NGO Coalition "All for Fair Trials" – Skopje
OSCE Mission to Skopje

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ANALYSIS OF DATA COLLECTED FROM TRIAL MONITORING IN 2016

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INTRODUCTION

The Coalition "All for Fair Trials" is a network of 14 civic organisations. Its members are local citizen associations for the purpose of monitoring trials before competent courts, in order to: a) ensure the guaranteed rights to fair trial as envisaged in the Constitution, laws and ratified international agreements; b) increase the public awareness and underline the required reforms and the respective implementation concerning trials; c) enhance the practical knowledge of students of law; and d) strengthen the role and capacity of non-governmental organisations.

Given the current increasing necessity for trial monitoring, in particular concerning the field of criminal law, i.e. criminal procedure, in the course of 2016, the Coalition, financially supported by the OSCE Mission to Skopje, implemented the project «Enhancing the independence, transparency and efficiency of the judiciary through trial monitoring", as continuation of trial monitoring activities from the previous year. It focused on the application of the new Law on Criminal Procedure in all four appellate regions in the country, specifically, in the basic courts, for the purpose of drafting a situational analysis along with recommendations for future activities and reforms, aimed at enhancing the capacities of the judicial system in the country.

METHODOLOGY

Monitors

15 monitors, with several-years long experience in trial monitoring throughout the country, were recruited for the needs of the project and for the preparation of the analysis, resulting from the available data from trial monitoring. The monitors were required to have a university degree – a degree in law and thorough knowledge of criminal matters in order to be able to identify the most prevalent challenges encountered by the courts and all participants in criminal proceedings, as well as to detect the inadequate, i.e. incomplete implementation of the Law on Criminal Procedure.

Questionnaire

In the process of collecting data from trial monitoring, the monitors were provided with a tool, i.e. a questionnaire, which guided them within the system for processing the initial information and observations that were noted during their presence in the courtrooms. Specifically, after having initially obtained the overall information from a particular hearing, based on 72 systematically arranged questions in the questionnaire, the monitors entered the collected data to an extent and in a manner that served the needs of the analysis. The questionnaire itself was designed according to the sequence and manner of conducting criminal proceedings before a competent court, with particular focus on some of the new provisions, that is, introduced novelties in the Law on Criminal Procedure, along with provided tailored space where the personal cognitive perception of the monitors is entered.

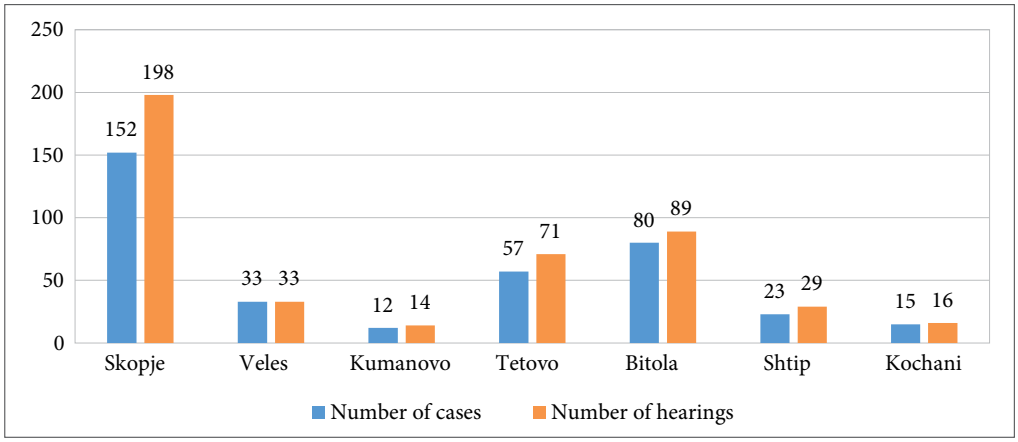
GENERAL DATA

The monitoring system in the framework of this project covered the whole territory of the country, that is, the four appellate regions, with special focus on the courts in Skopje (Basic Court

Skopje 1), Veles, Bitola, Shtip, Tetovo, Kumanovo and Kochani and targeted 450 court hearings or 372 criminal cases.

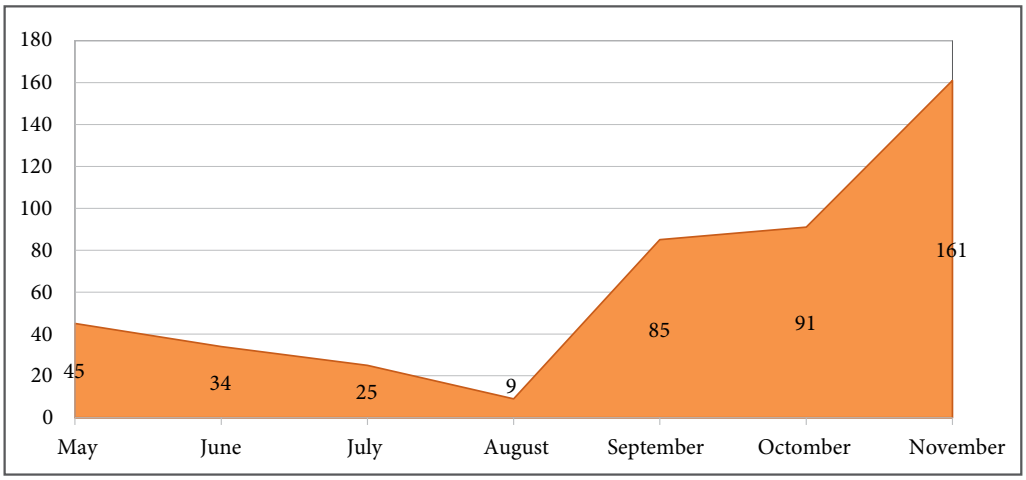
The total number of monitored trials included monitoring of 198 hearings or 152 cases in the Basic Court Skopje 1; 33 hearings and equivalent number of cases in the Basic Court Veles, 14 hearings concerning 12 cases in the Basic Court Kumanovo, and 71 hearings resulting from 57 cases in the Basic Court Tetovo. In the Basic Court Bitola, the number of monitored hearings was almost similar to the total number of monitored cases; 29 hearings were monitored concerning 23 cases in the Basic Court Shtip; and finally, the number of monitored hearings in the Basic Court Kochani largely overlapped with the number of cases, i.e. 16 hearings in 15 cases. The respective statistics is presented in the Table below.

Statistics on the number of monitored hearings against the number of cases



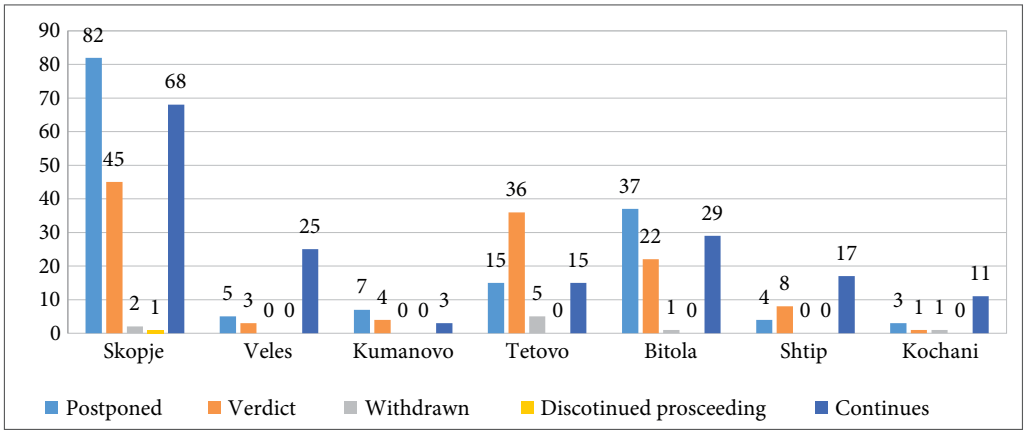
Given the fact that the initial phase of this project overlapped with the beginning of the judicial administration (court clerks) strike, that lasted over half of the period envisaged for trial monitoring, the very dynamics of the monitoring activity was volatile, i.e. varied and reached its highest peaks once the strike ended. Namely, as shown in the Table, one can note that the last 3 months of the monitoring process entail the largest number of hearings, i.e. September- 85, October- 91 and November- 161 hearings. However, one can especially note the trend of hearings being held at the Basic Court Skopje 1 during the court administration strike. Even though the court operation was at stand throughout the country and no hearings were held in most of the courts, i.e. the work was completely blocked; yet, that was not the case at the Basic Court Skopje 1. In this court, some judges proceeded with work and held the scheduled hearings, and only small part of them demonstrated solidarity with the administration and discontinued the work. However, one should note that this refers to an insignificant number of judges.

Hearings per month



The data collected from the total number of hearings that were subject of monitoring throughout the country show that ⅓ of the hearings or 153 were postponed, 119 were completed in verdict, the indictment was withdrawn in 9 cases, the criminal proceedings were stayed in one hearing, whereas 168 hearings proceeded with procedural acts, as shown on the Chart below. In realistic terms, this is a striking figure, especially given the fact that the number of postponed hearings in the two biggest appellate regions is clearly higher compared to the other regions.

Statistics on proceedings taken by courts



Based on the data, the postponement of hearings relies on several circumstances which are stipulated both in the Law on Criminal Procedure and beyond the law. Namely, problems such as improper service of process, and failure of the parties and the witnesses and expert witnesses to appear in court hearings are singled out as topics that require further elaboration in order to advance and improve the system of securing the presence of the participants in the proceedings. The statistics deriving from analysed data show that the postponement of hearings largely results from the absence of the defendant in the court proceedings – in 97 cases i.e. hearings, or due to the absence of the public prosecutor – 32 cases; absence of the defence attorney - 26 cases and

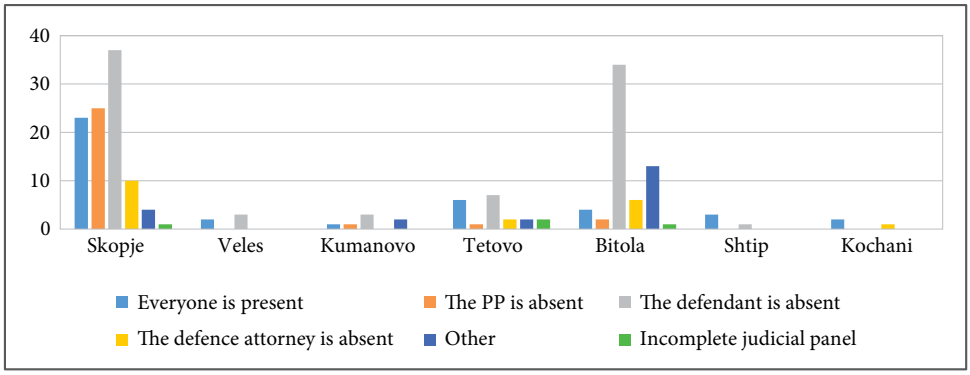
incomplete panel of judges appointed on a specific case - 4 cases. However, one should not overlook the total number of 53 hearings when the postponement relied on "other grounds".

One of the stated reasons for non-appearance of the defendants during the trial is the failure to bring them from the penitentiary facilities before the court. In some cases, it results from lack of coordination with the registration system for transfer of detainees, while in other cases it results from technical difficulties (which is necessarily related to finances) for the detainee to be brought before court when the trial is held in cities outside the regions where the penitentiary institutions are located. Also, in some cases it results from overlapping with certain high profile court cases that practically leads to total blockage and dysfunction of the overall system in a given court region (in this particular case, the Basic Court Skopje 1).

The legal provisions concerning the failure of the public prosecutor, i.e. private plaintiff to appear before the court clearly stipulate the essential role they have in the proceedings. Despite this fact, public prosecutors failed to appear before the court in 32 cases or 32 hearings, which is a high percentage and accounts for 20% of the total number of postponed hearings. This figure is further augmented by the number of 26 hearings where the defence attorney failed to appear. This fact relies on the most prevalent reasons that defendants replace their defence attorneys and the concurrent obligations of defence attorneys in other cases, as well as the time required for the defence attorneys to study the facts and evidence of the respective case. And finally, one reason for postponements under the category "other" refers to the failure of witnesses or expert witnesses to appear in court proceedings, as well as the need to present certain evidence, which is not yet provided or an expert report which is still not drafted. In the instant case, total of 53 hearings were postponed under the category of reasons «other».

The Table below provides an overview of postponed court hearings by cities and the most frequent reasons thereof. In view of the foregoing, this is one of the most striking problems that has been persistent in the past years in the judiciary. The presented overview leads to the conclusion that the number of postponements is proportional to the size of the cities where the monitoring was conducted; hence, all the listed options for postponements in the questionnaire were exhausted in Skopje and Bitola, unlike smaller cities such as Veles and Kochani. One thing that stands out, as shown in the Table below, is the defendant's absence as reason for postponement in Skopje and Bitola, along with the absence of the public prosecutor (higher % in Skopje).

