Republic of Macedonia

MINISTRY OF JUSTICE

STRATEGY FOR REFORM OF THE CRIMINAL LEGISLATURE

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A) REFORM OF THE CRIMINAL PROCEDURE

Abbreviations:

ECHR	European Convention on Human Rights
ECHR	European Court of Human Rights
EC	European Commission
EU	European Union
LPPO	Law on Public Prosecutor Office
LCP	Law on Criminal Procedure
LP	Law on Police
LFP	Law on Financial Police
LC	Law on Courts
CC	Criminal Code
MIA	Ministry of Internal Affairs
DLPPO	Draft Law on the Public Prosecution Office
NPAA	National Programme for the adoption of the acquis
UK	United Kingdom
UN	United Nationa
RM	Republic of Macedonia
USA	Unated States of America
CoE	Council of Europe
SFRY	Socialist Federalist Republic of Yugoslavia
FP	Financial Police
CA	Customs Agency of Republic of Macedonia

EXECUTIVE SUMMARY

2) Current state of the relevant sector

The reforms of the legal and criminal system are political, legal and societal priority for Macedonia today. The state of the judiciary is central to political and expert discussions and is the main obstacle to integration in the EU and NATO. Despite accepting contemporary theoretical paradigms such as fundamental freedoms and human and civil rights and the rule of law, the legal and criminal system is in a state of permanent crisis. The crisis does not only entail protracted and inefficient judicial procedures, but also articulates a general lack of trust in the quality and predictability of the judiciary, which causes erosion of the entire legal order. The sense of crisis is further enhanced by the inability of the judiciary to cope with typical transitional problems in the last fifteen years, such as: corruption, organized crime, providing legal security and protection of human rights and freedoms.

Now we seek a modern criminal procedure, which would respect human rights and freedoms, but would also be efficient. This does not mean seeking new specific procedural institutes, which are the critical points of the existing model, but re-thinking of the very foundations of the criminal procedure, as well as its objectives, values, type and structure. No extensive, systemic reforms have so far been attempted in Macedonia. The existing continental system has been adjusted by instituting fundamental rights and freedoms, which came as an international obligation.

3) Reform Objectives

2.1 Problems to be solved

Reforming the criminal system can only be successful if based on a clear and consistent reforms concept and supported by solid comparative and empirical research. Overwhelming reforms can be successful only if planned and conducted on the basis of rational and reliable methods of establishing and removing dysfunctional elements in the organization and work of the prosecutor, police and the judiciary. Macedonia needs essential systemic changes of the criminal procedure model, which is currently burdened with judicial paternalism.

The entire structure of the criminal procedure must be changed in order to make the criminal code compatible with the European criminal code and to be capable of combating organized crime. This implies not only changes in the legal and criminal procedures, but also changes regarding the authorization and organization of the main actors involved. Thus, the criminal procedure must be adjusted to the European trends and the police, prosecutors and courts will have a substantially different role to play in it. Most probably, the institution investigation/-tive judge will need to be replaced by a “freedoms judge” – with a significantly different function – instead of actively investigating the judge will only monitor/control the legality of the investigation measures with touch upon rights and freedoms, such as collecting evidence.

Apart from extensive changes in the legislation and organization, this would imply change of the mentality of the judges and prosecutors.

2.2 Wider Reform Objectives

The objective of this project is to modernize the criminal procedure and harmonize it with the European trends in the field and to improve the efficiency of the criminal legal system, especially regarding prosecution of heavy forms of crime such as organized crime, corruption, financial crime and human trafficking. Inefficiency in the criminal part of the legal system can be removed by redefining the role of the participants in the criminal procedure, institutional strengthening of the public prosecutor, defining priorities of the criminal policy, simplification of regular court procedures, application of shortened procedures and outside courtroom negotiations and agreements on the guilt and penalty.

The National Program for Adoption of the EU Acquis contains a larger structural reforms concept which would upgrade the efficiency of the criminal legal procedures. Without such structural reforms, recent legislative and constitutional reforms will be unsuccessful. The Strategy for Development of the Judicial System does not contain such activities, mostly due to lack of clear vision and appropriate societal consensus. This must be immediately amended, including the programme and financial aspects. Systematic and institutional reforms will also require certain financial and international expert support.

2.3 Specific Reform Objectives

In this spirit, the specific objectives of the project are the following:

- Preparation of consistent reform strategy for the criminal legal system.
- Acceleration of the criminal procedure
- Organizational and functional strengthening of the PP
- Preparation of proposals for new LPP, along with necessary amendments in the …… and other secondary legal and sub-legal acts.

Basic benchmarks of the criminal procedure reforms are the following:

- Application of the *opportunity* principle of criminal prosecution
- Promotion of outside courtroom agreements and simplified procedures.
- Abandoning judicial paternalism and transferring the burden of proof to clients.
- Providing active and managerial role of the public prosecution in the above procedure, including efficient control over the police.
- Abolishing court investigations and transferring those procedures to the PP.
- Reducing participation of jury-judges.

- Introducing a system of preclusions for certain procedural activities and measures against abuse of procedural authorities of the clients.
- Strict deadlines for reaching and writing down court decisions.
- Rationalization of the system of legal remedies.
- Implementation of the EU and CoE recommendations regarding criminal procedures.
- Creation of efficient public prosecution and establishing new organizational and managerial structures.
- Managing and cooperating with the police and other law enforcement bodies as well as foreign prosecutors.

2.4 Expected Results

The first step of reforms is conducting research in order to establish the real state, pressures and error sources in each stage of the criminal procedure. The next step would entail developing certain systemic solutions that would reduce the discovered problems and would strengthen the institutions. Based on this new concept, the criminal legal system will become more efficient and with enhanced capacities for fighting organized crime, thus also becoming more compatible with European standards and systems and successfully adapting to international cooperation practices in the field.

3) Hypotheses and Risks

3.1 Hypotheses

- Reforms must be approached with clear vision and plan. *Scientific analysis* of the state and ambitious yet realistic activities dynamics is indispensable.
- Successful reforms are possible only with *consistent reform concept* supported by solid comparative and empirical research.
- *Essential systemic changes* of the criminal procedure model, which is now burdened with judicial paternalism, are required.
- The work on new laws should be organized as a well-planned project with *clear objectives and obligations*. Foreign experts need to be engaged and several foreign laws in the field need to be translated.
- Drastic increase of public prosecutors is necessary in order to properly implement the new LPPO and LCPP. These new laws will increase the authority of public prosecutors in prosecution and will assume a more important role in the preparation and investigation of criminal cases.
- Changes in the legislation on which demands for institutional performances are based will improve institution strengthening process in the middle term.

3.2 Risks

- The relation between legislation making and institutional reforms is a complex one. Implementation problems are not endemic to countries in transition. Across the world, even well prepared laws are not always

successfully implemented in practice. Institutional strengthening demands time and resources. Adopting laws which are not implemented is in the best scenario only an inadequate start, and in the worst scenario a counterproductive exercise which undermines public trust in the rule of law.

- Past experiences with reforms indicate that everyday practices in the work of the police, the courts and the public prosecution follow unwritten rules and are difficult to change with administrative and legislative means. If new legislative solutions and organizational approach are imposed without appropriate preparations and realistic evaluation of the potential risks, the effort may result with inefficient procedures.
- Adopting foreign solutions from comparative law, without the necessary doze of critical thinking and knowledge of ones own strengths and weaknesses may cause a clash with the values of the domestic legal culture, which may ultimately lead to practitioners rejecting and ignoring the new legislative solutions. Previous reform experiences advocate a realistic and careful approach to proposing and undertaking systemic reforms.

4) Time Table – February 2007 – February 2008

1. Feb-March 2007 – Preparing an analysis of existing weaknesses
2. April 2007 – Comparative Study (Germany, Italy, Croatia)
3. May 2007 – Draft – Strategy for reforming the criminal justice system
4. June 2007 – Strategy for reforming the criminal justice system
5. July 2007 – Measures for institutional strengthening of the PP.
6. August – December 2007 – Draft-Law on Criminal Procedure (LCP)
7. January – February 2008 – Proposals for amendments to the LPPO, LP, LC and LFP.

5) What comes after

- Expert discussions on the Draft-Strategy
- Public discussions on the proposed laws.
- Governmental and parliamentary procedures.
- Implementation of the institutional and functional strengthening measures for the Public Prosecution (HR and space teams, training etc.)

2. BASIC FOUNDATIONS OF THE REFORM OF THE CRIMINAL PROCEDURE

1. Introduction

The first Law on Criminal Procedure in Macedonia was adopted in 1997 (Official Gazette 15/97). The main objective of this law was to implement human rights and freedoms into the domestic criminal-procedural legislation. This text was subsequently twice subject to change and amendments (Official Gazette 44/2002 and 74/2004). The first series of changes were of predominantly revisionist nature while the second had also systemic impact, shifting the focus towards better efficiency of the criminal justice system. Therefore, ever since the initial changes, there is a dilemma whether there is a balance between the tendency to be efficient and the tendency to protect human rights. The balance of these two tendencies is directly reflected on the conditions of the defendants in the procedure. Managing the position of the defendant is a fundamental question in every modern criminal procedure, which aims to correctly distinguish the guilty from the innocent and to device a just and legal punishment for the guilty.

Partial changes, gap-filling, partial answers to pressing problems and other 'first aid' practices to the text of the Law for Criminal Procedure can not provide lasting solutions for the above problems, especially since such changes often entail incorporating different and even random ideas about improving the law, stemming from the contingent interests of the social subjects at the time of the reforms. Therefore, there is a pressing need to revise the LPP at a systemic level and in accordance with the modern criminal policies in the countries in transition. Serious changes of any systemic law, such as the LPP, must result with a new, coherent and logically consistent law which in its clarity and precision fits the postulates of a legal state.

The second big reason behind systemic reforms of the criminal procedure is that there have been some changes introduced in the contemporary continental criminal procedure. On the one hand, with the very emergence of the 'mixed' type of procedure in the late nineteenth century a tendency of improved state of the defendant is notable. This tendency led to recognition of the right of the defendant on formal defence even before start of the court procedure (Germany 1964, Italy 1971, UK 1984, France 1993, former Yugoslavia 1967, will be referred to later). On the other hand, the initial structural focus has shifted from the stage of mail discussion to the stage of preceding procedure, while the procedural activities in the preceding procedure have shifted from the investigation judge and the public prosecutor to the police. With the establishment of modern criminal police in the nineteenth century, the states accepted the police as the most adequate state body for reaction against crime.

The above developments present a serious dilemma in front of all European legislators, not solely Macedonian or transition states' legislators: whether to revise the old procedural model by upgrading and adjusting it to the current criminal-policy needs or to introduce an entirely new model of

criminal procedure. These are the two options according to comparative law - the German legislator followed one the Italian legislator the other one, with the new LPPO of 1988. The French despite strong pressures from the experts community still resort to extensive and quite frequent upgrading the old model.

However, the rising consciousness of the necessity to protect human rights in the state repressive power mechanisms (primarily, criminal procedures) and the democratic governments efforts to prevent future wars on European territory all contributed to greater influence of international human rights provisions over domestic structures in these procedures. We shall not enter into theoretical discussions over the influence that /*international criminal procedure law',* established in the last fifteen years, has over national criminal procedure law. Yet, we stress the fact that specific segments of international law in today's globalized world serve as *legal sources* for every national legislator and directly affect his work.

As a member of the Council of Europe, Macedonia is bound by the two categories of international legal standards regarding the relations between the citizens and the state bodies of repressive power (with those accused of committing a crime as well as with victims of crime to whom the state needs to guarantee some rights). Those are standards based on 1) the judicial practices of the European Court of Human Rights (ECHR) following the provisions of the European Convention on Human Rights (ECHR) and 2) the resolutions and recommendations of the CoE, which, admittedly, are formally only 'soft law', but which logic morally obliges the member states. Besides, following the Stabilization and Association Agreement, Macedonia is also obliged to adopt the relevant legal provisions from the EC/EU *acquis communitaire*. We elaborate on each of these three categories of standards below.

First, let us present the third major reason behind the reform of the criminal procedure – it is the fact that all European legislators face the same challenges and criminal-policy demands – how to adapt the criminal procedure to the challenges of contemporary crime, especially its most dangerous forms, such as organized crime, trans-national crime and terrorism, while also ensuring respect for fundamental rights and freedoms and a fast and economic criminal procedure. Therefore, one can note the identical or similar measures that the different European legislators are introducing although coming from divergent legal traditions. Thus, in (Germany, Italy) states where the principle of legality of prosecution bounds the public prosecution to collect sufficient evidence before starting formal prosecution, more exceptions from this rule are introduced which allow the public prosecutor greater discretion of starting the procedure (just like in states where the principle of opportunity is followed such as England, Wales, Belgium and France). The public prosecutor is also tolerated when taking practical exceptions from the legality principle (Italy) in order to reduce the burden created by the inflow of new cases and to 'rationalize' criminal justice law.

However, ‘rationalizing’ implies frequent avoiding formal procedures and resorting to shortened forms of the procedure. Recently ‘rationalization’ has also come to include the consensual endings of criminal prosecution or practices of agreement between the public prosecutor and the defendant, or between the public prosecutor, the court and the defendant. This leads some to conclude that the penetration of consensual practices in the traditional continental criminal procedure, which was initially envisaged as a formal investigation in which the criminal event is ex officio examined and through which just and legal punishment is applied in the public interest, allows space for ‘re-privatization’ in judicial procedures and replaces public with private interests. Although this can be seen as beneficial, especially regarding efficiency concerns (for example the number of cases resolved only with preceding procedure has fallen below 10% of the overall number of cases). Yet, we must remember that the ‘reduction’ of traditional judicial procedures, including omitting the preceding procedure in front of the investigation judge, as a guarantee of respect for human rights and freedoms, might be damaging for the defence of the defendant. Commenting on the present discrepancy, some authors say how trying to better protect human rights and freedoms while also insisting on more efficient conducting of procedures, a situation in which legislators ever more often change national criminal justice legislation, has brought legislators across Europe in a situation of ‘permanent revolution’.

Therefore, resorting to comparative law, it is useful to see how different European laws fulfilling the disparate strivings of criminal policy solved the systemic issues of criminal procedure. This needs to be done before the priority and strategic decisions regarding the nature and the scope of the structural reform of national criminal procedure in Macedonia are adopted.

The above three reasons behind the systemic reform of the criminal justice procedure in Macedonia provide the frame for these *Basic Foundations*, which also tackle the normative foundations for the reform of criminal procedure law. This is done by presenting, in Chapter 1, the **legal situation in the order of criminal procedure in Republic of Macedonia**, with emphasis on the existing order of the preceding procedure. In Chapter 2 we present a **comparative overview of European criminal procedure law**, paying particular attention to German law which served as a basis for Macedonian law. The last part of Chapter 2 also presents observations about the legal foundations of these foreign solutions and possibility of adopting them in Macedonian national law. This can be used by the Macedonian legislator in approaching the legislative framework of the reform and setting the terms and deadlines for its implementation. Consequently, Chapter 3, proposes potential directions for the development of Macedonian criminal procedure law and the principles on which this reform will be implemented. We shall pay particular attention to the re-ordering of the preceding procedure by abolishing court investigation and enhancing the role of public prosecution, the manners and forms of accelerating the procedure, and finally, revising the main hearing and the judicial remedies system.

Chapter 1. The Legal Situation of the Ordering of Criminal Procedure in Macedonia and some related questions

1. Historical Development

The Macedonian Law on Criminal Procedure can be seen as a descendant of the Austrian *Starfprocessordnung* (StPO) of 1873, which was greatly influenced by the French *Code d'instruction criminelle* of 1808. This French code is seen as the model of the mixed criminal procedure in continental Europe, which is divided on two stages: the preparatory stage and the main hearing (and several control sub-stages). During the preparatory stage the investigation judge is the main actor who is expected to conduct the investigation him/her-self if there are grounds to believe that a crime has been committed by an adult person. Even if there is only a vague possibility the public prosecutor, with the assistance of the investigation judge and the police, should clear out the initial circumstances under which the crime took place. These activities, however, are not part of the formal criminal procedure and are referred to as 'pre-investigation' procedure.

The Austrian model entered Macedonia indirectly, through the Codex for Criminal Procedure of the Kingdom of Yugoslavia of 1929, whose effects were extended to Macedonian territory within the unitary state. After the World War II, Macedonia became a federal unit within Socialist Yugoslavia where in 1949 a new, heavily influenced by Soviet law, Law on Criminal Procedure was adopted. The investigation judge was abolished and the public prosecutor became the 'master' of the preparatory stage as well as the control phase, due to judicial remedies against the court decision. In practice, public prosecutors enjoyed great political power, although great part of their authority in the pre-investigative stage was transferred to the police. The division on pre-investigation and investigation stage was kept intact. The police was responsible for the pre-investigation stage while the public prosecution for the investigation stage of the procedure.

After the political break-up between Yugoslavia and the Soviet Union, the criminal legislation is revised and a new Law on Criminal Procedure is adopted in 1953 (ZKP/53). Drawing on the 1929 law, the new law re-instituted the investigation judge and limited the authority of the public prosecutor. In accordance with the liberal idea of division between criminal prosecution and investigation, the public prosecutor takes the initiative to start the criminal procedure and the investigation judge is responsible for deciding to start the procedure. This led the Yugoslav criminal procedure to a model in which the criminal procedure is the sole responsibility of the judiciary (*reines Gerichtsverfahren*) in order to strengthen the guaranteeing role of the judge in the process. Yet some elements of the previous system remained. Thus, court investigation was conducted only for hard criminal offences, for which over 15 years of sentence is served. For the rest of the cases the public prosecutor was to base his case only on the police evidence, so the solely the police was responsible for collecting evidence. Even the investigation judges could

entrust their procedural activities to the police. Thus, documents from the police investigation were treated as valid evidence in front of the court even though the defendant had no procedural protection. Therefore it is not surprising that the police became the decisive factor throughout the criminal procedure.

On the famous Brioni Congress in 1986, the Communist Party of Yugoslavia decided to conduct a thorough reform of the police, state security and the preceding procedure. Besides the general mistrust in the hypertrophied police, and especially the state security, the motivation for the reforms was strengthening the federal structure of Yugoslavia. The key element of the reform was the new model of the preceding procedure defined with the changes and amendments of the Codex for criminal procedure, called "Change 1967" which entered into force on January 1, 1968. Thanks to the rising consciousness and increasing democratization efforts, the role of the police was further limited and the status of the investigation judge improved by increasing his/her authority. The 1967 changes implied return to the pure investigation procedure led by the judge, who bar in several exceptional cases, can not delegate the authority to the police.

Thus, the results from the police investigations served only as a basis for the decision of the public prosecutor and could not be used as evidence in court. However the support for the judge from the police was secured: in case of possible delays the police could search persons and locations, to confiscate objects, to conduct examination and prescribe expert analysis. The other stages of the criminal procedure were not substantially changed by the 1967 Change, thus keeping the typical features of mixed criminal procedure, primarily the inquisitors' maxim seeking thorough engagement of the court in order to establish "complete and real truth" as the basis for the main hearing in court. All other institutes and rules were subjected under this primary rule, which ultimately fitted the political and ideological concept of the active role of the state in the political and social life. This concept was kept intact throughout the reform process of the criminal legislation in Yugoslavia in the mid-seventies when the Federal Criminal Law and the Law on Criminal Procedure were adopted (ZKP/77).

After the break-up of Yugoslavia, Macedonia initially inherited the Federal criminal legislation, and consequently, ZKP/77 as well. It own Law on Criminal Procedure Macedonia adopted in 1997, after lengthy preparations. This Law was amended first in 2002 by the Law on Changes and Amendments to the ZKP which operationalized the provisions of Amendment V of the Constitution of Republic of Macedonia, regarding the use of the languages of the communities in Macedonia.

The Law was more thoroughly reformed in 2004. The main objectives for the change, which included a third of the initial provisions, were the following:

- Acceleration of the procedure by setting short deadlines for decisions and improving the delivery/serving which caused great delays.
- Introducing special investigative measures for combating organized crime.
- Expanding and enriching the measures for ensuring defendant's presence during the procedure.
- Regulating arrest and its duration, as well as determining house arrest.
- Improving the position of the victim and re-defining the legal property demands.
- Accepting the concept for witness protection, as well as protection of collaborators and victims.
- Accelerated procedure – reaching decision without main hearing.
- Procedure against legal persons.
- Possibility for repeating the procedure on the basis of a ruling from the Human Rights Court in Strasbourg.

2. Present Situation

Bodies of Criminal Procedure

Courts

In Macedonian judiciary system the judiciary power is executed by basic courts, the Administrative Court and the Supreme Court. The basic courts rule in the first instance, and can be based as courts with basic authority and courts with extended authority. According to the Law on Courts (Official Gazette of RM 58/2006) within the frame of the basic courts with extended authority there will be specialized court departments dealing with specific types of legal disputes.

Basic Courts with basic authority for the territory on which they have been established are responsible of making first instance decisions on criminal acts and misdemeanours including criminal acts for which the law predicts a sentence no longer than five years, criminal acts for which the law stipulated are under the jurisdiction of basic courts, all types of misdemeanours except those for which the law stipulates fall under the jurisdiction of other state bodies or bodies with public authorization, as well as for appeals and complaints to the procedures for which basic courts are responsible.

Basic courts with extended authority are responsible for making decisions on criminal acts for which the law stipulates sentence longer than five years and criminal acts committed by underage persons, to conduct investigation and investigative actions for the criminal acts within their responsibility, to rule on cases concerning extradition, as well as to rule on appeals and complaints on the procedures within their responsibility and to

decide on procedures for international judicial assistance as regulated by the law.

Appellate Courts are established for the territory of several first instance courts. Appellate courts are based in Bitola, Gostivar, Skopje, and Stip. Appellate courts are responsible for making decisions on appeals against the decisions of the basic courts within their territory, to decide clashes of authority between different courts of first instance from within their territory and fulfil other obligation designated by the law.

The Supreme Court of Macedonia, based in Skopje, executes judicial power on the entire territory of Macedonia. It is responsible to make second instance decisions against the decisions of its councils, to make decisions of third and ultimate instance on the appeals against the decisions of the appellate courts, to make decisions on extraordinary judicial remedies against the enforced decisions of the courts and the decisions of its councils as designated by the law, to decide on clashes of authority between basic court from territories of different appellate courts and on clashes of authority between appellate courts.

Public Prosecution

Public Prosecution is the unique and independent state body responsible for prosecuting those who committees criminal and other criminal acts and fulfil other obligations as prescribed by the law. According to the current Law on Public Prosecution (Official Gazette of RM 38/2004) it is organized as Public Prosecution of Republic of Macedonia, higher public prosecutions and basic public prosecutions.

The public prosecutor is responsible of taking all necessary measures and legal means for discovering criminal acts and those who committed them and to direct the preceding procedure, to undertake all procedural activities within the limits of the public prosecutor function and to submit and represent indictments, to decide whether to undertake or continue criminal prosecution for those who committed criminal acts, to declare regular and extraordinary judicial remedies against court decisions, to look after consistent implementation of sanctions for criminal act and after the protection of the rights of persons under arrest and fulfil other obligations as designated by the law. In order to better fulfil the prosecution function, the public prosecution along with other investigation bodies and other relevant bodies and legal persons is responsible for discovering the criminal and other criminal acts and those who committees them. The public prosecutor directs the work of the authorized official persons in the Interior Ministry and in the other state bodies for taking necessary measures for discovering criminals and accomplices of criminal acts, preventing them from escape and discovering the leads and evidence, and has the right to ask the Interior Ministry and other state bodies to collect all information and to take other measures for discovering criminal and other criminal acts and those who committed them.

Within the Public Prosecution of Republic of Macedonia, a Unit for prosecution of organized crime and corruption is established. The unit acts for prosecution of criminal acts committed by a group of at least three persons which is active for a longer period of time in order to gain financial or other benefit and which has committed one or more criminal acts, as well as on criminal acts for which the law proscribes sentence of at least four years. The Unit is responsible to act in front of the relevant courts on the entire territory of Macedonia. The basic public prosecution are responsible to inform the Public Prosecutor of Macedonia as soon as they find out that a criminal act has been committed which falls within the area of organized crime and corruption, while the Public Prosecutor will decide on the necessary measures. The basic public prosecutors are under an obligation to cooperate with the Unit and to assist the work of its members, if necessary. The public prosecutor can ask for one or more authorized official person to be allocated to him for a specific time period during the preceding or the official criminal procedure, on the basis of better prosecution of criminal acts concerning organized crime and corruption and criminal acts for which the law proscribes sentence of at least four years.

Police

The Law on Police (Official Gazette of RM 114/2006) deals with police work, organization of the police, police authorization and rights and obligations stemming from the work relations of the staff of the Interior Ministry. The approach in modelling the law is based on police function, the Macedonian Constitution and laws and the human rights standards as well as universal values. The legal text is part of the police reform project dealing with public security.

