapter specifies the institute of defense.

⁷⁷⁴ Article 22.

⁷⁷⁵ Article 47.

⁷⁷⁶ Article 48.

⁷⁷⁷ Liakas, A., *Baudžiamosios procesinės veiklos dalyviai* (The Participants of Criminal Procedure Activity), Vilnius, 1973, 38-42.

4 Victim

Victim must have access to information directly related to the protection of its rights and interests. Moreover, criminal procedure should be focused on other rights of parties to the proceedings which are atypical and related to the protection of human rights such as right to access information, compassion, honorable treatment, legal aid and compensation for damages.⁷⁷⁸ Enforcement of rights and rightful interests of victims is guaranteed not only with procedural law but also with substantive law *e.g.* compensation for damages incurred in the course of criminal offense.

Victim may be heard or questioned only with regard to the facts which are to be proven in the criminal matter.⁷⁷⁹ However, it has right to give explanations concerning all facts. Victims are heard or questioned pursuant to the procedure established for the hearing or questioning of witnesses.

Preliminary investigators and courts have right to impose compulsory attendance to victims who fail to appear without reasonable impediment. Moreover, in that case a fine may be imposed.⁷⁸⁰

Only a natural person can be a victim. According to effective Code enterprises, institutions and organizations cannot suffer moral or physical damage. In cases when a legal person suffers property damage it is recognized as a civil plaintiff.

4.1 Victim as Subject of Civil Claims

The Second part of the Code regulates the compensation of damage caused by the crime (*nusikalstama veika padarytos žalos atlyginimas*). Those provisions are apply regarding the two systems of compensation. One is compensation while civil claim was not brought before the court (*žalos atlyginimas, kai civilinis ieškinys baudžiamojoje byloje nepareiškiamas*).⁷⁸¹ Another one is compensation of damage when civil claim was brought before the court (*žalos atlyginimas, kai civilinis ieškinys baudžiamojoje byloje pareiškiamas*).⁷⁸²

4.2 Victim as Subject of Other Rights in Proceedings

See supra 4.

5 Other Participants

The other participants in the criminal proceedings are: pretrial investigator,⁷⁸³ pretrial investigation judge,⁷⁸⁴ suspect as the participant in the pretrial investigation stage,⁷⁸⁵ experts,⁷⁸⁶ representatives,⁷⁸⁷ witnesses,⁷⁸⁸ specialists,⁷⁸⁹ translators, convicted, civil plaintiff and civil defendant. A citizen, an enterprise, an institution or an organization, which suffers material damages as a result of the crime, could present a claim for damages against the

⁷⁷⁸ Juzukonis, S., Protection of Rights of the Victim in Criminal Procedure (Ph. D. thesis), Vilnius, 2002.

⁷⁷⁹ Articles 28, 142 and 163.

⁷⁸⁰ Article 163.

⁷⁸¹ Articles 107 and 108.

⁷⁸² Articles 109 through 118.

⁷⁸³ Article 18.

⁷⁸⁴ Article 19.

⁷⁸⁵ Article 21.

⁷⁸⁶ Articles 84 through 88.

⁷⁸⁷ Articles 53 through 56.

⁷⁸⁸ Articles 78 through 83.

⁷⁸⁹ Articles 89 and 90.

accused or other persons, who bear material responsibility according to the law. The court adjudicates this claim simultaneously with the criminal case.

IV General Principles of Criminal Procedure Legislation

Principles of criminal procedure law are determined through Lithuanian legal system, international documents and case law of the European Court of Human Rights. In addition, Roman law has a significant influence.

It is important to consult the theory behind of principles to understand their true meaning. One of the most famous scientists Prof. *M. S. Strogovicus* has developed a position accordingly to which principles of criminal procedure activity are seen as the guiding legal ideas or propositions leading criminal procedure. Those ideas provide for the stability of criminal procedure and criminal justice. Just a few of the principles are fully realized. Those are the principles of publicity and material truth. These principles determine the investigation of a crime, the main trial and other procedural stages. However, majority of principles are realized at the stage of main trial in the first instance court. Those are principles of publicity, abundance, immediacy, continuity etc.

The system of principles is divided into the general and special groups of principles. General principles have to be understood as constitutional or absolute. The generality of those principles has one specific condition - they are to be recognized as the principles determined by international law and thus fixed in the Constitution. They are incorporated in the following sections of the Constitution: I The State of Lithuania (*Lietuvos valstybė*), II Human and the State (*žmogus ir valstybė*), III Society and the State (*visuomenė ir valstybė*), VIII Constitutional Court (*Konstitucinis Teismas*), IX The Court (*Teismas*) and others. The most important are those contained in the Second section.⁷⁹⁰

Other groups of principles are called special principles (disciplinary or interdisciplinary). These principles are shaped according to general principles although they are not in the Constitution. They explain general principles. If general principles apply to all different and independent branches of law, special principles are applicable to just one or a few law branches e.g. special principle of criminal procedure law and civil procedure law etc. That is why they are sometimes called disciplinary or interdisciplinary principles.

The Code sets out the principle of legality of prosecution in detail.⁷⁹¹ Prosecutor and pretrial authorities ought to initiate a prosecution if there is evidence that criminal offense has been committed.

The administration of justice exclusively by a court is one of the most important principles.⁷⁹² Courts are exclusively competent to administer justice in criminal matters. A person may be convicted for the commission of a criminal offense and punished pursuant to criminal procedure only by a court judgment and in accordance with the law.

Justice in criminal matters is administered according to the principle of equality of persons before the courts regardless of the person's origin, social status, financial situation, race, nationality, gender, education, language, attitude towards religion, field and type of activity, place of residence and other circumstances. During the trial, the prosecutor, the accused, criminal defense counsels, victims, plaintiffs, defendants and the representatives thereof have equal rights in the submission of evidence, participation in the examination of evidence and submission of requests.

Parties have equal rights to provide evidence, examine evidence, raise requests and applications, object and express their own positions or opinions regarding all questions, which

⁷⁹⁰ Articles from 18 through 25 and from 28 through 31 of the Constitution determine main principles which are also formulated in the ECHR.

⁷⁹¹ Article 2.

⁷⁹² Article 6.

may arise in court sessions. Contradictory principle applies only to the court proceedings.⁷⁹³

A participant in a criminal proceeding and other persons involved in the criminal proceeding who do not understand the language of the proceedings have the right to submit petitions, give statements and testimony, appear in court and submit applications through a translator in its native language or in a language in which is proficient (*supranta kalba*). One of the important rules is that participants in criminal proceedings are to be provided with copies of the decisions in Lithuanian prepared as separate documents.

All court hearings are public.⁷⁹⁴ A court may declare that a session or a part thereof be held *in camera*: to maintain a state, office, professional or business secret; to protect moral or private life of a person; in case of a minor's interest; in case of interest of participants security, and of witness or victims anonymity. At a court session held *in camera*, participants in criminal proceedings and, if necessary, with the permission of the judge, witnesses, experts and translators are to be present at the hearing. Persons of up to sixteen years of age who are neither participants in the proceeding nor witnesses may be present in a court session with the permission of the court. Court judgments (resolutions) are pronounced publicly even when the court sessions were closed.

Suspect, accused at trial and the convict are to be ensured the right of defense.⁷⁹⁵ Courts, prosecutors, preliminary investigators are obliged, within the limits of their competence, to ensure opportunity to defend against the suspicion or charges brought against suspect or accused by means and in the manner prescribed by law, and to ensure the protection of personal and proprietary rights of the suspect, accused at trial or convicted person.

The principle of accountability is also followed when using precautionary measures and procedural actions.⁷⁹⁶ Those measures and actions are applied only to reach procedural objectives.

Confidentiality of the private life, correspondence, telephone calls and telegraph messages of persons is protected. Search, seizure, inspection of premises and persons, detention of correspondence and seizure thereof from post and telegraph offices may be effected only pursuant to procedure prescribed by the Code. A person ought to be considered innocent of a crime until guilt has been established by a final verdict.⁷⁹⁷

Important principles of direct and oral court trial are also obeyed.⁷⁹⁸ Upon hearing a criminal matter the first instance court directly examines evidence and, during the trial, personally hears the accused, victim, witnesses and expert opinions, inspects physical evidence and discloses minutes and other documents.

Constitutional principles applicable in criminal proceedings are as follows: legality, protection of citizens' rights and freedoms, *ex officio* principle, presumption of innocence, inviolability of persons, property,⁷⁹⁹ personal correspondence, and other communications,⁸⁰⁰ equality before the law, court, and other State institutions and officers.⁸⁰¹

V Course of Criminal Procedure

⁷⁹³ Article 7.

⁷⁹⁴ Article 9.

⁷⁹⁵ Article 10.

⁷⁹⁶ Article 11.

⁷⁹⁷ Article 44.

⁷⁹⁸ Article 242.

⁷⁹⁹ Article 22 of the Constitution.

⁸⁰⁰ *Loc. cit.*.

⁸⁰¹ *Ibid.* Article 29.

1 Pretrial Stage

Criminal proceedings begin with the pretrial (preliminary) investigation stage (*ikiteisminis tyrimas*). This stage is the most important because it enables collection of evidence and sometimes is called the primary or opening mechanism of the whole criminal procedure.

2 Trial Stage

Main stage of the proceedings is a trial in the first instance court (*bylų procesas pirmosios instancijos teisme*). Afterwards, the court has to deliver and pronounce sentence, which can be considered as the third stage.⁸⁰²

A court judgment is to be in accordance with the law and reasoned. It ought to be based only on evidence which has been presented at court.

3 Remedy Stage

Appellate proceedings are the fourth stage (*bylų procesas apeliacinės instancijos teisme*). There is a *ratione temporis* time limit of twenty days to appeal the first-instance decision.

Execution of the court judgment (*nuosprendžio vykdymas*) is the fifth stage. If appeals or protests are not filed a court judgment will enter into force upon expiration of the above-mentioned time limit. If an appeal or protest is filed, a court judgment enters into force after the appellate court decides on the criminal matter, unless the first instance judgment is annulled.

The sixth stage is called main hearing in cassation instance court (*bylų procesas kasacinės instancijos teisme*). Cassation may be submitted three months after court judgment has entered into force. The Supreme Court of Lithuania has exclusive jurisdiction on the cassation.

The seventh stage is renewal of criminal proceedings (*baudžiamosios bylos atnaujinimas*). Conditions *ratione materiae* for renewal are: 1) discovery of facts and evidence; 2) manifestly wrong application of the Criminal Code; and 3) opposite decision of the European Court of Human Rights.

4 Special Forms of Procedures

These forms of procedures are peculiarities of criminal procedure in investigating and judging stages (*baudžiamojo proceso ypatumai tiriant ir nagrinėjant atskirų kategorijų bylas*) and applicable in: 1) cases concerning entities; 2) cases concerning administration of coercive treatment to mentally disabled persons; 3) summary proceedings; and 4) trials *in absentia*.

Procedural rules on the cases on the legal entities regulate general and specific procedures.⁸⁰³ Whereas a entity has a special procedural status, it is compulsory to appoint a representative person (natural person). This representative is somebody who can be held legally responsible for the crimes committed by the entity. As usual, such persons can be directors or other authorized representatives. Situations in which entity is liable for criminal responsibility are prescribed with the Criminal Code.

Administration of coercive treatment starts when it is detected that suspect is mentally unsound.⁸⁰⁴ Only public prosecutor, pretrial investigator and judge can pass the decision to take any measures for the administration of coercive treatment. Therefore, investigation of the crime becomes more specific. Thus, there are special rules to collect and to approve the evidence. Of course, the main procedural act is to obtain an expert opinion. If the

⁸⁰² Editor's note: Doctrine usually considers those main trial and delivering the sentence as a single stage.

⁸⁰³ Articles 387 through 391.

⁸⁰⁴ Articles 392 through 406. See also Articles 18(2) and 98 of the Criminal Code.

investigation and expert analysis resulted with conclusion that suspect is totally or partially mentally disabled, case is referred to the court which decides on the particular measure.

Proceedings on private charges start only if there is a victim's motion or an application by its representative.⁸⁰⁵ Criminal Code indicates crimes can be recognized as the object of private charges. Pretrial investigation in such matters is not carried out.

Victim has double status: the victim and the private prosecutor.⁸⁰⁶ This means that criminal prosecution exclusively depends on its motions. Sometimes, especially when there is a public interest or if there is damage caused to the victim who cannot bring the complaint for compensation on his own private prosecution becomes a public one. In general, proceedings in private cases are mainly held in court sessions.

Simplified proceedings can appear in two forms: proceedings for delivering court penal order and summary proceedings.⁸⁰⁷

The first type of the proceedings can be characterized as a procedure without court session. In general pretrial investigation is carried out, but only the public prosecutor decides whether to finalize this procedure with a court penal order or to finalize it in ordinary procedure. If this participant decides to carry out one of the simplified forms, there has to be a written application from the prosecutor. This procedural document is directed to the court with the request for a penal order.

Second form is absolutely unlike the first one. If public prosecutor considers any respective grounds are existent it can apply to the court for carrying out summary proceedings. Court sessions are held accordingly the Part V of the Code.

VI Evidence

1 General Provisions

Basically there is no definition of evidence in the Code.⁸⁰⁸ However, the definition is shaped in legal theory of criminal procedure. Therefore, evidence is any data on the basis of which pretrial investigators, prosecutor and court establish existence or non-existence of fact, namely an act posing a danger to the public, guilt of the person who has committed the act and other circumstances that impact correct decision in the case in accordance with prescribed procedure.

Evidence is any information about facts or phenomena relevant to the case but not the facts or phenomena themselves. Facts relevant to the case ought to be established only on the basis of evidence. Therefore, an alibi, for example, is a fact but not a piece of evidence (*irodymų dalis*).⁸⁰⁹ Presence of a person in another place must be proved with appropriate information which is specific evidence e.g. documents, witness testimony (*liudytojų parodymai*), etc.

⁸⁰⁵ Articles 407 through 417.

⁸⁰⁶ Articles 34 and 408.

