Veljko Turanjanin,*
*Milica Kolaković-Bojović**
*Snežana Soković**

THE ROLE OF DEFENCE COUNSEL IN THE SERBIAN CRIMINAL PROCEDURE CODE: THE NORM AND PRACTICE[1]

Abstract

The defendant's right to a defence counsel in criminal proceedings is one of the fundamental rights guaranteed by numerous national and international legal instruments. However, the guarantee of a certain right does not automatically imply the immutability of the position of a particular subject in the criminal proceedings. Extensive reforms of criminal procedural systems, such as those undertaken by Serbia a few years ago, necessarily entail changes in the rights and duties of the participants in the criminal proceeding. The authors discuss the position of defence counsel in criminal proceedings, whereby, after the introductory remarks, they explain the role of the defence counsel in the prosecutorial investigation system in the Republic of Serbia, followed by the explanation of the results of empirical research carried out among the defence attorneys, which showed the extent to which lawyers use the new solutions of the Criminal Procedure Code.

***Key words**:* defence counsel, professional consultant, prosecutorial investigation, Criminal Procedure Code of the Republic of Serbia

1)* *PhD, Faculty of Law, University of Kragujevac*
* *PhD, Institute of Criminological and Sociological Research, Belgrade*
* *PhD, Faculty of Law, University of Kragujevac*
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I INTRODUCTION

Implementation of the new Code of Criminal Procedure from 2011 (hereinafter CPC) that had started in 2013 in all criminal courts in Serbia, brought significant novelties related to right to the defence counsel, but also putted a new light on the role of defence counsel in criminal proceedings, even in the parts of the procedure that was remained same as according the CPC from 2001. Having this in mind[2], there are several issues of the great importance for the scope and enjoying of the right to counsel that have significant influence on length and efficiency of criminal proceedings: widening the circle of defendants who have obligatory professional legal aid; issue of necessary qualifications of the defence counsel; specific role of the defence counsel in the concept of prosecutorial investigation; the important role of defence counsel on preparatory hearing, etc.

There are many works devoted to the role of the defence counsel in the criminal proceedings. However, they are mostly theoretical works, without empirical researches on this very important issue in the contemporary criminal procedure worldwide. Serbian CPC introduced several novelties in this sphere that imposed an obligation for the empirical monitoring and research of its application after the relevant period. In this paper we analyzed legal solutions on the position and role of the defence counsel in the Serbian CPC, especially in the new sphere such as prosecutorial investigation, as well as the position of the European Court of Human Rights in this topic. What it very important, we conducted the survey between defence counsels using the standardized questionnaire, for the period 2013-2015. The survey was conducted in the four lower and four higher courts. The sample consisted of 154 lawyers. Results of the research we gave in the separate chapter of this work.

II DEFENCE COUNSEL: THE COMMON CONSIDERATIONS

Without any doubt, the right to defence counsel belongs to fundamental procedural rights of the defendant. Recognized by the most important human rights instruments,[3] as well as in national legal systems all around

2) Initially, the idea of the legislator was to introduce special professional requirements for defense councils in criminal proceedings, other than those required for other types of court proceedings.

3) European Convention of Human Rights in the article 3c stipulates that anyone has right to

the world, this right mostly has a status of constitutional principle.[4] Despite differences in prescribing procedural timeframe for its validity, the existence of this right itself is out of question.[5] According to European Court of Human Rights, (hereinafter ECtHR) has ruled in many decisions that presence of a defence counsel should be ensured from the early beginning of investigation,[6] but there are still important differences in a way of prescribing conditions, modalities and limitations of the right on defence counsel, that reflect on the efficiency of proceedings. The Constitution of Serbia prescribes in the article 33 that any person charged with

defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. Similar provision is included in the article 4 of the EU Charter of Fundamental Rights.