The structure of the police is prescribed in the chapter “Organization of the police.” The approach is based on the de-concentration principle, abandoning the previous centralized model of police organization. Within the Interior Ministry, police work is conducted by the Bureau for Public Security, as a body associated to the Ministry. The Bureau is responsible for: conceptual planning, monitoring and analyzing of security and events that cause occurrence and development of criminality or threaten public security; coordination, direction and general and technical supervision of the work of the police organizational units; collecting, processing, analyzing, applying, evaluating, storing and erasing of data relevant to the work of the police; participation in certain complex tasks of police work; implementation of international agreements for police cooperation and other international acts related to police work; proposing standards of equipment and technical resources of the police; looking after the capability of the police to operate in complex conditions and under security threats, as well as other tasks as prescribed by the law (Art.15). The above concept is of crucial importance for the future work of the police and, therefore, it is necessary to be adequately understood, reflected in secondary legislation and implemented in the work of the Ministry.

For the purpose of performing police tasks requiring high levels of expertise, within the police and responsible for the whole territory of Macedonia, Central police services are established to perform tasks related to organized crime, crime techniques and tasks supporting the execution of other complex tasks. Within these central police services, a special Department for fight against organized crime is created, officially in responsible for preventing and discovering criminal acts committed by group of at least three persons which have been active for a certain period of time with the objective of gaining direct or indirect financial or other benefits, as well as for other types of criminal acts for which the law prescribes a sentence of at least four years. This Department also performs tasks related to discovering and preventing criminal acts of trans-national nature, as well as discovering groups that use violence and other types of pressure to enter legal economic activities and commit corrupt acts in order to achieve profit easier and avoid persecution.

The Department for fighting organized crime cooperates with and implements the direction from the Public Prosecutor and can also receive material or human resource support from the Sector for Interior and the Border Police (Art.18). The above provisions display a greater autonomy that the police possesses in the investigation procedure than prescribed by the Law on Public Prosecution (Official Gazette of RM 38/2004), which stipulates that the police should follow the directions of the Public Prosecutor and take all reasonable measures in the shortest time period. However, although theoretically the Public Prosecution should dominate the pre-investigation procedure, in practice the police has the predominant role. Even though the Public Prosecution functionally (by procedure) is superior to the police and should direct its action, the situation on the ground is different due to several reasons: 1) the police more operational, 2) passivity of the Public Prosecution, 3) insufficient information forwarded to the Public Prosecution by the police and other law enforcement agencies until the criminal case if filed, 4) administrative inferiority of those civil servant entitled to perform those activities to the staff in the Interior and Finance Ministries, upon which their careers depend, and 5) lack of human resources educated and trained to implement this law properly. This hierarchical dualism prevents the Public Prosecution from gaining greater operational power. Therefore, in the future **it must be considered some police forces to be placed under direct control of the Public Prosecution, which could also influence the development of their careers in the future.**

There are several Sectors for Interior on the territory of Macedonia, distributed according to the area, population size, the number of criminal acts and misdemeanours committed and the importance of the road network on the territory. These Sectors are responsible for: monitoring and analysis of the security situation and events that lead to occurrence of criminality; organization, coordination, direction and control of the work of the police stations; crime and prevention related tasks; immediate participation in the more complex tasks of the police stations; taking measures for protection of certain persons and objects; informing the public for specific parts of their work; as well as other tasks as prescribed by the law (Art.21).

Police cooperation is becoming a hot political issue, due to the fact that it is crucial for preventing and fighting organized crime. Therefore, special attention needs to be paid to police cooperation, especially in the regional context, including coordination of the work of the police and the public prosecution as well as with other national bodies (Slovene and Croatian experiences might be useful).

Defendant

In the criminal procedure, the defendant has a double role: as a procedural subject and as a source of information when establishing the facts in front of the criminal court.

a) Statements of the defendant as a source of information

Articles 210-216 of the Law on Criminal Procedure regulate how the defendant is interrogated. Primarily, the police can interrogate a person when sufficient grounds for suspicion that the person committed a criminal act exist. Macedonian Law on Criminal Procedure adopted the provision of the ex-Yugoslav LCP stating that the police can not interrogate the citizens as "defendants, witnesses or experts" so these examinations are of only *informal* nature or are the so called "informational talks."

One of the problems with the above procedure is that the "sufficient grounds for suspicion" principle is rather indeterminate and it is at the discretion of the police officers to decide when this criterion is fulfilled. Therefore, this can easily be abused an the police can treat the citizens as potential suspects thus violating their rights and freedoms without precise legal frame regulating its actions (for example regarding involuntary presence in the police station, whose duration can be prolonged through abuses of several provisions of police work and could also sometimes include violence.)

On the other hand, an "informative talk" of the police with the suspect can not result with a statement of the defendant that can be used as evidence in front of the criminal court. Therefore the note with the statement must be separated from other evidence, even though often, in the cognitive sense, that is the most valid source of information for the facts important for the criminal procedure. Thus, a new solution must be found by legal reconstruction of the concept of "defendant" in the new law.

By introducing the material concept of defendant, as defined by the ECHR, the person that the police and other crime prosecution bodies treat as a probable criminal, would immediately acquire the basic rights of a defendant, regardless of whether there is a formal criminal procedure started against him or her. By doing so, the state gives the person that possibly committed the crime (who can be called a "defendant") an equal position in the dispute about his guilt even before the formal criminal procedure has started. The manner of receiving his/her statement, which would have a construction element of an accusatory type with minimal defence rights, would

legitimate this statement as valid criminal court evidence. Yet, another open question remains for the legislator: proscribing the procedural measures by which the police would *guarantee* the defendant the basic rights of defence.

Art. 210-216 from the Law on Criminal Procedure apply also for summoning and examination of persons for whom opening a criminal procedure is demanded. The person summoned would teach the investigation judge in the sense of Art.3 and Art.210 of the LCP (Art.152, p.4), would proscribe the *guarantee form* and the *contents* of the examination. Regarding the former, the judge must list the accusations against the person and reasons behind the suspicion against him or her. After that, the judge needs to inform the person that he/she is not obliged to state his defence neither to answer any questions and that he/she has the right of attorney. Failure to do so must be sanctioned. During the examination, it is forbidden to use measures that affect the will of the defendant to express him- or her-self (Art.210 LCP). During the defendant's examination on the main hearing, the same provisions will apply as during the examination of defendant under investigation (Art.309 LCP).

2) The defendant as a procedural subject

The defendant is a party in the criminal procedure and the LCP guarantees the right with which he/she can pursue his/her interests in accordance with the law and in the logic and function of the defence. These rights include the following: to know the subject of the charge, to be able to defend him/herself or with an attorney of his/her choice, the right to face the evidence of the charge, the right to propose his/her own evidence, the right to see the transcripts, the right to judicial remedy etc. A crucial question here is whether the law allow the defendant to admit his guilt and immediately take responsibility for the criminal act. However, Macedonian LCP provides that despite the defendant's confession, the court must seek to collect and present other evidence. If the confession is clear and complete, and supported by additional evidence, further collection of evidence will be pursued only on plaintiff's demand (Art.215 LCP). This is in accordance with the accusatory procedure, according to which the court does not have a proactive role in raising and running the procedure, whilst is also in the spirit of the legal and material principles of rehabilitation of the perpetrator: if the Criminal Code acknowledges the rehabilitation right of the perpetrator, according to which a person tried and convicted of a certain criminal act has served the allocated sentence, after its completion it has the right not to be regarded as a perpetrator. Thus the court must acknowledge the wish of the perpetrator to be rehabilitated at the moment of confessing the guilt, not only after the parson had served their sentence. This an important, strategic issue which must be resolved by letting the defendant know he/she is allowed to terminate the procedure by confessing guilt and thus, precluding further costs and delays.

The current Macedonian LCP (unlike the Croatian LCP, for example) does not allow the defendant at the beginning of the main hearing to state what status he claims under each of the points of the charge (Art.320/337 p.3

of Croatian LCP), and in case he/she pledges guilty the hearing to be reduced to discussion concerning the sentence only (by limiting the right to appeal Art.363/380 p.7 and Art.365/383 p.4 of the Croatian LCP). This is a good solution to be adopted in Macedonia and to be also expanded by introducing modalities through which the public prosecution and the defence could agree on the defendant's confession of guilt before the main hearing for certain criminal acts, which would significantly increase the number of cases closed before/without main hearing and appeal procedure.

Victim of Criminal Act

The LCP mentions the "aggrieved" side on several occasions. This concept traditionally refers to a person whose rights or interests have been violated by the occurrence of a criminal act, so he/she is paid amends for the damage through an additional trial, adherent to the main, criminal procedure. Art.305 of the LCP proscribes that at the beginning of the main hearing of the criminal procedure the judge should inform the aggrieved persons who have not submitted amends demands that they are entitled to do so through the criminal procedure.

Unfortunately, the legal and property demands of the aggrieved are rarely resolved through the criminal procedure, despite the court's obligation to do so except in cases where deciding on amends would "cause significant delays in the criminal procedure" (Art.96 LCP). In practice, this exception has become the rule. This legal solution allows the aggrieved person to appeal to the decision to the criminal procedure on the grounds of the costs of the procedure, while not for the property demands and for directing to a civil court.

In practice, the concept "aggrieved" is interpreted widely and usually includes the majority of victims, who thus gain the right to participate in the criminal procedure as a sort of assistance to the prosecutor. Theoretically, the victims should not be included in the preceding procedure. On the other hand, when the public prosecutor decides to drop the criminal charge and informs the aggrieved of it (Art.144 LCP), the victims only rarely file a subsidiary charge and have only slight chance of winning it. Moreover, public prosecutors rarely ever contact the victims, unless the victim approaches the prosecutor. The prosecutors are believed to take into consideration the interest of the victim.

The above suggests that the LCP provisions related to the aggrieved have, in practice, been substantially derogated. These provisions need to be questioned and revised so that the victim would receive not only normative support, but also a guarantee that the victim will be recognized and listen to as a person who suffered an injustice and therefore has the right to see that justice has been satisfied through the criminal procedure. In particular, procedural methods are required that even during the preceding procedure would: 1) provide a special treatment to the victim by the prosecution bodies in order to guarantee a minimal threshold of examination to victims who suffered from violence and provide a frame of statement which would prevent their further victimization, 2) provide psychological and social assistance to

the victim by experts, and 3) provide amends for the damage suffered by special state funds.

The Croatian example is illustrative: in Croatia the aggrieved has the right to judicial assistance as a subsidiary prosecutor (Art.60 p.2 of Croatian LCP) however, has no right to free attorney assistance in the adherent procedure. Besides, there is no psychological and social assistance for the victim, and in general, active protection from secondary victimization is missing. There are legal provisions for procedural protection of "vulnerable" witnesses (Art.238 a, 238 d, 252 from Croatian LCP) – especially the highly vulnerable witnesses, such as children or mentally disabled persons, can contribute with their statement on a video tape (Art.238, 239, 254 from Croatian LCP), but no such provisions exist for victims, not even for those of heavy violence, such as rape victims or human trafficking or family violence victims (unless children). There are no provisions protecting adult victims from secondary traumas.

Steps of Criminal Procedure

The course of the criminal procedure is proscribed in the second part of the Law on criminal procedure. The law mentions the following stages: preceding procedure, charge/indictment, main hearing and procedure on judicial remedies.

a) The preceding procedure includes the *pre-investigation procedure* (criminal charge, authorization of the bodies responsible for the pre-investigation procedure and special investigation measures) and *investigation*. The decision on the criminal charge and pre-investigation procedure are meant to determine whether the initial suspicion regarding the criminal act was justified. Therefore, public prosecutor and the police led by him/her collect evidence in an informal manner. The public prosecutor, along with those official persons authorized by the law, takes all necessary measures.

During the preceding procedure, state bodies, institutions performing public services and authorities and other legal persons are obliged to report criminal acts of which they are aware or have been informed. Every citizen is also under obligation to report criminal acts (Art.140 p.3 LCP).

The criminal charge is submitted to the responsible public prosecutor orally or in writing. If charges are submitted to the courts, the Interior Ministry or a prosecutor not in charge, those are obliged to immediately submit the charges to the public prosecutor in charge (Art.141 p.3 LCP).

If there are sufficient grounds to suspect that a criminal act has been committed, the Interior Ministry is required to undertake all necessary measures to discover the person who committed it, to prevent them from escape or hiding, to discover and secure the leads on the crime scene and other objects that can serve as evidence (Art.142 p.1 LCP). For the above purpose, the police can demand necessary information from the citizens, can stop, demand personal documents, do search and inspections, to divert and

limit the movement of persons and vehicles, issue pursuits/persecutions for persons, notice for property (Art. 142 p.2 pts.1-7 LCP). The Interior Ministry can invite persons for informative talks, however the invited person can only be brought against his/her will if there is a court decision and only if it is obviously avoiding answering to a correctly served invitation, which warns him/her of the possibility to be brought to court against his/her will. The LCP now also contains a provision which allows the persons against which some of the above measures have been undertaken, during a period of 30 days to demand by the court to examine the legality of the measures (Art.142 p.9 LCP).

When making a decision on a criminal charge and in cases where there is insufficient information to establish firm grounds for decision, the public prosecutor, in person or through other bodies, can ask the police to undertake additional measures and collect additional information necessary for discovering the criminal and the details of the act (Art.144 p.2 LCP).

If the perpetrator is unknown and the public prosecutor finds additional investigative activities necessary, the judge needs to authorize those. The same applies when exhumation of a corpse is required. If the investigation judge does not agree, the council will decide upon the measures (Art.22 p.6 LCP)

Based on the results from the pre-investigation procedure, the public prosecutor can decide whether to raise immediate charges, to file demand for investigation or to cancel the prosecution.
Court investigation is also part of the preceding procedure. It is headed by an investigation judge. Court investigation is conducted on the demand of the public prosecutor when there are grounds to suspect that a certain person has committed a criminal act. In cases concerning criminal acts for which at least five years of sentence is served, court investigation is mandatory.

The investigation judge terminates the investigation when he finds that state of fact has become sufficiently clear. After terminating the investigation, the investigation judge submits the transcripts to the public prosecutor, who based on the information contained, within 15 days submits a proposal to continue the investigation, raise an indictment act or make a statement dropping the charges (Art.167 p.1 and 2 LCP). If within 90 days the investigation is not completed, the investigation judge is obliged to inform the president of the court about the reasons behind the delay. The president of the court should then take appropriate measures towards completing the investigation (Art.168 LCP).

The systemic problem of rearranging the preceding procedure concerns three issues: a) the division of the procedural functions of the indictment, defence and running the procedure on different procedural subjects, b) differentiation and integration of the elements of the preceding procedure and c) the applicability of the preceding procedure results as evidence in the courtroom.

a) Division of the procedural functions of the preceding procedure. As already mentioned, only the public prosecutor can start and conduct present criminal procedure of mixed type. That is, the court starts and conducts the criminal procedure on the demand of its prosecutor. Therefore, Art.151 of LCP states that the public prosecutor can demand opening a criminal procedure. However, once the public prosecutor submits the demand and the criminal procedure starts, the judge takes the initiative *propio motu* and takes all necessary measures for successful running of the criminal procedure (art.154 LCP).

Therefore, the fundamental idea of the law is the criminal procedure to be started and run by the court and the court procedure to be the first stage. This separates the functions of investigation and court persecution: the prosecutor is expected to make the initial step and demand the opening of criminal procedure (function of persecution) and the court runs the investigation against the identified suspect or defendant. From a historical perspective of the nineteenth century legislator, all that took place before the start of the court procedure was not regarded as part of the criminal procedure and thus, was not regulated with special legislation. Today, however, the investigation judge needs to participate in the pre-investigation procedure as well, which is run by the public prosecutor who decides what measures should be undertaken. Thus, for example:

- If the perpetrator is unknown, the judge will ask the police to take certain measures. However, if the public prosecutor believes that some measures should be taken by the investigation judge, he/she can demand that from the investigation judge (Art.148 LCP).
- Reaction to the challenge of organized criminality is only recently introduced in the law (as Chapter XV of the LCP, titled “special investigation measures” Art.142b-142gj) and is the most difficult case to reconcile to the original model of criminal procedure. Those provisions allow the court to authorise the usage of a set of measures that “temporarily limit certain constitutional rights of the citizens” such as secret overseeing of the activities of the citizens and infiltration within criminal groups. Those measures have become popular internationally, as part of the fight against organized crime. It is not quite clear why those measures are regulated within the pre-investigation context rather than as part of the investigation, regardless of the fact that the defendant can not be informed about the use of special measures because of division of procedural functions between the public prosecutor and the investigation judge on the contrary could follow the basic legal model.

Furthermore, the situation of the investigation judge vis-à-vis the public prosecutor has deteriorated. A rising number of judges get used to fulfilling all the public prosecutor demands and implement all measures required from them. The public prosecutors, on the other hand, tend to take the leading, decision-making, not only preparatory, role in the pre-investigation procedure: Art.42 of LCP gives the public prosecutor the task to take measure necessary for discovering perpetrators and criminal acts prosecutable ex officio. In accordance with the above approach, Art.141 of LCP states that all criminal charges should be submitted to the public prosecutor. Moreover, Art.144 of

LCP allows the public prosecutor to ask the police to take certain measure only when he/she is not capable of taking them himself. In those extraordinary cases, the police are limited regarding the measures it can take according to the prosecutor's demand and needs to inform the public prosecutor about the measures undertaken within 30 days. Thus, the public prosecutor is the *dominus litis* of the pre-investigation procedure.

The police also have extensive prerogatives in the pre-investigation procedure. The Law on Police states that the police are responsible for prevention of criminal acts and misdemeanours, discovering and arresting the perpetrators and undertaken all other necessary measures as prescribed by the law (Art.5 p.1). In line with this provision, Art.142 of LCP, when there is grounds to believe that a criminal act has been committed, assigns the police responsible for discovering the perpetrator, collecting evidence and all relevant information. This, however, is not the limit of the police investigation which is continued *ex officio*, which in practice the public prosecutors do not find problematic. It is rather unclear in which cases the public prosecutor should run the investigation. Even the provisions of Art.142 p.2 to 7 of LCP transfer extensive authorities to the police, such as undertaking "other necessary measures and activities" which makes it obvious that the law addresses the police as the state body responsible for conducting the investigation.

All of the above causes unclear division of the functions of the state bodies in the preceding procedure. From the three possible answers to the question: "Who is responsible for the preceding procedure?" – the police, the public prosecutor or the court – none would be an incorrect one.

This conclusion is also supported by the regulation stated in Art.148 of LCP which allows the public prosecutor to ask the police to conduct certain investigative activities in case "the perpetrator is unknown" - which is very similar to the case when the public prosecutor can ask the police for clarification of the "grounds for suspicion" when he/she can not do so himself. However, the public prosecutor can also ask the investigation judge to take certain measures "when the perpetrator is unknown" and it is at his/her discretion to choose who to ask for assistance since the law does not mention any criterion for this.

b) Differentiation and integration of the elements of the preceding procedure follows the division of the functions of its actors: the police, the public prosecution and the investigation judge. The preceding procedure was initially divided on two stages: first, discovering and arresting the perpetrator of a criminal act and collecting evidence, which was entrusted to the executive bodies, and second, finding evidence which can be used during the trial, entrusted to the judiciary. This division, however, has proved inapplicable in practice and is largely abandoned. On the one hand, the work of the police for discovering and collecting evidence was stretched through the entire preceding procedure. On the other hand, the court was reduced to only an "evaluator" of police work, thus neglecting the other more essential elements of criminal prosecution. Thus, considering the above, we can safely conclude

that the existing Macedonian system of preceding procedure, in which all subjects involved perform investigation and persecution tasks in a similar way, does not clearly differentiate between the tasks of the police, the public prosecutor and the judges.

This is best illustrated by the fact that in practice it has become difficult to differentiate between the pre-investigation procedure and the court investigation. It has become a routine for the investigation judge to follow the public prosecutor's instructions during the court investigation. Although according to the law the investigation judge can undertake investigative measures *proprio motu* that does not always happen, not even in obvious cases like when a witness has pointed to another potential witness – the investigation judge would not examine the other witness but will return the transcript to the prosecution and wait for "further suggestions".

Such situation makes the difference between the pre-investigation activities and the investigation a mere formality: the pre-investigation activities should be conducted by the public prosecution, but are instead performed by the police; the investigation should be independently run by the investigation judge, who instead only follows the public prosecutor's instruction, who in turn repeats what the prosecution received from the police. This has taken the practice away from the initial idea of the continental European legislators. The original point of the court investigation was to limit the influence of the public prosecutor in the procedures against an identified perpetrator, so that to prevent, in the liberal model, one of the parties (the prosecutor) to dominate of the other (the defendant), which is why in the XIX and XX century court investigation the judge was expected to act ex officio, not waiting for instructions from either of the two parties (prosecutor and defence). The consequences are obvious: no need of court investigation as a separate form of the preceding procedure and for specialization of the judges in performing investigative activities.

The existing model is redundant and inefficient: the legally relevant facts are established by the police, then the investigation judge and finally the court. It would be sufficient if the preceding procedure is focused only on the gathering of information and evidence required for the decision about criminal prosecution, while the main hearing to be focused on making a merit decision based on the principles of immediate and contradictory evidence. **By introducing clear and separate roles for the police, public prosecution and the courts, the reform should reject those contradictions. The reform should also include the Law on Police, which regulates the work of the criminal police.**

c) Applicability of the preceding procedure results as court evidence.

The LCP has the tendency to set the legal foundation for police investigation measures and activities (which is in accordance with the Constitution) but also to proclaim the results from these not valid as evidence. As already mentioned, the police have the right to invite persons and collect their statements, but only to investigate them informally, not in the *legal* capacity of witnesses, defendants or experts. The law also allows the police,

based on the collected information, file the criminal charge, which lists all the evidence and contains the material evidence gathered, but must not include the statements from the citizens.

Therefore, the statements of the citizens for the police need to take a procedural form of a statement of defendant, witness or expert. Compared to the other European legislation, this law is too strict in this sense. Therefore, any aberration from these strict provisions must be accompanied with appropriate guarantees that the police would respect the rights of the citizens and the balance of just procedure would not be violated.

To summarize, the solution of the above systemic problems of the preceding procedure is making the public prosecutor a *dominus litis*, who would raise and conduct the preceding procedure with the sole purpose of deciding whether to start an indictment act against a certain person in front of the relevant court. The police (within the Interior Ministry) would be functionally – not organizationally – inferior to the public prosecutor and would assist him/her in collecting evidence and discovering and ensuring presence of the defendant. The judge would not investigate the state of fact on his own initiative, but would act primarily as a judge – a guarantor of human rights and freedoms in the measures of procedural enforcement, and in extraordinary cases as an evidence collecting judge, but exclusively on the demand from the public prosecutor or the defendant. This would exhaust the preceding procedure, and after its termination the criminal procedure would start with indictment, control of the indictment act and possible agreement between the prosecution and the defence in front of the court. **This new structure of the preceding procedure would be based on a reduction of the present inquisitory elements and expansion of the accusatory (partisan) elements in a manner in which – following the standards originating the ECHR practices – would make the two balanced while the roles of the procedural subject would become clearer. The preceding procedure would not be of inquisitory-accusatory type anymore, but a "partisan" type of procedure.**

2) **The main hearing** is the central part of the criminal procedure (Art.279 to 339 of LCP). In the main hearing, based on the political, constructional and functional principles (publicity, oral expression and immediacy) a decision is made regarding guilt or innocence and for the use of legal and just punishment. Considering the main hearing is public, the questions regarding the quality and expeditiousness of it are often reflected in the media and daily politics. As a rule, sensational cases are selected for public discussion, which promote the interests of political and other interest groups, but not cases which display the need for discussion of the substantial questions concerning the quality of the criminal judiciary.

Systemically, the present outlook of the main hearing is a result of a compromise between the elements of the accusatory (partisan) and of inquisitory type, established as a mixed type of criminal procedure by the end of the XIX century. In this type of criminal procedure, primacy is given to the inquisitory maxim by giving the president of the council the right to examine

the defendant in order to get a statement which can be used as evidence in front of the court (inquisitory elements). In addition, the systemic changes that had taken place, made this stage the dominant stage, thus leading the theoreticians to believe that the main hearing has turned into a control stage of the procedure, when the veracity and reliability of the evidence, previously collected by the police or the investigation judge, is being checked. This can be seen in the French of Dutch system, where during the main hearing only the records from the previous procedural stages are read and evidence is only immediately inferred.

Apart from the above mentioned systemic question regarding the increased party autonomy throughout the entire criminal procedure, the main systemic question about the main hearing is whether the existing model, which emphasizes the role of the judge in the evidence procedure, and the inquisitory maxim (see Art.314 p.6 of LCP authorizes the president of the court to provide and infer evidence not presented by the parties), should be preserved. (See Art.314-329 of LCP that proscribe that the president of the council chairs the main hearing, examines the defendants, infers evidence, decides upon the evidence suggestions of the parties, reads the records of previous statement of the defendant, witness and experts and ex officio determined that certain witnesses and experts would be examined.) Alternatively, the accusatory type can be adopted, where the burden of procedural initiative and supervision of proof are with the parties and are conducted according to the principle of *contradiction*.

When deciding on this question, one must keep in mind that introducing pure accusatory elements would not be possible because the main hearing is not conducted as a dispute between parties in front of a jury and a neutral judge, who must remain passive due to psychological features of a neutral court, but is conducted in front of a mixed court, where the council is responsible for its decision and therefore, has to posses at least some minimal cognitive tools for establishing the factual foundation of the legal decision. This implies that the systemic reform of the main hearing can not abolish the present inquisitory elements, but only reduce them to an acceptable degree.

