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WATCH
ANALYSES

A CLOSER LOOK
AT THE APPLICATION
OF THE LAWS

EFFECTIVE DEFENCE IN CRIMINAL PROCEEDINGS IN THE REPUBLIC OF MACEDONIA

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ABBREVIATIONS

SSO	State Statistical Office
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
LB	Law on Bar
LFLA	Law on Free Legal Aid
LIA	Law on Internal Affairs
LPP	Law on Public Prosecution
LCP	Law on Criminal Procedure
LP	Law on Police
LFP	Law on Financial Police
LCA	Law on the Customs Administration
LCJ	Law on Children's Justice
LJJ	Law on Juvenile Justice
PP	Public Prosecution
CC	Criminal Code of the Republic of Macedonia
CPT	Commission on Prevention of Torture
MoI	Ministry of Interior
ICCPR	International Covenant on Civil and Political Rights
MJCLP	Macedonian Journal of Criminal Law and Practice
OSCE	Organization for Security and Cooperation in Europe
RM	Republic of Macedonia
CE	Council of Europe
FOSM	Foundation Open Society – Macedonia

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FOREWORD

To present, eight publications have been developed as part of the edition "Law Watch Analyses: A Closer Look at the Application of Laws", but this is the first publication that analyses the criminal law. Irrespective of the individual topics covered, publications from this edition are always focused on human rights. Hence, this publication is centred on the right to efficient defence and the right to fair trial. Development and publication of this research study implied two challenges. First, to maintain the quality of research studies that served as inspiration for this analysis implemented by several European states and supported by the Open Society Justice Initiative. And second, to research systemic problems in exercising the right to efficient criminal defence at times when two laws on criminal proceedings are in effect.

What distinguishes this research study is the thorough data collection process. To a great extent, this research is based on data collected by means of survey questionnaire distributed to legal practitioners. Processed survey data were further discussed within focus groups, and followed up with additional interviews organized around issues that have been identified as problematic.

This publication upholds the overall goal of the edition "Law Watch Analyses: A Closer Look at the Application of Laws" and offers data on successful enforcement of laws closely related to process on legislation approximation with the international standards, including the EU acquis. Hence, the authors have concluded that national laws and practices are, in general, aligned with the European standards on fair trial, but emphasize a series of inconsistencies affecting the exercise of the right to effective defence. Moreover, the research study proposes specific solutions aimed at overcoming the shortcomings identified. Hopes are that these recommendations will be taken into consideration by both, legal practitioners and institutions.

The Editors

1. INTRODUCTION

This research study aims to identify normative, systemic and practical problems affecting exercise of right to efficient defence and right to fair trial, in compliance with established international standards and good practices applied in developed democracies across Europe. It follows the example of the research study conducted in several European countries,[1] and should demonstrate whether international standards and good practices applied in European democracies are complied with in the Republic of Macedonia.

Carrying out such research in the Republic of Macedonia is both delicate and complicated endeavour, especially due to the fact that our criminal justice system is undergoing major reforms. At the moment, two different laws on criminal procedure are in effect: "old" law, developed according to the European continental tradition, characterized by strong inquisitorial elements and applicable in previously-initiated proceedings; and "new" law, adopted in 2010, whose enforcement started in December 2013.

Overall goal of this research study is to contribute to efficient implementation of criminal defence rights, especially in the light of novelties introduced with the reform process. Our focus is on securing fair trial and so-called "equality of arms" in a situation when courts and

1 See: E. Cape, J. Hodgson, T. Prakken and T. Spronken, "Suspects in Europe", Antwerp: Intersentia, 2007; E. Cape, Z. Namoradze, R. Smith and T. Spronken, "Effective Criminal Defence in Europe", Antwerp: Intersentia, 2010 (summary available at: http://www.soros.org/sites/default/files/criminal-defence-europe-summary.pdf); E. Cape and Z. Namoradze (eds.), "Effective Criminal Defence in Eastern Europe", 2012 (available at: http://www.soros.org/sites/default/files/criminal-defence-20120604.pdf); T. Spronken, G. Vermeulen, D. de Vocht and L. Van Payenbroeck, "EU Procedural Rights in Criminal Proceedings", Maastricht/Brussels, 2009 (available at: http://arno.unimaas.nl/show.cgi?fid=16315)

parties in criminal proceedings have completely new roles. Actually, the crucial change introduced by the reform process is abandonment of judicial paternalism under which courts had active role and *ex officio* powers not only in terms of wholesome and comprehensive establishment of the truth, but also in terms of enabling implementation of rights and interests enjoyed by individuals involved in criminal proceedings, i.e. defendants and victims. By abandoning the concept whereby courts have active role, the parties in criminal proceedings are now given power of motion throughout the process, which is expected to contribute to greater impartiality of courts in decision-making, with concerned parties responsible for evidence gathering and presentation as part of expressly adversarial proceedings.

This research study attempts to verify whether, under the new concept, the defence has an honest chance to rebate state accusations as guaranteed by relevant international instruments, including those recently endorsed and adopted by the EU. Notably, comparative research and studies on law and practice, which served as inspiration for this research, show that legal provisions guaranteeing criminal defence rights and enabling protection mechanisms at courts and other competent authorities are only the first and the easiest step towards enabling suspects to exercise their defence rights. An illustrative example thereof is implementation of the right to have the defence attorney present at the police station which, according to field evaluation findings of the Committee on Prevention of Torture and the Ombudsman of the Republic of Macedonia, is exercised by only 5% of suspects. Thus, adherent implementation of defence rights is a much more complex issue and goes beyond "letter of the law".

EU Directives on criminal defence rights are in the focus of this research study. They were adopted as part of the plan on strengthening the procedural rights of suspects or accused persons in criminal proceedings[2] which, to present, has resulted in adoption of three directives, those being: Directive on the Right to Interpretation and Translation in Criminal Proceedings from 2010; Directive on the Right to Information in Criminal Proceedings from 2012; and Directive on the Right of Access to a Lawyer from 2013.[3] Recently, the European Commission published the Proposal

2 Resolution of the Council of Europe of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings

3 Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings; and Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant

for Directive on Strengthening Certain Aspects of the Presumption of Innocence and the Right to be Present at Trial in Criminal Proceedings.[4] These EU Directives were adopted in the period after Macedonia adopted its new Law on Criminal Procedure (hereinafter: LCP) in 2010 and, therefore, they have not been taken into consideration when LCP was drafted and enacted.

The research was conducted by analysis of existing data disposed by state authorities, i.e. annual reports and statistics that include information on issues that are of interest for this study. This endeavour demonstrated that, unfortunately, there are few solid empirical research studies available in Macedonia, although it is matter of extremely important issues. On the other hand, readily available statistical data disposed by competent state authorities have been compiled on the basis of non-harmonized methodologies, due to which data obtained from different institutions are often characterized by major discrepancies about one and the same issue. Therefore, this research heavily relies on existing scholar literature, as well as reports, analyses and projects of governmental and non-governmental organizations and reports developed by various expert missions, more frequently organized in the last decade. In addition to information obtained in above-indicated manner, the research used other instrument on data collection: questionnaires, focus groups and interviews.

Survey questionnaires were developed on the basis of similar questionnaires used in recent comparative legal researches. They were distributed to an adequate sample comprised of 95 respondents, i.e. practitioners from the line of judges, public prosecutors, attorneys and police inspectors. *Focus groups* were organized with a view to analyse particular aspects and issues of critical importance that have been identified on the basis of survey questionnaires, and sensitive problems in practice. Particularly sensitive issues were further explored during in-depth *interviews* with 20 expert practitioners. In that, efforts were made to clarify dilemmas that have been raised on the basis of answers provided to survey questionnaires, and to verify their credibility.

proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

4 Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (available at http://www.ecba.org/extdocserv/projects/poi/20132711_PropEC_PoI.pdf)

Comparative method was used to assess domestic legislation's alignment with international standards on criminal defence rights, which resulted in identification of good practices from developed states across Europe that could be proposed as solutions to identified shortcomings in domestic law and practice.

2. STATISTICAL INDICATORS ON THE CRIMINAL JUSTICE SYSTEM'S PERFORMANCE

According to official crime statistics in the Republic of Macedonia, the crime rate is marked by *trend of increase* in the last 15 years.[5] As regards reported crime, the average number of reported perpetrators (20,000) during the 1990s has dramatically increased at the millennium turn and rose to more than 30,000 adult perpetrators in the last five years,[6] accounting for increase by 50% compared to the 1990s![7] Statistical indicators on the crime rate show that the situation is alarming, but does not significantly differ from relevant crime rates in the region, which provides the conclusion that Macedonia is a state with an average crime rate.[8]

5 Unlike the situation observed in Macedonia, relevant crime rates in the United States and Europe are marked by trends of decrease. See: P. Buonanno, F. Drago, R. Galbiati and Giulio Zanella, "Crime in Europe and in the United States: Dissecting the 'Reversal of Misfortunes'", Economic Policy, Vol. 26, Issue 67, pp. 347-385, 2011 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1889952).

6 As regards registered crimes, trend of decrease has been observed only in 2001 and 2002, and is more likely due to the armed conflict, rather than actual decrease of crime rates. Lower number of crimes registered by MoI leads to erroneous conclusion that the crime rate in 2003 has rapidly increased by 23%. See: http://www.mvr.gov.mk

7 Juvenile crime is also on the rise and accounts for around 20% of the total crime rate. See: http://www.mvr.gov.mk/DesktopDefault.aspx?tabindex=0&tabid=392

8 In truth, the crime rate (number of crimes per 100,000 citizens) shows continuous increase, from 840 in 2001, to 1,331 in 2009 and 1,543 in 2013. Similarly, 2012 rate of detainees and inmates was 123.5 and is almost equal with the European average of 126. Compare: http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home/

Table 1. Reported, accused and sentenced adults (2002 - 2012)

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Reported	**18.171**	**20.161**	**22.591**	**23.814**	**23.514**	**23.305**	**26.409**	**30.404**	**30.004**	**31.284**	**31.860**
Known perpetrators	11.057	12.150	13.503	14.866	14.646	15.019	15.462	15.565	15.383	14.627	15.480
Unknown perpetrators	7.114	8.011	9.088	8.948	8.868	8.286	10.947	14.893	14.621	16.657	16.380
Rejected criminal reports	**2.425**	**2.585**	**2.956**	**3.346**	**3.006**	**3.123**	**3.341**	**3.503**	**3.580**	**3.727**	**4.385**
Act does not imply criminal elements	1.493	1.381	1.551	1.660	1.500	1.426	1.423	1.647	1.729	1.810	2.099
Crime of insignificant effect	11	38	24	19	19	13	20	9	18	16	29
Circumstances that exclude criminal prosecution	392	488	595	763	719	896	1.037	941	1.146	1.226	1.545
No reasonable doubt	529	678	786	904	768	788	861	906	687	675	712
Discontinued investigation	**148**	**121**	**208**	**190**	**149**	**117**	**172**	**166**	**162**	**114**	**103**
Occurrence of temporary mental illness	1	-	-	2	-	-	-	3	-	-	2

Perpetrator is unavailable	147	121	208	188	149	117	172	163	162	114	101
Terminated investigation	**728**	**630**	**698**	**807**	**734**	**741**	**768**	**618**	**651**	**735**	**641**
Act does not imply criminal elements	194	167	227	191	223	265	277	200	263	240	244
Crime of insignificant effect	3	9	2	1	1	2	2	-	3	6	1
Circumstances that exclude criminal prosecution	140	59	52	35	98	51	76	65	66	148	105
Circumstances that exclude criminal responsibility	12	28	26	30	22	18	23	31	13	25	14
No evidence	379	367	391	550	390	405	390	322	306	316	277
Criminal indictment	**7.756**	**8.814**	**9.641**	**10.523**	**10.757**	**11.038**	**11.181**	**11.224**	**10.990**	**10.051**	**10.351**
Immediately	4.194	4.938	4.553	5.961	6.356	6.966	6.657	6.335	6.263	5.948	6.035
Upon completed investigation	3.562	3.876	5.088	4.562	4.401	4.072	4.524	4.889	4.727	4.103	4.316
Sentenced	**6.383**	**7.661**	**8.097**	**845**	**9.280**	**9.639**	**9.503**	**9.801**	**9.169**	**9.810**	**9.042**

Source: State Statistical Office (www.stat.gov.mk)

In recent years, the public's attention has been diverted to organized crime and terrorism, creating an erroneous image that serious crimes and offenses have been significantly increased.[9] This public image is abused to justify frequent use of intrusive investigation methods, such as special investigative measures, witness protection by granting anonymity, etc., which imply limitation of citizens' right to privacy and right to fair trial.[10] Official statistics show that dominant share of criminal offences in the Republic of Macedonia are less serious, and include thefts and *other crimes against property,* accounting for two thirds of the total number of reported perpetrators (70%), traffic crimes (around 10%), crimes against life and body (less than 5%), etc.

Furthermore, official statistics show that the police have failed to identify majority of perpetrators of reported crimes. Their number is continuously increasing, from 7,114 in 2002 (39%) to 16,657 in 2011 (53%). On the other hand, the public prosecution has rejected a significant number of criminal reports (3,727 criminal reports rejected in 2011, which account for 12% of all criminal reports or 25.5% of all "known perpetrators").

On the basis of official data, it can be concluded that the share of *rejected criminal reports* is low (around 12%), but the share of criminal indictments is relatively high and accounts for around 70% of known perpetrators (but only 30% of all criminal reports, having in mind that more than 50% of perpetrators remained unknown to law enforcement authorities). Number of rejected criminal reports significantly differs according to the reporting party, i.e. whether the report was made by MoI or directly by concerned citizens and legal entities. In that, the public prosecution has rejected half of criminal reports directly submitted by concerned citizens or other entities, but has accepted and processed almost all criminal reports submitted by or through the police (more than 90%)! Undisputable is that the police are more competent in assessing reasonable doubt that a criminal offence has been committed. Be that as it may, the low share of rejected criminal reports submitted by or through MoI should be thoroughly analysed.

Analysis of data concerning criminal prosecution motions shows that the number and share of unknown perpetrators and of rejected criminal

9 In that, MoI's Department on Organized Crime has reported a success rate of 100% in terms of resolved cases! See: http://moi.gov.mk/DesktopDefault.aspx?tabindex=0&tabid=393

10 See: G. Kalajdziev, "On Fight against Organized Crime and the Rule of Law", FOSM, Skopje, 2012 (available at: http://soros.org.mk/dokumenti/za-borbata-so-organiziraniot-mk.pdf).

reports are increasing![11] Notably, only ten years ago half of revealed, i.e. reported crimes implied unknown perpetrator or have been rejected! Today, only the number of unknown perpetrators is higher than 50%! In general, this is indicative of criminal justice system's inefficiency in fighting crime, in the early stages of criminal proceedings nonetheless!

Therefore, this research study is more concerned with data about "who is who" on the criminal justice terrain. First and foremost, the rate of detected and clarified crime or "realized" crime - as dubbed by MoI - is rather low. On the other hand, as demonstrated later in this analysis, the ratio of reported and sanctioned crime is worrying: while the number of reported crimes is increasing, the number of accused and convicted persons is decreasing, resulting in major difference between reported and sentenced crimes!

Instead of the public prosecution, damaged parties and other reporting entities more frequently submit their criminal reports to MoI.[12] Business entities and legal persons, by rule, report crimes to the public prosecution, while damaged parties and other citizens frequently report them to the police. The fact that almost half of directly submitted criminal reports are rejected by the public prosecution compared to the small number of rejected reports submitted through MoI confirms the assumption that the police do not only fail to report all crimes it have detected, but also fail to forward or process share of reports made by citizens. Obvious is that the police have pre-screened and selected these criminal reports. How else would one explain the low rate of admitted criminal reports made by citizens and legal entities, which significantly differ depending on the fact whether the report has been submitted directly or through the police.[13]

11 According to SSO, in 1997 there were a total of 19,277 criminal reports, of which 2,497 have been rejected by the public prosecution and 7,939 implied unknown perpetrators, accounting for 42% of all criminal reports. In 1998, there were a total of 20,582 criminal reports, of which 2,859 have been rejected and 7,605 implied unknown perpetrators. In 1999, there were a total of 19,383 criminal reports, of which 2,552 have been rejected and 7,492 implied unknown perpetrators. In 2000, there were a total of 20,220 criminal reports, of which 2,370 have been rejected and 8,438 implied unknown perpetrators. Such disparity of figures was maintained in the following years, with the difference that the number of reported, accused and sentenced perpetrators has increased. In 2011, 53% (16,657) from the total of 31,284 criminal reports implied unknown perpetrators, followed by 3,727 rejected reports (12%) and only 10,051 criminal reports (32%) in which the perpetrators have been charged and sentenced.

12 There are multiple reasons behind this practice, most important of which are the public's perception about the police compared to the courts and the prosecution, legal illiteracy of citizens, etc.

13 Portion of these cases do not include reasonable grounds, i.e. the police are

It should be noted that statistical data of competent state authorities are not methodologically aligned. Relevant figures on reported perpetrators and other crime-related data presented in MoI reports and statistics differ from those published by the public prosecution and the State Statistical Office.[14] Moreover, statistical data cannot be considered reliable due to authorities' superficial approach in enlisting the legal grounds on which a procedural decision has been made.[15]

Judicial system's inefficiency is best represented in *undue course of proceedings*. Thus, 2012 data on the duration of criminal proceedings, from criminal report to court ruling, in cases of known perpetrators is broken down in following manner: among total of 15,480 reports, proceedings lasted for 1 month in 4,492 cases, 1 to 2 months in 1,872 cases, 2 to 4 months in 2,203 cases, 4 to 6 months in 1,124 cases, 6 to 12 months in 2,313 cases, and more than 12 months in 3,270 cases. These statistical indicators show a particular consistency and proportionality of the criminal justice system. Thus, from year to year, the general image remains the same, with continuously increasing numbers, but almost identical ratios!

rejecting them *bona fide,* avoiding to burden the prosecution with ungrounded reports from citizens. On the other side, it is yet to be examined whether and to what extent are the police attributing themselves with powers incumbent to the prosecution to decide not to initiate criminal proceedings in given cases, as well as whether there is a hidden number of unregistered reports, given that in practice cases have been observed where the police dissuade citizens from making a formal complaint or report.

14 According to MoI, in 2010 there were a total of 21,093 reported perpetrators, 3,415 of which are juveniles. According to SSO data, in 2010 there were a total of 31,248 reported perpetrators, 1,244 of which are juveniles!

15 Examples thereof are reasons indicated for rejecting criminal reports. It is unlikely for so many criminal reports to be rejected by the police on the grounds that reported activities do not include elements of criminal offence, which has been enlisted as the ground for rejection of every second criminal report. Compare: D. Krapac and D. Novosel, "State Attorney Performance in Pre-Trial Proceedings and Reasons for Rejecting Criminal Reports According to the Law on Criminal Proceedings", Croatian Journal of Criminal Law and Practice, Vol. 17, no. 1/2010, pp. 125-174 and 160-67

Table 2: Duration of criminal proceedings

	Total	DURATION (REPORT TO COURT RULING)					
		up to 1 month	1 – 2 months	2 – 4 months	4 – 6 months	6 – 12 months	more than 12 months
2003	12.150	3.523	1.372	1.562	1.124	1.942	2.627
2011	14.627	4.477	1.755	1.920	1.249	2.198	3.028
2012	15.480	4.492	1.872	2.203	1.330	2.313	3.270

Source: State Statistical Office (www.stat.gov.mk)

It could be argued that the model of combined proceedings burdened with judicial paternalism lasted too long and was inefficient both, in terms of investigation (no new evidence was found, instead evidence gathered by the police and the prosecution was formally presented in front of investigative judges) and in terms of court guarantees on protection of rights and freedoms enjoyed by suspects and other parties in criminal proceedings. Namely, the courts underperform as participant in criminal proceedings, but also in fulfilling their role in the power sharing system in a democratic society and the rule of law: to protect citizens from unjustified intrusion in their privacy and freedoms by law enforcement authorities. High share of motions made by the police and the prosecution concerning apprehension, detention, body search, special investigative measures, etc. (measures that negate presumption of innocence and imply limitation of fundamental rights and freedoms of suspects and other parties involved) are easily approved by the courts.

This statistical situation can be partially explained by systemic problems of criminal justice pursued in expressly inquisitorial proceedings, which was the case in Macedonia until the reform process. Comparison of this information against the high number of unidentified perpetrators and the high number of rejected criminal charges (25% to 30%)[16] provides the conclusion that the model of criminal proceedings is not the only problem of the criminal justice system. According to some analysts, these data are indicative of the fact that efficiency problems in fighting crime are more prominent in respect to detection and prosecution of criminal offences (pre-investigation) than in terms of court proceedings (investigation and main hearing).[17]

16 See: 2011 Annual Report of the Public Prosecution of the Republic of Macedonia

17 See: I. Josipović, "Investigation Prison vs Detention: Reform or Restoration" Croatian Journal of Criminal Law and Practice, Vol. 15, no. 2/2008, pp. 915-938

It can be easily established that the police have *monopoly* over crime detection and investigation. The police do not only appear as the most frequent reporting party, way ahead of citizens and other state authorities with similar powers and capacity, but dominate the initial stages of criminal proceedings wherein, contrary to the letter of the law, majority of criminal reports are addressed to MoI, and not to the public prosecution. This situation, *inter alia*, is explained with the monopoly over investigation powers and the active role of the police that in most cases, contrary to the legal concept according to which pre-trial proceedings are led by the public prosecutor, have completed the investigations. Truth to be told, due to the urgent need for action and the reality of power relations and capacity, which are in favour of the police, the police do need a degree of autonomy in the initial stages of investigations. On the other hand, the public prosecution disposes with modest budget funds, as well as human and material resources. While the number of prosecutors is not negligible, the public prosecution offices lack expert associates and other staff and vehicles, and their budget funds are insufficient to address daily desk work. On this account, the conclusion is inferred that the state policy has been undermining and marginalizing the public prosecution for many years.

Reform of criminal proceedings focused on investigations. Relevant scholar literature has reiterated the fact that court-led investigations are one of the main reasons for longevity of criminal proceedings. Statistical indicators confirm that *extremely high number of investigations* have been led in the Republic of Macedonia. In practice, investigations are not implemented with a view to protect suspects against unreasonable trials, particularly due to the associated negative publicity and other detrimental effects on suspects' freedom and personal life (for the purpose of avoiding these negative effects on suspects, the old doctrine on investigation's secrecy has been practically abandoned) and the fact that investigation's main goal is to secure and present evidence against suspects before the start of court proceedings, which ultimately turned investigations into "trial before the trial", instead of protective filter for suspects and defendants.[18]

18 In small number of cases, investigations have been discontinued because the suspects are on the run or have been otherwise unavailable for the law enforcement agencies (around 150 cases annually or 0.5% of all cases). Significant share of investigations have been discontinued on the grounds that the reported activity does not imply elements of criminal offence or there are insufficiently compelling evidence (around 700 cases annually).

Data show that' "protective" role of investigations, as filter of ungrounded charges, is not as inefficient as initially perceived. At first glance, it seems that criminal proceedings are discontinued on the grounds of insufficient evidence only in a small number of cases. However, comparison of discontinued or terminated investigations against the total number of investigations provides the conclusion that their share is not negligible. Namely, investigations have been discontinued in around 20% of all cases (20% in 2002 and 17% in 2011). Number of *indictments motioned* upon completed investigation is constant and accounts for around 4,000 annually, while the number of directly motioned criminal charges is continuously increasing.[19] Thorough analysis is needed to establish whether the prosecution has ordered investigations "just in case", especially when such proceedings should not have been initiated, or because the courts have demonstrated criticism. Having in mind the courts' position visible in cases of indictment review upon motioned complaint where they have rejected almost all complaints, unlikely is that investigations have been initiated due to the courts' critical stance.

The problem with court-led investigations is closely related to the problem of detention orders. In the last several years, the number of *detainees* has significantly increased. According to 2011 Annual Report of the Directorate on Execution of Sanctions, in 2010 there were 1,219 detainees demonstrating an increase by 45% compared to 2008 and 2009 figures, when there were only 673 and 955 detainees, respectively. We already indicated that in Macedonia the rate of detainees (per 100,000 citizens) is relatively low, but the ratio of sentenced and detained persons is more illustrative: it has doubled in a period of few years![20]

More indicative is the long duration of detention (about one third of detainees remained in detention for more than 6 months!) and demonstrates a trend of increase. Namely, while in 2009 only 10% of all detainees remained in detention for more than 150 days, in 2012 almost 50% of all detainees remained in detention for more than 150 days![21] Increased number and duration of detention in the recent years are mainly due to exclusive use of detention orders in cases of organized crime and corruption, where detention has become a rule, not an exception.

Finally, striking is the high share of suspects that are later *convicted!* Thus, in 2011, as many as 9,810 among total of 10,051 suspects have been

19 Share of directly motioned criminal charges accounts for around 60%.

20 In 2008, only 5% of all sentenced persons have been detained, followed by a rapid increase: 7.4 % in 2009, 9.6% in 2010, 10.1% in 2011 and 9.6% in 2012.

21 See: M. Joveski, "Rate of Detained Persons", MA Thesis, Faculty of Law "Iustinianius Primus", Skopje, 2014, pg. 150

sentenced, accounting for astounding 93%! This is an unprecedented "success" of the prosecution authorities in Macedonia or, better said, of the criminal justice system, including courts. These statistical indicators provide evidence in support of the assumption that courts perceive themselves as institutions that should fight crime and sentence suspected criminals, instead of acting as guarantees for lawful and fair trial in which suspects are given honest chance to defend themselves against the criminal charges raised against them. In this regard, judges act as allies to the police and the prosecution in fighting crime (embodied in the suspects), instead of being guardians of procedural justice!

As regards convicted persons, less than 30% of them have been issued imprisonment sentences and around 25% have been sentenced with fines (in 2011: 3,020 of the total of 9,810 convicted persons were imprisoned[22] and 2,223 were fined). Accordingly, 1 of 10 "perpetrators" of reported crimes (excluding the hidden number) ends up serving an imprisonment sentence! As regards types of sanctions, dominant are short-term imprisonment sentences (more than 60% of convicted persons) and probation sentences (around 50%), which is strongly criticized in the literature.[23] In 2010, 4,138 or 45% of all convicted persons (9,169) were issued probation sentences, while in 2011, their number accounted for 4,241 or 43% of all convicted persons (9,810)!

22 Majority of persons sentenced with imprisonment have committed thefts and other crimes against property (1,772 in total).

23 See: V. Kambovski, "10 Years of Implementation of the Criminal Code of the Republic of Macedonia: Criminal and Political Analysis, Situation and Trends", MJCLP, no. 2, 2006, pp. 9 and 26-28

3. POSITION OF SUSPECTS UNDER REFORMED CRIMINAL PROCEEDINGS

Criminal law and criminal procedural law in particular, are undergoing major reforms. Main guidelines and instigators of reforms are international standards on human rights and constitutionalism on the one side, and increased crime and corruption, on the other side. Development of international law on human rights has significantly influenced the Macedonian legislation, triggering changes of criminal proceedings for the purpose of aligning them with international norms and standards on human rights. European Convention on Human Rights (hereinafter: ECHR) has had a major impact on the domestic law and practice and was considered major instigator of reforms in the field of criminal proceedings.[24]

In Macedonia, the legislator opted for complete abandonment of judicial paternalism and introduction of adversarial proceedings.[25] Criminal reforms aimed to accelerate proceedings and contribute to greater fairness, by fulfilling standards on fair trial and human rights protection. Following the example of reform processes in Italy and Bosnia and Hercegovina, the legislator abandoned judicial paternalism and engaged in de-formalization of pre-trial proceedings. Hence, instead of transforming investigations from court-led into prosecution-led, with elements of "trial before the trial", as done by Croatia and Serbia,

24 After several years of preparations, the new LCP was adopted in 2010, with effect from November 2012. However, on the account of late preparations for implementation of the new law, which did not only change the type of criminal proceeding, but the criminal justice system as a whole, LCP's enforcement was delayed for another year.

25 See: D. Krapac. G. Kalajdziev, V. Kambovski and G. Buzarovska, "Criminal Law Reform Strategy of the Republic of Macedonia", Ministry of Justice of the Republic of Macedonia, Skopje, 2007

Macedonia opted for complete abandonment of formal investigations. This concept is based on the idea that public court trials are the only place for presentation and reconsideration of evidence, i.e. evidence collected in the course of investigations is presented and tested at public hearings.[26] In this sense, the new LCP stipulates that statements made during interrogation of suspects and witnesses have limited use in court trials.

Reasons for abandoning court-led investigations are straightforward. Not only did investigative judges, as active investigators, failed to perform their function of unbiased protectors of human rights and freedoms, due to the incompatibility of their roles as protectors and investigators, but they have been proved unable investigators because evidence already gathered by the police and the prosecution is re-introduced and reconsidered during court-led investigations. On the other hand, court-led investigations unnecessarily delayed criminal proceedings, rendering them expressly inquisitorial and implying formal presentation of the most important evidence that was later used as grounds for delivering court rulings.

Reducing courts to controllers of legality and guarantors of rights and freedoms, instead of active investigators, allows them to make unbiased decisions on detention orders, special investigative measures, searches, etc. Unburdened of duties for active investigation, pre-trial judges are in much better position to fulfil their role of protectors, unlike investigative judges that were bound by the principle of investigation and the duty to clarify all factual matters in the case. On the other hand, it must be acknowledged that with the introduction of the new model of criminal proceedings, the defence is losing an important assistant in gathering evidence in its favour. The defence does not have the capacity nor will the public prosecutor assist them, in spite of declarative commitments to act in objective manner.

Nevertheless, abandoning the combined model of expressly inquisitorial proceedings as obsolete should contribute to promotion of courts' impartiality and create conditions for fair trial, as part of which, instead of confronting defendants, courts will guarantee legality of proceedings and their rights and freedoms. Second, such unburdening of

26 On the other hand, it seems that the concept of formal prosecution-led investigation relies on fears that suspects and witnesses might change their previously deposited statements due to various reasons. This thesis is still legitimate in Croatia. See: Z. Đurđević, "Overview of Results of the Ministry of Justice Task Force on Aligning the Law on Criminal Proceedings with the Constitution of the Republic of Croatia", Croatian Journal of Criminal Law and Practice, no. 1/2013, pp. 3-100

courts is expected to make significant contribution in terms of speedy proceedings and increased efficiency of the judiciary. Of course, this is only relative unburdening of criminal proceedings, having in mind that these responsibilities will be assumed by the parties in criminal proceedings and the prosecution in particular, as the latter holds the burden of proving guilt beyond any reasonable doubt.

Transformation of inquisitorial into accusatory criminal proceedings is expected to result in speediness and fairness. Nevertheless, in order to properly function, this system requires two - more or less - equal parties. In other words, defendants and their attorneys must have an active role in criminal proceedings, counteracting the prosecution. Serious concerns are raised in this regard, particularly knowing that in poor countries, such as Macedonia, large portion of the population cannot financially afford defence attorneys, and the state is unable to secure sufficient funds for that purpose.

3.1. POSITION OF THE DEFENCE AND TEMPTATIONS RELATED TO SUSPECT'S RIGHTS

Abolishment of court-led investigations is based on the thesis that active role of investigative judges renders them allies to the prosecution and prevents them to fulfil their role of protectors in terms of fundamental rights and freedoms in impartial and adherent manner. For example, duties of investigative judges to clarify matters in the case makes them prone to issue detention orders, searches, communication interception and similar measures that aggressively intrude in fundamental rights of freedom and privacy, simply because such actions would facilitate their tasks. Combined with the fact that in most cases investigative judges have not proved themselves to be solid investigators, court-led investigations unduly prolonged criminal proceedings.