4) According to Section 137 of the German Criminal Procedure Code, the accused may have the assistance of defence counsel at any stage of the proceedings. Not more than three defence counsel may be chosen. In the Serbian law, this limit is up to five. But, attorneys admitted to practice before a German court, as well as professors of law at German institutions of higher education as defined in the Framework Act for Higher Education who are qualified to hold judicial office, may be engaged as defence. In Serbia, the situation that professor can be attorney it is not possible. Then, according to the article 128 and 129 of the Switzerland Criminal Procedure Code, a defence lawyer is obliged to act solely in the interests the accused, subject to the restrictions laid down by law and in the professional code of practice. The accused is entitled, in any criminal proceedings and at any stage of the proceedings either to instruct a legal agent to conduct his or her defence (right to choose a defence lawyer) or, to conduct his or her own defence. Turkish Criminal Procedure Law in the article 2 defines a defence counsel as a lawyer who defends the suspect or the accused during the criminal proceedings. Article 16 of the Russian Criminal Procedure Code states for the suspect and for the accused shall be guaranteed the right to defence, which they may exercise themselves or with the assistance of a counsel for the defence and/or of their legal representative. The court, the prosecutor, the investigator and the inquirer shall explain to the suspect and to the accused their rights, and shall guarantee to them the possibility to defend themselves while resorting to all ways and means, not prohibited by the Code. In the cases stipulated by the Code, obligatory participation of a counsel for the defence and/or of the legal representative of the suspect and of the accused shall be provided for by the officials, conducting the proceedings on the criminal case. In cases stipulated by the Code and by other federal laws, the suspect and the accused may make use of the advice of a counsel for the defence free of charge. Article 62 of the Portuguese Criminal Procedure Code provides that defendants may choose a lawyer at any stage of proceedings. If a defendant has more than one chosen lawyer, service of process will be made in relation to the lawyer having been chosen in the first place during the formal declaration as defendant. Section 38 of the Criminal Procedure Code of the Netherlands provides that the suspect shall have a right to choose one or more defence counsel at all times.

5) J. Taylor, *Right to Counsel and Privilege against Self-Incrimination: Rights and Liberties under the Law*, ABC Clio, Santa Barbara – Denver – Oxford, 2004, 20.

6) W. Schabas, *The European Convention on Human Rights - A Commentary.* Oxford, Oxford University Press, 2015, 310.

criminal offense shall have the right to defend himself personally or through legal counsel of his own choosing, to contact his legal counsel freely and to be allowed adequate time and facilities for preparing his defence. The par. 3 of the same article says that any person charged with criminal offense without sufficient means to pay for legal counsel shall have the right to a free legal counsel when the interests of justice so require and in compliance with the law. When it comes to legal nature of this right, there is a several main opinions in legal theory, that see the defence counsel as kind of assistant, supporter, representative or legal aid provider during the criminal procedure.

According to Škulić,[7] defence through counsel is just one of the elements of the complex right to defence of defendant, and defence counsel itself could be defined based on his/her role as a subject of criminal proceeding, legal ground of his/her appearance in the proceeding, his professional status, but also having in mind a basic elements and content of his/her procedural function. He defines a defence counsel as a "natural person who poses adequate legal education, works as a lawyer and represent defendant based on his/her wish or court decision (in cases when court determinates defence counsel), together with an defendant or independently, but not contrary from the interest of defendant (e.g. in cases when defendant is not available for court or, to some extent, when he/her defend him/herself keeping silent). The defence counsel taking necessary activities included in defence function and helps to defendant in defence, taking care about his/her procedural rights and interests.

Even it is clear that (non)engagement of a defence counsel has influence on length of criminal proceeding (that can be positive or negative), a fair procedure principle requires letting an defendant to choose whether he/her wants to defend him/herself without additional support in cases where does not exist.[8] It is well known that defence counsel use various tactics in order to extend criminal procedure (e.g. multiple requests for exemption, *restitutio in integrum*, absence from hearings, avoiding delivery of court documents, cancelling engagement in important procedural moments, not

7) M. Škulić, *Serbian Criminal Procedure Code: A Commentary*, Faculty of Law of Belgrade and Official Gazette, Belgrade, 2011, 309.