Comparative law show that those degrees vary across different states. For example, in the Croatian case the examination of the defendant, experts and witnesses is a responsibility of the parties, but the president of the council is allowed to ask additional question for the sake of clarity, as well as to provide additional evidence, not presented by the parties (Art.312 p.4 and 236 p.1 from Croatian LCP). Other solutions are also possible, for example limiting the authority of the president of the court to inferring evidence only beneficial to the defendant (as in the English law).

From a functional perspective, the main hearing is divided on separate successive procedural stages, of which the president of the council is in charge: preparations for the main hearing (Art.271-178 LCP), beginning of the main hearing and reading of the indictment act (Art.303a-307 LCP), examination of the defendant (Art.308-313 LCP), evidence procedure of the

hearing (Art.314-328 LCP), changes and amendments to the indictment act (Art.329 and 330 LCP), final speeches of the parties (Art.331-336 LCP) and reaching and declaring the verdict (along with a written version of the verdict distributed to the parties and the other procedural subjects (Art.337-349 LCP)).

Regardless of the decision about the future systemic outlook of the main hearing, some issues need to be reconsidered: should the preparations for the main hearing be adjusted to the different procedural situations (for example when the court already possess the confession of the defendant and when it does not); should the president of the council be relieved from the administrative obligations of summoning the parties, witnesses and experts and providing evidence; should the president of the council be allowed during the preparations for the main hearing to demand re-consideration of the grounds of the indictment act; should the defendant and the attorney be first allowed to state their stand on the indictment after the first reading and only after they have rejected it the floor to be given to the prosecutor; should the examination of the defendant be so divided that there is a clear difference between statement that can be used as court evidence and statements as answer to the indictment (as it is in the Croatian law); should the strict objective and subjective link between the verdict and indictment and the obligation of the public prosecutor to change the factual description of the act if the evidence suggest a different criminal act from the original, be kept, or to replace it with accusatory elements which disregard the rigorous identity of the indictment and verdict, but respect the grounds of the indictment in the suspicion that the defendant committed the act described in the indictment act, which the prosecutor can not drop and must run the risk of unclear proven every time when based on the facts in the indictment act a convicting verdict can not be reached.

It would be wise to also reconsider the provisions regarding the reaching and proclamation of the verdict and the distribution of the written version, in order to accelerate the whole procedure and guarantee the defendant a trial within reasonable time period. The constitutional provisions about the right to appeal to the verdict preclude major reductions of the court's obligation to structurally justify the verdict. However, when formulating the new provisions, the foreign experiences of breaking the set procedural deadlines by the court would be sanctioned as grave violations of the provisions about criminal procedure, could be taken into consideration.

3) The procedure on judicial remedies includes regular (Art.350-387 LCP) and extraordinary judicial remedies (Art.388-415 LCP). In the section on regular judicial remedies the LCP: 1) introduces the extensive right of the defendant to appeal against the verdict (and solution) on the grounds of the set of authorized persons, on the grounds of deadline for appeal and its prolongation with return to the previous condition if it has not been respected, in respect to minor demands regarding fulfilling certain formal necessities for

the appeal by the defendant rather than the public prosecutor; 2) in a simple and clear manner determines the categories of reasons for appeal within the frame of significant violations of the criminal procedure, incorrect and insufficiently set factual condition and violation of some norm of the material criminal law; 3) efficiently determines the manners of reaction of the appeals court on the established existence of reasons for appeal, by allowing predominantly cassatory and exclusively revisionist authorizations in respect to the verdict, which would refute the appeal; and 4) guarantees the minimal rights to the parties in case of contradictory examination of the appeal in front of the higher court. Thus, one can safely claim that in Macedonia the regulation of the judicial remedies is in accordance with constitutional right of the citizens to appeal to criminal procedures (Art.13 of the Constitution of RM and art.2 of the VII Protocol of the ECHR), which is a reflection of the wider constitutional values of justness and equality in front of the law.

The appeals stage of the criminal procedure is a section that has been subject to least changes, both in earlier regulation in former Yugoslav law and the subsequent LCP of RM, and can thus presents a coherent and stable image of the appeal as a *unique (universal), bilateral, suspension and devolutionary judicial remedy*. Therefore, the reform of the procedural criminal law should be focused solely on reconsidering certain practical concerns which do not affect its physiognomy. For example: whether do reduce the scope of absolutely significant violation of the provisions of the criminal procedure on verdicts with no legitimate reasons behind the facts and evidence; whether to reduce the list of appeal reasons that the secondary court examines ex officio; whether to better specify the limits of the re-examination of the primary verdict by the higher court in cases where only part of the verdict is disputed; whether to expand the domain of prohibitions on reform *in peius* of all types of court decisions refuted only by the defendant's appeal; whether to specify the cases when *beneficum cohaesionis* applies, etc.

From the systemic question, the only important one is that concerning the negative consequences of the cassation system – the possibility of multiple abolishment of the primary verdict for the same criminal case, which in some cases can lead to substantial delays and even to final failure of the trial, which de-legitimizes the judiciary on the eyes of the public. The possibility for multiple abolishment of the primary verdict stems from the too wide (and imprecisely determined) authorization of the appeals court to use cassation in stead of revisionist authorization. These wide authorizations of the president and the members of the council are not compensated by increased contradiction of the meeting of the appeals court, nor with the obligation in case after the repeated primary court verdict there is another appeal to conduct the hearing and change the primary verdict if necessary.

Chapter II: Comparative analysis of the legislation on criminal procedure in several European countries and the effects of the different procedural solutions

1. General remarks on the European systems of criminal procedure

Modern European legislation on criminal procedure can be divided into several groups according to different criteria. The classic division between the different European systems is between the common law system, on the one hand, and the civic or European continental model on the other. Until recently, socialist criminal procedure legislation existed side by side with these two basic groups. Today, the differences between the two basic models are not as evident as they used to be. Hence, this division is not as significant as it used to be. Today, it is much more important to examine systematically and carefully which contents have the importance of a milestone, and which institutions despite their differences in structure are intended for the realisation of the same tasks. As a result, for this analysis, significant grounds for division are the criteria concerning the period of adoption of a legal source, the type of procedure and the structure of the rules.

The first criterion is the period of adoption of a legal source on procedural rules. On this basis, European legislation can be divided into three groups. The age of the source of the criminal procedure is a dominant feature of European systems. In a large number of European countries, the legal sources based on the systems from the beginning of the 20th century are still in force. Such old legal sources are still in force in England and Wales; the Criminal Procedure act in Scotland dates from 1887, the French *Code d'instruction criminelle* dated 1808 is in force in Belgium and Luxembourg; Ley *de enjuiciamento criminal* dated 1882 is in force in Spain; in Germany the *Strafprozessordnung* dated 1877, while in the Netherlands the slightly younger *Wetboek van Strajvordering* from 1926.

There are only a couple of fully new codified sources in the European Union member countries. The most important are the Greek Criminal procedure Code from 1950, the Portuguese Criminal Procedure Code from 1987 and especially the Italian Criminal procedure Code from 1988. In France, the cradle of the European continental procedure, the Criminal Procedure Code has been significantly reformed in the course of the past century, with the most significant changes adopted in 1993 and in 2002. Nevertheless, the system remained faithful to its foundations modelled in the *Code d'instruction criminelle* from 1808 and its legal form from 1958.

The biggest novelties in the criminal procedure take place foremost in the countries of the "second" Europe. In the last decade, the European transitional countries, unlike the previously mentioned countries, have become a true laboratory in which new structures of the criminal procedures have been put in place. In the 21 European transitional countries numerous systems of criminal procedure have been established in which the most significant novelties are precisely in the design of the preliminary procedure.

Some of these countries, nevertheless, were not undergoing transition in the literal sense of this word. The procedural law in former East Germany disappeared with the including of this country in the legal system of the Federal Republic of Germany. Kosovo since 1999 has been under the administration of the UN and despite the radical reforms of the criminal procedure it also does not represent a case of a transition of the criminal procedure law literally. The legal system of Bosnia and Herzegovina in the area of criminal procedure is especially complicated.

Although the transitional changes in the area of the criminal procedure in each new European country are an important expression of its newly acquired independence, it is important to emphasize that a very small number of these countries in the initial period completed the reforms through a radical break up with the former socialist laws. Such example is the new procedural legislation of the Republic of Albania which introduces the Italian system of criminal procedure with adjustments primarily of organisational nature. The second example is the Law on Criminal Procedure of the Brcko district of the Federation of Bosnia and Herzegovina since 2000, a new accusation system created with combination of separate elements from the former Yugoslav procedure with elements of the accusation system of some American states. A movement towards the accusation model has been made in Bulgaria in 1999. The temporary Code of Criminal Procedure of Kosovo of 2003 is also a new accusatory procedure with many elements of the former Yugoslav mixed system, a hybrid solution typical as a result of the international community efforts in the area of the former Yugoslav country.

The other European transitional countries at least in the first phase of the changes did not head for a radical break up, but prioritised the removal of inconsistencies with the basic sources for human rights and harmonisation with the new constitution.

Russia adopted a new criminal procedure in 2001. It signifies a definite break up with the 1960 Code of Criminal Procedure, which was in force more than 40 years. This reform followed a couple of years after the 1997 procedural code of the other big European transitional country – Poland. This code introduced a completely new guarantee structure with a set of modern solutions, some of which even went to far. As a result, the Polish legislators with the 2000 and 2003 reforms aimed to establish the necessary balance between the newly introduced rights and the necessary efficiency of the criminal procedure.

In the initial period after their separation, the Czech Republic and Slovakia went on the road of gradual reforms maintaining the solutions of the procedural law from 1961. This law, as most of the procedural laws of the former Warsaw pact was adopted following the adoption of the Law on Criminal Procedure in the USSR based on the famous *Foundations of criminal procedure* since 1958 and served as a model for organisation in the countries of the realist socialism.

In the countries of the former Yugoslavia in the initial period of the changes a large number of new laws were enacted based on the former Yugoslav Law on Criminal Procedure from 1997 (Bosnia and Herzegovina in 1997, Croatia in 1997, Macedonia in 1997, Slovenia in 1998 and Yugoslavia in 2001).

In some former USSR members like Ukraine and Lithuania, the laws of the old structure of 1961 are in force. These laws in the course of the last 50 years underwent numerous changes and amendments especially in the period of obtaining independence. In the other countries, the reform process was faster and as in Estonia and Lithuania, after the initial reforms of the socialist law, new codifications have been adopted.

Following these changes, the region of the transitional countries becomes an area in which the biggest number of novelties in the contemporary European criminal procedure law appears. This is especially valid for the preliminary stage of the procedure, which as a separate area of the criminal procedure is connected with political changes. Therefore, in point 2 below, we will examine at length the systems of the preliminary criminal procedure in Austria and Germany, These countries developed the criminal procedure in the second half of the 19th century, which served as a model for the subsequent Yugoslav law, from which the current Law on Criminal Procedure in Macedonia is derived. Afterwards, the two countries abolished court investigation (Germany in 1974, while Austria in 2004). Both of them assigned the investigation in the preliminary procedure to the flexible cooperation of the police and public prosecutor's office and paid special attention to the position of the victim in the criminal offence and have mechanisms which enable large number of cases against known perpetrators of criminal offences to be resolved without a trial in the main hearing.

The following, second, criterion for delineation of the rules according to which the criminal procedure takes place is the existence or non-existence of a separate systematic source of the criminal procedure rules. In the group of the economic most developed European countries, some countries such as Denmark do not have the separate source of criminal procedure at all. Sweden exclusively has the preliminary procedure as a sui generis criminal procedure, while the main stadium is the sole civil or criminal procedure.

The third criterion for division of the valid systems of criminal procedure is the source of procedural legislation. In European countries, there are differences between the systems of written and (predominantly) common law (England, Wales, Scotland, and Ireland). Still, in these countries, there are a large number of written rules with reference to the preliminary procedure.

The structure of the procedure, as a fourth criterion divides the accusation and inquisition model – the second as a reformed mixed form is known as the European continental model. This division is very important for the examination of the preliminary procedure. Historically, namely, the main feature of the inquisition as an investigation procedure was the dominant

importance of the preliminary procedure, i.e. the investigation, quite opposite to the situation in the accusation model.

There is almost no modern European system of criminal procedure without features of both models. This is a result first of all, of the influence of the two common general components of the European systems of criminal procedure: internationalisation and constitutionalisation, but is also due to the necessary cooperation in the area of combating transnational crime.

Internationalisation in the area of the criminal procedure implies first of all, introduction of the international concept of human rights in the criminal procedure including the legislative and applicative level. The national system of criminal procedure in every European country must be harmonised with the European convention for protection of human rights and with other European legislation on human rights. This goes also for the application of the provisions on criminal procedure guaranteed by the European court of human rights. The internationalisation of the criminal procedure influences the national system in a specific manner: less upon its basic profile (e.g. the accusation or inquisition model) and more upon the structure of certain key processes or institutions.

In addition to the above mentioned direct way, internationalisation is expressed in an indirect, although not less significant manner. In the European area, namely, ongoing is a process of approximation and harmonisation of the national systems of criminal procedure with the purpose of developing and facilitating mutual criminal legal cooperation. It is also demonstrated through the determining and publishing of the position on separate problems and issues in numerous resolutions, and currently in the recommendations of the Council of Europe and international gatherings on which separate issues are discussed. There are a number of significant recommendations in relation to the preliminary procedure (Recommendation R (80) 11 on custody pending trial; R (85) 10 on interception of communications; R (94) 12 on the independence, efficiency and role of judges, R (95) 12 on management of criminal justice; R (95) 12 on management of criminal procedure; R (97) 13 on intimidation of witnesses and the right of defence; R(2000) 10 on the role of the public prosecutor in the criminal justice; R(2000) 11 on the guiding principles in the fight against organized crime; R(2001) 10 on the European police code of ethics and others).

European criminal and legal cooperation in its contemporary form is both widely used and developed according to the forms of actions in line with the frequent contacts, as an important area of relations between the European countries regulated with a set of international agreements.

In the European Union the area of criminal trials is extensively examined and the separate procedural institutions in the member states are regulated with framework decisions and guidelines.

The constitutionalisation in the criminal procedure in its largest part overlaps with the process of internationalisation. Still, in relation to the former, the influence of the constitutional provisions upon the national source of criminal procedure is more indirect. The constitutional arrangement primarily contains provisions on the human rights in relation to the criminal procedure and the conditions of their limitation. In this manner, organisational provisions crucial for the position and area of work of the criminal procedure organs are set, essential for the enforcement of criminal procedures in a country.

2. The system of criminal procedure in Germany

2.1. Sources of criminal procedure law

Pursuant to the German Constitution of 1949 (*Grundgesetz*), the states (*Bundeslander)* do not have legal competences in the area of criminal law and procedure, thus, the complete criminal legislation in Germany is at the federal level. The main source is the Law on Criminal Procedure (LCP, *Strafprozessordnung)* since 01.02.1877 (in force since 01.10.1879). Germany ratified the European convention on human rights in 1952 (the Convention has only the power of a law). The LCP adopted at the end of the XIX century has been subject to numerous changes appropriate to the political and societal conditions of certain periods. From these changes we emphasize the ones from 1975 and 1987 when a consolidated text was adopted (*Neubekanntmachung*). Nevertheless, this law has also been subject to changes and amendments.

A second important source of German criminal procedure legislation is the Law on Courts (*Gerichtsverfassungsgesetz*), also from 1877, republished in 1975, that among other things regulates the competence of the courts and the state prosecutor's office (competence, staff, internal organisation, appointment of judges - members of jury). The introductory law in the Law on Courts provides judicial control over administrative measures of the institutions involved in the criminal procedure: this specific procedure is subsidiary to the legal remedies defined in the LCP. Finally there is the Law on Judges (*Deutsches Richtergesetz*), which defines the principles and modes of performing the judicial obligations.

The Criminal Law from 1871 (*Strafgesetzbuch*) contains regulations relevant for the criminal procedure (for example provisions on the acts defendant upon the proposal of the injured, provisions on becoming obsolete). The Law on the Courts for Youth (*Jugendgerichtsgesetz*) determines the special procedural laws and sanctions for juvenile crime perpetrators and younger adults (14 to 21 years of age) Some provisions from the Law on Litigation Procedure are applied in criminal procedures when stipulated by the LCP (for example provisions on measures for seizure).

Professional responsibilities, ethics and duties of the prosecutors are defined in the federal Law on Prosecutors (*Bundesrechtsanwaltsordnung*). The Law on Police is in the competences of the individual states, but there is a federal law in relation with the federal office for crime (*Bundeskriminalamtsgesetz*).

2.2. The police and the criminal judiciary

The German constitution stipulates that the organisation of the security and police forces is in the competence of the state, while it reserves the possibility for creating central bodies, such as the border police and the state security for the federal government. Still, the cooperation between the federation and the state been ensured in the area of police through the Federal Office on Crime.

The police of the federal states also have two categories of staff with different competences: “investigators of the public prosecutor” (*Ermittlungspersonen der Staatsanwaltschaft*) and the rest. All the police members can make arrests or check identity, but only the investigators have further authorisations form actions in procedural coercion in emergency cases (like search, deprivation of items, taking blood etc.)

The State (public) prosecutor’s office (*Staatsanwaltschaft*). Besides the office of the federal public prosecutor (*Bundesanwaltschaft*) and the special institution attached to the federal court (headed by the main federal public prosecutor (*Generalbundesanwalt*) and whose competence is limited to the criminal prosecution of certain criminal offences against the state (*Staatsschutzdelikte*) and certain serious criminal offences in the cases of special importance, the criminal prosecution is in the competence of the public prosecutor's office of the state. The federal Minister of the Judiciary is the superior of the main federal public prosecutor. The latter is superior to the federal public prosecutors (*Bundesanwälte*), but he/she does not have the competence upon the public prosecutors in the federal units. Each state has its own public prosecutor’s office which is subjected to the Ministry of the Judiciary in that state. The public prosecutor’s office is organised hierarchically and in a monocratic way.

At the head is the main public prosecutor (*Generalstaatsanwalt*) on the level of the high state court (*Oberlandesgericht*). The criminal prosecution is run by the local public prosecutor’s offices which are affiliated to the state courts. The main public prosecutor is subjected to the Minister of the Judiciary in the state and is the only higher functionary in the public prosecutor’s office and performs duties in the different courts of the state. In 2003, there were 5156 public prosecutors in Germany t(without the so called service prosecutors [*Amtsanwälte*] which appear before the service court (*Amtsgericht)* and are not lawyers, this they manage the most simple forms of minor punishable acts, so called breaches (*Vergehen).*

For the fight against the separate types of crime, special prosecutors (*Sonderdezernenten*) are appointed, and there are also offices for special criminal prosecution (*Schwerpunkt-Staatsanwaltschaften*), primarily for crimes in the area of drugs, economic crime, wine production and ecological crime.

The legal status of the separate public prosecutors, which are civil servants, is ambivalent: on the one hand, they belong in the judiciary, and on the other hand, their administrative hierarchy in the executive indicates that they do not have independence in decision-making as the judges. The public prosecutor is linked with the directions (which usually refer to the criteria for evaluating the existence of a criminal offence and the criteria for evaluation of the presence of guilt) from the Minister of the main public prosecutor. On an individual level, the superior public prosecutor can direct the public prosecutor to decide on a case in a specific manner or he can remove him/her from working on a specific case at any time. Further bureaucratic factors are also present, such as the obligations for reporting, supervision and disciplinary responsibility, fulfilment of qualifications as a condition for promotion or even the rules of professional ethics, which can be considers as means of indirect supervision and influence.

There are two authorities for criminal prosecution in the country, which do not make indictments, but just inform the competent public prosecutor: *Zentralstelle in Ludwigsburg* which investigates the Nazi crimes and the *Zentrale Beweismittel- und Dokumentationsstelle* in the office of the main public prosecutor in Braunschweig, which collected evidence on the criminal offences perpetrated by the East German state agents.

Before the courts, the first instance criminal cases are decided by the service court (*"Amtsgericht"*), in which the sentences are passed by an individual judge or a council consisting of a professional judge and two judges, members of the jury. Then, the state court ("*Landgericht")* decides with its two types of Councils - *kleine Strafkammer* and *große Strafkammer* (it can have three special forms as a jury court as a council for state security and a council on economic crime) or the higher state court (*Oberlandesgericht*), but only in cases of terrorism or serious political crime. There are around 690 county courts. There are also special juvenile courts. The federal Supreme Court (*Bundesgerichtshof*) never decides in first instance cases.

The German judges are independent and are appointed for life according to the German Constitution and the Law on Judges. The judge can be dismissed only in cases determined by law. The hierarchical control of the court administration is performed by the president of the court, who is under the control of the state Ministry of the judiciary. This control must never influence the judicial activity as disciplinary responsibility may be imposed against the judge to a degree that it does not influence his/her independence.

2.3 The steps of the first instance criminal procedure

The state (public) prosecutor or the police initiate the preliminary procedure (Vorverfahren) depending on the manner in which the information on the criminal offence was acquired. In theory, preliminary investigations (*Ermittlungsverfahren*) are conducted by the public prosecutor so as to examine the grounds of suspicion of the act and the perpetrator, in accordance with the requests set by the principle of legality of the criminal prosecution. In practice, the criminal charges are received and decided upon by the police, which sends to the public prosecutor the final report which combines the statements and the collected evidence.

After the investigation is completed, the public prosecutor decides whether to reject the charges to cancel the procedure or to submit an indictment to the competent court. The case then enters into an inter-period of prosecutions (*Zwischenverfahren*) which serves to protect the innocent from public trial. The court where the main hearing would take place decides whether this “”inter-procedure” will be enforced. Before a decision on this is made, the indictment has to be delivered to the defendant. The court decides upon it *ex officio*, so it can ask additional evidence, to discontinue the procedure or to order the defendant to be put to a trial according to the submitted or the altered indictment.

The main hearing is held in accordance with the principle of transparency, verbenas, directness, contradictorness, and free evaluation of evidence. Nevertheless, the hearing is dominated by the president of the council or the individual judge who has a duty in determining the truth. The probative hearing is in his hands and not in the applicants or the defendants, although in undertaking new actions the court must provide *equality of weapons* between the defendant and the public prosecutor. In accordance with the principle of directness, the court must show all the evidence in the presence of the defendant and the public prosecutor, allowing them to participate in the determining of the facts and to influence the court (which bears the burden of proof in the German case) to derive or collect the evidence. As a rule, no proof derived outside of the main hearing can be used as a basis for the sentence.

Audio visual recording of the statement of the witness in the preliminary investigation and presenting of such a recording is allowed only if necessary to avoid direct and serious threat for the witness. The examination of a witness can be substituted with the minutes of a previous statement in the cases of an absent or remote witness, death, mental misbalance of the witness or agreement of both sides for reading of minutes. The statement of third persons given before the prosecutor or the police can be read at the hearing only with the approval of the public prosecutor, the defendant’s lawyer and the defendant him/herself only if the person has died or it is impossible to hear him/her in the near future.

As regards the charges for less serious criminal offences in the competence of the state court (*Landgericht)* quicker procedures are available, especially the procedure for issuing a criminal order (*Strafbefehlsverfahren*).

2.4. Function and objectives of the preliminary criminal procedure

The preliminary procedure in Germany has the objective to examine whether the criminal offence can be assigned to the suspect and if this is the case – how to initiate criminal prosecution. It serves the public prosecutor as a provider of information in order to determine whether to prosecute or to reject the charges. Besides, one of the main aims is the preparation of the indictment. Due to the specific structure, as already explained, the presentation of the evidence starts from the beginning at the main hearing. Therefore, in Germany there is one repetition of the proving of facts. This means that the deliberating court has numerous reasons to investigate the factual situation. The preliminary procedure serves for providing evidence for the main hearing only secondary. This construction, nevertheless, does not influence upon the rights of the defendants and the issue of ensuring their presence at the trial. Besides, it is sometimes necessary to provide for deprivation of the property benefits acquired by a criminal offence with measures of sequestration and seizure.

2.5. The selective role of the public prosecutor

Contrary to the principle of legality of the criminal prosecution, the German public prosecutor has wide legal possibilities to revoke the prosecution or to cancel the procedure in accordance with the criteria for purposefullness. He usually uses these possibilities in the preliminary procedure. Firstly, the public prosecutor can inform the person that pressed criminal charges that the case in question is defendant upon private suit. (*Privatklage)*. The private prosecutor can then initiate prosecution only after an unsuccessful attempt of conciliation before the special authority. Then, in the case of criminal offences defendant *ex officio*, the public prosecutor can revoke the prosecution conditionally or unconditionally. Unconditional revoking is possible in several cases and it implies the end of the procedure without any consequences for the defendant. The German LCO provides for this in the following situations:

- In cases with minor guilt and no public interest for criminal prosecution (art. 153 paragraph 1 from LCP). In general, this provision is applicable for all minor criminal offences (breaches) for which a prison sentence of less than one year or a fine has been stipulated. Prior to making such a decision, the public prosecutor must obtain approval from the court, but after 1993, in cases where the consequences of the act are insignificant, this is not necessary ;

- In cases where the defendant participated in the conciliation between the victim and the perpetrator and/or compensation was paid to the victim (art. 153-b paragraph 1 from LCP and art. 46 of the Criminal code). In this case, positive influence of the perpetrator is warranted, i.e. making efforts for repairing the damage. For revoking of charges, the court assent is necessary.

