

Short Commentary

Evidence and Exclusionary Rule in Serbian Criminal Proceedings

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Belonging to European inquisitorial (or mixed) model of criminal procedure^[1], Serbian law traditionally was not familiar with the concept of burden of proof in an adversarial sense, meaning that the prosecutor is obliged to prove all charges beyond reasonable doubt.^[2] The reason for that was leading importance of the principle of truth, which implies an active judge who decides which facts are relevant and which evidence should be presented at trial and who actively examines the evidence in order to ‘discover the truth’.^[3] In such a model, it is therefore understandable that the burden of proof is not of leading importance, as the parties are not the ones who are trying to prove their respective statements by the presentation of their evidence. Instead, it was the court’s obligation to discover the truth and consequently investigative judge was one who collected exculpatory and inculpatory evidence, while the trial judge was one who decided which evidence will be presented at the trial, and produced such evidence.^[4]

1 - In Anglo-American literature, model of criminal proceeding implemented in the majority of European countries is labeled as inquisitorial, having in mind judicial domination at the trial, non-party investigation and principle of truth, while in Europe this label is not used since it reminds on middle-age inquisitorial proceeding. Instead of that European scholars name this model of proceeding as “mixed”. See: Mirjan Damaska, *Two Faces of Justice and State Authority*, (Yale University Press, 1986): 3, Christoph Safferling, *towards and international criminal procedure*, (Oxford University Press, 2001): 6-7, Kai Ambos K/2003/: “International Criminal Procedure: ‘Adversarial’, ‘Inquisitorial’ or Mixed?”, 3 *International Criminal Law Review* (2003): 2-4.

2 - In Serbian literature it was often stated that our criminal procedure is not familiar with the burden of proof in adversarial sense that obliges the prosecutor to prove all charges beyond reasonable doubt. See, e.g., Tihomir Vasiljević, *Sistem krivičnog procesnog prava SFRJ*, (Savremena administracija, Beograd, 1981): 311-312; Milan Škulić, *Krivično procesno pravo* (Pravni fakultet, Beograd, 2013): 188. It was even stated that burden of proof in “our criminal procedure is on the court, not on the parties” M. Grubač, *Krivično procesno pravo-uvod i opšti deo*, (Službeni glasnik, Beograd, 2004): 273.

3 - More about principle of truth in criminal procedure: John D. Jackson, “Theories of Truth Finding in Criminal Procedure: An Evolutionary Approach”, 10 *Cardozo L. Rev.* 475 (1989); Robert S. Summers, “Formal Legal Truth and Substantive Truth in Judicial Fact-Finding: Their Justified Divergence in Some Particular Cases”, *Cornell Law Faculty Publications*, Paper 1186. <http://scholarship.law.cornell.edu/facpub/1186> (accessed: 18.06.2017.), Thomas Weigend, “Is the Criminal Process about Truth?: A German Perspective”, 26 *Harvard Journal of Law & Public Policy*, 157 (2003), Thomas Weigend, “Should we Search for Truth and Who Should Do It?” *N.C. J. Int’l L. & Com. Reg.* Vol. 36, Num. 2, (2011).

4 - Contrary to that, “Within the common law tradition, legal truth is seen as something which is contingent, existing not so much as an objective absolute but as the most plausible or likely account, established after the elimination of doubt.” See: Jacqueline Hodgson, “Conceptions of the Trial in Inquisitorial and Adversarial Procedure”, in 2 *The Trial on Trial* 223, 225 (Antony Duff et al., eds., 2006): 225.

Departing from the principle of truth, the Criminal Procedure Code (CPC) of 2011 gives greater importance to the burden of proof, explicitly providing that ‘the burden of proof is on the prosecutor’ (Art. 15 para. 2 CPC). Instead of the former ‘truth’ model, the judge now examines evidence upon motions by the parties and the prosecutor is required to prove his/her indictment with ‘certainty’.^[5] Serbian law is not familiar with different standards of proof, such as ‘preponderance of evidence’, ‘beyond reasonable doubt’, ‘clear and convincing evidence’ etc.^[6] Instead, according to the Article 16 of the CPC, the judge can base his/her judgment only on such facts in which existence is certain. The standard of ‘judicial certainty’ however, could be compared with the common law standard ‘beyond reasonable doubt’. In case of doubt regarding the existence of certainty, the rule in *dubio pro reo* applies, which means that the judge should rule in favour of the defendant.^[7]

5 - For the ongoing debate in Serbia, regarding the departure of truth principle and introduction of adversarial trial, compare Goran P. Ilić et al., *Komentar Zakonika o krivičnom postupku*, (Službeni Glasnik, Beograd, 2012) (arguing that more active position of the parties will contribute to overall fairness of criminal proceedings as the parties will be more active and less dependent on the discretion of the former investigative judge) and Milan Škulić, G. Ilić, *Novi Zakonik o krivičnom postupku-Reforma u stilu jedan korak napred, dva koraka nazad*, (Beograd, 2012) (They believe that the defendant’s position in adversarial model will primarily depend on his financial capabilities to engage a good lawyer, and that public interest requires criminal verdicts to truthfully reflect reality, as opposed to verdicts based on the disposition of the parties).