8) A. Jakšić, *The European Convention on Human Rights - A Commentary*, Belgrade, 2006, 231.

respecting procedural discipline).[9] Of course, counsels' approach is different when their clients are detained, when they have a strong interest to reduce length of procedure until detention is cancelled. Sometimes, immediately after cancelling detention, they start obstruction of procedural efficiency.[10] However, sometimes it not easy to make distinction between abuse and legitimate right of a defence counsel to take procedural actions within legal scope of the CPC, according to interests of his/her client. ECtHR referred to this issue in case *Union Alimentaria Sanders S.A. vs. Spain,* and concluded that applicant has duty to show commitment to respecting and enforcement relevant procedural steps, to prevent himself from any dilator tactics and to use all available means in domestic law to reduce length of procedure.[11] Similarly, in *Puzović and Medarević vs. Serbia*,[12] the ECtHR emphasized that, if extensive length of procedure is in connection with abuse of procedure on the side of defendant and defence counsel, than defendant cannot claim that his rights from the Art. 6 of the Convention have been violated. The ECtHR further explains that obstructions that are not apologizing include the irrelevant submissions and unjustified absences of the defendant and defence counsel.[13] In that context, the Court's earlier position in the *Capuano v. Italy*[14] case is interesting, so that the applicants should be held liable for the prolongation of the proceedings brought by their proxies. Nevertheless, the ECtHR reminds that the defendant is not obliged to cooperate with the court, and that the court has at its disposal a whole range of procedural means intended to suppress various types of obstruction of the proceedings.[15] On the other hand, in the *Tsilira v. Greece*[16] case, the Court denied the argument that the prolongation of the proceedings was very often caused by the behaviour of the lawyers, stating that the member state is obliged to organize its legal system in a manner

9) This issue, the Court also analyzed in case *Klamecki v. Poland*, No. 25415/94, decision from March 28th 2002, and concluded that reason for prolonged procedure could be found in repeated canceling of defense authorizations and engagement of new defense counsels.

10) The group of authors, *The Duration of the Criminal Proceeding*, Serbian Supreme Court, Belgrade, 1976, 16.

11) *Union Alimentaria Sanders S.A. vs. Spain*, No. 11684/85, decision of December 11th 1987.

12) *Puzović & Medarević v. Serbia*, No. 2545/05, decision of September 15th 2009.

13) *Ibidem*.

14) *Capuano v. Italy*, No. 9381/81, decision of Jun 25th 1987.

15) *Ibidem.*

16) *Tsilira v. Greece*, No. 44035/05, judgment of May 22th 2008.

that ensures everyone the right to a final court decision. A similar attitude was taken by the Supreme Court of Cassation ruling on the motion for a violation of the right to a trial within a reasonable time and stating that it is obvious that the reason for the unjustified length of the first instance trial is that the basic court did not sufficiently take care about breaching the procedural discipline by the parties (the absence of the defendant and his from the scheduled hearings, which resulted in the delay - by not holding a number of main hearings, 20 out of the total 23 scheduled hearings), which violated the applicant's right to protection of the right to a trial in a reasonable time.[17]

The article 14 of the CPC rules duties of the court related to the right to trial within reasonable time saying that the court has a duty to conduct criminal proceeding without delay and to unable any abuse aimed at prolongation of procedure. This obligation is more concretely articulated in the articles 372, 374 and other of CPC that provide for various mechanisms applicable when defence counsel needs to use simplified criminal procedural forms in order to ensure prompt finish of the proceeding for his/her defendant.