- In the procedures against juveniles where education was offended, the juvenile participated in the conciliation procedure for cases of minor criminal offences in relation to drugs, when the fault of the juvenile is negligent and there is no public interest of the prosecution and acquitting from prosecution from political reasons, including the cases of extraction. (art. 153 – c/d, 154 –b from LCP).

- In procedures against persons that have performed a criminal offence against national security and were then repentant (art. 153-e from LCP). The possibility of acquitting the case in the interest of the investigation as it existed under the so called Law on Key Witnesses form 1990, and which was originally planned to be in force by the end of 1992, but has been extended a couple of times - expired (automatically) at the end of 1999. The Law stipulates that the acquittal in certain circumstances can be approved for key witnesses in cases of terrorism and organised crime. In the course of a decade when this law was in force it was used only in several cases.

Besides the unconditional, the German LCP provides for conditional acquittal from the criminal prosecution. In this case, its effect is enforced after the defendant fulfils the imposed conditions, i.e. the temporary acquittal becomes permanent. On the material side, the conditions have the legal character of an informal punishment and their imposition is allowed only if the major subjects of the procedure – the court and the defendant agree.

Types of “conditions at the disposal of the public prosecutor’s office against adult perpetrators are:

- Orders for compensation payment to the victim
- Transaction fines
- Community work orders
- Conciliation orders
- Alimony orders

Similar measures are available in the area of juvenile justice, where the prosecution can be acquitted in the case of a juvenile perpetrator, who admits having performed a criminal offence and if criminal prosecution seems unnecessary in the light of the fulfilled conditions. The *conditions* which have legal nature of educational measures for juveniles, unlike the adult perpetrators – are determined by the juveniles’ court on the basis of a proposal from the public prosecutor. These measures consist of various warnings, orders for community work, making efforts for conciliation of the victim and the perpetrator, driving lessons etc.

The prosecution acquittal in the case of **less serious criminal offences related to drugs** are possible if the prescribed punishment is not longer than two years and the defendant agrees to go to therapy and rehabilitation.

It can be concluded, that in Germany there is an evident trend of extending the authorisations of the public prosecutor both in the area of initiating and conducting the preliminary procedure, and in the completion of the case on the basis of purposefulness of the criminal prosecution and agreement with the defendant about the use of para-criminal sanction with approval from both the court and the defendant.

2.6. Completing the procedure without a main deliberation

If the public prosecutor has submitted a indictment, the court can always complete the procedure with the assent of the public prosecutor and the defendant on the basis of art.153 paragraph 2 and article 153-a from the LCP which provide basis for cases of application of the acquittal from prosecution according the principle of purposefulness. In addition, the public prosecutor has the possibility to formally suggest sanctions with a criminal order for certain minor criminal offences, where a concrete punishment for the perpetrator can be adopted (art. 407 from LCP) involving a fine or a probationary prison punishment up to one year and other measures such as confiscation, taking away the driving licence up to two years etc.

If an objection is not submitted, the criminal order has the same implications as a court sentence, i.e. the sentence pronounced is included in the criminal record. Statistics shows that in some of the federal states, in the last couple of years around 75% from all passed sentences and more than 80% of all fines are pronounced with a criminal order, indicating that the criminal sanctions pronounced as a result of the main deliberation have become an exception.

A consequence from this development is that the majority of perpetrators formally sentenced have not been faced with the judge. Instead, the public prosecutor took this role in the trial. This development, up to a large extent is a result of the pressure of the increased number of cases. Due to limited resources – number of public prosecutors – which unlike the number of cases – has not increased, the public prosecutors have extended the possibilities of using discretionary decisions in resolving cases. Even before the introduction of art. 153-a form the LCP in the mid 80s of the last century, the public prosecutors in practice formulated the boundaries of this discretionary norm.

2.7. Functional competences of the police and the public prosecutor's office in the preliminary procedure

The division of competences between the public prosecutor's office and the court as well as between the public prosecutor's office and the police is precisely determined by law. According to the LCP and the Law on Courts, the public prosecutor is at the head of the procedure in all investigations. Although conducted by the police, all the investigations are conducted at the responsibility of the public prosecutor. However, although according to the law the police assist the public prosecutor, in practice, the police conduct the investigations.

The police intervene or at its own initiative undertake various activities and measures for discovering and obtaining evidence or facts, i.e. it intervenes in accordance with the guidelines from the public prosecutor. The police has the responsibility to enforce initial actions, for example to ensure that the evidence are maintained on the spot. The federal office for crime (*BKA)* provides support at the federal level, *ex officio* it conducts investigation only in a limited number of criminal offences, such as terrorism or international organised crime.

For some coercion measures, for which a court order is necessary, the public prosecutor and the police may instruct a measure or to issue an order in the case of emergency, but after a short period, the measure has to be confirmed by a judge.

The police do not have selective authorisations. As soon as the investigation is completed, all the records without delay have to be delivered to the public prosecutor, as the only one who decides whether there are enough evidence for criminal prosecution or not.

The authorisations of the public prosecutor in the preliminary procedure are wide, as already explained: he is in charge of investigations, registers charges and statements of the injured, initiate and conducts criminal prosecution, guides police investigations and instructs certain coercion measures in emergencies etc.

Without a court decision, the public prosecutor and the police can photograph the defendant and to take his fingerprints, to determine the identity, to instruct the capture of a person and to instruct temporary arrest. For some coercion measures for which court order is needed the public prosecutor and even the police can instruct measures or issue an order in the case of emergency.

In accordance with law, the public prosecutor must be impartial and objective i.e. to examine the indictment and the alleviating facts (the legal obligation to seek the material truth). At least in theory, the public prosecutor

belongs to the criminal judiciary and has not a status of a party in the procedure. The LCP stipulates that the public prosecutor can submit legal remedies favouring the defendant. In relation with this authorisation, the public prosecutor protects the legality, even in relation with the court's decision making.

In the course of the preliminary procedure, the choice of the experts and the decision on the number of experts is made by the public prosecutor. After the changes of the LCP in 1975 the position of the investigation judge has been abolished with the purpose of unlimited authorisation of the public prosecutor. Today, the judge (who cannot be the deliberating judge in the case) can intervene in the preliminary procedure only upon the request of the public prosecutor to issue an order for procedural coercion measures where the law strictly demands. So, depending on the level of intruding in the private sphere of the defendant, some coercion measures can be instructed only by the judge, i.e. issuing of a arrest and pre-trial detention order, temporary accommodation in a mental hospital for surveillance, order for molecular and genetic research, technical surveillance of the private premises of the defendant, temporary taking away of the driving licence or temporary ban to perform duty.

The intervention of the judge is limited to the surveillance of the legality of the coercion measures which the public prosecutor can instruct against the defendant. These are measures which require court order, but in the case of emergency, the public prosecutor or the police can instruct the measure. This category of measures refers to the body search of the person, taking away of objects, computer search, seizure of mail and interception of communications, video recording and audio tracking of private communications of the defendant outside of his home or premises with technical equipment, search, control of the road traffic and the use of undercover investigators.

2.8. Measures for ensuring the presence of the defendant

The police officer (or the citizen present during the criminal offence) can arrest the perpetrator in a situation when the latter's identity is unknown and there is a risk of escape. The public prosecutor and the police officers can undertake all the measures for discovering the person, for whom a founded suspicion of a criminal offence exists, including placing the suspect in police detention of 12 hours. If this is not the case, the person can be arrested only on the basis of the order issued by the judge. The orders enforced by the police. The following day, at latest, the suspect must be brought to the judge who informs the next of kin to the suspect, continues with the examination, and decides whether to keep the arrested person in pre-trial detention.

The pre-trial detention is subject to the principle of proportionality. It can be revoked at the request of the public prosecutor; the judge is obliged to respect this, since in the preliminary procedure the public prosecutor has the main say. The detained person can suggest releasing with a guarantee or can

file a complaint against the pre-trial detention before the trial. The basis for the detention is examined *ex officio*, first after 3 months if the defendant doesn't have a lawyer and he has not asked for releasing with a guarantee or filed a complaint; then after 6 months, the check is conducted by the *Oberlandesgericht* every 3 months. In principle, the detention can not last longer than 6 months, but the *Oberlandesgericht* can extend it every 3 months. In the course of the examination in detention, the public prosecutor's office or the judge have to inform the defendant that he/she has the right to an attorney of his/her own choice at any point in time.

2.9 Procedural right of the defendant in the preliminary procedure

The German terminology in relation to the defendant uses the term *Beschuldigter* (suspect) in the investigation after the initiating of a procedure *Angeschuldigter* (defendant), and *Angeklagter* (defendant) after the beginning of the main deliberation. The procedural rights of the defendant are not outlined in a separate chapter of the LCO. Some of them are not even mentioned in the LCP, but have been determined by the criminal court or the federal constitutional court upon the principles of rule of law. These are the right to silence and the right of the person not to incriminate him/herself (art.6 paragraph 3 from ECHR).

The defendant has the right to consult an attorney of own choice in any phase of the procedure (after he informs the attorney regarding the prosecution against him). When examination in the preliminary procedure takes place, the presence of the attorney in the examination the judge conducts is mandatory, but can be ruled out if the judge deems it dangerous for the success of the investigation. The presence of an attorney is optional when the public prosecutor conducts the examination. Although the attorney does not have the right to be present at the examination from the police, the statement of the defendant given in the absence of his attorney can not be used in court if the criminal prosecution authorities have prevented the contact between the defendant and the attorney.

One cannot choose more than three defence attorneys at the same time; the defence attorney cannot represent more than one person charged for the same criminal offence. The lawyer can act as a defence attorney only if he fulfils the criteria applied to the service of the judge. Although the defence attorney has a public function as part of the judiciary, he is released of judicial control in his procedural acts; the court can dismiss him only in extraordinary circumstances.

The assistance of a defence attorney is obligatory only if for example the main deliberation takes place in the *Landgericht* or before a higher court, if the person is charged for a serious criminal act (crime, *Verbrechen)* or if the person is deprived of liberty in an institution on the basis of a court order for three months.

Defence attorneys have numerous procedural rights, like for example unlimited access to the defendant in pre-trial detention and after the investigation, right of unlimited access to the records. They also have the right of participation in any investigation act which demands the presence of the defendant. The defence attorney must be informed of the investigation acts administered by the judge and has the right to conduct an investigation upon personal initiative.

The defendant has the right to be present in the course of the search of the premises – or if absent – has the right to be presented in the course of this action, and he can also ask a written information with a detailed description of the search and a list of items which have been handed over to the public prosecutor as evidence.

In the course of the examination in the preliminary procedure, the defendant can ask for investigation and collection of evidence in his support, which the public prosecutor can decline, but the judge has to accept.

2.10 Victim of a criminal offence

In German criminal procedure, the victim until 1986 almost had no rights, except the rights of the witness. Then, the Law on Protection of Victims (*Opferschutzgesetz)* entered into force and later several additional regulations were adopted that improved the position of the victim. But, the victim does not have the status of a party in the procedure, but of an injured (*Verletzter).* As such the defendant has several procedural rights: right of access in the record (through an attorney) right of free representation when poor, right to participate as a secondary prosecutor (*Nebenkläger*) in the procedure besides the state prosecutor, right to attend deliberations and give a statement, right to question witnesses, experts and the defendant, to propose evidence and to submit an appeal to the sentence. The costs of the procedure are borne by the secondary prosecutor, unless the defendant is sentenced. The LCP provides the defendant with the possibility to submit a legal property request for compensation in the adhesion procedure. This procedure is nevertheless, seldom used in the German criminal courts.

Recently, the federal Government submitted to the Parliament the draft second Law on Modernisation of the Judiciary (*Zweites Justizmodernisierungsgesetz*). This law has the purpose to strengthen the rights of victims in relation to both juveniles and adult perpetrators. In this manner, the legal property request would have priority over the payment of the fine. If the perpetrator does not have the means for either of the two, the court could instruct a postponement of the payment of the fine so as to enable the payment of damages. The draft law also recommends widening of the adhesion procedure against younger adults.

2.11. Legal remedies

They are divided into regular and extraordinary. The former can be divided into a) appeal (*Beschwerde)* as the only legal remedy against procedural solutions and conclusions (which can be submitted as a so-called simple complaint without the prescribed deadline or as a prompt complaint, *sofortige Beschwerde,* which is submitted in a short deadline in cases strictly determined by law, b) appellate (*Berufung)* which is the only legal remedy against first instance sentences and which in front of the higher court brings about meritorious deliberation of the case and the prosecution and eventual change of the first instance sentence and c) revision (*Revision),* legal remedy due to breach of law which can be submitted against the sentences of *Amtsgerichte* and *Landgerichte.* There is also a jumping revision (*Sprungrevision*), which the applicant submits when wanting to bring about a decision for breach of law with this legal remedy, skipping the eventual preliminary submission and decision on the appellate level. The appellate and the revision are devolutionary and suspensionary legal remedies. The extraordinary legal remedies according to the LCP are renewal of the criminal procedure and return to the prior state, and according to other regulations which include also the complaint to the constitutional court and the complaint to the ECHR.

3. Repercussions of the comparative analysis of the European procedural law for reform of the domestic legislation

The overview of the European criminal procedural law with an outline of the German criminal procedure in comparison to our criminal procedure does not offer ready made solutions in reference to the above mentioned systemic questions of procedural reform, but enables us to find certain directions more safely. These directions are: a) a new awareness focus (heuristic) of the criminal procedure; b) new balance between the main procedural subjects, especially in the preliminary procedure; c) new differentiation and specialisation of the state repressive authorities and d) new wider frames of autonomy of the individuals (the defendant and the injured) in front of the state authorities in the criminal procedure.

3.1. New awareness focus in the criminal procedure

As known, the origin of today's mixed continental criminal procedure is to be found in the inception and the development of the strong centralised state authority in a period of absolute monarchy, which established a set of court procedures in the XVIII century, organised according to the criteria of bureaucratic rationality and efficiency. Among these, the forms of covert service investigation, initiated as a duty in cases of suspicion of breach of the criminal law, stand out, as a stadium in the procedure when the truth has to be found out (to determine the facts) for the wrongdoing of the defendant and to make a record of the case upon which the judicial council will pass a decision on the guilt and sentence. Faced with the suspicion for disrespect of

the law, the criminal judiciary system emphasizes the rule of law and demonstrates the power of the will of the ruler. The objective is not to convince, but to impress. The procedures are also not open for the public, but only the announcement and execution of the sentence are: the inquisition criminal procedure is the proclamation of the absolute power of the ruler over his subordinates.

In contrast, in the English common law, the core of the criminal procedure is the public deliberation in front of the jury which decides upon the guilt of the defendant on the basis of the evidence brought by both parties in the dispute. Even the English rulers, at the height of their power, remained attached to the criminal prosecution of their opponents in front of the courts. As a result, in England, the jury acquired a symbolic role as a means for protection of the citizens from the excessive power of rulers.

If, then, we have in mind the starting points of both systems, it is clear that the development of the criminal judiciary in Europe can be described as a process of adopting elements of the common law in the continental system. After the French revolution, the focus of the criminal procedure was gradually transferred from a secret investigation to a public main deliberation. But, when in 1808 in Napoleon's *Code d'instruction criminelle* for the first time the function of an investigative judge *juge d'instruction* was introduced, this new judicial official acquired the task of questioning the defendants and the witnesses, noting their statements and making a record which would be the backbone of the case against the defendant in the trial. As a novelty, the investigation judge was not included in the trial, raising the importance of the main deliberation as a separate stadium of the procedure. The continental countries have kept this double division of the functional competence until today (with the exception of Spain). In it, the investigative judge can both pass a verdict and a sentence in the procedures for criminal offences for which a prison sentence up to 6 years is prescribed.

In the second half of the XIX century Austria and Germany introduced the oral questioning of witnesses in the court and the so-called principle of directness (*Mündlichkeit"*, *„Unmittelbarkeit der Beweisaufnahme"*) transferring the core of the procedure from the preliminary to the deliberation phase. The Austrian model from 1873, namely, combined the preliminary procedure with the French model of a deliberation modelled in accordance with the common law, rendering the preliminary procedure up to a certain extent unnecessary. Therefore, the public prosecutor's office was provided with the possibility to submit direct indictments, which were more frequent.

After the fall of Napoleon's government, his *Code d'instruction criminelle* remained in the European countries which either kept it (as Belgium did) or used it as a basis for the drafting of their own procedural law (like Italy, Austria and Germany). As a result, the history of the continental criminal procedure is a story on how countries accepted, modified or abolished the French model if deemed too authoritative. A clear trend in these

developments is the abolishment of the investigation judge (*juge d'instruction*). In Germany, the investigation judge was abolished in 1974, in Italy in 1988 and in Austria, on January 1 2008. In France, the cradle of the court investigation, there have been suggestions for abolishing the investigation judge in 1949 and in 1990. This can be explained with two reasons:

Firstly, as long as the deliberation court founds its decision on the record prepared by the investigation judge, one cannot expect the final decision of the court to be based on any other ground. But, once when evidence is brought into the deliberation, the court investigation becomes obsolete and the preliminary procedural phase acquires a different function: heuristically, it is not directed towards the collection of evidence, but only seeks to provide both parties the orientation of what evidence will be brought into the trial and to enable the public prosecutor to formulate the indictment.

For these functions, in sense of awareness, the limited investigation which the police and the public prosecutor can conduct are sufficient, having in mind that the latter has already performed these functions in the preliminary investigation procedure (which in the period of the inquisition procedure as a so-called *inquisitio generalis* had the aim to enable the court to adopt a decision for initiating of a formal court investigation, *inquisitio specialis*). So, when the concept of the main public deliberation and the direct presenting and evaluating if evidence was taken over from the common law system, the function of the investigation judge lost its meaning and turned into "an unnecessary and time restricted repetition of what was done earlier from the public prosecutor's office and the police".

Second, the enlightened civic liberalism represents the basic idea that the court's task is the protection of personal and procedural rights of the defendant in the procedure. In order to perform this task, the court must be impartial and objective. Thus, it is of imperative importance to give the function of prosecution to the prosecutor and to put the judge into an impartial, objective position of leading the procedure. This results in the triangle structure, important for the idea of a righteous procedure: the court runs the procedure between the two opposing parties, carefully listening both parties and performing surveillance on the healthy balance on their procedural authorisations (i.e. equality of weapons).

Even though the criminal prosecution was given to the public prosecutor, this did not provide the traditional investigation judge with an objective and impartial position. This is evident when looking at the pre-trial detention decisions. It is known that in the common law system the number of detainees is still low in comparison to their number at the continent. Part of the explanation lies in the fact that in England, the judge that makes a decision on pre-trial detention is independent form the investigation, while in France and Belgium it is traditionally the investigation judge – whose function theoretically is to lead the investigation, but it often suits him/her to have the person at

investigation near, thus it is evident, that if nothing else, there is a risk of using detention before the trial as a tool for pressure upon the defendant for cooperation.

We can conclude: the assigning of the investigation of facts to the court in the preliminary procedure is not only useless and a loss of time and means, but also disrupts the judge in the proper performance of the role as a guarantor of the rights of the defendant.

3.2. New balance between the parties in the preliminary procedure

Still, the abolishment of the court investigation opens many important questions. Firstly, the transfer of the investigation of facts to the police and the state prosecution in itself does not create balance of the power between the prosecution and the defence. On the contrary, while in the French model, the investigation judge performs the investigation in the benefit of both parties, it is realistic to expect that the police and the state prosecutor in the procedure, in the preparation of the indictment will automatically focus on the prosecution, and not on the aspects in the benefit of the defendant. It is psychologically impossible to work simultaneously in the benefit and in the detriment of one's own assumptions.

This has been noted by the criticizers of the police investigation in the common law countries, criticizing the lack of balance between the criminal prosecution, the defence and the effective police control. They emphasize that "the police and the public prosecutors have much bigger resources for running an investigation that the defendant". It has been proved that this situation has led to cases in which innocent people have been sentenced. We need to remind ourselves that in the case Rowe and Davis v. the United Kingdom, the ECHR concluded that the defendants have been deprived of their right of a fair procedure, because the prosecution breached the obligation for discovering the material relevant for the defence, deeming it sensitive and failing to inform the judge concerning the matter. One cannot deny that the criminal procedure in the UK has been seriously discredited with a number of cases in which justice has failed, and which show that without equality of weapons in the investigation, prejudiced assumptions of the contradictory procedure can render both the truth and the procedural guarantees senseless.

It is therefore necessary to introduce additional measures for security in the system, in order to balance the power of the police and the prosecution on the one hand, and the legitimate interest of the defendant on the other. These measures can include: a) process mechanisms that fit the equality of weapons postulate, and b) strengthening of the independence and sovereignty of the investigation authorities of the police and the state prosecution.

a) In relation to the process mechanisms which fit the postulate "equality of weapons" effective solutions on the one hand are the ones which

provide the defendant the collection and maintenance of the evidence in his/her benefit for the deliberation procedure (for example Italian regulations for maintaining evidence in the form of *incidente probatorio*). On the one hand, these are the mechanisms which provide for the re-examination of the submitted indictment in its factual and legal basis (like for example the previous deliberation *udienza preliminare*). The process mechanisms that disable the police and the public prosecutor's office from making pressure upon the defendant are of increasing importance in this regard. This is the reason, why in numerous systems, the police is not allowed to question the suspect who has not had the chance to get advice from an attorney (like in Germany since 1964, in Italy since 1971, in England and Wales since 1984 and in France since 1993). In principle, the police or the public prosecutor's office should not have the authorisation to question the arrested suspect; this should be performed by the court, as is the case in the Italian law, where the statement of the arrested suspect is taken exceptionally *giudice per le indagini preliminari* (*GIP*). This principle has not been weakened even by the anti mafia laws from 1992.

b) It is known that the due to the institutional independence from the executive, it can be expected that the investigation judge neither force the investigation, nor will keep silent of evidence due to the political sensitivity. This is exactly the difference between the public prosecutor which is subjected to the instructions from the Ministry of Judiciary and the judge who is independent in France. It also explains the public support of the investigation judges (*juge d'instruction*), who seemingly will survive in France as long as the public prosecutor is subject to political control.

Therefore, if the investigation judge is abolished, the public prosecutor needs to be provided with independence from the executive just like the courts with legislation and organisational measures. Italy can also serve as an example in this regard, as in this country, the high status and the high level of independence of f the public prosecutors has created an environment which provided for the abolishment of court investigations and transfer of the investigation tasks and responsibilities from the courts to the public prosecutors. The public prosecutors more than once have effectively shown their independence from the government, even in very difficult political conditions.

As an argument, the independence of the investigation judge from the executive however, is weakened in the cases where he according to the law and in practice depends from the public prosecutor, so the eventual abolishment of the court investigation looses importance. In the French and the Belgian system, the investigation judge does not depend on the requests from the public prosecutor, since he can also act on the basis of a citizens' suit, *partie civile*. In addition, once a court investigation begins, it is hard to stop it unless the investigation judge has the will to make compromise with the holders of political power. However, if the practice shows that the investigation

judge does not have the will to do anything which is not requested by the public prosecutor – as is the case in Croatia, Slovenia and Macedonia today – then, the public prosecutor becomes a dominant figure in the preliminary procedure and the issue of independence is transferred to his function.

Still, the abolishment of the investigation judge does not mean that the court will not collect evidence in the preliminary procedure. Under certain circumstances, they must be obtained and preserved. Even the Italian system enables the judge, who is the *giudice per le indagini preliminari*"(*GIP)* to collect evidence before the trial (in the form of „*incidente probatorio"*), if they could disappear until the trial. Such autonomous and individual actions for collection evidence upon the request of the public prosecutor, the defendant or the injured leave the initiative for starting a preliminary procedure to the police and the public prosecutor's office and are not likely to endanger the objectiveness of the judge.

In relation with the police, it is equally important to revise the relationship of the police with the political authority with the purpose of gradual disentanglement of the politics from the police activities and strengthening of the transparency of both parties in their mutual relation. Unlike the majority of police on the continent, the English police is organised locally and is independent of the political authorities in London. There are 43 local police services, for which the responsibility is carried by the chief of the police and the local police administration. Having in mind this model, it seems that the role of the continental police would be improved with the better delineation of the political authority and the police, with the decentralisation of the police structures and a larger level of transparency in work and responsibility of the police service.

3.3. New differentiation and specialisation of state authorities in the preliminary procedure

a) Organisation of the public prosecutor's office

In England and Wales in 1985 the Crown Prosecution Service – CPS was set up, as a centralised service which employs public prosecutors and works according to the instructions from the Director of the Public prosecutor's office, who acts under the surveillance of the Attorney General who is a member of Government, but not the cabinet. The main function of CPS is to take over or reject the criminal indictment started by the police. Although CPS is hierarchically subjected to the Chief prosecutor, it is considered that this authority enjoys far reaching independence, provided on the one hand by the long term tradition of the state not to interfere in the questions of investigation or criminal prosecution, and on the other side with self control from the Government, considered as necessary for maintaining the trust of the public in the judiciary.