Reasons for postponement per city

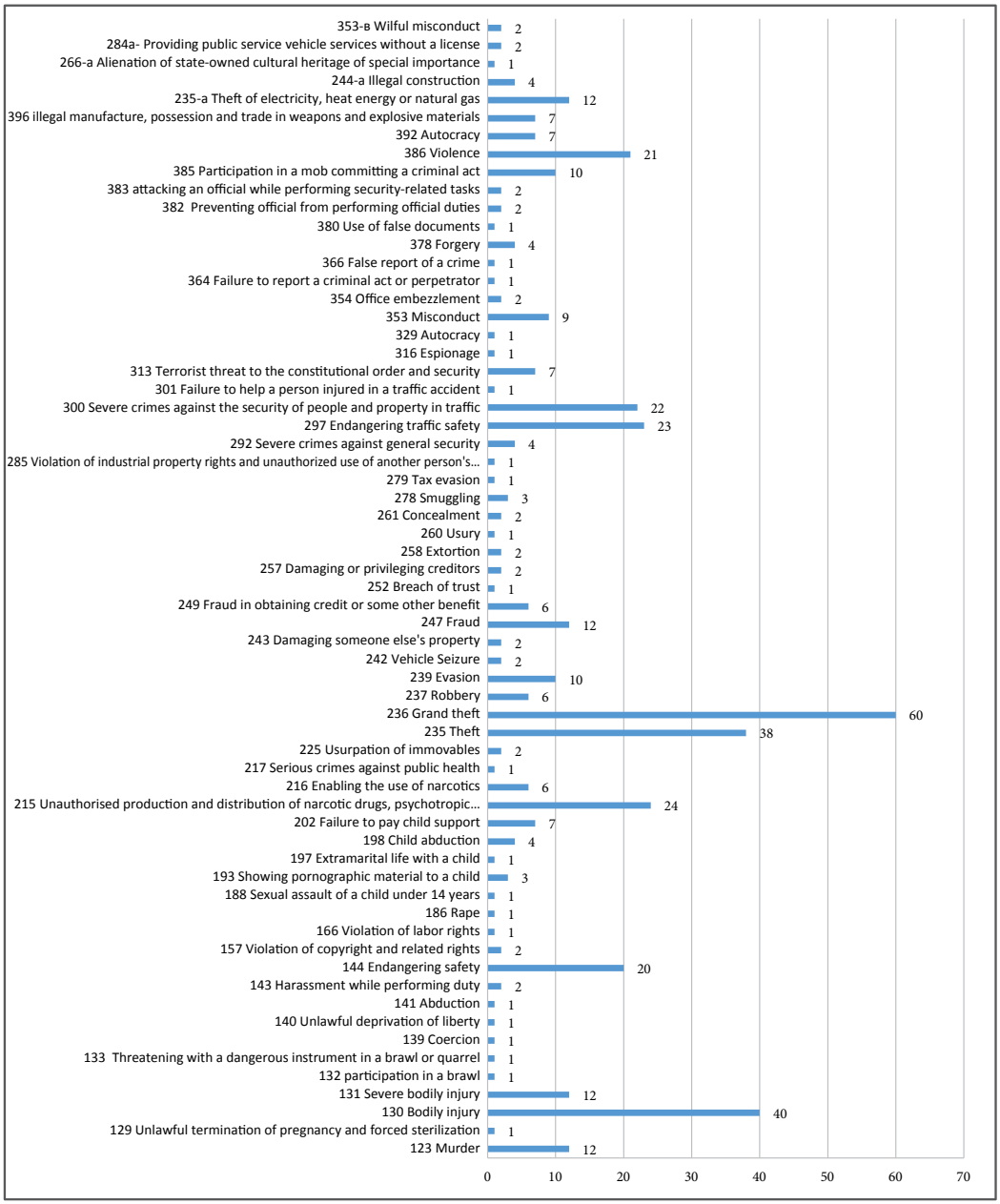


In view of the monitoring data from the previous year, the data for this year do now indicate an upward trend, but quite the opposite. The statistics for both the previous and this year, shows

that ⅓ of monitored hearings were postponed, which means that it poses a problem that may not be overlooked, but would require the adoption of legal solutions along with preventive mechanisms in order to improve the court proceedings. Whether that would entail improved cooperation among the judicial authorities and those in charge of bringing detainees before courts, as quite often the absence of the defendant is not a fault on the part of the court, or whether that would mean more consistent application of the legal provisions pertaining to sanctioning the parties that fail to appear in court, such as the public prosecution office in the present case, the necessity for improved solutions has become increasingly obvious.

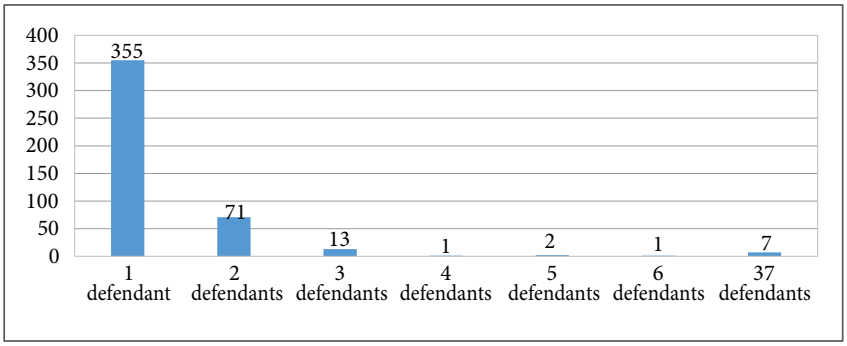
Based on the data from the conducted monitoring, the crimes committed in 450 hearings out of the total number of monitored hearings, mainly refer to the following chapters: «Crimes against property», «Crimes against life and body» as well as «Crimes against public transport safety». Most common crimes were "Grand theft" and "Theft" in 60 and 38 of the monitored hearings, respectively, then "Bodily injury" in 40 hearings, "Endangered safety" in 20 hearings as well as "Endangered traffic safety" in 23 and «Severe crimes against the security of people and property in traffic» in 22 of the monitored hearings.

Number of criminal acts



From the total of 450 monitored hearings throughout the year, the monitors registered a number of 815 defendants that appeared in before the court for cases involving only one defendant or several defendants, reaching up to number of 37 defendants in one single case.

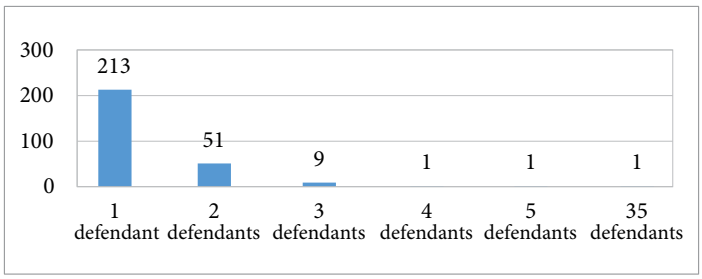
Number of hearings



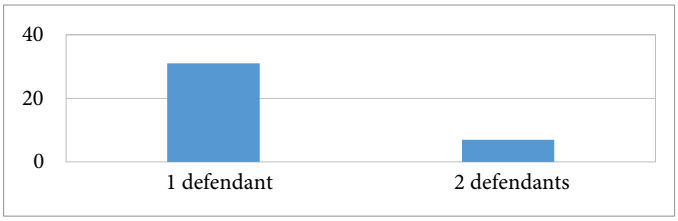
Article 71 and Article 74 of the Law on Criminal Procedure stipulate the right to defence attorney. According to the law, any individual who is suspected of or charged with a crime shall have the right to a defence attorney throughout the whole criminal procedure taken against him/her. Prior to the first examination or any other proceedings specified in the LCP are taken, the defendant shall be advised of his/her right to a defence attorney of his/her choice who can be consulted as well as that the defence attorney can be present during the examination. However, in cases when the defendant is mute, deaf, or lacks the capacity to successfully defend him/herself or criminal proceeding are undertaken against the defendant for a crime which is punishable with a life sentence according to law, a defence attorney must be present at the very first examination. According to the law, a defence attorney is necessary when detention is foreseen or imposed, that is, throughout the whole detention period. In a situation when defence is mandatory and the accused fails to provide his/her defence attorney, the president of the court shall appoint an ex officio defence attorney for the further course of the proceedings, until the verdict becomes effective.

The following statistics derives from the data collected throughout the monitoring process: 276 accused individuals hired their own defence attorneys, 38 accused individuals were appointed an ex officio defence attorney and 108 accused individuals had no defence attorney.

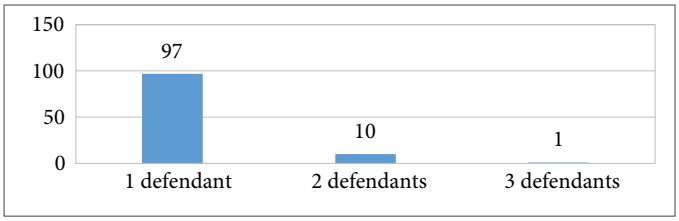
Number of hearings in which the defendant had a defence attorney



Number of hearings in which the defendant had a defence attorney appointed ex-officio

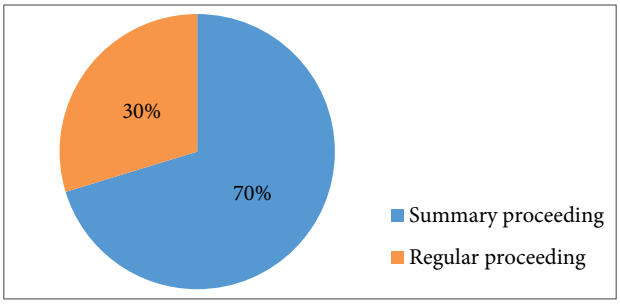


Number of hearings in which the defendant did not have a defence attorney



The Law on Criminal Procedure prescribes 4 types of summary proceedings: 1) summary proceedings for cases where a fine or imprisonment sentence up to 5 years is imposed, 2) proceedings in which a verdict is reached based on a plea agreement between the public prosecutor and the defendant, including the bargaining on the imposed sanction, 3) mediation proceedings where a specialized third party takes part - mediator, and 4) proceedings for issuing a penal notice proposing and prescribing a certain sanction when sufficient evidence of committed crimes exist, which is under the competence of a trial judge. Having in mind that the monitors from the Coalition "All For Fair Trials" are allowed to access and attend only proceedings held in the court, i.e. public hearings, in addition to the regular proceedings, there was an opportunity to attend only one of the summary proceedings. Accordingly, the collected data include 129 held regular proceedings or this accounts for 30% of all monitored hearings and 305 summary proceedings, which accounts for 70% of the hearings held.

Type of proceeding

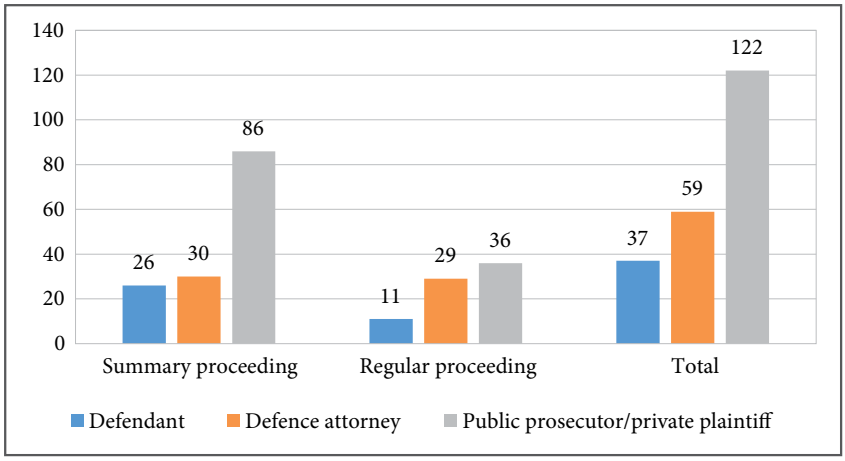


MAIN TRIAL

Pursuant to the Law on Criminal Procedure, when the judge or the panel ascertains that all individuals required to attend the main trial are present, i.e. whether the trial can be held in the absence of some of the summoned persons, the court instructs the parties at the main trial to make the opening statements. The process is conducted in successive order, i.e. the plaintiff-public prosecutor is given the opportunity to make the opening statement, followed by the defence attorney, i.e. defendant. In view of this part of the procedure, once this legal instrument started to apply, the parties are given the opportunity to disclose decisive facts that they intend to prove, to list the evidence that they will present in a later phase and to determine the questions that will be discussed. However, LCP distinguishes between the acts undertaken by the court and the application of this legal instrument both in regular and summary proceedings. Namely, in regular proceedings, the above mentioned principle of making an opening statement is a rule, according to which the defence is always entitled not to make an opening statement. In summary proceeding, which cover over 80 % of the court cases, and entail crimes which are punishable with imprisonment sentence of up to 5 years, the opening statements of the public prosecutors transform into presentation of the indictment's content, whereas the law does not foresee the contribution of the defence in respect of putting forward decisive facts in favour of the defence. Even though the opening statements are not legally binding in summary proceedings, they are often utilized also by the defence attorneys.

Based on the processed data resulting from this monitoring exercise, there were a total number of 122 opening statements made by the public prosecutor, 59 by the defence attorney and 37 by the defendant. The Table below shows the application of this legal instrument both in regular and summary proceedings. One specific aspect that stands out is that in regular proceedings, on several occasions, the defence attorneys exercised their right not to make an opening statement, or specifically in 7 of the monitored cases. Even though it is not specified for the summary proceedings, in almost 30% of cases, defence attorneys made opening statements, as shown in the graph below.