PROSECUTORIAL INVESTIGATION AND ROLE OF THE DEFENCE COUNSEL

At first glance, the concept of prosecutorial investigation should not have any significant relevance to the issue of professional defence. However, in the context of the "extreme" type of prosecutorial investigation, chosen by the legislator in the 2011 CPC, the situation is completely different. Namely, pursuant to article 301, with justification that it is a mechanism for ensuring the equality of arms of the parties to the proceedings, the suspect and his defence counsel are entitled to independently collect evidence and materials for the benefit of the defence: to talk to a person who can provide them with data that can be useful for defence[18] and to obtain

17) Decision of the Supreme Court of Cassation no. Ržk 36/2014 of 24.11.2014. adopted on the Session of the Department for the protection of the right to trial within reasonable time on March 19th 2015.

18) The authorization referred to paragraph 2 item 1) of this Article does not relate to the injured party and persons already questioned by the police or public prosecutor. The written statement and opinion referred to in paragraph 2 item 1) of this Article may be used by the defendant and his counsel during the questioning of a witness or a test of the authenticity of his statement, or for issuing a

from that person written statements and information, with his consent; to enter private premises or areas which are not open to the public, a dwelling or premises linked with a dwelling, with the consent of their holder; to take over from a natural or legal person the objects and instruments and obtain the information possessed by that person, with their consent, and with the obligation to issue a certificate to that person with a list of objects and instruments taken.[19]

In the context of defining the concept of efficiency that we have previously given, which implies not only speed but also respect for the rights of participants in the proceedings, such a solution can hardly be considered a mechanism for ensuring the efficiency of the proceedings. Namely, in a situation where a professional defence is not guaranteed to every defendant in criminal proceedings, it is justified to ask if we can refer to equality of arms at all, despite the shift of the boundaries of mandatory defence[20] from

decision to question a certain person as a witness by the public prosecutor or the court.

19) Article 78 of the CPC/2011 stipulates that several defendants in the same case may have a common defense counsel only where that would not hinder the professional, conscientious and timely provision of legal assistance with their defense. Where several defendants have a common defense counsel in contravention of paragraph 1 of this Article or Article 73 paragraph 3 item 4) of this Code, the authority conducting proceedings will invite them to agree within three days which of them would be defended by the defense counsel who defended all of them up until that point, or for each of them to choose a different defense counsel. If they do not do so in the case of mandatory defense, a court appointed defense counsel will be appointed for them. One defendant may have a maximum of five defense counsel in one proceeding, and it will be considered that defense has been secured when one of the defense counsels is participating in proceedings. Where one defendant has more than five defense counsel, the authority conducting proceedings will invite him to choose within three days which defense counsel he will retain, and caution him that if he fails to do so, the first five attorneys pursuant to the order of submission of their powers of attorney or provision thereof on the record will be deemed his defense counsel.

20) The defendant must have a defence counsel: 1) if he is mute, deaf, blind or incapable to conduct his own defence successfully – from the first interrogation until the final conclusion of the criminal proceedings; 2) if the proceedings are being conducted in connection with a criminal offence punishable by a term of imprisonment of eight years or more – from the first interrogation until the final conclusion of the criminal proceedings; 3) if he has been taken into custody, or prohibited from leaving his abode, or is in detention – from the moment of deprivation of liberty until the ruling discontinuing the measure becomes final; 4) if he is being tried in absentia – from the issuance of a ruling on an in absentia trial and for the duration of such trial; 5) if the trial is being held in his absence due to reasons he himself induced – from the issuance of a ruling for the trial to be held in absentia until the ruling by which the court establishes that reasons for his inability to stand trial have ceased becomes final; 6) if he has been removed from the courtroom for disturbing the order, until the conclusion of the evidentiary procedure or the termination of the trial – from the issuance of the order on his removal until his return to the courtroom or the pronouncement of the