In France, Belgium and Italy the public prosecutors have the status of magistrates, i.e. basically the same status as the judges. In these countries it is common to see the prosecutors and judges as one group (*magistrature/magistratura*). Both of them are recruited and appointed on a public announcement and with the same professional qualifications. But there are differences between the separate countries. In France, the public prosecutor's office is hierarchically organised with the Minister of Justice at the top (*garde des Sceaux*) who is superior to the general prosecutor (*procureur general*) at the cassatious court and the public prosecutors (*procureur généraux*) in appellate courts (*cours d'appel*). The latter are superior to the prosecutors of the Republic (*procureur de la République)* in lower courts. The Minister of Justice with an opinion from *Conseil supérieur de la magistrature (CSM)* decides upon promotion or transfer. The Minister of Justice and not the CSM enforces disciplinary measures against the public prosecutors in France. Finally, in the performance of function, the public prosecutor is up to a large extent obliged to respect the instructions from the Minister of Justice, even in reference to concrete cases.

The Belgian situation is similar with the French, but the Minister of Judiciary has the right to instruct for a procedure to be implemented in a certain direction, but not to instruct the revoking of prosecution. The Minister of Judiciary together with 5 *procureurs généraux* decides upon the questions and politics of prosecution and in this sense, issues directions, but the decision on how to act in the specific case is left to the prosecutor who decides the case, since the Minister of Judiciary seldom uses his authorisation for intervention. In December 1998, the *Conseil supérieur de la justice* was established, which is competent for the appointment, promotion and discipline of public prosecutors.

Contrary to the French system, in Italy, head IV of the second part of the Constitution regulates the performing of the service *magistratura* and prescribes that judges and public prosecutors are subservient only to law. According to art.105 of the Constitution, Consiglio *Superiore della Magistratura* is responsible for recruitment and careers of judges and public prosecutors. The circulars issued by the *Consiglio* explain the regulations in relation to organisational issues. The public prosecutor (*pubblico ministero*), as the judge, has guaranteed permanence and immovability in the service (art. 107 of the Constitution). This has created the self-management in the magistrature. Not only externally against the state executive, but also internally the Italian system shows the independence and decentralised structure in the relations between the different prosecutors' offices. The offices at different levels in the judicial system are independent one from the other. In 1992 an exception has been made with the *Direzione distrettuale antimafia (DDA)*, which is a centralised authority, intended for coordination of the investigations of mafia crimes. For this purpose, the director of this authority has the right to give instructions to the regional anti-mafia prosecutors. The main prosecutor, who is at the head of the office of the prosecutors, has the right to issue instructions to the staff in his/her offices.

b) Role of police and public prosecutors in the preliminary procedure

In England and Wales, the police investigates independently and upon its own initiative. The CPS does not have authorisations to direct the police, and the police is the one that decides for initiating criminal prosecution. In 1984, the authorisations of the police have been consolidated with the Law on Police and Criminal Evidence (*PACE*), but at the same time important procedural guarantees for the suspects have been introduced, including the recording of police questioning and the right of defence attorney. As a result, the relationship between the police and CPS is of coordinating, rather than hierarchical nature.

In continental Europe, public prosecutors are requested to direct and make surveillance over police investigations and the public prosecutors decide upon the criminal prosecution of the defendant. It is even requested from the police to inform the public prosecutor whenever it comes across about a suspicion of a criminal offence. In this manner, the public prosecutor is authorised to direct the police. The role of the police, according to the law, is to execute the instructions of the public prosecutor. But, in practice, the situation is more complex and different so that some researchers note that there is a tendency towards the independent political investigations, not very different from the English case. As a result of a comparative analysis, Mathias analysing the situation with the transfer of roles and authorisations related with majority of criminal offences, concluded that since the beginning till the end of the preparatory phase, the police dominates the scene due to a combination of two factors: not fulfilling the duty to inform the public prosecutors and their passivity in the course of the investigation.

We can even conclude that there is a certain correlation between these two factors: if the public prosecutor remains passive, what is the purpose of keeping him informed? Thus, it is no wonder that in practice between the police and the prosecution sometimes *contra legem*, a silent consensus is established about when should and also when shouldn't the public prosecutor be involved in the investigation for criminal offences. In some countries this is legalised: In the Netherlands it has been determined that the engagement of the prosecution in routine cases is very small. As in other places, the most common reason for including the public prosecutor us the need of the police to obtain certain type of authorisation from the court. Thus, in the Dutch and similar practices, police officers will not involve the prosecutors until the investigation has been completed.

In France, there have been recent events for strengthening the public prosecutors' control of the police: with the amendments of the law from 2000 a provision has been introduced requesting that when the *procureur de la République* issues directions for the police to conduct an investigation, to set the time frame and to request from the police a report on the progress after 6 months.

For Germany, we already mentioned that although the public prosecutor has been envisaged as a leader directing and supervising the police activity, in practice, the police investigate independently, while numerous commentators considered that this situation imposes serious questions related to the rule of law.

The Italian system is probably the most principled one when talking about the duties of the public prosecutors in directing and supervising the investigation. Special police departments (*sezioni di polizia giudiziaria*) are under the exclusive competence of the public prosecutor and their officers cannot be replaced by the superior police officers without prior assent from the public prosecutor. But, on the other hand, the public prosecutor in Italy has authorisations to delegate procedural activities to the police, extended with the laws against the mafia from 1992. The police can even undertake measures to determine the existence of a criminal offence or investigation measures imposed for discovering new criminal offences upon its own initiative.

It can be concluded that, regardless of the normative differences, the practice of the police in the preliminary procedure in the majority of European procedures is similar in relation to the police tasks and the methods used. Thus, we suspect the usefulness of the model of virtually emphasized leadership of the preliminary procedure by the public prosecutor's office. Therefore, the legislation should on the one hand accept and develop the idea of as many as possible police investigations, and on the other hand, establish a system of coordination and cooperation between the police and the public prosecutor's office. This should materialise the assumptions on including the prosecution in police investigations but at the same time allow the police and the prosecution as different subjects, to be able to have different starting hypotheses concerning the conducting of the investigation. Although in reality, there would be a mix in motives, still the aims will be reflected in the division of functions between the police and the prosecution and in the modes of their cooperation and communication.

The flexibility of the prosecution in delegating the investigations to the police can be different, dependent on the mandate of the public prosecutor. The system must be capable of establishing and maintaining the mechanism which enables the public prosecutors to intervene and take responsibility of the investigations when necessary, while at the same time not to overburden the public prosecutor's office with the number of cases and their significance. Finally, one must not forger the protection of the rights of the victim already in the preliminary procedure to contest the rejection of the police to conduct investigation or the public prosecutor to start criminal prosecution. This task is possible in the German model or *Klageerzwingungsverfahren* model of subsidiary suit.

3.4. Wider frameworks of autonomy of the individual (the defendant and the injured) in front of the state authority in the criminal procedure

a) Right of the defendant and the victim to a procedure and trial within reasonable time

Between the common law and continental countries there is a difference of the average length of criminal procedures. As Spenser noted, delays which exist in certain continental procedures seem almost fantastic in the common law systems. This is a result of the complaint procedures, but also from the fact that the systems of criminal judiciary at the continent are seriously overburdened. But, on the other hand, the one sided, hastened and shallow investigations of the English police often delay the procedure after passing a formal prosecution (this is the case with the cases before the ICTY in The Hague) and sometimes bring about ungrounded sentences. A serious problem of the English criminal procedure in general is that the investigation phase is insufficiently strict in obtaining evidence, in cases where the facts are serious or complicated. What is exceptional in the most famous cases where the English justice failed is that these were not trivial cases, but extremely serious – and that at the end the more rigorous collection and checking of evidence brought about annulment of the majority of sentences.

Thus, it is necessary to evaluate the difference between the more complex and simpler procedural forms which are compatible with complex, i.e. simple cases. Although in complex cases, it is necessary to have procedural guarantee which prevent urgency, one needs to provide a) simpler cases to be resolved without delay, and b) the length of the pre-trial detention should be limited with strict deadlines. It is of key importance to strengthen the position of the defendant, who could contest the conducting of a procedure if he deems that the procedure is unjustifiably expedited or is managed with prejudices. At the end, the court should be in a position to effectively protect the defendant from an unfounded, premature indictment and to instruct collection of additional evidence.

b) Statement of the defendant on guilt and completing the procedure without a main deliberation

The famous difference between the English and the continental system is in the role of the admitting guilt by the defendant during the procedure. If the defendant pleads guilty, the procedure does not continue with deliberation, but directly with a sentence. The facts the court needs for choosing and determining the sentence can be established informally. The court offers “reduction of sentence” of about 30% for those who plead guilty. In this manner, the defendants can take the responsibility for the criminal offence and avoid being drawn into long and public deliberation at the trial. This model, evidently, not only is in the benefit of the defendant, but significantly decreases the workload of prosecutors and judges and contributes to facilitating the criminal judiciary.

Today's continental process systems in different ways approach the common law model, so the assent of the defendant becomes an ever more important factor in the continental preliminary procedures. As an example we highlight:

a) In Spain, the defendant at the beginning of the trial can give up the right of deliberation (*conformidad*). This is similar as the English model for pleading guilty. In France the pleading of guilt was introduced in the LCP in March 2004 (the Law called "Perben II") This option exists for those defendant for criminal offences (*délits*) for which the prescribed prison sentence is up to 5 years.

b) In Germany, as in Italian Law, there is a simpler form of investigation which provides prosecutors and judges to complete the case by a criminal order without deliberation (*Strafbefehlsverfahren, procedimento per decreto*). The defendant gets an order prepared by the public prosecutor and issued by the court. Unless one files a complaint, the criminal order enters into force.

c) Some countries have introduced procedures of alternative sanctioning which provide for completing the case without deliberation if the public prosecutor has provided assent or the preparedness of the suspect to take over responsibility for the criminal offences for which he/she is charged, perceiving them as if implying a type guilt admitting. This group of countries includes Germany (whose model we have already outlined), the Netherlands, Austria and France, which for the first time in 1992 through the circulars of the Ministry of Judiciary, and then in 1999, on the basis of law, introduced the forms of conditional completing of the procedure (*classements ous condition*) on the basis of certain achievements of the defendant, including the conciliation between the victim and the perpetrator (*médiation*). In English Law, the development of alternative sanctioning has been mainly based on inciting the use of traditional police warning (*caution*). In the Netherlands, in minor cases, the police also has the right to complete the procedure offering the suspect to pay a certain fine.

d) An interesting model is the Italian shortened sentence (*giudizio abbreviato*) in accordance with art. 438 of the Italian LCP. The purpose of this procedure is to avoid the deliberation by passing a sentence in the earlier phase of the procedure. The procedure is administered by the *giudice dell'udienza preliminare* (or *GUP*) of the court, and is initiated with a defendant's request before or in the course of the preliminary deliberation. The defendant can ask from the judge to conduct additional investigations. The sentence is passed on the basis of the records. The judge can either acquit or sentence the defendant (so there is no agreement between the parties on the facts). In the cases where the defendant is released, the punishment is decreased by one third. In this manner, the Italian

system provides the prosecutor and the defendant to agree on a certain sentence (*applicazione della pena su richiesta delle parti*, so called *pattegiamento)*, which again presupposes that the defendant is prepared to take responsibility, at least to a certain degree. On the basis of the records, the judge can reject the request if he deems that the legal qualification of the offence or the recommended sentence is inappropriate. This model is used by the Croatian LCP in art. 190-a.

One can note that the Italian model provides for avoiding of lengthy court procedures and at the same time does not sacrifice the basic principle that for pronouncing a criminal sanction a court decision is necessary, which cannot be replaced with the decision of the public prosecutor. Thus, the German system which enables the public prosecutor to decide upon the alternative sanctions on the basis of the principle of purposefullness of the criminal prosecution (as we have already outlined it has been often criticised from the aspect of presumption of innocence of the defendant and the constitutional division of the authority).

Therefore, the position of the *common law* that the role of the court should depend on the statement of the defendant is right: if the defendant is prepared to be held responsible for the offence, the question of sentence, rather than guilt remains open. But, at this point one does not plot agreements on the guilt in the *common law* system. The defendant that *sua sponte* is held responsible for his acts is one thing, but it is completely different when the prosecutor and the defendant agree on the sentence and accommodate the facts in relation with the results of this agreements. Such agreement functions if one excludes the victim that has legitimate interest in discovering and recognition of truth. The Anglo-American agreement on guilt poses numerous questions connected with the probationary alternative sanctioning: it distorts the truth and provides the prosecutor to influence the sanctioning without court control.

If we put the agreement on guilt aside, then the **English and Italian system indicate the direction towards the quicker completing of the procedure in the competence of the judge,** as long as the defendant is prepared to be held responsible for his behaviour. In contrast, the public prosecutors in the German system for example, have full responsibility for investigation and on the basis of their own findings can decide on the criminal prosecution. In this way, they have wide discretionary rights to decide upon the sanctions against the defendant without any court control, enjoying these authorisations, despite of the fact that they are especially dependent on the Minister for Judiciary – creating a rather bad scenario – as is the case with the Netherlands today.

c) Extending of the procedural rights of the victim in the preliminary procedure.

In France and Belgium, any person that claims to have been a victim of a criminal offence can submit charges and become a *citizens' party* (*partie civilel)* in the criminal procedure before the court (regardless whether the procedure is run before the *juge d'instruction* or before the deliberating court). In this manner the citizens' party joins the public prosecutor, and if he is missing, with the submitting of the compensation order, the citizen's party independently initiates criminal prosecution by the judge. In this manner, the victim has the right to initiate a procedure by issuing a court invitation (*citation directe*). The competent judge then has to make a decision regardless of the position of the public prosecutor. The disadvantage of this model is that the participation of the victim depends on the court's competence, and in the initiated procedure the victim has no role in the investigation phase. In Belgium, since 1988, the rights of the victim have been strengthened in relation to information and appropriate actions. In addition, the victims have the right to approach the public prosecutor and to submit a statement of an injured party (*personne lésée*). On this basis, the victim has the right to propose evidence and to be informed about the course of the procedure. Similarly, the French regulations from 2003 had the purpose of improving the situation of victims; it was requested from the prosecutor to outline the reasons for rejecting charges, and the victim obtained the right to contest the prosecutor's decision for rejecting charges by filing a complaint to the *Procureur general*.

Similarly as the Belgian situation, in Italy, the victims can participate in the procedure as *parte civile*. In this manner, any victim (*persona offesa dal reato*) has the right to submit a statement and evidence supporting it.

In Austria, with the entering into force of the new procedural regulations since 1 January 2008, the participation of the victim as a party in the procedure will become a basic principle of the procedure which will be reflected in the different rights of the victim for obtaining information, support and participation in the course of the procedure and protection from secondary victimisation. Similarly, in Germany, the victim has been devoted a lot of attention with the changes of the LCP and other laws.

The Anglo-American system of criminal procedure stands out as the only model in which the victims, contrary to the measures to be protected as witnesses, have no special status as parties in the criminal procedure, neither the right to be included as *partie civile*, not even the formal *locus stand* to seek a *compensation order*.

One can therefore conclude that in this segment the Anglo-American system cannot serve as a basic model and we have to direct ourselves to other countries of continental Europe, where there has been an evident and strong movement towards extending procedural rights of victims and recognising their legitimate role in the criminal procedure.

4. Conclusion

- The presented analysis indicates that the current criminal procedure based on the tradition of a mixed type of criminal procedure with strengthened inquisition elements in the investigation and in the main deliberation and with the dysfunctional features of the preliminary procedure needs to be re-arranged in line with the procedural institutes of the criminal procedure from accusation (parties) type, but with careful accommodation in accordance with the domestic specificities and needs, in order not to instigate negative consequences on the criminal judiciary as a whole. It is namely, a systemic change whose strength can be assessed only with the strength (or the weakness) of the weakest link.

- The changes we have identified in the comparative criminal procedural law indicate that it would be suitable to take them over in four areas in the Republic of Macedonia focusing on the preliminary procedure.

- Firstly, it would be suitable to **reorganise the criminal prosecution and investigation in the preliminary procedure**. Today, the investigation of criminal offences is administered in two phases, the first one dominated by the police and the public prosecutor's office (deciding upon criminal charges, police investigations), while the second one is dominated by the investigation judge. We consider that the investigation should be completed in one phase and it should be trusted to the police in cooperation with the public prosecutor's office. **It is recommendable to abolish the court investigation.** But, the most important precondition for this is **institutional reform of the police and the public prosecutor's office**: without organisational reform, including the strengthening of the position of the police officers, their rights and responsibility and lastly, the responsibility, independence and continuity in the service of the managing police staff with the adequate education and practice, without transparency in the work of the police and its legal responsibility and without the full institutional independence of the state prosecution from the executive, the reform of the criminal procedure cannot be implemented in a satisfactory and sustainable manner.

- The **role of the court** in the preliminary procedure should be redefined. On the one hand, in the investigations of the police and the public prosecutor's office, the court would have to remain a guarantor of the human rights of citizens when enforcing coercion measures and in exceptional cases, when undertaking emergency procedural actions, whose basic purpose is to collect and maintain important evidence on the trial. Besides this, the court would have to control the grounds and lawfulness of the indictment before the beginning of the main deliberation. On the other hand, the courts would have to provide the possibility for completing the criminal procedure in the preliminary procedure by examining and ratifying the agreements between the

defendants and the public prosecutor's office on admitting of guilt and using criminal sanctions without a trial.

- In relation to the **victim of the criminal offence**, it is necessary to strengthen the victim's rights in order to provide as early as possible in the preliminary procedure protection from secondary victimisation and to provide compensation from the state funds in cases of certain serious criminal offences. The existent provisions on the right of initiating and conducting an adhesion procedure for compensation of damages in the criminal procedure should be upgraded so as to avoid common unnecessary instruction of the injured to suit and to assign primary importance of the claims of compensation prior to deprivation of property acquired with a criminal offence in the benefit of the state.

- **The construction of the main deliberation** should be re-organised in accordance with the accusation elements so as to enable the defendant to admit guilt and taking responsibility for the criminal offence without a trial, at the same time ensuring quicker completion of the deliberation limited only to the facts important for the choice and measurement of the punishment. The burden of proof should be fully left to the initiative of the parties. The deliberating court should keep only the controlling and eventually complementary authorisations in relation to collecting and deriving evidence in cases when the parties can not or do not want to use their procedural rights. The rights for the sentence should be simplified, but without questioning the possibility of the higher court to examine the legality and regularity of the first instance sentences upon complaint.

- **Implementing the reform.** The reform should be approached gradually, by giving utmost importance to the factual situation, which should be determined with an empirical research. The participation of all experts from the theory and practice of criminal law is necessary in the reform. A key initial assumption is the assent and will of the political public to provide the necessary institutional, human and financial resources for the reform. The entering into force of the new regulations must be accompanied with sufficient time for familiarisation with them, education and acceptance on the side of all addressees.

Chapter III: Guidelines for the development of the criminal procedure in the Republic of Macedonia

1. Introduction: Key reasons and objectives of the reform of the criminal procedure

The reform of the criminal legislative system today is a priority legal, political and societal task of the Republic of Macedonia. The situation in the judiciary, as never before occupies the central place in the competent and political debates, and in the media the judiciary is singled out as the main obstacle for the integration of the Republic of Macedonia in the European Union and NATO. The status of a candidate country for EU membership has also imposed the Republic of Macedonia numerous obligations in the area of justice and home affairs.

In contrast with the accepted modern paradigms, such as the fundamental human rights and freedoms and rule of law, the criminal justice system is in a state of permanent crisis. It does not entail only the length and the (in) efficiency of the court procedures, but articulates a common lack of trust in the quality and predictability of the judiciary, which has resulted with an evident erosion of the legal order in general. The feeling of crisis has been accentuated with the courts' system behaviour as incapable to handle some of the basic societal problems, such as corruption and organised crime, providing legal safety and protection of human rights and freedoms.

The criminal procedure law today is on a crossroad. The current criminal procedure legislation conceptually is a result of the system which originated before more than one century. In the course of history it has been more or less accommodated to the major political and societal changes. The criminal procedure of the XXI century must guarantee protection of human rights and freedoms, successfully to protect society from the most dangerous attacks and to provide communication in international relations. The main guidelines and anchors of reform are international human rights standards and constitutionalism, on the one hand, and the increase of crime and corruption, on the other. The development of international human rights law has significantly influenced our legislation, and the criminal procedure has been changed for harmonisation with the international human rights norms. The ECHR has especially influenced the law and practice, and has been one of the main drivers of reform of the criminal procedure in the last decade.

Today, we're searching for a modern criminal justice procedure, which will respect human rights and freedoms, but will also be efficient at the same time. The procedure must guarantee determining of truth. The criminal procedure refers to numerous heterogeneous criminal offences from minor forms of crime, through the traditional criminal offences against the founding values of the individual to new complex forms of international crime. The system must design the procedure in a differentiated manner, accommodated to the criminal offence and the special categories of perpetrators, to enable conciliation and resolution of disputes with agreements, to ensure procedure

in reasonable time and in an economic manner. This, is not a question only of separate procedural issues which stand out as critical points in the framework of the existent model, but highlights the need for re-examination of the foundations of the criminal procedure, its objectives, values, type and structure.

The questions of overburdening the courts are also important, together with the excessive length of procedure, resulting in a need for its simplification, abandoning the principle of legality, introducing consensual elements etc. The efforts for facilitating the criminal procedure have brought to enrichment of the forms of speedy, summarising procedures as well as procedures which result with sentences even without conducting a regular procedure in the cases of minor criminal offences.

For the preparation of a full reform of the criminal procedure, in the academic circles, scientific institutions, and with individual efforts several studies have been prepared. Several of them are worth mentioning, such as the works that deal with the development of the criminal procedure in European terms, comparative research on the transition countries, the practice on deciding for conducting criminal prosecution and preparing of an indictment, use of coercion measures, especially arrest, on custody and pre-trial detention, separate phases of the procedure and process actions, reasons for the delays of the procedure etc. The research has alarmed about the critical spots, about the points of entropy of the system, the reasons for the unfavourable situation and the possible solutions. They analysed at the same time the situations regulated with the acts of the Council of Europe bodies. The beginnings of the creation of the first transnational sources and rules of the criminal procedure in the EU have also been followed. The conducted research shows that if partial reform of the LCP is conducted, it will present a limitation of the efficiency of the protection of rights and freedoms, i.e. the frequent changes of the normative acts would act as obstacles for the realisation of the rights and freedoms protection. In some components, the legal solution demands optimal harmonisation with the ECHR and those of other European countries.

2. Key issues in the reform of the criminal procedure

The existence of a clear and consistent conception for the reforms supported by relevant legal, comparative and empirical research is a condition for success of the reforms of the criminal judiciary. An integral reform must be planned and developed on the basis of rational and reliable methods in locating and abolishing all dysfunctional elements in the organisation and actions of the public prosecutor’s office, the police and the judiciary. Substantial systemic changes in the model of the domestic criminal procedures burdened with court paternalism are needed. It can be noticed that in the current formulation of the criminal procedural law in the Republic of Macedonia, a comparative study of the leading legal systems was largely missing. In this context, one should have in mind that all over the world, extensive legal reforms are not conducted without an examination of experiences of other countries.

The modernisation of the criminal procedure with legal transplants is surely a more secure than improvisation, although it is not completely deprived of dangers such as dilettantism and eclecticism, especially if the foreign and international law are not always familiarised one with the other. The criminal procedure is complex and operates in different, sometimes radically different manners in different environments. We must be aware of the problems linked with the practical implementation of legal transplants. The legal system is connected with important cultural, historical and political values. Thus, it is very unlikely that whatever type of reform incorporated from a system that does not share these values can be accepted, and if accepted it is unlikely to succeed as planned. The reforms failing to take into consideration the existent structure of the current national authorities or training and professional experience of the existent staff in the judiciary will most likely fail. However, the pressure for reforms is strong. It is very important to direct them through the collective European historical experience and the common standards on the basic righteousness of the criminal judiciary, built foremost on the legislation and jurisprudence of the ECHR.

The following questions are of increasing importance: a) the character of the criminal procedure; b) the reform of the preliminary procedure; c) forms of fastened procedures; and d) efficiency in processing.

a) The character of the criminal procedure

In the Republic of Macedonia, for now, we have not undertaken major systemic reforms and have focused on the improvement of the existent mixed continental model accommodated to the contemporary standards on human rights, which have imposed themselves as an international obligation for the country.

The differences between the accusation and inquisition model are explained with the specific societal and historical factors which have shaped legislation, institutions and procedures. In contemporary times, the barriers between separate legal traditions are overcome, thus breeding easier influence and borrowing of procedures from other countries. The comparative research in this are is extremely useful and important. The basic question posed by the comparative analysis in the criminal procedural law is whether the continental approach is really more efficient than the accusation with the active role of the court and vice versa, does the accusation approach really better protect human rights. Today, no one can claim with certainty that one of the models is better and there is no system on this planned which has not been subject to serious criticisms. Another issue is that even when we would know that one system is better than the other, this does not imply that we can take it over easily. The legal transplants from a societal contest might not promise success, as something that succeeds in one set of societal circumstances might not succeed in others. Seen historically, various societies value these issues differently, but it is important that the procedural guarantees for the regularity of the procedure have priority in international and constitutional law, thus a choice has been made to a large extent. The rights guaranteed with the International Covenant on Civil and Political Rights and

the ECHR are a minimal standard which have to be respected in every criminal procedure.

b) **Reform of the preliminary procedure**

The main problems of the procedure in the Republic of Macedonia have been located in the legally elapsed **pre-investigation procedure** and in the **court investigation**. It is necessary to make a principled division of the functions for gathering of data for the indictment conducted by the public prosecutor, from the deciding in the procedure, which is a right and duty of the judge; introducing an investigation team as a body which acts upon the request of the public prosecutor; introducing a judge of the investigation as a new body for deciding in the preliminary procedure instead of the current solution of the cumulative investigation function (gathering data and evidence) and decision making by the investigation judge.