Opening statements



As part of the questionnaire, the monitors were tasked to assess, based on their individual perception, whether the opening statements disclose the decisive facts that will be further discussed and proved in the proceedings by the respective party making the opening statement. Accordingly, the following data were obtained:

-the public prosecutor's opening statements were clear in 49% of the hearings, unclear in 23% of the proceedings and in 28% of the hearings the opening statements only partially revealed what was presented and will be proved by the public prosecutor;

-the opening statements made by the defence attorney were clear in 77% of the hearings, unclear in 8% of the hearings, whereas 15% of the opening statements only partially revealed the facts that the defence i.e. defence attorney will further prove;

-the opening statement made by the defendant was clear in 35% of the hearings, unclear in 6% of the hearings, and 59% of the opening statements only partially revealed the facts given by the defendant.

As a result, the data which were in this way obtained concerning the opening statements, undoubtedly show that defence attorneys make more clear and precise opening statements compared to the public prosecutors. Furthermore, the high percentage of partially clear facts and evidence referred to by the defendants are indicative of the need for hiring a professional, that is, a defence attorney, that would represent the defendant's interests and from the very beginning of the proceedings would portray a clear picture to the court about the intentions to propose evidence and about the case theory that will be elaborated. Yet, one has to note that some of the opening statements made by the defendants, according to the monitors' questionnaires, were made in the presence of their defence attorneys.

Furthermore, one must underline the detected inconsistency in the work of public prosecutors from the aspect of reducing the opening statement to a "plain" reading of the indictment, without presenting the theory of the case or the thesis that will be represented, and the way of distinguishing the legal elements that will be discussed in order to prove the grounds of the indictment. Based on the processed data, the statistics shows that in over 70% of cases where the opening statements were made by the public prosecutor, it was reduced to plain reading of the indictment, rather than a more detailed explanation of what may be derived thereof. Having made such opening statements, neither the court is clear what will the public prosecutor aim to prove, nor the defence is clear about the prosecutor's thesis on the substantiation of the indictment or the plan to prove it.

GUILTY PLEA

The monitors attended 95 hearings in which the defendant pleaded guilty. On this occasion, an analysis is conducted on the data obtained from the monitors regarding the legality of the guilty plea, the role of the court and the parties during the guilty plea process, as well as certain circumstances of guilty plea that concern some specific instruments in the criminal procedure and have immediate impact on the justification and legality of guilty plea. Therefore, analysis is conducted on the data which refer to imposed detention at hearings when the defendant pleaded guilty, as well as the quantity of presented evidence by the court in determining the type and extent of criminal sanction under conditions of guilty plea during the first hearing of the main trial.

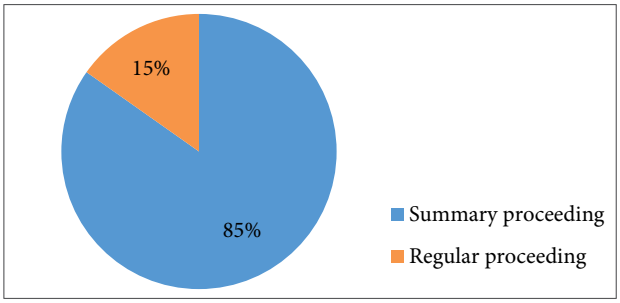
The Table below shows the trend of submission of guilty pleas, that is, out of the total number of 450 monitored hearings and 153 postponed, the monitors attended 95 hearings in which the defendant pleaded guilty. Compared to the total number of hearings held (168), one can draw the conclusion that data concerning the guilty pleas made by defendants are considered as especially relevant data for drawing conclusions. Moreover, out of the total number of analysed verdicts – 119, almost 95 verdicts were reached by guilty plea.

Guilty plea and type of criminal proceedings			
	Summary proceedings	Regular proceeding	Total
Guilty plea	**78**	**14**	**92**

Based on the obtained data, one can draw the conclusion that the instrument of guilty plea is put in place and has begun to take root in the national system of criminal justice. Moreover, this instrument is also recognised by the parties in the criminal proceedings as an efficient tool for rapid, efficient and effective completion of criminal proceedings. An additional argument for the increased application of this instrument may be the data from monitored trials in the previous year when guilty plea was made in 70 cases out of 550 hearings monitored in total. Compared to this year, there is an increase of over one third, that is, defendants pleaded guilty at the main trial in 95 cases out of 450 hearings monitored, in total.

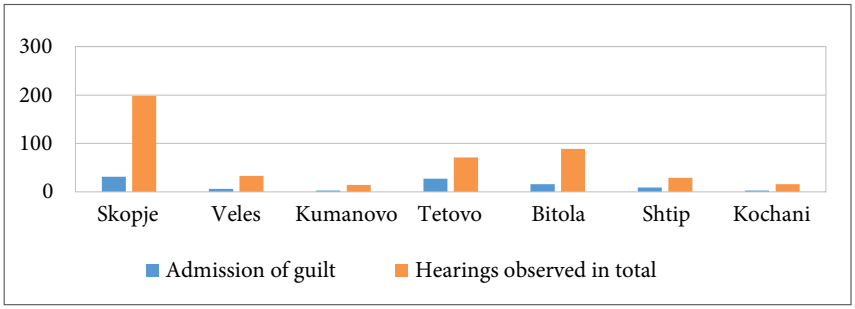
However, from the analysis of the basic courts' annual reports[1], the application of guilty plea is not made in the same extent as in the monitored cases, even though one can conclude that this instrument is applied with increased frequency.

Pleading guilty in summary proceedings



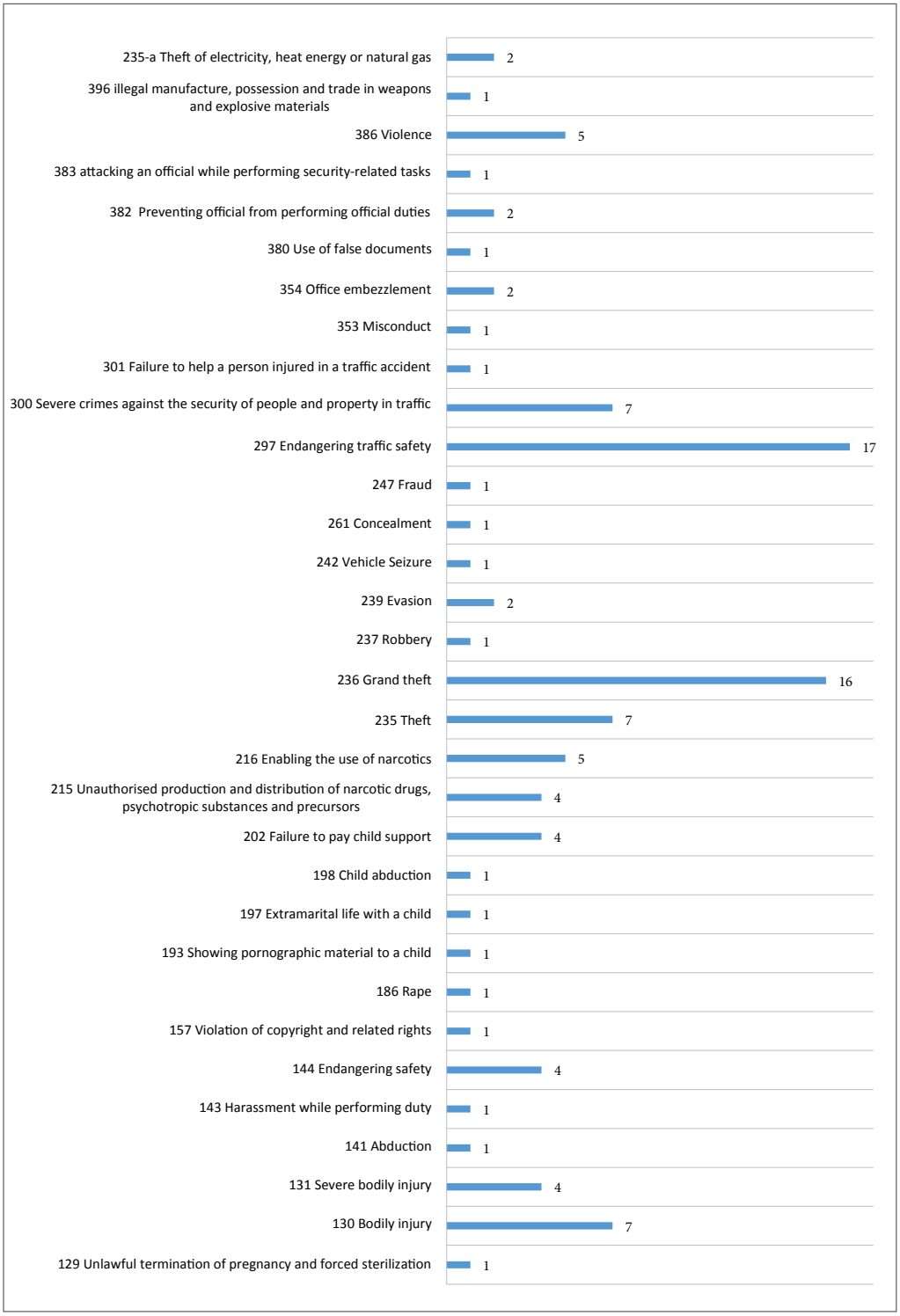
In view of the applicability, an additional argument is the fact that based on the analysed data, obtained by the monitors, this instrument is largely applied in summary proceedings, which accounts for around 85% of the cases, or for crimes which are punishable with up to 5 years of imprisonment. These data support the thesis that courts feel safer to apply this instrument for minor crimes, while considered in correlation with the data obtained from the annual court reports, as well as the data obtained by the trial monitors, one can draw the conclusion that this instrument is not frequently applied for more serious crimes. The data only confirm that it concerns a new instrument and the courts, understandably, have certain reservation to apply it in relation to more serious crimes.

1 For example, see the 2015 Annual Report on the Performance of BC Skopje 1, available at: http://osskopje1.mk/cms/FCKEditor_Upload/gizv15.pdf



Concerning the geographical distribution of the guilty plea in relation to the total number of monitored hearings, one can note that guilty plea was registered, in general, in almost one fifth of the monitored hearings, which accounts for 20% of monitored hearings. Basic Court Skopje 1 and Basic Court Tetovo deviate from this trend. Thus, one can notice the lowest number of monitored hearings in the Basic Court Skopje in which the defendant pleaded guilty, which accounts for 16% of the total number of monitored hearings, whereas guilty plea was more frequent at the Basic Court Tetovo, that is, in one third of monitored cases, which accounts for 38% of all monitored hearings.

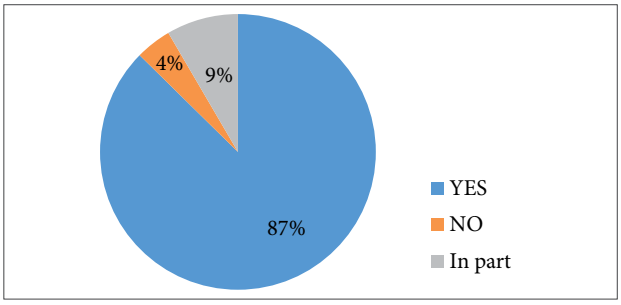
Admission of guilt per criminal act



As to the type of crimes to which the defendants were willing to plead guilty, in general, it concerns a wide range of crimes. If compared to the statistical yearbooks on crime movement[2], one can draw the conclusion that the defendants were generally willing to plead guilty to all crimes; or in other words, the trend of pleading guilty corresponds to the trend of crimes which are processed before the basic courts. The majority of guilty pleas refer to crimes against the life and body, property and public traffic safety. This is followed by crimes against the official position, sexual morality and sexual freedom. Based on the data, one can discern the fact that pleading guilty during the main trial does not depend on the type of crime. Generally, this is a positive conclusion as one cannot detect any selection in the guilty plea in relation to the type of crime. In this context, an additional conclusion derives from the thesis that the willingness of the defendants to plead guilty depends on the extent to which the case and the criminal incident were investigated by the law enforcement agencies, i.e. the extent to which the indictment was substantiated.

The graphs below concern the analysis of the procedural rules on admissibility and legality of guilty plea. Pursuant to the obligation deriving from Article 74 of the LCP that a defence attorney must attend when the defendant pleads guilty, the data, obtained from the monitors and further analysed, show that defence attorneys were present in all of the cases.

