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BASIC RULES OF APPLYING THE PRINCIPLE OF EQUALITY OF ARMS IN THE MISDEMEANOUR PROCEDURE OF THE REPUBLIC OF SERBIA

The author discusses the principle of equality of arms in the misdemeanour procedure of the Republic of Serbia. Following the introductory remarks, the basic characteristics of the misdemeanour procedure are indicated. The subject matter of the analysis is the case law of the European Court of Human Rights, which establishes this principle as the basic principle of fair trial. The author emphasizes the importance of the proper management of the misdemeanour procedure by the court by linking the principle under consideration with the principle of the party which requires legal assistance. The relationship between the said principle and the defendant's right to a defence, has been analysed. The subject of interest of the author is also a specific institute - a decision without hearing the defendant. The author concludes that the application of the principle of equality of arms in the practice of misdemeanour courts must be grounded in normative frameworks and that this principle must be the guiding principle that obliges the court to resolve any doubts in the interpretation and application of law, bearing in mind the imperative of a fair misdemeanour procedure.

Key words: equality of arms, misdemeanour procedure, right to defence, party which requires legal assistance, decisions without hearing defendant

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1. Introduction

Serbian penal law has three kinds of delicts: criminal offences, misdemeanours and economic offences. The misdemeanours are the most common delicts. Misdemeanour law, as a part of positive legal norms has had long tradition in the Republic of Serbia. As a part of penal offences, misdemeanours have been regulated by legal acts since 1851 (Vuković, 2015: 21), and since then this part of legal norms has been constantly improving. There is no part of life regulated by legal norms that is not in touch with misdemeanour law. Everyone who applies misdemeanour law has big challenges in realisation basic principle of the law skills – applying law or legal act in a concrete case, because there are large number of legal acts that predict misdemeanours, the different social relation, subjects of misdemeanour responsibility and legal-technical specification of misdemeanour’s legal norms (Jeličić, 2018a: 148). The doctrine indicates that multiplicity and variety of misdemeanours, represents a special problem both in positive law (regulation of the matter) and misdemeanour’s practice (applying law regulation), but also in the theory of misdemeanours law (Dimitrijević, 2001: 16). The misdemeanour’s law is not exclusively legal law because the attribute of misdemeanours can be defined by assize and acts (Vuković, 2015: 32).

In the Republic of Serbia misdemeanour courts are courts of special jurisdiction since 2010. Forty-four first instance misdemeanour courts were created, as well as Misdemeanour Appellate Court as a court of republican rank, with headquarters in Belgrade and departments in Niš, Kragujevac and Novi Sad. The new stage in development of misdemeanour legislation started after that. Misdemeanour courts became a part of judicial power and in that way multi decade stage “mixed” status of misdemeanour bodies which were in the middle of executive and judicial power, was finished. New position of misdemeanour courts gave the new challenges in practice, especially in the field of the application of human rights in misdemeanour proceedings.

The legal architecture of international human rights has been established by formal legal texts negotiated and ratified by governments of sovereign states, as well as by the institutions and procedures for implementation that have been given an intergovernmental role either within the United Nations or elsewhere (Falk, 2008: 8). Everyone has human rights, and responsibilities to respect and protect these rights may, in principle, extend across political and social boundaries (Beitz, 2009: 1).

The European Convention on Human Rights and Fundamental Freedoms (ECHR) was created under the auspices of the Council of Europe after the end of the Second World War, as a result of the aspirations of the people of Europe to create a different and more modern way of mutual cohabitation, as well as a dif-

ferent and more modern attitude of people towards the authorities in his own state (Jakšić, 2006: 11). States are perceived as having “inherent” positive obligations to protect and guarantee human rights within their territory and the ECHR has passed to its complete phase under which entitlement to human rights means entitlement to enjoy human rights and not merely an entitlement to their non-violation by state agents (Xenos, 2012: 2). The European human rights system has spurred majority - rule parliamentary democracies to transition into more pluralistic systems in which the principle of the rule of law trumps the principles of parliamentary supremacy and popular sovereignty (Duranti, 2017: 340).

