THE RIGHT OF THE DEFENDANT TO A DEFENCE AND LEGISLATIVE REFORM IN SERBIAN CRIMINAL PROCEDURE

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Dear President Đurđević, distinguished colleagues, ladies and gentlemen,

First of all I would like to thank you for the invitation to participate in the work of this conference and to congratulate you on the excellent organization. I am deeply convinced that the results of this session will be of great benefit to a more qualitative continuation of work in the process of reforming our criminal procedure. But before I present you with the main characteristics of the defendant's right to a defence which was introduced by the current reform process of Serbian criminal procedure, I would like to make a few general points about the current reform process of Serbian criminal procedure. All the more so because I have the impression that most of the characteristics of the reform of Serbian criminal procedure are shared by the reform of criminal procedure in the countries in the region in general.

As I assume you already know, legislation regarding Serbian criminal procedure started with the adoption of the Code on Criminal Procedure of the Federal Republic of Yugoslavia of 2001, and the most recent legislation of this nearly fifteen years long process is the Code on Criminal Procedure of 2011. There are many characteristics in the current reform process, but the most important are the following:

1. Very frequent, and mostly unjustified, legislative interventions. In certain years such interventions occur several times. The justification for these frequent interventions is very questionable, and can be seen as an attempt to justify interventions by a "wandering legislator" trying to find solutions for the realization of, quite justified, reform objectives. This, in the first place, is because criminal procedural legislation, by its nature, belongs to a quite conservative branch of the law. If we add to this the existence of adopted legal texts that have ceased to be valid even before their implementation, we can clearly see the unjustified nature of these interventions. The best example of the negative effects of such a practice is the Criminal Procedure Code of the Serbian Republic of 2006, which ceased to be valid even before its comprehensive application.

2. A key objective of the reform as a whole is to create a normative basis for the desired level of efficiency of criminal procedure, provided that it is not to the detriment of compliance with international laws and relevant national

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standards relating to the guaranteed freedoms and rights of its subjects, especially the defendant and persons affected by the offence. In accordance such a goal, the reform process has introduced many changes. Key among them, viewed in this context, is not only the legalization of many simplified forms of procedure in criminal matters, but also the constant expansion of their possible use. For example, now there are endless possibilities in relation to concluding the agreement on admission of the offence.

3. The revised procedural position of the main procedural parties, primarily the public prosecutor and the court. Unlike current solutions, now there are very few criminal cases which cannot, on their own or with minimal involvement from the court, finally be resolved by the public prosecutor (primarily through the application of simplified forms of procedure in criminal matters).

4. The next well known result of reform is the devaluation of the truth principle and the formalisation of the passive role of the court regarding proof in the main trial. The legislator has deviated from our former solutions, and indeed the solutions which reflect legislation of this type in the continental legal system. The principle of truth has been completely devalued, and the almost complete passivity of the court is intended in the taking of evidence at the main trial. The presentation of evidence ex officio is the only exception. The burden of proving the charges is on the prosecutor, and the court adduces evidence at the proposal of the parties. Only in exceptional cases the court has been given the power to influence the process of proof, and as a rule it exercises that power indirectly by giving orders to the party by which it does not have to act.

By banishing the principle of truth from criminal proceedings and releasing the court from its duty to collect and present evidence, criminal proceedings become similar to civil proceedings in which the parties have the right of disposition, and consequently bear the responsibility for establishing the truth, which is in complete contrast to the dominant principle of continental legal doctrine on the nature and purpose of criminal proceedings. According to this, because of the public-legal character of criminal proceedings and the public interest in prosecuting the offender for the criminal offence, in criminal proceedings the principle of judicial investigation of the truth must be applied, and consequently in relation to the clarification of the subject of the proceedings, the court cannot be linked to the activity of the parties, but it "explores the truth" by taking evidence ex officio which is relevant to a judicial decision. The current solution of our legislator has led to a series of illogical solutions, and has been subject to criticism by most of the profession.

5. The concept of the investigation has changed. With the intention to create a normative basis for increasing the efficiency of criminal proceedings, and starting from the fact that, in no small degree, this also depends on the effectiveness of the investigation, the CPC of 2011 has abandoned the concept of judicial investigation and has moved on to one of prosecutorial investigation. However, when the provisions of this phase of the procedure are analysed,

a completely different conclusion can be drawn. Specifically, such analysis shows that we have ended up with some kind of concept of so-called parallel investigation. We have an investigation that can in parallel be lead by the defendant and by the public prosecutor. We have an investigation in which the court has a role opposite to the role of the court in a prosecutorial concept of investigation. We have a concept of investigation in which there are no single provisions that can withstand even the mildest criticism, not to mention the fact that some of them contradict the Constitution.