Were questions posed to check the admission of guilt made by the defendant

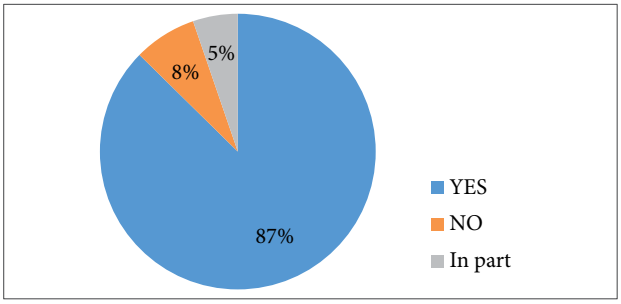


Concerning the data related to verification of all elements of a particular crime, one can conclude that when judges reviewed the guilty plea statement, the defendant was largely advised about the charges and what s/he had pleaded guilty for. Nevertheless, there is a still persistent practice, despite the minimal improvements compared to the previous year (87% against 82%), that judges only read the indictment to the defendant, or provide explanation about the process of determining the type and extent of criminal sanction, according to the provisions of the Law on Determining the Type and Extent of Criminal Sanction. Therefore, one can draw the conclusion that the judges should dedicate more attention to the defendant as well as his/her defence attorney, with regard to the request for providing adequate legal aid to their clients; in the explanation about the legal elements of the crime; the prosecutorial evidence to corroborate the legal elements of the crime; and the manner of commission of the respective crime. The court should be entirely convinced that the defendant had committed the respective crime as provided in the indictment; that is, the specific crime to which the defendant pleaded guilty in the course of the main trial. It is therefore considered inadmissible that the court has adopted a practice to read the indictment or as entered in one of the monitors' questionnaires - the defendant pleaded guilty, but the respective crime had not been committed as presented in the indictment. Any such opposing by the defendant or correction made by the defendant concerning the indictment during the pleading of guilt should not have been

2 See : 2015 Statistical Yearbook , accessible on http://www.stat.gov.mk/OblastOpsto.aspx?id=6

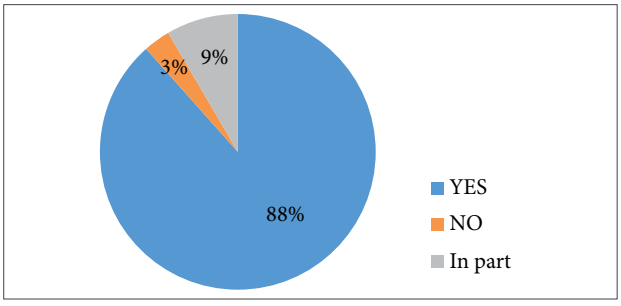
accepted by the court as a voluntary admission of guilt for a given crime, as stated in the indictment. The court should have dismissed it and proceeded with the main trial as if no guilty plea had been made, pursuant to the provisions in Articles 381 and 334 of the LCP.

Were questions posed to check whether the defendant made the admission of guilt of his/her own free will?



An interesting fact is that in 13% of the monitored hearings, where the defendant pleaded guilty, the monitors could note some inconsistency as regards the free will to plead guilty. That is, in 11 cases, the defendant did not plead guilty of own free will or he/she had certain reservations; however, the court failed to take those reservations into account and accepted such flawed guilty plea. Needless to say that such practice adopted by the court should be eradicated, especially in respect of the court›s role in the plea hearing or plea bargaining proceedings, as it assumes the role of guarantor and protector of the defendant's rights. Such practice stimulates the wrongful application of the guilty plea, and shows tolerance for the tactics of the authorised plaintiff to find a scapegoat with the aim to complete the processing of the cases through the court labyrinths, but failing to take account of either the real perpetrator of the crime, or the safeguards of justice.

Were questions posed to check the defendant's awareness of the consequences from the admission of guilt?

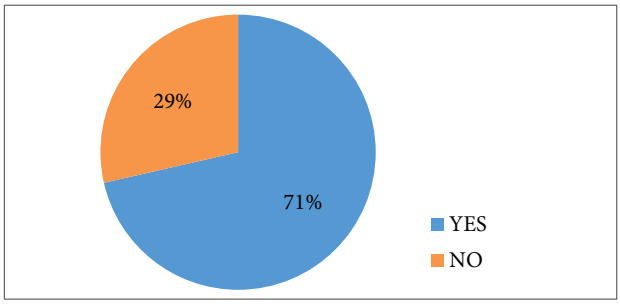


The same is the percentage of cases where the monitors took note of the lack of awareness on the part of the defendant regarding the admission of guilt. The monitors detected cases where the court failed to pay any attention to the opposing on the part of the defendant during the guilty plea, which can lead to the conclusion that such admission of guilt was extorted. The monitors provided interesting data that in one particular case, the court directly advised the defendant to plead guilty so that the public prosecution avoids to file an indictment against an older close relative, on whose behalf the electricity meter was recorded, concerning a case in which the defendant was charged with the crime – theft of electricity, pursuant to Article 235-a of the Criminal Code. In these cases,

instead of acting in the interest of justice and showing impartiality, the judges had predetermined position in relation to the defendant›s guilt, irrespective of his defence and failed to take into account the presumption of innocence of the defendant.

Despite the slight improvements compared to the previous year, it is of major concern that there are persistent cases in which the court, instead of being a passive arbitrator in assessing the defendant's free will and awareness about the admission of guilt, the court still actively represents the interests of one of the parties, which is also contrary to the interests of the justice. In this context, one can arrive at the conclusion about the need to provide additional training for judges, concerning the proactive protection of justice under conditions of admission of guilt during the main trial that is, increasing their active role in the process of assessing the admission of guilt. This role brings it closer to the role of the court within the mixed criminal proceedings. In other words, in order to determine whether the defendant made a guilty plea of one's own will and with full awareness about any consequences thereof, the court can and should be active, as well as inquisitive in assessing the admission of guilt, in such a manner as requesting additional evidence or statements from the defendant in order to ensure complete disclosure and clarification of the criminal event and be fully convinced that the defendant committed the admitted crime[3].

Was there any evidence presented after the admission of guilt?



Finally, apart from examining the awareness and free will under which the admission of guilt is made, the court is to assess whether the guilty plea is corroborated by evidence. Accordingly, Article 381, paragraph 3 of the LCP stipulates the court's obligation to verify whether the admission of guilt is supported by evidence, i.e. during the main trial, the court shall only present evidence that leads to determining the type and extent of criminal sanction. Based on the data obtained by the monitors, one may conclude that the specific part of the proceedings aimed to assess the defendant's admission of guilt is most "vulnerable" in view of prevention of any false testimonies.

Based on the data, it is obvious that the court presents insufficient corroborating evidence for the admission of guilt, and the verdict is largely based on the statement, i.e. the admission of guilt by the defendant. The monitors noted that only in nine hearings there was corroborating evidence presented concerning the determination of the type and extent of criminal sanction. Moreover, an additional problem lies in the fact that in one half of these hearings, i.e. five of them, the only evidence presented by the court was the defendant's prior conviction. Therefore, it is needless to elaborate how questionable is the prior conviction as prima facie evidence. This is for the simple reason that recidivism, i.e. prior conviction[4], itself cannot suffice as ground to determine the crimi-

3 See: Misoski B. , Ilikj Dimoski D., Judges' Role in the Evaluation of the Defendant's Plea within the Sentence Bargaining Procedure, Journal of the Faculty of Security, Skopje, University St. Klement of Ohrid, Bitola, 2016.

4 See Gruevska Drakulevski A., Recidivism and prison, Grafoden, Skopje, 2016.

nal life style of an individual. Any prior conviction should be analysed from the aspect of the type of crime and the respective conviction, the time elapsed from the prior conviction until the admission of guilt, and the respective life style of the defendant. It is considered impossible to determine a more severe penalty by applying a simple mathematical operation and calculate the prior conviction as nine points[5].

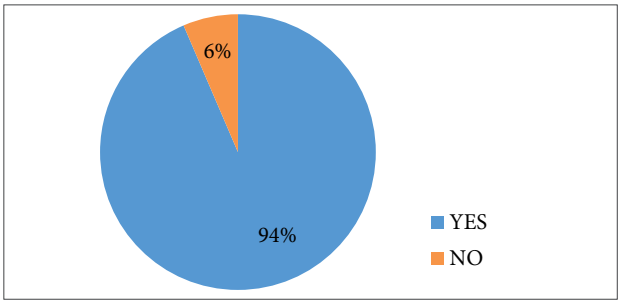
Having regard to the presented data, one can arrive at the conclusion about the necessity of having the court to undertake an active role during the evidentiary hearing; that is, to be authorised to request the parties to provide evidence of appropriate quantity and quality, in order to accept the admission of guilt as righteous and fair, and determine the adequate sanction accordingly. The reasons why evidence is presented in this manner cannot be identified only with the role of the court, but also with some inconsistencies in the LCP. According to the LCP, evidence is proposed by the parties, and following the defendant's guilty plea, the court has insight only in the list of evidence that will be presented during the evidentiary hearing in support of the indictment (Article 321, paragraph 2 of the Law on Criminal Procedure - LCP). The court, therefore, has no knowledge in advance whether any of the listed evidence may be in favour of the guilty plea and to which extent the respective evidence can contribute to the determination of the type and extent of sanction. Moreover, there is a prevailing dilemma, whether any of the parties would be interested in complete disclosure of the evidence through the extensive methods of direct and cross examination of witnesses under conditions when the defendant pleaded guilty.

Accordingly, the LCP would require certain reforms, in the context of modification of the previsions that regulate the main hearing, in such a manner that would accept the "originary" solution from the American criminal justice system that is, holding a separate sentencing hearing. Such a hearing would eliminate the dilemmas which the local courts are confronted with, due to the existing provisions of the LCP which fail to provide efficient means for presenting evidence in support of the guilty plea and determining the most appropriate sanction. Therefore, the court relies only on very simple evidence, that is, prior conviction records, and also relies on the already questionable[6] provisions of the Law on Determining the Type and Extent of Criminal Sanction.

In respect of the question ***"Did the defence attorney have enough time to advise the defendant?"***, the monitors had the possibility to make an assessment only in one third of monitored hearings in which the defendant pleaded guilty. Based on the data from 31 answers, the monitors noted that in 94% of the cases that the defendant had enough time to consult his/her defence attorney, whereas in 6% it was noted that the defendant did not consult his/her defence attorney or he had no sufficient time to consult his/her defence attorney.

5 In accordance with the provisions of the Law on Determining the Type and Extent of Sentences, Official Gazette, no.199/2014.

6 See: Buzarovska G., Tupancheski H, Sentencing Guidelines, "The Paradox of the Macedonian Legislation", Attorney, no.238, November, 2015 Skopje



Nevertheless, one cannot consider these data as problematic for a simple reason - if the defendant already had a defence attorney during the previous phases of the criminal proceedings, one can expect that the guilty plea had been already agreed upon and elaborated with his/her defence attorney.

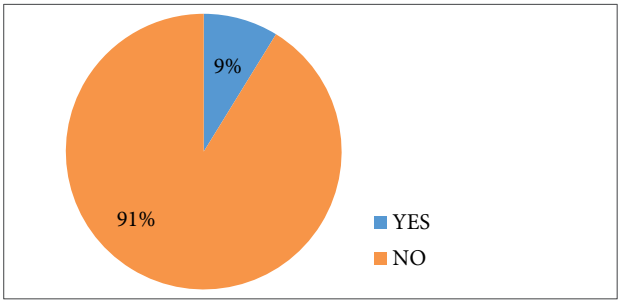
This practice would become problematic in cases in which the defendant had no defence attorney, then decided to plead guilty, and only then hired an attorney or was appointed an ex officio attorney by the court. In such cases, it is considered necessary that the court provides sufficient time to the defendant and the defence attorney, in order to enable the defence attorney to explain any consequences of the guilty plea to his/her client.

Moreover, if such remarks relate to this risky group in 6% of the hearings, any such practice of the court needs to be eradicated and should not be tolerated by any of the parties, irrespective of the fact that the acceptance of the defendant's guilty plea by the court is in favour both of the defendant and his/her defence attorney, as well as the public prosecutor. Such a practice is unlawful and contrary to the interests of justice.

DETENTION AND MEASURES FOR SECURING ATTENDANCE

Article 144 of the Law on Criminal Procedure provides the following measures for securing attendance: summons, precautionary measures, bail, arrest, deprivation of liberty, retention, short detention, home detention and detention. In respect of the range of these measures, the monitors attended only 34 hearings in which the defendants were in detention (see table below), while milder measures for securing the attendance of defendants were applied in only 14 cases.

Monitored hearings in which the defendant was held in detention



Based on the obtained data, there is a noticeable tendency for non-excessive use of detention by the court in the analysed and recorded cases by the monitors, or the measure of detention was applied in about 8% of the monitored cases. However, having in mind the type of crimes for which the hearings were subject to monitoring, one can conclude that detention is not imposed only in small and insignificant percentage, compared to the other hearings. There is a concern, as noted by the monitors, about the persistent practice of the courts not to provide appropriate explanation on the reasons to impose the measure of detention, or to provide realistic assessment of the underlying factors and register them in writing in the decision to continue the detention[7].

In addition to imposing the detention measure, the monitors noted that milder measures for securing the attendance of defendants were applied by the court in only 26 cases (see the table below).

MILDER MEASURES FOR SECURING ATTENDANCE								
		Ban on leaving the place of residence?	Registration at the court	Passport seizure and registration at the court	Forcibly bringing a defendant	Forcibly bringing an damaged party	Forcibly bringing a witness	Total
Were there any other measures imposed to secure attendance?	Yes	1	6	1	6	1	1	26
	No							325
Total		1	6	1	6	1	1	351

The monitors noted that these measures were imposed on the defendants in 14 cases; in two cases the measures were imposed on the other participants in the criminal proceedings, that is, the damaged party and the witness were forcibly brought on one occasion, whereas the milder measure - summons - was applied in the remaining 10 cases.

According to these data, it is inevitable to conclude that the court fails to take into account the alternatives to the most severe measure – detention[8] - as the efficiency of such measures is already recognised in other more developed criminal justice systems.