the prescribed imprisonment of ten to imprisonment of eight years, as well as the rights guaranteed indigent defendants, provided for in Article 77 of the CPC. Namely, in accordance with this article, a defence counsel shall be appointed for a defendant who, because of his financial status cannot afford to pay the fees and costs of the defence counsel at the defendant's request although the reasons for mandatory defence do not exist if the criminal proceedings are being conducted in connection with a criminal offence punishable by a term of imprisonment of over three years, or where reasons of fairness demand so. In a situation where they cannot count on defence counsel to represent them "at the expense of the state", the defendants will find themselves in a position to choose whether to engage, in accordance with their own intellectual and educational capacities, in they will enter into an "equitable" duel with the public prosecutor or to engage the defence counsel. It is here that the key problem lies, because it is unrealistic to expect that even a lawyer who does not practice criminal law could be an equal opponent to the public prosecutor in an evidentiary duel, let alone a defendant, whose knowledge of the course of criminal proceedings and procedural rights guaranteed to him, is far more modest. At the same time, not only does such a legal solution put in an unequal position the defendant who does not have a defence counsel in relation to the public prosecutor, but it also openly discriminates against the defendants who are not poor enough to be entitled to indigent defence, but whose financial status is not good enough to be put in an equal footing with those for whom evidence is collected by the whole teams of top lawyer.[21]

The argument that the aforementioned extension of the boundaries of the mandatory defence would include a significantly higher number of defendants is valid, but it also carries an additional potential danger. Namely, it is not a secret that paying out the costs of mandatory defence has

judgment; 7) if proceedings for pronouncing a security measure of compulsory psychiatric treatment are being conducted against him – from the submission of a motion for pronouncing such a measure until the issuance of the decision referred to in Article 526 paragraphs 2 and 3 of this Code or until the ruling pronouncing a security measure of compulsory psychiatric treatment becomes final; 8) from the beginning of the negotiations with the public prosecutor on the conclusion of the agreement referred to in Article 313 paragraph 1, Article 320 paragraph 1 and Article 327 paragraph 1 of this Code, until the issuance of a court decision on the agreement; 9) if the trial is held in his absence (Article 449 paragraph 3) – from the moment of adoption of the ruling to hold the trial in his absence, to the adoption of the judicial decision on the appeal against the judgment.

21) M. Kolaković-Bojović, „The Right to Defence and Efficincy of the Criminal Procedure", *Zbornik Instituta za kriminološka i sociološka istraživanja*, 1/2013, 145.

been a major problem for the judicial budget in the past 15 years, so it is already easy to predict what problems can be expected. In the process of drafting the Law on Free Legal Aid, arguments could be heard in the public that one could also think about connecting the system of free legal aid providers with the needs of mandatory defence in the criminal proceeding.[22] An additional problem will be changing prosecutors' habits to "think" only about the incriminating evidence, and it is realistic to expect that the defendant and his defence counsel will regularly have to go through the procedure foreseen in Article 302 of the CPC.

The situation with availability of materials for defence preparation is much the same. Pursuant to Article 303, the public prosecutor is obliged to enable the suspect who has been examined and his defence counsel, within a sufficient time limit for the preparation of the defence, to examine case-file documents and view objects which will be used as evidence. In case several persons are suspects in connection with the same criminal offence, examination of case- file documents and viewing of objects which will be used as evidence may be deferred until the public prosecutor has questioned the last of the suspects who is accessible. Additionally, preparation of the defence implies unhindered access to case files, primarily evidence. For unclear reasons, the right of the defence counsel to have files copied or recorded, or to enable him to copy or record certain files, was left out, even though the ECtHR in the *Kamasinski v. Austria*[23] case took a clear view that the court was obliged to provide the defendant with access to all evidence, as well as the possibility to copy the case-files no later than filing the indictment, and that defence counsel may exercise the rights of the defendant.

Equally important as in the investigation (and we would dare to say the most crucial) is the importance of professional defence at a preparatory hearing and during the main trial. In the first of these two phases, the importance of the existence of professional defence is reflected in the nature of the preparatory hearing, as a sort of hearing for the planning of the further course of the main trial, while in the second, the role of counsel can be the decisive determinant of duration, both the main trial and the entire

22) See S. Bejatović/M. Kolaković-Bojović, (editors) "Free Legal Aid (*ratio legis*, scope and conditions for the application), Silver Lake, 2017.