6. One of the more significant features of the new Serbian CPC, not only in relation to the main trial but also to its entirety, is the adversarial structure of the main trial. By virtue of this solution, the Serbian CPC has not only abandoned its current model, but also the model that is the staus quo in the legislation of continental Europe, and has changed to a model characteristic of the Anglo-Saxon system (primarily the United States, England and Wales). The more or less completely adversarial structure of our main trial manifests most prominently in the way of standardizing the evidentiary procedure at the main trial as the central phase of the criminal proceedings, the phase that represents the trial in the narrow sense of the meaning.

The adversarial structure of the main trial has led to another change in the reform process, which consists of a fairly high degree of equalization of civil and criminal proceedings, particularly evident in the content of the standardization of certain principles. It is especially the case with the principle of truth and the role of the court in its practical realization. This CPC solution has also been subject to criticism by the profession, on the basis that it is not in accordance with the nature and purpose of criminal proceedings.

7. The introduction of a preparatory hearing is one of the changes to the design of the main trial. Its *ratio legis* is based on the adversarial structure of the main trial and its aim is that the parties, as early as possible in the proceedings, declare themselves in terms of their 'evidential intentions' in relation to the future main trial, and thus enable the court, in front of which the trial will take place, to plan the duration of the proceedings in an appropriate way, which should improve its efficiency. In addition, this way also allows the parties a mutual 'cards opening' in terms of their future planned evidential activity at the main trial. As such, it represents a forum in criminal proceedings which forms part of what legislative systematics would categorise among elements for the preparation of the main trial. The procedure of the hearing focuses on the corresponding declarations of the parties in relation to the charge, each party offering certain evidential justifications and expressing relevant evidential initiatives, and in general the hearing represents a kind of preliminary 'confrontation' of the parties before the court, by the application of the principle of contradiction. In addition, the court has powers to make a series of important decisions, even at that preparatory phase before main trial proceedings, including the decision on the dismissal of criminal proceedings.

The obligation to hold a preliminary hearing depends on the nature of the offence, in terms of the criteria of type of crime and the degree of stipulated criminal sanction. The rational for instituting the hearing is justified. However, the attitude of the majority of the profession, which I also share, is that such a standardized preliminary hearing is, because of its complexity, of little value, not only because it does not serve to increase the efficiency of the main trail, but also because it delays the proceedings. In this respect a commitment to abolishing the preparatory hearing and to finding a better and more efficient court control of the system of indictment seems justified, which would be in accordance with the changed concept of investigation.

8. Moreover, there is a lack of adequate control over the use of opportunism by the prosecution and the consequent minimization of the role of the injured party in the application of the same, especially currently in light of the constant expansion of its application, which is widespread practice.

9. Following this, but no less significant, there should be pointed out some inconsistencies in the application of the provisions on summary criminal proceedings, where there is an evident trend of continuous expansion of application. In consequence of this trend, we have come to the situation that, where a criminal offence carries a punishment of a fine or imprisonment of up to eight years, the provisions of summary criminal proceedings are applied. As exceptions to this, one of which could be seen as a welcome development in terms of the scope of application of these provisions, there are two qualifications which appear both negative and contradictory. The first allows for the application of the provisions on summary proceedings before special departments of the Belgrade Higher Court, i.e. in proceedings which by their nature are intended for the most serious crimes. Another qualification stipulates that the provisions on summary criminal proceedings are disapplied in all criminal offences where the prosecution is based on a private claim. It is very difficult, if not impossible, to find arguments to justify these two solutions.

When it comes to the right of the accused to a defence, it should be primarily noted that in work on the reform process special attention has been paid precisely to this issue. The initial attitude of legislators in the standardization of this issue was to provide more adequate expert defence for the accused, as well as the creation of a normative basis for expert defence for the accused, in as many criminal cases as possible. In terms of the practical realization of this right, the reform process has introduced many changes when it comes to the right of the accused to a defence. From the current text of the CPC (the CPC of 2011) the most important changes in relation to the right of the accused to a defence are the following:

1. Expanding the set of criminal offences for which a defence is mandatory. Instead of criminal offences for which a penalty of imprisonment for a term exceeding 10 years can be imposed, now the defence is mandatory for offences for which a prison sentence of 8 years, or a more severe punishment,

can be imposed, which should contribute to a greater number of proceedings being carried out more fairly.