In this context, the milder measures remain to be only a matter of normative style in our LCP, which are applied very rarely or not applied at all. Regretfully, the same is true about the following measures: bail, home detention and most of the precautionary measures. Accordingly, one needs to note the arguments for overlooking these measures. Namely, there is lack of adequate mechanism for their application and control; the court does not dispose of appropriate tools that would provide convincing data that if applied, there will be sufficient guarantee that the defendant's presence will

7 These comments have been referred to our judges for longer period of time and have been also recognised by the European Court of Human Rights, for example in the case "Vasilkovski and Others vs. the Former Yugoslav Republic of Macedonia", No. 28169/08, 28 October 2010. For more details, see: Buzarovska, G.,Andreevska S., Tumanovski A., Application of the detention measure according to the Law on Criminal Procedure of 2010 – Legal Analysis, OSCE, Skopje, 2015.

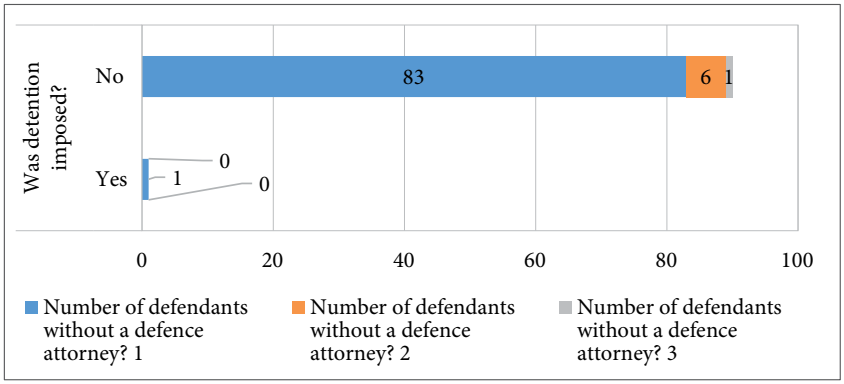
8 See: Misoski B., Bail, Precaution Measures and/or House Detention: Analysis and Recommendations for More Frequent Application, Proceedings of the Post Doc Colloquium in Public Law, Tirana and Skopje, SEELS Network, 2014.

be secured during the main hearings and that their application would exclude or reduce the risks for which the measures were applied.

Therefore, it is recommended that mechanisms for institutional support of the court need to be developed in order to ensure the application of milder measures that secure the attendance of the defendant in the course of criminal proceedings. In this respect, such mechanisms are primarily seen from the aspect of developing the capacities of the Probation Services, which are established in accordance with the Law on Probation; introduction of changes and amendments to the Law on Probation that would incorporate the respective measures as competence of the probation services; as well as application of the LCP by imposing an ex officio obligation to the probation services to deliver the respective data to the court and generate risk assessments concerning the defendant, that would serve as ground on which the court would decide about the application of the most appropriate measure for securing the attendance of the defendant. Finally, having regard to these recommendations, the court would be enabled to provide true and based on fact rationale in the decision to apply the measures for securing attendance.

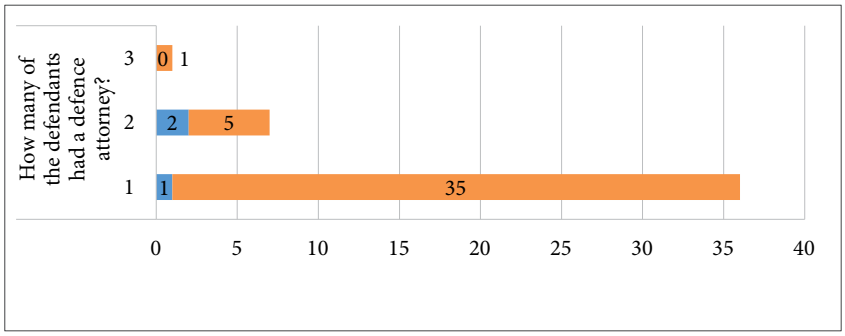
In respect of assessing the legality of the procedure to apply these measures, one can conclude that apart from one case, the requirements of the LCP referring to the presence of the defence attorney when the measure of detention is imposed, were properly applied in all other cases.

Detention-without a defence attorney



On the other hand, based on the monitors' analysis, one can commend the practice of the court (see the graph below) for having entirely fulfilled the procedural provisions on the obligatory attendance of a defence attorney under conditions when the detained person admitted the guilt.

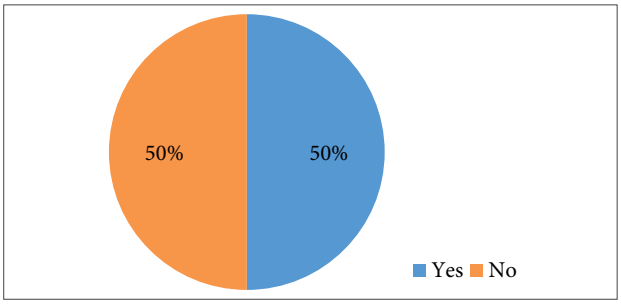
Admission of guilt made with a defence attorney-detention



The observed practice of the court to fail to act in line with Article 173 of LCP is problematic, that is, according to this Article, detention is to be discontinued following the admission of guilt, in cases when it had been imposed under conditions of existent justified risk that the defendant will hide, falsify or destroy the traces of the crime; or if there are special circumstances indicating that the defendant will obstruct the criminal proceedings by tempering with witnesses, expert witnesses, accomplices or those covering up criminal acts. Or, despite the insignificant number of observed violations when the court acted contrary to the LCP in two of four noted cases, or specifically, it failed to discontinue the measure of detention once the defendant admitted the guilt, yet, any such cases require to be further analysed. This is for a simple reason that being driven by the iura novit curia principle, one can draw the conclusion that most probably detention in such cases was imposed on several grounds, and there was rational expectation on the part of the court that the other grounds for continuation of the measure of detention would persist, even though the defendant pleaded guilty.

However, despite of having accepted this argument, and as noted in this report, the existing problem still persists in respect of the factually instituted decisions to impose detention, that is, the frequent, uncritical and unsubstantiated imposing of detention on several grounds from Article 165 of LCP, as well as the noted problem concerning the rationale in the decisions to impose detention based on (in)appropriate facts and evidence, which also implies their (in)appropriate registration in the respective decisions.

Was the detention discontinued after making admission of guilt



Any other explanation concerning the monitors' allegations would lead to the conclusion that the foregoing Roman legal principle is denied, which would further result in wrongful application of the LCP provisions. Moreover, had the court taken this position in such cases, defence attorneys as well as public prosecutors, who are the guardians of legality, should not have tolerated any such

action, i.e. it should have been challenged in appeal proceedings for a simple reason that such cases endanger the fundamental human right – right to liberty.

EVIDENTIARY PROCEEDINGS

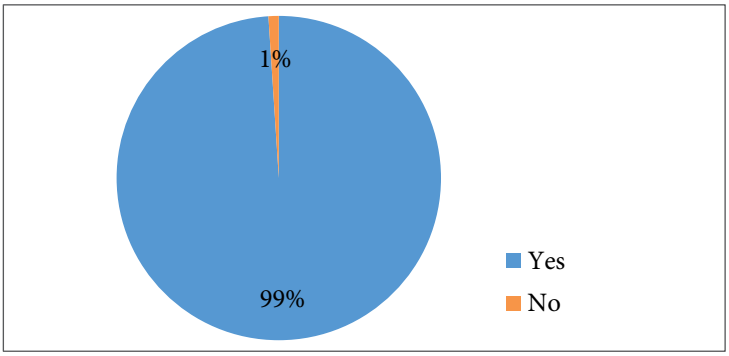
The evidentiary proceeding, as part of the main hearing, is stipulated within the scope of Articles 382 to 394 of the LCP, and as such it is given a consecutive order in the law, as well as in the systematically arranged questionnaire of the Coalition, that is, after the defendant is advised about his/her rights and the option to plead guilty during the hearing. There is a clearly prescribed order of presenting the evidence in this part of the proceedings. Specifically, the first to be presented are the evidence related to the indictment and any property claims, followed by the evidence of the defence and possible prosecutorial evidence that would challenge any of the evidence presented by the defence, in the form of evidence in rebuttal, as well as the evidence of the defence in response to the such challenging, in the form of evidence in reply.

The Law on Criminal Procedure specifies 3 ways of examination - direct examination, cross-examination and re-direct and re-cross examination. Direct examination is undertaken by the party that proposed the witness, the expert witness or the technical advisor; cross-examination is undertaken by the opposing party, whereas any additional examination is repeated by the party who called the witness or the expert witness, so that any questions posed during this examination are limited to the questions posed during the examination of the opposing party. After the parties complete their examination, the chair of the judicial panel (and its members) may ask questions.

During the evidentiary proceedings, the role of the court is to exercise control over the manner and order of examining witnesses and expert witnesses as well as the presenting of evidence, and accordingly takes into account the efficiency and cost-effectiveness of the proceedings and the determination of truth. In this part of the proceedings, the court also decides about any objections raised by the parties, whereby it can ban a certain question or answer to a question which had already been posed or if that is considered inadmissible or irrelevant for the case, or the respective question entails both the question and the answer. Indeed, cross-examination is considered as an exception.

The data collected by the monitors show that there is strict adherence to the legal provisions in this respect, and only minimal exception of 1% was registered; that is, the monitors registered inconsistences in the legally prescribed order of presenting evidence in only 2 cases, which was explained on the ground of ensuring the cost-effectiveness of the proceeding. However, what is being perceived as cost-effectiveness on the part of the court (in the respective 2 cases), in fact, entails the violation of the defendant's rights which are specified in the LCP.

Was the order of presenting evidence in accordance with the legally prescribed order?

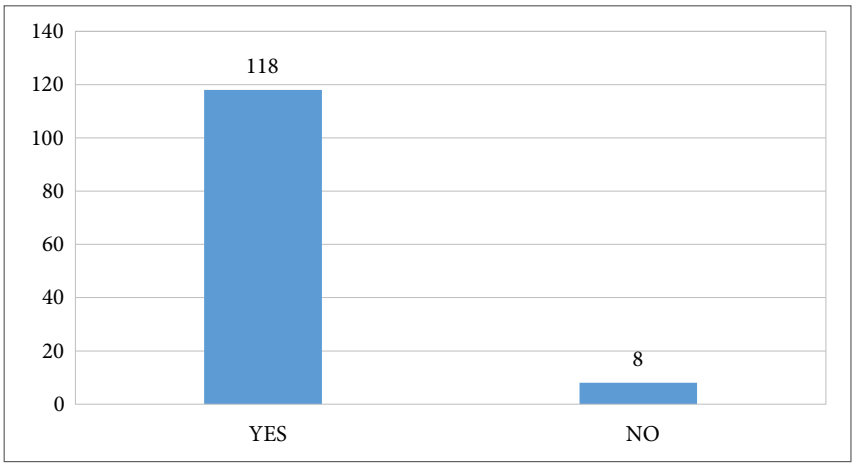


One novelty that was introduced in the LCP and is currently being applied, refers to the application of paragraph 2 of Article 386, according to which the witness should take an oath before giving a testimony. One should underline the fact that even though taking an oath is prescribed by law, the court is obliged to warn the witness about his/her duty to inform the court on any matters related to the case to the best of his/her knowledge, and advise the witness that any false testimony is a considered a serious offence. Based on the available data, the novelty in the law is applied to a satisfactory extent by the court - 69%. However, irrespective of whether an oath was taken or not, the person who testifies may be held criminally responsible for giving false statements in the capacity of a witness and this may be the reason why such obligation is seen as non-obligatory.

In view of the LCP application, and especially the application of the introduced novelties, during the period of vacatio legis as well as once the LCP started to apply, numerous training were organized by the OSCE Mission to Skopje, the American Bar Association in cooperation with the Academy for Judges and Public Prosecutors and the Bar Association. Yet, one can note the need for additional professional development of all actors in the proceedings. In particular, this refers to the application of the provisions related to direct examination, cross-examination and re-cross and re-direct examination of witnesses which is due to the fact that the actors in the proceedings have not yet mastered the techniques which are required to apply the respective legal provisions.

The foregoing conclusion derives from the data collected in respect of the examination of witnesses. The questions that were designed and included in the questionnaire and were used by the monitors as tool for sharing the experiences and the findings obtained in the court, also included a set of questions that precisely refer to the manner and techniques for different types of examination. The questions entail the aspects of clarity, lack of ambiguity, the extent to which the parties in the proceedings have studied and become familiar with the case, as well as the technical rules that the court and the parties are to respect during the proceedings.

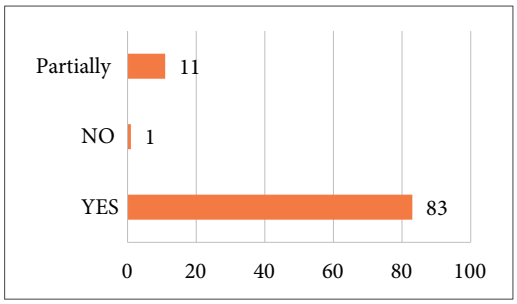
In respect of the part "Were the questions clear and precise during the direct examination of the witness or expert witness?", the following data were obtained from 126 hearings in which direct examination was applied:



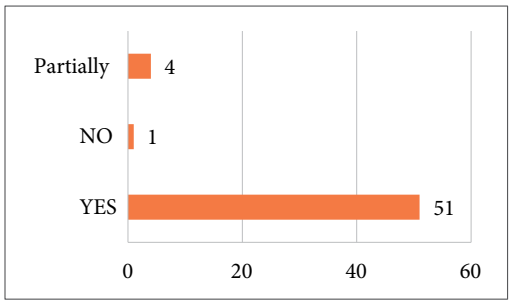
In respect of the question whether the party, who called the witness, left an impression of knowing what he/she was asking and can properly handle the case, we found that irrespective of whether the public prosecutor or the defence called the witness, both parties made the impression that they knew what they were asking and that they handled the case well, which can be seen in the graphs below.