As for the **relationship between the prosecution and the police,** with the exception of England, European criminal legal systems are oriented towards the domination of the prosecution over the police, at least in theory. In this sense, almost all continental legislation stipulates that in the criminal investigations the police works on the basis of orders and supervision by the public prosecutor's office, and stipulates an obligation upon the police to inform the public prosecutor concerning all the offences that it has information about. The examination of the procedural legislation in continental Europe indicates that he laws have been constructed is such a way that in theory all the investigation activities can be conducted by the public prosecutor, i.e. the police authorisations in criminal investigations are at the same time authorisations of the public prosecutors.

This means that the police does not have exclusive authorisations, and vice versa, the public prosecutors have wider competences than the police. In this manner, unlike in Republic of Macedonia, most European laws do not provide for any investigation activities as exclusive competence of the police in the criminal procedure. In these countries, the police do not have autonomous authorisations to discover and investigate, but intervene or execute orders of the public prosecutor or the court, or what is more frequent, use the common authorisations with the public prosecutor's office working under its control.

The draft Law on Public Prosecutor's office makes a first important step in the direction towards a more active role of the public prosecutor's office in the pre-investigation phase. In order for the public prosecutor's office to really have a more significant role, more explicit provisions on the relations between the public prosecutor's office and the police are inserted in this law. The public prosecutor's office also manages the pre-investigation procedure and has at its disposal the Police, the Financial Police and the Customs Administration of the Republic of Macedonia. The public prosecutor's office now has all the authorisations of the police and other law enforcement authorities linked with discovering criminal offences and their perpetrators. It can individually undertake any action necessary for discovering and prosecuting the criminal

offence and the perpetrator, for which authorisation is given to the Police, the Financial Police and the Customs Administration. If there is a rivalry between them, the public prosecutor's office will uptake the authorisations given to the police or another state authority. The provisions do not support the more radical solution, according to which parts of the police would be directly and fully put at disposal to the public prosecutor's office, as is the case in many European countries, but they do emphasise the superiority of the public prosecutor's office over the police.

To put it differently, they are much stronger than the proposed formulations in art. 31 and 34 of the Law on public prosecutor's office which stipulate that the public prosecutor's office "takes care", "manages and coordinates", "incites" etc. On the other hand, these provisions provide a linkage and can successfully resolve the problem of authorisations (with the Law on Police these are presented as being exclusively in the hands of the police). The idea is not to paralyse the police and other authorities, neither to loosen them up as the discovering and investigations will be conducted only by the public prosecutor's office. The police must have a certain level of autonomy in the police investigations and clear responsibility which will not suffocate its initiative. The procedural provisions in LCP and the Law on Police in this sense should more precisely determine the obligation of the police and the others to inform the public prosecutor's office on time and to follow its instructions and orders. The public prosecutor's office will have to perform this role in the future more actively, which not only depends on its will and ambition, but also on the real capacity (enough trained personnel, equipment etc).

The proposed legal framework for a new LCP for a different relationship between the public prosecutor's office, the court and the police provides real possibilities for starting a new era in the fight against crime and corruption in the Republic of Macedonia. The new LCP in accordance with the changes to the Law on Public Prosecutor's Office provides space for the public prosecutor's office to position itself as a real *dominus* of the pre-investigation procedure, an authority which will manage the police and coordinate all other state authorities working on the discovering of criminal offences and their perpetrators (the Financial police, the Customs Administration, the Directorate for Prevention of Money Laundering, the Public Revenue Office etc.). The public prosecutor's office with the possibilities the Law on Public Prosecutor's Office offers (establishing research centres, employment of new staff – criminal, financial and other experts etc.) can already start preparing for the future reforms in the direction of full taking over of the preliminary procedure (the investigation) within its competence. The process of acquiring more extensive authorisations of the prosecution in Europe goes hand in hand with the improvement of the transparency of the decision making in the various Prosecutor's offices with the purpose of obtaining greater consistency in decision making, both through a system of stricter internal control within the organisation, but also external control performed by the injured and courts. In this manner, the acquired independence in relation to the executive is balanced with a higher level of legal control on the work of the public prosecutor's office.

The active role of the investigation judge and his findings are problematic when the results of the investigation are extensively and without major obstacles used in the trial and in the passing of the sentence. In this sense, there have been numerous well founded remarks noting the potentially negative influence upon the courts' independence. The modern tendency is for the investigation judge to become judge of the investigation, which means that he is less an inquisitor and more a guarantor of the legality in the area of human rights and freedoms. Our investigation judges as various reports show are not very enthusiastic over this issue. Although the experiences of the countries which don't have or have abolished the *investigation judge* institute are neither instructive nor convincing, the **abolishment of the investigation judge** is already a world trend.

It's a fact that the investigation judges in Macedonia have not managed to establish themselves as an inventive factor in the criminal procedure as a subject which independently or with the help of the Ministry of Interior is in a condition to find new evidence (which did not exist at the beginning of the investigation). Hence, the investigation is more a factor that delays the procedure, rather than a necessary preparatory phase which would enable uninterrupted conducting of the main deliberation. The investigative judges do not show great initiative in collecting evidence material, but on a purely formal manner once gain register the witnesses' statements which have already spoken with the police and the other existent evidence. As a result, one can seriously consider abolishing the court investigation, or at least reduce it only to the especially complicated cases.

It is in principle recommended to **release the court from the obligation upon duty to clarify the case**. The burden could be completely overtaken by the prosecution that will undertake the conduct of the preliminary procedure, which will contribute for the court to become an independent and an impartial arbitrator. On the other hand, the affirming of the defendant as an active subject with strong rights in the procedure, the court has relieved itself from the paternalistic relation towards the defendant although it continues to guarantee the ensuring of his/her rights. It is primarily important and useful to ensure greater initiative of the involved parties in the course of proposing and executing the evidence. This is possible even without greater structural alterations through ensuring the immediate calling of witnesses and though the introduction of their cross examination. In this case, for example, German and Croatian practices could be primarily used. In our opinion, the Court should be "activated" only when the defence is shown to be incapable to perform its "role." The model of the new Italian criminal procedure seems optimal, precisely because in the proposition and the conduct of evidence the initiative is given to the parties involved and the court is at the end left with the possibility to ask questions, to deliberate the evidence and the like, when the court deems it necessary.

c) Remodelling the main hearing. The abandonment of elements of inquisition in our so called mixed criminal procedure is not relevant only for the investigation. The court is relieved from establishing the truth based on its competence, which additionally burdens the judiciary through practically

imposing part of the obligations of the parties involved in the procedure which is a strategic question that deserves prioritization.

Abandoning of such judicial paternalism will lead to more positive effects. First, it will contribute to the impartiality of the court and it will allow for conditions for more righteous trial in which instead of confronting the defendant, the court will be a guarantor for the legality of the procedure and for his/her freedoms and rights.

Second, the relieving of the court in itself will contribute for speeding up of the procedures and increasing the efficiency of the judiciary. This, of course is only a relative relieving because these obligations will be taken over by the concerned parties, primarily, the prosecution, which will now in essence bear the burden of proof of guilt outside of any reasonable suspicion. Presumably, the restructuring of the inquisitory towards an accusatory procedure, the main deliberation will easily gain in speed and in righteousness. Still, in order to function, such a system requires two more or less equal sides. This implies that the defendant and his defendant play an active role opposite of the prosecution in the criminal procedure. Here we have a serious problem because in a poor country such as ours, a great part of the population cannot financially afford a defendant while the state on its part cannot afford sufficient number of public funds for this purpose.

In a way, contradictory elements could be introduced even in the preliminary procedure, through the introduction of private examination which would be conducted by the defence in the preliminary procedure, in parallel to the examinations of the state bodies, which will terminate the long tradition of monopoly of the state bodies in overtaking the investigative actions This will allow for a practical departure from the deeply enrooted understanding that the aim of the preliminary procedure is to gather all the evidence for the facts in an in-depth and objective manner.

The most convenient ground for the introduction of accusatory elements in a continental procedure such as ours is by all means the main deliberation, which was until now considered to be of accusatory nature as well. Still, in a consistent implementation of the provision of contradictoriness and presumption of innocence, the deliberation of evidence should not commence with the examination of the defendant especially when he rejects the criminal responsibility. Upon the reading of the prosecution instead of the examination of the defendant, the evidence suggested by the prosecution in support of the accusation should be deliberated and only afterwards should the court use the deliberation of the defendant as a means of evidence.

Indeed, in the present legislature, the idea of examination of the defendant prior to the procedure for deliberation of the evidence was theoretically intended to give the defendant the possibility to deliberate on the prosecution and to delineate his/her defence. However, as we are well aware, he/she was treated more as a source of understanding in the procedure. In all cases when the deliberation of evidence starts with examination of the defendant, it practically comes to the transference of burden of proof at the

expense of the defence. Apart from this, in a situation of consistent organization of argumentation as a conflict between the parties involved, the question of guilt of the defendant should be resolved first and than to move to the determination of circumstances which influence the measurement of punishment.

Until now it was not even practically considered for such a division of the stadium of the main deliberation in our country and the facts which are of importance for the measuring of punishment were gathered as early as in the investigation. The procedure, as it is, functions significantly inquisitory beside the insistence for deliberation of the entire material of evidence during the main deliberation organized in a manner of a contradictory argument.

Namely, the influence of the preliminary procedure is not neutralized beside the insistence on contradictoriness of the main deliberation, because the investigative material remains the main source of information during the entire procedure which in practice means that during the main deliberation the validity of the results of investigation is essentially checked.

In this sense some ‘barriers’ need to be set for the influence of the investigation over the main deliberation based on the example of some modern European procedures. Likewise, in the Italian procedure, the president of the council has a limited access to the materials gathered in the investigation which are in the possession of the prosecutor. The material that is delivered to the court’s disposal contains minutes only on the non repeating acts, such as the completed examinations or other actions which cannot be repeated in the main deliberation. The evidence before the court is as a rule deliberated again. Similar to this, the deliberations given in the preliminary procedure in Germany could be used only as a reminder of the defendant and as to assess the validity of the deliberation but they cannot on their own serve as evidence on which the verdict will be based. Conversely, in our law and in practice the deliberations of the defendant given in the investigation are still the informational basis for the entire procedure.

г) Forms of speedier procedures. The problem of inefficacy and the long duration of of court procedures is one of the main failures of the criminal legal system and thus one of the key points on which further work is necessary in the future. Until now there was no serious research undertaken in our country in this field, so empirical data that could help us find solutions for exiting the bad state do not exist even for the phases or the critical points in which the procedures are mostly stuck. Special attention should be given to backlog or the period which passes from one step to the next in the procedure of a case or the unnecessary waste of time for taking the next step in the procedure which could have been taken but it was not. The reasons for this are multiple and are more of organizational than procedural nature and are mainly determined by the low level of professionalism. The time in which work is really done on a case is less than 5% of the entire duration of the procedure. One case passes through over ten “working stations” in the course of its processing while the number of people that work on one case in the police, prosecution and judiciary is ten to twenty. The bigger the number of

movement of the case, the bigger the possibilities of backlog and unnecessary waste of time until the next subject takes over the case in progress. Hence, the decreasing of the number of movements of the case from one to another participant in the procedure could significantly decrease the time of waiting and the overall duration of the procedure.

The instruments of the Council of Europe in the area of criminal justice incorporate many instructive standards directed towards the speeding up of the criminal procedure ('trial within reasonable deadline'), simplification of the procedure and 'turning' of the procedure in other areas of solving criminal-legal cases (mediation, compensation of damages, etc.). Hence, *Recommendation No. R (87)18* of the Committee of Ministers of 1987 on the **simplification** of criminal justice entails the following measures: broadening of the usage of the principle of opportunity of criminal persecution; shortened procedure of minor or mass deed; extrajudicial negotiation; introduction of simplified procedures for mass acts of minor significance (traffic, customs, fiscal) which get down to written procedure and without participation of a judge or taking a decision, such as a criminal order, similar to a verdict; simplifying the regular procedure for limitation of the previous investigation only on some cases based on the assessment of the court and the formalization of acts overtaken in a police investigation or taking an additional investigation in the general deliberation phase, reaching a verdict on the basis of confession of guilt; shortening of the deadlines for procedural acts, deciding on minor acts in the absence of the defendant or deciding and releasing the verdict in a strictly determined deadline; delivery of a written verdict and invitation to the fastest way, including even postal delivery as well as on the official address declared by the defendant in the first phase of the procedure; limitation of advise on professional judges in concrete cases and solving cases by an individual judge, limitation of a jury trial only to specific categories of more serious crimes and resolution of specific acts, such as economic crime by specialized judges.

Recommendation No. R (95)12 of the Committee of Minister of 1995 for management with criminal judiciary leads to the usage of modern principles of management with criminal cases and usage of new information and other technologies as a condition for effective end efficient functioning of criminal justice. The standards in this sphere relate to the capacity and technical equipment of courts, forms of cooperation between the judge, the expert advisors and the judicial administration and the management with judicial decisions based on the precise differentiation between the judicial and administrative functions and the relieving of judges from the unnecessary administration.

Significant possibilities for fastening and increasing of effectiveness of the system should be primarily searched for in the simplification of procedures. In this sense, under simplification we mean simplification of the regular criminal procedure as well as discovery of forms of special shortened procedures for less complex cases or through plea-bargaining.

A serious analysis of the problems of organizational nature is necessary which needs to be prepared by experts in the area of management. The transferring of cases from one subject to the next in the course of the procedure (from the police to the prosecution, than this to the court) without its sufficient preparation only prolongs the case. The experiences from other countries show that when the problem of proper management of cases and decreasing of duration are treated seriously and where the progression of cases is subject to monitoring, usually with computer systems, results do not fall short.

Of course, a lot can be done for speeding the procedures within the frame of the current system. Hence, each institution of the criminal legal system should be re-examined in the direction of improvement of how cases are treated in that institution. Apart from this, legal and practical steps should be taken in the direction of decreasing the delays caused by the interactions among different subjects in the system. The system in which the roles of police, public prosecution and investigation judge are intertwined unnecessarily complicates things, and the same actions are preformed by several bodies.

On the other hand, the principle of **legality** in its present form is unrealistic and in preserved in a small number of European countries so they find outlet in the different forms of shortened procedures and the introduction of possibilities for plea-bargaining. On the other hand, the wide possibility for discretion in the criminal prosecution does not pose any problems from the point of view of equality before the law.

For us, the German system is of special interest where the principle of legality is combined with a degree of discretion in the criminal prosecution. In general, the process of acquiring greater competences of the prosecution in Europe goes through the improvement of transparency of decisions in the prosecution with the aim of gaining greater consistency in the decision-making as well as through the system of stricter internal control of the organization itself and through external control undertaken by the damaged and the courts. In such a way, the independence acquired in relation to the executive is balanced with a higher degree of legal control over the work of public prosecution.

The questions of overburdening of courts are becoming increasingly important in relation to **long duration** of procedure, and in relation to that for its simplification, abandoning of the principle of legality, incorporation of consensual elements, etc. In that sense, some traditional continental stand points and principles are abandoned. So, the strict abiding by the principle of legality is considered practically not implemental while the introduction of consensual procedural forms is a consequence of the abandoning of material truth and of justice as something that cannot be realized. Under the influence and practice of the USA, negotiation is most strongly represented in the Italian criminal procedure, but it slowly enters in the reformed inquisitor procedure.

Thus, from the point of view of rights of the defendant it is most important to ensure his/her free will to the point to which this is necessary and realistically possible. So, apart from strengthening the contradictory, the introduction of consensual elements represents the most actual trends in modern criminal procedure. The attempts for speeding the criminal procedure led to enrichment of forms of fastened, summary procedures, as well as procedures that result in reaching verdicts even without undertaking regular procedure in the cases of less complex criminal acts. In that sense, some of these forms should be seriously considered for introduction in our criminal procedures:

Transaction implies an extrajudicial procedure in which the public prosecutor, the damaged and the perpetrator take part. It is contained in the initiative of the public prosecutor which sets a condition to the defendant that provided that he pays determined sums of money within a predetermined deadline all the charges against him/her will be withdrawn.

Mediation is different from transaction in the fact that not only a sum of money is paid but compensation for the damage incurred is offered through making the perpetrator take some actions in a manner of services for the victim.

Plea-bargaining is an extrajudicial manner of conflict resolution between the defendant and the public prosecutor, which stems from the accusatory procedure in the United States and the UK. Consensual plea bargaining is not formally accepted in Germany. But, in practice we find informal plea bargaining in cases of more complex criminal nature. Plea-bargaining is related to the type and complexity of a criminal act entailed in the prosecution act and the type and complexity of the criminal sanction proposed by the prosecutor. There has to be an agreement between the concerned parties for plea-bargaining to exist. The proclamation of guilt has to be given personally by the prosecutor while the judge must be persuaded that the defendant is aware of the act for which he declares guilt and the consequences from it. In the course of deciding whether the declaration of guilt will be accepted, the circumstances of the act and the criminal file of the defendant must be considered.

Practice of punishment on request of the parties involved (pattegiamento) is a special type of procedure practiced in Italy and it is very similar to *plea-bargaining*. At the beginning, the public prosecutor and the defendant agree on the punishment which they will ask the court to pronounce, and whether this will be the one will depend upon the consent of the judge. Such plea-bargaining will allow the defendant to decrease the penalty.

Procedure for pronouncing a criminal order consists of reaching a verdict without holding the main deliberation in predetermined legal conditions. This is, in fact, a special type of procedure in which a judge of the lower court and an individual judge, in agreement with the proposal of the defendant, gives a criminal order in which all the necessary data related to the

perpetrator and the criminal act are contained and the criminal sanction is precisely determined which will be used when the criminal order becomes final.

Effectiveness of the processing – improvement of procedural rules which regulate the measures of effective procedure as an assurance of measures for direction and measures of enforcement; reforms of the rules and specific procedural sections and some procedural actions.

3. CONCLUSION

The following could be outlined as **key questions**:

- **Reform of the preliminary procedure**; consistent separation of functions of data gathering for the prosecuting act undertaken by the public prosecutor, from the decision-making in the procedure – which is a right and a duty of the judge; introduction of an investigative team as a body which acts on the request of the public prosecutor; introduction of the judge of investigation as a new decision-making body in the preliminary procedure instead of the current solution of accumulation of function in the investigation (gathering of data and evidence) and of taking decisions in the face of the investigative judge;
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- **Introduction of new types of speedier procedure**; solving of less complicated cases of reconciliation, plea-bargaining, shortening of the criminal prosecution with an appropriate remuneration of the victim; simplification of the procedures in the course of preparation of the argument; widening of the fields of implementation of agreement of the parties involved for the duration of punishment; reform of the shortened procedure;

- Improvement of procedural rules which regulate the measures for an **effective conduct of procedure** as assurance of the measures of direction and measures of use of force; reform of the rules of separate procedural sections and separate procedural actions.

A wholesome foundational change of the procedural criminal law wich allows for replacement of the current judicial investigation with investigation on the side due to simplification and shortening of the procedure will bring important savings on the long term. However, after the adoption of the Law on Criminal Procedure important adjustments of the police and public prosecution are necessary. These adjustments will necessitate:

- the new responsibilities of the police and the public prosecution require new employments of stuff in the police – which will ensure the preservation of rights of people held in custody and stuff that will work with the actions of investigation in the public prosecution office.

- in the period between the adoption of the Law on Criminal Procedure and its entry into force it will be necessary to conduct a thorough **training** of police officers and public prosecutors and of the people involved in the workings of investigation as well as training of the judges which will be needed.

The reform of the criminal procedure will be implemented incrementally and methodologically according to the concept delineated herein. The principles on which it is based are directed towards the adoption of a new system of regulations of criminal procedure which must guarantee protection of human rights, valid confirmation of truth, in a speedy, simple and economic procedure which will take into account the nature and the seriousness of the criminal act, the personality of the defendant and the victim, as well on the needs of protection of society from criminal acts.

Upon the acceptance of these principles the work needs to continue to **construct the legal drafts** and their alignment with the entire Macedonian criminal legislature, while taking into consideration that this reform of the legal acts will not in itself serve as a magical solution to the existent problems in the criminal procedure unless **human and material resources** are not ensured and are necessary for the acceptance and usage of the new acts in the practice.

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ANNEX: DRAFT STRUCTURE OF THE NEW LAW ON CRIMINAL PROCEDURE

I. General provisions

The general provisions mainly correspond to the structure of the provisions of the first part of the present Law on Criminal Procedure. This relates to the basic provisions in the first articles of this law determined in the same manner in which this is done in some other contemporary criminal procedures. Most of them will remain unchanged and only a few, such as the prohibition for the usage of illegal evidence and the list of rights of an individual deprived of his/her freedom will be considered on the basis of practical implementation.

The real competence of courts is conferred by taking into consideration the provisions of material criminal law and the taxonomy of the specific part and in accordance with the organization of the judiciary. In the functionary competence the setup of the investigation is change. The investigation is in the competence of the public prosecutor while the judge of investigation decides on the acts which deal with the rights and freedoms and the acts of evidence.

The removal of problems related to unjustified absence of the persons that have been called, which sufficiently burdens the success of the criminal procedure will be achieved though:

- consistent implementation of the procedural punishments for the persons that have not responded to the invitation;
- the division of burden of ensuring the presence of witnesses between the court and the concerned parties, which will allow the court with the eventual usage of procedural force only to assist the given party to ensure presence of their witnesses; and
- transferal of the administrative obligation for inviting the persons and ensuring their presence before the court from the judges to the administrative stuff in the court under the supervision of the secretary of the court.

II. Types of criminal procedure

The criminal procedure has two main types: regular and shortened, as well as special types of procedures. Special rules of procedure can be adopted in the subjects which are considered to be serious criminal acts: a) against the state, b) for values protected under international law and c) corruption and organized crime. Such an approach allows for protection of human rights and proportional settling of the resolution of complicated factual and legal questions. The regular criminal procedure is the basic, general and most developed type of procedure whose rules are applicable for all types of procedure unless special rules are stipulated. This type of procedure is prescribed for criminal acts for which a prison sentence of 5 years has been pronounced as well as for separate criminal acts independent of the prescribed penalty.

III. Steps of the regular criminal procedure

1. Investigation

a) The investigation is founded on the deeds of the parties involved (the public prosecutor and the defense) and only as an exception on the deeds of the court. It is regulated with rules for prosecutor investigation. It starts on the order of the public prosecutor when there is founded suspicion that a criminal act has been conducted. It is initiated against a known and unknown perpetrator. The suspect has no legal remedy against the order of the prosecutor, but as soon as he received general notification of his/her rights, he can suggest termination of the procedure at any time. The order to start the investigation, as a rule, is immediately presented to the suspect. In exceptional cases, with special explanation, in the case of legally stipulated criminal acts, he/she receives a general notification on his/her rights.

In such cases the notification must be presented: 1) in the course of undertaking the first act of evidence under the sanction of invalidity of the act; 2) in the course of undertaking action in which the suspect is personally involved. From the moment of presentation of the investigation order, the suspect has all the rights to defense except for the right of overview of materials which he gains upon his/her interrogation.

b) The investigation is finished when the state of play is sufficiently clear to allow for the submission of the prosecution or when there is basis for the termination of the investigation. Prior to the termination of the investigation the public prosecutor must interrogate the suspect if this is not previously conducted. The duration of the investigation is limited in time, after the end of which the case is transmitted to the higher ranked public prosecutor who undertakes necessary measures for the termination of the investigation with the obligation of determining a new deadline.

c) The duty to gather data in the investigation lies with the prosecutor that is assisted by a crimes investigator as a new subject in the preliminary procedure. The function of investigator is performed by the criminal police, the investigator in the public prosecution and for separate criminal acts, other competent bodies assigned by law. The investigator works on the orders of the public prosecutor and in the event of taking urgent action for finding evidence or other measures for which the court decides, on the order of the judge of investigation.

d) The investigation consists of general and specific examinations and urgent actions for finding evidence. Examinations for criminal acts are initiated personally by the public prosecutor or the criminal investigator. The results of the overviews are used by the public prosecutor in the act of submitting of prosecution.

e) The police discover criminal acts and their perpetrators and participate in the finding and securing of evidence for the needs of the criminal procedure. The police officer is an investigator with general competence for investigation of criminal acts. The consideration of criminal acts and the urgent actions for gathering of evidence, when prescribed by the Law on Criminal Procedure, are undertaken by the police on order and under the immediate management of the public prosecutor. The standards for procedures and actions that are taken by the police in accordance with the new Law on Criminal Procedure will be regulated with amendments and addenda of the Law on police.

f) The actions of evidence in the investigation could be approved by the judge of investigation on the proposal of the public prosecutor or the suspect and to conduct them on his/her own or to present them to the investigator. In some cases the evidence actions could be exceptionally warranted on the proposal of the damaged.

g) The evidence acts are regulated with due care for protection of human rights and in accordance with the provisions for resolution of factual and legal questions in the course of the procedure.