6 - More about these standards, See e.g., Michale H. Graham, “Burden of Proof and Presumptions in Criminal Cases”, 16 *Criminal Law Bulletin*, 44, (2009) Stephen I. Dwyer, “Presumptions and Burden of Proof”, 21 *Loyola Law Review* (1975).

7 - M. Damaska believes that the idea of proof beyond a reasonable doubt has, at least potentially, a wider reach than the presumption of innocence and in *dubio pro reo* principle, because the latter relates only to those facts which concern the defendant’s guilt, while the former is related to many additional facts outside the guilt-innocence alternative (e.g., mitigating or aggravating circumstances, procedural facts, etc.). See: M. Damaska “Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study”, 121 *University of Pennsylvania Law Review*, (1972-1973): 541.

Facts relevant to criminal proceedings which must be proved at the trial are defined by the Criminal Procedure Code (CPC) as the facts that constitute the elements of a criminal offence and those relevant to the application of another provision of the criminal law or criminal procedure (i.e., facts relevant to the determination of a criminal sanction). While Serbian law is not familiar with the common law notion of judicial notice in the sense of a written statement of the facts that should be taken into consideration as already proved facts,^[8] the CPC explicitly prescribes that a matter of proof excludes the following: (i) generally known facts; (ii) facts that, in the opinion of the court, have already been proved; (iii) non-disputable facts or those confessed by the defendant; and (iv) facts agreed by the parties, provided that such agreement is not contrary to other pieces of evidence.^[9] The judge is solely responsible to decide whether a certain fact may be considered as generally known, already proved, non-disputable etc., and may refuse the parties' proposals to produce evidence about such facts. Other relevant facts may be established only by the investigatory measures explicitly enumerated and regulated by the CPC. Such measures are divided on ordinary investigative measures that can be used in the proceedings for all criminal offences and special investigative measures reserved only for most serious criminal offences, explicitly enumerated by CPC.

Ordinary Investigative Measures

Witness

A witness is defined as a person who can provide information about a criminal offence its perpetrator or other relevant circumstances.

Every person summoned as a witness is required to appear before the court and testify under oath. Unjustified failure to appear or refusal to testify may result in the arrest of the witness (following the warrant for compulsory appearance issued by the judge) and a fine.^[10]

Some categories of persons (so-called privileged witnesses) are excluded from the duty to testify.

Thus: A person required to keep a state, military or official secret may refuse to testify until a competent authority revokes the secrecy of information or releases the person from his/her obligation of secrecy;

A person required to keep a professional secret (lawyer, priest,

8 - About judicial notice See, e.g., Edmund M. Morgan "Judicial Notice", 57 Harvard Law Review (1944) K. C. Davis "Judicial Notice", 55 Columbia Law Review 7 (1955), J. T. McNaughton /1961/: "Judicial Notice- Excerpts Relating to the Morgan-Wigmore Controversy", 14 Vanderbilt Law Review 779 (1961), David M. Paciocco "Judicial Notice in Criminal Cases: Potential and Pitfalls" 40 Criminal Law Quarterly (1998), Christopher Onstott /2007/: "Judicial Notice and the Law's "Scientific" Search for Truth", 40 Akron Law Review (2007),.

9 - CPC Art. 83 Para. 3.

10 - CPC Arts. 91, 92 and 101.

psychotherapist, etc.), may not testify unless released from that obligation by a special regulation or a statement of the person for whose benefit the confidentiality has been established; and

A defence lawyer may not testify about confidential information received from his/her client.^[11]

Besides that, defendant's close relatives (his/her spouse or partner, brother, sister, parents, etc.) have no obligation to testify against the defendant, but they can testify if they so wish.^[12] It is duty of the court or the public prosecutor to inform these persons that they are not obliged to testify. Likewise, a minor who, because of his/her age or mental development is not capable of understanding his/her right not to have to testify, may not be examined as a witness, except if the defendant requests him/her to testify.^[13]

All witnesses are allowed not to answer certain questions if such answers are likely to expose them or their close relatives to serious disgrace, considerable pecuniary damage or criminal prosecution.