Direct examination undertaken by

Public prosecutor



Defence attorney



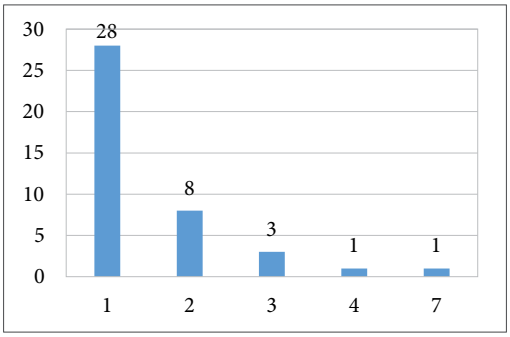
As to the court›s activity in the process of presenting evidence, it is stipulated that the role of the court is to exercise control over the manner and order of examining the witnesses, expert witnesses and the presentation of evidence, and accordingly the court takes into account the efficiency and cost-effectiveness of the proceedings, and the determination of truth, when necessary, but also takes care about the dignity of the parties and witnesses in the proceedings. During the proceedings, the court can ban a certain question or answer which had already been answered, or if the question is considered as inadmissible or irrelevant; the court may also reject that certain evidence is presented if considered as unnecessary and of no relevance for the case, however; under no circumstances after the cross-examination, the court may not prevent the opposing party to cross-examine the witness. This type of violation was observed in only 2% of the processed data.

As regards the cross-examination, the data indicate the necessity for further improvements by all actors in the proceedings. Cross-examination is stipulated to be limited and to entail only questions that were previously asked by the party that proposed the witness. Deviation from

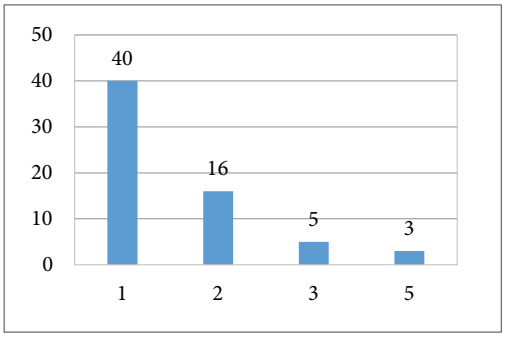
this rule, which is stipulated in the LCP, was noticed in 18% of the monitored cases. Specifically, in 88 hearings involving cross-examination, in 72 of them, which accounts for 82%, the cross-examination was limited to questions from the direct examination; however, this was not true in the remaining 18%. There were registered cases when the judge directly reacted to questions which deviate from the concept of cross-examination, even though it is still questionable whether the judge has the right to ban a particular question without properly raised objection by the party in the proceedings. In other cases, the parties failed to raise objections on the questions, and therefore they were subject of further explanation and reply.

Based on the collected data, it is a striking fact that the mechanism of cross-examination is more utilized by the defence attorneys than the prosecutors. As shown in the graphs below (the horizontal line on the bottom of the graph shows the number of defendants in the proceeding), total of 64 persons were cross-examined by the public prosecution, and 104 persons were cross-examined by the defence attorneys. The data lead to the conclusion that defence attorneys show more determination to utilize the available resources in order to put forward their defence strategy and prove the theory of the case in the interest of the defendants.

Cross-examined persons by PPO



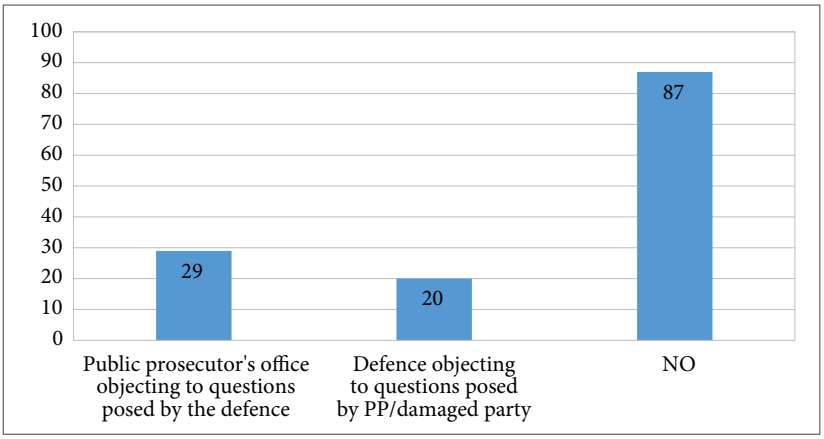
Cross-examined persons by the defence



Another indicator of the need for improved application of the mechanism- cross-examination by the parties, relies on the fact that no closed questions were used in 31% of cross-examinations. Furthermore, some interruptions were registered during the cross-examination, that is, 31% of the examination was not performed in a smooth and uninterrupted manner. On the other hand, according to the monitors' perception, the cross-examination was successful in 80% of cases.

With regard to the use of objections as tactical mechanism to defend one's own strategy in a particular case, one can conclude that practically there is equal utilization of this mechanism by both the prosecution office and the defence. However, if compared to the statistics from the analysis for the previous year when the use of objections by the public prosecution accounted for 22% of the cases and 11% on the part of the defence, this year there is a slight downward trend concerning the public prosecution office and upward trend concerning the defence. That is, the public prosecution office used objections in 20% of hearings, whereas the defence used objections in 15% of hearings, which, in fact, implies that the utilization of this mechanism is brought closer.

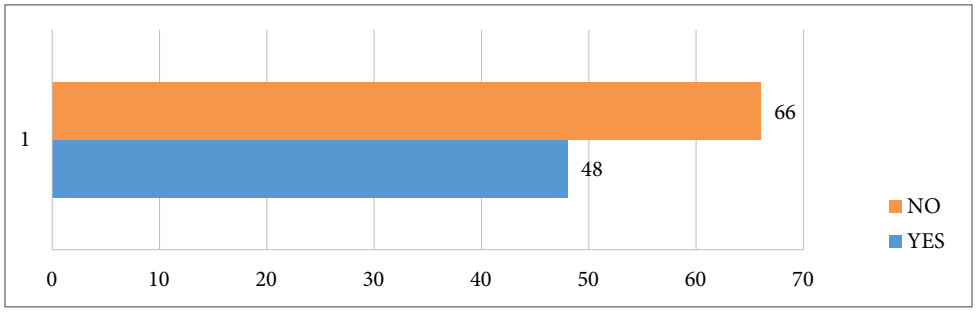
Use of objections in the course of the proceeding



As previously mentioned, the possibility for the court to ask questions in order to clarify certain facts and inconsistencies in the statements is not completely removed, but one has to bear in mind the old Law on Criminal Procedure where such possibility was an exclusive right of the court; that is, it was the court that asked questions, while the parties could pose questions once the examination was completed in order to establish some missing facts. The court is now given the possibility to pose questions as soon as both parties in the proceeding have completed their examinations; however, such possibility should not be transformed into a separate examination.

The graph below enables us to analyse the possibility for the court to pose questions, which illustrates that the court has been largely utilizing the additional mechanism for posing questions, i.e. in 48 of the monitored proceedings, which accounts for 42% of all monitored proceedings.

Does the court exercise its right to pose questions to the witness/expert?

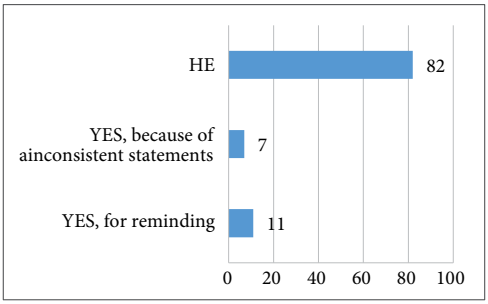


Some questionnaires include that judges have shifted this possibility into an entirely separate examination of witnesses/experts. Obviously, the old habits which were deeply rooted in the previous system are being still applied, despite the diametrical changes of the overall system of court proceedings.

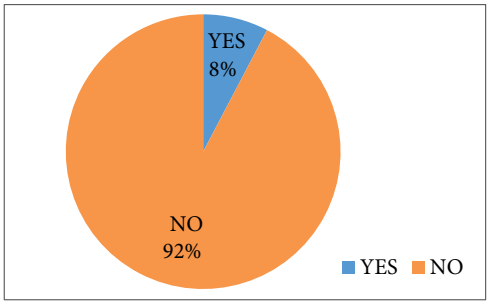
With respect to Article 388, paragraph 2 of LCP, i.e. exception to direct presentation of evidence, according to which the statements made by witnesses during the investigation and the statements collected by action of the defence during the investigation, can be used in cross-examination or to challenge the presented findings or as evidence in rebuttal, for the purpose of evaluating the authenticity of the statements given during the main hearing, the monitors found that this exception was not

largely applied. However, for certain percentage or 18% of cases where this exception was applied, this was undertaken due to inconsistent statements or due to reminding the witness about already given statement in order to discredit the witness, that is, when the statement given in direct examination deviated from the previously given statement. In addition, in lower percentage of the hearings, i.e. 8% of the monitored hearings, the public prosecutor gave a proposal for reading the statement that the witness or the defendant made in a preliminary procedure.

Statements used/Statements made in preliminary proceedings



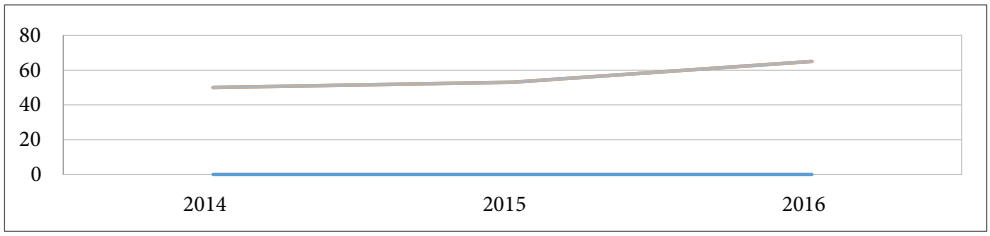
Reading the statement made by the defendant in preliminary proceedings



With regard to the examination of the defendant in the proceedings, one has to underline that in accordance with Article 391, paragraph 1 of the LCP, the defendant shall be examined on the proposal of the defence. The introduction of this provision in the law means complete abandoning of the principle for automatic examination of the defendant only based on the need of the prosecution office to prove the indictment. Having abandoned this system of examination, now the defendant is enabled not to be examined in the proceedings, but rather it relies on the disposition of the defence, which is contrary to the previous provisions according to which the defendant should have used the right to remain silent in a situation when s/he considers that no statement should be made, which in return creates a different image of the defendant, most often that s/he is guilty and early conclusions are reached by the court both for the defendant and his/her actions.

When the defence makes a proposal that the defendant should be examined, the examination during the hearing is carried out according to the applicable rules which are valid for examination of witnesses, i.e. expert witnesses with respect to particular types of examinations, whereby the defendant may not refuse to answer any questions that are posed according to the concept for cross-examination.

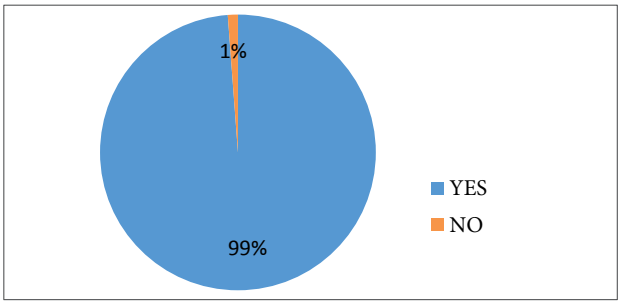
The statistics obtained from the data collected this year, shows that in 65% of the monitored hearings the defendant was examined, which is an upward trend compared to the data from previous years, that is, 53% in 2015 and 50% in 2014, respectively.



FAIR TRIAL – equality of arms

With respect to the evaluation of the equality of arms between the parties, one can conclude that the monitors preserved the same position as in the previous years. On the question "Were the parties equally treated by the court and whether the defence was given the same opportunities as the public prosecution office in the process of proposing evidence?" the monitors provided high percentage of affirmative answers - 99%. According to the answers, the monitors provided negative answers in only three, i.e. two cases, as illustrated on the graph below.

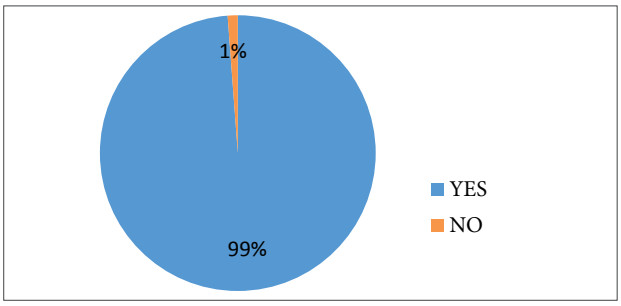
Were the defence and the public prosecutor equally treated by the court?