⁸⁰⁷ Articles 418 through 432

⁸⁰⁸ Criminal procedure in feudal Lithuania considered rules of evidence (*irodymai*) as identical with the whole procedure: surveillance, finding stolen articles and testimony in court. These issues are dealt with more extensively in the works of Prof. M. Maksimaitis, Prof. S. Vansevičius and Associate Professor P. Danisevičius. Vansevičius, S., *Lietuvos baudžiamoji teisė ir procesas 1919-1940 metais* (Lithuanian Criminal Law and Procedure in 1919-1940), Vilnius, 1996. See also: Rinkevičius, J., *Procesiniai įrodinėjimo baudžiamojoje byloje pagrindai* (Procedural fundamentals of arguing in the criminal case), Vilnius, 1990 and Rinkevičius J., *Daiktiniai įrodymai* (Tangible evidence), Vilnius, 1996.

⁸⁰⁹ Cininas, A., *Aktualios įrodymų sampratos ir jų leistinumo problemos Lietuvos baudžiamojo proceso teorijoje ir praktikoje* (Significant Issues of the Concept of Evidence and Admissability of Evidence in the Theory and Practise of Code of Criminal of Procedure Lithuania) Jurisprudencija: Vilnius, 2001.

Evidence is any data obtained pursuant to the procedure established by law.⁸¹⁰ The court decides whether obtained data is to be considered as a piece of evidence. Evidence may only be such data that confirms or denies at least one fact that may influence correct resolution of the case.

Evidence is considered to be data lawfully obtained, which may be checked by procedural acts, provided for in the Code. Judges evaluate evidence on the basis of their inner conviction based on a comprehensive and fair investigation of all relevant facts.

2 Means of Evidence

Lithuanian tradition developed the following types of evidence: 1) testimony of the accused; 2) testimony of witness and victim; 3) documents; 4) material things; 5) tangible evidence; 6) examination reports and other procedural acts; 7) expert examination report and expert explanations; 8) specialist's opinion and explanations; 9) results of the use of technical means and others.

3 Interference with the Right to Privacy

Private life of an individual is inviolable.⁸¹¹ Personal correspondence, telephone conversations, telegraphs messages, and other communications are also inviolable. Information concerning private life can be collected only with a justified court order and in accordance with law. The legal system and courts protect individuals from arbitrary or unlawful interference in their private or family life, and from encroachment upon their honor and dignity.

Definition of evidence must include the second requirement of its admissibility related to the procedural form of information gathering and recording. Only such information that is obtained and confirmed strictly by following procedure established in the Code is admissible as evidence. If essential violations of the procedural form occur in the course of gathering information, such information may not be admitted and used to prove facts of a case.

Issues related to relevancy, and especially to the admissibility of evidence, are to be dealt with by a court. Any information that does not meet the relevancy and admissibility requirements must be excluded from the evidence that parties may use in proceedings. However, superior court may assess relevancy and admissibility of evidence differently and therefore it must be enabled to use evidence that was inadmissible at the lower court.

VII Precautionary Measures

1 General Provisions

Provisions regarding precautionary measures (*kardomosios priemonės*) are included in the Code.⁸¹²

One of the main objectives of precautionary measures is to ensure defendants, attendance during the criminal proceedings. We should not forget deterrence.⁸¹³ If there is reasonable doubt to believe that defendant who is at large absconds during the investigation or court proceedings, impedes the establishment of the truth in criminal matter or continues to commit criminal offenses, or in order to ensure the enforcement of a court judgment, one of the following precautionary measures may be applied with regard to it: 1) taking into custody (*suėmimas*), 2) home arrest (*namų areštą*), 3) personal surety (*užstata*); 4) seizure of

⁸¹⁰ Article 20.

⁸¹¹ Article 22 of the Constitution.

⁸¹² Third Part, Chapter XI (Articles 119 through 139).

⁸¹³ Article 119. Editor's note: Substance of the term "deterrence" is not precisely determined.

documents (*dokumentų paėmimas*), 5) obligation to register at the police office periodically (*ipareigojimas periodiškai registruotis policijos įstaigoje*), 6) signed undertaking not to leave place of residence (*rašytinis pasižadėjimas neišvykti*).⁸¹⁴

In addition to the application of such precautionary measures a minor may be placed under the supervision of its parents, guardians, curators, or under the administration of an educational, childcare or medical institution. With regard to a member of the armed forces, supervision by the command staff of a military unit may also be applied as a precautionary measure.

The most serious precautionary measure is detention. Pretrial judge and the court can pass decisions regarding custody and home arrest. Prosecutor, pretrial judge and court can use other measures.⁸¹⁵ One of less serious measures can be applied instead of custody.

Seriousness of the criminal offense, personality of the suspect or accused at trial, possibility that suspect, accused, or accused at trial may abscond during the investigation or court proceedings or may impede the establishment of the truth, health, age, marital status and other facts which may be relevant on the application of a preventative measure are to be taken into account while passing relevant decision.

2 Particular Measures

Detention⁸¹⁶ may be applied as a precautionary measure with regard to a suspect or accused in order to prevent it from absconding during criminal proceedings, from committing a new criminal offense or in order to ensure the enforcement of a court judgment. Prosecutor ought to notify criminal defense counsel of an application for detention. Defense counsel and prosecutor have right to participate in the hearing of the application by the county or city court judge. A person to be taken into custody must be interrogated as a suspect or accused, and the person has to be ensured the right of defense.

Home arrest is defined as the obligation of the suspect or accused not to leave home during certain fixed period, not to visit public places or to keep company with named persons. Additional conditions also apply to home arrest.⁸¹⁷

On a motion of the suspect or accused at trial, a county or city court judge may substitute detention with security. While determining the amount of security, the court judge has to consider seriousness of the criminal offense, extent of damage caused and the financial situation of the suspect, accused or accused at trial.

Seizure of documents is a precautionary measure used to prevent freedom of movement of the suspect or accused, if this movement can negatively influence pretrial investigation or court hearings. Driving licenses, passports and identification cards are the only documents subject to seizure.⁸¹⁸

A signed undertaking not to leave the place of residence⁸¹⁹ is written commitment obtained from a suspect or accused at trial not to leave its permanent or temporary residence without permission of a preliminary investigator, prosecutor or court. If a suspect or accused at trial violates such a commitment, more severe preventative measure may be applied with regard to it.

Supervision of a member of the armed forces who is a suspect or accused at trial by the command staff of a military unit⁸²⁰ is a measure prescribed by the regulations of the armed forces in order to ensure the required conduct of the suspect, accused or accused at trial, and

⁸¹⁴ Article 120.

⁸¹⁵ Article 121(1).

⁸¹⁶ Article 122.

⁸¹⁷ Article 132.

⁸¹⁸ Article 134.

⁸¹⁹ Article 136.

⁸²⁰ Article 137.

its appearance when summoned by the pretrial investigator, prosecutor or court. Upon application for supervision, the commanding officer of a military unit ought to be notified of the criminal offense of which the member of the armed forces is suspected or accused. Commanding officer of the military unit has to give to a pretrial investigative authority, prosecutor or court a written notice of the application of supervision.

Upon placement of a minor, who is a suspect, accused or accused at trial, under the supervision of its parents, guardians, curators, or the administration of educational, child care or medical institutions, a written commitment ought to be obtained from them to ensure appearance of the minor who is a suspect or accused at trial before a pretrial investigator and court, and to ensure its good conduct.⁸²¹

⁸²¹ Article 138.

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Chapter 8

Criminal Procedure System of Republic of Moldova*

Iurie Margineanu-Berislav Pavišić-Eduard Kunštek



I Sources

1 General Observations

After gaining the independence from the former Soviet Union the Republic of Moldova adopted its new Constitution on the 29 July 1994.

Accordingly to the Constitution structure of the courts, their competence and the corresponding judicial procedures ought to be established by law.⁸²²

2 Historical Overview⁸²³

3 Code of Criminal Procedure

Code of Criminal Procedure was adopted on 14 March 2003 and entered into force 12 June 2003 (hereinafter: Code).

4 Other Sources

Others sources are *e.g.*: Law on the Police of 18 December 1996 as amended 25 June 1999, Law on Enforcement of Criminal Sanctions of 22 June 1993, Law on the Judiciary Organization of 6 July 1995, Law on the Protection of Witnesses of 26 March 1998, Law regarding the Lawyer's Activity of 9 September 1999, Criminal Code of 18 April 2002 *etc.*

II Criminal Justice System

1 Investigating Services

The new Code provides for officer of criminal investigation who is competent and responsible for criminal investigation on behalf of the state.⁸²⁴

Criminal investigation is in the competence of: 1) Prosecutor's office; 2) Ministry of Internal Affairs; 3) Information and Security Service; 4) Customs Department; and 5) Centre for Fighting Economic Crimes and Corruption.⁸²⁵

* Editor's note: National reporter send the text entitled as *Some theoretical and practical aspects regarding the the Code of Criminal Procedure of Republic of Moldova* (Agreement to Acknowledge Guilt, Right to Defense, Examining Judge), 25/10/2003. Based on this text, and English translation of the Code of Criminal Procedure of the Republic of Moldova, research team has drafted the present summary report following the common scheme.

⁸²² Constitution, Article 115(4).

⁸²³ Editor's note: Deeper roots and history of Moldovan criminal procedure are not included in this paper. However, it is obvious that the recent history of criminal procedure of this country was predominantly shaped with Soviet doctrine.

⁸²⁴ See Article 57(1) of the Code. Official translation uses the term "criminal prosecution officer". It is the official who, on behalf of the state, within the limits of its competence, carries out the criminal prosecution in a criminal case. On the responsibilities of the criminal prosecution officer see Article 57(2).

⁸²⁵ Criminal investigation with regard to a high ranking officials and members of judiciary can be conducted only by the prosecutor's office. Exclusive investigative competence of a prosecutor is also extended to cases

2 Prosecuting Authorities

Prosecuting function is based on the Constitution which provides for the system composed of the General Prosecution Office, territorial prosecution offices and specialized prosecution offices.⁸²⁶ The structure, powers and activities of the prosecution offices are established with law. As in many other legal systems the Prosecutor General and public prosecutors subordinated to it exercise control over the exact and uniform application of laws.

3 Judging Authorities

The Moldovan court system is governed by Chapter IX of the Constitution. Justice is exclusively administered by courts of law.⁸²⁷ Judges sitting in the courts are independent, impartial, and irremovable under the law.⁸²⁸ They are appointed by the President following a proposal submitted to it by the Higher Magistrates Council.

The Moldovan court system is made up of the following levels: 1) the Supreme Court of Justice; 2) courts of appeal; 3) tribunals and the courts of law.⁸²⁹ The Constitution prohibits establishment of martial courts.⁸³⁰

The Higher Magistrates' Council in accordance with regulations established in the organization of the judiciary performs the appointments, transfers promotions of judges as well as the disciplinary actions against them.⁸³¹

3.1 Courts in Pretrial Stage

The Code provides for the examining judge to ensure the judicial control throughout the criminal investigation. Its *ratione materiae* competence is as follows: 1) the preventive or house arrest, its replacement, termination or cancellation; 2) the provisional withholding of the driving license; 3) authorization of searches, body searches, levying of distraint, confiscation of property; 4) authorization of intercepting communications, withholding correspondence and videotaping; 5) hearing of witnesses etc.⁸³² Examining judge does not have fact-finding functions.

3.2 Courts in Trial Stage

First instance court proceed in cases regarding minor offenses provided for in the Criminal Code, except those that are of the competence of other higher courts, as well as requests and complaints against decisions and actions of the criminal investigations bodies,

linked with murder of law enforcement employees and members of judiciary including their close relatives if those crimes are connected with their professional activity.

⁸²⁶ See Constitution, Article 124(2).

⁸²⁷ *Ibid.* Article 114. Justice shall be administered in the name of the law by courts of law only. This provision is strengthened with the Article 25. Serving Justice-an Exclusive Prerogative of the Courts. (1) In criminal cases, justice is served on behalf of the law only by the courts. Constituting illegitimate courts is forbidden.

⁸²⁸ *Ibid.* Article 116(1).

⁸²⁹ *Ibid.* Article 115

⁸³⁰ *Loc. cit.*

⁸³¹ *Ibid.* Article 123. Moldavia has also Constitutional Court which *inter alia*: 1) enforces on notification constitutionality control over laws, regulations and orders of Parliament, Presidential decrees, decisions and orders of Government, as well as international treaties to which Moldova is a party; 2) explains and clarifies the Constitution; 3) solves exceptional cases of non-constitutionality of judicial acts, as signaled by the Supreme Court of Justice. Its detailed competence *ratione materiae* is provided with the Constitution. However it provides that Constitutional Court carries out its activities on initiatives started by the legal entities mentioned in the law regarding the Constitutional Court which means that authorization for commencing the proceedings is restricted to certain types of persons and entities.