Nevertheless, it should be acknowledged that certain aspects of the new concept of pre-trial proceedings related to preparations for court hearings imply particular risks for the defence. Under the new concept, defendants loose an important ally in evidence gathering on the account of gaining impartial decision-maker on issues affecting their fundamental rights and freedoms in pre-trial judges.[27] Hence, the new LCP must

27 Namely, investigative judges were obliged to collect evidence in favour of the prosecution and in favour of the defence. In terms of objectivity, investigative judges provide more guarantees than public prosecutors given that, in spite of their commitment to act in objective manner, they are primarily tasked with criminal prosecution.

provide additional guarantees that would ensure defendants, at least, minimum "equality of arms" with the prosecution in the stage of pre-trial proceedings. As argued below, the new LCP attempts to compensate this loss with broadly defined defence and procedural guarantees and possibilities, especially by tasking law enforcement authorities to detect and disclose all evidence in favour of the defence and by providing possibilities for defence investigations which, in addition to defence attorneys, can be conducted by other private investigators and forensic experts. Of course, these counterparts of the criminal police and other state authorities will never be able to match resources disposed by the state and therefore LCP stipulates new higher procedural standards for the police and the prosecution in terms of lawfulness and professionalism.

3.2. DEFENCE IS EXCLUDED FROM PROSECUTION-LED INVESTIGATIONS

Transformation of the criminal justice system into adversarial does not necessarily imply adversarial investigations in the sense of "equality of arms" between the prosecution and the defence, especially in the early stages of criminal proceedings. Notably, accusatory proceedings do not include formal investigations that we have grown accustomed to. On the contrary, adversarial proceedings in the legal systems that served as models for the new LCP imply "equality of arms" only after completion of investigation activities. In this stage, the parties must disclose evidence they dispose with and test them at public hearings held in front of independent and impartial court. In essence, right to fair trial and equality of arms as an inseparable element thereof, are not guaranteed in the stage of investigations, which are informal, but at court hearings where both parties are given the opportunity to present their evidence and contest the evidence proposed by the other party.[28]

It should be acknowledged that controversies have been raised primarily in relation to defendants' rights and their position in pre-trial proceedings. Macedonia has opted for informal adversarial investigation only for evidence gathering which, at first glance, appears to provide fewer guarantees for suspects, as they are involved in fewer investigation activities.[29] In our opinion, suspects' active participation in prosecution-

28 See: European Court of Human Rights, judgment in the case of *Solakov vs Republic of Macedonia* (available at www.pravda.gov.mk)

29 Some countries from former Yugoslavia opted for formal prosecution-led investigation and maintained the old paternalistic concept whereby suspects participate in investigations and are present at investigation activities. At

led investigations only appears to be more favourable for them, because they are involved in "trial before the trial", with little possibilities for them to rebate and test the credibility of evidence compared to court hearings, and consequently suspects are actually legitimizing investigations to their detriment!

This does not mean that by abandoning presentation of evidence before start of court trials, the legislator has solved all problems of the defence. Highly unlikely! Although it can be argued that defence's non-participation in investigations of law enforcement authorities (led by the public prosecution) as anticipated under the new concept of criminal proceedings, is advantageous for defendants, keeping the defence away from prosecution-led investigations in the extreme manner, which has been done with the new LCP, raises concerns in terms of protection of defence rights in compliance with European standards, as analysed in details below.[30]

First, under the new LCP suspects are not entitled to **court review** of investigation orders.[31] Investigations are initiated upon prosecutor's orders, which cannot be contested by any legal remedy. In that sense, suspects have an ambivalent position: while a series of procedural mechanisms guarantee their defence rights in compliance with international standards, the moment they learn about investigation orders against them and have the possibility to actively participate in investigations is conditioned by prosecutor's decision on notifying them, unlike the previous system when suspects were entitled to contest the grounds for initiation of investigations against them from the moment they were presented with investigation orders.[32] This legal solution allows the prosecutor, for tactical purposes, to schedule suspect interviews by the end of investigation activities and in the meantime collect all information about possible prosecution and defence witnesses, in complete secrecy.

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first sight, it seems that notifying suspects about investigation's initiation and their participation in investigations guarantee more rights in terms of "equality of arms".

30 See: J. Hodgson, "Safeguarding Suspects' Rights in Europe: A Comparative Perspective", New Criminal Law Review 14 (4), 2011, pp. 611 – 665

31 LCP provides possibilities for court oversight of legality and lawfulness of activities taken by the police and the prosecution, but not over the investigation order! In Croatia, the Constitutional Court acted in the opposite manner, by reviving courts' role in legality oversight. See: Z. Đurđević, *supra*.

32 Compare: B. Dodik, "Defence Investigations - Experiences from Bosnia and Hercegovina, Current Trends in Criminal Procedural Rights in Serbia and Regional Criminal Legislations: Normative and Practical Aspects", Belgrade, 2012, pg. 24

The issue whether suspects and accused persons should be **notified** about investigation orders was and remains disputable. When the new LCP was adopted, practicing judges and prosecutors insisted on a legal solution by means of which suspects should not be notified about investigation orders, in order to prevent them to compromise the efficiency of investigation activities by fleeing the state, hiding evidence, influencing witnesses, etc. Additional arguments included avoidance of unnecessary harassment in cases when investigations are not pursued and the fact that such situations are rare, because suspects would anyhow be informed of possible charges or investigations at the time they are interrogated, strip searched, etc.[33] Furthermore, notifying suspects would not have been in their best interest, given the likelihood for issuance of detention orders due to possible fleeing the state or influencing evidence once they have learned of investigations being initiated against them.[34]

According to the new LCP, suspects and defendants are not present at interrogation of witnesses by the public prosecutor, except for witnesses testifying in favour of and proposed by the defence. Thus, suspects and their attorneys enjoy restricted and slightly alternated possibilities to be present at investigation activities taken by the public prosecutor, in the capacity of state authority competent to lead pre-trial proceedings.

In addition to the controversial legal solution on defence's non-information and non-participation in prosecution-led investigations, which raises major concerns due to the fact that in most cases suspects and defendants are prevented to exercise their law-guaranteed defence rights, the defence is facing series of other problems that are analysed below.[35]

33 Of course, this is not as simple as it might seem because in practice persons questioned by means of so-called informative talks in pre-trial proceedings are not entitled to know whether investigation will be initiated on the basis of their questioning and other information.

34 However, LCP does not provide important answers whether suspects and accused persons are entitled to request and receive information about investigations initiated against them and how will they exercise their rights in investigation activities given that they are unaware whether investigations are initiated against them and given that they will not be able to legitimize themselves as parties in criminal proceedings!?

35 For Croatia, see: V. Drenški Lasan, J. Novak and L. Valković, "Legal and Practical Problems of Solid Defence for Accused Persons" Croatian Journal of Criminal Law and Practice, no. 2/2009, pp. 521-541

3.3. DEFENCE-LED INVESTIGATIONS

Following the example of criminal proceedings in Italy, the new LCP stipulates that the defence is entitled to initiate and lead own investigations for the purpose of gathering evidence to its benefit that would allow efficient defence, which ultimately grants them certain "equality of arms" in this early stage of criminal proceedings.[36] In that regard, defence attorneys can take certain activities aimed at finding and collecting evidence in favour of the defence.[37] These activities can be taken by defence attorneys, their proxies or by contracted chartered private detectives and technical/forensic advisers, when needed.

First, in order to collect necessary notifications, defence attorneys or private investigators they have contracted are allowed to interview persons who might present circumstances useful for investigation activities.[38] Should defence attorneys decide to request written statements or notifications from persons they have interviewed, they need to make notes of these statements in compliance with LCP provisions governing minutes- and record-taking.[39]

According to the new LCP, defence attorneys are entitled to request access to private premises or areas that are closed for public access,

36 Professor Damaška, quite righteously, argues that "if the public prosecution is entrusted with leading investigations, the logic underlying adversary proceedings requires the defence to be allowed to conduct independent evidence gathering, instead of being limited to raising motions and other forms of participation in investigations led by the opposing party". See M. Damaška, "About Certain Outcomes of Adversarial Pre-Trial Proceedings", Croatian Journal of Criminal Law and Practice, no. 1/2007, pp. 3-14

37 According to the Macedonian LCP, evidence gathered in this manner is given almost equal weight as evidence presented by the prosecution, which is not the case in Serbia and Croatia. Emphasis is on "almost" equal weight, because the prosecution is entitled to record statements and request, under certain circumstances, to have the recordings reproduced in the course of court trials, which is not granted to the defence.

38 Articles 307 and 308 of LCP provide detailed description of actions which defence attorneys can take for the purpose of gathering notifications from persons believed to be able to present circumstances in favour of the defence and the manner in which they should be performed.

39 If a person can provide information useful for the defence, but refuses to, defence attorneys can request the public prosecutor to summon and interview this person. Attorneys are present at these questionings and have primacy in asking questions. However, this right is limited in cases of suspects or accused persons involved in the same proceeding, which is understandable. Namely, suspects or accused persons enjoy certain rights in proceedings led against them; however, when they are summoned to make a statement before the public prosecutor in capacity of witnesses, their rights might be violated.

within homes or other amenities. Should persons in possession of such premises deny access thereto, defence attorneys can address the court with a request for access, which the court approves by means of orders that are reasonably justified and clearly indicate manner in which such access should be granted.

Defence attorneys are entitled to request *data and notifications* from state administration bodies, local self-government bodies, legal and natural persons tasked with public services and other legal entities, as well as disclosure of documents, records and notifications. Entities addressed with such requests are obliged to respond within a deadline of 30 days from the request's receipt and within a deadline of 7 days from the request's receipt in cases when suspects have been detained.[40]

Defence attorneys are authorized to directly present the public prosecutor and the pre-trial judge with information and evidence in favour of suspects. This legal provision allows suspect's defence attorney to present the competent body acting in criminal proceedings with knowledge or evidence concerning the criminal offence and in favour of the suspect, at any stage of criminal proceedings, for the purpose of familiarizing and enabling them to make a correct decision about the course of future proceedings against the suspect or to decide upon specific motions made by the parties involved.[41]

In the literature, some scholars refer to these possibilities as "defence investigations".[42] In addition to defence attorneys, suspects can also be assisted by private investigators or other experts contracted as technical/forensic advisors. Here, the question is raised whether this type of active "investigative attorneys" are realistic in poor countries.[43]

40 In case entities addressed with information request fail to comply with the law-stipulated deadline, defence attorneys can request the pre-trial judge to order disclosure of requested information. In the course of court trials and hearings, this request is addressed to the court. Fines can be imposed in cases when addressed entities fail to comply with the court order.

41 See: M. Trombeva et al., "Investigation Procedure", Manual, OSCE, Skopje, 2013 (available at: http://www.jpacademy.gov.mk/upload/PDF%20Files/Priracnik%20za%20modul%202%2011.04.2013.pdf)

42 See: B. Pavišić, "New Croatian Law on Criminal Proceedings: Novelties in Criminal Legislation", Inženjerski biro, Zagreb, 2009; V. Drenški Lasan, J. Novak and L. Valković, "Legal and Practical Problems of Solid Defence for Accused Persons", Croatian Journal of Criminal Law and Practice, no. 2/2009, pp. 521-541

43 Pavišić argues that defence investigations in Italy have not produced any results. S*upra*

4. RIGHT TO DEFENCE ATTORNEY

In our criminal justice system, the right to defence attorney, as fundamental right of suspects and defendants in criminal proceedings, is indisputable. Nevertheless, as this analysis shows, practical exercise of this right is burdened with serious problems and shortcomings. As seen in the jurisprudence of the European Court of Human Rights (hereinafter: ECtHR), reports of the Commission on Prevention of Torture (hereinafter: CPT) and numerous comparative studies,[44] the struggle to make the right to defence attorney real and efficient, instead of theoretical and illusory, is – more or less - a global issue.[45] Efforts in this regard resulted in the adoption of the EU Directive on the Right of Access to Lawyer, following several years of heated debates.[46]

New LCP introduces the accusatory model of criminal proceedings according to which the burden of proof falls on the parties in criminal proceedings, with judges having a passive role, in order to maintain their impartiality. Concerns raised about this model include the fact that suspects and defendants might not have adequate access to funds or expert knowledge. Therefore, our analysis is focused on guarantees for fair trial and "equality of arms" in a situation when courts and parties in criminal procedures have completely new roles.

44 See: Cape, Namoradze, Smith, and Spronken, *supra*

45 See: "EU Procedural Rights – the Right to Legal Advice During Pre-trial Detention", Universiteit Gent, Dissertation for Master Degree in European Criminology and Criminal Justice Systems by (00907253) Opdenakker Sarah, academic year 2009-2010

46 See: Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to lawyer in criminal proceedings and in European Arrest Warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:294:0001:0012:EN:PDF)

Increased efforts on the part of defence attorneys will certainly have serious financial implications. Defendants who are financially unable to contract defence attorney will be in a disadvantaged position, especially at court hearings.[47] In this regard, establishment of a cost-effective system of public attorneys and promotion of *pro bono* defence should be duly reconsidered.

4.1. NEW ROLE OF DEFENCE ATTORNEYS

4.1.1. Defence attorneys in pre-trial proceedings

On one side, the new investigation concept significantly reduces defence attorneys' participation in investigation activities taken by the prosecution, particularly because they are not granted insight in prosecution's documents and records in this early stage of proceedings, which was the case under the old LCP. Article 79 of LCP stipulates that defence attorney should be given insight only in records from investigation activities attended by the defence! However, in addition to witness interviews,[48] defence attorneys are now allowed to be present during searches,[49] interrogation of suspects, forensic activities and insights.

For the first time, the new LCP includes provisions on police line-ups which, in the past, were categorized as police activities for determining the identity of suspects and were completely inadequate. Namely, establishing the identity of suspects and identification of suspects by witnesses or victims in police line-ups are two different things. Given the importance of such activities in criminal proceedings, the new LCP includes guarantees for suspects' rights by allowing their defence attorneys to be present at police line-ups.[50]

47 Law on Free Legal Aid does not govern legal assistance in criminal proceedings. In truth, this law makes erroneous reference to the fact that it does not apply to mandatory defence in the meaning of LCP, which does not solve anything, because mandatory defence in some cases is not regulated in terms of the entity responsible to cover defence costs.

48 Although LCP does not explicitly stipulate this, it seems logical for the defence to be allowed to attend interviews with witnesses it has proposed, in compliance with Article 305 of LCP.

49 Truth to be told, LCP does not anticipate defence attorney's presence during searches; instead they should be performed in the presence of the property's holder!

50 Unclear is how will defence attorney attend so-called "group line-ups", which imply identification of one person among a group of persons in natural environments (for example, when exiting schools, factories, etc.)! British Codes were taken as the model to regulate police identification of persons. See: Po-

Last, but not least important, is the fact that the new LCP introduces **defence investigations,** following the example of criminal proceedings in Italy**.** Accordingly, from the moment they assume this duty, defence attorneys are entitled to take certain activities aimed at finding and collecting evidence to the benefit of the defence. This novelty will be a major challenge for the defence. It does not only require special skills, but also greater engagement of defence attorneys. Thus, likely is that adherent implementation of these legal provisions would lead to significant increase of attorney fees, due to higher number of billable hours spent on preparation of the defence, as well as additional costs for engagement of private investigators, forensic experts, etc.[51]

4.1.2. Defence attorneys in plea-bargaining

Plea-bargaining is another major challenge for defence attorneys, as it requires acquisition of new skills and implies more working hours and brand new activity of defence attorneys. New LCP stipulates mandatory participation of defence attorneys in plea-bargaining. In that, unclear is the exact start of the plea-bargaining process for suspects and defendants to be appointed defence attorneys in cases they have not contracted attorneys on their own.[52]

4.1.3. Defence attorneys and cross-examination

Under the new concept, all evidence material is presented at the main hearing in front of the court. Here, it should be noted that preparations for court hearings will significantly depend on the parties in criminal proceedings, as they hold the responsibility for presentation of evidence in front of the court. Courts are no longer competent to present evidence

lice and Criminal Evidence Act 1984, Codes of Practice, Code D, Code of Practice for the Identification of Persons by Police Officers. This aspect needs to be studied in detail and regulated with much more details compared to what has been done under MoI bylaws. Compare: Rulebook on Identification of Persons. "*Official Gazette of the Republic of Macedonia"* no. 153/2012

51 Until recently, this type of engagement on the part of defence attorneys was unknown on the European continent. Anglo-American experiences do not recognize explicit regulation under procedural laws of activities taken by the defence, due to which the new LCP transposed the relevant provisions from the Italian LCP. Provisions on defence investigations were not integrated in the Italian LCP adopted in 1988, while high costs were indicated as the main reason for poor enforcement of these provisions in practice.

52 Article 486 of the new LCP stipulates that "suspects must have defence attorney at the start of the plea-bargaining process. Suspects shall select an attorney of their choice. Should they fail to select an attorney, president of the competent court shall appoint them official defence attorney.

ex officio, but can sanction untimely proposal of evidence intended for court trials.

Apparently, transformation of inquisitorial into accusatory criminal proceedings will easily contribute to speediness and fairness of court hearings. Nevertheless, in order to properly function, this system requires two equitable parties. In other words, defendants and their attorneys must have an active role in criminal proceedings, counteracting the prosecution. Obvious is that this model will raise serious problems, given that in poor countries, large share of the population cannot afford defence attorneys, and the state is unable to secure sufficient public funds for this purpose.

4.2. ACCESS TO ATTORNEY

There are no detailed and standardized written procedures and mechanisms on guaranteeing and facilitating the right to defence attorney in cases when suspects are summoned for questioning at the police station and by the public prosecutor, especially when they are deprived of liberty, arrested or detained. Most probably, this is one of the reasons why suspects in Macedonia almost never have their defence attorney present at the police.

Namely, according to reports published by the Committee on Prevention of Torture at the Council of Europe and based on their evaluation visits to the Republic of Macedonia, only 6% of suspects had their defence attorney present at the police station "Gazi Baba", with similar shares of suspects at other police stations.[53] National prevention mechanism at the Ombudsman Office has arrived to similar data on the low number of cases in which suspects had their defence attorney present at the police.[54]

According to collocutors interviewed by CPT, the main reason for such practices is suspects' inability to contact and pay for attorney services.[55] Therefore, the new LCP stipulates that instead of informing suspects about practicing attorneys in the Republic of Macedonia, the police, in

53 See: CPT Report Macedonia, pg. 16 (available at http://www.cpt.coe.int/documents/mkd/2012-04-inf-eng.pdf)

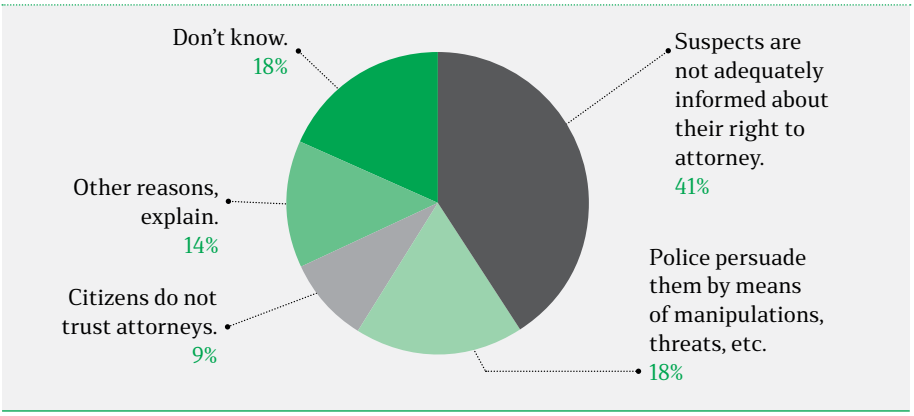
54 See: findings of CPT (available at www.cpt.coe.int) and of the Ombudsman (available at http://ombudsman.mk/upload/NPM-dokumenti/2014/NPM%20Godisen%20izvestaj-2013.pdf)

55 According to CPT reports, the police station in Veles is the only exception therefrom, which allegedly disposed with a list of official attorneys that are easily accessible (no reference is made whether their services had to be paid by citizens or they were "ex officio" or maybe *pro bono* engaged).

cooperation with the Bar Association, should present them with a list of on-duty attorneys who are available.[56] Learning from experiences concerning problematic negotiations and payment of fees for attorneys engaged in police proceedings, the new LCP stipulates that attorneys engaged during night hours should be reimbursed from the Budget of RM.

According to interviewed attorneys and police inspectors, reasons behind non- engagement of defence attorneys include police inspectors' pressure on suspects to waive their right to defence attorney under the promise of faster release, more lenient sanction, etc. Possible solution that might reduce occurrence of these pressures is to have an independent person, not involved in the investigation, inform suspects about their right to attorney and other procedural rights, for example, the custody officers at police stations.[57]

What are the reasons for rare presence of defence attorneys at police stations?

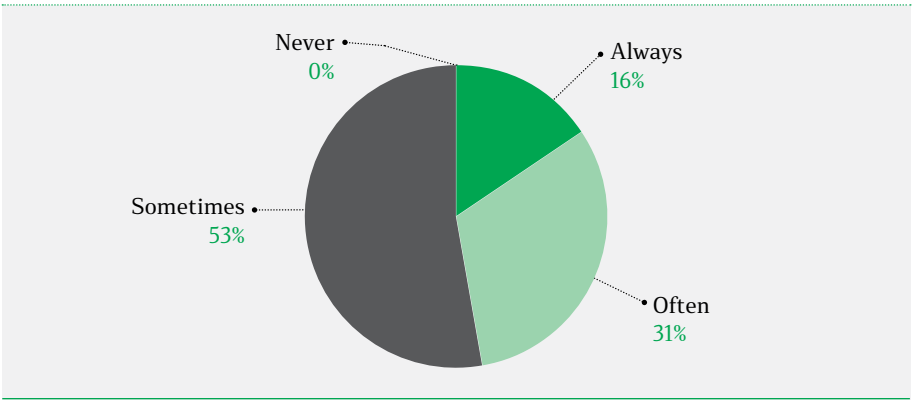


Constitution of the Republic of Macedonia wisely stipulates that all persons are entitled to defence attorney when they are summoned for questioning, apprehended or detained, and that all persons must be informed of reasons for being summoned for questioning or apprehended. However, having in mind practices whereby people are not informed of reasons for being summoned to so-called informative talks in the relevant invitation, but have been summoned for "official interview" - as if an interview with the police can be private! – they are rarely accompanied by defence attorney when arriving at the police.

56 See: Report of the Open-ended Intergovernmental Expert Group Meeting on Strengthening Access to Legal Aid in Criminal Justice Systems, Vienna, 16-18 November 2011 (available at http://www.unodc.org/documents/justice-and-prison-reform/DRAFT_report_IEGM_legal_aid.web.pdf)

57 See: G. Kalajdziev, "On the Draft Law on Amending the Law on Police", MJCLP, no. 1-2, 2001/2012, pp. 49-69

Person has defence attorney



4.2.1. Contact with selected or on-duty defence attorney

Suspects summoned at the police (or in front of the public prosecutor) are entitled to select an attorney *of their choice*.[58] However, LCP anticipates limited right of choice for suspects or persons deprived of liberty, i.e. they can either engage "own" attorney or somebody from the list of on-duty attorneys compiled by the Bar Association.[59] Hence, it seems that suspects without own attorneys have restricted right of choice compared to the relevant legal provision from the old LCP. Albeit being logical on the account of urgency, these narrow guarantees raise concerns in terms of compliance with international standards. However, "on-duty" attorneys must be truly on-duty, in literal meaning of the word, and easily accessible.

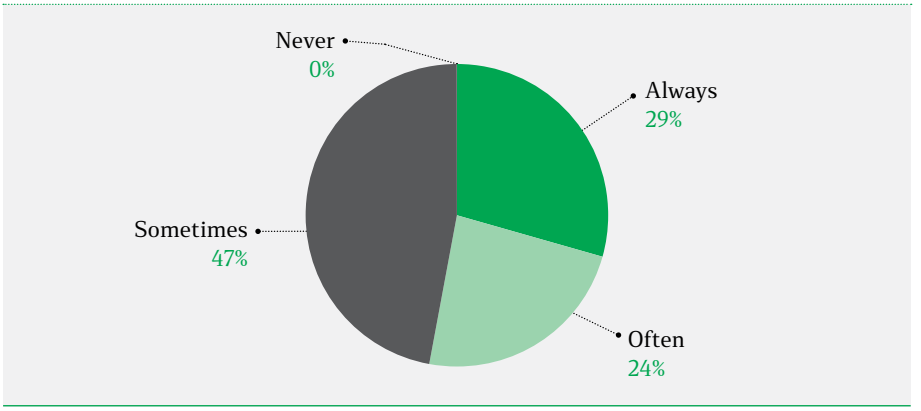
Therefore, one must differentiate between attorneys who have expressed preparedness and interest to be engaged by people in urgent need of defence attorney and on-duty attorneys who are prepared to instantly appear in given situations, including during night hours or weekends and holidays. It seems that the domestic legislation and

58 This originates from Article 12 of the Constitution, Article 6 of the ECHR and is explicitly stipulated under Article 69, paragraph 2, Article 70, Article 71, paragraph 2 and Article 206, paragraph 1, item 3 of LCP. National laws are still not adjusted to law practices/firms as such. For example, British Codes anticipate the possibility for suspects, instead of the chosen attorney, to engage another attorney from the same law practice. See: Police and Criminal Evidence Act 1984, Codes of Practice, Code C, Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, 6B (available at www.gov.uk/police-and-criminal-evidence-act-1984-pace-codes-of-practice)

59 Hence, Article 206, paragraph 3 of LCP provides precise stipulation of the right to defence attorney for all interrogations. Same is stipulated under Article 161, paragraph 3 of LCP.

practice does make this distinction, and according to comparative law and practice, similar is the situation in states with developed legal systems.[60]

Police/public prosecution assist suspects to find attorney



Furthermore, the police are obliged to facilitate suspects' *contact* with their chosen attorney. In Macedonia, this practice implies only *direct/immediate contact,* although some states explicitly allow written or telephone-assisted contacts.[61] Truth to be told, LCP does not exclude these types of contacts, i.e. it does not prohibit them, but they are rarely observed in practice. On this account, due consideration should be made whether these communication channels between suspects and defence attorneys should be allowed under another law or regulation, in order to further regulate such possibilities, including allowed duration of consultations, communication confidentiality, etc.

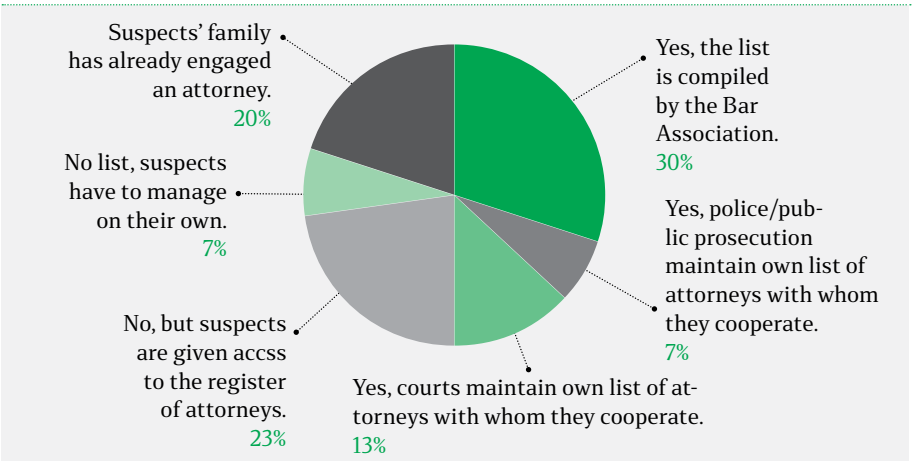
When they are available and responsive, defence attorneys chosen by suspects need time to arrive at the police station or the public prosecutor. LCP does not stipulate particular period of time, except in cases of

60 Hence, in Great Britain, persons in need of legal advice are entitled to consult with attorney of their choice, but when this attorney is unavailable, they are offered an on-duty attorney, and if this attorney is unavailable, they may choose from the list of attorneys who have expressed interest to provide assistance in such cases. If these attempts to secure attorney are unsuccessful, suspects may choose up to two alternatives. If these attorneys are not available, the custody officer has discretion to allow further attempts. Nevertheless, the police are strictly prohibited to suggest particular attorneys! See: Codes of Practice, Code C, *supra*

61 For Great Britain, see: Codes of Practice, Code C, 6J. According to available data, in England worrying is the high number of consultations made by telephone! Compare: M. Zander, "The Police and Criminal Evidence Act 1984", Sweet & Maxwell; 6th revised edition, 2013

deprivation of liberty and police custody, given the narrowly defined deadlines for police custody in duration of 6 to maximum 24 hours.[62]

Is there a list of on-duty attorneys for urgent cases, in order to guarantee the right to defence attorney of persons deprived of liberty, even in cases when they cannot afford one?



4.2.2. Interested or on-duty defence attorneys

According to past practices, access to defence attorney was often reduced to enabling insight in registers or lists of practicing attorneys compiled by the local bar association. Practices vary from town to town, one to another police station. Some police stations keep own lists of attorneys, but criteria applied for compilation thereof are unknown. New LCP makes a step further and stipulates so-called on-duty scheme, which is not sufficient. Relevant experiences from Croatia show that compilation of lists of attorneys who have agreed to be called at the police station on request of suspects or persons summoned for "informative talks" does not provide sufficient guarantees. Hence, in reality, it has been noted that attorneys do not perceive such enlistment as serious obligation, rather an expression of principled *interest*! There must be a shorter list of *on-duty* attorneys obliged to respond when being called. At the same time, the Bar Association should sanction enlisted attorneys' failure to respond, especially in cases of on-duty attorneys!

62 According to the new LCP, persons deprived of liberty can be kept in custody for a period longer than 6 hours provided that custody officers, by means of special decision, establish that they need to be kept for the purpose of establishing or verifying their identity, checking their alibi or due to other reasons establish a need for collection of other data necessary for initiating proceedings against them.

Equally important are budgetary considerations, i.e. who will cover attorney costs. New LCP explicitly stipulates that costs for attorneys from the on-duty list engaged during night hours (22:00 to 06:00 hrs.) should fall on the burden of the central budget, which is not sufficiently precise (LCP: art. 161, para. 1). Legal provisions on "poverty law" are applied in the remaining cases, but they are designed exclusively for court proceedings. The fact that LCP and other laws and bylaws do not stipulate detailed procedure on implementation of the right to defence attorney at the police and that the police and the public prosecution have not allocated budget funds for this purpose, clearly shows that this right is not going to be easily practiced and exercised.

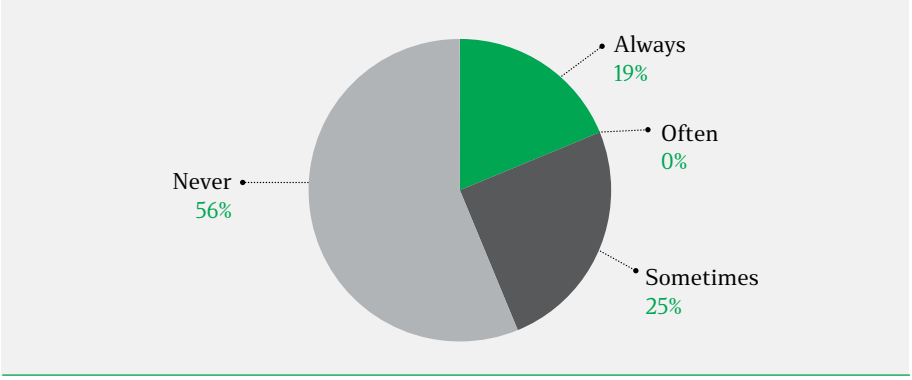
Data obtained from the Criminal Court Skopje 1 provide the conclusion that attorneys have been engaged in a relatively low number of cases (average of 1,500 cases annually) and were awarded modest fees in the amount of around 5,500.00 MKD for an average of two court hearings per case.[63] Comparison of total number of resolved cases and payments made on the ground of attorney fees (which are *de facto* reimbursed only for completed cases) provides the conclusion that attorneys acting as "official" defence attorneys in criminal proceedings have been engaged in only 2% of all cases.