In this context, one can conclude that during the main hearing, when the parties are afforded the possibility to oppose before the court, the court largely equally treats the parties, that is, gives them equal opportunity to propose evidence. In addition, the identified remarks[9] in the sense of restricting the right to equality of arms, most probably derive from the unequal opportunities given to the parties, primarily in the course of the preliminary proceedings, that is, when evidence is collected, so by analogy, if the parties are not able to collect certain evidence during the investigation, there is no possibility to propose that such evidence is presented during the main hearing. In fact, in this way, the problems related to the equality of arms between the parties, which is part of the fair trial principle, can be possibly disguised if the analysis is made only from the aspect of the role of the court in the course of the main hearing.

9 See: Kalajdziev G. Denkovska, Analysis of the data obtained from court proceedings observed in 2015, "Coalition All For Fair Trial", Skopje, 2015, page. 52

Was the defence given the same opportunities as the public prosecution office in respect of proposing evidence?

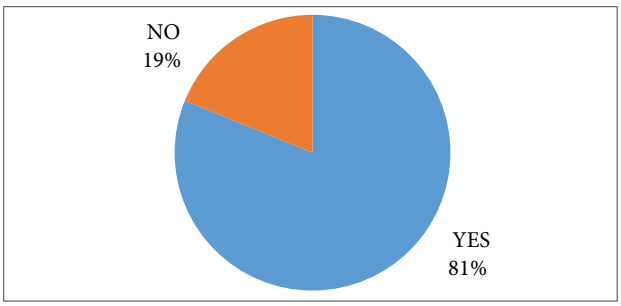


Public trial right/principle

With regard to the publicity, as one of the fundamental principles of court proceedings, one can conclude that any significant inconsistencies in the application of provisions of the LCP were not noticed by the monitors. Also, the monitors concluded that in cases where the public was excluded, that was undertaken in compliance with the provisions of the LCP.

One interesting fact in terms of protecting the right to public trials is the obvious inactivity when it comes to having publicly announced the time and cases brought before the courts. As this matter is concerned, one can notice a constant downturn. Compared to the previous year, when the time and the place of the trials were not announced before the courtroom in only 12% of the monitored cases[10], this year, the trend is further enhanced and accounts for almost 20% of the analysed cases. The reasons for such weakening of the right of the public to be informed about the place and time of court proceedings in the court buildings can be identified with the poor maintenance of the notice boards in the courts; there is poor planning about the regular maintenance of the notification systems in the Judicial budget or the court administration units lack adequate understanding of the relevance of timely notification about action taken before the court, so that they overlook the obligation during the ongoing exercising of the judicial competencies.

Were the place and time of the trial publically announced on the notice board outside the courtroom?



10 Ibid, page. 54.

Impartiality right/principle

The principle of court's impartiality is one of the essential principles as part of the right to fair trial and fair proceedings. The analysis whether this principle is protected in the court proceedings was based on a set of questions concerning the judicial disqualification, which is, in fact, one mechanisms under conditions when the partiality of the court towards some of the parties is recognized. Throughout the monitoring, the monitors did not witness any cases when the parties requested the judge to be disqualified. The data lead to the conclusion that the court adequately applied and gave due attention to the provisions of the LCP, which stipulate when a judge must be disqualified, as well as that the court appropriately conducted the proceedings without any grounds for suspicion of its partiality, which can be a ground for optional disqualification of judges (recusal).

Interestingly enough, in seven proceedings the monitors noted that the judges had already formed opinion with regard to the case. In particular, the data show that these figures are continuously on the increase in the last three years, that is, from only two registered cases two years ago, it increased to five cases last year and finally, seven registered cases in this year. Furthermore, it is worth noting that this is usually the case when the defendant had already pleaded guilty. Despite the insignificant number of such registered case, i.e. seven hearings out of total of 450 monitored hearings, yet, such practice poses a certain concern because instead of having the court actively assess the guilty plea, there is a situation where the court hardly waits for the admission in order to have its position towards the defendant verified. Moreover, such cases would also require that the role of the defence attorney is re-evaluated, i.e. whether and how was the client advised about the admission of guilt. When the court has taken such a role, the overall guarantee and safeguard mechanisms of the courts' image become highly questionable. One possibility to abandon this situation is the prospective future reform of the LCP provisions by introduction of a special sentencing hearing, and in such case some additional evidence will have to be presented before the court that would confirm the guilt on the part of the defendant, which was previously discerned by the court through the defendant's admission of guilt.

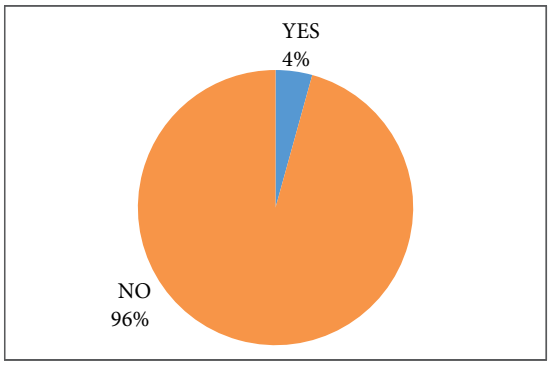
Based on the data, one can conclude that the court was biased in five cases, whereas the defendant was intimidated in two cases. Such intimidation, as was additionally explained by the monitors, was detected through the way in which the court, while explaining the provisions of the Law on Determining the Type and Extent of Criminal Sanction, used wording that stimulated the defendant's admission of guilt and put strong emphasis on the fact that admission of guilt implies a milder sanction as opposed to the having held the main hearing which would result in more severe sanction.

In such cases, one can consider it probable that the court delivered inappropriate wording for the purpose of somehow assisting the defendant, while giving explanation about the consequences from the admission of guilt. Yet, such practice of the courts should be minimized and eliminated through appropriate training of judges, in order to avoid the practice of the court to give indications about the consequences from the admission of guilt, which may be further interpreted both by the defendant or other actors in the proceedings that the court is in favour of the admission of guilt. In this way, the admission of guilt would only result from the free will of the defendant and would be void of any burdens from initiatives or subtle pressures on the part of the court.

As far as the additional training for judges is concerned, a particular accent should be put on training the judges about the communication of the court with the clients, given the fact that improper ex-parte communication can largely create an impression about the (im)partiality of the court both for the defendant and the general public. Such impression was created based on the

fact that the monitors registered this practice in 12 hearings, which implies a significant increase, compared to the previous year, when such communication was registered in only 5 cases.

Was there improper *ex-parte* communication?

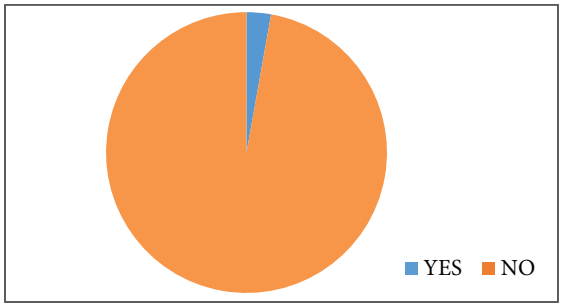


The reasons for the necessity of additional trainings for judges rely on the fact that under conditions of improper ex-parte communication, the court runs the risk to be recognized as closer to some of the parties, whereby the general public no longer has impression that the court is impartial. Also, sometimes defence attorneys make an attempt and/or abuse the improper communication with the court so as to present themselves before the clients as having close relations/contacts with the judges, and justify the promises that they had made to the clients, even though not always realistic, regarding the outcome of the criminal proceedings.

Presumption of innocence

Presumption of innocence is closely related to matters of partiality and all other previously analysed aspects. This year, unlike the previous year, the situation has deteriorated when viewed from the aspect of the data observed by the monitors. The monitors registered that the defendant's right to presumption of innocence was violated in eight cases, which accounts for 3%, and there is a triple increase compared to the previous year when it accounted for only 1% of the cases[11].

Was there anything suggesting that the principle of presumption of innocence was not respected?



11 Ibid, page. 60.

This conclusion, viewed in relation to other data on the court's impartiality, where the monitors found that the court was biased in seven cases, and the defendant's right to presumption of innocence was violated in eight cases, can point to the conclusion that in all of the registered cases, the court was biased to the detriment of the defendant. No comments are needed in terms of which would be the effects deriving from this conclusion. Therefore, it is deemed necessary that additional training is delivered for the judges with respect to their role in assessing the defendant's admission of guilt during the court proceedings. However, a dose of optimism is instilled by the low number of registered cases, which is why one can conclude that this is not a widespread phenomenon among the judges and therefore, it can be easily thwarted and eliminated.

Right to defence

The right to defence was analysed in a set of questions, mainly in respect of advising the defendant about his/her rights, defence attorneys' efficiency to realise the theory of the case during the main hearing, the access of the defence to the overall evidence, the appropriate time for preparation, and possible restrictions on this right or/and restrictions on the right of the defendants held in detention to communicate with their defence attorneys.

As to the efficiency of the right to defence, our monitors noted that in 19 cases, which accounts for 12% of the answers to the question, defence attorneys were not equal to the task in terms of ensuring efficient and professional defence to their clients. In that context, even though it concerns a low percentage from the total number of monitored cases, it is deemed our duty to note that defence attorneys, and the Bar as a professional organisation, are obliged to ensure continuous education and development of the professional standards for the members. Therefore, there will be a need to provide analysis on continuous basis concerning the efficiency and professionalism of the defence attorneys[12] , in particular, under conditions when the adversarial system is put in place, and when their professionalism becomes especially apparent during the main hearing, while the outcome of the criminal proceedings largely depends on the defence. This fact is supported by an additional argument, which poses a concern, that compared to the previous year there is an upward trend, that is from 6%[13] to 12% in the analysed completed questionnaires. Furthermore, our primary consideration refers to the appropriate formulation of the case theory of the defence, the proposing of appropriate evidence, and the active role of the defence to challenge the prosecutorial evidence by cross-examination and the practice of raising objections to the court so that prosecutor's questions during the witness testimony are overruled by the court.

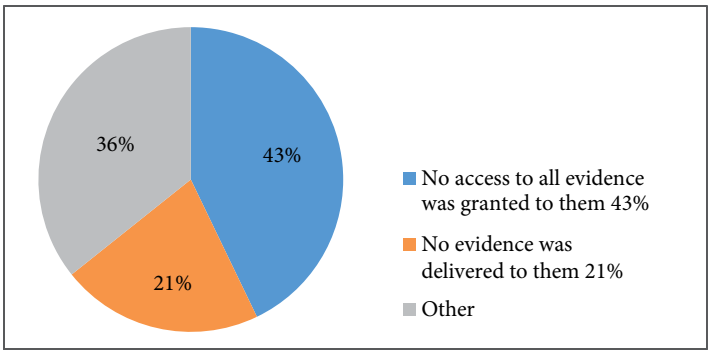
Regarding the efficiency of the defence, the defence attorneys, in a defensive manner, often put forward arguments based on the lack of sufficient time to prepare their own defence or that they were confronted with certain restrictions in the contact with their clients. Such inconsistencies were registered in four cases.

12 The importance of the role of the defence attorney in the course of the adversarial criminal proceeding, especially in the course of the mediation proceeding, was stressed in multiple empirical studies in USA and England even in the 70s of the previous century – for example see more in: Albert Alschuler, The Defense Attorney ‹s Role in Plea Bargaining, 84 Yale Law Journal 1179 (1974); Baldwin J. & McConville M., Negotiated justice: pressures on defendants to plead guilty, London : Martin Robertson, 1977. Or for more contemporary studies see: McConville, Mike, Plea Bargaining: Ethics and Politics, pp. 562-587, Journal of Law and Society, Vol 25, No. 4, 1998; Yue, Ma, Prosecutorial Discretion and Plea Bargaining in the USA, Germany, France and Italy: A Comparative Perspective, International Criminal Justice Review, 2002, 12, 22.

13 Ibid, page. 68.

With regard to the problems that defence attorneys face in the provision of effective and efficient defence to their clients, traditionally, they claim that they have restricted access to all the evidence available to the public prosecution office (in 6 cases); that the prosecution fails to deliver the evidence to the defence (in 3 cases); and in other 5 cases in which defence attorneys were denied this right. One can notice that this year, there is drastic increase in the number of complaints from defence attorneys, that is, from two registered case in the previous year, up to fourteen registered cases this year, or a sevenfold increase[14].

Were there reactions on the part of the defence because



Accordingly, this can be understood that the desired objectives of the criminal procedure reform[15] , put in place through the adoption of the LCP in 2013, have not appropriately echoed in practice; and by making an analogy, one should consider certain modifications of the LCP provisions that would incorporate the safeguard mechanisms for the defence attorneys, so that the obligation to allow the defence attorneys access to all prosecutorial evidence would be enhanced. This can be made feasible through introduction of a ban to present evidence which was not delivered to the defence and is deemed detrimental to the defendant, or through introduction of an obligation to present evidence which is beneficial for the defence, but the defence claims that even though the public prosecution office is in possession of that evidence, yet it was not delivered to the defence. Also, the practice of giving limited access of the defence to certain evidence should be prohibited, because no copying, recording or transcripts are allowed. This refers to cases when the evidence is presented to the defence only in the premises of the public prosecution office, with no possibility for the defence attorney to copy or make transcripts of the evidence, or this activity is further burdened with inappropriately high costs for copying or electronic multiplication on another electronic device for data transfer.