2. Prosecution

a) The prosecution is the concluding part of the preliminary procedure conducted by the judge of investigation in the line of duty. It includes: 1) the submission of prosecution 2) examination of the prosecution, 3) decision on the prosecution, 4) retrieval of the prosecution, 5) amendments and addendum of the prosecution, 6) notification of the suspect for the prosecution, and 7) negotiation of guilt.

b) The examination of the prosecution has key importance which is regulated in order to: 1) put aside the deficiencies of the preliminary procedure including also the evidence gathered illegally, 2) to check the presumptions for holding the main hearing, 3) to precise the content of the prosecution as well as 4) to clarify the legal position of the parties involved and to discern the procedural material which will be subject to the hearing.

3. Main hearing

a) The main hearing is a middle and most important stadium of the criminal procedure. In the regular and shortened procedure the hearing has the same order with the fact that the contents of prosecution influence the case and the progress of the hearing. The hearing is held in the presence of the parties involved and, only in the legally stipulated cases, in the absence of the prosecution.

b) The reading of the prosecution is broadened with the introductory address of the public prosecutor and the right of the prosecutor except for the information on the prosecution to have his/her own introductory speech. The damaged does not have an introductory speech, but he can in a short announcement pinpoint the guilt of the defendant and to explain the legal and property request.

c) The law prescribes rules for preclusion on data hearing and the proposal of evidence upon the commencement of the main hearing.

d) The hearing of evidence for hearing of witnesses and forensics is rearranged in order to gain “accusatory elements” in a manner that allows for cross examination of witnesses and forensics instead of allowing them to deliberate the content of their own saying.

4. Procedure on legal remedies

The concept of appeal is preserved, but the control of regularity and the wholeness of the factual situation in the line of duty will be reexamined along with the concept of the request for extraordinary reexamination of the legally effective verdict.

5. Speedier procedure

With the introduction of new type of **speedier procedures** in the regular and shortened procedure two aims are taken into consideration. The first one entails the relieving of courts from conducting hearings in the cases in which the situation is such that it can terminate even without a hearing or with the conduct of hearing only on the question of sanction that needs to be pronounced.

With the appropriate practice of the usage, a significant fastening of the procedure can be expected along with the decrease of the total number of deadlines for main hearing and also will bring about accounting savings on the long run. The second aim is the concentration of the court on the cases in which a hearing is necessary due to their seriousness or complexity. Accordingly, significant rise of the quality of the procedure and the fastening of the dynamics of things in those complex cases is expected.

6. Speedier types of conducting a procedure in the regular criminal procedure

The solving of less serious cases with reconciliation, plea-bargaining, shortening of the criminal prosecution with appropriate compensation of the victim; simplification of procedures in the course of preparation of the argument; expanding of the fields of practice of plea-bargaining of the parties involved for the duration of the penalty; reform in the shortened procedure.

The speedier procedures in the regular criminal procedure are 1) proclamation of verdict on the basis of an agreement of the parties involved, 2) procedures for immediate prosecution and 3) procedure for proclamation of criminal sanction upon the receipt of confession from the defendant.

7. The flow of the shortened criminal procedure

The shortened criminal procedure is carried out for criminal acts for which there is a prison sentence in the duration of five years or a financial penalty, unless stated otherwise for other acts. The shortened procedure is undertaken by an individual judge, unless it is stipulated by law that the judicial council should conduct the same. The number of prosecution acts of prosecution and private indictment is shortened. The prosecution on the shortened procedure does not have an explanation, but it does have a proposal for sanction and a given number of evidence proposals for each point of the prosecution. There is no interrogation on the prosecution in the shortened procedure except in case of deficiency in the form. The hearing must be set in a deadline of eight days from the reception of the prosecution or the private indictment and to implement the model of regular criminal procedure, but simply and effectively, as a rule on one deadline, in the event of which it is recorded with technical devices. The hearing cannot take place without the authorized prosecutor, except if he/she previously authorized the damaged, who can be present and represent the prosecution.

8. Speedier types of conducting a procedure in the shortened criminal procedure

The speedier types of procedure in the shortened procedure are: 1) reaching a verdict on the basis of reached agreement with the concerned parties, 2) reaching a verdict with criminal warrant and 3) procedure for passing a criminal sanction upon the reception of confession from the defendant.

B) REFORM OF THE CRIMINAL LAW

Abbreviations:

EU	European Union
LCP	Law on Criminal Procedure
CC	Criminal Code
CCM	Criminal Code of the Republic of Macedonia
OECD	Organization for Economic Cooperation and Development
UN	United Nations
RM	Republic of Macedonia
USA	United States of America
CoE	Council of Europe

1. EXECUTIVE SUMMARY

1) Current situation in the relevant sector

The implementation of the Criminal Code in the past decade has shown certain deficiencies in the legal provisions which has resulted with difficulties in its practical implementation on the part of competent institutions. In some of the problematic provisions there is a need of corrections of existing formulations while in others there is a need for re-examining the entire concept of the competent institute of criminal law.

The proposed reform of the material criminal legislature presupposes amendments in the general as well as in the specific part of the Criminal Code. The weaknesses are detected and therefore interventions and research is necessary for the following criminal-legal institutes and questions:

- Confiscation of property and property gain;
- Criminal responsibility of legal persons;
- Defining of organized crime;
- Economic criminal acts;
- Acts of cyber crime;
- Precise determination of international obligations of the Republic of Macedonia and alignment of our criminal legislature with the new international and regional legal acts (conventions, directives, etc.)
- Other areas.

2) Aims of the reform of material criminal law

2.1. Problems that need to be solved

It is necessary to firstly re-examine problematic provisions of the CC in order to approach the reform, which presupposes investigating their practical implementation. The implementing institutions of the CC are in this respect expected to provide key contribution towards detecting problematic provisions. Therefore, comparative research is necessary along with setting the frame of the reform as an operational model which will result in concrete proposals for amendments and addenda of the Criminal Code.

Monitoring the dynamics of the development of the criminal law is key to reform undertakings and considering the fact that the aim of the proposed reform is adjustment to the contemporary European trends and alignment of the CC with the new European and international standards, current criminal-legal innovations in the EU and in general in the contemporary developed democracies which should find their place in the Criminal Code which will allow for a higher degree of harmonization of domestic with European legislative systems.

2.2. Aims of the reform

The broader aim of the project is to strengthen and improve the criminal law framework which is one of the main assumptions for effectiveness in the performance of competent institutions in protecting the rights and freedoms of people in a democratic country founded on the rule of law.

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The Reform of the Criminal Code will contribute the approximation of the Republic of Macedonia to European standards which is a key condition for the European integration processes in our country.

2.3. Specific aims of the project are the following:

- Comparative research of the institutes of criminal law which are subject to the proposed reform;
- Designating the current situation and the problematic aspects in the practice of criminal law provisions;
- Determining the most recent European standards in the criminal law area and preparation of their incorporation in the Macedonian criminal legislature;
- Preparation of a consistent concept of the reform of material criminal law;
- Preparation of proposals for amendments and addenda to the Criminal Code and other relevant legal acts and bylaws.

2.4. Expected gains

The implementation of planned project activities presupposes results that would consist of:

- Analysis of the extent of implementation of criminal law in the Republic of Macedonia;
- Academic comparative analysis with assumptions of current tendencies in criminal law;
- Determining the deficiencies of the system of material criminal law;
- Establishing an operational frame for implementation of the proposed reform;
- Concrete proposals for amendments and addenda of the Criminal Code in the direction of approximation (and for some institutes) and alignment with the international and European standards.

3) Assumptions and risks

3.1. Assumptions

The success of the delineated reform is immensely dependent on the realization of the following assumptions:

- support of the state institutions in the implementation of the reform and establishing coordinated cooperation among the project team and the responsible institutions;

- incorporations of representatives of all the 'beneficiary' institutions due to ensuring so called ownership over the project;

- identification and engagement of an expert and research team as well as associates of the relevant institutions necessary for setting the framework for research of academic, competent and practical aspect for detecting the points that require intervention and formulation of concrete solutions, propositions for amendments and methods of implementation;

- financial and technical support of the Government anf the Ministry of Justice for the implementation of the reform project.

3.2. Risks

The legislative, institutional and systemic reforms in general in the Republic of Macedonia are a lengthy process and no visible results can be spotted of such activities. The previous is due to several reasons which should be envisaged as risks in this case and their overcoming should be insisted upon. These are:

- Lack of political will for implementation of the reform of the Criminal Code in general;
- Insufficient cooperation of relevant institutions and inability to successfully implement project activities due to the lack of the necessary input from them, thus resulting in inability to ensure s.c. ownership over the project benefits;
- Financial difficulties which resulted in the inability to engage compatible experts as well as for the implementation of essential and systemic research endeavours, etc.

4) Work plan: intervention areas and timeframe

PERIOD ***February* 2007 – *February* 2008**

February – March 2007	Setting the framework of concrete activities and detecting of institutes which will be reformed
April – May 2007	Research (general part)
June -July 2007	Research (specific part)
August – October 2007	Preparation of concrete proposals of provisions
November 2007- February. 2008	Discussion and determination of final proposals for amendments

The project activities will be carried out through individual work of the experts, joint working meetings, seminars, workshops, etc.

Areas and institutes of criminal law on which the reform is founded:

- Confiscation of property and property gain;
- Criminal responsibility of legal persons;
- Defining of organized crime;
- Economic criminal acts;
- Acts of cyber crime;
- Precise determination of international obligations of the Republic of Macedonia and alignment of our criminal legislature with the new international and regional legal acts (conventions, directives, etc.)
- Re-examining the provisions of unaccountability; re-examining the provisions for overview of biological grounds for unaccountability for which problems have been pinpointed in the daily implementation;
- System of alternative measures;
- Proposals for amendment in the Criminal Code as a consequence of the presumable incorporation of the new system of juvenile criminal justice;
- Reforming of the acts against armed forces due to misplacement of several incriminations;
- Consideration of the acts of abuse of official position, etc.

5) What will follow

- Public debate on the proposed laws;
- Government and Parliamentary procedure;
- Implementation of the proposed future activities.

2. GROUNDS FOR THE REFORM OF THE MATERIAL CRIMINAL LAW

The adoption of the Criminal Code of the Republic of Macedonia in 1996 was the first phase of reforms of the Macedonian material criminal legislature which had the aim of its conceptualizing on the basis of a new value system founded upon democratic benefits, rule of law and the protection of human rights and freedoms.

The basic criminal law postulates on the basis of which the Criminal Code of the Republic of Macedonia is founded are: criminal law philosophy of liberal criminal law, criminal law of the state based on rule of law and the primate of individual human rights and freedoms, alignment of the criminal law with the new value system, establishment of a rational and effective criminal law system for repression and prevention of crime, alignment with the European criminal law, monitoring and implementation of international obligations of the Republic of Macedonia, etc.

The Criminal Code of the Republic of Macedonia is review for the first time in 1999 with the amendments in the specific part of which the amendments in the direction of strengthening the repression of corruption are dominant. The second novelty dates from 2002 when small amendments and addenda in the specific part of the Criminal Code of the Republic of Macedonia are introduced.

The second phase of the reforms in the material criminal legislature commenced in 2002 and the amendments and addenda were introduced in 2004 with the adoption of the Law on amendments and addenda of the Criminal Code of the Republic of Macedonia on March 19, 2004. The main motivations for commencing the amendments were the obligations stemming from the European integration processes in the Republic of Macedonia (the signing of the Stabilization and Association Agreement with the EU) and the serious changes in the image of crime in terms of scope, dynamics and the appearance of new, serious and unconventional forms. The amendments in the Criminal Code of the Republic of Macedonia of 2004 are a serious intervention characteristic of the set of innovations which are incorporated for the first time as institutes in our criminal legislature. Apart from the amendments in the provisions on the criminal act and the criminal responsibility, an important novelty is the introduction of criminal responsibility for legal persons and consequently, the introduction of corresponding punishments for legal persons.

In the system of sanctions the comparatively broadly represented, alternative measures are accepted. The repertoire of punishments is broadened while the repertoire of security measures for relocation of a part of the current ones in the system of punishment reduced. Amendments are introduced in the provisions of the criminal law measures: confiscation of property and property gain and taking over of objects.

Upon the reception of the candidate country status of the Republic of Macedonia for full membership in the EU, the reform process of the material criminal legislature gained momentum due to the requirements for alignment of domestic to EU legislature.

3. REFORM OF THE CRIMINAL LEGISLATURES IN THE WESTERN EUROPEAN STATES

1) Introduction

The criminal law crisis in the 21st century, i.e. the crisis of society in which the criminal law is expected to perform its functions – such as primarily the protective one, stemmed from the inefficiency of preventing and repressing and radical changes in the image of crime. According to the realistic conceptualization – the criminal law has the task of holding crime under control and on a tolerant level which in reality is impossible to eradicate. The two major criminal-political conceptions: the liberal conception, i.e. the conception of human rights and basic postulates of a democratic country based on the rule of law raised the question of legitimacy of the laws.

In the last decades of the 20th century crime has encountered radical changes. It is an undeniable fact that generally development is always followed by increase in crime. The basic characteristics of the situation and tendencies of crime in the Western countries are: expansion of organized crime, increase of commercial crime, money laundering, trafficking with weapons, corruption, illegal transport of waste, visa and passport forgery, smuggling and other immigrant criminal acts, crime related to industrial legislature, prostitution and other types of sexual exploitation, violence towards foreigners. Statistics shows rapid growth of crime in general. For example, official statistics of the USA show increase in all types of crime in the period between 1970-1980, when acts of violence against people increased for 136%, robbery, burglary for 138%, burglary for 54%, etc.

UN reports (first, second and third) with regard to crime tendency only confirm the perception of rapid growth of crime in the period of 1970-1986 in all countries The malignant state of crime triggered by the rapid transformation of the system of criminal justice, which often is constituted of increased repression and greater implementation of the prison sentence: in 1986 the number of prisoners was raised on average for 2 prisoners on every 1000 citizens over 18 years of age, and in some countries for over 6% of the total male population there was a probability that they will end in prison in the course of their life.

According to the UN Report on the tendencies of crime in the period 1986-1990 there was again a rapid increase in the Central and Eastern European countries: in the Czech Republic crime raise four times, in Hungary three times, in Poland 3,5 times, in Russia 5 times, etc. This tendency continued in the period of transition 1990-2000.

Since the beginning of the nineties (1990-1994 period), there is a tendency of decreasing crime in the Western European countries and the USA. This tendency, with the exception of the drug related crime, was maintained in the period 1990-1997 (Report of the UN Secretary General at the tenth congress of the UN on prevention of crime and treatment of perpetrators, Vienna 2000).

According to the research conducted in the Council of Europe on the tendencies of classical serious forms of crime (murder, body injury, rape, robbery, burglary and acts related to narcotics) in 36 countries members of the Council of Europe in the period 1990-1996: there is a decrease in crime reported to the police only in seven countries while in the remaining countries the reported crime is on the rise, especially in Estonia, Latvia, Lithuania and Russia where the crime rate doubled. In the Republic of Macedonia there is a small increase of 3,2 criminal acts on every 100.000 citizens in 1990 to 4,0 in 1996. The biggest decrease is in Croatia – 10%, Italy – 29% and Northern Ireland – 65%. Criminal acts related to narcotics show general increase and only in four countries it is bellow 15% while in other four countries it is raised for over 1000% (Croatia, Estonia, Hungary and Romania). In the Republic of Macedonia, the increase is 412%. Statistical data of this research show increase in the mentioned types of crime in the Republic of Macedonia, yet they are relatively better compared to for example, Bulgaria where the rise of reported crime is doubled, or Slovenia where the rise is even greater, except for rape, robbery and burglary where a decrease is noticed.

The achieved stagnation is a result of investments in the system of criminal justice and the preference of the model of „implementing punishment“ and ”law and order.” For example, the number of police officers on 100.000 inhabitants in the USA in 1994 was increased to 882, in the UK to 502, in Sweden 466, in Norway 387, etc. Evidence for such a claim is the situation in Macedonia: in a state of weak economic capacity, crime is on the rise and sources of his control are increasingly limited.

The state of crime in the period 1995-1999 is characterized by stagnation even a decrease in the rate of discovered crime in the member state of the EU for 1%, in the UK – 10%, in the USA – 16% and in Canada – 11%. In the Central and Eastern European countries in 1999, the crime rate decreased in Hungary for 16% while at the same time there is a great increase in Russia for 16%, Estonia 13% and Slovenia 12%. Still, contrary to that, the violent crime is in the rise in all EU countries for 11% (Italy 37%, the Netherlands 34%, etc.), there is an increase of 31% in the narcotics business (particularly in Ireland 1339%, and Greece 128%).

The rate of use of prison in the member states in the EU marks an increase of 5%. In the Central and Eastern European countries there is a rapid expansion of organized crime, racketeering, criminal acts against property, commercial crime, corruption, illegal trafficking of weapons, forgery and criminal acts related to narcotics.

Faced with such a situation, as well as with the new post-industrial informatics era and correspondingly, the consequences of that in the society, the western criminal legislature undergoes series of changes and reforms.

There are two main strategies that are differentiated in the reforms: the first is a pragmatic approach and analysis of the existing criminal law institutes and solutions, and the second one is the so called scientific approach – developing a new system on the basis of which the ideas of the Movement of social defence lie: social hygiene, psychiatry, psychology and pedagogy. The real image shows acceptance of a mid way and adoption of new ideas which are not in collision with the basic classical – traditional system of criminal law of which the founding values are the provision of legality, of guilt, duality, punishments and security measures, on individualization, etc. The partial approach is dominant of occasional partial amendments and addenda of the criminal codes.

1) Short overview of the reforms of criminal legislature in separate countries

Sweden

The Criminal Code in Sweden dates from 1962 and it is mainly founded on the conception of special prevention. It is characterized with pragmatic legislative logic in its systematic. The criminal responsibility of private persons is introduced with the 1986 amendments, generally useful work in 1992, and electronic monitoring in 1994. The provisions on juveniles are not systematized in one segment but the entire Criminal Code also includes juvenile delinquents unless that is not explicitly excluded. The issue of juvenile delinquency is regulated in separate laws. Apart from the provisions on juveniles in separate laws there are also provisions on addicts and mentally disabled which are complementary to the provisions in the Criminal Code.

The specific part incorporates ten chapters of criminal acts. Amongst them, amendments are introduced in the acts of cyber crime, sexual assaults, acts against trustees and criminal acts against the judiciary. The system of sanctions is founded on the monist approach and the only goal of all sanctions is re-socialization of the perpetrator. The Code largely departs from the classical concept and it is inclined towards the neoclassical orientation.

Norway

The Norwegian Criminal Code was adopted in 1902 and more significant amendments were introduced in 1990 in the area of juvenile justice and the introduction of the generally useful work. The Criminal Code of Norway is considered to be the first modern Criminal Code. Unlike Finland, Norway is less oriented towards repression and more towards prevention. The direction of the Scandinavian criminal law reform is a welfare state, management and the idea of treatment. The definition of criminal act reflects the social understanding of crime as a consequence of systemic deficiencies and social control which are triggered by urbanization and industrialization.

Therefore, the balanced relationship between formal and informal control is characteristic. The introduction of alternative measures in the Norwegian criminal legislature is followed by in-depth caution and experimentation.

Denmark

The Danish Criminal Code from 1930 has been amended three times since 1997 – 1999 which included the incorporation of criminal responsibility of legal persons (which does not exclude state bodies), alternative measures probation and generally useful work and the implemented of complete and partly confiscation for some serious crimes has been expanded.

The rare amendments of the Danish Criminal Core result from the stability of crime and the low rate of sentencing to prison sentenced. The specific part does not entail a large number of provisions, but they are flexible and the situation is discerned by the fact that the Danish Criminal Code is the only one in Europe that recognizes analogy along with recognizing judicial practice as a source of law. Still, the novelties are introduced in the part of verbal assaults against the state, the acts of corruption and the acts of economic crime. A separate law deals with criminal acts against environment.

Finland

The Finish Criminal Code of 1889 was amended in the incrimination of property and economic acts in 1991, while in 1995 in the acts against the state and violent criminality. Criminal responsibility of legal persons was introduced in 1995 and the generally useful work in 1996.

The reforms of the Criminal Code of Finland are focused mainly on the general institutes and on the system of sanctions. The crime in Finland has a constant downward tendency and the rate of imprisonment is stable.

Germany

The Criminal Code of Germany dates from 1871. It has been reformed with several laws: two times in 1969, in 1970, in 1973, in 1975 and in 1976. From the more recent reform activities those of economic incriminations of 1986, incriminations of organized crime and trafficking of narcotics of 1992 are characteristic while in 1998 the repression of crimes against life and body is strengthened. In respect of monetary fine the system of daily fine (globa) is adopted and the law recognizes specific security measures such as safety possession. The treatment of juvenile delinquents is a subject of separate laws.

The reforms of German material criminal legislature was guided by the idea of transformation and modernization, adaptation of the existent criminal legislature to the new social and cultural conditions within which human rights and freedoms are all the more endangered of the speedy technical-technologic development and mass culture.

The philosophical-legal and criminal-political foundations are shattered in the idea of individual responsibility, human rights and freedoms and the

provisions of a democratic country founded on the rule of law. The two main provisions on which contemporary German criminal law is based are the provision on guilt and the provision of special prevention that is determined by the provision of proportionality of the sentence and the setting of reasonable limits to the criminal law repression.

The reform in the general part of the Criminal Code was focused on the defining of approval, defining of unaccountability and the legal confusion consequently to the normative conception of guilt, redefining of the final need and accomplice. In the field related to sanctions, the sentence is set as a basis and regular sanction, and the shrinking of the field of implementation of short term sentences – the taking away of freedom. Such solutions in Germany have brought to more than 85% monetary sentences and less than 5% of prison sentences of less serious crimes and decreasing of the prison population.

The specific part was reformed several times due to the need of adjustment to the new forms of crime. The crime against the environment were innovated, economic crimes, forms of organized crime (a separate law on the acts of trafficking of drugs and other forms of organized crime) the implementation of property sentences and confiscation is broadened and sexual assaults were modified, etc. A separate law on prevention of corruption was adopted. The Law on crimes against international criminal law was prepared as a separate law. The guiding idea of the German reform which is still in progress is the combination of ideas of retribution and prevention.

France

The French Criminal Code from 1992 is founded on the basic conception of the Napoleonic Penal Code of 1810. It is characteristic in not recognizing security measures for unaccountable persons which have been moved to the medical law, while it recognizes the criminal responsibility of legal persons. In 1998 the societal judicial monitoring was introduced as a measure as a type of probation. Juvenile delinquency is subject to separate regulation. The Criminal Code of France is a continuum and it reflects the “untouchable” nature of the classical structure and the traditional categorical system of criminal law. In view of distinguishing between criminal acts and misdemeanours, the French law accepts the quantitative

In view of differentiating between the criminal acts and misdemeanours, the French law accepts the quantitative conception, In the new French Criminal Code the term unaccountability is redefined, while retaining the consistency of the concept of criminal act as an act of an accountable and guilty perpetrator, legal confusion is envisaged as basis for exclusion of guilt. The system of sanctions is comprised of penalties (retributive, improving, side and misdemeanour penalties) and admonitive sanctions.

The specific part of the French Criminal Code is characterized by a liberal and individualistic approach which results from the novel tendencies and abandoning of the priority of state protection. It is interesting that the actions against the state are renamed as criminal acts against the nation, the

state and public order. For these actions - criminal association is also incriminated.

Switzerland

The Criminal Code of Switzerland was adopted in 1937 and it is reformed in several occasions: in 1950, in 1968, in 1971, in 1992, etc. The reforms in the Swiss criminal legislation are characterized by a slow pace and long discussion and debates. The first reforms of the Swiss Criminal Code relate to the specific part while the more recent to the general part: introduction of the system day-globa for the monetary fine, criminal responsibility of legal persons, etc.

The Code is a moderate reflection of the philosophy “dual track” which reflects the ideas of compromise of the classical and modern schools. The basic principles on which the Swiss criminal law is founded are the principle of legality, the principle of guilt, defining of unaccountability and the introduction of the security measures for mentally disabled, dangerous delinquents from habits and repeating returnees. The amendments of the Swiss Criminal Code are mainly concentrated on the system of punishments and security measures.

Spain

The Criminal Code of Spain was adopted in 1995. The code recognizes the division of criminal acts into crimes and misdemeanours. The criminal responsibility of legal persons is not accepted but the system recognizes the system of day-globa for financial penalty and the measure of confiscation of property and property gain.

The Spanish Criminal Code is based upon the principle of legality, prohibition of cruel and inhuman undertakings, and prohibits the death penalty as well. The criminal act is formally defined. This code does not recognize life imprisonment but it recognizes sanctions such as generally useful work, weekend-penalty and the righting of specific rights. The attitude towards security measures is reserved and it reflects the field of their duration which is limited on the duration of the penalty for the committed crime in the concrete case.