4.2.3. Oversight of custody conditions

In their relevant reports, the Committee on Prevention of Torture and national prevention mechanism at the Ombudsman Office continuously criticize custody conditions for persons deprived of liberty.

63 Namely, in 2009 there were 1,646 cases in which decisions have been taken for appointing "official" defence attorneys, and they were reimbursed in total amount of 8,768,851.00 MKD (on average, an attorney was reimbursed in the amount of 5,327.00 MKD per case). In 2010, there were 1,549 cases in which "official" attorneys have been appointed, and they were reimbursed in total amount of 9,126,000.00 MKD (on average, an attorney was reimbursed in the amount of 4,844.00 MKD per case). In 2012, a total of 1,178 attorneys were appointed in cases of mandatory defence, and they accounted for 1,432 in 2013. In 2013, court-appointed attorneys were reimbursed in total amount of 6,128,260.00 MKD. They all acted in cases of mandatory defence. No payments have been made on the ground of defence attorneys for indigent people!
Some attorneys have been engaged in multiple cases, due to which we found it interesting to check the claim that courts are appointing a relatively small number of attorneys with whom they have close ties, but were unable to obtain such information.

Are attorneys allowed to inspect custody conditions of persons deprived of liberty (custody cell, hygiene, etc.)?



Article 6 of the proposal, which was excluded from the text of the EU Directive, implied a breakthrough in defence rights, as it stipulated that attorneys are entitled to inspect custody conditions of suspects or defendants and should be given access to premises where they are detained.[64] Nevertheless, this legal solution is not included in the adopted EU Directive, although it would have implied a possibility for increased importance attributed to attorneys and precondition for improving conditions at investigation prisons and avoiding possible malpractices and ill-treatment. Be that as it may, this requirement can be perceived as European standard on the account that it has been insisted upon by the European Court of Human Rights in Strasbourg.[65]

4.3. CONFIDENTIALITY OF COMMUNICATIONS

Building upon ECtHR jurisprudence, the EU Directive on the Right of Access to Lawyer insists on confidentiality of communications between suspects and their defence attorney. Special justification and explanation of this guarantee are not necessary. Actually, suspects' right to consult with defence attorney and confidentiality thereof are considered *condition sine qua non* in the domestic literature as well.[66] However, the

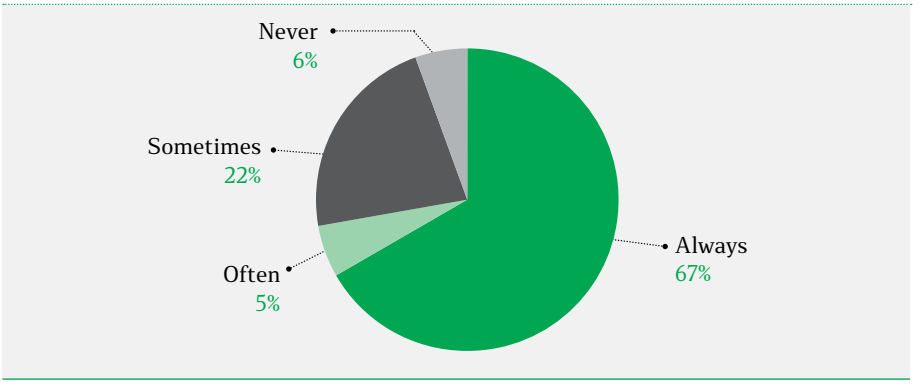
64 See: J.P.W. Temminck Tuinstra, "The Right to Legal Assistance", Faculty of Law, University of Amsterdam, 2009 (available at http://dare.uva.nl/document/122658); Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, Brussels, 08.06.2011, COM (2011)

65 See: *Dayanan vs Turkey*, judgment from 13 October 2009, no. 7377/03, para. 32

66 See: G. Kalajdziev, "Fair Procedure", PhD Dissertation, Faculty of Law, Skopje, 2004

police did not allow confidentiality and justified their behaviour with the fact that this has not been written anywhere!? On this account, several provisions from the new LCP reiterate the need for suspects to be allowed consultations with their attorney "in private" (LCP: art. 69, para. 2; art. 71, para. 2; and art. 206, para. 1, item 3).

Are suspects allowed to consult with their attorney before the first interrogation?



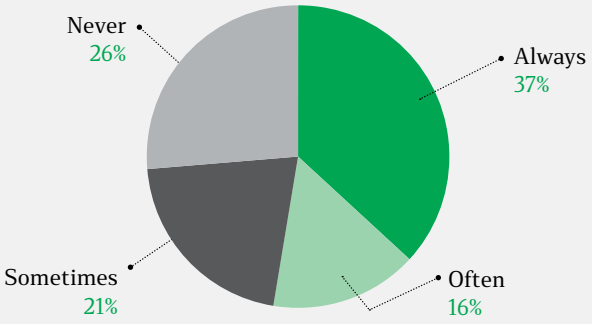
Information presented in the Ombudsman's Annual Reports refers to the fact that special premises for such confidential consultations are only secured at several recently refurbished and equipped police stations. On the other hand, purposefully or not, the new Law on Police[67] avoids this explicit requirement put forward by LCP.[68]

In the course of interviews, it was confirmed that defence attorneys have a passive role in questioning or interrogation, but they are still the best guarantee for procedural rights of suspects and can prevent possible pressures and ill-treatment.

67 Law on Amending the Law on Police, "*Official Gazette of the Republic of Macedonia"* no. 145/12

68 See: G. Kalajdziev, "On the Draft Law on Amending the Law on Police", MJCLP, no. 1-2, 2012, pp. 49 and 62-63

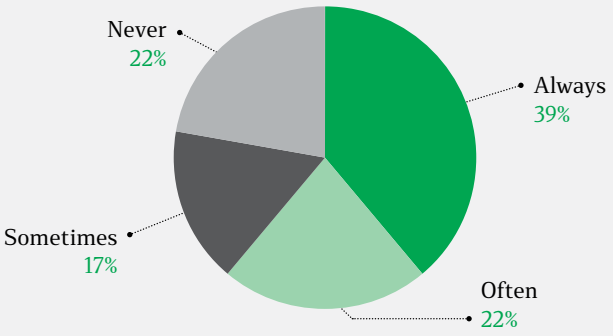
Are attorneys allowed to councel suspects during interrogation/questioning?



5. RIGHT TO DEFENCE ATTORNEY FOR INDIGENT AND OTHER VULNERABLE GROUPS

Although the right to defence attorney, in particular indigent people's right to have defence attorney in criminal proceedings, as required by interest of justice and fair trial, is enlisted among fundamental human rights guaranteed by international instruments, the Constitution and the laws, but is completely dysfunctional in practice. Available data show that in Macedonia indigent people face difficulties in exercising their right to defence attorney in criminal proceedings, and defence services they do receive are inadequate and do not guarantee them justice. Few people are aware that except for mandatory defence, there are practically no cases in which defendants have been appointed attorneys only on the basis of their poverty status. Nevertheless, experts we interviewed were of different standing, which shows that sometimes facts and perceptions can differ.

When persons cannot afford attorney, are they awarded attorney for indigent people?



5.1. MANDATORY DEFENCE

Mandatory defence and defence for indigent people are different instruments, but having in mind that mandatory defence accounts for most (and maybe only) cases in which indigent people are awarded "official" defence attorney,[69] the public often confuses and uses them interchangeably.[70] As is the case in other European states, our LCP stipulates mandatory defence by means of court-appointed defence attorney in cases when due to gravity of criminal charges or any other obvious handicap defendants are not able to represent themselves. In such cases, defendants (or their family members, etc.) can contract defence attorney of their choice, but if they do not have an attorney, the court appoints them "official" defence attorney.

Payment of defence services is a completely different issue. The state assumes responsibility to make advance payment of services provided by these attorneys but, by rule, once criminal proceedings are completed, convicted persons are obliged to reimburse these costs,[71] unless they convince the court that payment thereof might endanger their or their family's sustenance.

LCP stipulates different stages and different circumstances in criminal proceedings when defence attorney must be involved; however,

69 The term "official" attorney is erroneous, because it is not a matter of public attorneys that work as civil servants, but private attorneys engaged by the state in given situations and reimbursed from the Budget of the Republic of Macedonia.

70 ECtHR jurisprudence does not distinguish between mandatory defence and legal aid for indigent people. This is understandable, given that international instruments only guarantee the minimum standards of defence and do not engage in nuances and differences of national legal systems. It seems odd that the Anglo-Saxon criminal proceedings do not recognize *mandatory defence,* given the individualist philosophy applied in this criminal justice system. Nevertheless, most European states maintained mandatory defence despite moving to accusatory criminal proceedings. In this manner, liberalism is combined with social views that assistance should be given to defendants.

71 According to the Law, court proceeding costs and "necessary expenses" of court-appointed defence attorneys should be paid in advance from the budget funds of state authorities leading the criminal proceedings, and later they can be reimbursed by persons who, in compliance with the Law, are obliged to reimburse them. In practice, costs are often reimbursed from the court budget, with a delay of one year or more, and there are no data available whether and to what extent the state is able to collect these costs from defendants and convicted persons. Insistence on "necessary expenses" in the Law raises several dilemmas: is this the only category of expenses reimbursed in advance; does this mean that attorneys will be appointed in "cost-effective" manner, etc., which would undoubtedly affect the quality of defence services.

except in cases of juveniles, defence attorneys need to be engaged in court proceedings, but not in police- or prosecution-led proceedings.[72] Hence, according to Article 74 of LCP, when defendants are deaf, hard-on-hearing or *incapable of successfully representing themselves* or when criminal proceedings are initiated for criminal offences which, by law, are liable to *lifetime imprisonment sentence,* defendants must have an attorney present at the first questioning (refers to court hearings). Persons' inability to represent themselves is a factual matter assessed by the court. Scholar commentaries and court practice do not have clear answer about situations in which persons are unable to represent themselves in order to be appointed defence attorney.[73] Interviewed practitioners referred to low intelligence and legal illiteracy, but in practice main concerns are related to avoiding statute of limitations to come in effect.

Another novelty is the fact that defendants who have been ordered *detention* must have defence attorney for the entire duration of their detention. The idea behind this legal provision is straightforward: defendants in detention are not in position to successfully organize their defence; however, here it should be noted that in most cases defendants have already been questioned by the police and by the prosecution.

In cases of indictment for criminal offence which, by law, is liable to imprisonment sentence *in duration of ten years* or more, defendants must have an attorney at the time they are presented with the indictment. Defendants tried in absence must have an attorney from the moment the court has ordered trial in absence. Finally, the new LCP stipulates mandatory participation of defence attorneys in *plea-bargaining*.[74]

72 Unlike the police, the public prosecution rarely interrogates suspects and witnesses before it has taken the decision on initiating formal investigation, due to lack of adequate conditions, typists, etc.

73 Professor Marina believes that defendants' inability to defend themselves is assessed on the basis of their individual features, including serious speaking impediments, such as severe stammering. See: P. Marina, "Comment on the Law on Criminal Procedure", Kultura, Skopje, 1978, pg. 68. Pavišić refers to physical disabilities, provided they affect persons' ability to defend themselves. See: B. Pavišić, M. Vučković, P. Veić and A. Radulović, "Law on Criminal Proceedings", Zagreb, 1998, pg. 50. Skulik writes that inability could be caused by any physical or mental disability. See: M. Skulik, "Comment on the Code of Criminal Proceedings", *Official Gazette*, 2007. Interviewed practitioners, inter alia, enlisted defendants' low intelligence and legal illiteracy.

74 LCP mandates that "*in the course of plea-bargaining and negotiations* with the prosecutor, defendants must have defence attorney" (art. 74, para. 4), but does not stipulate the exact moment these proceedings are initiated, which could be problematic in practice.

In case of mandatory defence, when defendants do not have attorney, president of the court appoints them "official" defence attorney for further course of criminal proceedings until the court ruling becomes enforceable. In cases when defendants are appointed "official" defence attorney after motioned indictment act, they should be notified thereof when they are presented with the indictment.

Once defendants have been declared guilty of charges they are accused of, the court, as part of the ruling delivered, orders convicted persons to reimburse criminal proceeding costs. By means of separate decision on court proceeding costs, the court may exempt convicted persons from reimbursement of criminal proceeding costs, fully or in part, on the ground of poverty, provided that payment thereof threatens their or their family's sustenance. If these circumstances are established after the court has delivered the ruling, it can take a separate decision on exempting convicted persons from the obligation to reimburse criminal proceeding costs.

5.2. DEFENCE FOR INDIGENT PEOPLE

Another, rarely applied possibility is for indigent people to benefit from free defence services in cases that do not qualify for mandatory defence; however, only when they are charged with criminal offences which, by law, are liable to imprisonment sentence.[75] In these cases, on defendants' request, the court may appoint them defence attorney at the cost of the state, provided that persons' financial status prevents them to cover defence costs and "interest of justice" requires these people to be awarded attorney.

Legal provisions stipulating that president of the court council decides in these matters and president of the court appoints defence attorneys are still in effect. This normative solution has been uncritically taken from the old LCP and implies dominant role of courts in pre-trial proceedings, but this solution is unsuitable for the new model and is considered highly impractical, and will, most certainly, negatively affect defendants' right to attorney. Hence, it must be immediately revised.

75 Old LCP was more restrictive in terms of court-appointed defence attorney, notably because defence attorneys could be appointed only in cases of serious criminal offences liable to imprisonment in duration of more than one year, and only after the indictment act has been motioned!

5.2.1. Eligibility criteria for appointing defence attorney to indigent people

On several occasions, attempts were made to align the Macedonian LCP with ECHR practices, first by introducing the term "interest of justice" and later by lowering the threshold of anticipated criminal sanctions, but the most recent LCP makes a step further in alignment with ECtHR jurisprudence.

ECtHR case law refers to several criteria that clarify "interest of justice", some of which have been explicitly transposed in Article 70 of the new LCP. First criterion made due consideration by courts is ***gravity*** *of the criminal offence and severity of the law-stipulated sanction*, i.e. they need to be aware of the maximal sanction and realistically expected sanction in the given case.[76] Next important criterion, which appears to be reasonable and easily understandable at first glance, is ***complexity*** of the given case. This might refer to complexity of both, factual and legal matters; however, legal matters more frequently appear as reason for establishing that defendants will not be able to successfully defend themselves without representation. The third criterion is financial (indigent status of defendants), and it should be noted that the new LCP guarantees legal assistance for indigent people in earlier stages of criminal proceedings (LCP: art. 75, para. 1).[77]

Criteria governing ***financial status*** of people eligible for free legal aid in criminal matters are not clearly defined, which resulted in varying practices among domestic courts, but also within one court.[78] Unlike the

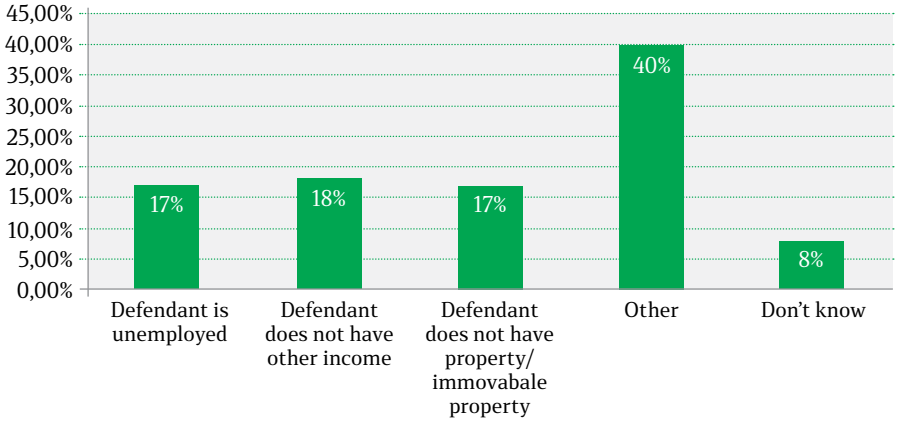
76 Although, by rule, the court adheres to specific circumstances in the case, it seems that the maximum stipulated sanction has been given greater weight in some rulings, which is rightfully criticized in scholar literature. See: S. Trechsel, "Human Rights in Criminal Proceedings", Oxford University Press, 2005, pg. 274. Known is the case of *Quaranta v. Switzerland*, Series A, no. 205, from 1991, where the law has stipulated a maximum sentence of imprisonment in duration of 3 years, although the circumstances in the case clearly indicated that a smaller sentence should be taken into account, which did happen, i.e. the defendant was sentenced with imprisonment in duration of 6 months. This case is particularly important for us because it provided grounds for amending the LCP in regard to legal provisions governing free legal aid for indigent people. Namely, the old legal solution from the federal LCP, transposed in the first LCP from 1997, implied appointment of defence attorneys only for criminal offences that by law are liable to imprisonment in duration of more than 3 years, only to have this threshold lowered to 1 year in 2004.

77 According to the old LCP, application for court-appointed defence attorney on this ground was admitted only after the indictment act has been motioned.

78 LCP is not clear whether poverty criteria, documents and relevant eligibility assessment procedure in cases of "defence for indigent people" are identical

Law on Free Legal Aid, applicable in civil and other proceedings,[79] court practice does not include precise eligibility criteria (on the financial status) for free legal aid in criminal proceedings. Judges do not consider this a serious problem and believe that their poverty status can be easily established on the basis of documents presented as evidence in support of defendants' unemployment status, absence of income sources or property tenure, or their status of social allowance beneficiary (issued by the Public Revenue Office, the Real Estate Cadastre and other competent authorities).[80]

Criteria on awarding defence attorney to indigent people and criteria on exemption from payment of defence costs



As indicated above, defendants' financial status is not the only criterion: equal importance is attributed to complexity and gravity of the given case, whereby people of particular financial status might not be awarded defence attorney, while those of better financial status can

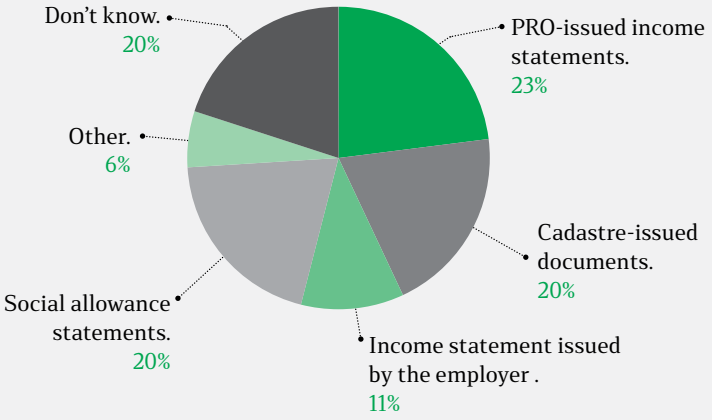
with the criteria governing exemption from payment of criminal proceeding costs in cases of "mandatory defence".

79 Pursuant to LFLA, the right to free legal aid is exercised only by the poorest population: beneficiaries of social allowance, disability social allowance, lowest pension benefits, etc., which do not have other income sources or property. These criteria do not exclusively concern the free legal aid applicant, but his/her household, whereby the accumulative income on all grounds should not exceed 50% of the average salary in the state calculated in the last six months, and the household should not be in possession of immovable property. This restrictive approach was strongly criticized by the non-governmental sector as one of the key reasons behind the fact that otherwise modest funds allocated for this purpose have not been spent in the first several years of law's implementation.

80 Demonstration of applicant's property and financial status is pursued by means of statements issued by the Public Revenue Office, on defendant's request. For this purpose, PRO has developed relevant templates of applications and statements.

benefit from legal assistance and representation on the account of gravity and complexity of circumstances in the case. This is inferred on the basis of relevant legal provisions.

Which documents should be submitted in attachment to the application on court-appointed attorney for indigent people, i.e. the application on exemption from payment of attorney fees and costs?



5.2.2. Indigent people's right to defence attorney of their choice

Comparative and international law raise the dilemma *whether defendants should be entitled to be appointed "official" defence attorney of their choice.* According to ECtHR case law, defendants are not entitled to choose their court-appointed attorney.[81] Positions presented in commentaries and recent court practices are on the opposite ends of the argument so as to allow greater acknowledgment of defendant's preference, following the example of some states in Europe.[82]

Old LCP did not stipulate defendants' right to defence attorney of their choice when requesting the court to appoint and reimburse them, nor did it exclude this possibility. New LCP allows defendants to *indicate* particular defence attorney from the list of attorneys compiled by the local bar association (LCP: art. 75, para. 1).[83] Use of such phrases

81 See: *Croissant v Germany,* 25 September 1992

82 Hence, in Germany, when appointing defence attorneys, president of the court allows defendants to indicate their preferences within a given deadline. Provided there are no important reasons to act on the contrary, president of the court appoints the attorney indicated by the defendant (Art. 142 of the German LCP).

83 Survey results show that in practice defendants rarely reject the attorney

indicate that defendants do not enjoy explicit right to choose their court-appointed attorney, but mandates the court to make due consideration of their preference. This solution is realistic and reasonable, but does not mean that defendants are at liberty to select their defence attorney from the list they are presented with, because not all attorneys are available or willing to work on their case. Due to this reason, the courts and the Bar Association should establish separate lists of attorneys willing to be engaged on indigent people's request, following the example of some courts that maintained such lists for "recruitment" of official defence attorneys in cases of mandatory defence.

5.2.3. Free defence

As regards *"free services"* provided by court-appointed attorneys, the question is raised whether payment of attorney fees from budget funds is a permanent solution and defendants should not be concerned, or they might be required to reimburse these costs in future, provided they are convicted or their financial situation has improved.[84] In Macedonia, it seems that funds for defence of indigent people (beyond mandatory defence) are permanently awarded from the Budget of RM,[85] and imply due assessment of defendants' financial status at the time their application for free defence services is reconsidered, irrespective of the fact whether they will be convicted or their financial situation will improve. On the other hand, fees of court-appointed attorneys for indigent people fulfilling criteria for mandatory defence are temporarily paid in advance from the budget of the state authority leading the criminal proceedings, but are later reimbursed by persons obliged to compensate these costs, unless payment of attorney fees and "necessary expenses" would endanger their or their family's sustenance.

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they have been appointed by the court and request another attorney. When they prefer particular attorney, defendants contract them privately (and pay for their services from their own pocket). The new LCP adopted in 2010 does not include an explicit provision on dismissal of court-appointed defence attorneys, but this is implied on the basis of defendant's right to privately contract an attorney.

84 ECtHR case law distinguishes between defence attorney costs and translation costs (ECHR: art. 6, para. 3, item *(e))*, implying that the translation-related costs will never be charged from the defendant. Thus, in one case against Germany, the Commission has found no violation of Article 6 of the European Convention if these costs are charged in case the defendant's economic status has been improved to an extent that no longer renders free legal aid justified, while the Court has left this issue open. See: *Croissant v Germany,* 25 September 1992

85 This refers to the *judicial budget* as part of the Budget of RM.

5.2.4. Stage of criminal proceeding in which indigent people are entitled to defence attorney

Indisputable is that defence attorneys are very important in the early stages of criminal proceedings[86] and therefore, under the new LCP, the right to free attorney is not conditioned with motioned indictment act![87] American theory and practice pay great attention to this issue, indicating that defendants must be appointed attorney in all *"critical stages"* of criminal proceedings.[88] There are no reasons why this logic and practice should not be applied by the courts in Macedonia. Therefore, terms and conditions governing mandatory defence and stipulated under Article 74, paragraph 3 of LCP should not be interpreted in the meaning that persons accused of serious crimes liable to imprisonment in duration of 10 years or more cannot refer to Article 75 and be appointed defence attorney at the cost of the state before the indictment act is motioned. Domestic courts should be flexible when interpreting the principle of fair defence or "interest of justice", as indicated in the European Convention, and make due consideration of the critical need for legal assistance in individual cases and individual stages of criminal proceedings.

5.3. REIMBURSEMENT OF ATTORNEY FEES AS QUALITY ASSURANCE

By rule, court-appointed attorneys should be reimbursed in compliance with the Tariff Code for Attorneys; however, due to lack of funds, courts reimburse them in different amounts, depending on complexity, number of defendants, etc. According to surveyed judges and attorneys, *average reimbursements* for court-appointed attorneys in criminal cases range from 2,000.00 to 5,000.00 MKD per court hearing held, i.e., per day. Similar amount is paid for attending investigation activities, usually for their presence when investigative judges' question suspects or witnesses.[89] Defence attorneys are paid lump sums, depending on the judge or the case, criminal offence gravity, complexity, etc. It should be noted that there are

86 See: Kamishar, LaFave and Israel, *supra*, pp. 100-102

87 Compare Article 69 of the old LCP with Article 75 of the new LCP.

88 See: J. H. Israel and W. LaFave, "Criminal Procedure – Constitutional Limitations", West, St. Paul, Minn., 2001, pp. 339, 346, etc.

89 According to data disposed by the Judicial Budget Council, in 2011 all courts in Macedonia have paid a total of 25,795,957.00 MKD (419,446 EUR) for court-appointed defence attorneys on all grounds, in total of 4,254 cases or on average 6.064.00 MKD (more than 90 EUR) per case. In 2013, this amount was significantly lower (by around 30%) and accounted for 18,304,779.00 MKD.

no written rules on payment of attorneys, so judges rely on past practices of their colleagues, which may vary from judge to judge, from court to court. In that, due care is not made of hours spent on preparation and work on the defence, and most often attorneys are paid only for attending court hearings.

Attorneys do not always submit their list of expenses, knowing that the court would pay them lump sum only for court hearings held. Some judges reported that when court-appointed attorneys submit their list of expenses, the court accepts only justified, i.e. admissible expenses, but this practice is not established as rule.[90] In addition, defence attorneys are paid their indicated fee only for court hearings held, and are not reimbursed for cancelled court hearings. According to surveyed attorneys, the courts do not reimburse them regularly for legal remedies lodged. It seems there are different practices in terms of the issue whether defence attorneys appointed in cases that involve several defendants are paid higher fees or are reimbursed as if they provide services for one defendant.[91]

According to LCP, this amount should be paid immediately, as advance, but in reality attorneys are paid after completion of criminal proceedings, usually with a delay of one year or more. According to surveyed attorneys, cases have been observed when the courts' payment liabilities towards attorneys are written-off on the ground of statute of limitations coming to effect. These practices vary from court to court.

Attorneys' performance and normative regulation of their fees and expenses are indicative of their passive approach to criminal defence, primarily due to judicial paternalism and courts' active role, and partially due to poor payment abilities of defendants and the state.[92]

90 Truth to be told, LCP suggest courts to make due care for reimbursement of only "necessary" expenses of court-appointed attorneys, which provides legal basis for their "frugal" behaviour. It would be more correct for the Law to refer to admissible or justified costs. Otherwise, in practice attorney fees and expenses are often confused. According to some surveyed attorneys, they frequently enlist their fees as expenses for the purpose of paying lower taxes, which is neither correct nor legal, just as practices whereby they are reimbursed for reduced expenses or only their fee is neither correct nor legal.

91 According to the Tariff Code for Attorneys, their fee should be increased for each new defendant, but some attorneys claim that in cases involving several defendants the courts reimburse them as if they defend only one defendant or slightly more, but never according to the Tariff Code. Therefore, attorneys find organized crime cases which, by rule, include several defendants and multiple court hearings, more lucrative and are particularly interested in being engaged in such cases.

92 Under the current system, there are almost no defence investigations (if one can describe as such attorneys' proactive approach characteristic for accu-

Indisputable is that, unlike fees collected in cases when they are paid by defendants, court-appointed "official" defence attorneys[93] are reimbursed less, allegedly, significantly below the Tariff Code. Although the Tariff Code establishes the lowest attorney fee, in reality attorney fees are subject of agreement with the clients, notably because there are much more practicing attorneys than clients able to pay according to the Tariff Code, which forces them to negotiate fee levels below those established in the Tariff Code. Moreover, the Tariff Code and Code of Conduct, including the Law on Bar Activity, stipulate attorneys' moral obligation to charge lower fees or work without reimbursement in cases of indigent clients.[94]

The fact that courts, i.e. the state, reimburses "official" defence attorneys in amounts lower than the minimum fee established in the relevant Tariff Code, is indisputably reflected in **quality of defence services.** This is a complex issue. Usually, young attorneys are appointed as official attorneys, by means of which they acquire experience. Nevertheless, financial aspects of court-appointed attorneys have slightly different effect in Macedonia, unlike the situation observed in other states where similar research studies have been conducted.[95] Namely, in Macedonia, high number of attorneys, not only beginners but also experienced practitioners, express interest in being appointed as official defence attorneys, knowing that they would be paid less. Unlike states that are economically developed and richer, very small elite of renowned attorneys in Macedonia finds it undignified to work as court-appointed defence attorneys for modest fees. At first sight, this is a result of high number of practicing attorneys and low number of payment-able clients.[96] Stable and solid earnings are not the main reason behind their great interest to work as court-appointed

satory systems), especially field investigations, on the account of which the Tariff Code enlists only fees for: presence at police stations, presence at court-led investigation activities, attendance at court hearings, writing appeals and similar submissions. Practices whereby attorneys are reimbursed only for attendance at court hearings provide evidence that they are less engaged and are often passive in their defence.

93 The term "official defence attorney" has been naturalized in our language, although there is no legal obligation for attorneys to work in these cases. Relevant regulations on bar activity, however, establish moral obligation for attorneys to provide free defence for indigent people.

94 According to the Code of Conduct for Attorneys, they should charge lower fees to people of unfavourable material status and should not to charge their services to people living in extreme poverty.

95 See: Cape and Namoradze (eds.), *supra*

96 According to data obtained from the Bar Association, only in 2011 there were a total of 196 new attorneys enlisted in this organization. Bar Association's register enlists 2,209 attorneys and 63 law practices/firms.

defence attorney, but rather the high number of unemployed lawyers.[97] On the other hand, when working on such case, attorneys dedicate less time compared to criminal cases in which they are privately engaged, proving the saying "if you pay peanuts, you get monkeys"! Of course, this negatively affects quality of legal assistance for indigent people.[98]

Data obtained from courts and surveyed judges and attorneys provide the conclusion that there are no differences in fees paid to attorney appointed in cases of mandatory defence and defence for indigent people. In reality, there are rare cases of defence for indigent people. High share of surveyed judges and prosecutors did not recall cases in which defendants had referred to their right to defence for indigent people, because, usually, in cases of serious criminal offences defence attorneys are appointed pursuant to rules governing mandatory defence, provided that defendants have not already contracted an attorney (however, they argued that attorney fees in cases of defence for indigent people would be on same level with those paid in cases of mandatory defence).[99]

Lower attorney fees are not the exclusive factor that affects quality of defence in criminal cases. Limitations in terms of insufficient time and possibilities for preparation of the defence strategy are another serious problem. Namely, attorneys are sometimes called by phone or engaged when they are available and present at court buildings, especially in cases of mandatory defence when judges, wishing to avoid unnecessary costs by having defendants accompanied by court security or having them brought from distant investigation prison, appoint attorneys on the spot and give them little time to browse case records, without being able to consult with the defendant and agree on the defence strategy.[100]

97 According to the State Employment Agency, there are more than 2,000 unemployed law graduates.

98 Some attorneys make efforts to provide quality defence, in order to persuade clients to engage them privately.

99 FOI responses obtained from the Judicial Budget Council of the Republic of Macedonia, Basic Courts and Appeal Courts provide the same information, i.e. there are no recorded cases of defence attorneys being appointed on the grounds of defendants' poverty status.

100 Another interesting observation is the fact that majority of judges do not like when court-appointed defence attorneys submit complaints, appeals, etc., and therefore refrain from re-appointing them in future cases. According to our collocutors, such practices "encourage" passive behaviour on the part of defence attorneys, as they are more motivated to please judges, not defendants. By doing so, judges secure easier completion of criminal cases, while attorneys earn smaller income, but without much effort.