A witness is questioned individually and without the presence of other witnesses. Before examination, witnesses will be warned that they are required to tell the truth and that perjury is a criminal offence. After providing their personal data, witnesses are required to take an oath before examination, except juvenile or mentally disadvantaged witnesses who do not testify under oath. In case of contradictory statements, a witness may be confronted with another witness or the defendant.^[14]

The CPC contains contradictory provisions regarding the examination of witnesses. Introductory provisions and those pertaining to trial foresee direct and cross-examination of witnesses by parties and other participants in the proceedings, which is typical of the adversary model. On the other hand, in the provisions regulating examination of the witnesses it is prescribed that 'following the general questions, witnesses are asked to state everything they know about the case' (Art. 98 para. 2 CPC), which implies narrative witness statement typical of the mixed (or inquisitorial) model of criminal proceedings.^[15] The said ambiguity can be explained only by the fact that Article 98 provides for the examination of witnesses during investigation or pre-trial proceedings by a public prosecutor, while their direct and cross-examination is related to the trial stage.^[16]

Protection of witnesses

The authority conducting the proceedings (the public prosecutor

11 - CPC Art. 93.

12 - CPC. Art. 94.

13 - The rules about privileged witnesses that are excluded from the duty to testify, also existed in a former "truth model" of criminal procedure what some scholars took as a proof for belief that "some other social values have priority over the truth in Criminal process." See e. g. M. Grubač, Krivično procesno pravo, uvod i opšti deo, (Službeni glasnik, Beograd, 2004): 298, M. Škuljić, Krivično procesno pravo (Pravni fakultet, Beograd, 2009):77.

14 - CPC Arts. 95 - 99.

15 - About different forms of witness examination in different procedural models See: Mirjan Damaska, "Presentation of Evidence and Fact-finding Precision", 123 University of Pennsylvania Law Review., 1103 (1975).

16 - Article 98 paragraph 3 of the CPC confirms this interpretation: 'After a witness has completed his/her statement, he/she may be asked additional questions in order to fill in gaps in the statement or to clarify it. The questions must be clear, unambiguous and understandable, and they cannot be suggestive or misleading, except during cross-examination at the trial.'

during investigation and the judge in subsequent stages) is required to protect injured parties and witnesses from insults, threats and any other attacks. A person, who insults an injured party or a witness, threatens him/her or endangers his/her safety, may be fined by the court or, in case of a serious threat or violence, such a person may be prosecuted for a crime.^[17] In addition to these general provisions, applicable to all witnesses, the CPC recognizes two categories of witnesses who enjoy special protection during criminal proceedings: particularly vulnerable witnesses and protected witnesses.

Particularly vulnerable witnesses are those who require special treatment because of their age, experience, gender, health, the consequences of the criminal offence and other circumstances. This category includes for example, victims of rape or domestic violence, children, endangered women, very old persons, etc. Protective measures for particularly vulnerable witnesses are mostly related to a special way of their examination. Only the authority in charge of the proceedings (a public prosecutor or a judge) may pose questions to them, and a psychologist, a social worker or another professional may assist in the examination. A particularly vulnerable witness may be examined at his/her home or in a special institution professionally qualified for interviews with particularly vulnerable persons or by means of audio-video devices. In general, such a witness may not be confronted with the defendant, but if the defendant insists on confrontation, the authority in charge of the proceedings will decide on the request, taking into account the level of the witness's vulnerability and rights of the defence. The public prosecutor or the court, depending on the stage of the proceedings, renders a decision granting the status of particularly vulnerable witness, and may appoint an attorney to protect such a witness's interests.^[18]

A protected witness is a witness who enjoys particular protection during criminal proceedings, given that his/her life, health, freedom, property or other important rights could be jeopardized because of his/her testimony. Only the court (the judge for preliminary investigation during investigation or the chamber in subsequent stages) is entitled to grant the status of protected witness, *ex officio* or following a proposal by the public prosecutor or the witness him/herself. Measures of protection imply a special way of examination, where testimony is provided from a separate room through audio-video devices, the public is excluded from the courtroom and the witness has his/her identity concealed. Exceptionally, the identity of the witness may also be hidden from the defendant and his/her defence counsel if the court determines that the witness is credible and that the life, health or freedom of the witness or a person close to him/her are threatened to an extent that prevails over the defence right to this effect. In that case, the identity of the protected witness must be revealed to the defence no later than 15 days before the commencement of the trial.^[19] Therefore, Serbian law does not allow the examination of anonymous witnesses. The only exception refers to the examination of an undercover agent, who, exceptionally, may be examined as a witness, but the ensuing judgment cannot be based exclusively

or significantly on his/her testimony (Art. 187 CPC).

Wider protection of witnesses is further regulated in the Serbian law by a special statute (Law on the Programme of Protection for Participants in Criminal Proceedings), prescribing measures that include physical protection of people and property, relocation of witnesses to other states, concealment of identity and other data and change of identity.^[20] The applicability of this law is limited to cases of war crimes, organized crimes and criminal offences against constitutional order and security. In practice, given the fact that entrance into the protection programme of protection implies drastic changes in the earlier life-style of the witness and his/her family, these measures generally apply to co-operative defendants who accept to testify in the most serious criminal cases.