The specific part is characterized by a modern approach, incriminations which correspond to international standards, development of incriminations against environment, surroundings, natural sources, flora and fauna and the special part on genetic manipulations. The provisions of the specific part are with clear and precise descriptions of the legal basis of the acts.

The Netherlands

The Dutch Criminal Code was adopted in 1881 and it was renewed in 1976 with the introduction of the criminal responsibility for legal persons, in 1983 with the reforming of the system of sanctions, in 1989 with the

introduction of alternative measures and in 1992 and 1993 when compensation and confiscation were introduces. In relation to the system of monetary fine the system day-globa is accepted.

The Dutch Criminal Code is renowned for the exceptionally humane criminal system, avoiding of prison and focus on the measures for assistance and care in the community. Such characteristics change in the last decade through sharpening of the criminal policy and prioritizing towards the neoclassical policy of other European legislative systems.

Belgium

The Criminal Code of Belgium from 1867 was reformed several times from 1976 to 2002. The generally useful work is envisaged, criminal responsibility of legal persons is introduced and confiscation and liquidation are moved within the system the punishments. In 1996 the death penalty was terminated and the duration of prison sentences is shortened.

The reforms of the Belgian criminal legislature are under the influence of the French criminal law.

Italy

The Italian Criminal Code dates from 1930 and it was renewed in several instances. It includes a strict system of sanctions, day-globa in the system of monetary fine, security measures, etc.

The strict nature of the Italian Criminal Code is decreased with several amendments in the direction of broadening the usage of probation, transferring of small crimes into misdemeanours and introduction of some alternatives and substitutes to prison.

The most recent reforms are in the direction of determining the causality, the provisions for overlooking, overlooking of exculpatory act of legal confusion, defining of biological grounds for unaccountability, limiting the security measures and mentally ill persons, alcoholics, drug addicts, deaf people, minors, etc.

4. DIRECTION OF THE REFORM OF THE MACEDONIAN MATERIAL CRIMINAL LAW

1) Introduction

Ten years after the adoption of the first Criminal Code of independent Republic of Macedonia in 1996, the Association of criminal law and criminology of Macedonia on its seventh annual counselling in September 2006 considered the questions regarding the difficulties of the practical unsafe of some provisions of the Macedonian criminal legislature. Prior to the counselling, a series of analysis and research was undertaken by judges, public prosecutors and other representatives of the academic circles, as well as foreign experts, judges and prosecutors and law professors. The analysis and discussions showed that there are numerous deficiencies in the criminal provisions and the provisions and the institutes were identified for which there is a need of novel re-examination and redefining.

2) Organized crime

Organized crime, as well as other new unconventional forms of crime, requires re-examination of the general institutes of traditional criminal legal system, such as criminal responsibility – in relation to the responsibility of legal persons, the system of sanctions – sharpening criminal repression and new sanctions, particularly those of property character, along with the formation of a corresponding system of incrimination. However, the first question that needs to be posed is – how to react to organized crime, while preventing its seriousness and difficulty to pose a reaction that will push legislature to what some call 'panic' legislature. The former signifies forming limitations with weak outlook to be realized while the latter means reaching fast and insufficiently considered norms.

It is completely clear why criminal legislature should be kept away from these dangers. To make an exception in this case from an in depth state-legal provision – the criminal law as *ultima ratio,* and to reach for the criminal legal norms as a unique, fast and effective regulation for given new situations, means the same as to prematurely doom to failure the intention for forming an effective criminal legal system. The easily promised speed at the end easily gets down to weakness and constant dead race due to the new forms of crime. Hence, precisely on the example of organized crime the standpoint of complementary nature of criminal legal prohibitions should be reaffirmed. The new forms of organized crime (such as money laundering) can not be effectively repressed without a complex legal regulation of specific areas.

Organized crime is increasingly examined as the most serious danger to the quality of life which excuses the usage of 'extraordinary' criminal legal measures based on the idea for necessary defence of contemporary society.

The contemporary criminal law is faced, primarily, with new challenges, for which balance needs to be find between, on the one hand, the need for strengthened protection of society from organized crime, while the border of criminal legal intervention is moved in the previous stage, and on the other hand, the need from protection of individual freedom and respect of state-legal postulates. The balance between these two requests is realized through the expansion of the criminal legal intervention with novel solutions in the material criminal legal law while at the same time strengthening the protection limits of the rights of the defendant in the criminal procedural law

3) New regime for confiscation of property

In the last decade, European legislative systems started the trend of *reaffirmation* of confiscation of property as a measure which has the property of the perpetrator as its subject along with the special confiscation which entails the retaining of objects that have been used, they became or according to specific legislature, is the object of the criminal act. These are legal consequences of the criminal act on whose consistent usage the novel philosophy of criminal legal repression is founded: in search of not only the act, but the *criminal income* created through illegal activities, as well as the most effective mean in the fight against organized economy and other form of property crime (corruption, money laundering, etc.). The consistent tracking, discovering, freezing and finally confiscation of the entire criminal income, as well as all the objects which were created in the course of performing the criminal act or which were used for committing the crime, should strengthened the warning that crime is not something that is worth, at times more than the practice of the envisaged punishment. These are the reasons for attracting attention in the criminal legislature towards general and special confiscation, triggered as well by the adoption of several international conventions: Council of Europe 1999 Criminal Convention against corruption, Council of Europe 1999 Civil Convention against corruption, UN Convention against illegal trading of opiate drugs and psychotropic substances (Vienna Convention) from 1988, Council of Europe 1990 Convention on money laundering, search, freezing and confiscation of crime income (Strasbourg Convention), UN Convention for transnational organized crime (Palermo Convention) from 2000 and the most recent Council of Europe Convention on money laundering, search, freezing and confiscation of property gains of 2005.

The heterogeneous character of general and specific confiscation of our former criminal legislature withdrew their arbitrary positioning both among punishments and among security measures! The 2004 novelty in the Criminal Code, confiscation of property and property gain is systematized as a specific criminal legal measure with whose pronunciation the property gain received through criminal acts is forcefully confiscated.

The elementary condition for confiscation is an act against the law, an act that fulfills the objective characteristics of a criminal act as a minimum, while there is no ground on which its illegality could be excluded as illegal. Namely, the property gain is confiscated with a court decision which stipulates the execution of the criminal act. Such a solution is logical, because it is a consequence from the broadening of the usage of this measure on third persons, while implying further distinguishing between two legal situations: when it is possible and when it is not possible to perform the criminal procedure against a concrete perpetrator. In the second instance – when the criminal procedure cannot be undertaken due to factual or legal obstacles against the perpetrator of the criminal act, there was an obvious loophole in our criminal procedural legislature, which was closed with the last 2004 amendments of the Law on Criminal Procedure (art. 494-1 and 494-b). The property gain is confiscated from a legal person, when he appears to be the perpetrator of a criminal act, or when property gain has been obtain on him for the criminal act of another (physical or legal person).

The 2004 amendments of the Criminal Code, which delineate criminal responsibility and sentencing of legal persons, confiscation of property and property gain is envisaged under the general conditions (art. 98-100). Afterwards, an exceptionally important novelty was introduced (art. 96-b): if property or property gain cannot be confiscated from a legal person, the founder or founders of the legal persons, i.e. the LTD, the associates or the action holders will in solidarity make a commitment to pay a monetary amount which corresponds to the obtained property gain. This is a solution enrooted in the following principle: the one that draws the gain from the performance of the legal person (founder, action holders, and associates) should in solidarity pay the entire illegal property gain obtained with the criminal act. Such a solution should be implemented in our regular practice of obtaining enormous criminal benefits on the part of legal persons (through tax evasion, fraud, etc.) which in turn have no one to confiscate from because the legal person is an open bankruptcy in the meantime.

The novelty in the Criminal Code of the Republic of Macedonia and the amendments to the Law on Criminal Procedure very short time has passes to assess whether there is a change of conduct in our courts towards the usage of confiscation of objects. The fact that the usage is less than satisfactory is supported by the statistical date for the usage of these measures from the 2000-2004 period. The reasons for the marginal usage of these measures can be placed in a wider frame of insufficiently complementary legal solutions and even weaker reaction of judicial practice. A part of them have been put aside from the 2004 novelty of the Law on Criminal Procedure, but effective investigation instruments are still lacking prior to the commencement of the criminal procedure and in the course of the investigation. There is a lack of legal regulation, institutions and practice related to the general identification of property gained in a criminal manner, which cannot be captured only with criminal procedural norms, but also with complementary norms in the areas of banking, finances, trading of real estate and other areas.

The 2004 novelty of the Criminal Code in essence incorporates material legal solutions in relation to confiscation entailed in international conventions on corruption, money laundering and organized crime. Still, there is a need to analyze to which extent the Criminal Code is aligned to the 2005 *Framework Decision* of the Council of Ministers of the EU in the sense of broadening of the practice of confiscation (according to art. 3, pg. 1 and 2 of the Framework Decision) not only for property gain acquired in the concrete criminal act that is subjected to prosecution but the gain attained on behalf of the perpetrator defendant for participation in criminal association.

The court should pronounce such a measure when it confirms that the value of property of the defendant is not proportional to the legal incomes provided that he/she does not prove the origin of property. The solution which the *Framework Decision* pleads for in a material legal manner should follow the example of the new provision (2004) from art. 359-a – detaining of origin of not proportionally acquired property, for which confiscation of property is envisaged that will significantly overcome the income reported for taxation for which the perpetrator is covering the real origin. Following the same logic, in the specific part of the Criminal Code the acts that could be set aside are those in which it will be envisaged that apart from pronouncing the verdict for the perpetrator confiscation of property acquired in the last five years for which he will not prove that he acquired legally will also be pronounced. Such are the acts committed by a criminal association which has as a goal committing of crimes (stealing, robbery, fraud, etc.) and crimes of terrorism, money laundering, crimes of abuse of official position from self-interest and bribe, trafficking of narcotics, sexual exploitation and organization of prostitution, trafficking of weapons, human trafficking and trafficking of migrants. Which crimes of physical and legal persons will have for a consequence such a measure should be subject to a special analysis.

Material legal provisions should be followed with procedural provisions which will regulate the procedure of proving the validity that the property is a criminal income, particularly in relation to the limits the defendant and third persons on which the property is transferred without adequate compensation should have.

This is a case of *transferral of burden of proof* on the defendant as accepted in several legislatures. International basis for such a legislative move is the Vienna Convention (art. 5, pg. 7) according to which every country, in accordance with the principles of national legislation, should consider the possibility of transferring the burden of proof of legal origin of criminal income and other property that can be subjected to confiscation. The European Court of Human Rights is on the same stance (case *Murray v. UK* from 1996): when the evidence pronounced against the defendant call for his/her explanation that can be and should be provided by him/her, the absence of such an explanation may justify the conclusion that the defendant does not have an explanation and that he/she is guilty; in 1994 (case *Raimondo* which became quite an influential precedent), the Court is on the stance that in the fight against mafia, confiscation, which has for its aim to

block the movement of suspicious capital, is an effective an unnecessary mean and it is proportional to the set goal.

4) Development of a system of professional restraints

The transformation of the nature of organized crime – from crime of isolated criminal groups to crime of a 'symbiotic' kind, from organized crime to organizing of crime by countries, political, economic and other structures, in the modern criminal legal reforms triggered a search for specific criminal legal solutions directed towards the termination of such a relation. Such are, primarily, the different professional restraints envisaged in criminal legislative systems as side punishments which are meant to temporarily prevent the perpetrator, sentenced for the organized criminal activity or other kind of professional crime, to again take part in legal, professional and other activities after the prison sentence has ended. An especially developed system for such side punishment is known to the French Criminal Code of 1992. With regard to corporate responsibility, such measures are mainly envisaged in the regulations of commercial law and are contained in the restraint for a second registration of firms, participation in management of firms, etc. of responsible persons into legal persons sentenced for criminal acts.

The strengthening of position and wider usage of different professional restraints, either as criminal legal measures or as administrative restraints, is presently regarded as an increasingly significant instrument in the fight against organized crime. Their significance stresses the fact that especially in the sphere of economic crime the often practiced monetary fine does not produce expected results. On the other hand, reaffirmation of prison sentence would incline from the general tendency for its abolition, i.e. retaining for more serious cases of violent crimes and other harsher forms of crime. Some exceptions stem from such a point of view. Therefore, for example, the American model of repression of activities of organized crime in economics, in the antitrustian legislature, also incorporates short term prison sentences as 'shock therapy,' usually in combination with monetary fines and temporary restraints.

The restraint for practice of profession, activity or duty, envisaged in the Criminal Code (art. 38-a) could be pronounced only as a side punishment with a prison sentence or with a parole verdict in which a prison sentence has been decided, According to the Criminal Code the sentence which consists of a restraint to perform a certain and not all professions and positions, as well as to certain duties or managing tasks related to possession, usage, management or handling of property or watching over property, could be reached by the court if the perpetrator abused his profession, position or duty in the course of committing the criminal act and on the basis of the act committed and if the circumstances under which it was done make it possible to expect that such a position would be abused again for committing a criminal act (art. 38-a, pg. 1)

Due to the undoubtedly penal character, this sanction was transferred from the repertoire of security measured to the system of penalties with the 2004 amendments of the Criminal Code. The restraint consists of primarily retributive component based on its nature: it is reached due to abuse of profession, position or duty of perpetrator for commitment of a criminal act. The restraint should be related only to the profession, position or duty of perpetrator which in connection with the criminal act committed. Such a connection exists when the crime committed at the same time is an assault of the specific obligations of the profession, position and duty (for ex. The doctor that performs and illegal abortion makes an assault to the specific obligation that is provided by law with the specific procedure for legal abortion.) In a number of professions, positions and duties such obligation are regulated properly (teaching profession, lawyer, notary, pharmaceutical position, etc). However, there are professions, positions and duties for which there is no precise regulation. In this case, the request for an assault of the specific obligations of the profession leaves space for an arbitrary practice of this restraint. Hence, for example, a question is posed whether this restraint can be pronounced to the employer that did not pay health insurance for the employee or whether this obligation of making payments for health insurance is a specific obligation of the profession? Such an understanding will lead to its extensive practice, which could be extended to anyone who in the line of duty does not pay taxes and other expenses, because this is one of the basic obligations of every profession.

The term specific obligations of the profession as an essential element of abuse of profession, position or duty for committing a certain crime should be understood restrictively. Moreover, attention should be devoted to the constitutional provisions for limitation of freedom and rights: if from a constitutional point of view it seems unproblematic that the restraint for practicing a position is not in collision with the constitutionally guaranteed freedom for practicing a position, there is an open question whether such a restraint in the area of media, will not be in collision with the constitutional freedom of thought and public expression of though (art. 16 from the Constitution of the Republic of Macedonia). Namely, the Constitution strictly forbids limitation of freedoms and rights which relate to the freedom of thought and the public expression of thought (art. 54, pg. 4)

The execution of punishment is realized in different ways dependent on the nature of profession, position or duty whose performance is forbidden: with the taking away of the working permit or license (doctor, lawyer, notary, pharmacist, etc.), with the registering in the judicial registry (individual trader, person in charge into legal person), termination of the work or function (restraint for performance of a duty of an official or military person), etc. The execution of restraint, accordingly, is not only a question of voluntarily respect of the restraint by the defendant but also of numerous state bodies or legal persons. The disrespect of restraint is incriminated as a specific criminal act of overriding restraints of sentences that have been reached (art. 376 CC of RM).

The practice of a profession or duty could be limited in other ways such as, for example, with an administrative act in an inspection procedure (due to technical or health related deficiency of the object in which the profession is performed, etc) or with retrieving of concession or the working license. About the relationship between this punishment and such administrative restraints it is important to understand that it is a case of independent legal institutes which have different basis and action. So, for example, if a doctor who has a private medical office is forbidden to perform his/her position due to a committed criminal act, his/her medical office can continue its work with the other doctors employed in the same; but if the working permit is taken away in the administrative procedure, the medical office must be closed.

The development of the complex of professional restraints presupposes re-examination of the system of legal consequences from a verdict, envisaged in other laws. Primarily, the laws related to public servants and in general the accessibility and the performance of public functions are mainly of interest, but also the legislature of commercial associations within which limitations which are a consequence of corporative criminal activity should be incorporated.

5) Redefining the incriminations of economic crime

Repression of organized economic crime is a completely unsatisfactory ground for search of a conceptual model of incriminations and other material legal and procedural legal solutions for its effective discovering and prosecution. What is, or should be incriminated as economic crime – depends on the character of the economic system (state controlled commerce or economic system based on market freedom, entrepreneurship and competition).

The economic reform that lingers in the long transitional period and its incomplete results in our country trigger a sense of disappointment and a missing point as evident from the slow motion of the reform of the economic system that is most directly reflected in the immovable manner of its criminal legal protection. Therefore, the Criminal Code entails incriminations included in 1996, most of which are taken over from the old legislature, created in conditions of apparent and not real market economy ambient. The opening of the question of their reforming often came across sterile attempts for redefining the criminal actions: in such a way, for example, with the last 2004 novelty of the Criminal Code related to determining the content of the act *fraud in e working with financial documents and allotment* (art. 275 CC) argumentative suggestions from relevant subjects in the commerce and economic and legal science was almost left behind. Two explanations are possible: either the system of economic criminal acts remains not adapted to the needs of protection of the new economic relations and values or the economic system remains unchanged in the necessary extent in which it can affirm new values and relations which will trigger the need of a criminal legal protection.

Our economic and legal science has not undertaken a complex analysis of the founding characteristics of the economic system and its internal consistency and effects. Therefore, each argument on criminalization and decriminalization of specific performances must lean on individual and mainly superficial analysis of its specific elements. The greater part of these relate to the process of privatization, mostly carried out in the model of selling firms to persons that took over the management (according to the *2003 Report on the course of privatization of the Agency of privatization in the Republic of Macedonia*) and it is mainly assessed as criminal and without real effects, measured according to two criteria: economic development and owners democracy. From the point of view of the model of *corporative management*, such analysis lead to persistent utilization of politically founded *model of „crony" capitalism,* that is not based on dispersion and market allocation of capital among numerous action holders but on its concentration in closed political, party and business structures. A direct consequence that stems from such a model of corporate management is in direct correlation with the political authority and leads to the weakening of criminal legal protection of the economic system due to the corruptive connections with the authorities and the factual immunity of prosecuting the business oligarchy. Almost none of the elements of the economic system, which are considered as key to economics, are not developed in full capacity that could act as a stable point which could connect with other stable elements of the system. The high level of grey economy (according to the *National Strategy for economic development in the RM: development and modernization*, MANU, Skopje 1997: over 30% of GNP) is a direct consequence of the above delineated situation.

On the idea that designing of a novel system of economic incriminations is necessity, adjusted to the change in proprietor relations and the introduction of principles of market economy, free market and entrepreneurship, in the Macedonian criminal legislature (CC in 1996) the conception of economic criminal act is incorporated as a conduct which makes an assault to the economic system, its elements, institutions and rules, as well as social economic interests of the society which as a rule do not mean an assault to the individual property and other interests.

On that line of distinguishing of property capital, a separate chapter of crimes against *public finances*, *payment inflow and commerce* (chapter XXV, art. 268-287) is introduced. Apart from the legal systematization, *acts against property* performed in the course of commercial work (fraud of buyers, art. 248; fraud while taking a credit or other benefit, art. 249; insurance fraud, damage and unauthorized entry into a computer system, art. 251; making and introducing of computer viruses, art. 251-a; computer fraud, art. 251-b; abuse of trust, art. 252; unauthorized reception of gifts, art. 253; false bankruptcy, art. 254; causing bankruptcy due to unconscientious work, art. 255; abuse of the bankruptcy procedure, art. 256; damaging or authorizing of trustees, art. 257) should be considered as economic acts. The mentioned acts are systematized among acts against property because of the prevalence of interest of protection of the right to property as a basic right and of other

property rights independent of the fact whether they have been hurt in the course of commercial work or outside of it.

The use of these provisions has a special meaning, in view of the fact that some of the acts, especially those in relation to *bankruptcy,* are enlisted in the most common and most difficult forms of economic crime. Specific incriminations of the chapter on *criminal acts against official position* committed in the course of commercial work should be treated as economic crimes as well. Such are the acts: abuse of official position and competence (art. 353), unconscientious work in the service (art. 353-c), peculation in the service (art. 354), fraud in the service (art. 355), accepting of bribe (art. 357), illegal mediation (art. 359), covering of non proportionally acquired property (art. 359-a), forging of an official ID (art. 361), and illegal making payments and advance payment (art. 363) – committed from a responsible to a legal person. The responsible person is enlisted in the circle of perpetrators of some of these acts (art. 353, 357, etc.) with the latter 1999 amendments of the Criminal Code.

Some critics find that the great weakness and the main reason of expansion of economic crime and corruption in commercial associations is the absence of prescribing their responsibility in the 1996 Criminal Code. But they could not back than nor now answer the following question: According to which criteria can it be confirmed (considering the fact that we are dealing with *blanket beings*) that the responsible person used its competences or surpassed its limits – if there are not precise regulations that confer the duties and responsibilities of the persons in charge of the commercial associations, public firms or institutions? This is another converging point between economic criminal law and the Law on trade associations, which only entails insufficiently complex provisions on the duties and responsibilities of the persons in charge. Specific incrimination against *legal traffic* should also be considered economic criminal acts due to the meaning of documents in legal commerce, when committed by commercial trade between or with legal persons: forging of documents (art. 378) and special cases of forging (art. 379); computer forging (art. 379-a); and use of documents with invalid content (art. 380).

A concrete economic analysis of the preset incriminations is necessary in place of the present superficial statistical data along with the need of designing new incriminations. It should lead to the division of all segments of the economic system and observing of every one them from a point of view of: economic effects, legal legislature and the existence and effects of other legal instruments for its protection (civil-legal, civil-procedural, labour-legal, financial-legal, etc.) departing from the conception of criminal law as *ultima ratio*. The analysis should as well be directed towards the examination of the future institutional solutions and relations in the economic system which lean on the request for a *proper* economic system (economic system as it should be).

On the types and content of economic incriminations in our criminal legislature, the recommendations of the EU and other international bodies for

the directions for surpassing the weak points of our economic system and its legal protection are particularly important. A good basis for re-examining the system of economic incriminations could also be the directions contained in the *White book on corporative management in Southeastern Europe* of the Pact for reform, investment, integrity and development of Southeastern Europe (OECD, 2004) which relate to protection of minority action holders, increasing competence of boards of companies, convergence with international accounting and auditing standards, transparency of non financial data, strengthening of regulatory bodies, repression of abuse of market of financial documents and the capital market and limitation of insider trading, protection of rights of concerned parties, protection in the event of insolvency and bankruptcy, protection of transparency and announcement of data, strengthening of responsibilities of external auditors, regulators of the market of financial documents and the stock markets, strengthening of responsibility of accountants, as well as strengthening collective and individual responsibility of company board members.

Based on the economic analysis it is necessary, in parallel to economic reforms, to re-examine incriminations which relate to all elements of the economic system. So, in view of its basic element – property relations, there is no adequate optimal degree of protection of *intellectual (industrial) property* in our criminal law; in view of relations of the market the criminal legal elements of protection of not loyal competition and prevention of monopolies are insufficiently developed; there is no adequate system of protection of institutions such as stock exchanges, auditing position, accounting, etc. The focus should be placed on and over *company criminal law* based on several directions of the analysis and the need of criminal-legal justice: company responsibility and their management structures before the state – incriminations in the sphere of taxes, customs and other expenses; responsibility of associations and their organs towards other associations – incriminations of abuse of trust, playing over of trustees, fraud, bankruptcy, etc.: responsibility of associations towards consumers – companies, as well as towards the action holders – the acts of abuse of trust, corruption and economic espionage.

A key question in the next phase of reform is the establishment of a stable, *functioning and effective institutional system* which will guarantee a consistent implementation of laws. Hence, the procedure for constitutional and legal reform of the judicial system has advanced in this direction (2005 Constitutional amendments, Law on Courts, Law on Judicial Council, Law on the Academy for training of judges and public prosecutors, Law on administrative disputes, Law on misdemeanours and the Law on Police from 2006.) followed by the preparation of the Law on public prosecutor office and the Law on the Council of Public Prosecutors. The establishment of an efficient system of criminal justice along with the protection of human rights and freedom is a priority of the Republic of Macedonia upon the granting of the candidate country status for membership in the EU. The defining of such a priority goal has a long-term significant because it is precisely the reform of this system that will allow for exiting the magic circles of corruption, organized

crime and other deviations of politics and the state with expected positive reflections on the reform of the country and the economic reform.

6) Computer crime

Acts of computer crime require specific attention to be devoted to the question of their systematization and the success in practice.

Apart from the institutes from the general part of the Criminal Code of the Republic of Macedonia and the incriminations of the specific part, there is a need to pay attention to the question of relationship between criminal acts and misdemeanours and of incriminations which are found in other laws. Namely, they should follow the dynamics of change of institutes and areas to which they belong. Thus, there is a need for their re-examination (such is the case of incriminations of the multitude of tax laws, for example.)

In view of every criminal legal institute or incrimination which will be reformulated and reconceptualised, the starting point will be the new European and global trends, tendencies and standards in the concrete area.