Some judges claimed that in more complex or difficult cases or in the absence of compelling evidence, they are compelled by their conscience to appoint more experienced or prominent attorneys. Others argued that often these attorneys have good professional relations with the judges and are unwilling to decline court appointment as defence attorneys, although they are aware of lower fees paid in such cases. Nevertheless, these cases are more an exception than a rule.

While LCP requires president of the court to appoint official defence attorney in cases of mandatory defence, practices vary from court to court and sometime from case to case. Notably, in some cases and due to practical reasons, defence attorneys are appointed by the judge residing in the case.

Underperformance of court-appointed defence attorneys is contrary to the legal regulations requiring judges and attorneys to conduct in professional and conscious manner. In such cases, defendants can lodge a complaint to the courts or the Bar Association about their attorney's underperformance and poor quality, which does not exempt the courts from their responsibility to ensure professional and conscious performance of court-appointed attorneys.[101] Relevant regulations on bar activity stipulate the possibility for initiation of disciplinary procedures, but in reality these types of complaints and disciplinary procedures are rarely motioned. This phenomenon has been explained with the fact that defendants do not expect their attorneys to be particularly committed and active. Courts can motion criminal charges against attorneys (on the grounds of abusing official duty). Nevertheless, complaints lodged against attorneys concern privately contracted attorneys and not court-appointed attorneys.[102]

Most often, courts do not have a list of attorneys to be appointed in criminal proceedings, but rely on the general registry maintained by the Bar Association.[103] Courts use the list of practicing attorneys under their

101 Law on Bar Activity and the Code of Conduct for Attorneys require attorneys to conduct in conscious and professional manner, while LCP stipulates that president of the court, on the request and with the consent of defendants, can dismiss their court-appointed attorney in cases when they have performed their duties unprofessionally or unconsciously, and appoint them another defence attorney. Bar Association is duly notified about the attorney's dismissal (LCP: art. 77, para. 4).

102 One surveyed attorney reported that clients lodge complaints about their attorneys in attempt to delay criminal proceedings.

103 System established by LFLA uses a list of attorneys who have applied for this position under a separate procedure, i.e. they apply for being assigned status of free legal aid providers (which is not free-of-charge, but is free for clients

jurisdiction. This list is available for all judges, and there are no special rules governing selection of court-appointed attorneys. According to surveyed attorneys, judges often appoint attorneys they know in person, extending them personal favour and hoping that they have secured themselves allies who would not obstruct criminal proceedings and would not lodge appeals.[104]

5.4. FREE LEGAL AID FOR JUVENILES

Juveniles suspected of having committed criminal offence must have defence attorneys in all stages of criminal proceedings. When juveniles and their family provide evidence on inability to pay for defence attorney services, attorney fees are covered by the *Budget of RM*. Nevertheless, except for defence attorneys engaged and paid in court proceedings, other institutions competent to deal with juveniles do not dispose with specially allocated budget or other funds, on the account of which, to present, the law's implementation record is marked by mass engagement of attorneys that have not been reimbursed for their services, especially in the initial stages of criminal proceedings. Due to these reasons, attorneys started to decline appointment in juvenile cases, which triggered certain changes in the Law.

Fiasco of free legal aid for juveniles is the summit of state's hypocrisy in terms of juvenile justice, as the Law's generous inclination was not accompanied with realistic assessments of state's financial capacity and ultimately resulted in pressures for attorneys to provide *pro bono* services.[105]

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that have been approved free legal aid by the state, under a separate procedure). As indicated previously, except in the case of juveniles, provisions from LFLA do not apply in criminal proceedings.

104 Analysis is needed to see whether the share of complaints in cases of mandatory defence is actually lower than the share of complaints in cases where defendants have privately engaged their attorneys.

105 Law on Juvenile Justice was subject to amendments on several occasions and implied frequent change of the solution about who is responsible to pay for services of defence attorneys. According to the most recent Law on Children's Justice adopted in 2013, parents are exempted from payment of defence attorneys provided their total income is lower than the average salary calculated at national level. Funds for this purpose will be secured from the free legal aid system established by LFLA, i.e. the Ministry of Justice of the Republic of Macedonia, which is certainly much better solution compared to previous stipulations which referred to the Ministry of Labour and Social Policy!

5.5. EFFICIENT LEGAL AID SYSTEM

Right to defence attorney and other guarantees for fair trial are crucial elements of current criminal proceedings intended for establishment of criminal responsibility. Under accusatory proceedings, regulated as confrontation of parties in front of the court, defence attorneys are not merely guarantees of defendants' rights, but part and parcel of the system and precondition for its lawful and fair operation. Therefore, the state must seriously reconsider possible ways in which it can secure better and efficient legal aid system. Costs implied by efficient legal aid system are major problem for young democracies with weak economies,[106] but that does not relieve them of their responsibility. Possible solutions that could be reconsidered include introduction of public defence attorneys in bigger towns and greater *pro bono* engagement of attorneys.

5.5.1. Private vs public defence attorneys

Most European systems rely on private defence attorneys. Systems of court-appointed defence attorneys, paid by the state, usually generate poorly paid attorneys, weak defence and substandard justice. Often, outcomes of criminal proceedings arbitrarily depend on defendants' financial status. Therefore, throughout the United States, in addition to systems of defence attorneys for indigent population in smaller communities, bigger cities are establishing systems of public defence attorneys. According to some authors, representation provided by public defence attorneys is much more advantageous for the defendants, as attorneys employed or engaged by these systems are specialized in criminal matters.[107]

5.5.2. Pro bono publico

Another possible solution to financial problems affecting provision of legal aid for indigent people is *pro bono* representation.[108] Most Western democracies have developed traditions for legal aid provision or discounted fees for indigent people, including non-governmental organizations, civil society organizations or other individuals.

106 See: R. Smith, "Minimum Standards for the Procedural Rights of the Accused in Criminal Proceedings", Background note for conference at Friedrich Ebert Stiftung, Berlin, 14 November 2006 (available at www.fes-forumberlin.de/Bundespolitik/pdf/6_11_14_smith.pdf)

107 Legal aid agencies engage attorneys specialized in provision of legal assistance, which work exclusively for governmental legal aid agencies and cannot look for potential clients or other work engagements.

108 See: J. Anderson and G. Renouf, "Legal Services 'For the Public Good'", Alternative Law Journal, Vol. 28, no. 1, February 2003, pg. 13

Although bar profession, in principle, is supportive of *pro bono* representation, attorneys' engagement in this type of work is far from their declared commitment.[109] In the United States, there is a long standing debate on this issue,[110] whereby the Code of Conduct adopted by the Bar Association recommends provision of free legal services to individuals unable to pay for attorney services and defines obligation on *pro bono* work for practicing attorneys.[111] Today, it is considered that attorneys and attorney profession as a whole are morally obliged to provide legal aid to indigent population.[112]

Attorneys' obligation on *pro bono* work originates in the need for representation of people and organizations without sufficient means.[113] Access to legal services is indisputably an important social interest, because depriving citizens of such expert assistance could endanger their individual interest and the society's interest in guaranteeing equality, procedural and social justice. At the moment, debates are focused on the insistence for attorneys to demonstrate charity and willingness to volunteer their work.

Some argue that any type of volunteer work is useful for the service provider and that, with all volunteers, it contributes to reduced stress, depression, etc., and consequently has positive effect on their physical and mental health. In broader terms, volunteer work of attorneys improves the image and the public reputation of their profession in general. Therefore, it does not surprise that, according to surveys, attorneys believe that

109 It has been noted that actual *pro bono* activities are smaller in scope and number compared to official statistics, as high number of cases reported as *pro bono* work do not imply services actually provided to indigent people or services of public interest, but concern services provided to friends and family that could not have been charged.

110 See: Report of the American Bar Association's Commission on Professionalism, "In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism", 1986

111 Attorneys in the US are morally obliged by the American Bar Association's Code of Conduct to spend at least 50 hours on *pro bono* work annually. In reality, this "obligation" from the Code of Conduct is considered more as recommendation, because failure to act accordingly is not liable to sanctions. See: D. L. Rhode in: D. L. Rhode and D. Luban (eds.), "Legal Ethics", Fourth Ed., Foundation Press, New York, 2004, pp. 882-883

112 In the US, efforts to secure mandatory minimum hours dedicated on work with indigent people have encountered serious resistance, and in most US states, *pro bono* work of attorneys is not mandated by law. Some states, such as Florida and Maryland, require attorneys to submit reports on their *pro bono* activities. See: T. D'alemberte, "Tributaries of Justice: The Full Access", Florida Bar Journal, April 1999, pg. 1

113 See: D. L. Rhode, *supra*, pg. 884

they should provide *pro bono* services, but at the same time majority of them are against establishment of formal obligations. Most frequently indicated objection is the unfairness of expectations for attorneys to carry this burden, given that it is a matter of social need and therefore the society as a whole should be responsible for provision of legal aid.

Key argument why attorneys are expected to carry this burden is the fact that they hold monopoly over legal assistance, whereby it only fair for this privilege to come with particular duties. This is a very strong argument in states where attorneys are exclusive providers of legal services, which is also the case in our country.[114] On the other hand, common knowledge is that legal services are expensive and therefore it is logical for the systemic shortfall - due to the reality in which indigent population cannot afford such legal services - to be compensated, *inter alia*, by attorneys themselves. Therefore, it seems reasonable attorneys to be expected to give back to society for the privileged status they enjoy.[115]

In this regard, it should be noted that international standards, in addition to state obligations, also underline the obligation of practicing attorneys.[116] In Macedonia, the Law on Bar Activity does not address this issue, but the Code of Conduct for Attorneys, Associates and Interns adopted by the Bar Association of RM includes an explicit provision whereby: "In cases when clients are in poor financial situation, attorneys should calculate their fees in compliance with the client's payment ability, i.e. they should reduce their fees below the minimum threshold established, and should not charge clients living below the poverty line, having in mind the old ethical principle that nobody, on the account of their inability to pay for legal services, should be deprived of quality legal assistance".

114 In Macedonia, attorneys have this monopoly only in criminal proceedings, because the Constitutional Court has revoked the provision under Article 2, paragraph 1 of the Law on Bar Activity, according to which only attorneys can provide legal assistance. See: Decision no. 134/2002 of the Constitutional Court of the Republic of Macedonia

115 While majority agree with this argument, the debate is focused on the issue whether this engagement should remain moral obligation or the law should stipulate minimum hours of *pro bono* work. Arguments presented against having pro bono work stipulated by law refer to outward contradiction of mandatory volunteer work, which some have qualified as form of slavery, and even "patent fascism". Others believe that this obligation will result in incompetent services, which will ultimately be detrimental for the clients. See: Rhode, *supra*

116 See: Basic Principles on the Role of Lawyers, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx

Some states in the US and Italy have resolved this complicated issue of attorney fees by introducing provisions whereby courts should appoint defence attorneys who are not only obliged to provide legal assistance in the case, but should provide them free-of-charge, i.e. *pro bono*.[117]

5.5.3. Courts' responsibility

Possible solutions include activation of courts in cases when defendants cannot adequately represent and defend themselves. Hence, states with accusatory criminal justice systems allow judges, in cases when defendants represent themselves, to take actions on their behalf: they advise defendants of their right to cross-examine witnesses and to propose evidence, help them formulate the questions and, on own initiative, do not admit unlawful evidence materials presented by the prosecution. These practices are also pursued by judges in Sweden and other states in Europe that have accepted the accusatory model of criminal proceedings.[118]

117 Some authors believe that this solution to the problem is undesirable, having in mind that it implies financial burden for attorneys and raises ethical dilemmas, because attorneys must ensure that defendants are given necessary protection and assistance, without being rewarded for their efforts, and sometimes without having their expenses reimbursed. See: J. Herrmann, "Reform Models for Main Hearings in Criminal Proceedings in Eastern Europe - Comparative Perspective", Croatian Journal of Criminal Law and Practice, Vol. 4, no. 1, 1997, pp. 255 and 270

118 According to professor Herrmann, this does not mean "reversal of roles" because judges' help to defendants does not mean they have assumed responsibility for investigating facts and presenting evidence, which remain exclusive competences of the prosecution. *Supra*

6. ADDITIONAL GUARANTEES FOR PERSONS DEPRIVED OF LIBERTY

In addition to the right to defence attorney, the trinity of defence rights guaranteed for persons deprived of liberty or in police custody includes the right to have their family informed and the right to medical assistance. For a long period, these guarantees are in the focus of the Committee on Prevention of Torture at the Council of Europe and recently they are in the focus of new EU Directives on the rights of suspects in police custody, as a particularly vulnerable group.

6.1. RIGHT TO HAVE THEIR FAMILY INFORMED

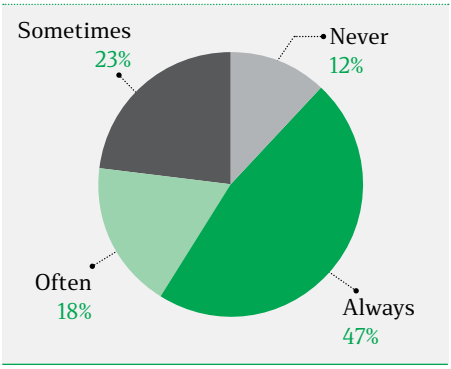
As regards the **right to have their family or close person informed** is characterized by serious inconsistencies due to different provisions in the Law on Police and the Law on Criminal Procedure. Article 34 of LP stipulates that a person is entitled "*to have a member of his/her family or another close person informed*". However, LP does not refer to aliens' right to contact their diplomatic and consular offices.[119] There are no decisive provisions whether persons are entitled to communicate in person, whether their family or close person are entitled to know about their whereabouts, whether the family is allowed to visit persons in custody, bring them food, etc., whether the family can make insight in documents and other details.[120]

119 Law on Police suggests that this information should be provided by a police officer, while Article 60, paragraph 3 of LCP refers to suspects' right "*to inform their family or another close person*", as well as "diplomatic or consular office of the state whose citizen they are, about their arrest or deprivation of liberty". Article 161, paragraph 5 of LCP includes addition obligation for custody officers to enlist information in the comprehensive file records concerning the time contact was established with suspect's family, defence attorney, medical doctor, diplomatic or consular office, etc.

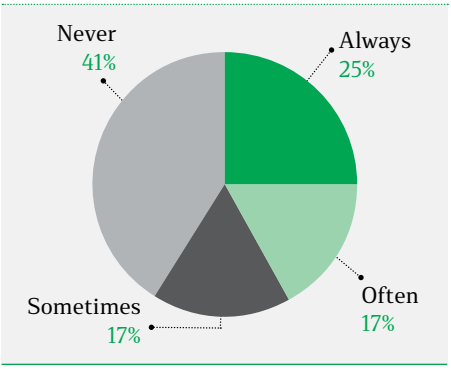
120 EU Directive requires mandatory **feedback** for suspects provided by the person contacted. In the domestic legislation, this has not been referred to as particular right/guarantee.

It is not explicitly stipulated what happens when the person indicated to be informed is unavailable, etc.

Person deprived of liberty is entitled to inform a third person thereof

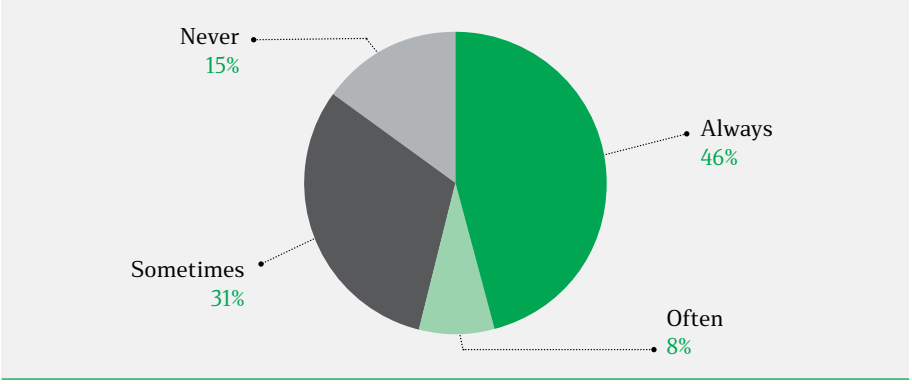


Person deprived of liberty can conact a third person



Popular case "Monster" brought to the surface inconsistencies in legal provisions governing treatment of persons who, after being arrested and detained at the police, are "transformed" into protected witnesses or so-called collaborators of justice. According to the legislation in effect, in cases of adult suspects turned into collaborators of justice, a signed consent is sufficient, but unclear is what happens with their right to have their family informed about their whereabouts, the right to defence attorney, etc. Otherwise, prolonged period of custody/detention for the duration of police proceedings with a view to award them status of protected witnesses remains fertile soil for malpractices, in the sense of pressures to admit the guilt, to witness against other suspects, etc., and *de facto* prolongs the period of keeping them *incommunicado,* not only in terms of having the family informed, but also in terms of access to attorney.

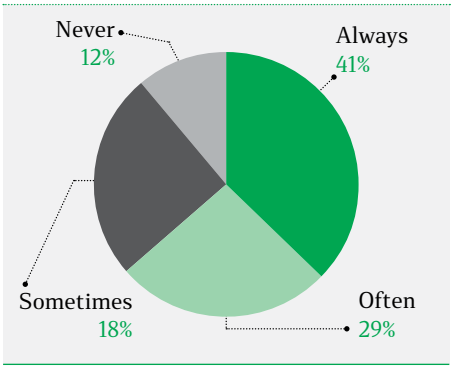
Family/third party is informed by officer



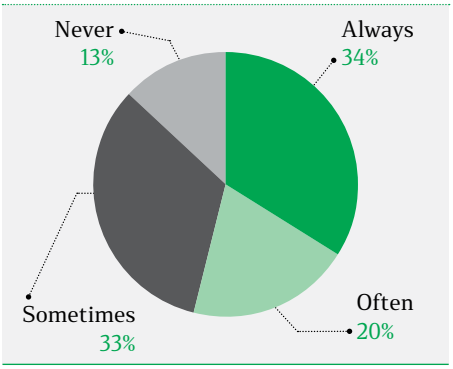
6.2. CONTACT WITH DIPLOMATIC OR CONSULAR OFFICES

As indicated above, LCP does not include provisions whereby aliens are allowed to inform and contact their or another diplomatic or consular office of their arrest or deprivation of liberty.[121] According to interviewed practitioners, it seems there are no serious problems with implementation of this guarantee.

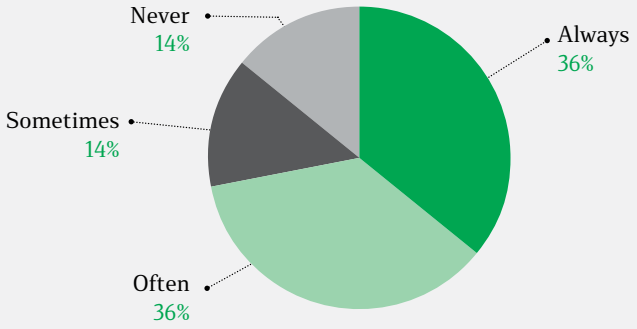
Person deprived of liberty can inform his/her diplomatic or consular office about his/her deprivation of liberty



Police assist the person to find contact information about his/her diplomatic or consular office



Person deprived of liberty can communicate with his/her diplomatic office



121 See: Vienna Convention on Consular Relations, adopted on 24 April 1963 in Vienna, in effect from 19 March 1967

6.3. RIGHT TO MEDICAL ASSISTANCE

Right to medical assistance is referred under several provisions from LCP and, in addition to its humane dimension, aims to minimize police malpractices and ill-treatment by addressing the phenomenon of impunity.[122] On the other hand, LP stipulates "provided the person has requested it [medical assistance]", which is a more restrictive provision compared to the new LCP, where Article 69, paragraph 3 stipulates that: "***When needed or upon request*** from persons detained or deprived of liberty, they shall be provided *adequate* medical assistance". As regards persons in police custody after their arrest, Article 160, paragraph 6 of LCP stipulates that "When needed, medical examination shall be ordered for persons deprived of liberty. Medical examination shall be ordered in all cases when persons have complained of injury, pain or illness. Custody officers must always inquire whether persons detained suffer from any disease and whether they are on medical treatment or medications".[123]

This restrictive approach is also risky for the police, because according to ECtHR jurisprudence, whenever a person complains of injuries after being released from the police station, and no injuries have been detected during the medical examination at admission in police custody, it will be assumed that the person has been injured at the police, whereby in case the state fails to provide solid explanation thereof, violation of Article 3 of ECHR is established in the sense of torture, inhumane or degrading treatment. Otherwise, both legal solutions are more restrictive compared to CPT standards mandating medical examination of persons in police custody to be performed under conditions in which police officers will not be able to observe or listen to the examination. Furthermore, results from such medical examinations, as well relevant statements made by persons in custody should be formally recorded by medical doctors and should be

122 See: G. Kalajdziev, "Who Will Guard Us from the Guardians: More Efficient Investigation of Abuse of Police Powers", Inventory in honour of prof. Franjo Bacic, Faculty of Law, Skopje 2007, pp. 364-383

123 There are no legal provisions indicating the entity responsible to cover costs of medical examination of persons in police custody without health insurance or the entity responsible for payment of medical participation fee, etc. It would be logical for medical examinations organized by the police to be paid from the Budget of RM.

available to them and their defence attorney.[124] In addition, CPT mandates, when needed, persons to be examined at an adequate health facility.[125]

6.4. INTERROGATION RULES

One remark and recommendation put forward by CPT and reiterated in all reports for the Republic of Macedonia is the absence of clear rules or guidelines on police interrogation. They should, *inter alia*, cover issues such as: informing persons in police custody about the identity (name or number) of persons in attendance at police interrogations, allowed duration of police interrogations, periods of rest between interrogations and periods of rests during the interrogation, venue where interrogation is conducted, whether persons in custody can be asked to stand during the interrogation, interrogation of persons under influence of drugs, alcohol, etc. Also, there needs to be systematic record-keeping about the time when the interrogation started and ended and about any requests made by persons in custody during the interrogation, as well as persons in attendance at each interrogation.[126]

Moreover, CPT adds that electronic (audio or video) recording of police interviews is another useful safeguard against ill-treatment of persons in police custody, which is advantageous for the police.[127] New LCP anticipates possibilities for recording interrogation of suspects at the police with the public prosecutor and defence attorney in attendance

124 Some states, such as Germany, believe that CPT is exaggerating when it requests the right to medical assistance to be performed (at the request of persons in police custody) *by medical doctors of their choice,* in addition to medical examination performed by the medical doctor called by the police. See: CPT standards, para. 38 (available at http://www.cpt.coe.int/lang/mkd/mkd-standards.pdf)

125 In Macedonia, this right is granted only to inmates, but under restrictive terms and conditions.

126 See: CPT standards, para. 39. LCP stipulates that custody officers should keep detailed records for persons deprived of liberty and in police custody, but LP does not clarify whether custody officers will be appointed at all police stations or only at those where persons could be detained for a period longer than 6 hours, which needs to be approved by custody officer. Therefore, it would be better for LP or relevant bylaws to stipulate in detail police proceedings for citizens summoned, detained or deprived of liberty.

127 Electronic recording is in the interests of persons who have been ill-treated by the police, but also in the interest of the police officers confronted with unfounded allegations that they have engaged in physical ill-treatment or psychological coercion. Electronic recording of police interviews reduces the opportunity for defendants to later deny that they have made certain admissions. See: CPT standards, para. 36

and, for the first time, allows these records to be used as evidence in court proceedings (art. 207, para. 1). In this regard, LCP tasks the police to notify the public prosecution about all persons summoned or deprived of liberty at the police stations, i.e. at any premises of the police (art. 160, para. 3 and art. 279, para. 8).

An interesting novelty in LCP is the obligation of competent authorities to keep special registry of persons deprived of liberty as part of MoI's IT system (art. 160, para. 2).[128] In order to reduce cases of inhumane and ill-treatment, LCP stipulates that the public prosecutor and the Ombudsman should perform insight and oversight at police stations. To our knowledge, no efforts have been made to enforce this legal obligation, which is not referred to in LP.

Article 161, paragraph 4 of LCP requires *the police stations where persons deprived of liberty are held to be specially arranged and equipped.* In this regard, CPT insists *physical conditions of police custody* to comply with particular elementary requirements, i.e. to be of reasonable size and have adequate lighting, ventilation, etc.[129] Therefore, LP should include more detailed provisions on treatment of persons deprived of liberty and in police custody, following the example of LCP in terms of treatment of detainees (art. 175 to 180).

6.5. RIGHT TO BE BROUGHT BEFORE A JUDGE AND LEGALITY OVERSIGHT FOR DEPRIVATION OF LIBERTY

Right to be taken before a judge tasked to review legality of his/her arrest, also known as *habeas corpus,* is the first guarantee in the history of human rights, established by the legendary *Magna Carta Libertatum* from 1215. Unfortunately, due to predominantly inquisitorial function of investigative judges, focused on efficient fight against crime and establishment of so-called factual truth, investigative judges in

128 LCP failed to enlist that this should also apply to persons detained at special premises of the Financial Police and the Customs Administration.

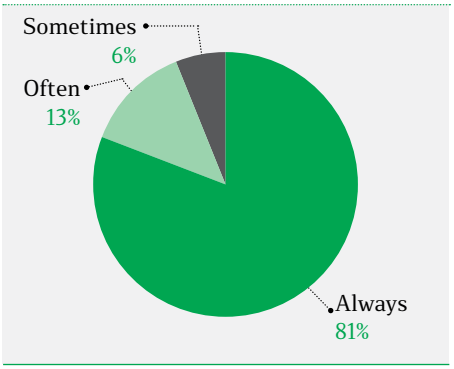
129 Persons in police custody should be allowed to comply with the needs of nature, when necessary, in clean and decent conditions, and be offered adequate washing facilities. They should be given food at appropriate times, including at least one full meal. Such provision is not included in the existing Rulebook on the Manner of Performing Police Activities, as well as in the recent changes made to the Law on Police. CPT also advocates for persons in police custody to be allowed to walk in the open air. *Supra*

Macedonia have undermined this important role of legality review for arrests and protection of freedom.[130]

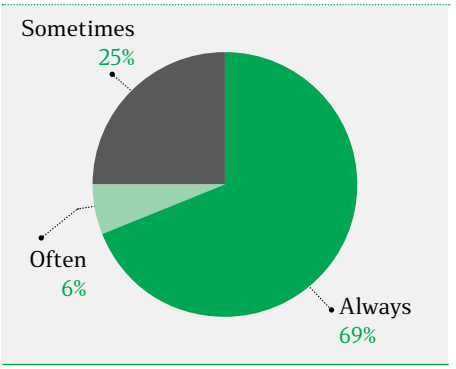
If persons deprived of liberty or in police custody are brought before pre-trial judges, the judge reviews legality of their arrest and custody order *ex officio* and is obliged to establish it by means of decision (LCP: art. 69, para. 4).

6.5.1. Legality review for deprivation of liberty

Are people deprived of liberty and kept in custody brought before a judge?



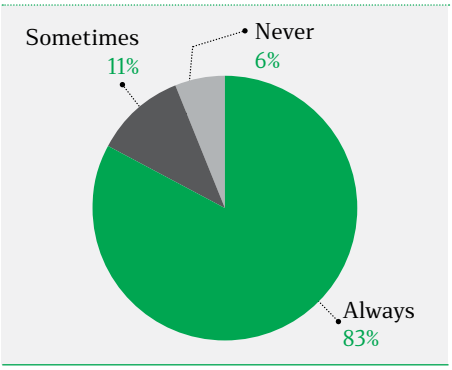
Are attorneys allowed to advise persons brought before a judge?



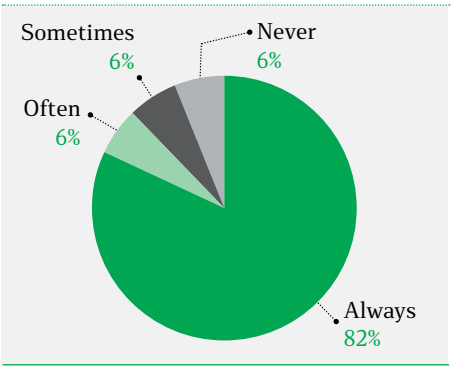
According to LCP, persons deprived of liberty or in police custody that have not been brought before pre-trial judge, are entitled – within a period of 30 days from being released – to request pre-trial judge from the competent court to review the legality thereof and establish it by means of decision. According to Article 25, paragraph 5 of LCP, this decision can be appealed in front of the court council within a deadline of 48 hours, which takes a decision within a deadline of 3 days.

130 Popular case "Chairman" in which the investigative judge examined Miroslav Sipovic several days after his extradition for the purpose of investigation activities instead of deciding about the legality of his arrest and detention order, is an obvious example of such legal atrocities! See: Position of the Helsinki Committee on Human Right of the Republic of Macedonia (available at www.helkom.org.mk)

Do judges hear the peron deprived of liberty and his/her defence attorney prior to making a decision?



Do judges deciding on liberation of persons deprived of liberty or in police custody justify their decision?



This guarantee is completely dysfunctional in practice and has been reduced to decoration in the Law. ECtHR has rightfully established this in the case of *Lazaroski v Republic of Macedonia* where it has found violation of several guarantees under Article 5 of ECHR, including legality review of the arrest order. Namely, the Court in Strasbourg has rightfully questioned how the domestic court has found that applicant's arrest is lawful, without having heard anybody and without having examined any evidence![131]

131 See: *Lazoroski v. Republic of Macedonia*, no. 4922/04, para. 52, 8 October 2009 (available at http://www.pravda.gov.mk/documents)

7. RIGHT TO INFORMATION

7.1. LETTER OF RIGHTS

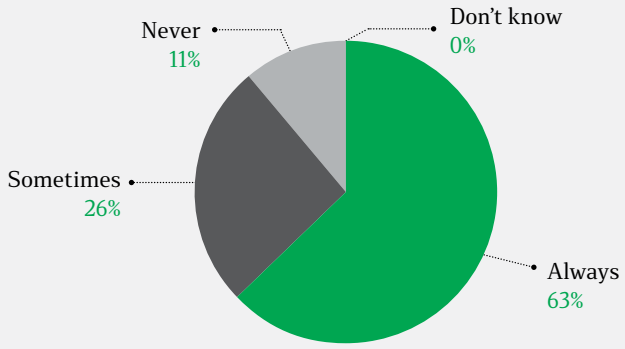
Title of LCP's Chapter VI explicitly refers to the defendant as subject in criminal proceedings, followed by a catalogue of defence rights in criminal proceedings. Catalogue of defence rights includes the right of persons summoned, detained or deprived of liberty to be immediately informed, in a language they understand, of legal grounds for being summoned, detained or deprived of liberty under suspicion of having committed criminal offence and to be informed about their rights. At the same time, defendants must be clearly advised of their right to remain silent, the right to consult with attorney in private and the right to have defence attorney of their choice present at the interrogation.

Furthermore, legal provisions on suspect interrogation include solutions according to which prior to any interrogation suspects must be advised of charges raised against them and the legal grounds thereof, including the catalogue of rights guaranteed under LCP: they are not obliged to present their defence; they are entitled to defence attorney of their choice, with whom they can consult in private and who can be present at the interrogation; they are allowed to make statement about the criminal offence they are charged with and to present all facts and evidence in their favour; they are entitled to insight in records and examination of items seized; they are entitled to free assistance provided by translator/interpreter if they do not understand the language of interrogation; they have the right to be examined by medical doctors when in need of medical treatment or for the purpose of establishing possible abuse of police powers (LCP: art. 206).[132]

132 Suspects can voluntarily waive a particular defence right, but the interrogation cannot start without written statement on waiver of particular right signed by them.

Contrary to this legal solution, survey results show high share of responses indicating that suspects are not always advised of their rights prior to being interrogated.