⁸³² See Article 41.

examine the matters related to the execution of the punishment and other matters given with the law to their competence.⁸³³

Military Court tries in the first instance cases on crimes provided with the Criminal Code committed by: 1) soldiers, persons belonging to the sergeants body and the officer body of the National Army, gendarme troops of the Ministry of Internal Affairs, Department of Exceptional Situations, Service of Security and Information, troops of the border guards and troops of the Service of Protection and Defense of the State; 2) persons certified in the staff of penitentiaries; 3) persons in the military service during call-ups; and 4) other persons on which there are special provisions in the legislation.⁸³⁴

The Appeal Court: 1) examines in the first instance certain criminal cases provided with the Criminal Code;⁸³⁵ 2) as an appeal court, tries appeals against judgments delivered in the first instance by courts, including Military Court; 3) as a recourse court, tries recourses against court judgments which can not be challenged in appeal; 4) settles competence disputes between courts; 5) tries cases in proceedings on the motion for revision.⁸³⁶

The Supreme Court of Justice: 1) tries in the first instance criminal cases on offences committed by the President of the Republic of Moldova; 2) tries on the recourses against judgments delivered by the first instance, or the Appeal Court as well as other cases provided by the law; 3) tries cases on the extraordinary remedies, including recourses in cancellation; 4) notifies the Constitutional Court to decide on the constitutionality of legal acts and on exceptional cases of their non-constitutionality of legal documents; 5) adopts explicative decisions in judicial practice matters on uniform application of criminal and criminal procedure legislation; 6) settle cases where the course of justice is interrupted as well as applications for transfer of competence.⁸³⁷

III Participants in Criminal Procedure

1 Judge

Code regulates the competence of the courts accordingly to the constitutional provisions mentioned supra II. 3. Courts of appeal also resolve conflicts of competence between courts. The Supreme Court is the first instance court only in case of the offences committed by the President of the Republic, while the rest of its competence is to decide on appeals and other remedies, adopt interpretative rulings, and bring cases to the Constitutional Court *etc.*

2 Prosecutor

The Prosecutor General is appointed by the Parliament on a proposal submitted to the latter by its President. Other public prosecutors are subordinated to the Prosecutor General, and appointed by him or her. Their mandate is limited to a period of 5 years and while exercising their competence they are bound only by the law.⁸³⁸

Moldova adopted adversarial type of criminal proceedings. Therefore, prosecutor is *dominus litis* in preliminary investigation.⁸³⁹ It has also the competence to bring the case to the court with its indictment. While the trial is pending it has the role of a party with rights and duties attached to it by the Code. It is worthy to mention that the prosecutor has the right

⁸³³ Article 36.

⁸³⁴ Article 37.

⁸³⁵ Articles 135 through 144, 278, 279, 283, 284, and 337 through 343 of the Criminal Code.

⁸³⁶ Article 38.

⁸³⁷ Article 39.

⁸³⁸ Article 125 of the Constitution.

⁸³⁹ See supra II 1.

to initiate civil action: 1) in the interest of the harmed individual who is not able to initiate civil action; 2) in the interest of the state.

3 Defense

The right to defense is explicitly mentioned in the Constitution. Therefore everybody has right to respond independently by appropriate legitimate means to an infringement of its rights and freedoms. Throughout the trial the parties have the right to be assisted by a lawyer, either chosen or appointed in cases prescribed by law.

3.1 Defendant

Suspect is the person towards whom certain evidence on the commission of the crime exists, before pressing charge. A person may be recognized as being suspect according to one of the following procedural acts: 1) minutes of the apprehension; 2) ordinance or court order on the application of the preventive measures not depriving of liberty; 3) ordinance of recognition of the person as being suspect. The interrogation of a person in the capacity of a witness, regarding whom certain evidence on the commission of the crime exists, is prohibited.⁸⁴⁰

Suspect has the right to defense. The criminal prosecution body ought to give to the suspect the possibility to exercise its right to defense by all means and methods that are not forbidden by law. Other rights of the suspect are regulated with the Code.

An accused is considered to be the person regarding whom an indictment ordinance was issued, according to the provisions of the Code. An accused whose case was sent to the court is called a defendant.

The new Code introduced guilt confessing agreement as a very important institute for the criminal procedure.⁸⁴¹

Something similar to this procedure existed before in Moldovan system of law too.⁸⁴² Contemporary procedure of prosecution and judgment was introduced in the Moldavian criminal procedure under the name of flagrant crimes.⁸⁴³

3.2 Defense Counsel

Accordingly to the Code defense counsel is the person, who, all along the development of the criminal proceeding, represents the interests of the suspect, accused, defendant, and

⁸⁴⁰ See Article 63.

⁸⁴¹ The procedure for the guilt confessing agreement is in fact use of certain elements of the Anglo-Saxon law. So-called "guilt confessing agreements" were frequently used in America at the beginning of the XIX century, while in 1900, almost 80% of the criminal cases were judged according with the guilt confessing agreement and without the examination in a Jury Court. This practice appeared in the USA not only as a way shortening the long and complex methods of the criminal justice process in front of jury, because at the beginning of the XIX century the Jury Court in one day could deliver up to maximum 5 sentences.

⁸⁴² Accordingly to the old Code (Articles 370 through 376) the documents could be sent to court in a period of 10 days. The same procedure existed in the Russian Federation (Articles 414 through 419 CPC of the Russian Federation).

⁸⁴³ See Article 513 through 519 of the Code. In the Russian Federation, the General Council of Judges proposed in 1988 to the Parliament a couple of changes to the project of the Code of Criminal Procedure which were examined by the Parliament in the first lecture. They considered that the project did not portray the reality of the new national criminal justice system and would lead to the prolonging of the justice system. One of the changes proposed was to present the right to state prosecution to obtain the guilt confessing agreement. The criminal procedure code adopted by the Russian Parliament in December 2002 included the shortened procedure of guilt confessing in the 40 Chapter, Articles 314 through 317. This procedure may be used in case of mild and not so serious crimes, at the initiative of the suspect at the point of the document presentation or the preliminary hearing. See *CPC of RF. Comments*, Moscow. AEKSMO, 2003, 585-586.

provides legal assistance through all means and methods that are not forbidden by law. Defense counsel may not be assimilated by the state bodies and official persons with the person whose interests are defended by him and with the character of the criminal case investigated with his participation.⁸⁴⁴

Persons who can participate as defense lawyer are: 1) lawyer; 2) other person enabled by the law with the responsibilities of the defense lawyer; 3) a foreign counsel if in assisted by a domestic lawyer.⁸⁴⁵

Defense counsel has no right to unjustifiably refuse the defense. It has no right to discontinue on its own initiative the authorization of the defender, to impede the invitation of the other defender or its participation in this case. It also has no right to transfer to another person its authorizations to participate in this respective case and without consent of the suspect or accused: 1) to declare guilty of commission of the crime; 2) to declare the reconciliation of the person it defends with the opponent party; 3) to recognize the civil action; 4) to withdraw the complaints of the person whom it defends; 5) to withdraw the appeal or recourse against the conviction sentence.⁸⁴⁶

4 Victim

The Code operates with terms plaintiff, damaged party and civil party. Plaintiff is any person or legal entity who, by a crime, was caused moral, physical or pecuniary damages.⁸⁴⁷ A damaged party is considered to be any person to whom, by a consequence of a crime, moral, physical or material damages was caused, recognized as such according to the law,

⁸⁴⁴ Article 67(1).

⁸⁴⁵ Article 67(2). The defense counsel has the right to: 1) know the essence of suspicion or indictment; 2) to participate, at the suggestion of the respective body at the carrying out by the criminal prosecution body of the procedural actions and all the procedural actions carried out upon his request; 3) to explain the rights to the person it defends and to notify the person who carries out the procedural action on the violations of the law committed by him; 4) to prepare materials in the respective case; 5) to submit materials and other means of evidence in order to be attached to the criminal case and examined in the court hearing; 6) to request the challenging of the person who carries out the criminal prosecution, of the judge, prosecutor, expert, interpreter, translator, court clerk; 7) to file applications; 8) to formulate objections against the criminal prosecution body and to request the including of its objections in the minutes of the procedural actions; 9) to be informed on the minutes of the procedural actions carried out with its participation and to ask for their completion or inclusion of its objections in the respective minutes; 10) to be informed on all the materials of the case and transcript all the necessary data, to make copies of them; 11) to participate in the court hearing in first instance, appeal, recourse, as well as at the trial of the case by extraordinary remedy; 12) to plead in the judicial debates; 13) to receive, upon its request, free of charge, the copies of the decisions regarding to the rights and interests of the person it defends; 14) to file complaints against the actions and decisions of the criminal prosecution body, as well as to challenge the sentence or any other final court judgment in respective case; 15) to participate at the reconciliation with the opponent party in case the person it defends participate at the reconciliation; 16) to formulate objections regarding the complaints of other participants at the proceeding, on which was informed by the criminal prosecution body or found out about them from other sources, as well as to express its opinion in the court hearing regarding the applications and suggestions of the other participants in the proceeding and regarding the issues settled by the court; 17) to formulate objections regarding the illegitimate actions of the other participants in the proceeding; 18) to formulate objections against actions of the president of the court hearing; 19) to get compensation for the expenses in the criminal case from the person whose interests it defends or from the state budget, in cases provided by law; 20) to get compensations for the damage caused as a consequence of illegal actions of the criminal prosecution body and the court. The defender of the suspect, accused, defendant exclude the criminal liability of a defended person in order to clarify the circumstances, or attenuate the punishment or the procedural means of constraint. The defense counsel has no right to take any actions against the interests of the person it defends and to impede to exercise its rights. The defender may not contrarily to the position of the person it defends to recognize its participation in the crime or guilt for the crime commission. The defender has no right to divulgate the information that was communicated to it for the exercising of the defense in case this information can be used to prejudice of the person it defends.

⁸⁴⁶ See Article 68.

⁸⁴⁷ See Article 58.

with its consent.⁸⁴⁸ A civil party is considered to be the physical or legal entity to which there are enough grounds to confirm that a moral or material damage was caused as a consequence of a crime, who filed an application with the criminal prosecution body or the court of the suspect, accused, defendant or persons which are patrimonially responsible for their deeds.⁸⁴⁹

4.1 Victim as Subject of Civil Claims

Court tries the civil action within the criminal proceeding if the volume of damage is indisputable. Recognition as a civil party can be made through an ordinance of the criminal prosecution body or through the court order. In case when after the recognition of the civil party, it was found that the application with the court was filed by an inappropriate person or when there is no legal base for the person to be recognized as a civil party, criminal prosecution body, through a reasoned decision, suspend the participation of that person as a civil party.⁸⁵⁰ This provision is at least not fair considering that the court should be authority to decide on whether certain person can be a party to the proceedings or not.⁸⁵¹

4.2 Victim as Subject of Other Rights in Proceedings

In order to support its application civil party has the following rights: 1) to give explanation on the filed application; 2) to submit additional materials as a support of its application; 3) to challenge the person who carries out the criminal prosecution, the judge, the prosecutor, the expert, the interpreter, the translator, the court clerk; 4) to submit requests, especially for assuring the initiated civil action; 5) to formulate objections against actions of the body that carries out the criminal prosecution or of the court, to request the inclusion of its objections in the minutes of the respective case; 6) to be informed on the minutes of the actions in which it participated and to request their completion or its objections to be included in the respective minutes; 7) to be informed on the materials of the criminal case as the moment the criminal prosecution was closed, to make copies of the materials of the case or to make notes on any data in the file referring to the civil case; 8) to participate in the court hearing, including in the examination of the case materials regarding its action etc.

5 Other Participants

Other participants mentioned in the Code are: 1) civilly accountable party;⁸⁵² 2) legal representatives of the damaged party, civil party, the suspect, accused, defendant;⁸⁵³ 3) successors of the damaged party or of the civil party;⁸⁵⁴ 4) court clerk;⁸⁵⁵ 5) interpreters and translators;⁸⁵⁶ 6) specialists;⁸⁵⁷ 7) experts,⁸⁵⁸ and 8) witnesses.⁸⁵⁹

IV General Principles of Criminal Procedure Legislation

Chapter II of the Code sets out the general principles of the criminal procedure as: 1) legality, priority of international human rights law, and binding nature of the interpretative

⁸⁴⁸ Article 59.

⁸⁴⁹ Article 61.

⁸⁵⁰ *Loc. cit.*

⁸⁵¹ See also III 2 on the role of prosecutor regarding the initiation of civil action.

⁸⁵² Article 73.

⁸⁵³ Article 77.

⁸⁵⁴ Article 81.

⁸⁵⁵ Article 83.

⁸⁵⁶ Article 85.

⁸⁵⁷ Article 87.

⁸⁵⁸ Article 88.

⁸⁵⁹ Article 90.

decisions of the Supreme Court; 2) inviolability of the person, residence, property, correspondence and private life; 3) carrying out the trial within reasonable terms; 4) presumption of innocence; 5) public character of court hearings; 6) liberty from testifying against oneself; 7) right not to be persecuted, judged or punished several times for the same reason; 8) adversarial character of the proceedings; 9) independence of judges; 10) free evaluation of evidence; 11) exclusive jurisdiction of the judiciary in criminal matters etc.⁸⁶⁰

V Course of Criminal Procedure

1 Pretrial Stage

Criminal prosecution authorities have an obligation to conduct the criminal prosecution actions in strict conformity with the provisions of the Code and only after the inauguration of the criminal prosecution.⁸⁶¹ In case of existence of satisfactory portion of evidence that the crime was committed by a certain person, the criminal prosecution authority has to draw up a report on proposal to press charge against that person. The report containing the materials of the case ought to be submitted to the prosecutor⁸⁶² who is competent to deliver an ordinance of pressing the charge.⁸⁶³ The accusation has to be brought to the accused by the prosecutor in the presence of the lawyer within the 48 hours but not later of the day in which the accused has shown up or have been brought by force.⁸⁶⁴

Prosecutor is authorized to change the accusation as well as to drop it in which case it can remand the case to the investigative body.⁸⁶⁵ It is also competent to dismiss the case in which case the copy of the ordinance on dismissal is handed over to the interested persons, at the same time explaining to them the modality and term to challenge it.⁸⁶⁶ There is a possibility of the resumption of the criminal prosecution after the cessation of the criminal prosecution, dismissal of the criminal case, or after dropping of the criminal prosecution.⁸⁶⁷

When the number of collected evidence is sufficient to conclude criminal prosecution, criminal prosecution authority submits the file to the prosecutor, accompanied by a report which ought to include the deed which had served as grounds for the starting of the criminal prosecution, information on the person of the accused, the last legal classification of the deed and the collected evidences. Prosecutor can also order the cessation of the criminal prosecution, dismiss the criminal case or drop the prosecution of the person through a reasoned ordinance.⁸⁶⁸

After the criminal prosecution materials being presented accordingly to the Code,⁸⁶⁹ the prosecutor draws up the indictment within a term that can not exceed 3 days. Indictment has to contain two parts: 1) exposition; and 2) resolution. The first part contains information on the deed and the person regarding whom the criminal prosecution has been carried out, enumeration of the evidence which confirm the deed and guilt of the accused, circumstances

⁸⁶⁰ See also Constitution, Articles 8-29.