Expert witnesses

An expert witness is a witness who possesses particular education, knowledge or skills relevant to the determination of certain facts (i.e., psychiatric, medical, scientific experts, etc.). Unlike in the common law adversarial model, where expert witnesses are engaged and paid by the parties, in Serbian law they are engaged by an authority in charge of proceedings, namely by a public prosecutor or a judge (depending on the stage of proceedings), with the purpose of providing objective, true and impartial expertise and opinions about relevant facts. While the defendant, his defence counsel and injured party acting as a prosecutor or private prosecutor may make proposals for the engagement of expert witnesses, deciding on such engagement lies within the exclusive competence of the relevant state authority (public prosecutor or judge). If during the investigation stage the public prosecutor denies the defence proposal for the engagement of an expert witness, the defendant and his/her defence counsel may appeal to the judge for preliminary proceedings who will render a final decision on the issue.

Although it does not provide a possibility for the defence to engage an expert witness, in order to protect his/her right and ensure the "equality of arms", the CPC of 2011 has introduced a new category of procedural subject - so called 'professional consultants'. Engaged by the defence, a professional consultant is a person who has special knowledge in the area being examined by the court. A professional consultant is allowed to follow an expert examination, to examine documents and the objects that are subject of examination, make proposals to expert witnesses and examine them at the trial, as well as to be examined at the trial under oath, like any other witness.^[21]

The CPC closely regulates who can or cannot be an expert witness, his/her rights and duties during proceedings, and special, most typical types of expert examinations, like examinations of injuries, psychological health of the defendant, autopsies or exhumation of the body. Reasons for the exclusion of witnesses (so-called privileged witnesses) are also applicable to expert witnesses.

An expert witness has a duty to appear before the court, conduct

17 - CPC Art. 102.

18 - CPC Arts. 103-104.

19 - CPC Arts. 105-112.

20 - More about these measures in European countries: G. Vermeulen (Eds.), EU standards in witness protection and collaboration with justice, (Maklu Publishers, 2005), in Serbian law: Vanja Bajović, "Polozaj i zastita svedoka saradnika", 9 *Pravni život*, 501, (2006).

21 - CPC Arts. 125-126.

expertise and provide the opinion within a certain time limit. Like any other witness, he/she is also examined under oath and may be prosecuted for perjury. If his/her expertise or opinions are unclear, incomplete, contradictory or contain some other shortcomings, the expert examination may be repeated, or the court i.e., the public prosecutor during investigation may engage another expert witness.^[22]

In some circumstances, the defendant may be limited in his freedom during expert examination. According to article 122 of the CPC, in case the defendant needs to be subjected to medical expert examination, he/she may be placed in a medical institution for a maximum of 30 days. Initially, the measure may not last longer than 15 days, but exceptionally it may be extended by another 15 days, following a reasonable proposal by the expert witness and based on the opinion of the medical institution. The judge brings a decision on the placement of the defendant in a medical institution *ex officio*, upon a party's motion or on the basis of the expert witness's opinion. The parties and defence counsel may challenge this decision by filing an appeal with the pre-trial chamber, which is required to render its decision on the appeal within 48 hours. The prison sentence or detention period will be reduced by the time the defendant spent in the medical institution.

Search and seizure

Search is defined as a series of activities undertaken by law enforcement officers, openly aimed at obtaining objects carried by a person or situated on private premises. Inviolability of the home is protected by the Serbian Constitution, which provides that 'No one may enter a person's home or other premises against the will of their tenant nor conduct a search in them. Entering a person's home or other premises, and in special cases conducting search without the presence of witnesses, shall be allowed without a court order if necessary for the purpose of immediate arrest and detention of a criminal offender or for the purpose of eliminating direct and grave danger to people or property in a manner stipulated by the law.' (Art. 40) The constitutional provisions are further elaborated by the CPC, which distinguishes warrantless search and that conducted pursuant to a court warrant.^[23]

Search pursuant to a court warrant will be ordered in cases where such an operation is likely to result in the capturing of defendant, traces of a criminal offence or objects of importance for particular proceedings. The general rule is that a judicial authority issues a written search warrant on the public prosecutor's motion. A

22 - CPC Arts. 113-124.