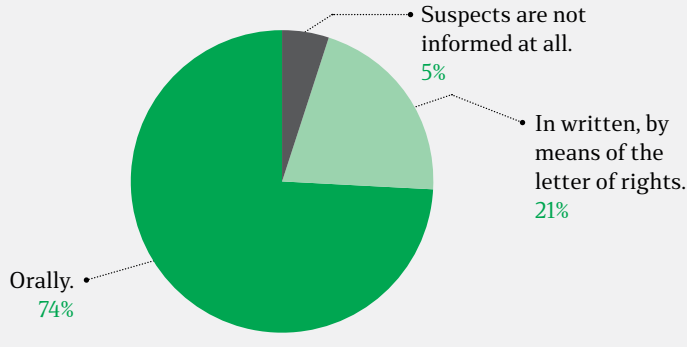
In practice, are people advised of their rights *prior* to being interrogated?



While it can be concluded that, in normative terms, legal provisions are in compliance with international standards, significant shortfall is identified in the absence of law-stipulated obligation for suspects to be presented with so-called *letter of rights,* which is insisted upon in Europe, and whose template has been drafted and attached to the EU Directive on the Right to Information in Criminal Proceedings.

Survey conducted for the purpose of examining and verifying enforcement of legal solutions in practice showed that in most cases suspects are informed about their rights *orally*. This manner of information is not only decreasing legal provisions' effect, but renders oversight and verification difficult.

In practice, how are suspects informed of their rights?



On the other hand, data we obtained are indicative of additional weaknesses in terms of suspects being actually informed about their law-guaranteed rights. Hence, while LCP stipulates that suspects should be immediately informed, relevant figures show that in most cases suspects are not informed about their rights. In almost half of cases, suspects have not been informed about their right to remain silent, right to have defence attorney of their choice and right to medical assistance. Particularly high is the share (more than half) of cases in which suspects have not been informed of their right to have insight in records and evidence against them, right to be present at investigation activities and right to propose and contest evidence.

Table 3. Are suspects immediately advised of their right to:

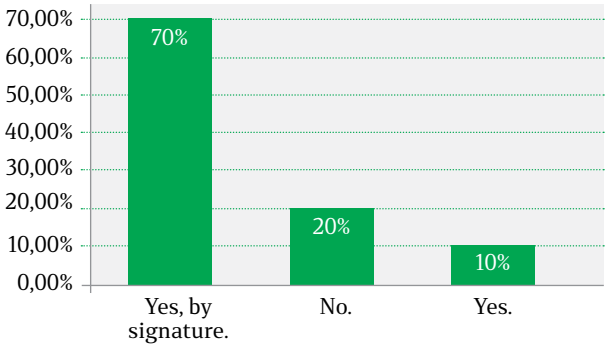
	YES	NO	NOT ALWAYS
Silence	45%	11%	44%
Defence attorney of their choice	56%	-	44%
Free defence attorney for indigent people	16%	16%	68%
Medical assistance	58%	10%	32%
Have their family or consular office informed	72%	17%	11%
Interpreter/ translator	72%	-	28%
Insight in documents and evidence	24%	41%	35%
Be present at investigation activities	16%	17%	67%
Propose and contest evidence	37%	10%	53%

As regards provision and oversight of information provided to suspects about their rights, it can be noted that LCP does not stipulate specific minutes or other records that would be signed by suspects in confirmation that they have been advised of their right, but this is enabled by signing interrogation minutes, despite the fact that minutes do not enlist individual rights of which suspects need to be advised prior

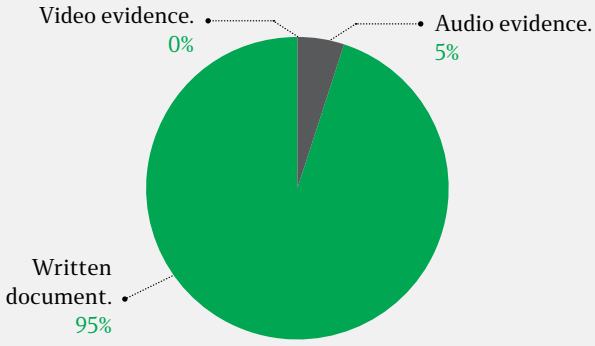
to the interrogation. Therefore, worrying is the fact that on the question inquiring about mechanism on provision and verification that suspects are advised of their rights, more than 70% of respondents reported that this is secured by signing the interrogation minutes which do not enlist the entire catalogue of defence rights, while the fact that legal provisions are not adopted with a view to exclusively stipulate compilation of the letter of rights is widely disregarded. Here, the question is raised whether this provides a sufficiently efficient mechanism on provision and verification that suspects are advised of their rights.

In this regard, it should be noted that LCP allows audio-visual recording of suspects' interrogation by or in the presence of the public prosecutor. Although this has been stipulated as possibility, rather than an obligation, it is an excellent solution that would eliminate all doubts whether persons have been advised of their rights.

Are guarantees in place to ensure that suspects are advised of their rights?

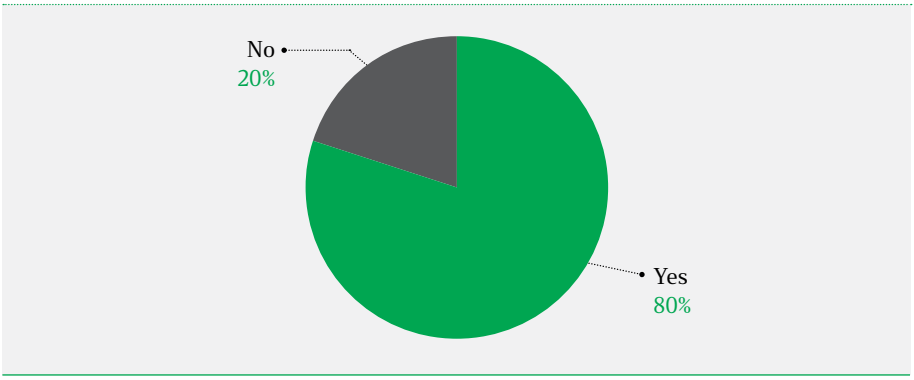


What serves as evidence that suspects are advised of their rights?



LCP stipulates that statements of suspects who have not been advised of their rights prior to the interrogation cannot be used in court proceedings. Survey results show that this prohibition is complied with in 80% of cases, but the remaining 20% are worrying.

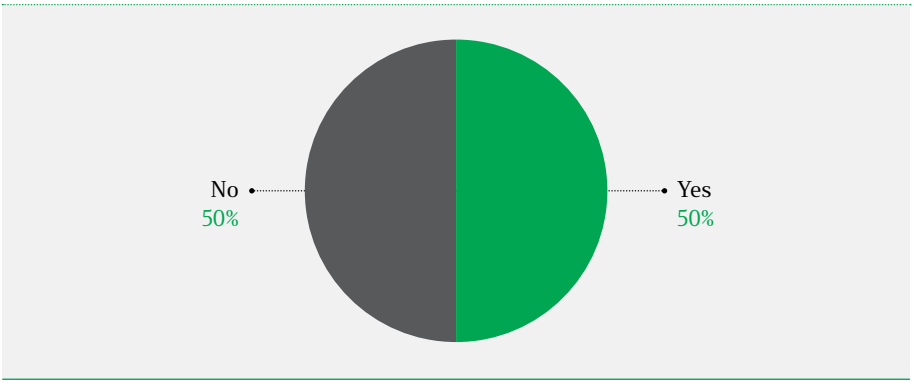
Is the prohibition for court admission of statements made by suspects who have not been advised of their rights prior to the interrogated complied with in practice?



Concerns are raised by the fact that, in half of cases, law enforcement bodies have not verified that suspects fully understand their rights. ECtHR case law requires law enforcement authorities to take active measures in order to ensure efficient compliance with Article 6 of ECHR, i.e. to have active approach to informing suspects of their right to legal assistance.[133] This requirement originates in the fact that, according to the Court in Strasbourg, it is not sufficient for suspects to be given written information, underlining that they need to take all reasonable steps to ensure that suspects are fully aware of their defence rights and understand implications of their behaviour at the interrogation.

133 See *Padalov v. Bulgaria*, app. no. 54784/00; *Talat Tunk v. Turkey*, app. no. 32432/96; *Panovits v. Cyprus*, app. no. 4268/04

Do law enforcement authorities verify that suspects have understood their rights?



7.2. INFORMATION ABOUT CRIMINAL CHARGES

Persons suspected of having committed criminal offence are entitled to be informed about nature and grounds of criminal charges raised against them within the shortest deadline possible, in detail and in a language they understand. Suspects must be informed about criminal charges raised against them. In essence, this guarantee should ensure provision of sufficient information they need to prepare their defence.[134]

Suspects' rights to be informed about charges raised, as one of the fundamental defence rights, aims to enable them to make a decision about their defence strategy, i.e. whether and what type of statement they will give. Therefore, in order to respond to charges raised, it is not sufficient for the defence to be aware of them, but it should also be aware of reasons and evidence on the basis of which charges have been raised.[135]

This issue is important in terms of influencing suspects by "evidence tampering" or keeping them uncertain about evidence disposed by law enforcement authorities. It has been shown that, often, law enforcement authorities do not disclose to suspects all evidence they dispose with. New LCP includes provisions that significantly limit defence rights in pre-trial proceedings, especially in the course of police investigations, for example, suspects are granted insight in documents and cannot examine the evidence.

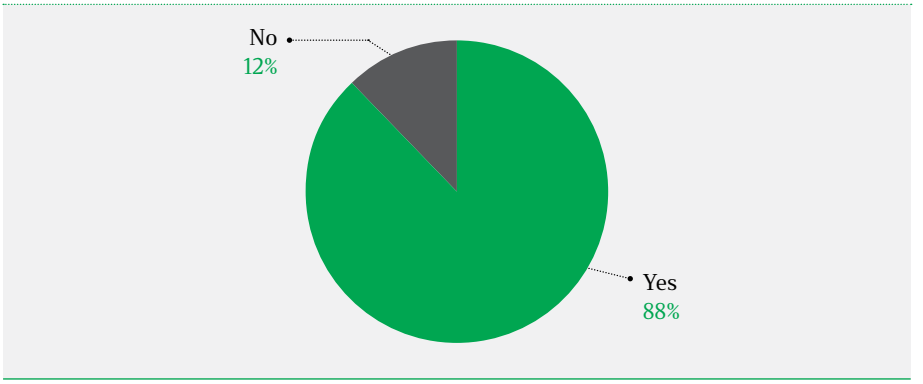
134 According to practices of ECHR bodies, this guarantee is interpreted as defendant's request to be familiarized with factual and legal grounds for charges raised against him. See: *Offner v. Austria*, Coll. 5, app. no. 524/59, 1

135 See: S. Trechsel, "Human Rights in Criminal Proceedings", Oxford University Press, 2005, pg. 222

According to the European Convention, requested information must be disclosed in *a language the suspect understands.* According to ECtHR case law, it is sufficient for suspects to understand the language used in criminal proceedings. However, unless the state authorities can demonstrate or have reasonable grounds to believe that suspects do not sufficiently understand the language in which information is disclosed, they must secure adequate translation.[136] In that, ECHR requirements are satisfied also in cases when information is provided in the language his/her defence attorney understands.[137]

In Macedonia, practitioners are of the standing that this guarantee is enforced in most cases. Exception therefrom are attorneys who argued that, in the early stages of criminal proceedings, the defence is not timely and in detail informed about evidence against the suspect.

Are letter of rights and information provided in a language the suspect understands?



LCP has transposed majority of international standards on information about charges and has attempted to adjust them to the new concept of accusatory proceedings. Indisputable is that suspects will learn about the criminal investigation led against them if they are strip searched, have their items seized, are interrogated, deprived of liberty, etc. In these cases, LCP stipulates that suspects should be informed about criminal offences they are charged with, evidence against them, and their rights. Hence, persons summoned, detained or deprived of liberty must be immediately informed, in a language they understand, about the reasons for being summoned, detained or deprived of liberty and possible criminal charges raised, as well as about their rights, including that they cannot be asked to make a statement.

136 See: *Brozicek v. Italy.* Moreover, written translation is insisted upon for key acts such as the indictment. See: *Kamasinski v. Austria*

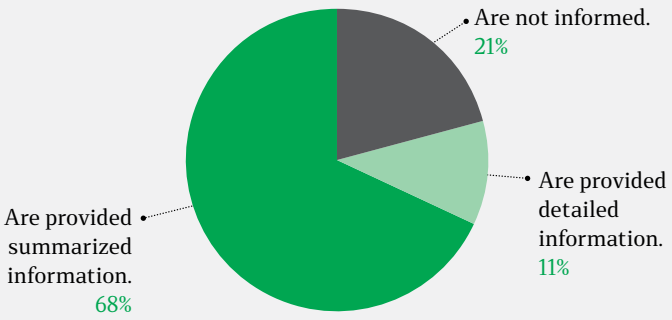
137 See: *X v. Austria*, app. no. 6185/73, 2 DR, 68 (1975)

Article 70 of LCP which stipulates fundamental rights of suspects includes that "suspects shall be immediately informed, in a language they understand and in detail, about the criminal offences they are charged with and the evidence against them". Here, the question is raised whether this phrase, taken from Article 6 of ECHR, provides additional guarantee in cases when the law has not explicitly stipulated suspects to be informed at the time when specific activities are taken against them or at the moment decisions are taken in the course of criminal proceedings.

Depending on the stage of criminal proceedings, LCP makes a distinction in terms of scope of information provided to suspects by law enforcement authorities. In this regard, survey results showed that, in pre-trial proceedings, as high as 21% of suspects are not informed at all, while in 68% of cases when they are informed, information is given in summary.[138]

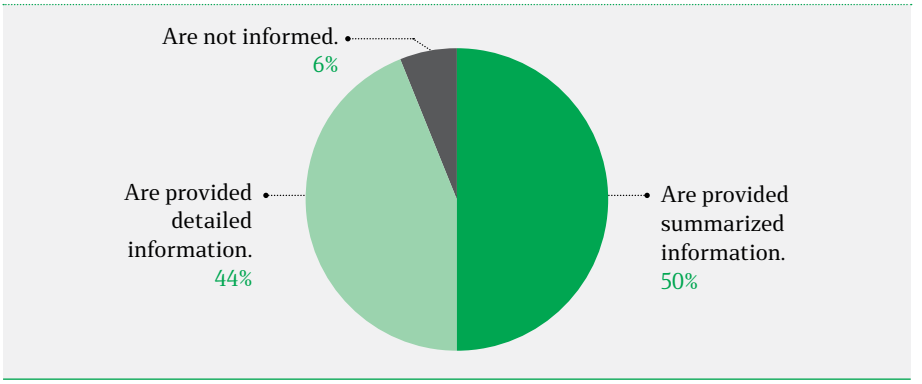
On the other hand, as regards investigation proceedings, suspects have been informed about the charges against them and grounds for reasonable suspicion in most cases, but in 44% of cases information is not detailed.

In the course of pre-trial proceedings (prior to first interrogation), suspects:



138 One should have in mind that considering the short period of implementation, on particular questions respondents provided their opinion about practices pursuant to the old LCP, of which they are better informed, rather than about practices pursuant to the new LCP.

In the course of the investigation, suspects:



Information provided to suspects is particularly limited in regard to application of special investigative measures. Namely, these measures are most often applied in the early stages of proceedings.[139] On the other hand, they become useless if suspects learn that they are subject of particular investigations.[140]

New legal solutions stipulate that suspects should not be notified of investigation orders and that the public prosecutor is not obliged to interrogate them before adopting this order. First obligation for notification of suspects is in effect upon investigation's completion, as the public prosecutor is obliged to notify suspects and their defence attorney about the completed investigation. Same is applicable in terms of suspect interrogation. Namely, the public prosecutor is obliged to interrogate suspects before the investigation is completed, unless this has been done earlier.

This notification includes brief description of the criminal offence for which investigation activities have been taken, the legal grounds, including an indication that all investigation-related records have been deposited to the archive at the public prosecution and suspects and their defence attorney are entitled to insight in and make notes of these records and evidence. The notification also includes a legal notice that the suspects, within a deadline of 15 days, is entitled to submit documents or other evidence, records of defence activities or request the public

139 See: G. Kalajdziev and M. Konevska, "Application of Special Investigative Measures and Use of Evidence Collected in this Manner in Trial in the Republic of Macedonia", OSCE, Skopje, 2013

140 This is the reason why under previous practices, public prosecutors ordered pre-trial measures allegedly against "unknown perpetrator", even in cases of known suspects, which is a form of circumvention of legal provisions in order to protect the efficiency of investigations.

prosecutor to collect particular evidence.[141] On the other hand, LCP stipulates that adoption of investigation orders is the starting point of criminal proceedings, which raises the question on how will suspects know that criminal proceedings are initiated against them in order to be able to take defence activities and legitimize themselves when, for example, they request state and other bodies and persons to provide notifications, in the absence of solid proof that they are under investigation!?[142] How can suspects take particular actions stipulated by LCP and necessitating court approval, such as access to private premises or premises that are not open to the public?

Furthermore, by failing to stipulate mandatory notification of suspects about investigation orders, LCP distinguishes and puts in unequal position two types of suspects: on one hand, suspects who are summoned for questioning by the public prosecutor and those against whom certain measures have been taken will learn about criminal proceedings being initiated against them, but on the hand, suspects who are neither questioned until final stage of investigation activities nor subject of investigation activities or measures, cannot learn about criminal proceedings against them.

Although it is understandable and adequate for public prosecutors to be given space and not to be obliged to immediately notify suspects of investigation activities started, due consideration should be made of the fact that, by doing so, suspects that might be innocent are prevented to take part in an important stage of evidence gathering, while the public prosecution often delays investigation activities in hope to discover new evidence.

141 The phrase "prior to deadline expiration", which can last up to 15 months, i.e. 21 months in cases of organized criminal, is not precise and leaves space for calculations on the part of public prosecutors. On the other hand, the deadline of 15 days for the defence to submit documents and other evidence, as well as records from defence activities, is too short.

142 See: D. Ilik, "Right of suspects to be informed about charges against them and the new model of investigative proceedings", Inventory in honour of prof. Nikola Matovski, Faculty of Law "Iustianius Primus", Skopje, 2011, pp. 505-521

8. ADEQUATE TIME AND FACILITIES FOR PREPARATION OF THE DEFENCE

Pursuant to Article 6, paragraph 3, item (b) of ECHR, everyone charged with a criminal offence has the right to adequate time and facilities for preparation of the defence. Crucial feature of the right to adequate facilities for preparation of defence is the possibility for defendants to be informed of results from investigations led against them.[143] In order to respond to the charges, the defence must be knowledgeable not only of the criminal charges, but also of the legal grounds, i.e. it should be given insight in records and evidence disposed by the prosecution.

8.1. ADEQUATE TIME FOR PREPARATION OF THE DEFENCE

Right of defendants to adequate time for preparation of the defence is guaranteed throughout the duration of criminal proceedings (LCP: art. 70), but particular attention is paid to preparations for court hearings. Namely, defendants must be presented with subpoenas in due time, allowing adequate time period for preparation of their defence, which should not be shorter than 8 days.

Guarantees on adequate time for preparation of the defence do not apply to suspects' interrogation in pre-trial proceedings, as there should be no time distance from suspects' notification about criminal charges and legal grounds thereof and the actual interrogation. Prior to the first interrogation, suspects are allowed 24 hours to contract a defence attorney if they wish to, but in this period they are not informed of the criminal offence and circumstances they are accused of. Therefore, suspects prepare their defence in the period from being summoned until

143 See: *Jespers v. Belgium*, app. no. 8404/78, para. 56

the first interrogation, but only on the grounds of scarce information provided in the invitation.[144]

Particular attention is paid to the time allowed for preparation of legal remedies. In that regard, the question is raised about adequacy of law-stipulated deadline of 15 days (8 days in fast-tracked proceedings) to lodge appeals, especially having in mind that the deadline of 15 days in cassation proceedings from the case of *Huber v. Austria* was considered problematic.[145]

8.2. ADEQUATE FACILITIES FOR PREPARATION OF DEFENCE

8.2.1. Insight in case records

Right to insight in case records and the right to propose and present evidence are cornerstones of criminal defence, i.e. exercise of these rights contributes to assessment whether criminal proceedings provide adequate facilities for preparation of the defence. Insight in records allows defendants to learn about criminal charges raised against them, evidence that has been gathered, and other information. Without guarantees for insight in case records, the right to defence is *nudum ius*. Actually, exercise of this right allows defendants to have active role and transform from being object of to being subject in criminal proceedings.[146]

Based on ECtHR jurisprudence, defence rights guaranteed under Article 70 of LCP for the first time include the right to insight in records and the right to present evidence in favour of the defence, allowing them adequate time and facilities to prepare the defence. It should be noted that the relevant legal provision does not include details about when and how this right can be exercised. Moreover, suspects must be advised of

144 Consequently, only possibility for suspects to secure time for preparation of their defence is to refuse to make a statement, on own initiative, and present their defence later, in the course of investigation activities, once they have been sufficiently prepared. Actually, from the defence standpoint, it would be optimal for defendants to get acquainted in detail with criminal charges and legal grounds thereof prior to the interrogation, in order to have adequate time and facilities for preparation of the defence, including the possibility to consult with defence attorney. This is especially important, having in mind practical importance of defendant's first interrogation in investigation activities for the final outcome of criminal proceedings as a whole.

145 app. no. 5523/78

146 See: B. Pavišić, "Commentary on the Law on Criminal Proceedings", Dušević & Kršovnik d.o.o. Rijeka, 2011

their right to insight in case records and right to examine items seized prior to their first interrogation. However, LCP does not clarify whether suspects can review case records *prior to* being interrogated (or later) and whether the interrogation will be postponed for the time needed for insight in case records and examination of items seized, in cases when suspects have expressed such request.

According to comparative law, the issue concerning time (stage of criminal proceedings) when suspects are given insight in case records and evidence is probably the most disputable issue in practice![147] In Macedonia, the new LCP has rendered this practice highly controversial! According to Article 79, paragraph 1 of LCP, defence attorneys are entitled to review records and evidence in the course of proceedings.[148] At first glance, this appears to be correct for the defence, but the next paragraph of this article limits the right to insight and transcript of minutes and other records only to those related to activities attended by the defence and kept at the public prosecution. As indicated above, due to the fact that the new LCP significantly limits the defence's right to be present at investigation activities, their right to insight in case records is also limited, whereby the defence, for example, is not granted insight in records and evidence related to witness interviews! This legal solution is restrictive and significantly limits possibilities for the defence stipulated under paragraph 1 of the same article.

On the other hand, when assessing the right to insight in case records in the course of interrogations, the question is raised about the time when suspects are considered to have been interrogated. In other words, is it established that a suspect has been interrogated and should therefore be granted the right to insight in records if he/she has been called for interrogation, but refused to give statement?

147 See comparative studies: Cape, Namoradze, Smith, and Spronken, "Effective Criminal Defence in Europe", as well as Cape and Namoradze (eds.), "Effective Criminal Defence in Eastern Europe", cited in note 1.

148 LCP include precise stipulation that criminal proceedings start with the investigation order or with the first investigation activity performed prior to the investigation order, with the scheduling of main court hearing upon criminal charges or private lawsuit motioned, with a motion for criminal warrant or with a motion for detention order. Consequently, defence attorneys have acquired this right by the act of suspect interrogation, which is considered to be an investigation activity that could be taken prior to the investigation order, given that such activity on part of law enforcement authorities marks the start of criminal proceedings. However, unclear is when defence attorneys acquire the right to insight in the records: after the interrogation has started or with the start of interrogation, in which cases it should be discontinued?

It should be noted that the public prosecutor's notification submitted to defendants prior to completion of criminal proceedings should include information on evidence against them gathered in the course of investigation activities, as well as evidence in favour of the defence.[149]

Attorneys we contacted claimed that in practice the right to insight in case records in the course of pre-trial proceedings had also been limited under the old LCP, but – in normative terms and in this context – the old LCP has been much more favourable for the defence, although it allowed insight in case records at a later stage of criminal proceeding or by the end of investigation activities.[150] In their opinion, under proceedings led by investigative judges, the defence, by rule, had been presented only with findings on the factual situation (related to the criminal report and investigation order), but had not been granted immediate insight in evidence, and almost never prior to suspect's interrogation. Moreover, defence attorneys had not been allowed insight in investigation orders, orders for special investigative measures, etc.

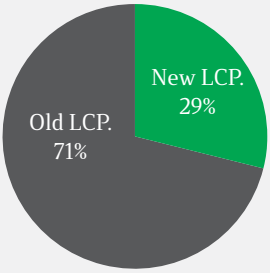
Survey responses and results from focus group discussions provide the conclusion that in practice the share of cases in which the defence has been allowed insight in case records prior to and after suspect's interrogation is almost identical, i.e. in equal shares of cases insight had been granted before start and after completion of investigation activities.

149 New LCP makes significant step forward in regard to the obligation to disclose evidence in favour of the defence collected by state authorities. Namely, the old LCP did not include clear rules on disclosing evidence to the defence collected by the police and the public prosecution. According to the old LCP, investigative judges could, but were not obliged to, summon the prosecution and the defence and introduce them with the more significant evidence collected during the investigation.

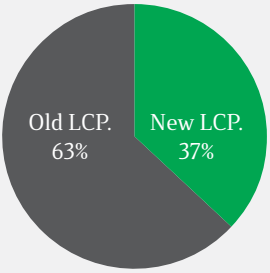
150 In practice, suspects are not informed about all evidence collected by the prosecution, nor are they allowed insight in all records. Suspects and their defence attorneys do not have immediate insight in records of the police or the public prosecution, but later, once the investigation is formally ordered. By rule, suspects are read the motion for investigation order, which allows them information about evidence against them.

Yes, prior to suspect's interrogation

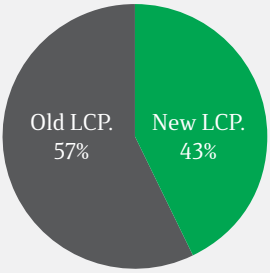
Yes, after suspect's interrogation



Yes, after investigation's start

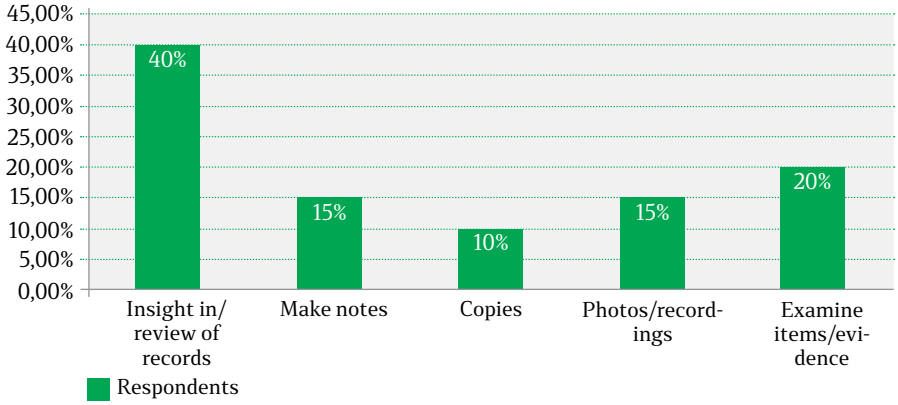


Yes, after investigation's completion



As regard scope of insight in records granted to the defence, majority of respondents reported that the defence is given insight in and possibility to review case records, while smaller share of them reported that the defence is also allowed to make notes, copies or take photos of these records.

Scope of insight in case records



9. RIGHT TO REMAIN SILENT

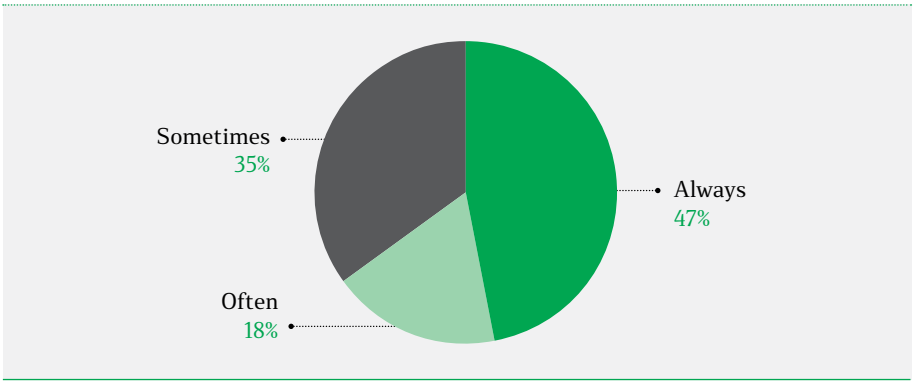
Right to remain silent is a key aspect of criminal defence rights. In criminal proceedings, it is considered to be a fundamental right and implies that defendants are not obliged to admit the criminal offence or give statement to acknowledge existence and credibility of facts presented in the course of relevant proceedings, as well as answer questions raised by the police, the public prosecution or the court. Therefore, defendants are not obliged to give any statement that would contribute to clarification of facts in the case, be it in the course of pre-trial proceedings or at court hearings.[151]

In this sense, legal provisions stipulate that defendants enjoy this right from the moment of their first interrogation. This is further confirmed by rules governing suspect interrogation, according to which prior to being interrogated, persons summoned for interrogation must be informed *expressis verbis*, i.e. in clear manner, about their right to remain silent, while minimum defence rights include the right not to be coerced to make incriminating statements for themselves or their relatives or to admit guilt, in compliance with the principle *nemo tenetur se ipsum,* whereby failure to provide such advise results in withdrawal of such statements.

151 Dilemmas raises by the legal provision from Article 12 of the Constitution of the Republic of Macedonia according to which, persons summoned, apprehended or deprived of liberty cannot be requested to make a statement are matter of the past with the interpretation that the legal provision in question expressly allows the right to remain silent, i.e. prohibits coercion of persons to make or sign a statement, which does not mean that the person cannot be interviewed. Indeed, this is not a completely restrictive interpretation of the constitutional provisions and should be assumed as principled approach in terms of fundamental rights and freedoms, but it is more realistic and ultimately adequate to legal solutions and practices identified in comparative and international law. See: G. Kalajdziev, "Fair Procedure", PhD Dissertation, Faculty of Law, Skopje, 2004, pg. 268

Hence, LCP does not leave possibility to prove that defendants, although not being advised, are aware of this right.[152]

Are suspects informed about their right to remain silent in adequate manner?



Another guarantee for the right to remain silent is the fact that persons responding to police invitation or forcefully apprehended by the police, who have refused to make a statement, cannot be re-summoned on the same grounds.

According to legal solutions in effect, defendants are advised that any statements they give can be used in criminal proceedings led against them. Additional guarantees are secured by the fact that, although defendants might have waived these rights voluntarily, their interrogation cannot start without written statement on waiver of particular right signed by them. Action taken contrary to these principles might result in withdrawal of such statements from court trials.