23) Kamasinski v. Austria, No. 9783/82, decision of December 19th 1989.

criminal proceedings. Namely, respecting procedural discipline and avoiding the dilator tactics of the defence counsel during the main trial, could be equated by relevance with his role in cross-examination.

DEFENCE COUNSEL IN THE NEW CRIMINAL PROCEDURE: RESEARCH RESULTS

In order to objectively present role of the defence counsels, there was a need to examine their attitudes. We conducted the survey between them using the standardized questionnaire, for the period 2013-2015.[24] The survey was conducted in the four lower and four higher courts. The four lower courts were: The First Lower Court in Belgrade, The Lower Court in Novi Sad, The Lower Court in Kragujevac and The Lower Court in Niš. The four higher courts were: The Higher Court in Belgrade, The Higher Court in Novi Sad, The Higher Court in Kragujevac and The Higher Court in Niš. In this paper, we analyzed attitudes of the defence counsels. The results of the research of the public prosecutors and police attitudes were presented in the separate paper, as it is mentioned before. The sample included 154 lawyers. In accordance with the conducted research, the basic characteristics of their role in the criminal proceeding are as follows.

The largest number of questions relates to the conduct of an investigation in favour of the defence, but we did not circumvent the problem of engaging a professional consultant.

24) On the results of the survey about the main trial and cooperation between polcie and public prosecutor see: S. Soković, D. Čvorović, V. Turanjanin, „The Main Hearing according to the New Serbian Criminal Procedure Code: Empirical Research“, *Zbornik radova Pravnog fakulteta u Nišu,* 1/2017, 145-159; S. Soković, V. Turanjanin, D. Čvorović, „Cooperation between police and public prosecutor: law and practice in Serbia“, *Zbornik radova Pravnog fakulteta u Novom Sadu,* 2/2017, 337/352; S. Soković, V. Turanjanin, D. Čvorović, „Cooperation between police and public prosecutor in Serbia“, *Zbornik radova Pravnog fakulteta u Novom Sadu,* 3/2016, 843-861.

Table 1. Have you ever conducted an investigation (collected materials and evidence) in favour of a defendant?		
	Percentage	**Total answered**
Yes	73, 4%	113
No	26, 6%	41
Answered the question		**154**
Did not answer the question		**0**

Almost ¾ of the defence counsels in the observed sample collected evidence and materials for the benefit of the defendants. However, 26, 6% of the defence counsels remain, who in practice do not use this legal possibility. This can also be explained by the inertness of a certain percentage of defence attorneys. In addition, it is not excluded that in some cases there was no need to conduct an investigation by defence counsel. Then, it was noticed in the research that there were questions that the respondents avoided to give the answer to. However, this is not one of them, since all 154 respondents expressed their views.

Table 2. Have you ever talked to certain persons in the process of collecting material?		
	Percentage	**Total answered**
Yes, once or only a few times	32, 5%	50
Yes, often	42, 2%	65
Never	25, 3%	39
Answered the question		**154**
Did not answer the question		**0**

According to the CPC, the suspect and his defence attorney can independently collect evidence and material for the benefit of the defence, and for that purpose they can talk to a person who can provide them with data useful for defence and obtain written statements and information from that person, as long as they have his consent (Article 301). That written statement and information may be used by the defendant and his counsel during the questioning of a witness or test of the authenticity of his statement, or for issuing a decision to question a certain person as a witness by the pu-

blic prosecutor or the court. All respondents answered this question, with the expected almost equal percentage of answers. Namely, as it can be seen from the table, 25, 3% of counsels have never used the provided possibility to talk to certain persons as part of the collection of material. However, a large number of defence lawyers have, with 32, 5% of respondents having spoken to certain persons several times, and most of them (42, 2% of defence attorneys) often. This indicates that a large number of lawyers use the possibility provided by legal rules, which is to be welcomed. However, as it follows from the following table, this does not apply to obtaining written statements, since only 25, 3% of the respondents decided to undertake this step.