23 - It is interesting to notice that in Serbian Law searches require a much lesser degree of suspicion than pretrial detention. Namely, a search is permissible whenever there is suspicion that a criminal offence has been committed, while degree of suspicion necessary for pretrial detention is "reasonable doubt." Similar situation is in German Law. See T. Weigend, "Germany" in C.M. Bradley (Eds.) *Criminal Procedure A Worldwide Study*, (Carolina Academic Press, 2007): 248-251.

search operation is mostly conducted by the police, and must start within eight days from the warrant issuance date. Otherwise, the search cannot be conducted and the warrant will be returned to the court.^[24]

The Criminal Procedure Code requires that a search should be conducted in a manner that respects the dignity of the person involved, usually during the daytime, and only exceptionally during the night. The search procedure should follow an established course. Specifically, once a search warrant has been served, the holder of the place or person subject to the search is asked to voluntarily surrender the person or objects sought. The holder of the place has a right to call a lawyer who may attend the search, and control its regularity. In that case, the police are required to postpone the commencement of the search until the lawyer's arrival, for a period not longer than three hours. A search should always be attended by two adult citizens acting as witnesses, who will observe its regularity and possibly make objections. This rule, however, can be avoided in practice as the CPC allows certain exceptions in cases of expected armed resistance or other form of violence, threat of evidence destruction, or holder's inaccessibility (Art. 156 para. 3 CPC). A search must be recorded in writing, with a detailed description of seized objects and documents, location of their finding and other relevant data. The witnesses to the search are required to sign the written record and make any objections they may have. If the search is conducted without the presence of witnesses, its course must be recorded by audio-video devices.^[25]

A search of premises may include search of electronic devices and equipment, if so provided by the search warrant. In such a case, the holder of the device/equipment or the person present at the scene is required to allow access to the relevant objects and provide information needed for their use. The foregoing does not apply to defendants protected by the rule *nemo proderet se ipsum* which releases them from any obligation to give evidence against themselves.^[26]

Warrantless search: The public prosecutor and police may enter any premises and undertake a search even without a search warrant if: (i) someone is calling out for help; (ii) a person is caught in the act of committing a crime (in flagrante); (iii) they have the consent of the holder of the premises; (iv) so is required for the purpose of executing an arrest warrant or a detention order issued by the court; or (v) so is required for the purpose of eliminating a direct and serious threat to persons or property.^[27]

24 - CPC Art. 152.

25 - CPC Arts. 156-157.

26 - Broadly defined, the rule 'nemo proderet se ipsum' or privilege against self-incrimination means that no one is obliged to offer proofs against himself. This rule is closely associated with the presumption of innocence and it protects the defendant's right to remain silent and not to be improperly compelled to give evidence that would incriminate him. According to the Serbian CPC, the defendant is explicitly exempted from the duty to surrender objects that could serve as inculpatory evidence in criminal proceedings. However, Serbian law provides certain exceptions to this rule. Therefore, even without the defendant's consent, the authority in charge of relevant proceedings may take finger prints, swabs and other biometric samples from the defendant, as well as his personal data, or take and publish his photo. The obtaining of samples of biological origin and performing other medical procedures for the purpose of the analysis and determination of facts relevant to the proceedings may be carried out even without the defendant's consent, unless such procedures might cause serious harm to his health. Voice or handwriting samples may also be taken from the defendant, as well as from the injured party, a witness or other persons, with the purpose of establishing facts in the proceedings. More about that: V. Bajovic, *O cinjenicama i istini u krivicnom postupku* (Pravni fakultet, Beograd, 2015).

27 - CPC Art. 158.

The public prosecutor or police are required to issue a confirmation to the holder of the premises explaining the reasons for warrantless entry, and in case the search has been conducted, they must make a record specifying the reasons for that action.

A warrantless search of a person is possible in case of the person's arrest, if the person is likely to conceal or destroy evidence or if he/she is suspected of possessing a weapon or another dangerous tool. Whenever they undertake a warrantless search, the public prosecutor and police are required to immediately submit a relevant report to the judge for preliminary proceedings, who will assess whether the search was justified.^[28]

A search operation usually results in the seizure of objects that may serve as evidence during the proceedings. In that respect the CPC provides that 'During a search, objects and documents connected to the purpose of the search will be seized.' (art. 153 par. 1) In any such case, a receipt for the seized objects will be made and immediately issued to the person from whom such objects or documents have been seized. During the search the police may also find objects that are not connected to the criminal offences for which the search is being undertaken, but are indicative of another criminal offence (i.e., the police may search for a weapon and find drugs). In that case such objects will be described in the record and seized, and if the public prosecutor is not present during the search, he/she must be immediately notified of such finding in order to initiate criminal proceedings.

Seizure is regulated as a particular investigative measure set apart from search (Arts. 147- 151 CPC). Although these two measures are inseparably connected, not every search will necessarily result in seizure, nor will every seizure be necessarily preceded by a search. The court may issue a seizure warrant, requiring any persons who possess certain object that could serve as evidence to deliver them to the court. A person who refuses to comply may be fined. Defendants and, under certain conditions, privileged witnesses are not subject to such an obligation, given that nobody is obliged to provide evidence against him/herself. Seized objects will be returned to the holder as soon as the reasons for their seizure cease to exist, unless there are reasons for their confiscation.