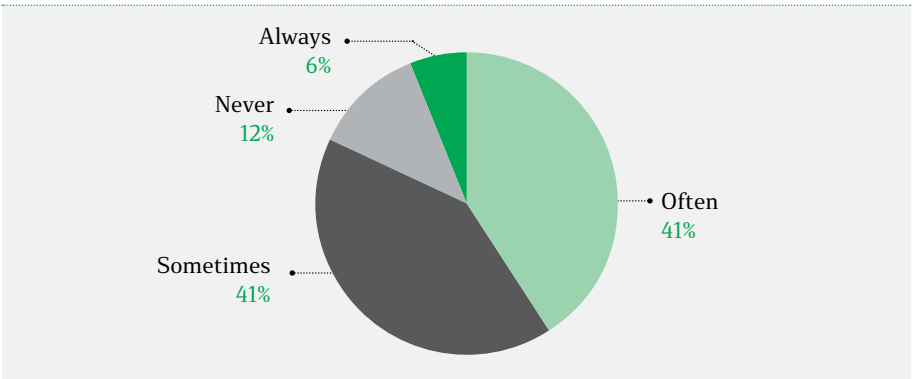
One of the most controversial issues related to the right to remain silent is the (in)ability to make unfavourable conclusions on the grounds of defendants' exercise of the right to remain silent. Macedonian law does not include a legal solution according to which relevant authorities are allowed to make unfavourable conclusions on this ground,[153] but on the other hand, it does not contain provisions according to which above-indicated authorities are not allowed to inquire about defendant's reasons for being silent and even treat their complete silence as evidence. Hence, although this means that the court should not take into consideration defendant's silence by inferring his/her guilt, there are no guarantees that this does not happen, especially having in mind that many believe that an innocent person would use the opportunity to offer explanation. In this

152 Such examples are noted in Germany.
153 For example, in England.

sense, the report developed as part of the project "Monitoring Organized Crime and Corruption Cases in the Republic of Macedonia" indicates that "...in some cases monitored, it became evident that domestic courts practice does not include a clear position on the controversial issue whether defendant's *silence* allows negative conclusions to be inferred. Most stakeholders in criminal proceedings believe that courts take defendants' silence into consideration, but do not explicitly refer to this ground in the rationale of court rulings".[154]

This assumption was confirmed by survey results according to which almost 90% of respondents believe that courts frequently draw unfavourable conclusions about defendants' guilt on the grounds of their silence. In practice, defendants' silence is made due consideration of and is interpreted as "aggravating circumstance", not only in terms of court rulings, but also in terms of detention orders. In addition, courts negatively assess statements given at court hearings by defendants who remained silent during the investigation, believing that at that time they had been hiding something.

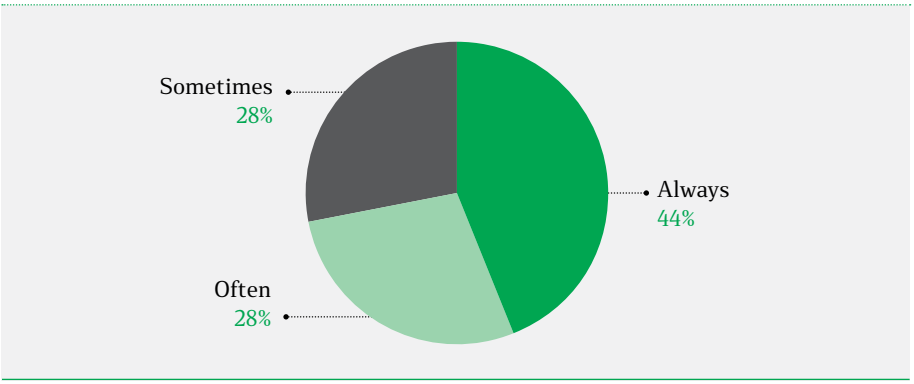
In practice, do courts make negative conclusions about defendant's guilt on the ground of his/her silence?



Although in normative terms it can be concluded that criteria and guarantees on the right to silence are in place, certain is that when defendants decide to exercise this right they are subjected to psychological pressure to speak, which is often practiced, especially by the police.

154 See: G. Kalajdziev, B. Misoski, A. Gruevska Drakulevski and D. Ilik, "Court Efficiency in Fighting Organized Crime and Corruption", Coalition "All for Fair Trials", Skopje, 2013, pg. 36

Is the right to remain silent respected in practice?



10. RIGHT TO TRANSLATION[155]

Defendants' right to be assisted by translator when they do understand the language used in criminal proceedings is an indisputable standard enshrined in international and comparative law and granted to all persons deprived of liberty or accused of having committed criminal offence. Although occasionally this right is raised in political discussions, practitioners we have interviewed reported that exercise of the right to translation/interpretation is not encountering serious problems in practice.

10.1. DEFENDANTS ENTITLED TO ASSISTANCE FROM TRANSLATOR/INTERPRETER

In Macedonia, this right is more broadly defined in normative terms on the account of political implications that are well known in public and is regulated under the Constitution of the Republic of Macedonia and several laws, amended in compliance with the Ohrid Framework Agreement.

First, the right to translation is not exclusive to defendants, but concerns all participants in criminal proceedings, and is free-of-charge![156] On the other hand, legal provisions differentiate when this right is granted to defendants and other participants in criminal proceedings.

155 Although the term "interpretation" implies oral (and sign language) translation and the term "translation" means written translation, domestic laws do not use these terms adherently, but as synonyms, probably due to the fact that in every-day conversations "translation is more frequently referred to. In that, it would be incorrect to refer to translators in interrogation activities, as is the case with Article 206, paragraph 1, item 6 of LCP. Due to same practical reasons, references to the right to translation in the criminal proceedings throughout this document also imply interpretation and/or interpreters.

156 According to Article 102, paragraph 5 of LCP, translation costs are always reimbursed from the central budget, which was not the case under the old LCP.

Namely, international standard from Article 6 paragraph 3 of ECHR and Article 14, paragraph 3 of the International Covenant on Civil and Political Rights do not imply persons' right to express themselves in a language of their choice when they or their defence attorney are sufficiently skilled in the language used by the court (which is a matter of fact).[157] According to these international instruments, this means that when defendants can adequately understand and speak the language used by the court, they are not entitled to translator assistance in order to present the defence in another language.[158] The right to translation covers exchanges between courts and defendants, but not between defendants and defence attorneys they have engaged.[159]

According to Article 9 of LCP, general terms and conditions governing the right to translation are applicable to all parties in criminal proceedings, provided they do not understand the language used in these proceedings (i.e. Macedonian), except for members of the Albanian community who "speak an official language different than the Macedonian language and are entitled to use their language and alphabet in criminal proceedings" irrespective of the fact whether they understand and speak the Macedonian language. Of course, this is a political right and is not necessarily related to criminal proceedings and fair trial.[160] Moreover, according to Article 9, paragraph 2 of LCP, all parties are entitled to translator/interpreter

157 Language skills needed to acknowledge the right to free assistance from translator is matter of fact and have been reduced to necessary assistance. In other words, defendants must be able, individually or assisted by translator, to understand and participate in proceedings to an extent that enables them *fair trial*. See: A. Grotrian, "Art. 6 of the European Convention on Human Rights", Council of Europe, Strasbourg, 1994, pp. 59-61

158 With due respect to exceptions, the states are not very inclined to guarantee greater rights from those established by the conventions. In this sense, exceptions therefrom are noted in Italy, Slovenia, Croatia and Norway, where certain national minorities are guaranteed the right to use their language in proceedings led in front of courts, regardless of the fact whether they understand the official language. See: "The Situation of Regional or Minority Languages in Europe", Council of Europe, 1994, pp. 94, 112 and 119

159 *X v. FR Germany*, app. no. 10221/82

160 In this regard, legal professionals have been debating whether the violation of relevant regulations on the right to use own language should always be considered so-called absolute violation of the Law, as currently stipulated under Article 415, paragraph 1, item 15 of LCP. Namely, illogical is to establish violation of the right to use "own" language in cases when defendants are skilled in Macedonian language and to impose procedural sanctions, especially by revoking the court ruling. Instead, these violations should be sanctioned in different manner, possibly as violation of political rights.

assistance only "in proceedings led in front of courts", but not in pre-trial proceedings.[161]

Right to translator/interpreter in *police-led* proceedings is poorly regulated under both, LCP and LP. LCP guarantees free assistance from interpreters only in court proceedings, whereas guarantees in police proceedings imply that this type of assistance is granted only to persons summoned, detained or deprived of liberty in terms of informing them in a language they understand about reasons thereof and their rights (LP: art. 34 and LCP: art. 69). No reference is made to translation of the letter of rights. Communication with their defence attorney is an exclusive problem of defendants and they are responsible to cover these costs! Article 10, paragraph 5 of LCP stipulates that aliens deprived of liberty are allowed to make written submission in their language, but no reference is made to the entity that should organize and pay for translation thereof. In this regard, domestic legislation must make efforts to align its provisions with the abovementioned EU Directive on the Right to Translation and Interpretation in Criminal Proceedings, which explicitly guarantees the right to translator/interpreter as early as police-led proceedings.[162]

10.2. WHAT IS TRANSLATED?

It is implied that translator assistance in criminal proceedings should enable understanding of everything presented by the prosecution, witnesses and forensic experts, but the right to free assistance from interpreter is not limited only to **oral hearings in court**. In addition to statements, this also concerns translation of all **documents** that defendants should understand in order to be guaranteed fair trial.[163] Such guarantees cover pre-trial proceedings and translation of documents, such as indictment acts, etc. Nevertheless, according to ECtHR, the right guaranteed under Article 6, paragraph 3, item (e) of ECHR *does not require translation of all evidence in written or records used in criminal proceedings*.[164] In this sense, translator's assistance should enable

161 Confusion is created by Article 206, paragraph 1, item 6 of LCP according to which defendants are advised of their right to free assistance from translator/interpreter, but only when they do not understand or speak the language used in the interrogation, which is obviously more narrowly defined compared to the right guaranteed under Article 9 of the same law!

162 See: Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings

163 See: Van Dijk and Van Hoof, "The Theory and Practice of the European Convention on Human Rights", 1990, pg. 355

164 Sometimes, depending on the circumstances, oral explanations of indict-

defendants to be informed of criminal charges raised against them and be able to defend themselves by presenting their account of events.[165] Moreover, this right includes translation of statements made by witnesses in defendants' favour.[166]

New LCP explicitly stipulates that "authorities competent for leading proceedings shall secure interpretation of oral accounts made by defendants and other parties, as well as translation of official documents and other evidence in written. Competent authorities shall secure written translation of all written documents important for criminal proceedings or defendant's defence."[167]

According to ECtHR, the term "free" is interpreted to mean that interpreting costs cannot be charged to defendants, even when they have been declared guilty.[168]

Obligation of competent state authorities is not limited only to provision of translator, but also implies reasonable **control** of *interpretation/translation adequacy*, especially when this has been brought to their attention.[169] In this regard, requests for replacement of interpreters are allowed.[170] EU Directive on the Right to Interpretation and Translation in Criminal Proceedings insists on adequate training and control of interpretation/translation services.[171]

Based on information obtained from the Judicial Budget Council of the Republic of Macedonia, in 2011, a total of 1,160,313.00 MKD have been disbursed for this purpose in 417 cases, accounting for 2,782.52 MKD

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ment's contents are considered to be sufficient. See: ECtHR judgment, *Kamasinski*, 19.12.1990, Series A, no. 168, paras. 78-83

165 See: *Kamasinski,* para. 74

166 Van Dijk and Van Hoof, *supra*, pg. 356

167 Article 9, paragraph 3 of LCP

168 *Luedicke a.o.*, judgment of 28.11.1978, Series A, no. 29, paras. 44-49

169 *Kamasinski*, *supra*, paras. 84-85

170 *Grotrian,* para. 61

171 Relevant research studies have shown the need of training system for translators/interpreters in order to ensure accurate translation and interpretation. This system should focus both on general practice of interpretation and translation and specific practices related to the domestic legal system. Research studies recommend member states to ensure establishment of training systems for translators/interpreters. Given the importance of quality assurance, independent bodies should be tasked with development of quality standards and accreditation. Accreditation/certification of translators and interpreters should be subject of regular renewal, with a view to maintain skills and ensure continuous professional development

per case.[172] The amount indicated does not reflect all translation and interpretation costs, as it concerns only payments made to interpreters hired per task contract by courts in the Republic of Macedonia and selected from the list of court-certified interpreters.[173] Courts have employed a number of officers who speak Albanian language, which are often used to provide interpretation/translation in criminal proceedings.[174]

172 This information was obtained from several courts in the country. Basic Court Bitola reported that in 2011 they contracted court-certified translators on two occasions and reimbursed them in total amount of 4,500.00 MKD. In 2012, the Basic Criminal Court in Skopje has spent a total of 390,958.00 MKD for translation and interpretation services, compared to 435,887.00 MKD in 2013.

173 List of court-certified translators is available on the official website of the Ministry of Justice of the Republic of Macedonia (www.justice.gov.mk).

174 According to informal sources, not all officers employed for this purpose are court-certified translators, but it seems that nobody raises this issue as problem. Number of such employees is unknown, having in mind that with the exception of larger courts, in most cases and in towns where Albanian language is commonly spoken (Skopje, Tetovo, Gostivar, Kumanovo, Kicevo, etc.), these employees are deployed to other job positions, and provide translation/interpretation services on demand, as part of their job duties.

11. RIGHT TO BE PRESENT AT TRIAL AND TRIAL IN ABSENCE

Right to fair trial means that defendants must always be present at their trials. However, while relevant provisions from international conventions underline the importance of defendant's presence in court trials, the international law does not strictly prohibit trial in absence.[175] UN Human Rights Committee has pointed that trials in absence are not strictly prohibited under international law, but the states whose legal systems allow such trials must guarantee defendants' right to defence, i.e. persons must be represented by attorney in court and they need to have the possibility of retrial.[176] According to ECtHR case law, trial in absence is not entirely incompatible with Article 6 of ECHR as long as the court has duly subpoenaed and informed defendants of criminal charges raised against them. However, persons who have been subpoenaed, but have intentionally avoided appearance in court might have their right to retrial limited.[177]

On the other hand, Council of Europe Resolution (75)11 refers to the fact that defendants must be duly informed of criminal charges against them before the start of court proceedings, while in case they have not been informed thereof or were unable to learn of court proceedings led against them, they must be granted right to retrial once having learned that they had been tried in their absence, as essential precondition for compatibility with human rights.[178]

Defendants need to be present at their trials, as they must be aware of criminal charges against them, but also with a view to guarantee their

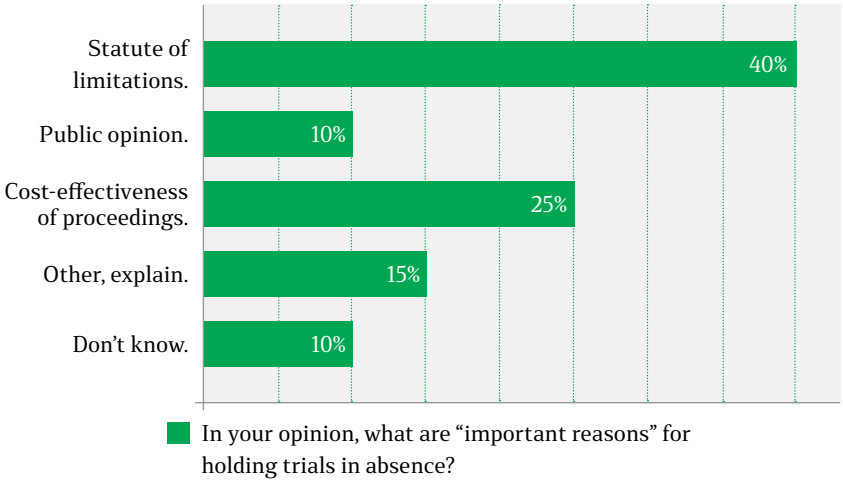
175 Art. 14, para. 3 of ICCPR; Art. 6, para. 3 of ECHR

176 See: Human Rights Committee, General Comment No. 14(2013), para 11

177 See: judgment in the case *Medenica v Switzerland,* app. no. 20491/92

178 See: Council of Europe, Committee of Ministers, Resolution (75)11 on the Criteria Governing Proceedings Held in the Absence of the Accused

procedural rights and guarantees, such as: the right to be heard during cross-examination; the right to make statement; the right to present own evidence and contest evidence against them; and the right to instruct their attorney, provided they have contracted one. Presence of defence attorneys at trials in absence is very important in the light of respecting the principle of fair trial, but attorney's presence does not compensate defendant's absence. ECtHR case law indicates that trials in absence, *per se,* are not incompatible with provisions from ECHR. Nevertheless, several examples from ECtHR practice indicate that when defendants have been served with subpoenas, but have deliberately sought to evade the justice, their motion for retrial is denied.[179]



Trial in absence is objectionable in terms of the right to be present at trial, which is a crucial element of the right to fair trial, but they are allowed due to the fact that undue delay of trials can sometimes lead to loss of evidence, statute of limitations for criminal prosecution, etc. Positions of survey respondents are similar and provide the conclusion that, in principle, trials in absence are justified, but in certain cases problems have been identified in terms of stricter sentences for convicted persons and inefficiency on the part of court-appointed defence attorneys due to inability to establish immediate contacts with clients that would enable them to adequately prepare the defence.

Be that as it may, possibility for trial in absence as stipulated under Article 365, paragraph 5 of LCP would not constitute any problems in terms of practices established by ECHR, in particular due to established guarantees for such trials, such as *provision of defence attorney* (LCP: art. 74). Hence, defendants can be tried in absence, but only when they are on

179 See: *Medenica v. Switzerland,* app. no. 20491/92, para. 59

the run or are otherwise unavailable for law enforcement authorities, and when important reasons are in play for holding trials in their absence. Orders for trial in absence are decided by the court council, on the public prosecutor's proposal, and can be appealed by defendants' attorneys in front of the second instance court, within a deadline of 3 days. Appeals do not delay order's enforceability (LCP: art. 365). These orders are adopted once and concern all court hearings held in the given case. When defendants do not have attorneys, the court appoints them official defence attorney in compliance with provisions governing mandatory defence (LCP: art. 74) following the adoption of order for trial in absence. In cases of convicted person tried in absence, the court ruling is published on the court's information board. It goes without saying that once the person appears before the court in the course of proceedings, the trial continues in his presence.

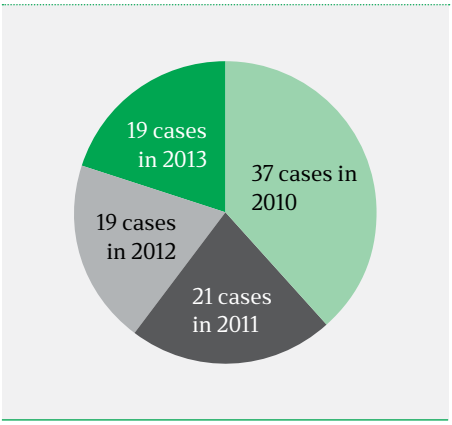
In this regard, *possibility for repeated proceedings (retrial)* in cases of trial in absence and upon motion lodged by the defendant or his attorney within a period of one year after the convicted person has learned about being tried in his/her absence (LCP: art. 456) is in compliance with ECHR and provides guarantees for defence rights. When these terms and conditions have been fulfilled, the criminal council must take a decision on retrial to the benefit of convicted persons, even in cases of pending statute of limitations for criminal prosecution, so when statute of limitations enters in effect in the course of repeated proceedings, this fact is established and court proceedings are discontinued.

Retrials are also allowed in the course of defendants' extradition procedure, however only when the extraditing state requests guarantees for the person's right to retrial (LCP: art. 456, para. 2).

Article 456, paragraph 4 of LCP explicitly stipulates that courts should not allow retrial in absence in cases of defendants whose motion for retrial has been approved, but have again become unavailable to law enforcement authorities.

The fact that proceedings completed in absence of defendants do not necessarily imply violation of the right to fair trial is supported with data obtained from the Appeal Court in Bitola,[180] according to which in cases when court proceedings have been completed in the absence of defendants falling under its jurisdiction, but persons concerned, i.e. convicted have not submitted motions for retrial. In other words, this means that persons convicted in this manner are either satisfied with court rulings or have failed to comply with the law-stipulated deadline governing motion for retrial.

180 Data obtained from the Appeal Court in Bitola.



Possibility for temporary removal of defendants from the courtroom when they have disturbed the order (LCP: art. 361) is an exception allowed by ECHR bodies. Similar is the situation in terms of removing defendants from the courtroom when co-defendants or witnesses refuse to give their statement in his/her presence or in circumstances under which likely is that these persons would not speak the truth in defendant's presence, which is allowed provided that defendants' attorney are present in the courtroom and defendants are later informed of statements made against them (LCP: art. 391, para. 4).

In terms of compliance with ECHR, problems are raised with legal provisions granting *trial in absence in case of fast-tracked proceedings,* when despite being subpoenaed defendants do not appear at court hearings or when subpoenas could not be served due to defendant's evasion, provided that fast-tracked proceedings are led in cases of criminal offences that are liable to imprisonment sentence in duration of up to 3 years (LCP: art. 479).

Namely, according to the practice established by the Court in Strasbourg defendants should be efficiently informed of (subpoenaed to) the trial, which means they need to be informed in time and in language they understand. In the leading case on this issue, *Colozza and Rubinat v. Italy,*[181] ECtHR found that competent authorities did not take all necessary actions to identify defendant's new address and that *trial in absence is disproportional sanction to defendant's failure to provide information on the change of address.*[182] Therefore, the new LCP wisely removed possibility for trial in absence in cases when subpoenas could not be served due to

181 See: *Colozza and Rubinat v. Italy*, Series A, app. no. 89, 1985

182 Compare: *F.C.B. v. Italy*, Series A, app. no. 208-B, 1991 and *T. v. Italy*, Series A, app. no. 245-C, 1992

unreported change of address to the court, but is allowed only in cases when it is obvious that defendants are purposefully attempting to obstruct courts' work. Nevertheless, trial in absence for such cases should be *exception*, especially having in mind provisions according to which retrial is no allowed in these proceedings and defendants are not entitled to court-appointed defence attorney.

In such cases, convicted persons have only one legal possibility, i.e. to motion reversal of situation, which is a common practice and implies that defendants have been neatly subpoenaed, but were unable to attend court hearings due to justified reasons. In that, convicted persons are entitled to motion waiver of the enforceability clause, provided that they have not been presented with the court ruling in compliance with legal provisions. When this motion is approved by the court, convicted persons are entitled to appeal the order for trail in absence and clarify reasons on the grounds of which the court had erroneously decided to hold hearings in their absence.

12. EQUALITY OF ARMS IN WITNESSES EXAMINATION

Until recently, the domestic legislation did not allow the defence's right to examine witnesses of the prosecution and to propose and examine own witnesses, as defined and guaranteed under ECHR. Admissibility of statements made outside court hearings was reconsidered only in terms of *the principle of immediacy*, and was therefore considered that it is important for the court to hear witnesses at court hearings in order to be able to observe their behaviour and assess their credibility. By rule, reading of minutes from pre-trial proceedings was not allowed due to the fact that the court must determine the truth, and not because the defence had not been given opportunity to examine witnesses. Under the previous model of criminal proceedings, the court had a dominant role in examination of witnesses, and the defence's possibility to ask questions was more of a convenience, instead of indisputable right.

Today, fair trials imply adversarial testing of evidence presented in front of impartial courts. Defendants need to be given adequate chance to provide their account of facts and arguments relevant for the indictment. Defendants right to be informed about criminal charges against them in timely manner and to be heard by the court (so-called defendant day in court) are fundamental defence rights and include, as absolute minimum, the right to be informed about criminal charges, the right to examine witnesses, the right to be heard by the court and the right to be represented by attorney. These rights are guaranteed with a view to protect defendants against state authorities and to facilitate their right to fair trial. Defendants' right to fair trial implies honest chance to defend themselves against state accusations. On the other hand, one should not undermine the fact that the right to present their defence promotes and stimulates establishment of the truth, while the need for presentation of facts is considered to be of fundamental importance for criminal justice system's integrity and the public's trust in this system.

12.1. ADVERSARIAL COURT HEARINGS UNDER THE NEW LCP

Following ECtHR steps, the new LCP starts from the premise that it is of utmost importance for the defence to be given possibility to rebate evidence presented before the court and serving as basis for court rulings. In principle, all evidence must be produced in the presence of the defendant at a public hearing, with a view to allow adversarial argument.[183] Thus, except in extraordinary circumstances that require special justifications, *witnesses* should testify in defendant's presence at court hearings, whereby both parties would be in position to present their arguments, while court hearings, on the account of being liable to public control, would offer tangible guarantees on fairness of criminal proceedings. Based on models that imply full respect of the principles of immediacy and of contradiction, the new LCP stipulates that statements obtained in the course of pre-trial proceedings would be used solely for the purpose of verifying or contesting statements made at court hearings, with the exception of statements which, with all guarantees for the defence, have been presented at the separate evidentiary hearing.

Abandonment of court paternalism and introduction of accusatory proceedings should contribute to courts' impartiality and creation of conditions for fair trials as part of which, instead of confronting defendants, courts would be guarantees of lawful proceedings and of defendants' rights and freedoms. On the other hand, courts' unburdening would contribute to speediness of criminal proceedings. In that, transformation of inquisitorial into accusatory proceedings is expected to result in speediness and fairness. Nevertheless, in order to properly function, this system requires two - more or less - equal parties. In other words, defendants and their attorneys must have an active role in criminal proceedings, counteracting the prosecution. Serious concerns are raised in this regard, particularly knowing that in poor countries, such as Macedonia, large portion of the population cannot financially afford defence attorneys, while the state is also unable to secure sufficient funds for that purpose.

Major concerns were raised in terms of status awarded to and treatment of forensic experts which, following the example of other continental models of criminal proceedings, were traditionally considered to be objective and assisting the courts. ECtHR does not openly oppose the model under which forensic experts, as objective and impartial parties, are appointed by the court. However, in cases when indictment acts are

183 See: *Case of Kostovski v. The Netherlands*, app. no. 11454/85, para. 41 (available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57615)

factually based on forensic findings and opinions, they are treated as "witnesses against the defendant" in terms of defendants' right to fair trial and therefore the defence has to be given adequate and honest chance to contest their findings and opinion, as well as to produce alternative forensic expertise in its defence.[184] The new LCP addresses this problem by applying the solution from the Italian LCP whereby the defence is granted the possibility to contract so-called "forensic advisors" to provide assistance on expert issues that defence attorneys, as legal professionals, are not qualified for.[185]

Important issue in conceptualization of court hearings concerns **examination of defendants,** i.e. whether defendants would be, by default, heard at court hearings or, following the example of accusatory proceedings, they would be given status of witnesses proposed by the defence. In Macedonia, the legislator has opted for the straightforward model in which only the defence proposes the defendants as witnesses. Under the illusion that the defence can be presented before the evidentiary hearing, the old solution puts defendants in position to be actively examined and therefore, their exercise of the right to remain silent was, by rule, perceived with doubts and to their detriment. [186]

As indicated above, under the cross-examination system *defence attorneys* are much more needed than before. Under the current model

184 See ECtHR judgment in the case of *Stoimenov v. Republic of Macedonia*, app. no. 17995/02, from 5.4.2007

185 In Macedonia, disputable is whether these experts can be used only as a tool to contest or assess previously conducted forensic expertise, or can serve as independent means of evidence production. It seems that provisions governing forensic advisers under the chapter on evidentiary means suggest limited use thereof in terms of the first enlisted purpose, in cases when the authorities leading the proceedings (i.e. the public prosecution, according to current regulations in effect) has ordered forensic expertise. On the contrary, provisions under the chapter on court hearings stipulate that these forensic experts should be subject of cross-examination, i.e. they are given the status of independent means for evidence production.

186 LCP has not addressed the following issue: if the defence calls the defendant to make a statement and he/she makes a statement, could it be assumed that the person is lying, because systems in which they are heard as witnesses of the defence give them the status of any other witness, implying that they can also lie, and could defendants refer to their right to remain silent during cross-examination if they have been examined by and on the proposal of the defence? LCP is not explicit in this regard, as it does not stipulate withdrawal of statements made in this manner (as required in the US), and leaves the possibility for critical reception of defendant's statement given when examined by the defence, but exercising his/her right to remain silent under cross-examination.

of proceedings in which the court acts as the main inquirer and is tasked, *ex officio*, to clarify matters and facts in the case, defendants are not necessarily required to have attorneys representing them. In spite of that, LCP stipulates mandatory defence and forces defendants to take defence attorney when they are disabled, i.e. deaf, mute, in detention, etc. Be that as it may, it is considered that under normal circumstances, even if defendants do not have attorney, the court would "assist" them due to obligations related to their role of objective investigators of the truth. If courts are passive, it cannot be expected from the prosecutor, who has decided that there is sufficient evidence to convict somebody, to "assist" defendants and produce or present elements of the defence. On the other hand, defendants who do not have attorney would not be able to handle cross-examinations which are already complicated even for attorneys, until they are trained. In truth, this system necessitates special techniques and skills.

13. DEFENCE IN PLEA-BARGAINING

Plea-bargaining is by far one of the most significant novelties introduced by the new LCP. Except for the need to encourage greater initiative on the part of the prosecution and the defence, introduction of plea-bargaining is mandated in the guidelines for increased efficiency of criminal proceedings put forward in the Council of Europe, Committee of Ministers Recommendation no. R (87)18 concerning the simplification of criminal justice.

13.1. PLEA-BARGAINING WITHOUT EXPLICIT ADMISSION OF GUILT

Based on provisions from the new LCP, plea-bargaining between the public prosecutor and defendants is marked by particular specificities. Namely, this instrument is applied for all criminal offences (LCP: art. 483), regardless of their gravity, and is activated as early as investigation activities. Hence, plea-bargaining can be initiated from the moment the public prosecutor adopts the investigation order and until the drafting of the indictment act and its submission to the court. In cases when the investigation order concerns several criminal offences, plea-bargaining can address all or only some criminal offences.

Participants in plea-bargaining are the public prosecutor on one side and defendant and his/her attorney on other side. Motion for plea-bargaining can be made by any of the parties, but both parties must give their consent for this process to start. In that, initiation of plea-bargaining mandates participation of defence attorney. Suspects are entitled to independently contract an attorney, but should they fail in that, president of the competent court is obliged to appoint them official defence attorney (LCP: art. 486). Comparative law recognizes mandatory participation of defence attorneys from the very beginning of plea-bargaining as an important precondition for successful and fair settlement.

It should be noted that in this stage of criminal proceedings LCP does not stipulate admission of guilt as precondition for initiation of plea-bargaining. However, although admission of guilt is not explicitly required, the mere fact that the defence and the prosecutor are entitled to motion plea-bargaining implies that both parties are not disputing the factual situation.[187]

According to LCP, damaged persons do not participate in plea-bargaining, but the public prosecutor is obliged to protect these persons' rights and interests. Protection of damaged parties by the public prosecutor as part of plea-bargaining is also seen in the law-stipulated obligation for the public prosecutor, in addition to other evidence, to attach to the draft-settlement written statements signed by damaged parties on the type and amount of their indemnity claim.

This means that indemnity claims can, but are not necessarily, subject of settlements. Thus, in cases when such claims are not covered under plea-bargaining, damaged parties reserve the right to collect their indemnity claims in private lawsuit based on the court ruling approving the draft-settlement.

Contrary to mandatory participation of attorneys, Article 487 of LCP explicitly prohibits the courts to take part in plea-bargaining, assessing that they should not influence parties and defence attorneys in regard to their decision on engaging in plea-bargaining, on accepting opposing party's motion for plea-bargaining, or influence them in regard to selection of type and scope of criminal sanctions subject of bargaining.

As regards "leniency" for defendants in cases of plea-bargaining, LCP does not anticipate mandatory reduction of law-stipulated sanctions,[188] but allows more lenient criminal sanctions within law-stipulated limits for the criminal offence in question, which should not be more lenient that mitigation limits stipulated under the Criminal Code (LCP: art. 483).

Successful plea-bargaining results in draft-settlement submitted to the pre-trial judge. Before the draft-settlement is submitted to the court for review, it must be endorsed by the public prosecutor, defendant and his/her attorney. Otherwise, the plea-bargaining process is considered unsuccessful.

187 On the other hand, preparedness to engage in plea-bargaining and acceptance of criminal charges, followed by preparation of draft-settlement that establishes criminal sanctions, represent implicit admission of guilt on the part of suspects.

188 Such as legal solutions under Articles 444 to 448 in the Italian LCP.

13.2. ADMISSION OF GUILT AS PRECONDITION FOR APPLICATION OF PLEA-BARGAINING

In the course of indictment review, rationalization of criminal proceedings by means of rulings based on draft-settlement submitted by the parties is allowed only when motioned by the defence, i.e. once suspects express preparedness for admission of guilty in terms of criminal charges enlisted in the investigation order (LCP: art. 329). In other words, at the indictment review stage admission of guilt is necessary for initiation of plea-bargaining.