Table 3. Have you ever obtained written statements from certain individuals?		
	Percentage	**Total answered**
Yes	25, 3%	39
No	74, 7%	115
Answered the question		**154**
Did not answer the question		**0**

The data from Table 4 indicate that out of the 39 respondents who obtained written statements, 32 of them personally drew up a statement, while in a significantly smaller percentage (17, 9%), this was done by the person with whom the respondent spoke.

Table 4. If so, who made a written statement? You or the person you talked to?		
	Percentage	**Total answered**
I	82, 1%	32
The person I was talking to	17, 9%	7
Answered the question		**39**
Did not answer the question		**115**

One of the optional questions when talking to a particular person is whether that person has already been examined by the police or the public prosecutor. This question is directly related to the next one, where it is con-

sidered whether the defence counsel, if he has knowledge that a particular person has already been questioned by the public prosecutor or the police, still talks to that person. In the first case, the highest percentage of the respondents (60, 8%) first ask a certain person whether they have already been questioned, while, a smaller number of defence counsels does not raise this issue. However, regardless of the outcome, significant number of respondents undertakes such interrogation even in the event that they have previously been examined which is in any case in the interest of the defence and represents good practice. Questions posed by the public prosecutor or the police do not have to and should not be identical to the questions of defence, and given the somewhat different function of the defence attorneys in the new system of criminal procedure, it is certainly desirable for the defence counsels to undertake the examination.

Table 5. When, in the course of the investigation you are conducting, you are talking to certain individuals, do you first ask whether the person in question has already been questioned by the police or the public prosecutor?

	Percentage	**Total answered**
Yes	60, 8%	87
No	39, 2%	56
Answered the question		**143**
Did not answer the question		**11**

Table 6. If you are aware that the person has already been questioned by the police or the public prosecutor, do you still continue talking to that very person?

	Percentage	**Total answered**
Yes	82, 4%	117
No	17, 6%	25
Answered the question		**142**
Did not answer the question		**12**

The purpose for which defendants use information or statements obta-

ined by the person they interviewed is extremely important in criminal proceedings. When formulating the questionnaire, we set three specific purposes and a fourth option, which includes all other purposes in which the information can be used. Three specific purposes are: filing with a judge for preliminary proceedings when deciding on detention, filing with a panel in the examination of the indictment and submitting it to verify the credibility of the witness. Expectedly, the highest percentage of respondents (45, 9%) use the information to check the credibility of the witnesses, while a slightly smaller percentage of the information is used for other purposes. Then 22 respondents used statements and information when deciding on detention, and only 8, 1% in the examination of the indictment. Here, it should be taken into account that 19 respondents were not willing to give the answer to the question raised.

Table 7. For what purposes do you use information or written statements obtained by the person you are talking to?

	Percentage	**Total answered**
I file it with the judge for preliminary proceedings when deciding on detention	16, 3%	22
I file it with panel when examining the indictment	8, 1%	11
To check the credibility of the witness	45, 9%	62
in other purposes	39, 3%	53
Answered the question		**135**
Did not answer the question		**19**

The next two questions are about taking certain evidentiary actions. Namely, if the suspect and his defence counsel consider that a certain evidentiary action needs to be taken, they will propose to the public prosecutor to take it. In the event that the public prosecutor rejects the proposal for undertaking certain evidentiary action or does not decide on the proposal within eight days of the day of its submission, the suspect and his counsel may submit the proposal to the judge for the preliminary proceedings who issues a decision thereon within eight days. If the judge for the preliminary