⁸⁶¹ See Article 279. Except in case of actions provided by article 118 (the crime scene investigation) and article 130 (corporal search and seizing), which may be carried out even before the prosecution starts.

⁸⁶² Article 280.

⁸⁶³ Article 281.

⁸⁶⁴ Article 282.

⁸⁶⁵ See Articles 283 and 284.

⁸⁶⁶ Article 286.

⁸⁶⁷ See Article 287.

⁸⁶⁸ See Article 291.

⁸⁶⁹ See Articles 293 and 294.

which mitigate or aggravate the liability of the accused as well as the grounds for liberation from criminal liability according to the provisions of the Criminal Code.⁸⁷⁰

The resolution contains data on the person of the accused and the formulation of the accusation against it together with the legal classification of its actions and a declaration on the sending of the file to the competent court. An information on the duration of the criminal prosecution, the applied preventive measures, the duration of the pretrial arrest, the *corpus delicti* and their place of preservation, the civil action and its protection measures, other procedural measures as well as the judicial expenses is attached to the indictment. The copy of the indictment is handed over under receipt to the accused and its legal representative. This ought to be indicated in the information attached to the indictment act.⁸⁷¹

Suspect, accused, their legal representative, defense counsel, damaged party, civil party, civilly accountable party and their representatives as well as other persons whose rights and legitimate interests have been violated can file complaints against the actions taken by the criminal prosecution authority. Those complaints are to be resolved by the instruction judge and do not have suspensive effect.⁸⁷²

2 Trial Stage

This stage of the criminal procedure is provided for in Title II of the Code. During the preparatory work numerous changes were adopted in the proposed text.

Trial is shaped with certain indicated principles as: 1) immediacy, publicity and adversary in case examination; and 2) equality of the rights of parties before the court; and publicity of court hearings. The Code contains numerous useful provisions on the conducting of the trial, summoning procedure, rights and obligations of the parties, injured person etc. There is a limit on *ratione materiae* and *ratione personae* scope of the procedure. The court examines merits only regarding the accused and within the charges in the indictment.⁸⁷³

Deliberations and judgment delivery ought to be done immediately after the closing of debates. For serious reasons the deliberation and judgment delivery may be postponed up to 10 days.⁸⁷⁴

The court is entitled to pass: 1) sentences; 2) decisions; 3) judgments; and 4) orders.⁸⁷⁵

3 Remedy Stage

Appeal is basic legal remedy against first-instance judgments. The Code lists judgments which are not subject to appeal: 1) sentences delivered by judges regarding crimes for the commission of which the law solely provides for non-custodial punishments; 2) sentences delivered by the military court for the commission of which the law solely provides for non-custodial punishments; and 3) sentences delivered by the courts of appeals and Supreme Court of Justice as well as other sentences in cases prescribed by the law.⁸⁷⁶ Appeal is restricted *ratione personae* to the: 1) prosecutor in regards to the criminal and civil side; 2) defendant in regards to the criminal and civil side. Sentences of acquittal and dismissal of the criminal trial may be challenged in regards to the grounds for acquittal or criminal trial dismissal; 3) damaged party, in regards to the criminal side in case the criminal case is to be initiated based on the preliminary complaint of the damaged party, under the legal conditions; 4) civil party and civilly accountable party in regards to the civil side; 5) witness, expert, interpreter, translator and defense counsel, in regards to the judicial expenses due to them; and

⁸⁷⁰ Article 53 of the Criminal Code.

⁸⁷¹ Article 296.

⁸⁷² See Article 298. See also entire Chapter VIII Judicial Control over the Pretrial Procedure.

⁸⁷³ Article 325.

⁸⁷⁴ Article 338.

⁸⁷⁵ Article 341.

⁸⁷⁶ Article 400.

6) any person whose legitimate interests were damaged though a measure or act of the court.⁸⁷⁷

Appeal is restricted *ratione temporis*, however there is a possibility of *restitutio in integrum*.⁸⁷⁸ It is devolutive regarding its character and appellate court can deliver following decisions: 1) on rejecting the appeal, maintaining the challenged judgment if the appeal was submitted after the due term, or is inadmissible, or is unfounded; 2) on admitting the appeal, cassating partially or totally the sentence, including *ex officio*,⁸⁷⁹ or re-judging the judgment and delivering a new judgment, according to the procedure applicable to the first instance.⁸⁸⁰ Decisions delivered by the courts of appeals as appeal instances may be challenged in recourse.⁸⁸¹

Annulment is an extraordinary remedy in restricted *ratione personae* only to the Prosecutor general.⁸⁸² However, this is not the case of the revision of the criminal trial.⁸⁸³

4 Special Forms of Procedures

The Code provides different procedure in cases of juvenile offenders,⁸⁸⁴ imposing medical coercive measures,⁸⁸⁵ as well as special procedure for plea bargain,⁸⁸⁶ conditional suspension of the criminal prosecution and liberation of criminal liability,⁸⁸⁷ flagrant crimes,⁸⁸⁸ crimes committed by legal entities,⁸⁸⁹ repairing the damage caused by illegal acts of criminal prosecution authorities and courts,⁸⁹⁰ and restoration of disappeared judicial documents⁸⁹¹.

VI Evidence

1 General Provisions

The Code contains definition of the evidence as element of the fact, obtained according to the provisions of the present code to serve for the establishment of the fact, and important for the fair settlement of the criminal case.⁸⁹²

2 Means of Evidence

Additionally, the Code considers evidence as any element *de facto*, collected in the way set by law: namely without an infringement of the constitutional rights and liberties of a person or with a restraint permitted by the court, serving to establish circumstances certifying the existence or the absence of a crime, identifying the person who committed the crime and

⁸⁷⁷ Article 401.

⁸⁷⁸ Articles 402 and 403.

⁸⁷⁹ See Article 409(2).

⁸⁸⁰ Article 415.

⁸⁸¹ Article 420. It has suspensive effect on the enforcement (see Article 440).

⁸⁸² Article 452.

⁸⁸³ Articles 458 through 465.

⁸⁸⁴ Articles 474 through 487

⁸⁸⁵ Articles 488 through 503.

⁸⁸⁶ See III 3.1.

⁸⁸⁷ Articles 510 through 512.

⁸⁸⁸ Articles 513 through 519.

⁸⁸⁹ Articles 520 through 523.

⁸⁹⁰ Articles 524 and 525.

⁸⁹¹ Articles 526 through 530.

⁸⁹² See Article 6(1) subsection 33. Also see subsections 34. "Pertinent evidences"- evidences related to the criminal case; 35. "Conclusive evidences"- pertinent evidences that may influence the settlement of the criminal case; and 36. "Utile evidences"-conclusive evidences, necessary in the settlement of the case by the information contained.

to establishing its guilt, leading to knowledge of other circumstances necessary for a just solution in the criminal case.⁸⁹³

Moreover, it lists admissible evidence as: 1) statements made by the suspect, accused, defendant, the damaged party, civil party, civilly accountable party, the witness; 2) expertise report; 3) material evidence; 4) minutes regarding criminal prosecution actions and the judicial investigation; 5) documents (including official documents); 6) audio and video tapes, photographs; 7) technical-scientific and medical-forensic reports.⁸⁹⁴ Finally, the Code list which evidence can not be admitted as: 1) materials obtained in circumstances or ways as listed below will not be admitted as evidence during the criminal proceeding and subsequently will not be taken as basis for a court sentence or other court decisions; 2) materials obtained through violence, threats or other constraining ways, through violation of a person's rights and liberties; 3) materials obtained through violation of the right to defense of the suspect, indicted or defendant, of the injured party and the witness; 4) materials obtained through violation of the right to an interpreter for the participants in the criminal proceeding; 5) materials gathered by a person with no right to carry out criminal proceeding actions in that particular case; 6) materials submitted by a person who obviously is to be challenged under the law; 7) materials obtained from a source impossible to verify during the court hearing; 8) materials obtained by the use of methods contravening to scientific provisions; 9) materials obtained with essential violations of the provisions of this Code committed by the criminal prosecution body; 10) materials that were not verified in the set way during the court hearing; and 11) materials submitted by a person that can not recognize the respective document or object, can not confirm its authenticity and can not inform about their origin and the circumstances of their procurement.⁸⁹⁵ Substantial part of the Code is dedicated to the particular means of evidence as well as to the probation procedure.⁸⁹⁶

3 Interference with Right to Privacy

Regarding the previously mentioned constitutional provisions, the Code protects persons which are subject to procedural acts which can violate their right to privacy. That can be seen in provisions regarding the search and seizure,⁸⁹⁷ sequestration of correspondence and interception of communications⁸⁹⁸ as well as in case of their interception, recording and authorization.⁸⁹⁹

VII Precautionary Measures

1 General Provisions

The Code contains numerous novelties regarding the preventive measures. Its Title V is dedicated to procedural coercive measures and position of the suspect or defendant is significantly improved.

2 Particular Measures

The Code provides for the following classes of preventive measures which are regulated in detail: 1) interdiction to leave the locality; 2) interdiction to leave the country; 3) personal guarantee; 4) guarantee committing from an organization; 5) temporary suspension

⁸⁹³ Article 93(1).

⁸⁹⁴ Article 93(2).

⁸⁹⁵ Article 94.

⁸⁹⁶ See Articles 102 through 164.

⁸⁹⁷ See e.g. Article 125.

⁸⁹⁸ Articles 133 through 135.

⁸⁹⁹ Articles 136 through 138.

of driver's license; 6) sending of the military under supervision; 7) sending of the minor under supervision; 8) provisional release under judicial control; 9) provisional release on bail; 10) home arrest; and 11) pretrial arrest.⁹⁰⁰

⁹⁰⁰ See Article 175.

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Chapter 9

Criminal Procedure System of the Republic of Poland*

Piotr Hofmański-Eduard Kunštek



I Sources

1 General Observations

Poland is not a federal state. Therefore, self-governmental authorities of regions (*województwa*) have no legislative competence in the field of criminal procedure law, which means that Poland has uniform criminal law and criminal procedure.

2 Historical Overview

After regaining of independence in 1918, criminal procedural legislation of occupation forces (Germany, Austria, and Russia) remained in force. The first Polish Code of Criminal Procedure came into force 1928.⁹⁰¹ This Code was the product of genuine Polish legal doctrine.

After the Second World War criminal procedural system was changed in 1949⁹⁰² and 1950⁹⁰³ under the Soviet influence and according to the Soviet model. Consequently, rights of the accused were notably reduced. Moreover, amendments reduced judicial control over the police investigation and abolished the jury system. Public prosecutors gained significant power strong in comparison to the provisions of the 1928 Code. Some positive changes in the model of criminal procedure took place after 1956. The second Code of 1969⁹⁰⁴ came into force at the beginning of 1970. This Code was a summary of changes over the period of 25 years after the Second World War. The system created by that Code was effective, but not compatible with the principle of rule of law because of the level of interference with the elementary participant's rights and lack of judicial control over this interference.

After the collapse of communism 1989, the Code was changed on several occasions, mostly regarding the ratification of the ECHR in 1993 (judicial competence in the application of pretrial arrest or interception of communications, judicial review of police detention and other coercive measures).

3 Code of Criminal Procedure

The most important source of criminal procedure is the Code of Criminal Procedure (hereinafter: Code)⁹⁰⁵ in force since 1 September 1998. It is a result of the development of criminal procedure law since 1918. The Soviet impact was definitively eliminated when the Code came into force. It is a democratic act compatible with the new Constitution of 1997⁹⁰⁶ and with the ECHR. Unfortunately, it influenced the legal procedure which became totally ineffective. Changes in 2000⁹⁰⁷ and 2003⁹⁰⁸ leading to the restriction of procedural guarantees

* National report dated 19 September 2003. The parts V to VII of the text of Criminal Procedure System of the Republic of Poland are prepared by Eduard Kunštek and revised by Piotr Hofmański.

⁹⁰¹ Ordinance of the President of the Republic of Poland of 19/03/1928, *Dziennik Ustaw RP* Nr 33, pos. 313.

⁹⁰² The parliamentary act of 27/04/1949 and decree of the same date, *Dziennik Ustaw* Nr 237, 238 and 239.

⁹⁰³ The parliamentary act of 20/07/1950, *Dziennik Ustaw* Nr 38, pos. 346.

⁹⁰⁴ The parliamentary act of 19/04/1969, *Dziennik Ustaw* Nr 13, pos. 96.

⁹⁰⁵ The parliamentary act of 06/06/1997, *Dziennik Ustaw* Nr 89, pos. 555.

⁹⁰⁶ The Constitution of the Republic of Poland of 17/10/1997.

⁹⁰⁷ The Code amendment act of 20/07/2000, *Dziennik Ustaw* Nr 62, pos. 717.

of the participants in criminal procedure were necessary, first of all regarding the accused. The goal of the amendments was to conduct criminal procedure much more effectively.⁹⁰⁹

4 Other Sources

The basic source of criminal procedure law is the Polish Constitution of 1997 which creates the justice system and principle of judicial review over any interference with the rights of participants during the proceedings. The most important principles of criminal procedure including the right to fair trial,⁹¹⁰ presumption of innocence,⁹¹¹ judicial competence to order arrest and detention⁹¹² and publicity of the proceedings⁹¹³ are prescribed in the Constitution. Since 1993, the emerging principal source of law of criminal procedure has become the ECHR and the jurisprudence of the European Court of Human Rights which is respected by Polish courts. Polish Constitution provides that international treaties ratified by Poland are the part of the national legal system and that they have to be applied directly by courts and other authorities.⁹¹⁴ In case of incompatibility with a national law the treaty provision has to be applied.

The Common Courts Act of 2001⁹¹⁵ and the Supreme Court Act of 2002 regulate the administration of justice.⁹¹⁶ The function and administration of state prosecutions is regulated with the Prosecution Office Act of 1985.⁹¹⁷ Evidence rules are partly regulated with the Police Act of 1990.⁹¹⁸

II Criminal Justice System

1 Investigating Services

⁹⁰⁸ The Code amendment act of 10/01/2003, Dziennik Ustaw Nr 17, pos. 155.