The ECHR was adopted in 2004 by the Republic of Serbia. The case law of European Court of Human Rights (ECtHR)¹ has had important criteria which determine characteristics of judicial proceedings, and therefore misdemeanour proceedings. Misdemeanour proceedings became the proceedings where the guarantees of ECHR must be respected. The ECtHR said that the principle of equality of arms is a fundamental principle of the fair trial. The doctrine emphasized that two related but distinct equality considerations interact within the concept of equality of arms: formal equality: ensuring equality between two equally situated parties; this corresponds to ‘a level playing field’ where the advantage of one party would lead to an unfair outcome; and material equality: the idea that a state should ensure some level of equality between the stronger and a weaker party (through, for example, a legal aid system) (Fedorova, 2012: 11).

2. Basic characteristics of misdemeanour procedure in the Republic of Serbia

The misdemeanour procedure is conducted by the misdemeanour courts, as well as the Republic Commission for the protection of the rights in public procurement procedures, which conducts the first instance misdemeanour procedure in accordance with the Law governing public procurement. The decision by which the Republic Commission can lead first instance misdemeanour proceedings on the basis of a special law, violates the original concept that the misdemeanour procedure is organized exclusively as a court, and the legislator did not take into account that such a decision could be contrary to Article 6 of the ECHR, and that other procedural provisions that are intended for court procedure cannot be applied in the procedure conducted by the Republic Commission (Petrović, 2014: 15).

1 The ECtHR case law is available at: <https://hudoc.echr.coe.int/eng#%7B%22documentcollection-id%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D%7D>

The Law on Misdemeanours² of 2013 changed the concept of misdemeanour proceedings. The introduction of the principle of proof was abandoned by the principle of determining the material truth which implied that the court was obliged to establish truthfully and completely the facts that are important for proving and making a lawful decision (Đuričić, Bejatović, 2015: 90). Article 89, paragraph 2 of the Law on Misdemeanours prescribes that the burden of proof mark of the misdemeanour and misdemeanour responsibility is on the applicant for the initiation of misdemeanour proceedings. The new concept of evidence procedure, caused a radically different position of the court, emphasizing the principle of equality of arms as a part of fair trial.

The consequences of the previous position of misdemeanour judges as a part of the executive branch are still present today. There is still a perception that the misdemeanour court is “on the same side” as the applicant for the initiation of a misdemeanour proceeding. In practice, authorized prosecutors do not understand what the realization of the burden of proof means and what is their role in the misdemeanour procedure (Jeličić, 2019: 55). The legacy of the past, when the applicant considered that all his work was completed by submitting a request for the initiation of a misdemeanour procedure, while not providing in a certain number of cases even the smallest evidence for the allegations made in the application (Bošković, Skakavac, 2017: 84) is still present. The authorized prosecutor is a party in a procedure with a clearly defined procedural role - to prove the mark of the misdemeanour and misdemeanour responsibility. He must bear the consequences of his inactivity or his mistakes. The doctrine indicates correctly that the court cannot prove on the side of the prosecution by self-initiative acquiring evidence that supports his request, because it would call into question the equality of arms and the role of an impartial arbitrator (Delić, Bajović 2018: 136). As the judge cannot instruct the defendant how to present his defence in order to avoid misdemeanour responsibility, the judge also must not help an authorized prosecutor (Jeličić, 2019: 55).