proceedings grants the proposal of the suspect and his defence counsel, he will order the public prosecutor to undertake an evidentiary action and will determine a deadline for its conduct (Article 302 of the CPC). The data in the following table show that the largest number of defence counsels proposes taking certain evidentiary action to the public prosecutor (75, 2%), while a smaller number of respondents does not take the described step. We consider such a practice unjustified, as it will be difficult for the public prosecutor to take all the evidentiary actions, especially those that can be for the benefit of defendant. However, the particular issue is the fate of the submitted proposals. Namely, we set three possible answers: rarely, always and never, while leaving the possibility for a response that was not explicitly stated. As the data indicate, 23 respondents did not answer the question asked, while only 13, 7% of the respondents stated that the public prosecutor always adopts a proposal for taking certain evidentiary action. In the largest percentage of cases (52, 7%), the public prosecutor seldom grants the proposal of defence, while 33, 6% of the defence counsels stated that the public prosecutor never grants their proposal for taking certain evidentiary action. In the analyzed data, two defence counsels appeared who gave a response that was not explicitly provided, but did not explain their answer.

Table 8. Have you ever proposed to the public prosecutor taking some evidentiary action?

	Percentage	**Total answered**
Yes	75, 2%	115
No	24, 8%	38
Answered the question		**153**
Did not answer the question		**1**

Table 9. Have your proposals been granted by the public prosecutor?		
	Percentage	**Total answered**
Rarely	52, 7%	69
Always	13, 7%	18
Never	33, 6%	44
Other (please explain)		2
Answered the question		**131**
Did not answer the question		**23**

The engagement of a professional consultant is one of the novelties introduced into the legal system of Serbia by new changes in criminal procedural legislation. Probably for this reason, the data from the following table show the relatively low utilization of this procedural possibility. Namely, only 31, 1% of respondents have used this possibility in their practice so far, but we expect its significantly wider use in the future.

Table 10. Have you engaged a professional consultant in the proceedings so far?		
	Percentage	**Total answered**
Yes	31, 1%	47
No	68, 9%	104
Answered the question		**151**
Did not answer the question		**3**

III CONCLUSION

Reforming criminal proceedings based on traditional grounds is neither a simple nor short-term task. The first efforts reforming criminal procedure legislation of Serbia can be traced back at the beginning of this century, and Serbia has so far introduced three new Criminal Procedure Codes, one of which has never entered into force, with several amendments. In addition, extensive changes to the valid CPC are also announced, which could even represent a completely new legal text. Experience has shown that the relatively long *vacatio legis* does not lead to increased efforts of procedural subjects in familiarizing with new solutions. Since the results of each individual question from the questionnaire have already been explained and commented separately, there is no need to repeat what was said earlier. Although some solutions to the new legal text are subject to a reasonable criticism, this is not the reason to not use the existing possibilities. The results show that some solutions have not been fully implemented, but for the time being we see no need for their abolition. This is especially the case with a professional consultant. Certain solutions will certainly be the subject of legislative changes, but until then they should be used in the best possible way, in accordance with the law. The defence counsel remains the key assistance to the defendant in criminal proceedings, and therefore his powers and obligations should be widely set.

POLOŽAJ BRANIOCA PREMA ZAKONIKU O KRIVIČNOM POSTUPKU REPUBLIKE SRBIJE: NORMA I PRAKSA

Sažetak

Pravo na branioca u krivičnom postupku predstavlja jedno od fundamentalnih prava zagarantovanih okrivljenom nizom nacionalnih i međunarodnih dokumenata. Međutim, garantovanje nekog prava ne implicira istovremeno nepromenljivost položaja nekog subjekta u krivičnom postupku. Velike reforme krivičnoprocesnih sistema, poput one koju je preduzela Srbija pre nekog vremena, nužno povlače i promene u pravima i obavezama učesnika krivične procedure. Autori u radu raspravljaju o položaju branioca u krivičnom postupku, pri čemu, nakon uvodnih razmatranja, objašnjavaju ulogu branioca u sistemu tužilačke istrage u Republici Srbiji, nakon čega objašnjavaju rezultate empirijskog istraživanja sprovedenog među braniocima, koje je pokazalo koliko se advokati koriste novim rešenjima Zakonika o krivičnom postupku.

***Ključne reči**:* branilac, stručni savetnik, tužilačka istraga, Zakonik o krivičnom postupku Srbije