⁹⁰⁹ One of the most important factors, which induced the Code changes, was the problem with the ECHR-standard of the proceedings within the reasonable time [Article 6(1) of the ECHR]. See *e.g.* the ECHR judgment in the case *Kudla v. Poland* of 26/10/2000.

⁹¹⁰ Article 45(1) of the Constitution. Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

⁹¹¹ Article 42(3) of the Constitution. Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court.

⁹¹² Article 41 of the Constitution.

(1) Personal inviolability and security shall be ensured to everyone. Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute. (2) Anyone deprived of liberty, except by sentence of a court, shall have the right to appeal to a court for immediate decision upon the lawfulness of such deprivation. Any deprivation of liberty shall be immediately made known to the family of, or a person indicated by, the person deprived of liberty.

(3) Every detained person shall be informed, immediately and in a manner comprehensible to him, of the reasons for such detention. The person shall, within 48 hours of detention, be given over to a court for consideration of the case. The detained person shall be set free unless a warrant of temporary arrest issued by a court, along with specification of the charges laid, has been served on him) within forty-eight hours of the time of being given over to the court's disposal.

(4) Anyone deprived of liberty shall be treated in a humane manner.

(5) Anyone who has been unlawfully deprived of liberty shall have a right to compensation.

⁹¹³ Article 45(2) of the Constitution. Exceptions to the public nature of hearings may be made for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest. Judgments shall be announced publicly.

⁹¹⁴ Article 91 of the Constitution.

⁹¹⁵ Parliamentary act of 27/7/2001, Dziennik Ustaw Nr 90., pos. 1070.

⁹¹⁶ Parliamentary act of 23/11/2002, Dziennik Ustaw Nr 240, pos. 2052.

⁹¹⁷ Parliamentary act of 20/06/1985, Dziennik Ustaw 2002, Nr 21, pos. 206.

⁹¹⁸ Parliamentary act of 06/04/1990, Dziennik Ustaw 2002, Nr 7, pos. 58.

Investigations are generally conducted by the police (*Policja*), but other state bodies also have competence in this area. For example, in cases of fiscal offenses investigations can be conducted by the treasurer's office (*urzędy skarbowe*) or by the organs of treasurer's control (*urzędy kontroli skarbowej*). In cases of serious crimes against the State, investigations are conducted by the Agency of State Security (*Agencja Bezpieczeństwa Wewnętrznego*).

The main investigative authority is the state prosecutor (*prokurator*). It is entitled to investigate in all cases and in some cases it has exclusive competence. All investigative bodies are under the supervision of the state prosecutor.⁹¹⁹

2 Prosecuting Authorities

The main prosecutorial authority is the state prosecutor. In case of minor offenses within so-called summary proceedings, its role can be executed by the body, which has conducted the investigation (specialized bodies).⁹²⁰

3. Judging Authorities

3.1 Courts in Pretrial Stage

Poland lacks the institution of examining judges,⁹²¹ but the court is active during this stage in one of three forms.

Court is entitled to review the decisions of the investigative body concerning the refusal and discontinuance of the investigation or inquiry. The victim is entitled to lodge a complaint against such a decision and the court can reverse it.⁹²²

Court is entitled to undertake some investigative actions during the pretrial stage too *e.g.* the examination of witness who cannot be examined during the trial or examination of a juvenile victim of sexual crimes, who can be examined only once during the proceedings.⁹²³ Moreover, court has exclusive authority to apply certain measures while the pretrial stage is pending, namely arrest and detention as well as some other measures affecting elementary rights of participants to the proceedings.⁹²⁴ It is entitled to decide on remedial motions against decisions of other investigative authorities *e.g.* arrest or detention, coercive measures and certain decisions in matters of evidence.⁹²⁵

3. 2 Courts in Trial Stage

During the trial stage the court is *dominus litis* of the proceedings.⁹²⁶ It is entitled to commence only on the basis of the indictment. In the majority of cases district courts (*sądy*

⁹¹⁹ See more about investigating services: Grajewski, J., *Wezłowe zagadnienia modelu postępowania przygotowawczego w polskim procesie karnym* (Basic Problems of the Preparatory Proceedings Model in the Polish Criminal Procedure), Palestra, 1988 (5).

⁹²⁰ See supra II.1 and Daszkiewicz, W., *Oskarżyciel w polskim procesie karnym* (The Prosecutor in the Polish Criminal Procedure), Wyd. Prawn.: Warszawa, 1960.

⁹²¹ Editor's note: Phrase „examining judge” means „investigating judge” as provided in some European civil law systems (*e.g.* Austria, Croatia, Slovenia).

⁹²² § 306 of the Code. Editor's note: The numbers of articles and paragraphs without additional mark refer to the Code.

⁹²³ § 185a(1and 2). “Juvenile” provision is one of the means of victim protection policy.

⁹²⁴ §§ 250(1) and 237(1).

⁹²⁵ § 252(2). See more on the role of the court in the pretrial stage of the proceedings: Kaftal, A., *Kontrola sądowa postępowania przygotowawczego* (Judicial Control over the Preparatory Proceedings), Wyd. Prawn.: Warszawa, 1974; Ziembinski, M., *Kontrola sadu nad postępowaniem przygotowawczym w swietle KPK z 1969 i 1997 r* (Judicial Control over the Preparatory Proceedings in the Light of Code of 1969 and 1997), Monitor Polski, 1997 (12).

⁹²⁶ See more: Murzynowski, A., *Pozycja i rola sadu w procesie karnym* (Position and Role of the Court in the Criminal Proceedings), Studia Prawnicze, 1987 (1).

rejonowe) are first instance courts. More serious cases are tried in the first instance by the regional courts (*sądy okręgowe*). District courts are entitled to take a motion to the court of appeal which can transfer the case to the competent regional court due to the importance and complexity of the case.⁹²⁷

Appellate jurisdiction is on the regional courts and courts of appeal (*sądy apelacyjne*). The Supreme Court (*Sąd Najwyższy*) decides on cassation (*kasacja*) which is an extraordinary remedy.⁹²⁸ The Supreme Court also gives legal opinions to the courts of appeal.⁹²⁹ Regional courts, courts of appeal and the Supreme Court have competence to renew the proceedings too.⁹³⁰

III Participants in Criminal Procedure

1 Judge

The Polish Constitution and the Common Courts Act the procedural position of the judge. The principle of the independence of judiciary is a “rule of law principle”.⁹³¹ There is no jury in the judicial system. Lay judges are included in first instance courts which decide cases in a panel of one professional judge and two lay judges.⁹³² If the case is very complex court can act in panel of three professional judges.⁹³³ In most serious cases, the trial is conducted by two professional and three lay judges.⁹³⁴ Minor cases are tried in summary proceedings and decided by one professional judge. The court of appeal always sits in the professional panel (three or five judges).⁹³⁵ The Supreme Court can decide cases in the composition of one, three, five or seven judges - or as the entire Criminal Chamber.⁹³⁶

2 Prosecutor

2.2 Public Prosecutor

The public prosecutor is basically the state prosecutor.⁹³⁷ Its position during the trial is defined with the principle of equality of the parties. Public prosecutor triggers the proceedings with an accusation.⁹³⁸ Withdrawal of the charge is not binding for the court which can continue with the proceedings without the public prosecutor.⁹³⁹ During the trial stage, the public prosecutor is entitled to submit motions and to lodge complaints against incidental decisions of the court as well as to lodge the appeal against the final judgment.

⁹²⁷ § 25(2).

⁹²⁸ See Chapter 55.

⁹²⁹ § 441.

⁹³⁰ § 544.

⁹³¹ Article 178 of Constitution.

(1) Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.

(2) Judges shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of their office and the scope of their duties.

(3) A judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges.

⁹³² § 28(1).

⁹³³ § 28(2).

⁹³⁴ § 28(3).

⁹³⁵ § 29.

⁹³⁶ § 30(1) and Chapter 26 of the Supreme Court Act.

⁹³⁷ See supra II 2.

⁹³⁸ §§ 14(1) and 331.

⁹³⁹ § 14(2). Editors note: It seems that this provision is contrary to the accusatorial principle. See English translation of section 2 “the court shall not be bound by the public prosecutor’s withdrawal of the accusation”. On the other side this provision prevents “duble jeopardy”.

2.2 Private Prosecutor

Polish criminal procedure allows the charge of the private prosecutor only in the limited number of cases defined with the substantial criminal law [offenses prosecuted by victims accordingly to the Criminal Code (*Kodeks karny*, hereinafter: CC)].⁹⁴⁰ Also, there is a possibility of accusation by the private prosecutor in case of discontinuation of the pretrial proceedings by the investigative body. A victim is entitled to lodge a bill of indictment if the prosecutor cannot find grounds for investigation after the reversal by the court of the decision concerning discontinuation of the investigation.⁹⁴¹

3. Defense

3.1 Defendant

The defendant (suspect, accused) is one of the parties with all rights and responsibilities attached to this position. The suspect enjoys its rights after the investigative body or body of inquiry informs it about charges.⁹⁴² It can submit all motions during the investigation and trial as well as lodge complaints against the decisions brought within the proceedings and against the judgment delivered by the court. Defendant is protected by the presumption of innocence as well as by the burden of proof and the rule *in dubio pro reo*.⁹⁴³ Accordingly, under Article 42 section 2 of the Constitution, the accused enjoys the right to defense.⁹⁴⁴

3.2 Defense Counsel

The accused is entitled to have no more than three defense counsels.⁹⁴⁵ A defense counsel ought to be a member of the Bar.⁹⁴⁶ If the accused is not able to cover the costs of the defense it is entitled to submit the motion for the appointment of the counsel *ex officio* by the court.⁹⁴⁷ Defense counsel is authorized to all actions on behalf of accused except in cases of exclusive individual acts such as confession or accepting the conditions of plea bargaining.⁹⁴⁸

4 Victim

4.1 Victim as Subject of Civil Claims

The Polish legal system provides for various means of compensation. According to substantial criminal law, persons are subject to penal measures and to liability for compensation. Injured is entitled to file a motion to apply such a penal measure provided in Article 46 of the Criminal Code⁹⁴⁹ Alternatively, it is possible to commence with a civil action during the criminal proceedings for pecuniary claims resulting directly from the crime.⁹⁵⁰ The court is entitled to adjudicate damages *ex officio* too.⁹⁵¹

⁹⁴⁰ See Chapter 6 of the Code.

⁹⁴¹ § 55. See more: Kmiecik, R., *Oskarżyciel posiłkowy w procesie karnym* (The Subsidiary Prosecutor in the Criminal Proceedings), Wyd. Prawn.: Warszawa, 1977; Lipczyńska, M., *Oskarżenie prywatne* (The Private Prosecution), Wyd. Prawn.: Warszawa, 1977.

⁹⁴² § 71(2) - legal definition of the accused.

⁹⁴³ § 5.

⁹⁴⁴ See § 6.

⁹⁴⁵ § 77.

⁹⁴⁶ § 82 and Part II of the Bar Act of 26 May 1982, Dziennik Ustaw 2002, Nr 123, pos. 1058.

⁹⁴⁷ § 78.

⁹⁴⁸ On the position of defendant counsel see: Kruszynski, P., *Stanowisko prawne obrońcy w procesie karnym* (Legal Position of the Defense Counsel in the Criminal Process), Temida: Białystok, 1991.

⁹⁴⁹ § 49a added by the amendment 2003.

⁹⁵⁰ See Chapter 7.

4.2 Victim as Subject of others Rights in Proceedings

Victim of the crime is a party to the investigation independently of any decision of the investigative authority. Its procedural position is rooted in the fact of victimization.⁹⁵² During the investigation, victim is entitled to submit evidentiary and other motions, to lodge complaints against incidental decisions and decisions on the discontinuation of the investigation.⁹⁵³

Victim is a party to the proceedings only if it acts in the role of private prosecutor,⁹⁵⁴ so called auxiliary prosecutor or claimant for damages in criminal proceedings.⁹⁵⁵ It can act as an auxiliary prosecutor along with the public prosecutor and enjoys the rights of a party.⁹⁵⁶

5 Other Participants

The Polish system of criminal law does not recognize the criminal responsibility of legal persons (an act introducing such a responsibility will come into force at the beginning of 2004). According to Article 52 of the CC person (natural or legal) which has taken undue advantage of the crime can be auxiliary responsible for the pecuniary penalty by the judgment of the court. According to § 416 of the Code such person enjoys rights of the party to the criminal proceedings.

IV General Principles of Criminal Procedure Legislation

Polish doctrine divides general principles of criminal procedure into four groups.⁹⁵⁷ Additionally, certain authors point at principles referring to the elementary rights and freedoms (principle of fair trial; principle of right to the court procedure), position of judges (principle of independence of judges) and administration of justice (principle of the participation of social element at the jurisprudence).⁹⁵⁸

a) Principles referring to the institution of proceedings. The principle of legality accordingly to which any authorized investigative body is obliged to institute proceedings if there is a justifiable suspicion of crime belongs to this group of the principles.

This principle is restricted with some exceptions. According to § 11, there is a possibility for discontinuance of the proceedings as far as suspicion of futile crime is concerned if at the same time the investigation concerning a much more serious crime is pending. Another exception is in the proceedings conducted regarding the Juvenile Act⁹⁵⁹ in which case investigation is instituted if it will meet educational goals.⁹⁶⁰

⁹⁵¹ § 415(4). See more: Daszkiewicz, W., *Powództwo cywilne w procesie karnym* (The Civil Claim in the Criminal Process), Wyd. Prawn.: Warszawa, 1976.

⁹⁵² § 49-legal definition of the injured person in the criminal proceedings.

⁹⁵³ On the position of the victim within the preparatory proceedings see: Zimoch, S., *Prawa i obowiązki osoby pokrzywdzonej przestępstwem* (Rights and Obligations of Injured Person by the Crime), Wyd. Prawn.: Warszawa, 1987. See supra III 2.2.