2. The presence of defence counsel as a condition for the legality of a suspect's statement to the police. For the suspect's statement to be used by the police as evidence, it is necessary that it was made in the presence of counsel. The aim of the provision is to prevent the police arriving at suspicion of the accused by exploiting the inexperience of the accused or his poor financial situation.

3. The condition to provide a legal counsel with a minimum of professional experience. As a parameter of experience required in order to provide an effective defence for criminal offences for which ten years or a more severe punishment may be imposed, five years of practising law is stipulated. Such a solution is criticized by part of the profession. The complaint is, among other things, that this stipulation does not specify which type of law practice is required, or to which area of law the professional experience must relate, which may lead to a situation where the duty counsel could be a lawyer who is not able to provide an effective defence, because he does not deal with or has not dealt with criminal matters.

Further to this, there is a provision that allows a law trainee to replace counsel only in proceedings conducted for criminal offences for which a sentence of up to five years in prison can be imposed.

4. The solution for the procedural position of the defence counsel in the case of his being rejected by the defendant is interesting. If the defendant states to the procedural authorities that he rejects the defence counsel appointed *ex officio* and that he wants to represent himself, the duty counsel is obliged to: be familiar with the contents of the evidence and the content and stages of the main trial; give to the defendant explanations and advice in writing, if the defendant refuses to talk to him; attend the proceedings and present the concluding remarks, provided the defendant does not explicitly oppose this; at the request of the defendant or with his express consent, explain regular legal processes and take other actions in the proceedings.

5. The right of the defence counsel to a confidential conversation with the defendant before the first hearing is expressly provided for, as is his right to read the criminal report, the crime scene investigation and the findings and opinion of an expert, prior to the first hearing. This solution is intended to provide an effective defence, and as such is a welcome development. However, the problem of its practical implementation is the lack of precision as to what is understood by ''the first hearing''. Is it a hearing by the police or by the public prosecutor?

6. The power to collect evidence in favour of the defence and to compel the public prosecutor to take action in favour of the defence are further rights of the defence counsel in the new concept of investigation. Moreover in this

regard, there is his right to be present at, and to actively participate in, the presentation of evidence by the public prosecutor in the investigation.

7. The obligation to provide a defence counsel even after the cancellation of the same is also one of the new solutions, according to which the defence counsel has an obligation to provide legal assistance to the accused within 30 days of the cancelled authorization, provided that before that deadline another counsel has not been chosen.

8. The obligation of the defence counsel to participate in the negotiation process for concluding an agreement on admission of the offence.

9. The power to determine the duration of the closing arguments after the pleadings of the parties, and the right of the presiding judge, after prior warning, to interrupt a person where his closing argument exceeds the authorized time or offends public order and morality, or offends others, or engages in repetition or exposure which is obviously not related to the case, with the requirement that the record of the main trial indicates that the closing argument was interrupted and why.

10. Moreover, there is a regulation that stipulates drastic penalties for violating the rights of the defence counsel (a fine of 150,000 dinars - about 1300 EUR).

In the end, without citing other changes related to the right of the accused to a defence, I would like to make a general comment about the quality of the content of the CPC RS of 2011. The key to this issue depends primarily on whether it is a matter of principle or an assessment of the concrete content of the changes that it introduced. Looking at the text in a general light, it can be stated that most of its solutions do serve the basic objective of the reform. i.e. to create a normative basis for more efficient criminal proceedings. Such an assessment is based primarily on the expansion of the application of summary proceedings in criminal matters, the abandoning of the concept of judicial investigation, the expansion of mandatory defence, and the like. However, even a remotely critical analysis of the manner of normative regulation of the majority of the new solutions introduced by this text, gives a completely different picture. The CPC RS contains a number of inconsistencies, contradictions and inaccuracies. There are innumerable examples to back up such a statement, however I am not able to enumerate them here because of limited time. Instead, let me express my opinion, and not just my opinion, that the CPC RS of 2011 should not only not be the end of the reform of our criminal procedure but should be seen as just one unsuccessful step in more than fifteen years of reform. In this respect it is necessary to continue work on reforms. In that work, I think, the views expressed at this session should be taken in consideration.

Thank you for your attention.