Documentary evidence

Relevant facts in the proceedings may be proved by reading, observing, listening or inspecting the documentary evidence. While there is a presumption of truth regarding the contents of documents issued by state authorities, the opposing party may prove that a certain document is not authentic, or that it was not prepared in an appropriate manner.^[29]

Documentary evidence may be obtained *ex officio*, on a motion by a party or by the authority conducting proceedings, or submitted by the parties. If a person or a state institution refuses to voluntarily surrender documentary evidence at the request of a

competent authority, such documents may be seized.^[30]

Examination and reconstruction

Examination is an investigative measure that implies direct observation of a person, an object or a location by the authority in charge of the proceedings, with the purpose of obtaining material evidence. The examination of a person without his/her consent is possible only if his/her body bears a certain trace or consequence of a criminal offence.^[31] Regarding the examination of objects, everybody is required to allow access to such objects and provide necessary information to the authority in charge of the proceedings. Movable assets may be seized under certain conditions.^[32] Examination of a location is performed at the crime scene or another location where objects or traces of the criminal offence might be found.^[33]

Reconstruction of an event implies artificial repetition of actions or situations in circumstances matching those of the criminal offence. Its purpose is to verify evidence presented and confirm facts relevant to the clarification of the criminal matter.

Obtaining samples

Biometric and biological samples (such as fingerprints, blood, voice sample, etc.) may be taken from a suspect even without his/her consent, unless such a procedure might be harmful to his/her health.^[34] A suspect's personal data and a photograph may also be taken and his/her personal description provided without his consent, and the court may order that his/her photo be published if it is necessary for the person identification or successful conduct of proceedings.^[35]

Biometric and biological samples may be taken from an injured party or other person even without their consent, if it is necessary for the identification of traces of criminal offence, or for the elimination of suspicion regarding their connection to the criminal offence, unless such procedures might be harmful to their health.^[36]

With a view to identifying the perpetrator of a criminal offence or establishing other relevant facts, the public prosecutor or the court may order forensic-genetic analysis of samples secured from the crime scene or another site where traces are located or of samples taken from a defendant, injured party or other persons.

In its decision pronouncing a custodial criminal sanction, a first-instance court may order forensic-genetic analysis of samples taken from the following categories of defendants: (i) those sentenced to terms of imprisonment for over a year in connection with intentional criminal offence; (ii) those found guilty of intentional criminal offence against sexual freedom and (iii) those subject to the security measure of compulsory psychiatric treatment.^[37]

Monitoring of suspicious monetary transactions

28 - CPC Art. 159.

29 - CPC Art. 138 Para. 2.

30 - CPC Art. 139.

31 - CPC Art. 134 Para. 2.

32 - CPC Art. 135.

33 - CPC Art. 136.

34 - CPC Art. 141 Para. 1.

35 - CPC Art. 140 Para. 2.

36 - CPC Art. 141 Para. 2.

37 - CPC Art. 142.

The monitoring, temporary suspension and seizure of monetary transactions apply to criminal offences punishable by at least four years of imprisonment, as well as to other clearly enumerated criminal offences punishable by lenient sanctions such as bribery, money laundering, trading in influence, etc. If there is a ground for suspicion that such a criminal offence has been committed, a public prosecutor may order a bank or another financial institution to provide him/her with information about the suspect's bank-accounts and may request the court to order the monitoring of suspicious transactions. In that case, a judge for preliminary proceedings will order the bank to submit periodical reports to the public prosecutor and may order temporary suspension of any suspicious transaction. Suspicious transactions may be temporarily seized and placed on a separate account.^[38]

Special Investigative Measures

Contrary to general investigative measures that are applicable to all criminal offences, special investigative measures are limited to explicitly enumerate criminal offences. A long list of these offences includes cases of war crimes, organized crimes, criminal offences against constitutional order and public security, murders, kidnappings, corruptive criminal offences, etc. The reason behind this limitation is the necessity to make a balance between the basic human rights such as that to privacy, invulnerability of personal communication, etc., and the need to ensure effective criminal reaction to the most serious forms of criminality that cannot be easily proved by regular investigative measures.^[39]

If there is a ground for suspicion that some of the explicitly enumerated criminal offences have been committed or that such crimes are being prepared, and evidence cannot be obtained in another manner, or it gathering would be significantly hampered, the court may order one or more special investigative measures including the following:

- (i) Undercover monitoring of communication, which implies phone tapping and recording, email tracking, seizure of letters and other messages of a suspect.
- (ii) Covert surveillance and audio and video recording, which imply the surveillance and recording of a suspect at public places, in a private car, in means of public transport or on other premises. The CPC explicitly excludes the implementation of this measure at the home of a suspect (Art. 171 CPC), having in mind the constitutional invulnerability of the home.
- (iii) Simulated transactions, which imply simulated trade or bribery by a member of the police or another law enforcement agency. It is explicitly prescribed that a person involved in a simulated

transaction is not committing a crime (Art. 176 para. 2 CPC), but is prohibited from instigating others to criminal conduct.