⁹⁵⁴ See III 2. 2.

⁹⁵⁵ See II 4. 1.

⁹⁵⁶ See Chapter 5.

⁹⁵⁷ See e.g. Marszał, K., *Proces karny* (Criminal Procedure), 5. Ed., Volumen: Katowice, 1998, 49.

⁹⁵⁸ See e.g. Mrzynowski, A., *Istota i zasady procesu karnego* (Essence and Principles of the Criminal Procedure), 2. Ed., Wyd. Prawnicze: Warszawa 1994, *passim.*; Waltos, S., *Proces karny. Zarys systemu* (Criminal Procedure. Outline of the System), 6. Ed., LexisNexis: Warszawa, 2002, 205.

⁹⁵⁹ The parliamentary act of 26/10/1982, *Dziennik Ustaw* 2002, Nr. 11, pos. 109.

⁹⁶⁰ On the principle of legality see more: Tylman, J., *Zasada legalizmu w polskim procesie karnym* (Principle of Legality in the Polish Criminal Procedure), Wyd. Prawnicze: Warszawa, 1965; Marszał, K., *Funkcjonowanie zasady legalizmu w procesie karnym* (Functioning of the Principle of Legality in the Criminal Process), *Rozważania o państwie i prawie*, Wyd. U. Śl.: Katowice, 1993.

Another principle of this category is the principle of prosecution *ex officio*. Exception to that principle refers primarily to crimes prosecuted on the initiative of the private prosecutor (injured person). CC contains the list of offenses that are privately prosecuted. Another exception refers to offences prosecuted on the motion of the injured person *e.g.* in the case of rape, prosecutor can institute the investigation only if the victim brings an adequate motion.⁹⁶¹

The principle of adversarial procedure takes effect only in the trial stage. Accordingly to this principle, the court can institute proceedings only after receiving the indictment raised by the authorized prosecutor.⁹⁶²

b) Principles concerning evidentiary proceedings. The most important principle in this category is the principle of objective truth.⁹⁶³ Of course the Code includes some rules that make it more difficult to discover the truth and refer to the necessity of the protection of privacy (*e.g.* right to refuse giving evidence)⁹⁶⁴ or state secrets.⁹⁶⁵

Another principle of the second group is the principle of the free evaluation of evidence. According to § 7 of the Code, court evaluates evidence taking into account principles of the correct argumentation, indications of knowledge, and its own experience.⁹⁶⁶

The principle of the independence of jurisdiction provided in § 8 means that the court is not bound by the decisions of any other courts or authorities. This principle is restricted because of the binding force of the court of appeal opinion in case of the removal of judgment and remanding of the case for reexamination. The court is also bound with the civil court's judgment creating a legal relationship.⁹⁶⁷

The principle of the direct examination of evidence by the judge also belongs to the principles of the Polish criminal procedure and results in many particular regulations within evidentiary law.⁹⁶⁸

c) Principles concerning the form of the proceedings. According to those principles, proceedings in the trial stage have to be conducted orally and be public.⁹⁶⁹ There are possible limitations of the principle of publicity with regard to the protection of state interests as well as important private interests.⁹⁷⁰

⁹⁶¹ On the principle of prosecution *ex officio* see more: Grajewski, J., *Sciganie na wniosek w polskim procesie karnym* (Prosecuting on a Motion of the Injured Person), Wyd. U.G.: Gdańsk, 1982; Grzegorzczak, T., *Wnioskowy tryb ścigania czynów karalnych* (The Motional Mode of Prosecuting Acts forbidden by Law), Wyd. U.L.: Lodz, 1986.

⁹⁶² On this principle see more: Stachowiak, S. *Funkcje zasady skargowosci w polskim procesie karnym*, (Functions of the Principle of Accusatorial Procedure in the Polish Criminal Process), Wyd. UAM: Poznan, 1975.

⁹⁶³ On this principle see more: Murzynowski, A., *Warunki i metody ustalania prawdy materialnej w polskim procesie karnym* (Conditions and Methods of Settlement of the Truth in the Polish Criminal Procedure), *Studia Iuridica* 8 (1979).

⁹⁶⁴ §§ 182 and 183.

⁹⁶⁵ § 179.

⁹⁶⁶ On this principle see more: Swida, Z., *Zasada swobodnej oceny dowodow w polskim procesie karnym* (The Principle of the Free Appraisal of Evidence in the Polish Criminal Procedure), Wyd. U.Wr.: Wroclaw 1983.

⁹⁶⁷ On this principle see more: Hofmanski, P., *Samodzielność jurysdykcyjna sadu karnego* (Independence of Jurisdiction of the Criminal Court), Wyd. U.Sl.: Katowice, 1988.

⁹⁶⁸ On this principle see more: Nowak, T., *Zasada bezpośredniości w polskim procesie karnym* (Principle of Direct Examination of Evidence by the Judge in the Polish Criminal Procedure), Wyd. UAM: Poznań, 1971.

⁹⁶⁹ Article 45 of the Constitution and Chapter 42 of the Code.

⁹⁷⁰ On the principle of publicity see more: Wojcicka, B., *Jawnosc postepowania sadowego w polskim procesie karnym* (Publicity of the Trial in the Polish Criminal Procedure), Wyd. U.L.: Lodz, 1989.

The principle of contradictory proceedings with its most important element-equality of arms also belongs to the principles of this group.⁹⁷¹

d) Principles concerning the legal position of the accused. The principle of the right to defense is stated both in Polish Constitution⁹⁷² and in Code.⁹⁷³ According to this principle, accused has the right to defense in all stages of criminal proceedings. It is entitled to use defendant according to the rules provided in relevant laws. The shape and scope of this principle results from provisions concerning the legal position of the accused⁹⁷⁴ and from provisions regulating the course of criminal proceedings in particular stages.⁹⁷⁵

The principle of the presumption of innocence with its consequences to the burden of proof, rules *in dubio pro reo* and *nemo se ipsum accusare tenetur*, also belong to the principles of the Polish criminal procedure.⁹⁷⁶

V The Course of Criminal Procedure

1 Pretrial Stage

The pretrial stage is regulated with the Part VII of the Code. Main goals that should be achieved in these proceedings are: 1) to establish whether a prohibited act has been committed and whether it constitutes an offense; 2) to detect the perpetrator and, if necessary, to effect its capture; 3) to collect certain data; 4) to elucidate the circumstances of the case, including the extent of the damage and to collect, secure and record evidence to the extent required. It is quite important to mention that pretrial proceedings should include attempts to elucidate circumstances favorable to the commission of the act.⁹⁷⁷

State prosecutors are in charge of conducting the preparatory proceedings. However, police and other agencies have competence prescribed with the law. In any case, relevant actions are to be conducted by the court. Parties to the proceedings are the suspect and the victim. Therefore, other persons are not parties. However, they can have certain specified rights if provided with the law.

The pretrial stage starts with the decision to begin an investigation. According to the principle of legality, state prosecutor and other investigative bodies are obliged to initiate the investigation if there is justifiable suspicion of the crime.⁹⁷⁸ The preparatory procedure is divided into two stages. The goal of the first, which is called “investigation in the case” is discovery of all circumstances of the crime and detection of the perpetrator. The second stage is called “investigation against the person”. The first act of this stage is delivery of the decision to inform the suspect of the charges against it.⁹⁷⁹

⁹⁷¹ On this principle see more: Bienkowska, B.T., *Kontradycyjność postępowania przed sądem I instancji w nowym K.p.k.*, (Contradictory Procedure in front of the First Instance Court in the New Code), Prokuratura i Prawo 1992 (12).

⁹⁷² Article 42 section 3 of the Constitution.

⁹⁷³ § 6.

⁹⁷⁴ See Chapter 8 of the Code.

⁹⁷⁵ On the right to defence see more: Kruszynski, P., *Stanowisko prawne obrońcy w postępowaniu karnym* (Legal Position of the Defence Counsel in Criminal Procedure), Temida: Białystok, 1991; Grzegorzczuk, T., *Obronca w postępowaniu przygotowawczym* (Defense counsel in the Preparatory Proceedings), Wyd. U.L.: Łódź, 1988.

⁹⁷⁶ Article 42 section 3 of the Constitution and § 5 of the Code. More on this principle see: Kruszynski, P., *Zasada domniemania niewinności w polskim procesie karnym* (Principle of Presumption of Innocence in the Polish Criminal Procedure), Wyd. UW: Warszawa, 1983; Sobolewski Z., *Samooskarżenie w świetle prawa karnego. Zasada nemo se ipsum accusare tenetur* (Self-accusation in te Light of Criminal Law. The Principle *nemo se ipsum accusare tenetur*), Wyd. Prawn.: Warszawa, 1982.

⁹⁷⁷ § 297.

⁹⁷⁸ § 303.

⁹⁷⁹ § 313.

Prior to its first examination suspect is to be advised on its rights: 1) to give or refuse to provide explanations, or to answer questions; 2) to submit motions for actions in inquiry or investigation; 3) to use the assistance of a defense counsel; 4) to receive final information about the materials collected against it, as well as of the right to be examined in presence of a retained counsel. However, the absence of the counsel shall not prevent the examination from being conducted.⁹⁸⁰

The suspect will also be advised of its duties especially regarding its obligation to submit to an external examination of its body and to other examinations not involving any invasion of its bodily integrity as well as psychological and psychiatric examinations and corporal examinations, except surgical procedures, provided that they are carried out by a health-care professional, according to medical directions and do not constitute a challenge to the health of the suspect (*e.g.* to submit blood and excretory samples).⁹⁸¹

There is an obligation on parties residing abroad to designate an addressee for the service in Poland.⁹⁸² Rights of the persons who are not parties to the preparatory proceedings are protected with the possibility of an interlocutory appeal.⁹⁸³

If there is good reason to suspect that an offense has been committed, an order to initiate an investigation or inquiry has to be issued, either *ex officio* or upon receiving a notice of an offense, describing the act in question and setting forth its legal classification.⁹⁸⁴

Until the amendment of 2003, the difference between investigation and inquiry was clear. Investigation (its institution, refusal to institute or discontinuance of the investigation) was in the competence of the state prosecutor. Police authorities issue an order on the institution of inquiry. Subsequent to this amendment investigation can be conducted both by the state prosecutor and police authorities.⁹⁸⁵ In a certain number of the most important cases and against certain suspects state prosecutor has exclusive competence.⁹⁸⁶ The police and other specialized bodies conduct an inquiry. The Code prescribes precisely when an investigation is mandatory and when the state prosecutor has exclusive competence. The consequences of the form of preparatory proceedings are connected with the mode of the proceedings before the court. Once the inquiry is conducted, the court can decide the case through summary (simplified) proceedings. In case of a previously conducted investigation, ordinary procedure before the court is mandatory.⁹⁸⁷

An order on refusal to institute or on discontinuance of investigation and inquiry can be issued both by the police and the state prosecutor. If issued by the police within the investigation it has to be approved by the state prosecutor.⁹⁸⁸

Civic duty of every person is to inform the state prosecutor or the police that an offense prosecuted *ex officio* has been committed. State and local government institutions

⁹⁸⁰ § 301.

⁹⁸¹ § 74. Also see § 75. The suspect will also be under the obligation to appear whenever summoned while the criminal proceedings are in process, and to advise the agency conducting the proceedings of any change of residence or sojourn exceeding 7 days.

⁹⁸² That can be deemed as usual and normal. However consequences of failing to do so are not in conformity with his rights to participate in the proceedings and to defend himself because documents sent to his last known address in Poland or filed with the record of the case shall be deemed as served. See § 138. Also see § 139 which applies if a party to the proceedings has changed its place of residence and failed to notify the agency before which the proceedings are pending of his new address, or if he has not resided under a designated address.

⁹⁸³ § 302.

⁹⁸⁴ Some criticism can be directed towards the inexistence of any definition of a “good reason” as we can hope that future practice will set up certain standards in order to avoid inquiries or investigations without sound reason. See § 303.

⁹⁸⁵ § 311(1).

⁹⁸⁶ § 311(2).

⁹⁸⁷ § 469.

⁹⁸⁸ § 305.

have further obligation to take steps not amenable to delay until the arrival of the officials of an agency authorized to prosecute such offenses, or until that agency issues a suitable ruling in order to prevent the effacing of traces and evidence of the offense. Police is under the obligation to immediately inform the state prosecutor together with any materials collected if the state prosecutor is exclusively authorized to lead the investigation in the case in question.⁹⁸⁹

If there is an order refusing to institute an investigation or inquiry, or order on discontinuance injured person and any person submitting a notice of an offense has the right to bring an interlocutory appeal and to inspect the files of the case. The decision on the appeal is under the competence of the state prosecutor superior to the state prosecutor who issued or approved the order, and if appeal is not accepted the appeal will be in the competence of the court.⁹⁹⁰

Police may always carry out inquiries within the time limits necessary to secure evidence of the offense against loss, distortion or destruction and even before the issuance of the order on the institution of the investigation or inquiry. That applies also to the examination of a person as a suspect. Those time limits are in any case defined up to 5 days from the first action.⁹⁹¹

The Code prescribes mandatory investigation in certain cases and when the investigation is under the exclusive competence of the state prosecutor.⁹⁹² However, investigations can be conducted whenever the state prosecutor decides, usually because of the significance or complexity of the case.⁹⁹³ There are also obstacles to the inquiry. The procedure cannot be conducted in this form in case of the deprivation of liberty of the suspect and when the suspect is mentally or physically disabled.⁹⁹⁴

There is a three-month time limit for the investigation. It can easily be extended by a superior state prosecutor in both justified cases and particularly justified cases and the investigation can last more than a year.⁹⁹⁵ If the investigation is not mandatory, police conducts the inquiry under the supervision of the state prosecutor. Time limits are set out as two months with possibility of extension to three months if state prosecutor decides so. Further extension is not possible. Preparatory proceedings must be carried out in the form of investigation.⁹⁹⁶

Relationship between the police and state prosecutor is set out in § 311. If the state prosecutor initiates the investigation, it may authorize the police to carry out the entire investigation or its part or to discharge particular investigative actions.⁹⁹⁷ Other similar agencies have the same procedural rights as the police in their respective fields of competence or if provided so in special regulations.