Also, it is considered essential that deadlines, specified in the law, need to be changed and extended - according to which the defendant and defence attorney during the investigation have the right to submit certain documents, evidence or request the public prosecutor to undertake certain investigation and secure certain evidence, in respect of paragraph 4 of Article 302 of LCP, as well as that special deadline should be determined for the main hearing, meaning that the defendant and his/her defence attorney would have sufficient time to prepare the defence concerning the newly obtained evidence by the public prosecution office.

14 Ibid, page. 70.

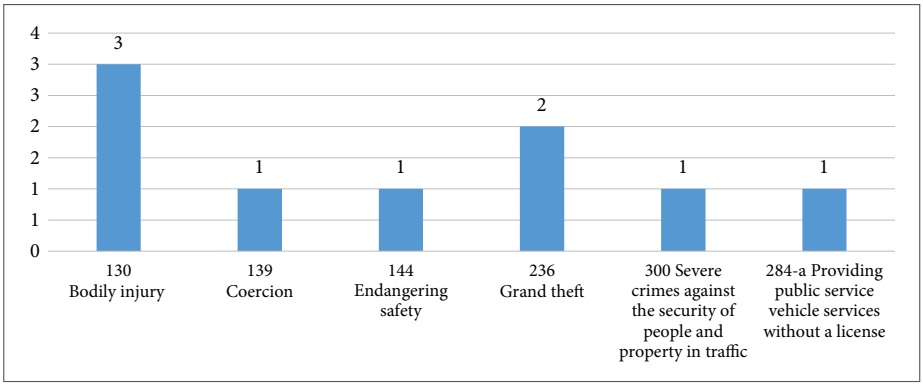
15 See: Krapac D., Kambovski V.,Buzarovska G., Kalajdziev G., Strategy for Reform of the Criminal Law, Ministry of Justice, Skopje, 2007, accessible on:http://arhiva.vlada.mk/registar/files/strategija_kazneno.pdf

PRONOUNCING AND ANNOUNCING THE VERDIT

Once all the evidence is presented, namely, the evidentiary and main hearings are completed, according to the LCP, the provisions referring to the verdict are successively applied. Three types of verdicts are stipulated in our Law on Criminal Procedure: rejecting – meaning that the indictment was rejected, not guilty – meaning that the defendant was acquitted, and guilty – meaning that the defendant was convicted/found guilty.

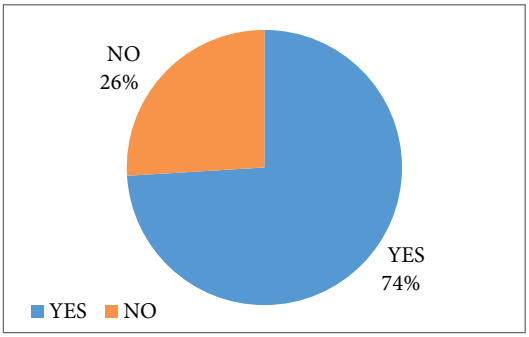
The trial monitors from the Coalition "All for Fair Trials" did not detect any rejecting and not-guilty verdicts; however, they came across situations when the indictment was withdrawn by the public prosecutor in the course of the proceeding. The indictment was withdrawn in 9 of the monitored cases, that is, in 3 cases where the crime "Bodily Injury" was the ground for prosecution, in 2 cases "Grand Theft" and the remaining for the following crimes "Coercion", "Endangered Safety", "Severe Crimes against the Safety of People and Property in Traffic" and "Providing Public Transport Services without License".

Indictments withdrawn based on the type of crime

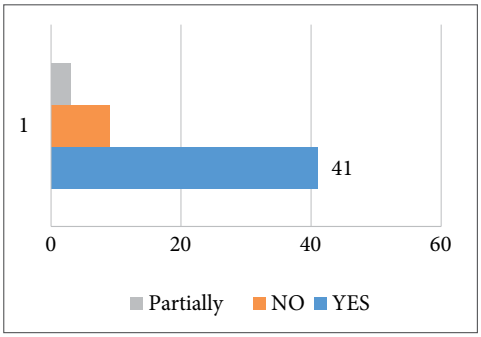


According to the provisions of the LCP, once the verdict is pronounced, it must be immediately announced in public. When the court is not able to pronounce the verdict the same day after the completion of the main hearing, the announcement of the verdict may be delayed for a period not longer than 3 days. It is stipulated that the court announces the verdict (chair of the judicial panel or sole judge) in the presence of the parties, their legal representatives, proxies, defence attorneys, by publically reading the enacting part of the verdict and stating the reasoning thereof. In a brief explanation, the court makes reference to the criminal act the defendant «is charged with» and already convicted for (with the verdict), as well as to the evidence presented.

Public announcement of the verdict



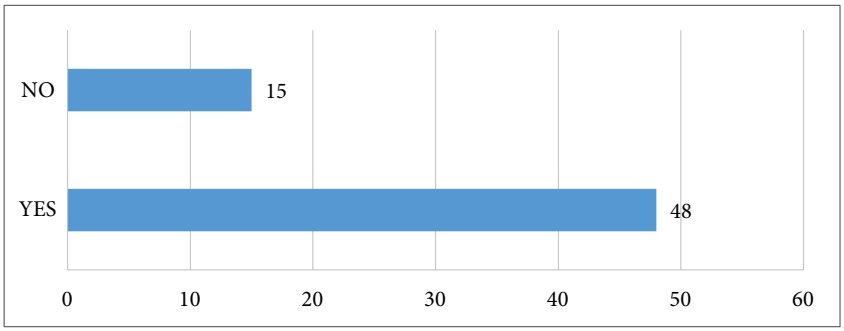
Did the court make reference to the criminal act the defendant is charged with and the evidence presented?



According to the processed monitoring data, it is shown that the verdict was publically announced in 74% of cases, unlike in 26% of the cases when the verdict was not publically announced (see the graph on the left above). Also, the data show that when the verdict was pronounced at the hearing (see the graph on the left above), in 41 cases or hearings the court made reference to the criminal act and the evidence, in 3 cases it made a partial reference, whereas in 9 hearings the court made no reference at all (see the graph on the right above). Compared to the statistics obtained for the needs of similar analysis in the previous year, one can note an upward trend in the percentage of verdicts that were not publically pronounced and announced. Specifically, based on the data from the previous year, the court publically announced the verdict in 88% of cases and in 12% of cases the court failed to do so.

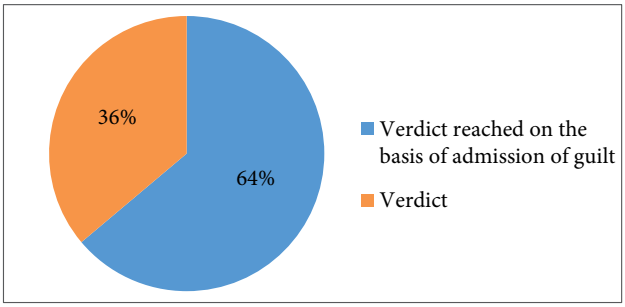
But, it I worth noting the fact that in accordance with Article 406 of the LCP, as soon as the verdict is announced, the chair of the judicial panel or the sole trial judge shall advice the parties on the right to appeal as well as the right to respond to the appeal. When a suspended sentence is pronounced, the court has the obligation to warn about the meaning of the suspended sentence and the conditions that the defendant (now convicted) must fulfil.

Was the defendant provided explanation on the terms of appeal?



As shown in the graph above, in 24% of cases, which equals 15 monitored hearings, the court failed to provide explanation on the terms of the appeal even though the court is under such obligation, irrespective of whether the defendant was present at the main hearing with or without a defence attorney. In 76% of hearings, which equals 48 monitored hearings, the court acted in compliance with the law. One has to underline that these data would not be considered as striking if there were available data that in most of the cases where the court failed to explain the terms of the appeal, the defendant's attorney was present and could later provide professional advice to his/her client on the appeal procedure. However, no such data were at disposal, and no further comments can be made.

If one summarizes and compares the data on the number of verdicts (convictions) against the data on the number of verdicts based on admission of guilt, one can arrive at the following conclusion, as illustrated in the graph below:



The provision on guilty plea is notably applied in in the course of the proceedings in large number of cases. The data show a high percentage of admission of guilt during the proceedings, i.e. it accounts for 64% of the total number of monitored cases, against 36% of regular (conviction) verdicts. Generally, this results from the need and the commitment of the defence attorneys to milder sanctions, given that the admission of guilt implies certain percentage to reduce the sentence, and given the attitudes and perceptions that the courts had established for many years concerning the defendants and the unavoidable possible conviction, so that on this ground defendants are more or less convicted, but still convicted.

CONCLUSIONS AND RECOMMENDATIONS:

- Detected problems concerning the improper summoning are still persistent, which further results in failure of the parties, expert witnesses and witnesses to attend court hearings.

Recommendation: It would be necessary that the summoning system for witnesses is further elaborated and improved and an efficient system for electronic service to the parties and experts is introduced, as well as to ensure the active involvement of the Ministry of Interior in providing personal data.

- The practice of failing to transfer defendants and detainees from penitentiary institutions poses a problem. The reasons mainly result from: lack of coordination with the registration system for escorting the transfer of persons deprived of liberty, or lack of financial or transportation means to transfer those persons.

Recommendation: Improved coordination among the respective authorities and improvement of the AKMIS System in order to eliminate the detected problems. The allocation of budget funds for proper functioning of the courts should be realistic.

- In view of the opening statements, there is an established practice of inappropriate formulation and presentation of the respective content; whereby the opening statements are transformed into a plain reading of the indictment, presentation of evidence, putting emphasis on the previous convictions of the defendant, without presentation of the case theory or identification of the legal elements which are to be further debated.

Recommendation: Provision of additional trainings for all participants in the criminal proceedings about proper application of the provisions of the LCP that stipulate the opening statements.

- The guilty plea as a new instrument is well represented in the national criminal justice system, whereby the application is not dependent on the type of the crime, despite that it is most frequently applied for smaller crimes. The collected data lead to the conclusion that this instrument is recognised by the parties in the criminal proceedings as an efficient tool for rapid, efficient and effective completion of the criminal proceeding.

- Concerning the assessment of the defendant's guilty plea, it is noted that there is an improper practice by the courts to accept flawed admissions of guilt, that is, situations when the court failed to fully establish whether the defendant made the admission of guilt (guilty plea) knowingly and/or of his/her own will.

Recommendation: Additional training of judges would be necessary in order to ensure proactive protection of justice under conditions when the admission of guilt is made in the course of the main hearing that is, increasing the active role of judges in assessing the admission of guilt.

- It was noticed that the courts have adopted an inappropriate practice in their assessment of the admission of guilt that is the courts accept the admission of guilt without it being substantiated by facts. That is, during the reduced evidentiary hearing, only evidence about previous convictions is presented.

Recommendation: Reform of the Law on Criminal Procedure (LCP) in terms of introducing the authorization for the court to request the parties to present evidence in the proper quantity and

quality so that the court can be able to fully accept the defendant's admission of guilt or introducing provisions on special hearing to determine the type and extent of the sanction.

- Rare application of the measures to secure the attendance of the defendant, which can serve as an alternative to the detention, even though the efficiency of such measures has been recognised in other more developed criminal justice systems.

Recommendation: Introduction of adequate mechanisms for application and control of milder measures that would enable the court to dispose of sufficient data and guarantees for efficient application of the respective measures. Such mechanisms may be introduced through changes and amendments to the LCP and the Law on Probation, i.e. to incorporate these measures in the competences of the probation services.

- Some inconsistency was noted regarding the legally prescribed order to present evidence, under the explanation that it results from the attempt to ensure the cost-effectiveness of the proceedings.

Recommendation: The provisions of the LCP that stipulate the order in which evidence is presented should be consistently applied.

- High percentage of improper application of the provisions of the LCP that stipulate the direct examination, cross-examination and re-cross and re-direct examination of witnesses and expert witnesses was documented, and that this results from inappropriately mastered techniques for examination by the parties to the proceedings.

Recommendation: Additional training of the parties to the criminal proceedings will be required for the purpose of proper application of these provisions.

- Unjustified frequent utilization of the court's authorisation to pose questions once the examination of witnesses/expert witnesses is completed, and an activity of the court which may shift into a special hearing in specific cases.

Recommendation: Reform of the provisions of the LCP in order to ensure that such authorization of the court is eliminated.

- Certain failures on the part of the court administrative units were noted, such as inappropriate announcing of the time and place of court hearings.

Recommendation: Increase the courts' publicity and transparency by ensuring that the time and place of the court hearings are publicly announced, both on the court's website and within the court buildings.

- Repeatedly noted practice of violating the procedural rights of the defence by restricting the access to evidence or hindering the insight into evidence.

Recommendation: Further improvement of the provisions in the LCP that would eliminate the practice of restricting the access of the defence to the prosecutorial evidence, as well as re-examination of the adopted rules on the costs for insight in the evidence and the transcripts thereof.

- An upward trend in the percentage of verdicts which are not publically pronounced and announced.

Recommendation: Consistent application of the provisions from the LCP that stipulate the publicly pronouncing and announcing of verdicts.