The authorized prosecutor in misdemeanour proceedings may be a public prosecutor, injured party, administrative authorities, authorized inspectors, and other authorities and organizations, which exercise public powers whose power include direct enforcement or supervision over the enforcement of regulations in which misdemeanours are stipulated.³ The Law on Misdemeanours does not define the term authorized prosecutor. The provision of Article 88 prescribes the accusatory principle, which provides that misdemeanour proceedings are ini-

2 Published in the Official Gazette of the Republic of Serbia, No. 65/2013 and 13/2016.

3 Article 179 paragraph 2 and Article 127 Law on Misdemeanors.

tiated and conducted upon the request of the authorized body or the injured or misdemeanour order, in accordance with this Law. Therefore, under the term of “authorized prosecutor” in a misdemeanour proceeding we consider all legal entities who can submit the request for initiation of a misdemeanour proceeding and issue of misdemeanour order that have certain powers in the case of submitting a request for judicial decision on issued misdemeanour order (Jeličić, 2018a: 150).

The defendants in misdemeanour proceedings and subjects of misdemeanour responsibility may be a legal entity, responsible persons in a legal entity, natural persons, entrepreneurs, foreign natural persons, foreign legal entity, responsible persons in foreign legal entity and minors.

There are two ways of initiating a misdemeanour procedure: by submitting a request for the initiation of a misdemeanour proceeding of the authorized body or the injured party or on the basis of a misdemeanour order, against which a request for judicial decision was submitted. An essential characteristic of misdemeanour proceedings is the coherent application⁴ of the Criminal Procedure Code.⁵

2.1. Application of Engel criteria to misdemeanour procedure

The ECtHR in case *Engel and Others v. Netherlands*⁶ said that criminal connotation have many delicts, not just criminal offences. These criteria are: the classification of the offence in domestic law, the nature of the offence, and the severity of the penalty that is at risk. On this judgment the Court emphasized that “it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently.” Second, the Court said that “the very nature of the offence is a factor of greater import. When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law.” Finally, the Court stated that “in a society subscribing to the rule of law, there belong to the “criminal” sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental.”

4 Article 99 Law on Misdemeanors.

5 Published in the Official Gazette of the Republic of Serbia, No. 72/11, 101/11, 121/12, 32/13, 45/13, 55/14 and 35/19.

6 *Engel and Others v. Netherlands* App. No.5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Judgment of 8 June 1976, par. 82.

In case *Lutz v. Germany*⁷ the Court points out that “the second and third criteria adopted in the judgments in the Engel and Others case and the Öztürk case are alternative and not cumulative ones: for Article 6 (art. 6) to apply in virtue of the words “criminal charge”, it suffices that the offence in question should by its nature be “criminal” from the point of view of the Convention, as in the instant case, or should have made the person concerned liable to a sanction which, in its nature and degree of severity, belongs in general to the “criminal” sphere.”

In case *Jussilia v. Finland*⁸ the Court said that “the autonomous interpretation adopted by the Convention institutions of the notion of a “criminal charge” by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties, prison disciplinary proceedings, customs law, competition law, and penalties imposed by a court with jurisdiction in financial matters. Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency.”

3. The principle of equality of arms in case law of the European Court of Human Rights

Regardless of whether the trial concerns criminal or civil matters, it must be “fair”. The words ‘just’ and ‘fair’, as we have them in ordinary speech, are such that, so long as the context or the speaker makes clear what sort of justice is under discussion—distributive, retributive, procedural, or so on—we largely agree on what is at issue (Griffin, 2008: 17). Fairness is clearly a variable standard and, in relation to trials, may depend upon technical procedural issues and wider circumstances including considerations of the public interest (Greer, 2006: 251). According to the text of article 6(1), this consists of two components: a hearing must take place “within a reasonable time”; and it must be held before “an independent and impartial tribunal established by law”. Case law has added a number of other principles: equality of arms; the right to be present at the hearing; protection against self-incrimination; and protection from pre-trial publicity (Schabas, 2015: 287). Equality of arms, however, relates to persons with essentially opposing interests (Trechsel, 2005: 95).

The principle of equality of arms has been established as a significant part of the right to a fair trial since the earliest decisions of the European Commission and the ECtHR.