If there is specific knowledge of the identity of the suspect at the time of the institution of an investigation, an order on presenting charges has to be issued and announced without delay to the suspect who will then be examined. That order should contain the identity of the suspect, detailed data on the act imputed to it and the legal classification thereof.⁹⁹⁸ Within the

⁹⁸⁹ § 304.

⁹⁹⁰ § 306.

⁹⁹¹ § 308.

⁹⁹² All crimes, certain specified misdemeanors, if suspect is an official of the police, Office of the State Protection, Border Guards or financial inquiry agencies (§ 309). The state prosecutor has to lead investigation personally in all murder cases and in the cases against such a officers (§ 311).

⁹⁹³ § 309(5).

⁹⁹⁴ § 325e(2) and § 79(1).

⁹⁹⁵ § 309(2).

⁹⁹⁶ § 325i.

⁹⁹⁷ That provision does not apply if suspect is an official of the police, Office of State Protection, Border Guards or financial inquiry agencies.

⁹⁹⁸ § 313(1 and 2).

inquiry, there is a possibility of simplified procedure in which case the suspect must be examined only. Examination starts with the charging information.⁹⁹⁹ On the other side, suspect should be advised about the right to request an oral presentation of the grounds for charges and those reasons should be prepared in writing before it is given notice on the date on which it can review the files of the preparatory proceedings. The statement of reasons should, in particular, contain facts and evidence relating to the charges.¹⁰⁰⁰

The suspect, the injured person and their legal representatives as well as defense counsel and the attorney for the injured person should be admitted to participate in any action if that action cannot be subsequently repeated at the trial.¹⁰⁰¹

The same provision applies to other actions if those persons file a request. However, the state prosecutor may deny this request in “particularly justifiable” cases if the interests of the investigation or inquiry so require.¹⁰⁰² In our view, this provision is incorrect and enables possibilities for misconduct of the state prosecutor. The suspect and its defense counsel as well as the injured person and its attorney ought to be permitted to participate in the examination of the expert if evidence is based on an opinion issued by the expert. However, the appearance of a suspect deprived of liberty will not be procured if this will involve serious difficulties.¹⁰⁰³

Interesting provisions relate to the right of the state prosecutor who can on its own initiate, or with the consent of the parties refer the case to a trustworthy institution or person in order to conduct a mediation procedure between the suspect and the victim. Until the 2003 amendment it was applicable in cases where mediation was connected with the respective motion to the court.¹⁰⁰⁴ After the amendment, mediation is possible in all cases both within the preparatory proceedings and while the trial is pending. Anybody conducting criminal procedure can use this institution if the result of the mediation can be relevant from its point of view. New § 23a prescribes precise procedural rules and time limits of the mediation.

On request of the suspect and the defense counsel, they are to be notified on the date of the final examination of the materials of the proceedings and advised on their right to examine files at an earlier suitable date set forth by the authority conducting the trial.¹⁰⁰⁵ Parties are allowed to submit motions to supplement the proceedings within three days of the suspect acquainting itself with the materials of the case. If there is no need to supplement the investigation or inquiry, an order concluding the same will be issued.

The investigation or inquiry can be discontinued if the proceedings have failed to disclose sufficient grounds to justify the preparation of an indictment. If the state prosecutor finds that the suspect committed an act in the state of non-accountability, and there are grounds to apply the precautionary measures, it may move to the court for discontinuance of proceedings and application of precautionary measures. The prosecutor should in writing ratify an order on the suspension of proceedings which has not been issued.¹⁰⁰⁶

The 2003 amendment introduced one new legal institution - discontinuation of inquiry and registration of the case in so-called „register of crimes”. It is possible if the police conducting the inquiry cannot discover the perpetrator within 5 days since the victim makes notification.

⁹⁹⁹ § 325g.

¹⁰⁰⁰ § 313(3)(4).

¹⁰⁰¹ § 316(1).

¹⁰⁰² § 317.

¹⁰⁰³ § 318. It is obvious that in that case at least defense counsel should be present and if it is not appointed to it should be appointed *ex officio*. Such amendment to the relevant provision is absolutely useful in order to protect suspect's rights to defend himself.

¹⁰⁰⁴ See previous § 320.

¹⁰⁰⁵ § 321.

¹⁰⁰⁶ On the conclusion of the investigation see Chapter 36 of the Code.

Discontinued proceedings can be reopened against the person who has not previously been suspect by the decision of the state prosecutor.¹⁰⁰⁷ In case of discontinuation of the inquiry with the registration in „register of crimes” reopening is quite easy and can be undertaken by the police if there is a perspective to detect the perpetrator.¹⁰⁰⁸ However, reopening is possible against the previous suspect only if there is discovery of circumstances of vital significance that were unknown in the previous proceedings.¹⁰⁰⁹ The Attorney-General has power to reverse any order discontinuing preparatory proceedings if it finds that the discontinuance was groundless except if the court upheld the order on discontinuance. This right is restricted *ratione temporis* to six months. After the lapse of that period, the Attorney-General may reverse or amend such orders only in favor of the suspect.¹⁰¹⁰

Court is competent to revoke an order on discontinuance of preparatory proceedings or on refusal to institute it too. It decides in panels of a single judge. However, if state prosecutor still does not find the grounds to bring an indictment it can again issue an order on the discontinuance or a refusal to initiate it. This order is subject to interlocutory appeal which ought to be submitted to a superior state prosecutor. If the appealed order is upheld injured party may file the indictment as a subsidiary prosecutor.¹⁰¹¹ In that case state prosecutor will be summoned to deliver the files of preparatory proceedings within 14 days.¹⁰¹²

If an order on discontinuance is not issued state prosecutor is obliged to file an indictment to the court within 14 days of the conclusion of the investigation or from the date of receiving records of the inquiry from the police. This term is shortened to 7 days in case the accused has been in preliminary detention.¹⁰¹³ Indictment has to contain all data specified in §§ 322 and 333.¹⁰¹⁴ If not, it could be remanded for corrections during the seven-day period.¹⁰¹⁵

One of the most interesting provisions refers to the case when the state prosecutor with the consent of the accused may attach to the indictment a motion to convict the accused for a contravention imputed to it, subject to a penalty not exceeding 10 years deprivation of liberty, without conducting a trial and impose a penalty with extraordinary mitigation, or decide a penal measure specified in Article 39 subsections 1 through 3 and 5 through 8 of the Criminal Code, or waive the imposition of a penalty or adopt a conditional stay of execution of the penalty - if circumstances surrounding the commission of the misdemeanor do not raise doubts, and the attitude of the accused indicates that the objectives of the proceedings will be achieved despite of lack of a trial.¹⁰¹⁶ If the court does not accept this motion case has to be tried within the ordinary proceedings.¹⁰¹⁷ Provisions of this nature are obviously directed towards efficiency and more economical procedure.¹⁰¹⁸

2 Trial Stage

¹⁰⁰⁷ § 321.

¹⁰⁰⁸ § 325f (2).

¹⁰⁰⁹ § 327. Editor's note: This opens possibility for fraudulent practice and amendments such as those investigative authorities were not normally been able to collect that data would be plausible.

¹⁰¹⁰ § 328.

¹⁰¹¹ §§ 330(2) and 55(1).

¹⁰¹² § 330(3).

¹⁰¹³ On the indictment see Chapter 39 of the Code.

¹⁰¹⁴ Identity of the accused, identity of the offense, data concerning the jurisdiction and venue, statement of reasons, facts, evidence, list of persons that state prosecutor requests to be summoned *etc.*

¹⁰¹⁵ § 337.

¹⁰¹⁶ §§ 335 and 343(1 and 2).

¹⁰¹⁷ § 343.

¹⁰¹⁸ On the preparatory proceedings see more: Mlynarczyk, Z., *Postępowanie przygotowawcze-uwagi ogólne* (The Preparatory Proceedings - General Observation), Prokuratura i Prawo 1995 (6).

If the indictment complies with the formal requirements, the president of the court orders a copy of the indictment to be served on the accused, summoning it to file evidentiary motions. It is to be advised on its right to file a written response.¹⁰¹⁹ There is no legal remedy in case the court decides to serve the indictment without reasons, which is possible “if there is a danger of revealing a state secret”.¹⁰²⁰

The competent court conducts procedure although *ratione materiae* limits are defined by the prosecutor. The president of the court issues a ruling in writing on the designation of the first instance hearing in which it indicates the judge or panel of judges to hear the case, the designation of the date, hour and venue of the hearing, the parties and other persons who shall be summoned to the main trial or informed of its date.¹⁰²¹ Judges are selected in line with the sequence of the cases submitted and the deviation from this rule is allowed only in the event of judge’s illness or other important obstacle. If the indictment includes a charge for a crime carrying a penalty of 25 years of deprivation of liberty or a life imprisonment, designation of the panel to hear the case shall, on a motion from the defense counsel or state prosecutor, be carried out by drawing lots at which they have a right to be present.¹⁰²² Hearings are of a public nature although some limitations are possible.¹⁰²³

Trial is conducted orally and in the presence of the accused.¹⁰²⁴ Of course some exceptions on the presence of the accused are possible.¹⁰²⁵ The first-instance trial commences with the calling of the case¹⁰²⁶ followed with the judicial examination (reading of the indictment, response to the indictment, advising the accused about its procedural rights, taking of evidence, closing arguments).¹⁰²⁷

Court has to examine all evidence presented by the parties. It is also entitled to take evidence *ex officio*.¹⁰²⁸ The originality of the Polish criminal procedure system lies in the possibility of sending the case to the public prosecutor and assigning it the time limit for presentation of additional evidence. If the public prosecutor doesn’t provide such evidence, all doubts must be decided in favor of the accused.¹⁰²⁹ Basically, the judgment of the court can be delivered only on the basis of all evidence taken during the trial.¹⁰³⁰ But there are wide possibilities to use records of the investigative acts conducted by the court¹⁰³¹ or even by the investigation authorities.¹⁰³²

Interruption of trial is possible for 35 days to take rest or for other important reasons (*e.g.* to enable the accused to prepare its defense, deliver a piece of evidence to court).¹⁰³³ If the time limit for the interruption has been exceeded, the trial shall be considered adjourned.¹⁰³⁴ In case of the reopening of suspended proceedings, trial ought to be commenced *de novo* if the panel has been changed.¹⁰³⁵

¹⁰¹⁹ § 338(1 and 2).

¹⁰²⁰ § 338(3). The reasons shall, however, be made available subject to conditions set forth by the president of the court or the court.

¹⁰²¹ § 350.

¹⁰²² § 351. Provisions like this are welcome and absolutely necessary in transitional countries with long history of judges “on the line with the people and the party”.

¹⁰²³ § 355 through 364.

¹⁰²⁴ The general order of the first instance hearing is regulated with Chapter 43 of the Code.

¹⁰²⁵ § 375 and 376.

¹⁰²⁶ § 381 through 384.

¹⁰²⁷ Chapters 45 and 46.

¹⁰²⁸ § 167.

¹⁰²⁹ § 397.

¹⁰³⁰ § 410.

¹⁰³¹ See *supra* II 3.1.

¹⁰³² §§ 389 and 391 through 394.

¹⁰³³ §§ 399 and 401.

¹⁰³⁴ § 402(3).

¹⁰³⁵ §§ 402(2) and 404(3).

The Polish procedure provides for two possibilities to reduce the trial. If the accused admits guilt and its statements are doubtless court can carry out the evidentiary proceedings partly – however, only if other parties of the proceedings are consent.¹⁰³⁶ Until the end of the first instance trial, the accused can file a motion for conviction without the trial and sentencing for the proposed penalty or for the proposed penal measure. The court can accept this motion if the circumstances of the case are clear, the goals of the proceedings can be achieved without the trial and the state prosecutor as well as the victim taking part in the trial do not oppose against the proposed judgment.¹⁰³⁷

Court has to deliver the judgment without delay and, in any case, within the time limit of 7 days.¹⁰³⁸ Deliberation is held *in camera* and after the voting is concluded court delivers the judgment in writing without delay.¹⁰³⁹ Civil complaints can be granted, entirely or partly dismissed and even left unheard in which case victim is entitled to claims in civil proceedings.¹⁰⁴⁰ Judgment is to be pronounced publicly.¹⁰⁴¹ In certain cases court can deliver the judgment not in the trial but *in camera*. In those cases judgment has to be disclosed within 7 days in the office of the court.¹⁰⁴²

3 Remedy Stage

The first instance judgment can be appealed by either of the parties and the person that has taken undue advantage from the crime (auxiliary responsible). Appeal can be based only on the statement of reason for judgment. The appealing party may appeal against the resolutions or findings only if they are prejudicial to its rights or benefits. This restriction is not applicable to the state prosecutor who is also entitled to file an appeal for the benefit of the accused.¹⁰⁴³ Introduction of new facts or evidence is allowed.¹⁰⁴⁴ If the appeal is filed after the time limit has lapsed or by an unauthorized person it will be denied. That would happen in case it is inadmissible by law too. A ruling on the denial is subject to an interlocutory appeal.¹⁰⁴⁵

The appellate court may deliver a decision adverse to the accused only if an appellate remedy has been filed against it, and only within the limit of such an appellate measure, unless otherwise provided by law.¹⁰⁴⁶ The principle of *non reformatio in peius* is not strictly followed and this is not a provision that should be welcome. It is an especially unacceptable solution according to which this principle is not applicable in case of conviction of the accused on the basis of adjustment between the state prosecutor and suspect as well as in the case of conviction without the trial following the motion of the accused.¹⁰⁴⁷ An appeal against the accused may result in a decision for its benefit.¹⁰⁴⁸

Powers of the appellate court are limited *ratione materiae* with the appeal and to greater extent only if prescribed by law.¹⁰⁴⁹ On the other side, the appellate court is under

¹⁰³⁶ § 388.