First opportunity for suspects to admit their guilt is presented upon receipt of the indictment act and they have a deadline of 8 days to plead guilty for all or some of criminal offences they have been charged with (LCP: art. 329). Once the indictment review judge or court council is presented with suspect's statement, they need to establish whether the statement has been made voluntarily, consciously and with full understanding of consequences, including those related to possible indemnity claims and criminal proceeding costs, as well as whether there are compelling evidence about suspect's guilt. In the event of affirmative ruling, the indictment review judge or court council assigns the parties a deadline of 15 days for organization of plea-bargaining and submission of draft-settlement.

Should the indictment review judge or court council reject suspect's statement (for example, in cases they have established that the statement had been made under threat, involuntarily or the suspect is misled about important aspects of the draft-settlement, etc.), this is duly noted in the court minutes, after which the parties in attendance are notified and the court hearing on indictment review continues.[189]

In the event of successful plea-bargaining and agreement reached on all elements in the draft-settlement, the indictment review judge or court council proceeds with review of draft-settlement at the scheduled court hearing. Otherwise, when the parties fail to present the court with draft-settlement within the given deadline, the court would assume the position that plea-bargaining was unsuccessful and will continue with indictment review.

189 Statement on guilt admission that has not been approved by the court, i.e. court records with the statement that has not been approved by the court cannot be used as evidence in further criminal proceedings, while the submission made, i.e. court records with the statement on guilt admission are sealed in separate file and must be removed from case records.

Second opportunity for suspects to admit guilt is presented at the court hearing scheduled for indictment review (LCP: art. 333).[190] If suspects plead guilty about all or some of criminal offences they have been charged with, proceedings continue in compliance with provisions governing court hearings on reviewing draft-settlements at the stage of indictment review.

13.3. COURT REVIEW OF DRAFT-SETTLEMENT

In the course of investigation activities, pre-trial judges are competent to assess draft-settlements, whereas in the course of indictment review this task is assigned to the indictment review judge or court council. In the event of accepted and approved draft-statement, they move to rule on the merits in the criminal matter, and proceedings are completed in the stage of investigation, i.e. indictment review, whereby the court ruling is final and enforceable.

Pre-trial judge or indictment review judge or court council are entitled and obliged to make complete, comprehensive and active revision of draft-settlements. Draft-settlements are reviewed at public hearings (LCP: art. 488).

At the public hearing, pre-trial judge or indictment review judge or president of the court council are obliged to impartially establish whether the draft-settlement has been submitted voluntarily and whether the defendant is aware of legal consequences arising from his/her acceptance thereof.

In cases when judges have established non-fulfilment of above-enlisted elements or defendants are confused about the legal consequences arising from the draft-settlement, they do not engage in reviewing contents thereof, but are obliged to reject the draft-settlement by means of a separate decision and return the records to the competent public prosecutor.

Pre-trial judge or indictment review judge or president of the court council is obliged to advise participants in plea-bargaining of the following circumstances:

190 This is a situation when the suspect, after being presented with the indictment act, did not use the opportunity to submit a statement on guilt admission, but has decided to so during the court hearing scheduled by the indictment review judge or court council for the purpose of meriting criminal charges raised.

- acceptance of the draft-settlement shall be considered to constitute waiver of the right to appeal the court ruling approving the draft-settlement; and
- parties are entitled to withdraw the draft-settlement until the court ruling is delivered.

Any deviation from what has been agreed under the draft-settlement on the part of participants in plea-bargaining would imply their change of position in terms of acceptable criminal sanction, i.e. it would be considered that they are withdrawing from the draft-settlement submitted. Withdrawal from the draft-settlement can also be made explicitly, at the court hearing, when the public prosecutor, defendant or his/her attorney motion for establishment of criminal sanction different from the sanction indicated in the draft-settlement. Such action leads to adoption of decision on draft-settlement's rejection.[191]

In cases when judges reviewing draft-settlements do not adopt a decision on draft-settlement's rejection on any of above-enlisted grounds, they deliver a court ruling (LCP: art. 490) that cannot establish a criminal sanction different from the sanction indicated in the draft-settlement.[192]

13.4. ADMISSION OF GUILT AS GROUNDS FOR RATIONALIZATION OF EVIDENTIARY HEARINGS, WITHOUT PLEA-BARGAINING

According to LCP, defendants have another opportunity to make a statement on guilt admission at court hearings, however only before the court moves to evidentiary hearing (LCP: art. 381).

191 Decision on draft-settlement's rejection can also be adopted when the pre-trial judge, i.e. the indictment review judge or president of the court council, has determined that evidence gathered about the factual situation important for selection and weighting of criminal sanction do not justify approval of proposed criminal sanctions, which implies that participants in plea-bargaining have not adhered to provisions of the Criminal Code (LCP: art. 489).

192 This court ruling is published immediately, i.e. it is read at the hearing scheduled for draft-settlement review, and is put in written within a deadline of 3 days from its announcement. Without undue delay, the court ruling is submitted to the public prosecutor, defendant and his/her attorney, as well as to the damaged party which, in case of remaining unsatisfied with the type and scope of indemnity awarded, can exercise its right to motion private lawsuit (LCP: art. 490, para. 4). Parties in the criminal proceedings are not entitled to appeal.

Unlike the situation observed in terms of indictment review where defendants make individual decision on objecting the indictment act or making a statement on guilt admission, at court hearings, after having advised defendants of their rights, the competent judge (in the capacity of individual judge or president of the court council) invites defendants to make a statement whether they are guilty of all or some of criminal offences enlisted in the indictment.

At this stage, defendants are those that have exclusive right to decide on pleading guilty for all or some of criminal offences they have been charged with. As was the case before, admission of guilt in this stage of criminal proceedings is not limited by nature or gravity of criminal charges motioned.

Once defendants have plead guilty, the competent judge is obliged to examine whether their admission is voluntarily, whether they are aware of legal consequences thereof and of consequences related to the indemnity claim, including payment of criminal proceeding costs.

Once admission of guilt is assessed as admissible, the court moves to evidentiary hearings, which are significantly rationalized, i.e. streamlined. Namely, in this stage of proceedings, only evidence necessary for setting the criminal sanction is presented and the focus is shifted from circumstances concerning defendant's guilt or criminal liability, including establishment of facts about the criminal offence committed, towards circumstances concerning type and scope of the criminal sanction, in compliance with provisions from the Criminal Code on weighting criminal sanctions.

Following presentation and reconsideration of evidence necessary for setting the criminal sanction, the court delivers a ruling with elements of conviction, which cannot be appealed by the defendant on the grounds of erroneous or incomplete establishment of facts.

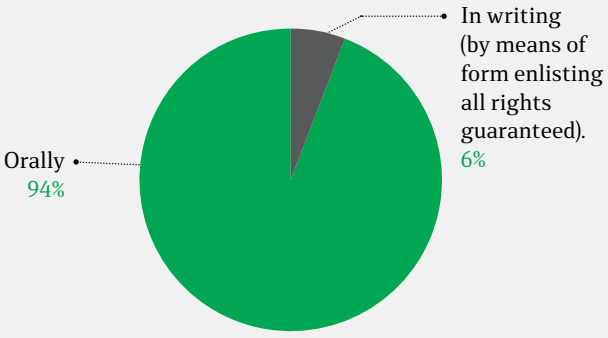
13.5. COMMENTS ON PLEA-BARGAINING IN PRACTICE

Despite initial scepticism as regards use of this instrument within the criminal justice system, it can be concluded that slowly, but certainly, plea-bargaining finds its practical use in criminal cases. Namely, in the first six months of implementation since the new LCP entered in effect, at the Basic Court Skopje 1 plea-bargaining was motioned and pursued in total of 54 cases. In 46 cases, plea-bargaining motions were made at the stage of investigation activities, while 7 court rulings had been deliv-

ered on the basis of guilty pleas made at court hearings. Having in mind workload and significance of the Basic Court Skopje 1, as one of the most overburdened courts in Macedonia, and considering the features of this process, it can be rightfully concluded that plea-bargaining is applied in practice and is not merely a décor in LCP[193].

On the other hand, despite its short implementation record, particular shortcomings have been identified in implementation of plea-bargaining, primarily in terms of motions for plea-bargaining. According to LCP, right to motion plea-bargaining enjoyed by persons deprived of liberty should be treated as integral part of their defence rights and they should be immediately advised thereof. Survey results show that in most cases right to motion plea-bargaining has been respected by means of advising persons deprived of liberty of this right orally.

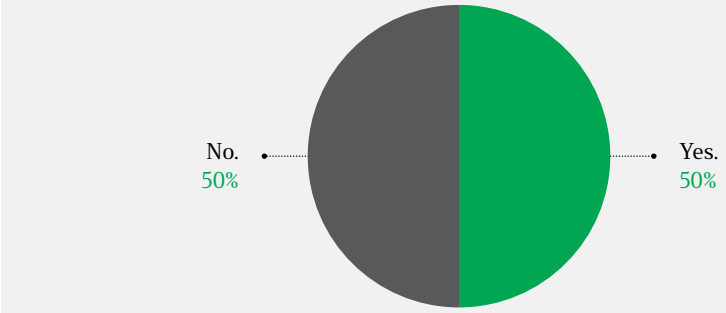
How are persons deprived of liberty advised of their right to motion plea-bargaining?



On the other hand, although the right to plea-bargaining should be immediately communicated, survey results show that, in half of cases, persons deprived of liberty have not been advised thereof. On this account, we believe that this right should be enlisted in the letter of rights to be submitted in written to all persons deprived of liberty.

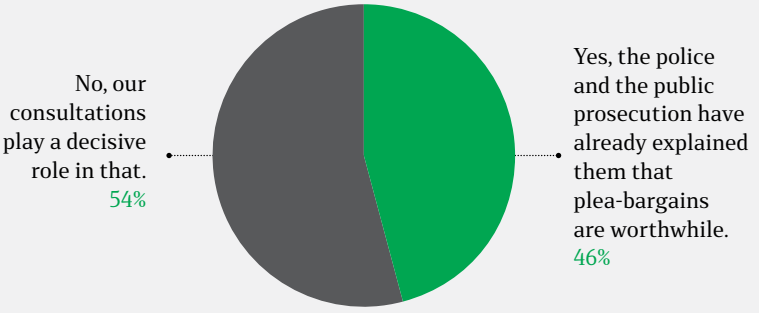
193 In Serbia, plea-bargaining is available from 2010, and by November 2013, a total of 123 settlements have been submitted. See: Report of the Department on Organized Crime and Department on War Crimes at the Higher Court in Belgrade.

At the first deprivation of liberty, are persons are advised of their right to enter plea-bargaining with the public prosecutor?



Be that as it may, evident is the trend on high share of plea-bargaining motions made by the public prosecution in the course of investigations (as high as 46%). In this regard, especially sensitive is the period from suspect's deprivation of liberty until his/her attorney's arrival at the police station. Concerns are raised with the fact that when notifying persons deprived of liberty of their rights, which are under reasonable suspicion of having committed criminal offence, or when the investigation order is adopted, the police and the public prosecutor are already advising them about their right to plea-bargaining in the absence of their attorney, by "serving" them a story that acceptance of such settlement is always in their favour.

Do you have the impression that, in the course of advising suspects about their right to plea-bargaining, they have been influenced in terms of their decision to enter plea-bargaining?

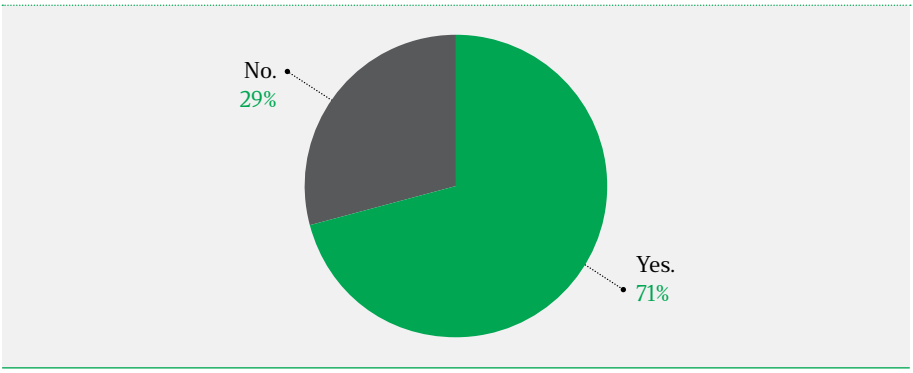


Notification and encouragement of suspects to enter plea-bargaining are pursued to the extreme and in some cases the public prosecutor

promises them exemption from detention order provided they agree to plea-bargaining about type and scope of pending criminal sanctions.

Particularly worrying are information that plea-bargaining has already been initiated prior to defence attorney's arrival, although LCP explicitly stipulates that defence attorneys must be present throughout the entire process of plea-bargaining.

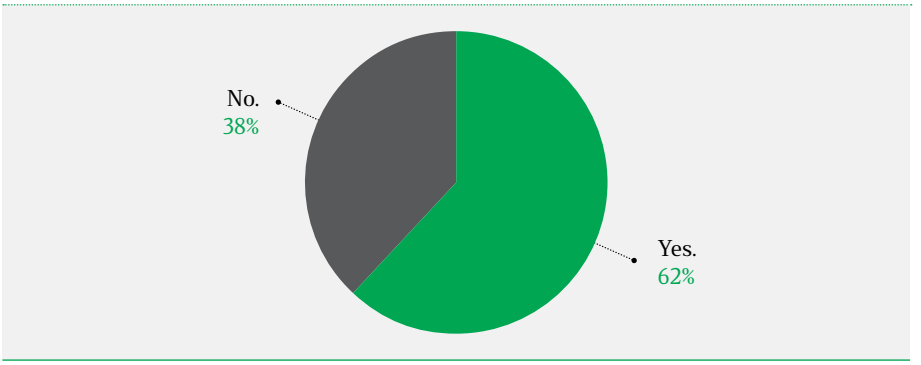
Were you present throughout the plea-bargaining process or was this process initiated before your arrival?



Such practices on the part of the prosecution aimed at stimulating plea-bargaining processes can be erroneously interpreted by the public as the prosecution's preoccupation with finding "scapegoats", instead of being committed to prosecute criminal offenders and fight against crime. Moreover, these practices raise concerns in terms of possible abuse of official duties on the part of public prosecutors in cases when the facts in the criminal case have not been fully clarified and by doing so they unjustifiably unburden themselves of professional duties to the detriment of defendant's rights, as they have not been given chance to consult with their attorney in private.

In this regard, LCP should include a provision whereby suspects, prior to deciding whether to collaborate with the public prosecutor, should be given the opportunity to consult with their defence attorney in private. This seems to be necessary, especially having in mind survey results according to which as high as 38% of respondents reported that they have not been given the opportunity to consult with their clients in private prior to moving to plea-bargaining.

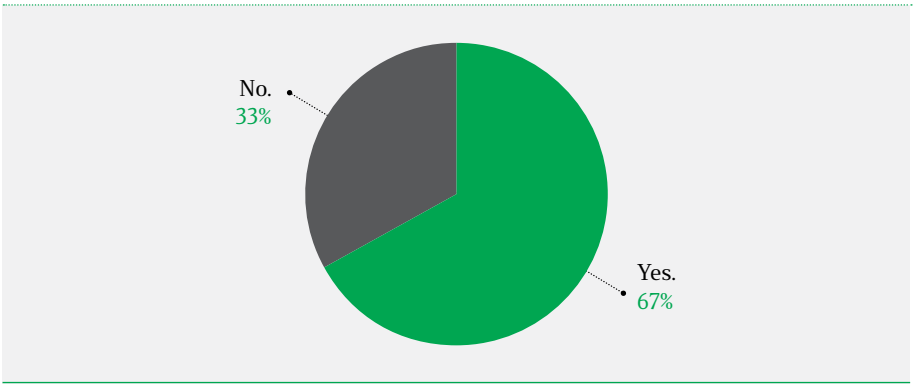
Were you given the opportunity to consult with your client about the right to plea-bargaining before initiation of plea-bargaining?



Such practices are contrary to principles underlying plea-bargaining processes, knowing that their main goal is to reduce robust court hearings, but only in cases of clearly established facts about criminal offences, and not in cases when the public prosecutor does not have all the facts or has not collected compelling evidence against criminal offenders. In other words, the prosecution should resort to this institute only in cases it can prove defendants' guilt at public hearing in front of the court. Plea-bargaining should not be perceived only as tool for fast and simple unburdening of the public prosecution from its workload.

On this account, the public prosecutor must dispose with evidence supporting the reasonable doubt that the person has committed the criminal offence and should grant them insight in evidence material. Restrictive stipulation of this obligation might put law enforcement authorities at risk of disclosing evidence to suspects in the early stages of criminal proceedings, with the person ultimately rejecting to enter plea-bargaining. It goes without saying that, in such cases, the investigation could be jeopardized. Therefore, the public prosecutors should not move to plea-bargaining without having secured compelling evidence supporting the reasonable doubt that the suspect has committed the criminal offence which is subject of plea-bargaining. Once the plea-bargaining process is completed, insight in relevant records thereof should be granted only as control mechanism for protection of suspects from unreasonable accusations.

In practice, were you granted insight in case records and evidence prior to deciding to move to plea-bargaining?



Comparative studies and experiences in the United States in particular[194], provide the conclusion that plea-bargaining motions in the course of investigation activities are made predominantly by suspects and their defence attorneys. Namely, the prosecution's insistence to move to plea-bargaining at this early stage is interpreted as unpreparedness and lack of evidence in support of criminal charges raised.

Worrying is also the fact that, in some cases, especially in cases concerning organized crime and corruption, the public prosecutors are prone to using detention orders as "bargaining chips". It goes without saying that such practices are unlawful. In specific circumstances, suspects' readiness to cooperate with law enforcement agencies should render detention orders unnecessary and pointless. Moreover, detention orders should not be reconsidered or initiated under these circumstances, including in the course of draft-settlement review and in the course of delivering the court ruling until it becomes enforceable. Court rulings based on approved draft-settlements are immediately enforceable, with the convicted persons being ordered to serve their sentence, instead of issuing detention orders until they start serving the sentence.

Another shortcoming of plea-bargaining processes is identified in the inequitable position of persons who have agreed to plea-bargaining and of those who have decided to move to regular criminal proceedings, in terms of type and scope of criminal sanctions imposed. Notably, in cases of plea-bargaining motioned in the course of investigation activities, relevance and fairness of criminal sanction's type and scope is assessed by pre-trial judges. Concerns are raised with the fact that pre-trial judges are

194 See: S. Saltzburg and D. Capra, "American Criminal Procedure", West Group, St, Paul, Minn., 2000, pp. 966, etc.

often inexperienced in delivering rulings, and therefore defendants who have agreed to plea-bargaining are issued stricter sanctions compared to those they would have been issued under regular proceedings.

In order to address this inconsistency, LCP should stipulate an obligation for the prosecution to present evidence in favour of the draft-settlement reached, and adoption of guidelines/manual instead of the rulebook on assessing this type of evidence.[195] Such manual would be helpful for pre-trial judges tasked to assess whether the proposed sanction corresponds - in type and scope – to the sanctioning policy.[196]

Another possibility is to introduce mechanism on generating average sanctions in the Automated Court Case Management Information System (ACCMIS), i.e. generation of average sanctions on the basis of similar court rulings taken by the court in question or other courts in the Republic of Macedonia. This would enable alignment of sanctioning policies pursued by the basic courts. In that, this system must be regularly and extensively "fed" with relevant data, including court rulings taken in the past, when possible, in order to make this database credible for generation of sanction proposals based on relevant statistics.

It should be noted that plea-bargaining has not been used at the stage of indictment review. Having in mind relevant statistics according to which more than 95% of indictments have been approved by the indictment review judge or court council, the small number of cases in which plea-bargaining is motioned in this stage of criminal proceedings is understandable.

Be that as it may, it seems that defendants should utilize, to a greater extent, plea-bargaining possibilities after the indictment act is motioned by the public prosecutor and plead guilty in this stage of criminal proceedings, if they are.

Absence of court rulings delivered in this stage of criminal proceedings and based on draft-settlements reached following defendants' admission of guilt is indicative of insufficient attention and interest on the part of courts and parties in criminal proceedings for this important instrument and filter of cases moving to court trials.

195 In this sense, we believe that the Rulebook adopted by the President of the Supreme Court of the Republic of Macedonia, in compliance with the obligation stipulated under the Criminal Code, constitutes restriction and violation of the constitutional principle whereby judges are entitled to discretionary assessment of evidence.

196 See: United States Sentencing Commission, Guidelines Manual (available at: http://www.ussc.gov/guidelines-manual/guidelines-manual)

Concerns are raised by the fact that, at this stage of criminal proceedings, the indictment review judge or court council is presented only with draft-list of evidence supporting the criminal charges and, therefore, once they are presented with the draft-settlement reached, courts do not have sufficient evidence on the basis of which they would make their review decision.

This means that LCP must emphasize the fact that submitted draft-statements should be based on evidence and facts, especially having in mind the legality principle according to which the public prosecutor is obliged to thoroughly clarify facts in the criminal matter and prosecute perpetrators thereof.

As regards admission of guilt at court hearings, it should be noted that LCP distinguishes types of admissible evidence, i.e. courts are obliged to streamline evidentiary hearings by admitting and reconsidering only evidence concerning type and scope of criminal sanctions. Such theoretical distinction is not applied in practice, and we believe that LCP should be amended with a view to authorize courts to take independent decisions on admissible evidence necessary for delivering fair and righteous rulings, starting from the fact that the defendant's guilt has already been established.

Right to indemnity enjoyed by damaged parties can be a major factor of inhibition, especially having in mind, for example, the general guidelines for public prosecutors in Serbia where, when deciding whether to move to plea-bargaining, they must make due consideration of damaged parties' interests. Linking plea-bargaining with damaged party's interest is erroneous, knowing that public prosecution is primarily concerned with prosecution of criminal perpetrators and protection of public interests, and only later take into consideration damaged parties' interest. In that sense, we believe that, when deciding to initiate criminal prosecution or whether and how to bargain with defendants, the prosecution must give primacy to the public interest for prosecution and fight against crime, and later take into consideration defendants' interests in terms of their re-socialization, and finally, interests of damaged parties who are allowed to collect their indemnity claims by means of private lawsuits. Namely, court rulings in criminal cases are of great assistance to damage parties, as they are delivered instantly and enable them reasonable time to collect their indemnity claim by means of private lawsuits.

Finally, courts play a crucial role in ensuring proper application of plea-bargaining processes, as well as in protection of rights guaranteed to suspects and defendants. Actually, courts are obliged to assess wheth-

er admission of guilt has been made consciously, voluntarily and whether criminal sanctions proposed are fair and proportionate to the criminal offence. In this sense, when reviewing draft-settlements or guilty pleas made by defendants at court hearings, courts must be critical, astute and inclined to protection of rights enjoyed by persons being heard. This means that courts should be engaged and active in plea-bargaining processes by assessing and examining whether defendants have been "scapegoated" or have indeed committed the criminal offence they have been charged with and are therefore voluntarily and consciously agreeing to plea-bargaining, in order to avoid the unpleasant criminal proceedings.

Manners in which courts exercise their active role are practically unlimited. Hence, courts are authorized to address defendants with questions or request them to clarify particular facts. Only by pursuing such proactive approach, courts can prevent and eliminate possible abuses and malpractices, including erroneous application of legal provisions on plea-bargaining.

In order to achieve this goal, judges must rely on defence attorneys who should conduct in professional and honest manner with their clients and should not promise them something that is legally impossible, or act to the detriment of one client, for the purpose of earning favours for another.[197]

197 Practices whereby defence attorneys knowingly act to the detriment of one client for the purpose of attaining lower sanction for another client were heavily criticized in the research conducted in England. In that, it is believed that the Bar Standards Board within the Bar Council must prevent such abuse, which can serve as basis for establishment of criminal responsibility of defence attorneys. See: M. McConville, "Plea Bargaining: Ethics and Politics", Journal of Law and Society, Vol. 25, no. 4, 1998, pp. 570, etc.

14. USE OF MEASURES ON ENSURING DEFENDANTS' PRESENCE

One general provision from LCP stipulates an entire catalogue of measures on ensuring defendants' presence, and gives primacy to less strict measures, provided their application contributes to attainment of the goal for which they have been issued.

LCP stipulates use of following measures on ensuring presence: summons, precautionary measures, apprehension, deprivation of liberty, custody, bail, transient detention, home detention, and detention.[198] In addition to individual application of these measures, the legislator allows combination of measures, except in the case of the strictest measure ordered.

14.1. USE OF DETENTION ORDERS

It has been noted that among the catalogue of measures on ensuring defendants' presence courts attribute the greatest attention to detention orders. This means that court intake records make written notes only of detention orders, while in other cases relevant intake records do not duly note other measures on ensuring presence ordered. Such practices on the part of courts do not allow complete and comprehensive establishment of

198 In Macedonia, the legislator stipulated the following precautionary measures: prohibition to leave the temporary or permanent place of residence; ordering defendants to occasionally report to officials or competent state bodies; temporary confiscation of passport or other traveling documents, i.e. prohibition for passport or other travelling documents to be issued; temporary confiscation or prohibition for driving license to be issued; prohibition for frequenting particular location or area; restraining order and prohibition for contacting and communicating with certain persons; and prohibition for performing particular working activities linked to the criminal offense.

the frequency of orders issued for other measures. This approach can be justified, as detention orders are considered to be the strictest measure on ensuring presence and, therefore, domestic courts cannot be held at fault for attributing special importance thereto. Relevant remarks about these practices concern the fact that other measures on ensuring presence cannot be appropriately identified in court practices.[199]

When compared against the total number of active cases at the basic courts in the Republic of Macedonia, the conclusion is inferred that detention orders, as the strictest measure on ensuring defendant's presence, are not as frequently issued as initially perceived.

Table 4. Number of detainees

Jurisdiction of the Higher Public Prosecution	2011	2012
SKOPJE	365 **(55,5%)**	419 **(57,1%)**
BITOLA	127 **(19,3%)**	150 **(20,4%)**
STIP	68 **(10,3%)**	78 **(10,6%)**
GOSTIVAR	97 **(14,7%)**	86 **(11,7%)**
TOTAL	**657**	**733**

Hence, in 2011 the Basic Court Skopje 1 in Skopje, as the biggest court in the Republic of Macedonia, has issued detention orders in one tenth of all new cases, i.e. 352 detention orders among total of 3,930 new cases. Similar is the situation observed in terms of detention orders issued in the course of investigation activities, as only 140 among the total of 1,423 investigation cases involved detention orders.[200]

Be that as it may, general perception on use of detention orders is different in terms of type of criminal offences for which detention has been ordered. In that, analysis of more serious criminal offences provide a dramatically changed image due to the fact that detention orders appear to be the dominant and only measure on ensuring defendant's presence in these cases. In particular, this has been noted under criminal

199 Concerns are raised with the fact that such practices prevent complete insight and oversight of courts' use of other measures. Moreover, courts must change their approach in the light of the new legal provisions that guarantee combination of less strict measures on ensuring defendant's presence.

200 See: B. Misoski, "Protection of the Right to Bail as a Derived Human Right from The Article 5 of the ECHR in Macedonia", SEE-LAW NET: Networking of Lawyers in Advanced Teaching and Research of EU Law Post-Lisbon Outcome of the SEE Graduates EU Law Teaching & Research Academy Collection of Papers, Saarbrucken, Germany, 2013, pp. 157-158

proceedings led in front of the specialized department on organized crime and corruption, where almost all suspects or defendants, without any exceptions therefrom, have been issued detention orders with a view to secure their presence.[201]

Table 5. Number of detainees in cases falling under the jurisdiction of the Public Prosecution on Organized Crime and Corruption, in 2012 (data obtained from the Public Prosecution of the Republic of Macedonia)

DETAINEES IN CASES FALLING UNDER THE JURISDICTION OF THE BASIC PUBLIC PROSECUTION ON ORGANIZED CRIME AND CORRUPTION, IN 2012		
Total	**Detention**	**Home detention**
188	**181 (96,2%)**	**7 (3,7%)**

In these cases, visible is the trend on attributing greater weight to gravity of criminal offences, which courts apply as single criterion when deciding about the measure on ensuring defendant's presence, contrary to ECtHR practice. Namely, ECtHR has developed a firm position that use of measures on ensuring presence should not be related to gravity of criminal offences.[202] In other words, although the case may concern serious criminal offence, this circumstance should not be of only or crucial importance for courts, when deciding about the measure on ensuring presence. This argument is based on the fact that selection of measures on ensuring presence should primarily make due consideration of circumstances related to defendant's character, and only then take into account gravity of criminal offences.

In addition to gravity of criminal offences, which appears to be hidden ground for issuing detention orders, survey results show that in most cases grounds for detention orders also include flight risks, while possible evidence tampering and influencing witnesses is of smaller significance. It should be noted that the public's opinion also appears as hidden ground for issuing detention orders, notably because courts often make due

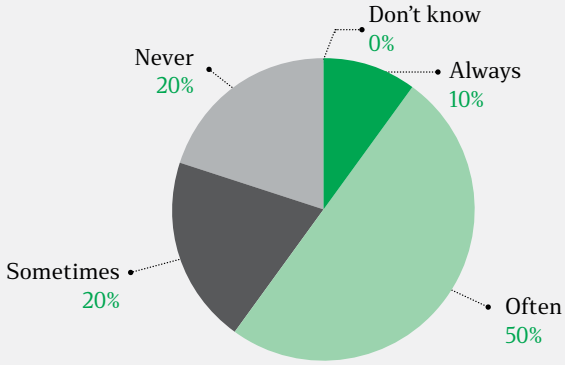
201 See: G. Buzarovska et al., "Pre-Trial Detention: National Practice and International Standards", OSCE, Skopje 2008, pp. 23-24

202 See: judgments in the cases of *Caballero v. UK*, paras. 18-23 (available at: http//hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58458), *Stögmüller v. Austria*, paras. 26-28 (available at: http//hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101358#{"fulltext"["Stögmüller"]}), or *Letellier v. France* (available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57678)

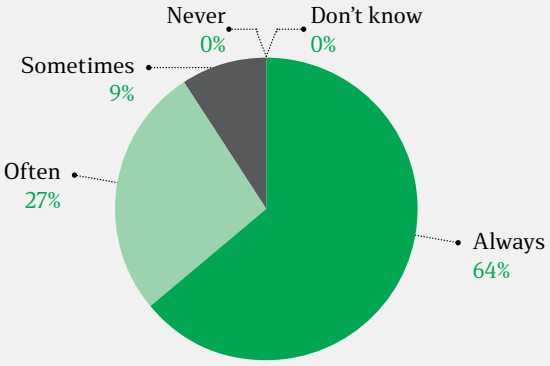
consideration of public perceptions about the case when deciding about detention.

Having in mind the public's interest in cases under which detention orders have been issued, the question is raised whether the legislator should reconsider introduction of this ground for issuance of detention orders under LCP. Nevertheless, such endeavour should not be pursued in the absence of comprehensive analysis.