7 Lutz v. Germany App. No. 9912/82, Judgment of 25 August 1987, par. 55.

8 Jussilia v. Finland App. No. 73053/01, Judgment of 23 November 2006, par. 43.

The European Commission used the term equality of arms in the criminal cases of *Ofner and Hopfinger v. Austria* and *Pataki and Dunshirn v. Austria*. Although the cases concerned different procedures, the unifying point was that they all revolved around the determination of an appeal in a non-public setting, in which the accused had not had an opportunity to be heard, even though the opposing side had been given this chance (Summers, 2007: 104).

In case *Dunshirn v. Austria* the European Commission determined that “the equality of arms, that is the procedural equality of the accused with the public prosecutor, is an inherent element of fair trial.”⁹ But, in case *Ofner and Hopfinger v. Austria*,¹⁰ the Commission considered the involvement of the Attorney General who had not influenced the decision-making process in anyway and was, thus, not prejudicial to the accused. In the view of ECtHR, “equality of arms implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.”¹¹ In case *Steel and Morris v. United Kingdom*¹² the ECtHR said that “it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary.”

The judgment of the ECtHR in case *Borgers v. Belgium*¹³ is important because the Court focused that a certain institutional or procedural inequality violates equality of arms, the less need there is for the defence to show that it suffered

9 *Pataki and Dunshirn v. Austria*, App. No. 596/59 and 789/60, report of 28 March 1963, Yearbook volume 6, 1963, p. 732. The European Commission said that “even on the assumption that the Public Prosecutor did not play an active role at this stage of the proceedings, the very fact that he was present and thereby had the opportunity of influencing the members of the Court, without the accused or his counsel having any similar opportunities or any possibility of contesting any statements made by the Prosecutor, constitutes an inequality which is incompatible with the notion of a fair trial.” Source: Fedorova, 2012: 39.

10 *Ofner and Hopfinger v. Austria*, App. No. 524/59 and 617/59, report of 23 November 1962, Yearbook volume 6, 1963, p. 680. Source: Fedorova, 2012: 44.

11 *DomboBeheer BV v. Netherlands*, App. No. 14448/88, Judgment of 27 October 1993, par. 33; *Bulut v. Austria*, App. No. 17358/90, Judgment of 22 February 1996, par. 47.

12 *Steel and Morris v. United Kingdom*, App. No. 68416/01, Judgment of 15 February 2005, par. 62.

13 *Borgers v. Belgium*, App. No. 12005/86, Judgment of 30 October 1991, par. 27. The Court emphasized that “once the avocat général had made submissions unfavourable to the applicant, the latter had a clear interest in being able to submit his observations on them before argument was closed.” In this case ECtHR has changed its earlier practise established in the decision *Delcourt v. Belgium* and found that the Belgian practice of having an Avocat Général present at the deliberations of the Court of cassation and submitting his views on the case, while this opportunity is denied to the accused, was incompatible with equality of arms and a fair trial (Fedorova, 2012: 34, 35).

actual prejudice arising from that inequality (Fedorova, 2012: 40). The same view the ECtHR had in the judgment *Lanz v. Austria*,¹⁴ when it stated that “the principle of equality of arms does not depend on further, quantifiable unfairness flowing from a procedural inequality”. Also, in case *Bulut v. Austria*¹⁵ the ECtHR took the view that “it is a matter for the defence to assess whether a submission deserves a reaction. It is therefore unfair for the prosecution to make submissions to a court without the knowledge of the defence.” In this case, the Court concludes that “the principle of the equality of arms has not been respected. Therefore, there has been a violation of Article 6 para. 1 (art. 6-1) on account of the Attorney-General’s submission of observations to the Supreme Court without the applicant’s knowledge”.

In case *Rowe and Davis v. United Kingdom*¹⁶ the ECtHR said that “it is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence.” The same opinion the ECtHR gave in case *Salduz v. Turkey*.¹⁷ The Court emphasized that equality of arms is “the generally recognised international human rights standards, which are at the core of the concept of a fair trial and whose rationale relates in particular to the protection of the accused against abusive coercion on the part of the authorities. They also contribute to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused.”