(iv) Search of computer data.^[40]

(v) Controlled delivery, pursuant to which a competent public prosecutor allows entry, delivery or transit through Serbia of illegal or suspicious parcels (drugs, weapons etc.), with the knowledge and under the supervision of competent authorities.^[41]

(vi) Engagement of an undercover agent, which is not applicable to all of the aforementioned (special) criminal offences, but only to those of war crimes or organized crime. An undercover agent is a member of the police, security agency or another person, infiltrated in a criminal group in order to deter and detect a crime and gather information and evidence for future prosecution. Consequently, he/she is allowed to use technical devices for taking photos or for audio, video or electronic recording in order to gather evidence. He/she is forbidden to commit criminal offences or incite others to commit crimes, but in certain cases, if he/she is forced to commit a crime, he/she can plead self-defence. Although Serbian law does not allow anonymous witnesses, the identity of an undercover agent who is exceptionally examined as a witness will not be revealed to the defence. However, the court's judgment in the relevant case cannot be based exclusively or substantially on his/her testimony.

Special investigative measures are ordered by a warrant issued by a judge for preliminary proceedings, following a competent public prosecutor's motion. Warrants are executed by the police (or security agencies) whose authorized officers make daily reports on such actions. Upon the termination of a particular measure, all collected materials and records are delivered to the judge for preliminary investigation and to the competent public prosecutor. Special investigative measures are mostly used during preliminary investigation, in view of the legally required grounds for suspicion that a certain crime has been committed, as opposed to reasonable suspicion which must be supported by certain evidence. While these measures are time-limited, mostly up to 1 year (initially, they are ordered for a period of up to 6 months but may be prolonged by additional 6 months), in certain cases and for certain crimes this period may be extended.

The CPC explicitly regulates the treatment of so-called 'accidental findings', prescribing that material collected by a special measure but relating to a criminal offence or a perpetrator not covered by the warrant, may be used in proceedings only if it relates to a criminal offence allowing for the implementation of such a measure.^[42] Otherwise, the material will be destroyed under the

40 - It could be data of crossing the borders, life or property insurance, income, taxes, monetary transactions, medical treatments and diagnosis, completed courses, hotels' bills, etc. See: Goran P. Ilić et al., *Komentar Zakonika o krivičnom postupku* (Službeni glasnik, Beograd, 2012): 404-406.

41 - Controlled delivery is defined in UN Convention against Transnational Organized Crime as the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence. UN Convention against Corruption provides the similar definition. Both conventions cover not only drugs but also weapons, rare animal and plant products, currency and other smuggled consignments transported and/or transacted illicitly. In Serbian law it is order by the Republic Public Prosecutor who is the highest prosecutor in the country. 42 - CPC Art. 164.

38 - CPC Arts. 143-146.

39 - The Council of Europe accepts secrecy as the common denominator for the "special investigation methods" used in the criminal procedure, accepts their secret nature and the fact that their application could infringe fundamental rights and freedoms. See: Council of Europe Committee of Ministers, Recommendation of the Committee of Ministers to member states on "special investigation techniques" in relation to serious crimes including acts of terrorism. (Adopted by the Committee of Ministers on 20 April 2005). More about these measures in Serbian and comparative law: M. Škulić, *Organizovani kriminalitet- pojam, pojavni oblici, krivična dela i krivični postupak*, (Službeni glasnik, Beograd, 2015).

supervision of the judge for preliminary proceedings. Data on requesting, deciding on and implementing special investigative measures are considered confidential, and all persons who learn about such data are required to keep them secret.^[43]

Exclusionary Rule

Serbian law contains general exclusionary provisions, prescribing that the court's decision may not be based on illegally or unlawfully obtained evidence. According to CPC: Court decisions may not be based on evidence which is, directly or indirectly, in itself or by the manner in which it was obtained, in contravention of the Constitution, this Code, other law or universally accepted rules of international law and ratified international treaties⁷.

Unlawful evidence is excluded from the case file, placed in a separate sealed folder and held by the judge for preliminary proceedings until the end of the process, whereupon it is destroyed. Parties may raise the issue of unlawful evidence at any stage of the proceedings and the judge, *sua sponte*, may declare evidence inadmissible. The exclusion of evidence is possible during the stages of investigation, indictment control, pre-trial hearing, trial, and appellate proceedings. One of the reasons justifying an appeal is a judgment based on unlawful evidence.