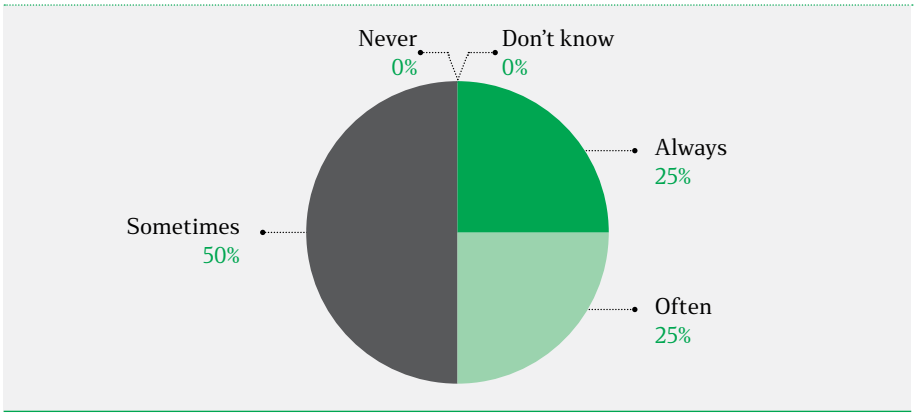
The public's opinion



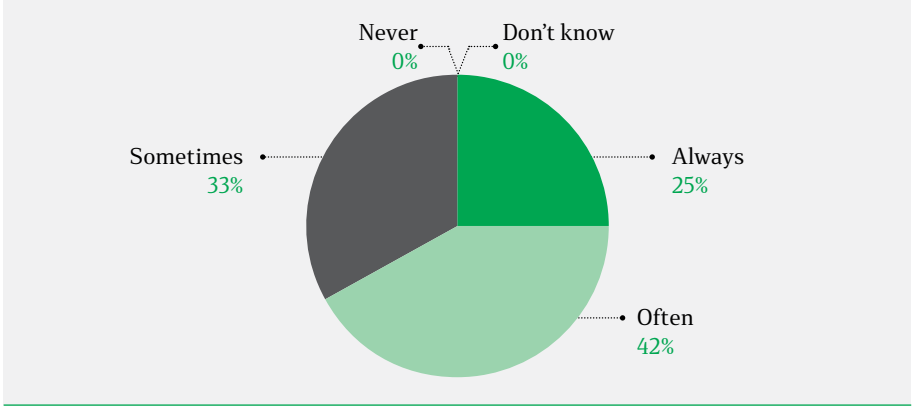
Flight risks



Possibility for evidence tampering



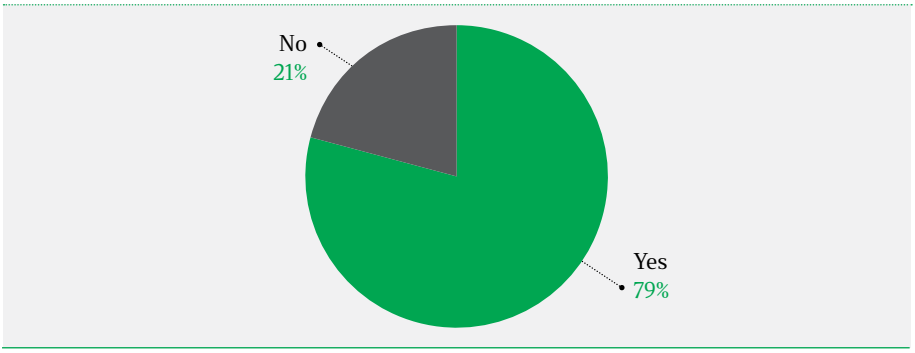
Possibility for influencing witnessess



Various reasons have been indicated for the need to apply a more restrictive approach to use of detention orders, most important being the fact that this measure significantly limits defence rights of suspects. Actually, in cases when persons are ordered detention, they cannot actively participate in criminal proceedings. Moreover, in most cases detainees perceive and experience detention orders as form of criminal sanction. On the other hand, aware of such perceptions, law enforcement authorities use detention to intimidate and often retaliate against defendants.

Additional arguments against use of detention orders include substandard conditions at detention facilities, as well as poor nutrition, overcrowded cells, absence of efficient socialization programme for detainees to make constructive use of time served in detention.

Do you encounter problems with material conditions at detention facilities (hygiene, cell, food, etc.)?



In this regard, there are two possible solutions to this problem. First and more expensive solution implies construction of new detention facilities that would improve material conditions in which detention is served. Second solution concerns use of detention orders only in exceptional cases, which should be accompanied with efforts on improving conditions for the reduced number of detainees.

With a view to improve the situation observed, courts need to introduce additional mechanisms on increased control and monitoring of detention orders, whereby detention should be ordered only in law-stipulated cases and as exception, whereas less strict measures on ensuring defendant's presence should be ordered in all other cases.

14.2. USE OF LESS STRICT MEASURES ON ENSURING PRESENCE

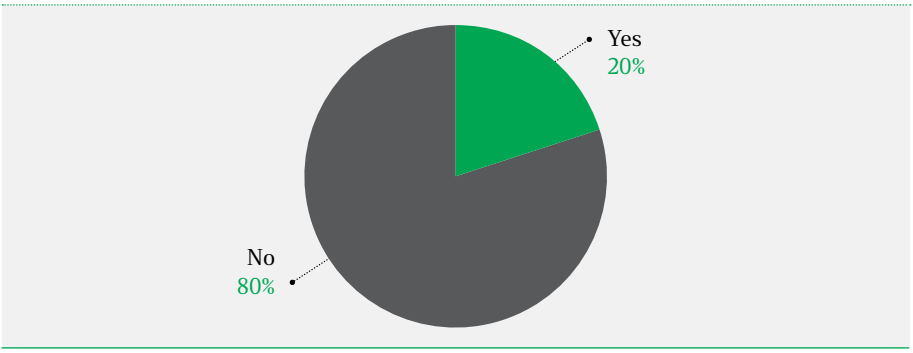
Application of less strict measures on ensuring presence is most common in cases of expired maximum period of detention, whereby detention orders are replaced with home detention.

Except for home detention which, in the course of 2012, was ordered for around 10% of the total number of detainees,[203] other measures on ensuing presence are characterized by low application in practice. In that, courts are not inclined to ordering other, less strict measures, with bail orders being the least common and home detention the most common measures.

203 See: 2012 Annual Report of the Public Prosecution of the Republic of Macedonia, pg. 12

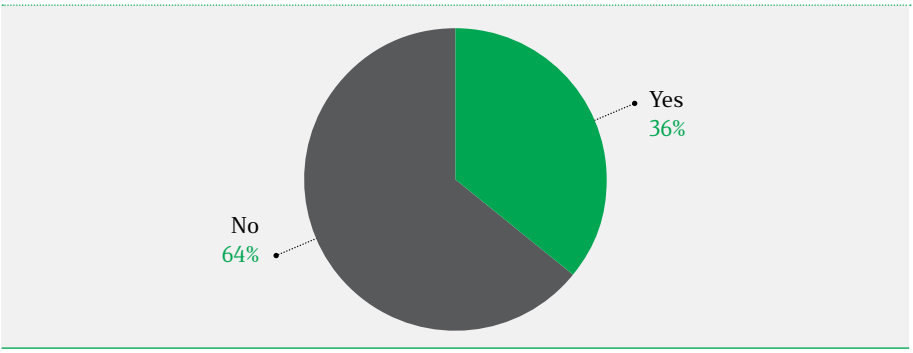
In that regard, it should be noted that in practice bail orders are not even reconsidered by participants in criminal proceedings and when proposed they act according to practices established by the old LCP, i.e. bail orders are only applied as replacement measure for detention orders.

In practice, did you often motion for bail orders?



Additional problem is identified in perceptions that when proposing less strict measures, courts do not make due consideration of evidence presented by defence attorneys and therefore the latter are discouraged to motion them.

In practice, are your motions for bail orders made due account of?



Reasons behind rare use of bail orders[204] on the part of courts in the Republic of Macedonia are related to several formal and practical problems.

204 For example, in the period 2000 - 2011, the criminal council at the biggest court in the Republic of Macedonia, i.e. Basic Court Skopje 1, has replaced detention order with bail for 75 detainees only. For more information, see: G. Buzarovska and B. Misoski, "Bail Order as Measure on Ensuring Presence: Legislative and Practical Aspects", Fourth Skopje–Zagreb Legal Colloquium, Faculty of Law, Skopje, 2013, pp. 151-172

14.3. PROPOSALS FOR INCREASED USE OF LESS STRICT MEASURES ON ENSURING PRESENCE INSTEAD OF DETENTION ORDERS

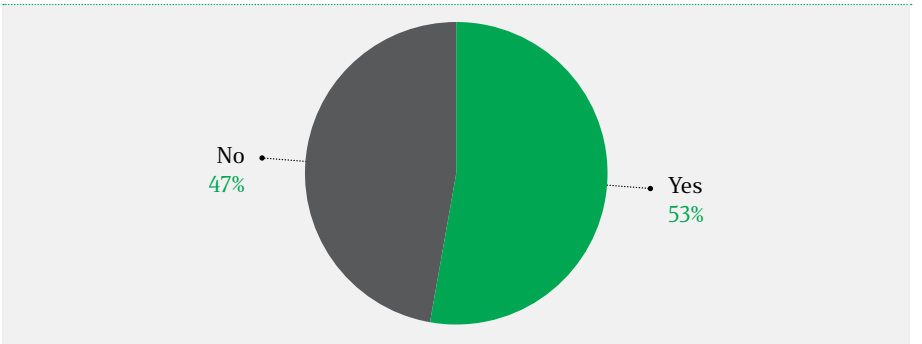
Except with a view to overcome major obstacles in terms of ***bail orders***, which were primarily identified in provisions from the old LCP where this measure was stipulated as replacement for detention orders, but only in cases when detention has been ordered due to flight risks, it seem that this measure is greatly undermined in practice.

In that regard, the new LCP makes great, maybe tectonic steps in promoting use of this measure by introducing advanced legal solutions. Most important change under the new LCP is identified in stipulation of possibilities for individual issuance of bail orders, nonetheless on the same two grounds for which detention orders are issued (LCP: art. 150). This legal provision allows the courts to opt for bail orders independently from the detention orders, as the strictest measure, in cases of flight risks or pending threat for suspects and accused persons to complete criminal offences in progress, repeat criminal offences or commit criminal offences they have threatened with.

Another solution that should increase use of bail orders is possibility to issue additional precautionary measures as part of bail orders (LCP: art. 150, para. 5). This solution should enable courts to find the most adequate combination of individual measures on ensuring defendant's presence in the course of criminal proceedings, with minimum restriction of his/her freedom.

Nevertheless, it seems that practitioners are not fully aware of this opportunity, as survey data provide the conclusion that additional precautionary measures are rarely applied.

In practice, do courts issue additional precautonary measures in the bail order?



Possibility to change the amount of bail bonds in the course of criminal proceedings should improve application of bail orders (LCP: art. 151). The idea behind this legal solution is to increase use of bail orders by making them more flexible to changed property or financial status of bail-guarantors or defendants. This means that when the financial status of these persons has changed or when new evidence has been identified in the course of criminal proceedings that can affect type and amount of bail bonds, courts are not obliged to revoke this measure, but are at liberty to reassess and set new bail bond.

Finally, most significant changes made in regard to this measure are identified in precise legal provisions on exonerating and/or forfeiting bail bonds (LCP: art. 152 and 153). In that, bail bonds are exonerated only in two cases with one and the same outcome: completion of criminal proceedings. Actually, bail bonds are exonerated in cases when courts have delivered acquitting rulings, when criminal proceedings have been discontinued or when indictments have been assessed as inadmissible, as well as in cases when courts have issued imprisonment sentences, wherein bail bonds are exonerated at the moment the defendants start serving their sentence.

In all other cases, bail bonds are forfeited, which provides an additional argument in favour of this measure's seriousness and restrictiveness. This means that legal provisions on forfeiture included in LCP provide guarantees that this measure cannot be treated lightly in practice, especially for the purpose of buying time on the part of defendants and for manipulating its goal. In that, bail bonds provide the courts with mechanism on sanctioning defendant's abuse of the trust they have been given to defend themselves from liberty.

Finally, legal provisions on bail orders from the LCP clearly indicate the court body competent to issue such orders (LCP: art. 154).

However, despite such legislative improvements, reasons behind non-application of bail orders are broadly present and obvious. Notably, clear is that at the very begging of criminal proceedings courts do not have sufficient information about defendant's character nor in-depth knowledge about their family status, social status, or factual financial status that would allow them to adopt adequate measures on ensuring their presence throughout the criminal proceedings. In other words, courts do not have sufficient data on defendants' personality and social milieu.

Absence of mechanisms that would assist courts in establishing and controlling personal and material status of suspects or defendants when deciding on these measures and later in the course of criminal proceedings

is identified as an important limiting factor in terms of greater issuance of bail orders and other less strict measures on ensuring presence.

On this account, evident are practices whereby courts, in cases of unavailable information about suspects and defendants for which bail is ordered is the course during criminal proceedings, repeat arguments from previously adopted orders for measures on ensuring presence or arguments used for extending detention. This practice has been sanctioned by ECtHR in its judgment in the case of *Vasilkoski and Others,*[205] when it has established violation of detainees' rights on the account that the domestic court, when assessing grounds for detention order, had failed to give specific reasons justifying extension of detention.

In order to mitigate this situation, courts need to have access to databases kept by different state bodies and concerning private citizens. In that, more frequent use of bail orders necessitates cooperation with MoI, the Central Register of the Republic of Macedonia, the Real Estate Cadastre and the Credit Bureau, whereby access to these databases granted to the courts would enable them greater insight in the character and social milieu of persons against which they have to take decisions on approving bail orders. Finally, in order to enable courts adequate information, they need to be assigned a special service tasked with collection and submission of such information, following the example set by similar services in England and the United States,[206] and can be, in terms of cost-effectiveness, merged with judges for execution of sanctions who, in addition to their primary duties, would also be responsible for developing profiles of defendants.

Additional problem in use of bail orders and ***precautionary*** measures is inability for efficient control and monitoring of adequate application thereof and possible manipulation of these measures. On this account, a special agency or department should be established within MoI exclusively tasked with monitoring issuance of these measures, instead of burdening courts or MoI with such duties, and by ensuring that police officers would not been given full insight in terms of matters that are subject of such oversights. In other words, when performing oversight, competent agencies are obliged to closely coordinate with the authority

205 Available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101358#{"itemid":["001-101358"]}

206 See: A. Hucklesby, "Bail Support Schemes for Adults", *The Policy Press*, 2011, pg. 20; M. VanNostrand and G. Keebler, "Pre-Trial Risk Assessment in the Federal Court", Federal Probation, Journal of Correctional Philosophy and Practice, Vol. 73, no. 2, 2009 (available at: http://www.uscourts.gov/viewer.aspx?doc=/uscourts/FederalCourts/PPS/Fedprob/2009-09/index.html)

issuing the measure that is being supervised, for the purpose of enabling true and effective oversight.

In this sense, additional solution to this problem is identified in introduction of new and modern precautionary measures, such as electronic monitoring,[207] mandatory addiction rehabilitation or anger management treatment, establishment of so-called *"halfway houses",*[208] as well as different forms of assistance, group re-socialization, etc. However, previously applied measures should be revived as well, in particular by increased interaction of actions taken by governmental bodies and civil society sector, including allocation of adequate financial resources for proper use of precautionary measures in the Republic of Macedonia.

Additional practical problems also include uncertain or impossible property seizure in cases of forfeited bail bonds, and limited possibilities for putting this property to use. Due to these facts, courts often perceive bail bonds, i.e. property seized as result of forfeited bail bonds, as *"inutile property"*, i.e. property that cannot be put to another use. In this sense, the Agency for Management of Seized Property needs to demonstrate expedite and active performance, while the relevant legislation should introduce a possibility for awarding tenancy over seized property to socially underprivileged persons or state bodies.[209] Also, property from forfeited bail bonds can also be used as securities for above-indicated precautionary measures.

Finally, legal provisions stipulating bail bond exoneration only upon court rulings that include imprisonment sentence could create problems in practice. Therefore, efforts are need to bridge the legal gap in cases when less strict sanctions have been issued, such as fines or alternative sanctions, in particular by introducing a possibility under LCP for bail bonds provided in cases of less strict sanctions to be exonerated once court rulings become enforceable, which is in favour of convicted persons. This is in line with accepting the rule *in dubio pro reo*, i.e. court's obligation

207 For more information on this measure's advantages, see: M. Nellis, "The Electronic Monitoring of Offenders in England and Wales: Recent Developments and Future Prospects", *British Journal of Criminology*, Vol. 31, No. 2, 1991, pg. 167

208 See: M. Dhami, "Conditional Bail Decision Making in the Magistrates' Court", *The Howard Journal*, 2003, Vol. 43, no. 1, pp. 27 and 39; A. Hucklesby, "Police Bail and the Use of Conditions", *Criminology and Criminal Justice*, 2001, 1, pp. 441 and 452

209 Similar as the case law in Italy, see: B. Vettori, V. Kambovski and B. Misoski, "Implementing Confiscation of Proceeds of Crime", Practitioners' Manual, OSCE, Skopje 2011, pg. 24-25, as well as B. Vettori, "Tough on Criminal Wealth. Exploring the Practice of Proceeds from Crime Confiscation in the EU", Doodrecht, Springer, 2006, pg. 79-83.

to accept more lenient measure for convicted persons, especially having in mind the fact that sometimes they need to use funds provided as bail bond to settle the fine imposed or compensate damages caused once their court ruling becomes enforceable.

As regards other measures on ensuring defendant's presence, evident is that the new LCP has eliminated to a great extent common inconsistencies in practice concerning deprivation of liberty and detention orders.

Thus, the new LCP includes clear provisions on use of ***transition detention***, and further clarifies proceedings on detainees' intake and record-keeping. With a view to improve protection of detainees' rights, LCP introduces a special police body tasked with intake of these persons, i.e. custody officers.

However, custody officers are neither sufficiently trained nor do they have sufficient knowledge that would enable them to act as true guarantors of rights enjoyed by persons deprived of liberty. Notably, more common are contrary practices whereby custody officers cover malpractices of police officers, i.e. provide minimum control and correction of police officers' behaviour when implementing these measures, instead of being true guardians of rights enjoyed by persons deprived of liberty. Therefore, specific standards and training for custody officers need to be introduced for the purpose of preventing possible violations of rights enjoyed by persons deprived of liberty, including establishment of mechanism on custody officers' professional conduct that would limit possible violations.

In practice, problems are identified also in regard to application of the most popular "lees strict" measure on ensuring presence: ***home detention***. Despite the fact that from its introduction in LCP, this measure is more frequently used, this situation is not a result of proper approach to its application, but implies erroneous use of home detention orders. Namely, home detention is more frequently used in cases when law-stipulated maximum periods of detention are expiring and in absence of grounds for issuing detention orders and is, therefore, used as substitute for detention orders.[210]

210 Reasoning behind such practices is straightforward: one day in detention or home detention is equal to one day imprisonment. In that, the persons against whom criminal proceedings are led have double benefit in cases when it is certain that they will be sanctioned with an imprisonment sentence. Namely, time spent in home detention in the course of criminal proceedings will be counted as effective part of the enforceable sentence, but in reality the persons enjoy the comfort of their home, which is perceived as justice evasion. On the one hand, this practice has added value for the courts, as the persons charged with criminal offence are present, i.e. the courts apply a relatively re-

Reasons behind this practice are identified in the fact that LCP does not anticipate additional formal criteria on use of home detention. In comparative law, reasons behind the use of home detention are closely related to legal grounds enlisted in the Criminal Code, such as serious or chronic illness, old age or pregnancy.

On this account, we believe it is necessary for LCP to include these additional requirements and thereby contribute to reduced use of home detention and increased use of bail orders and less strict measures on ensuring presence.

strictive measure in the fact that MoI could coerce these persons not to leave their home, but on the other hand, courts have sufficient guarantees in cases of insufficient evidence for issuing detention orders.

15. CONCLUSIONS AND RECOMMENDATIONS

- This research study confirmed the starting assumptions that domestic law and practice are aligned with European standards on fair trial and defence rights. Be that as it may, efforts are needed to promote mechanism that will guarantee exercise of these rights in practice and will render them real and efficient, instead of theoretical and illusory. Comparative studies provide the conclusion that this is not a simple task, but important. In this regard, Macedonia can learn a lot from comparative law and practice.

- Statistics and analyses show that the police have factual monopoly over investigations, and are key factor in the criminal justice system, especially in establishing whether and who is responsible for criminal offences. Large majority of perpetrators have never been discovered, while almost all reported or known perpetrators are later charged and convicted.

- Inferior status of the public prosecution and the courts within the criminal justice system, including their failure to properly protect lawfulness and legality, as well as rights and freedoms of defendants, brings under question their legitimacy, which is mainly due to their insufficient human and institutional capacity, but also serious problems in terms of autonomy and independence from the executive branch of government.

- Establishment of investigation departments at the pubic prosecution is an important requirement with a view to speed investigations, overcome the police's monopoly over investigations and address hierarchical dualism of the criminal police.

- Analysis of official statistics provides the conclusion that fight against crime must start with establishment of statistical and

other instruments that would enable precise image on crime rate, state-of-affairs and trends, as well as systemic and operational weaknesses in the criminal justice system.

» Except in cases where conspiracy is of crucial importance for data collection on most serious forms of criminal offences, suspects should be duly notified of investigation orders, thereby allowing them adequate and sufficient chance to defend themselves against criminal offences they have been charged with.

» In practice, the right to contact and counsel with defence attorney prior to and during the first interrogation is completely dysfunctional. Mechanism should be in place to allow easier access to attorneys, in particular by establishing a list of on-duty attorneys, whose services will be paid by the state. Bar Association of the Republic of Macedonia has an important role in this regard, while costs related to engagement of on-duty attorneys should fall on the burden of the Budget of RM.

» LCP must include a provision whereby suspects cannot be interrogated outside the police station, except in emergency situations when delayed interrogation might imply particular risks, such as threats to life or property.

» Suspects must be given the opportunity to consult with defence attorneys in private, prior to or during the interrogation. For that purpose, all police stations and the public prosecution need to secure separate premises for consultations with defence attorneys, as minimum precondition for confidentiality of communications.

» In the course of police- and prosecution-led proceedings, courts should not be allowed to appoint official defence attorney and defence attorney for indigent people. Instead, this should be done be the law enforcement authority leading the proceedings, i.e. the police or the public prosecution. Relevant legal provisions on this matter have been uncritically copy-pasted from the old LCP which implied dominant role of courts in pre-trial proceedings. Moreover, they are not compliant with the new model of criminal proceedings and are utterly impractical, and therefore they will negatively affect the right of access to attorney, due to which the said legal provisions must be revised.

- Technical conditions must be created for implementation of LCP provisions stipulating that the public prosecutor and the Ombudsman should have unconditional and direct insight in MoI's database on persons deprived of liberty and in police custody.

- An obligation should be introduced on advising suspects of their right to free assistance from attorneys, which should be enlisted in the letter of rights.

- Access to defence attorney for indigent people must be secured in all critical stages of criminal proceedings led against these persons, starting from their interrogation at the police.

- Financial criteria on eligibility of indigent people for free defence attorney need to be simplified, following the examples set by France and other states in Europe.

- Courts must be entrusted with relevant control in terms of adequacy and expertise provided by official defence attorneys. These attorneys are paid by the state, but their reimbursement needs to be fair, in order to stimulate professional and effective conduct.

- Increased engagement of attorneys for the purpose of representing defendants under reformed criminal proceedings has serious financial implications. Therefore, due consideration should be made of the possibility to establish a system of public attorneys, as well as greater promotion of *pro bono* work.

- Efforts made by the Bar Association of the Republic of Macedonia aimed at making a contribution to free legal aid by means of *pro bono* work must be supported, as they are indicative of affirmative *pro bono* policy and commitment to this project on the part of their leadership. In this respect, Macedonia can follow the examples set by bar associations in other countries concerning stipulation of desirable minimum number of hours spent on *pro bono* work for all practicing attorneys.

- Defence attorneys should be entitled to inspect conditions at custody premises and should be given access to facilities where detainees are held. By doing so, defence attorneys will be given greater role and, in turn, conditions at custody premises and investigation

prisons will be improved. Moreover, this will result in significantly reduced possibilities for malpractices and ill-treatment.

» Results of medical examinations and relevant statements provided by suspects complaining about police ill-treatment should be recorded in written and should be made available to persons in police custody and their defence attorney.

» Judges residing on legality and lawfulness of arrests and other actions or measures taken against suspects must hear in them in person, including all people involved in alleged police ill-treatment, and must gather all relevant evidence.

» Although, in normative terms, it seems that legal provisions governing defendants' right to information about their rights are in compliance with international standards, the police do not comply with these obligations.

» Right to information about procedural rights should not be reduced to declarative commitments, i.e. law enforcement authorities must routinely advise persons of their rights and explain meaning thereof.

» It is important to develop standardized forms for advising defendants of their rights in clear and understandable manner. This could be pursued by including provisions on so-called "*letter of rights*" in LCP, formulated in compliance with templates provided under the EU Directive on the Right to Information in Criminal Proceedings.

» Efficient mechanism should be established for verification that suspects are advised of their rights. Concerns are raised with the fact that law enforcement authorities do not verify whether suspects truly understand their rights. Therefore, it is of utmost importance to take all reasonable steps to ensure that suspects have truly understood their defence rights.

» Having in mind the fact that the police and the public prosecution have resources and are competent to conduct investigations and gather evidence, it is of critical importance for the defence to be given insight in evidence they have collected, both in terms of timing and scope of insight granted.

- Although legal provisions in effect stipulate that the public prosecutor is obliged to present defendants with evidence gathered against them, including evidence that might be in their favour, in practice the prosecution has discretion to decide which evidence will be included in case records. Therefore, obligation of public prosecutors to disclose all evidence relevant in the case needs to be strengthened.

- Efforts are needed to strengthen procedural defence rights, especially by means of normative provisions on the right to insight in case records and right to presence at investigation activities, as well as to strengthen courts' oversight competences in the course of investigation activities, especially for the purpose of guaranteeing respect for defendants' freedoms and rights and for the purpose of avoiding errors in this stage of proceedings.

- Opinions and manner of conduct demonstrated by the police and the public prosecution should not be aimed at limiting the defence's access to case records or preventing the defence to participate in investigation activities.

- Stronger guarantees are needed to ensure that illegally gathered evidence will be removed from case records, i.e. to ensure that statements given by defendants who have not been advised of their rights prior to being interrogated are not taken into consideration.

- Efforts are needed to ensure practical enforcement of legal provisions governing defence investigations and mechanisms should be established on strengthening the defence's possibility to influence course of investigation activities by taking actions stipulated under LCP.

- Training system for translators/interpreters should be established for the purpose of complying with the obligation on ensuring accurate translation and interpretation. This system should focus on general practices in translation and interpretation, and specialized practice of the domestic legal system. On the account of importance assigned to quality assurance, training standards should be developed and accredited by an independent entity. Accreditation/certification of translators/interpreters should be regularly renewed in the light of maintaining skills and continuous professional development.

- Grounds for appeals enlisted in LCP should only concern violation of defendants' right to translation in cases when they do not understand the language used in criminal proceedings, as an important violation of procedural rights, and not include any violation of person's right to use his/her language in criminal proceedings, which should be liable to sanctions, but only as violation of political rights.

- While LCP explicitly stipulated the right to remain silent and relevant legal solutions do not allow judges to infer unfavourable conclusions on this basis, i.e. to establish the factual situation and the guilt on the basis of their silence, in practice defendants' silence is made due consideration of and is interpreted as "aggravating circumstance" both, when delivering the ruling and when issuing detention orders. In addition, courts negatively assess statements given at court hearings by defendants who remained silent during the investigation, believing that at that time they had been hiding something.

- Trial in absence should be reduced to exception. In that regard, courts should insist on locating persons who are allegedly unavailable to be tried, requesting the competent authorities to make their best effort, whereas the law or court practice should provide clear definition of actually important reasons for allowing trial in absence.

- Defendants must be given adequate and sufficient chance to contest evidence against them. In that regard, the defence must have an honest chance to cross-examine witnesses proposed by the prosecution, and to propose defence witnesses under the same conditions enjoyed by the prosecution. Court hearing of anonymous witnesses must be an exception, and the court ruling cannot be based on such evidence. Practices on denying public access to court hearings of protected witnesses or evidence gathered by means of special investigative measures are illegal and should be abandoned.

- Suspects' right to be informed about their right to plea-bargaining with the public prosecutor should be respected at the moment these persons are advised of their rights, i.e. at the moment they are taken into custody. Right to plea-bargaining must be enlisted in the letter of rights, which should be presented to persons deprived of liberty in writing.

- Efforts are needed to encourage defendants and defence attorneys to motion plea-bargaining.

- Efforts are needed to discontinue practices on entering plea-bargaining with defendants (in any form) in the absence of their defence attorney, especially not in the period until defence attorney's arrival.

- Detention orders or other measures on ensuring defendant's presence should not be subject of bargaining between defendants, their defence attorney and the public prosecutor. Courts must find ways to control and limit such practices.

- Direct contacts between defendants and their defence attorney must be enabled before they decide whether to move to plea-bargaining or not.

- Defence attorneys should be given insight in all case records once the plea-bargaining process is completed, as a control mechanism for protecting defendants against ungrounded accusations, and consequently, against ungrounded rulings.

- Draft-Guidelines should be developed with a view to assist pre-trial judges in reviewing and delivering rulings on draft-settlements. Another possibility in this regard is to establish average sanctions, in type and scope, on the basis of ACCMIS, which would be beneficial for pre-trial judges in creating levelled sanctioning policies. This will avoid practices whereby stricter sanctions or dramatically more lenient sanctions are issued under plea-bargaining proceedings compared to those that would be issued under regular criminal proceedings.

- Importance of indictment review judges or court councils should be stressed, especially having in mind legal possibilities on delivering rulings at the stage of indictment review.

- Public prosecutor's decision to motion plea-bargaining with defendants should not depend on damaged party's will!

- Active role of courts in reviewing draft-settlements should be emphasized. Courts must demonstrate consciousness, astuteness, initiative and criticism when reviewing draft-settlements. Judges have an active and unlimited role in reviewing draft-settlements!

- Defence attorneys must conduct in professional and honest manner with their clients and they should not make ungrounded promises that cannot be realized, nor should they act to the detriment of one client and in favour of another.

- Courts should be encouraged to more frequently combine less strict measures on ensuring defendant's presence, in order to reduce or limit use of detention orders.

- Separate agency should be established or judges tasked with execution of sanctions should be obliged to generate reports on defendants' character, in order to enable courts complete insight in all circumstances about the person in question prior to ordering measures on ensuring their presence.

- All bodies tasked with data processing concerning private citizens of the Republic of Macedonia (Real Estate Cadastre, Credit Bureau, MoI, etc.) should be networked, in order to facilitate courts' access to data necessary for ordering measures on ensuring defendant's presence.

- Bail orders must be more frequently used and should be combined with other precautionary measures.

- Precautionary measures must be promoted and modernized, in particular by introducing contemporary measures, such as electronic monitoring, etc.

- Specific provisions should be adopted with a view to stipulate issuance of home detention by analogy to home prison, i.e. this measure should be applied only in cases of vulnerable groups of people who cannot endure detention conditions due to health problems or old age.

- Material conditions at detention facilities must be improved.

- Court practices whereby gravity of criminal offence appears as hidden ground for detention orders should be abandoned.

- Court practices whereby the public's opinion about the criminal offence appears as hidden ground for detention orders should be limited.

- Use of detention orders should be limited, especially in cases of organized crime and corruption in which detention is perceived as criminal sanction.

- Additional mechanism should be introduced with a view to increase control and oversight on use of detention orders, which will result in issuance of detention orders only in cases stipulated by law and as exception, while defendant's presence in other cases should be secured by means of less strict measures.

- Expert public should be informed about advantages of bail orders and of new provisions in LCP promoting greater use of bail orders compared to detention orders.

- Practices should be established on use of property seized in case of forfeited bail bonds for another purpose, in particular by refurbishment and awarding tenancy thereof to socially underprivileged groups of citizens or public institutions (schools, kindergartens, NGOs, etc.).

- Special standards and training of custody officers should be introduced with a view to prevent possible violation of rights enjoyed by persons deprived of liberty, including mechanisms on professional conduct of custody officers aimed at limiting these possible violations of rights enjoyed by persons deprived of liberty.

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