In case *Borisova v. Bulgaria*¹⁸ the ECtHR notes “that in the present case, the applicant was not allowed to call any witnesses in her defence even though she asserted on several occasions during the court hearing that she could do so and that their testimonies would refute the statements given by the witnesses for the prosecution... In contrast, the Court finds that the prosecution had an unfair advantage over the applicant to prepare for the hearing and to find witnesses to support its case. As a result, the witness testimonies heard by the domestic court may appear one-sided and supported only the prosecution’s version of the events in front of the Employment Office”.

14 *Lanz v. Austria*, App. No. 24430/94, Judgment of 31 January 2002, par. 58.

15 *Bulut v. Austria*, App. No. 17358/90, Judgment of 22 February 1996, par. 49, par.50.

16 *Rowe and Davis v. United Kingdom*, App. No. 28901/95, Judgment of 16 February 2000, par. 60.

17 *Salduz v. Turkey*, App. No. 36391/02, Judgment of 27 November 2008, par. 53.

18 *Borisova v. Bulgaria*, App. No. 56891/00, Judgment of 21 December 2006, par. 47, par. 48.

4. The relation between the principle of equality of arms with the obligation of the court to manage the misdemeanour procedure and the principle of the help to a party which requires legal assistance

The management of the misdemeanour proceedings is the procedural activity of the court which influences the establishment, the course and the termination of the misdemeanour procedure by undertaking actions of management and passing of court decisions (Jeličić, 2018b: 9). The management of misdemeanour proceedings, as the basic and essential activity of the court, must not be aimed at favouring any party to the proceedings, and the court must carry out its activities in such a way as to preserve its impartiality and equality of parties (Jeličić, 2018b: 11). Even in the early cases ECtHR it is clear that the equality of arms exists as a guarantee within the framework of Article 6(1), and perhaps most importantly alongside the guarantee of the right to an impartial judge, and envisages a relatively specific type of proceedings (Summers, 2007: 107).

The objectification of the principle of equality of arms during misdemeanour proceedings is caused by the manner in which the court handles the proceedings. The imperative of the court is to provide the conditions for a fair misdemeanour procedure in which the parties have the opportunity to carry out the process activities in an equal manner. It should be clear to the judge that his management of the misdemeanour proceedings must be impartial and that all the procedural activities he undertakes must be in that direction. There must be no difference in the procedural position of the parties for him, and he must not show the affection or intolerance of any kind to any of the parties or participants in the proceedings (Jeličić, 2019: 53). Only by such treatment a judge can ensure the equality of arms for the parties, managing the proceedings in such a way that, in the framework of the law procedural institutes, he enables the parties to have an equal position in the evidentiary duel.

The management of the misdemeanour proceedings by the court of second instance is particularly expressed in the reasoning of its decision. The second instance court should point out to the observed omissions, but its instructions must not impair the impartiality of the court. The reasoning of the second instance decision must not lead to the conclusion that the applicant for initiation of the misdemeanour procedure is favourable in relation to the defendant. Therefore, instructions of the second instance court must be process neutral, that is, the principle of equality of the parties must be respected (Jeličić, 2019: 56).

The law provided certain procedural institutes that aimed at ensuring equality of arms in court. The most important principle is the help to a party which

requires legal assistance, aiming at equalizing the party which requires legal assistance with the help of a court with the other party.

The help to a party which requires legal assistance is the basic principle of misdemeanour proceedings. The doctrine is unique in the view that this principle applies only to the defendant or the injured party, if they do not have a defence counsel or proxy. The public prosecutor, as a legally educated person, and the administrative bodies, various inspectors and other bodies and organizations exercising public authority cannot be considered as a party which requires legal assistance because the detection of the misdemeanour and the submitting of a request for initiating the misdemeanour proceedings belongs to the domain of their duties (Delić, Bajović 2018: 137).