The Serbian Constitution and Criminal Procedure Code explicitly prohibit torture, inhuman and degrading treatment, and evidence obtained in such manner is inadmissible. The Serbian Constitution regulates inviolability of physical and mental integrity, prescribing that 'Nobody may be subjected to torture, inhuman or degrading treatment or punishment, or subjected to medical and other experiments without their free consent'.^[44] The CPC also prescribes that 'Any use of torture, inhumane and degrading treatment, force, threats, coercion, deception, medical procedures and other acts affecting free will or extorting a confession another statement or action from a defendant or another participant in proceedings is prohibited and punishable'^[45].

In spite of numerous provisions that regulate the exclusion of unlawful evidence in all stages of criminal proceedings, the exclusionary rule has a limited effect. First, the CPC prescribes that the trial chamber will exclude unlawful evidence at the trial, place such evidence in a separate sealed cover and forward it to the judge for preliminary proceedings who will keep it separate from other documents (Art. 407). It is clear that the possibility of

unlawful evidence coming into the hands of the trial chamber puts this rule into question. The exclusionary rule is derived from the American jury-trial model, and its basic purpose is to prevent jurors from having access to and knowledge about illegally obtained evidence. Therefore, pieces of unlawful evidence are excluded at the stage of preparatory hearing by at professional judge, and jurors have no information about such item, which means that the jurors cannot have them in mind even at sub-conscious level as they decide about the defendant's guilt. By contrast, in nonjury trials, trial judges, albeit not formally allowed to use unlawful evidence as a basis for their judgements, cannot exclude such evidence so easily from their minds, given that the awareness of it, if not on the paper, is present in their minds and may affect their reasoning during the decision-making process.

Second, while a judgment based on illegally obtained evidence is explicitly recognized as a reason for appeal,^[46] such a reason is rendered irrelevant in cases where the same judgment would be made even without unlawful evidence, taking into consideration others legal evidence on which the judgment is based. The foregoing provision -albeit in accordance with the ECHR practice^[47] - undermines the exclusionary rule, given the fact that judgments are never based on a single piece of evidence, and it is always possible for a judge to explain in the grounds of judgment that his/her decision would have been the same even without illegally obtained evidence.^[48]

Third, in spite of explicit prohibition of torture, inhuman and degrading treatment, two ECHR decisions in cases against Serbia showed that the courts had accepted suspects statement given to the police under torture, which drew attention not only to unlawful police practice, but also to the use of unlawful evidence by the court.^[49]

According to Serbian legal theory it is disputable whether the fruit of the poisonous tree doctrine applies^[50] and the case-law also differs in that respect. While in some cases courts have excluded all objects seized during illegal search^[51] in others they have allowed as valid evidence expert-opinions based on statements illegally obtained from suspects.^[52] The CPC of 2011 insists, more firm, on the implementation of this doctrine, proclaiming that court's decisions may not be based on evidence that is, directly or indirectly, in contradiction to the law. This means that not only unlawfully obtained evidence should be excluded, but also any evidence that may originate from it. Despite the foregoing full implementation of this doctrine cannot be expected, especially in the light of the above-mentioned rule which tolerates judgments based on unlawful evidence where legal evidence also exists.

43 - CPC Art 16 para.1.

44 - Art. 25 of Constitution of Serbia.

45 - CPC Art. 9.

46 - CPC Art. 438 para. 1.

47 - In *Schenk v. Switzerland* the ECHR noted that the defence rights were respected and that Article 6(1) of the Convention (the right to a fair trial) was not violated, having in mind that unlawfully obtained recording of a telephone conversation was not the only evidence on which the conviction was based. See: *Schenk v. Switzerland* App. No.10862/84, judgement of 12.07.1988. See also Stefan Trechsel, *Human Rights in Criminal Proceedings*, (Oxford University Press, 2006): 86-88.

48 - See Vanja Bajović, "Illegally obtained evidence and exclusionary rule in Serbian and comparative law", *Archibald Reiss Days Vol I* (Belgrade, March 2015): 159-168.

49 - ECHR decisions: *Stanimirovic v. Serbia*, App. No. 26088/06, judgement of 18.10.2011., *Hajnal v. Serbia*, App. No. 36937/06, judgement of 19.06.2012.

50 - While some scholars argues that Serbian law fully accepts the fruit of the poisonous tree doctrine (M. Skulić, *Krivično procesno pravo*, Beograd, 2009: 190-192), others find that this doctrine is not so strictly implemented and that its full implementation is not acceptable in the Serbian system (M. Grubač, *Krivično procesno pravo-uvod i opšti deo*, Beograd, 2004: 291).

51 - Judgement of the Supreme Court of Cassation, Kzz. 90/10, April 07, 2010.

52 - Judgement of the Supreme Court of Cassation, Kz. 154/02, March 02, 2004.