¹⁰³⁷ § 387.

¹⁰³⁸ If not the trial shall be conducted *de novo*. See § 408 through 411.

¹⁰³⁹ § 412. Contents of the judgment are set out similar to other procedural systems. See § 413.

¹⁰⁴⁰ § 415.

¹⁰⁴¹ § 418.

¹⁰⁴² § 418a added by the amendment 2003. More on the trial stage of the proceedings: Jankowski, Z., *Postępowanie karne przed sądem pierwszej instancji w aspekcie prakseologicznym* (Proceeding in the First Instance Court in Praxeological Aspect), Wyd. Prawn: Warszawa, 1986.

¹⁰⁴³ § 425.

¹⁰⁴⁴ § 426(3).

¹⁰⁴⁵ § 429.

¹⁰⁴⁶ § 434(1).

¹⁰⁴⁷ §§ 335, 343, 387 and 434(3) after the amendment 2003.

¹⁰⁴⁸ § 434(2).

¹⁰⁴⁹ § 433(1).

obligation to consider all questions raised in the appeal.¹⁰⁵⁰ Exceptions to this principle if otherwise provided by law are: incorrect procedure and factual denial of the right to appeal. The first instance judgment can be sustained, amended or reversed.¹⁰⁵¹ A decision is subject to reversal or amendment if it is found that: 1) a violation of the provisions of substantive law has occurred; 2) a violation of the procedural provisions has occurred, if it might have affected the contents of the decision issued; 3) an error has occurred in the determination of the fact situation as a basis for delivering the decision, if this may have affected the contents of this decision; or 4) the penalty imposed is strikingly disproportionate to the offense, or the application or failure to apply the preventive measure, or any other measure has been unfounded.¹⁰⁵²

There are certain violations where it is presumed that they affected the decision (participation of a judge subject to disqualification, improperly constituted panel, incompetence of the court, failures on the instance jurisdiction, if accused had no defense counsel when mandatory *etc.*).¹⁰⁵³ In case of such violations judgment has to be reversed irrespectively of the scope of the appeal and the influence of the violation on the judgment.

If substantial interpretation of the law is required, appellate court may adjourn the hearing and refer the question to the Supreme Court whose decision should be binding as to the question at issue. The Supreme Court may also take over the case for examination.¹⁰⁵⁴ It should be noted that legal opinions and directions of the appellate court with respect to the further course of proceedings should be binding upon the court to which the case has been remanded for re-examination.¹⁰⁵⁵

Interlocutory appeal against the orders of a court, which preclude the rendering of a judgment and against the rulings is available in accordance with §§ 459 through 467.

Extraordinary remedies are cassation¹⁰⁵⁶ and renewal of proceedings.¹⁰⁵⁷ When deciding on cassation the Supreme Court does not have revisional powers.

Cassation can be filed against the judgments of an appellate court by the parties, The Minister of Justice, the Attorney General and the Commissioner for Citizens' Rights Protection (the Ombudsman). These so-called „special subjects” can also lodge the cassation against other decisions as judgments even if a decision of the first instance court is concerned.¹⁰⁵⁸ Restrictions *ratione materiae* regarding cassation are set out in §§ 439 and 523. However, cassation is possible in cases of flagrant breaches of law if it might have a significant effect on the contents of judgment.

Renewal of proceedings is basically possible for the benefit of the accused. If renewal is allowed because of a crime committed within the former proceedings it is possible without reference to the benefit of the accused. An authorization *ratione personae* is extended to a person who is closely related to the accused in case it died. Jurisdiction *ratione materiae* is limited to circumstances indicated in § 540. Renewal is permitted *propter nova*, but also in case of absolute appeal reasons provided in § 439. It is also possible if the decision of the Constitutional Court or the decision of European Court of Human Rights requires so.¹⁰⁵⁹ The competent court is the regional court and in cases in which it acted as the first instance court -

¹⁰⁵⁰ § 433(2).

¹⁰⁵¹ § 437.

¹⁰⁵² § 438.

¹⁰⁵³ § 439.

¹⁰⁵⁴ § 441.

¹⁰⁵⁵ §e 442(3).

¹⁰⁵⁶ Chapter 55.

¹⁰⁵⁷ Chapter 56.

¹⁰⁵⁸ § 521.

¹⁰⁵⁹ §§ 540(3 and 4) and 542(2).

the appellate court. The court decides in a panel of three judges. Competent authority on the motion against the decision of the appellate court is the Supreme Court.¹⁰⁶⁰

There is a possibility of certain proceedings after the judgment has become final. Those are proceedings on reinstatement of proceedings conditionally discontinued by the court,¹⁰⁶¹ compensation for unjustifiable sentencing or detention,¹⁰⁶² clemency,¹⁰⁶³ and rendering cumulative judgments.¹⁰⁶⁴

4 Special Forms of Procedures

Summary proceedings are applicable if the preparatory proceedings were conducted in the form of inquiry. However, in case the inquiry is lengthy and an investigation has to be conducted, the court is authorized to proceed in summary form.¹⁰⁶⁵

Procedure applicable in ordinary proceedings will be applied to summary proceedings if not specifically regulated with the Chapter 51.¹⁰⁶⁶ Proceedings in cases on private charges are conducted according to the rules relevant to summary proceedings in conformity with Chapter 52 (*e.g.* main trial ought to be preceded by a conciliatory session¹⁰⁶⁷ *etc.*). Other special procedures are provided in order/writ proceedings¹⁰⁶⁸ and in proceedings dealing with contraventions.¹⁰⁶⁹

VI Evidence

1 General Provisions

Evidence is taken upon the motion of the parties or *ex officio* by the court independently of the will of the parties. Notorious facts need not to be proven. Any evidentiary motion has to identify the evidence and indicate which facts are to be proven. However, an evidentiary motion may aim to reveal the proper evidence and its evaluation.¹⁰⁷⁰ The court can deny an evidentiary motion: 1) if taking of such evidence is inadmissible; 2) if the fact to be proven is either irrelevant to the case or has already been proven; 3) if the evidence would be irrelevant to the establishment of the fact in question; 4) it is impossible to take the evidence; or 5) it obviously drive at prolongation of proceedings.¹⁰⁷¹ The last reason for dismissal of an evidentiary motion has been added by the 2003 amendment as a countermeasure against the prolongation of proceedings by the defense.

Leading questions are not allowed. If the evidence is collected through coercion, unlawful threat, hypnosis or chemical or technical means affecting the psychological processes of the examined person it will be deemed inadmissible.¹⁰⁷²

¹⁰⁶⁰ § 544.

¹⁰⁶¹ Chapter 57.

¹⁰⁶² Chapter 58.

¹⁰⁶³ Chapter 59.

¹⁰⁶⁴ See more about remedy stage of the proceedings: Doda, Z., *Dopuszczalność zażalenia w polskim procesie karnym*, (Admissibility of the remedy in the Polish criminal process), Wyd.Prawnicze: Warszawa, 1982; Zablocki, S., *Postępowanie odwoławcze w kodeksie postępowania karnego po nowelizacji* (Remedy proceedings in the Code of criminal procedure after noovelization), ABC: Warszawa, 2003.

¹⁰⁶⁵ § 469.

¹⁰⁶⁶ See § 468.

¹⁰⁶⁷ See § 489.

¹⁰⁶⁸ Chapter 53.

¹⁰⁶⁹ Chapter 54.

¹⁰⁷⁰ § 169.

¹⁰⁷¹ § 170(1).

¹⁰⁷² § 171(3)(4).

After the 2003 amendment, lie detector tests are allowed only with the approval of the person in question and if conducted by an expert.¹⁰⁷³

The accused is presumed innocent until its guilt has been proven under the provisions of the Code. Irresolvable doubts will be resolved in favor of the accused. Moreover, agencies in charge of criminal proceedings are obliged to inquire into and to duly consider the circumstances both in favor and against the accused.¹⁰⁷⁴

2 Means of Evidence

Means of evidence are regulated in chapters 20 through 26 of the Code (testimony of the accused; witnesses; experts, interpreters and specialists; view and body examination; autopsy; experiment during the proceedings; inquiry within the community and investigating the person of the accused; seizure of object and searches; surveillance and recording conversations).¹⁰⁷⁵

A decision of the court must be based only on the whole set of circumstances and facts disclosed in the course of the proceedings. Any person summoned as a witness is obliged to appear and testify. There are usual exceptions to this principle (defense counsel on facts communicated to it while it was giving legal advice or conducting the case; a priest on facts communicated to him in confession; persons obligated to preserve a state or official secret, the next of kin of the accused). On the other side, lawyers, physicians and journalists may be examined as to privileged information if it is necessary for the benefit of the administration of justice, and the facts cannot be established on the basis of other evidence.¹⁰⁷⁶ Polish law provides effective witness protection. In case of imminent danger to the witness or its family members, its identity can be hidden. The examination of so-called *in cognito* witnesses is constructed accordingly to the outlines worked out by the jurisprudence of the ECHR.¹⁰⁷⁷

3 Interference with Right to Privacy

Objects which may serve as evidence, or be subject to seizure in order to secure penalties regarding property, penal measures involving property or claims to redress damage, are subject to surrender when so required by the court, the state prosecutor and in cases not amendable to delay by the police or other authorized agency.¹⁰⁷⁸

If the police or other agency conducted an action, the holder has to be served within seven days of the seizure and order of the court or the state prosecutor. In our view, the authority of the state prosecutor to order the seizure, inspection of the correspondence,¹⁰⁷⁹ and search of a person and/or premises¹⁰⁸⁰ is at least problematic. However, this authority of state prosecutor is subject to approval in cases of surveillance and recording conversations, which is possible only in certain cases specified in § 237(3) of the Code.¹⁰⁸¹ On the external examination of the body of the accused as well as psychological and psychiatric examinations and examinations to be conducted upon its body (*e.g.* to submit blood and excretory samples) see supra V 1.

¹⁰⁷³ § 199a. Editors note: It seems that his amendment provides use of polygraph for investigative aims.

¹⁰⁷⁴ §§ 4 and 5.

¹⁰⁷⁵ See Cieslak, M., *Zagadnienia dowodowe w procesie karnym* (Evidentiary Questions in Criminal Procedure), PWN: Warszawa, 1955.

¹⁰⁷⁶ § 180.

¹⁰⁷⁷ § 184. Hofmański, P. *Swiadek anonimowy w polskim procesie karnym* (The Anonymus Witness in the Polish Criminal Procedure), Zakamycze: Krakow, 1997.

¹⁰⁷⁸ § 217.

¹⁰⁷⁹ § 218(1).

¹⁰⁸⁰ § 220(1).

¹⁰⁸¹ *E.g.* homicide, white slavery, the hijacking of an aircraft and ship, act against the sovereignty or independence of the state, spying, forging of money, drug trafficking, organized crime *etc.*

VII Precautionary Measures

1 General Provisions

These are measures directed towards securing the proper conduct of the proceedings, and, exceptionally, to prevent a new serious offense from being committed by the accused. Types of measures are prescribed by the Code and the list is exclusive and not subject to any enlargement or alteration.¹⁰⁸²

2 Particular Measures

Part VI of the Code contains provisions on the coercive and preventive measures, searching for the accused and wanted notice, safe conduct as well as security on property. Anyone is entitled to apprehend a person caught *in flagranti* with the obligation to surrender the person to the police without delay. Police is generally authorized to arrest a suspect if there is good reason to suppose that it has committed an offense and if there is a possibility of escape or destruction of the evidence as well as if there is no possibility to establish the identity of the suspect. Arrested person is¹⁰⁸³ entitled to information on the reasons of the arrest.

Duration of the arrest can be extended up to 48 hours and deprivation of liberty¹⁰⁸⁴ is afterwards possible only if preliminary detention is ordered.¹⁰⁸⁵ However, preliminary detention is possible only in exceptional cases¹⁰⁸⁶ and if another preventive measures are not sufficient. The Code lacks a provision which would state the maximum period of preliminary detention. However, according to the § 263(4) this coercive measure can be prolonged for the time over one year within the investigation and over two years in case of the judicial proceedings only on the decision of the court of appeal.¹⁰⁸⁷

Posting of bail and guaranty is regulated with §§ 266 through 274. As a preventative measure, the accused may be committed to surveillance,¹⁰⁸⁸ suspended from its official function or performance of its profession or from driving specific types of vehicles.¹⁰⁸⁹ Also, there is a possibility to order a prohibition preventing the accused from leaving the country, which may be combined with seizing its passport.¹⁰⁹⁰

¹⁰⁸² See general observation to the coercive means: Amelung, K., Marszał, K., *Stosowanie środków przymusu w procesie karnym* (Application of Coercive Means in the Criminal Process), Wyd. US: Katowice, 1990.

¹⁰⁸³ §§ 243 and 244. On the police arrest see: Baran, K., Baran, E., *Instytucja zatrzymania osób w systemie prawa polskiego* (Institution of Police Arrest in the Polish Legal System), *Problemy Praworządności* (1986) 12; Hofmański, P., *Zatrzymanie policyjne w świetle nowego kodeksu postępowania karnego* (Police Arrest in the Light of the New Criminal Procedure Code), *U progu nowych kodyfikacji karnych*, Wyd. US.: Katowice, 1999.

¹⁰⁸⁴ Article 41 section 3 of the Constitution.

¹⁰⁸⁵ Preliminary detention may only occur on the basis of an order from the court. See § 250.

¹⁰⁸⁶ § 258 (e.g. resident abroad, crimes that provide minimal penalty of 8 years for offender etc.)

¹⁰⁸⁷ See more: Izydorzyc, J., *Stosowanie tymczasowego aresztowania w polskim postępowaniu karnym* (Application of the Preliminary Detention in the Polish Criminal Procedure), Zakamycze: Krakow, 2002.

¹⁰⁸⁸ § 275.

¹⁰⁸⁹ § 276.

¹⁰⁹⁰ § 277.