The help to a party which requires legal assistance is actually manifested in two modalities: the duty of the court to instruct the party in misdemeanour proceedings about their rights and to warn it of the consequences (point to consequences) of case of non-use of those rights (Pihler, 2000: 116). It is emphasized that the provision of this assistance also consists in pointing out legal resources that a party which requires legal assistance may use, what evidence, if it has, could use, in informing it about the deadlines and consequences of their omission (Đorđević, 2015: 199). However, this obligation does not mean that the misdemeanour court is obliged to teach the party how to defend itself, to give legal advice, etc., but it is the court's obligation to teach the party about the rights and obligations it has during the proceedings, to enable it to the most appropriate way to present the defence and points out to the consequences that may arise from its actions (Vukčević, 2014: 81). The court indicates to the participants of the proceedings their rights and possibilities, but does not assist them in the substantiation of those rights, which the court has to decide later (Vasiljević, Grubač, 2013: 52).

The concretization of this principle is manifested in the presentation to the defendant how he can exercise his right of defence and participate in the evidentiary proceedings. The essence of that instructions is to enable the defendant to exercise the right to a defence, which includes a number of rules and principles, that are procedural actions by which the defendant opposes the request for the initiation of the misdemeanour proceedings (Mitrović, 2014: 162).

In practice, the court most often applies this principle to the defendant, but in the event that the authorized prosecutor is an injured party who does not have a proxy, the court is obliged to provide assistance to him.

In relation to him, the application of the principle to a party which requires legal assistance is manifested through giving instruction on the position, rights and duties of the authorized prosecutor, as a party in the proceedings, on the essence of the procedural role that it entails: the burden of proof and the duty to provide the evidence whose presentation is proposed, pointing to the exceptions, when the court can obtain

evidence if the injured party as a prosecutor cannot do so, pointing out the characteristics of the misdemeanour procedure, as an adversarial procedure, and the procedural position of the defendant, in order for the injured party as a claimant to understand fully procedural position in misdemeanour proceedings (Jeličić, 2018c: 234).

The help of the court to a party which requires legal assistance that shows its procedural position, indicates the rights and obligations, and the consequences of undertaking or not taking particular actions, must be implemented in practice in a way that the court preserves its impartiality and ensures the equal position of the parties (Jeličić, 2018c: 235).

5. The principle of equality of arms and the defendant's right to defence in the misdemeanour procedure

The obligation of the court is to give the defendant the opportunity to plead the facts and evidence that burden him and to present all the facts and evidence that benefit him, except in cases provided by law.¹⁹ That is the condition that the authorized prosecutor and the defendant have an equal position in the misdemeanour proceedings. It is a basic principle of penal law that relates essentially to the realization of a defendant's right to a defence. Its application encourages equality of arms because the defendant is given the opportunity to confront the authorized prosecutor.

The first step in this process is introduction with the evidence that exists in the case files. It follows from the legal provision that the quality of the evidence is a necessary condition for this form of realization of the defendant's right to a defence. Namely, there must be some evidence that charge the defendant, for which reason the court is not obliged to introduce the defendant with the evidence that goes in his favour, which was presented in the court without the presence of the defendant or his counsel. The legislature does not impose an obligation for the court to give the defendant the opportunity to plead all the facts and evidence, but only those which go to the defendant's detriment.

It should be pointed out that the application of the cited provision implies that the court marks the evidence before making a decision, therefore, during the misdemeanour proceedings. The court's conclusion that the facts and evidence charged to the defendant, who is unfamiliar to them, causes the court's obligation to take adequate procedural steps and to enable the defendant to become aware and familiar of them.

19 Article 93 paragraph 1 Law on Misdemeanors.

There are numerous decisions in the case law pointing to a violation of the defendant's right of defence when he is not given the opportunity to plead the facts and evidence against him. The Constitutional Court²⁰ noted that the defendants' right to a defence were violated when they were denied the right to examine the prosecution witnesses themselves or through their defence counsel.²¹ The Supreme Court of Cassation²² pointed out that the violation exists when the defendant is not allowed to give evidence about the testimony of the police officer who is charging him,²³ the defence counsel is not allowed to attend the witness hearing,²⁴ or the expert witness findings and opinion were not provided to the defendant,²⁵ or when the verdict was issued based on the defendant's written defence who didn't have opportunity to plead about facts and evidence against him and adversarial evidence was presented during the proceedings.²⁶ The Misdemeanour Appellate Court found that an injury existed when summonses were not served on the defendant and that he was not given the opportunity to attend the hearing of witnesses, police officers, nor was he given the opportunity to comment on the testimony of witnesses.²⁷

The defendant has the right to propose evidence and participate in its presentation. The exercise of this right must be in the spirit of the principle of equality of arms. This means that the procedural position of the defendant must not be less favourable than position of the authorized prosecutor. Namely, the Constitution of the Republic of Serbia²⁸, in the provision of Article 33, paragraph 5, stipulates that any person prosecuted for criminal offense shall have the right to present evidence in his favour by himself or through his legal counsel, to examine witnesses against him and demand that witnesses on his behalf be examined under the same conditions as the witnesses against him and in his presence.

In a misdemeanour proceeding, the rule is that the party is obliged to obtain the evidence whose presentation it has proposed.²⁹ It refers to the authorized pros-

20 The Constitutional Court case law is available at: <http://www.ustavni.sud.rs/page/jurisprudence/35/>

21 Decision of Constitutional Court Už. 1036/11 from 26 May 2016.

22 The Supreme Court of Cassation case law is available at: https://www.vk.sud.rs/sr/solr-search-page/results?court_type=vks&matter=33®istrant=_none&subject_number=&date_from%5Bdate%5D=&date_to%5Bdate%5D=&keywords=&phrase=&sorting=by_date_down&redirected=216&referer=216&results=10

23 Decision of Supreme Court of Cassation Kzz. Pr.26/15 from 26 May 2015.

24 Decision of Supreme Court of Cassation Przz. 6/16 from 22 December 2016.

25 Decision of Supreme Court of Cassation Kzz. Pr.16/17 from 29 September 2017.

26 Decision of Supreme Court of Cassation Kzz. Pr. 50/16 from 19 January 2016.

27 Decision of Misdemeanor Appellate Court, department in Novi Sad, Prž. 86/17 from 17 January 2017.

28 Published in the Official Gazette of the Republic of Serbia, No. 98/2006.

29 Article 89 paragraph 4 Law on Misdemeanors.

ecutor and defendant. As an exception, it is provided that the court may of its own motion obtain evidence if the defendant is unable to do it on its own or is justified on grounds of the expediency and efficiency of the proceedings.³⁰ Such a solution is justified because the defendant is not always able to provide the evidence he wants to be presented, unlike authorized prosecutors, who are usually state bodies with a far greater degree of authority than the defendant. Another possibility relates to the reasons for the expediency and effectiveness of the proceedings for which the court may of its own motion obtain the evidence proposed by the parties, regardless of whether the presentation of the evidence was proposed by the defendant or the authorized prosecutor. One of the cases in which the defendant waives his right to present the facts and evidence in his favour is the ability of the court to make a decision without hearing the defendant.

6. The principle of equality of arms and the institute of decision without hearing the defendant in misdemeanour procedure

It is important to consider the relationship between the institute of the decision without hearing the defendant and the principle of equality of arms. The provision of Article 93, paragraph 3 of the Law on Misdemeanours provides that if a duly summoned defendant fails to appear and to justify the absence or fails to file a written defence within a certain time period, and his examination is not indispensable for establishing the facts that are of importance for making a lawful decision, it may be handed down even without examination of the defendant.

The existence of three cumulative factors are condition of the application of this institute. The first factor concerns the proper delivery of the summons to the defendant. This means that the summons to the defendant was served in accordance with the delivery provisions laid down by the Law on Misdemeanours. In doing so, the orderly delivery of the summons implies that the defendant was also served the request for the initiation of a misdemeanour procedure with a summons.³¹ When this was not done, according to the Supreme Court of Cassation, the conditions for making the judgment without the hearing of the defendant were not met.³² An integral part of the summons must also be a warning to the defendant that in case of failure to appear, the decision shall be handed down without his examination,

30 Article 89 paragraph 5 Law on Misdemeanors.

31 Article 187 paragraph 4 of Law on Misdemeanors.

32 Decision of Supreme Court of Cassation Kzz. Pr. 7/16 from 10 March 2016.

which is conditioned by the court's assessment that the presence of the defendant is not necessary for establishing the state of facts.

The second factor concerns the defendant's unjustified failure to attend a scheduled trial or failure to provide a written defence. If the defendant justified his absence, the conditions for applying the institute were not met. In a misdemeanour proceeding, the defendant can present his defence in two ways: during an oral hearing, which is often the case in practice, but also by providing a written defence. It is important to point out that in the summons of the defendant must be indicate that it can provide a written defence, because the application of this institute does not depend on the defendant's discretion, but on the evaluation of the court. The doctrine states that if a defendant does not use the opportunity to present his defence, he bears the consequences of such action and agrees with a decision which will not be based on his defence (Vrhovšek, 2010: 110), and that the defendant cannot decide for himself to submit the written defence although he was invited to an oral hearing (Delić, Bajović, 2018: 280). The same is the case law. The second-instance decision stated that "the first instance court did not find that a defendant's direct hearing was not necessary; on the contrary, the first instance court summoned the defendant for a hearing, and therefore it follows that the defendant's written defence was given on his own initiative."³³

The third factor of the institute under consideration relates to the court's assessment that a defendant's hearing is not necessary to establish the facts that are relevant to the lawful decision. This condition will be fulfilled only if there is evidence in the case file that enables the court to reach a decision without hearing the defendant. This means that the attached evidence may indicate the defendant's responsibility or his innocence, which the court assesses in each case.

Although the legislature did not explicitly prescribe the obligation of the court to inform the defendant with the evidence that charged him before making decision without hearing the defendant, we consider it is necessary. In addition to the summons and request for the initiation of a misdemeanour procedure, the court must also provide the defendant with the evidence provided by the authorized prosecutor. In this way, the defendant becomes aware of the evidence against him and if the other analysed conditions are met, the court can make a decision without hearing the defendant. The contrary action of the court would not be justified in terms of the defendant's right to a defence.

The expediency of this ruling is obvious because it allows the defendant the opportunity to familiarize himself with the evidence against him and prepare his de-

33 Decision of Misdemeanor Appellate Court, department in Novi Sad, Prž. 23804/17 from 12 December 2017.

fence for the scheduled trial. In this situation, the justification of applying the institute of decision without hearing the defendant becomes even more important because the defendant is aware of all the evidence presented by the authorized prosecutor.

7. Conclusion

It is the duty of the court to take care of the application principle of equality of arms in practice, which the court makes with lawful management of misdemeanour proceedings. The application of this principle is caused by two factor. The first of these concerns the normative regulation of this matter. The Law on Misdemeanours and the Criminal Procedure Code, set the procedural framework in which the practical aspects of the principle of equality of arms can be implemented. The second factor concerns the interpretation and application of law by the court. Respect of the principle of equality of arms is imperative in misdemeanour proceedings, so the vagueness of certain legal norms must always be interpreted in the spirit of this principle. Interpretation of law is a creative activity of the court that must be based on the principles of fair process. That is why the court must resolve any unclear situation in practice with only one idea in mind - to ensure equality of arms of the parties and to conduct a fair misdemeanour procedure.

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